BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 22

READT 070/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL WEBER**
	Appellant / Complainant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20002)**
	First respondent
AND	**DAVID PENROSE**
	Second respondent/Licensee

MEMBERS OF TRIBUNAL

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

HEARD at QUEENSTOWN on 20 February 2015

DATE OF THIS DECISION 2 April 2015

REPRESENTATION

The appellant on his own behalf
Mr R M A McCoubrey, counsel for the Authority
Ms J Eckford, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL

The Issue

[1] This case is about the adequacy of an appraisal from a licensee to a vendor in terms of Rule 9.5 (set out below) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[2] Mr Paul Weber ("the appellant") appeals against the 30 October 2013 decision of a Complaints Assessment Committee of the Real Estate Agents Authority which determined, under s.89(2)(c) of the Real Estate Agents Act 2008, to take no further action with regard to his complaint, or any issue involved in the complaint, against

Mr David Penrose ("the licensee"). The complaint is that the licensee did not provide a "proper" appraisal of the appellant's undeveloped property at 59 Atley Road, Arthurs Point, Queenstown.

Background

[3] On 29 July 2010, the appellant contacted the licensee with a view to having him market that property.

[4] On 2 August 2010, following discussions between the appellant and the licensee, the latter emailed the appellant with research regarding the asking price for the property. That email (set out below) is asserted to be the appraisal but together with the licensee's previous email to the complainant on 29 July 2010 (also set out below).

[5] The issue put for us to determine is whether or not those emails meet the requirements under the 2009 Rules for a marketing appraisal by a licensee.

[6] On 9 October 2010 the parties signed an agency agreement which, in Part C of its Schedule, quoted the real estate commission as being 4% of the *"appraised/instructed value of $1,195,000"*.

[7] This case arises out of the complainant vendor feeling aggrieved that, although his said property was sold for his asking price of $1,195,000 in late 2010, he had sought an extra $100,000 in price if the purchaser happened to be a particular neighbour of the property; and that situation came about but unknown to the vendor at material times. That aspect led to the appellant complaining to the Authority that the conduct of the licensee in marketing the property had prevented the complainant vendor from obtaining a proper sale price. A Committee of the Authority decided to take no further action on that complaint and the matter came before us as an appeal by the current appellant against that initial Committee decision. In our decision of 2 September 2013 ([2013] NZREADT 75) we endeavoured to cover issues comprehensively and concluded as follows:

> *"[60] Simply put, it has not been proven that the licensee, or Brown's, failed in their conduct and duty to the appellant by not achieving a special high price from the neighbour. We agree with the reasoning and conclusions of the Committee of the Authority. Accordingly this appeal is dismissed."*

[8] Ms Eckford found it helpful (which it is) to set out the background to this current appeal in more detail as follows:

> *"…*
>
> *[3] The third respondent, Brown's Real Estate Limited trading as New Zealand Sotherby's International Realty, was the agency with which the second respondent is licensed.*
>
> *[4] On 29 July 2010, the appellant approached the second respondent with a view to him marketing and selling the property.*
>
> *[5] On 9 October 2010, and after various discussions with the second respondent, an Agency Agreement was signed by the appellant. This reflected an asking price of $1.195m for the property*

[6] An agreement was entered into for the sale and purchase of the property. The price agreed was $1.195m and the property later settled for this price.

…

[13] On 29 July 2010 the appellant contacted the second respondent with a view to selling the property. The appellant knew of the second respondent through previous contact in 2008. The second respondent replied by email of the same date ("the 29 July email")…. [set out later below].

[14] Discussions ensued between the appellant and second respondent. On 2 August 2010 at 2.34 pm the second respondent sent an email to the appellant which specified research into the likely asking price for the property ("the 2 August email") and attached details of residential sales in the Arthurs Point area ("the attachment")….

[15] The content of the email is as follows:

> *"Good Morning Paul, I trust that you have had a good weekend.*
>
> *I've been carrying out some research for you in relation to the parcel of land that you own at 59 Atley Road, Arthurs Point.*
>
> *As you will see I have researched the number of sales and transactions that have taken place over the last 12 months in the Arthurs Point area. Please find this information attached above in a PDF for you to look over. I understand that the land sizes differ and some of these may not be relevant to your site however these are all of the land sales over the last 12 months. You will note the last site on this list is an area of 4,495m^2 which sold for $556,000.*
>
> *I have also been studying the area out there and I have observed the fact that there are approximately 10 parcels of land in varying sizes currently for sale so the choice is quite extensive. In saying this Paul I believe that your site is marketable however we would need to be completely realistic to achieve a sale for you. Do you have any idea what you would be prepared to accept for the property?*
>
> *I can call you tomorrow as agreed Paul, however if you wish to email me prior please feel free to do so? Warm Regards David Penrose"*

[16] At a meeting on 4 September 2010, amongst other items of discussion, the appellant expressed to the second respondent that he wanted at least $1.2m for the property, and more if the purchaser was his neighbour, a wealthy Singaporean art collector. He considered that the property would be worth a premium to the neighbour as it would preserve his views.

[17] On 7 October 2010 the second respondent sent to the appellant an agreement for the sale of the property in revised form, pursuant to earlier discussions between those parties ("the Agency Agreement"). On 9 October 2010 the appellant returned the executed Agency Agreement to the second respondent.

[18] The Agency Agreement listed the price for marketing the property as $1.195m. It made no mention of specific marketing to the neighbouring property….

[19] On 9 October 2010, the second respondent submitted an offer for sale to the appellant. The offer emanated from another licensee of the third respondent, Mr Julian Brown. The second respondent had no dealings with the buyer. He was told by Mr Brown, and communicated to the appellant, that the buyer resided in Bangkok. The offer was for the sum of $1.075m and made by "Margaret Scott on behalf of Pop Properties".

[20] Some negotiations took place regarding price.

[21] On 11 October 2010, the second respondent received a written request from the solicitors acting for the appellant to clarify whether the buyer was in any way related to the neighbour. At this stage, the second respondent had a discussion with Mr Brown and it became apparent that the buyer was, in fact, acting on behalf of the neighbour. This was immediately communicated by the second respondent to the lawyer acting for the appellant.

[22] The sale proceeded for the agreed sum of $1.195m, as per the listing price."

The Committee's Decision of 30 October 2013

[9] As indicated above, the appellant had complained that the licensee failed to provide him with a proper appraisal of his property. The Committee concluded that while the information provided by the licensee in the 2 August 2010 email may have seemed sparse to the appellant, the key elements required by the said Rule 9.5 were met. The Committee's reasoning is as follows:-

"…

1.7 Having satisfied itself that it had sufficient knowledge and information in relation to the complaint on which to form a decision, the matter was considered by the Committee on 16 October 2013. The hearing was conducted on the papers pursuant to section 90(2) of the Act and the Committee made its determination on the basis of the written material before it.

2. Discussion

2.1 Whilst it is difficult to ascertain from the information provided by the Complainant whether there had been any further appraisals the Committee notes that amongst the July 2010 and 2 August 2010 information there were (a) statistics of sales of similar land in the location similar to the Complainant's, and (b) the Licensee had provided a perspective of market conditions "your site is marketable however we will need to be completely realistic to achieve a sale for you."

2.2 The Committee came to the conclusion that whilst the information received may have seemed sparse to the Complainant, the key elements required in an appraisal, as required in Rule 9.5, had been provided by the Licensee.

2.3 Whether obtained from an appraisal(s) or from other sources the Complainant would seem to have received sufficient information on which to base his price expectations i.e. the "asking price was driven by the form requirements of the appellant at all material times including from the outset." (Tribunal's decision dated 2 September 2013, (para 57)

3. Decision

3.1 The Committee has determined under section 89(2)(c) of the Act to take further action with regard to the complaint or any issue involved in the complaint."

Important Agreed Facts

[10] The parties before us agreed that the appraisal now under our scrutiny arises out of the two said emails from the licensee to the complainant respectively dated 29 July 2010 and 2 August 2010. The later is set out above. The 29/7/10 email reads

"From: David Penrose

To: [pweber]

Subject: 59 Atley Road …. Next to what was formerly the Shotover lodge…

Date: Thursday, July 29, 2010 3:08:27 PM

Hello Paul,

Thank you very much for your email and for letting me know of your expression of interest in allowing Sothebys to market your parcel of land at 59 Atley Road.

I know the land well And will look into this for you and reply with my synopsis and appraisal shortly.

Are you able to tell me what your price expectations are for this land Paul? I am sure you will understand that the value for land has been re-aligned considerable since you purchased it for $1,550,000 in September 2007?

Warm Regards

David Penrose
Sales Associate

2nd Floor, Mountaineer Building
Crnr Shotover and Reed Street
P O box 1595
Queenstown, NEW ZEALAND"

[11] The listing agreement has a Schedule, which in Part C, states:

> *"**Part C – Commission and Expenses.***
>
> ***Commission***
>
> *Commission shall be at 4% of the sale price plus GST. Based on the appraised/instructed value of $1,195,000 the estimated commission payable is $47,800 + GST".* It continues ... *"Notwithstanding any other provisions of this agreement the vendor will not be obliged to accept any offer whether such offer is the same as the appraised/instructed value (or any other figure) at the vendor's sole discretion."*

Relevant Legislation

[12] In terms of the overall issue of whether or not the licensee has been guilty of *"unsatisfactory conduct,"* as defined in s.72 of the Real Estate Agents Act 2008 we set out that s.72 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."*

[13] At material times Rule 9.5 of the 2009 Rules applied and that Rule reads as follows:

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

[14] That heading of "Appraisals and Pricing" also encompasses RR 9.6 and 9.7 which read:

> *"9.6 An advertised price must clearly reflect the pricing expectations agreed with the client.*
> *9.7 A licensee must not mislead customers as to the price expectations of the client."*

[15] By way of further background, we also set out the current Rules regarding appraisals and pricings, i.e. in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, namely:

> *"**Appraisals and Pricing***
> *10.2 An appraisal of land or a business must –*
> *(a) be provided in writing to a client by a licensee; and*
> *(b) realistically reflect current market conditions; and*
> *(c) be supported by culpable information on sales of similar land in similar locations or businesses.*
> *10.3 Where no directly comparable or semi-comparable sales data exists, a licensee must explain this, in writing, to a client.*
> *10.4 An advertised price must clearly reflect the pricing expectations agreed with the client."*

The Stance of the Licensee

[16] Ms Eckford noted that in our said 2 September 2013 decision between the parties [2013] NZREADT 75 we made the following comments about the appraisal concept:

> *"[56] A matter which did arise from the evidence is that an appraisal which the licensee gave the appellant in about July 2010, shortly after receiving the appellant's instructions to market the property, seems quite inadequate. It seems to have only comprised the licensee advising the appellant that the licensee thought the value of the property was at least $1.2 m to a buyer "off the street", and, likely, significantly more to a neighbour. If that was the only appraisal given, it does not comply with Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:*
>
> *…*
>
> *[57] We cannot be satisfied that there was no further appraisal than that. There was evidence that on 2 August 2010 the licensee provided the appellant by email with information regarding sales in the area. Also, we are conscious that the asking price was driven by the firm requirements of the appellant at all material times including from the outset. The evidence of Mr N Brown is that, at material times, he would have appraised the property at about $700,000; but he would regard himself as a little conservative in terms of the optimism of his sales-people. The evidence of the licensee is that in his own mind he appraised the value of the property at material times at about $1 m, but that the appellant would not listen to him in that respect.*
>
> *[58] In any case, there has been no complaint about the nature of that appraisal. We note that it shows that, at the outset, there was some thought given to the possibility of a buyer being a neighbour.*
>
> *[59] While, if more evidence was heard on the issue of the appraisal, it might be possible to find that there had been unsatisfactory conduct on the part of the licensee in that respect, there has simply been no complaint about the appraisal aspect. In any case, that issue was not put to the Committee of the Authority. Our jurisdiction under s.111 of the Act provides for an appeal "against a determination of the Committee". We consider that if there is no such determination then we have no jurisdiction to deal with such an issue on an*

appeal and, indeed, that is the view Woodhouse J expressed in Wyatt v Real Estate Agents Authority HC Auckland CIV-2012-404-1060, 3 October 2012."

[17] By way of further background we record that the above extracts from our said decision about an appraisal, or lack of it, were preceded by the following paragraphs:

[52] There were detailed submissions about the nature and extent of a real estate agent's fiduciary duties. However, at material times, neither the licensee nor Mr J Brown knew that the appellant contemplated requiring a much higher price from an offeror who was a neighbour to the property.

[53] Incidentally, for all the detailed submissions put to us by or on behalf of the appellant, we note that there is no retrospective valuation as at the time of sale which could, perhaps, suggest there was loss experienced by the appellant in relation to the market. Frankly, we consider that his concept of having two prices for the property i.e. one for the general public and a much higher one for the neighbour, was unrealistic, uncommercial, and unworkable.

[54] In view of the current almost obsessive concern of the appellant about his neighbour having purchased the property for, in effect, $1.2 million, we wonder why he so sold the property knowing that the purchaser was the neighbour and he (the appellant), seemingly, not being under any particular pressure to shorten negotiations with the neighbour.

[55] We are unable to find any failure on the part of the licensee or of Brown's Real Estate in terms of the issues on appeal. We find no merit in the appellant's assertion that they hindered him achieving a higher price from the neighbour in the circumstances."

[18] In her submissions Ms Eckford refers to the transcript of the first hearing where our Chairman is recorded as commenting *"… From what we have heard so far, one could say that Mr Penrose's appraisal was pretty sparse …".* However, as she observed, that comment has to be taken in the context that it was midway through that hearing with further evidence still to be heard.

[19] Ms Eckford then submits that it is a misapprehension to consider that a written appraisal must include a figure value for the property. She continues that the requirement is not for a valuation of the land; there is no obligation on a licensee to put a dollar figure upon the value of the property; and such a licensee is not a registered valuer and not qualified to provide such a valuation.

[20] Ms Eckford drew our attention to the final sentence of paragraph [57] of our said decision of 2 September 2013 which reads: *"The evidence of the licensee is that in his own mind he appraised the value of the property at material times at about $1m, but that the appellant would not listen to him in that respect".* She puts it to be irrelevant that the appellant now alleges that the licensee did not refer to a $1m valuation in any discussions because the appraisal is required to be in writing and the appellant's price expectation was, in fact, driven by outside motivators so that the appellant took little, if any, consideration of the licensee's recommendation.

[21] Ms Eckford also suggests that it might have been misleading to put a dollar value on the property because it differed so dramatically to comparable sales in the area. She continued: *"The property comprised 6,692 m^2 and had spectacular views,*

as compared with the largest plot referred to in the attachment of 4,495 m^2, which sold for $556,000".

[22] Ms Eckford noted that Rule 10.3 of the 2012 Rules provides that if no comparable or semi-comparable sales data exists, the real estate agent must explain this, in writing, to the client; but there was no equivalent to that in the 2009 Rules, which applied at material times to this case, so that there was no requirement for the licensee to put an explanation in writing.

[23] Ms Eckford submitted that, in any case, the above appraisal situation did not affect the appellant's decision to market the property for $1.195m or his acceptance of an offer at that price.

[24] Ms Eckford then addressed some relevant case authorities as follows:

> *"**Authorities***
> *[66] The READT considered Rule 9.5, in the matter of Ivan & Janiss Flannery v REAA and Deborah Lyons and Barfoot & Thompson [2014] NZREADT 31. The facts in that case were that the real estate agent, Lyons, relied upon a written appraisal which had been prepared some 5 months earlier by another licensee of Barfoot & Thompson. This provided a comparative market analysis and gave a value range for the property of between $1.1m and $1.4m. The property was shown on an overseas television documentary with the suggestion that the property might be worth $1.5m. The listing price was agreed at $1.5m. The property failed to sell and was eventually sold some time later by another agent for $1.1m. Amongst other things, the Flannerys complained that Lyons had erred in her approach to the appraisal process.*
>
> *[67] The Tribunal held that there was nothing in the Rules to require the appraisal to be carried out by the listing agent, nor is there a timeframe within which an earlier appraisal must be redone. Relevantly, it was determined to be, "enough … to provide to a [client] with the information needed so they could determine what the property value for the property was". Lyons had, therefore, discharged her duties.*
>
> *[68] The second respondent submits that the nature of the appraisal in the present case was sufficient to fulfil this criteria. Regardless of the fact that a dollar value was not put on the property, it was sold for the full listing price.*
>
> *[69] This Tribunal has also considered the format of an appraisal in the matter of CAC v William Hume [2011] NZREADT 37. In that case, the document described by the real estate agent as an appraisal was prepared prior to the agent having had a chance to view the actual property. It provided an indicative market range of between $325,751 and $330,000. A schedule to the Agency Agreement shows an "appraisal figure" of $340,000.*
>
> *[70] In fact, the property sold for $250,000 and the real estate agent gave evidence that he believed the property would have had a value in the mid $200,000s. The Tribunal held that the appraisal did not comply with Rule 9.5, stating that an appraisal, "means an assessment or an estimation of a property's worth or value … it must be a figure which accurately represents what the agent believes a property could or should sell for in the current market."*

[71] Hume can be significantly distinguished from Flannery and the present case. In Hume:

(a) the property was essentially over-valued by the real estate agent, leading to false expectations by the vendor; and

(b) the appraisal was carried out before the property had even been viewed by the real estate agent, and was based purely on other sales in the area.

[72] In the present case there were no such issues. The second respondent knew the property (as evidenced by the 29 July email), carried out an assessment of comparable sales (the attachment), provided a written appraisal (the 2 August email) and the listing price was achieved."

[25] Ms Eckford then, helpfully, summarised the licensee's stance as follows:

*"**Conclusion***
[73] The only question before this Tribunal is whether or not the appraisal, comprising the 29 July and 2 August emails and the attachment, satisfactorily fulfilled the criteria pursuant to Rule 9.5. If it did so, there can be no finding of unsatisfactory conduct or misconduct.

[74] The Rules do not provide any guidance as to what should be included in the written appraisal.

[75] Cases previously decided by this Tribunal have determined that an appraisal will be satisfactory if it allows the vendor to determine the value of the property in the current market.

[76] It is trite to state that a property is only worth whatever a buyer will pay for it, but in the present case it is significant. As has been determined by the facts of the sale, the property was worth more to the eventual purchaser, the neighbour, than to any other potential buyer.

[77] This was a topic of discussion between the appellant and second respondent, but the actual value to the neighbour was not something that could have been estimated by anyone except the neighbour himself, and it is submitted that there was no requirement upon the second respondent to provide this high level of sophisticated reasoning in order to comply with Rule 9.5.

[78] The written appraisal provided a summary of market conditions in the Arthurs Point area including an assessment of the number of other sections which would effectively be in competition with the property area, and examples of similar properties sold in the previous 6 months.

[79] The CAC's determination that the appraisal complied with the Rules is entirely correct, reasonable, and furthermore is in line with the reasoning of this Tribunal in the first READT decision at paragraph [57].

[80] Even if the appraisal did not meet the standard of best practice, which is not admitted, it is submitted that this does not automatically lead to a disciplinary finding. The second respondent relies upon Earl Henton v REAA

and Barfoot and Thompson Limited and Debbie-Lee Wallace [2014] NZREADT 2, in which this Tribunal found that the real estate agent's conduct, although not exemplary, did not meet the threshold to determine unsatisfactory conduct.

[81] It is further submitted that, even if the 29 July and 2 August 2010 email and the attachment do not, together, constitute a proper appraisal, which is denied, any defect in the appraisal was to no effect, because, as the READT held, the appellant had a fixed price in his head for the property in any event. The appellant would, therefore, have maintained the listing price of $1.195m. Indeed, there has been no loss to the appellant as this price was, in fact, achieved.

[82] It is clear that the appellant remains aggrieved with both the sale price and the complaint process. It is understandable, given the price originally paid by the appellant for the property, that he is disappointed to have sold for a lesser amount. However both the CAC and READT have found there are no grounds for complaint against the second or third respondents.

[83] Finally, it is relevant that this complaint was only occasioned by the reference by Judge Barber to the appraisal in the first READT decision. No complaint was made to the REAA until this decision had been handed down."

The Stance of the Authority and of the Complainant

[26] We record that the appellant complainant agrees with the submissions for the Authority and, effectively, they incorporate the separate submissions we received from the complainant.

[27] As Mr McCoubrey puts it, the purpose of Rule 9.5 is to ensure transparency and that any appraisal provided by a licensee is realistic so as to avoid the risk of:

[a] an overinflated (and therefore misleading) appraisal that is used simply to obtain a property listing; and

[b] an unrealistically low appraisal, that ensures a quick sale and commission for the licensee, but may lead to the vendor achieving significantly lower than market value for their property.

[28] This is not to say that an appraisal will always match the purchase price. A different purchase price from the appraisal figure may, of course, be realised, whether that be under or over the appraised value. What is important is that the licensee has exercised the required care and skill in reaching his or her market appraisal and supports it with comparable sales data. This enables a client to make an educated decision when they are presented with purchase offers - *McCay-Woods v Real Estate Agents Authority* [2014] NZREADT 103 at [57] and [58].

[29] Mr Weber has complained that the licensee's appraisal did not meet the requirements of Rule 9.5 because no dollar value for the property was given.

[30] It is submitted for the licensee that a dollar value is not required by Rule 9.5 and that it is enough if the vendor is given adequate information to make his own price determination. Ms Eckford relies on *Flannery v Real Estate Agents Authority* [2014] NZREADT 31 to support that interpretation, specifically the comment at [18] which

states: *"… It is enough if an agent within the agency provides to Mr and Mrs Flannery the information needed so that they could determine what the proper value for the property was …".* We endorse the views expressed in *Flannery*.

[31] Mr McCoubrey submits that, as the appraisal is in writing, the key issues are:

[a] Was a dollar value required for the appraisal to be compliant;

[b] Did the appraisal realistically reflect the current market conditions and was the appraisal supported by comparable information?

[32] He adds that the complaint did not require the Committee to specifically consider the first of these issues. The Authority's position is that, while Rule 9.5 does not specifically state that a dollar value is required, and the word *"appraisal"* is not defined in the Act or Rules, an actual dollar value or range is impliedly required by the Rules.

[33] Rule 9.5 requires an appraisal to be *"supported"* by comparable information on sales of similar land in similar locations or businesses. This suggests that the provision of sales data itself is insufficient. What needs to be supported by that data is an opinion as to what the property's current market value is. Further, it is unclear how an appraisal can be judged to *"reflect current market conditions"* (as required in Rule 9.5) if no price or dollar value is provided.

[34] Mr McCoubrey puts it that, more generally, if appraisals are not required to have an actual dollar value or range, their usefulness is undermined. In most cases, the reason vendors ask for an appraisal is so the licensee can give them an indication of what sort of price they can expect to achieve for their property. An appraisal involves the licensee giving his or her opinion of that, based on the sales data, their assessment of the subject property, and on their experience and knowledge of the market. The comparable data is required so the vendor can decide whether or not to accept that opinion and so they can see how the licensee reached that opinion but, in and of itself, the data does not amount to an appraisal.

[35] It is submitted for the Authority that this interpretation is supported by reference to Rule 9.8, relating to agency agreements, which states (in part):

> *"When inviting signature of an agency agreement a licensee must explain to a prospective client in writing –*
>
> *(a) The conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual $ amount) of commission payable to the client, based on the appraised price of the land or business. …"*

[36] We observe that an appraised price for listing purposes is a different concept from an appraisal under Rule 9.5.

[37] It is put for the Authority that, for Rule 9.8 to operate sensibly, the appraisal must include an actual dollar amount or range, in order to accurately calculate the estimated commission; and that this interpretation also aligns with the purpose behind the rule about appraisals, which is to ensure that enough information is given to the vendor to allow them to consider the appraisal in comparison to offers that are made.

[38] It is argued for the licensee that a price would have been misleading given the so-called comparable sales were not that comparable, so that it was open to the licensee to say that he considered the property would sell above or below the comparable sales figures; and an indication of the price range could still have been given.

[39] In *Flannery,* we stated (at paragraph [18]) that it was enough if an agent provided the appellants in that case with the information needed so that they could determine what the proper value for the property was. However, that was in a situation where an appraisal with an actual dollar range had been given just some months earlier than listing. In that same paragraph, we went on to record that fact and to note that there was a discussion between the vendors and the agent in which the parties agreed to use that appraisal. Mr McCoubrey submits that our comments were directed at the facts of that particular case in determining that the agent had sufficiently discharged her obligations.

[40] Mr McCoubrey points out that if we accept his submissions for the Authority that a dollar value or range must be provided, the requirements of Rule 9.5 have not been met. It is submitted for the Authority that, without a dollar value or range, no assessment can properly be made as to whether the appraisal reflected current market conditions, nor can any analysis be done as to whether the information provided was comparable. Mr McCoubrey essentially submits that there was no *"appraisal"* by the licensee in this case.

[41] For completeness, it is also submitted for the Authority that the past conduct by Mr Penrose, as outlined in Mr Weber's submissions, does not assist us as the issue in this case is fact specific. We agree.

[42] Mr McCoubrey also observes that if we accept the Authority's submissions in respect of Rule 9.5, that rule has been breached in this case, and, accordingly, it is open to us to make a different finding to that made by the Committee.

Our Views

[43] It seems realistic that we not only deal with the issue of whether the licensee has complied with Rule 9.5 of the 2009 Rules but also, as obiter dicta, the effect of the current Rule 10.5.

[44] We consider that the starting point is the ordinary meaning of the word "appraisal". From the *Concise Oxford English Dictionary (11th Edition)*, we set out as follows the meanings given to *"appraisal"*, *"appraise"*, and *"assess"*, namely:

> *"**appraisal** ■ n. an assessment ▸a formal assessment of the performance of an employee.*
>
> ***appraise** ■ v. assess the value, quality, or performance of. ▸(of an official valuer) set a price on.*
>
> ***assess** ■ v. evaluate or estimate the nature, value, or quality of. ▸set the value of a tax, fine, etc., for (a person or property) at a specified level."*

[45] We consider that Rule 9.5 required the licensee to provide the vendor in writing with the licensee's assessment of the value and quality of the property to be

marketed from the realistic experience of the licensee as to the relevant market conditions based on relevant sales information for similar property.

[46] We agree with Ms Eckford that a licensee is not a registered valuer and is not required to provide a formal written valuation. However, we consider that such an appraisal should either place an approximate dollar value on the property, or a general valuation range or, if that is not sensible in the opinion of the licensee, then provide reasons why that is not sensible. We think that the 2012 Rules 10.2 and 10.3 sensibly expand and express that approach.

[47] The point about the parties linking the 9 July 2010 email with that of 2 August 2010 is that the earlier email emphasises that the licensee knew the land well and refers to the purchase price paid by Mr Weber for the property in September 2007 as $1,550,000.

[48] The appraisal letter of 2 August 2010 could be taken to suggest a valuation of approximately $556,000. The listing agreement could be taken to record an appraisal of $1,195,000.

[49] While Rule 9.5 does not impose a time limit on the provision of an appraisal, at the latest it would need to be given upon listing but, for the formal appraisal, an appraisal figure or range needs to be given as part of that rather than left in the air until the point of listing the property for sale.

[50] We appreciate that making an appraisal of land is not an exact science. We are conscious that there were telephone calls and, probably, other communications between the complainant and the licensee over the period 29 July 2010 to 2 August 2010 and that, by 9 October 2010, they together referred to the appraised and instructed value being $1,195,000.

[51] We note that the complainant accepts that he agreed in the listing agreement to an instructed value from him to the agent but asserts that at no stage did he get an *"appraisal"* in terms of Rule 9.5. We agree that the appraisal document of 2 August 2010 (including the email of 29 July 2010 also) did not give an appraisal figure even though the instructed value seems to have been agreed upon by 9 October 2010, (the date of the listing agreement) as being the appraised figure. It seems to us to be a mitigating factor that, at least by the time of the listing agreement, there was an appraised figure in existence.

[52] In terms of submissions for the licensee, we agree that an *"assessment"* is a different concept from a *"valuation"* of property.

[53] In the present case, the appraisal does not provide any price guidance whether reasonably specific or over a range, nor does it explain why this is not done. Otherwise, the appraisal is helpful.

[54] We consider that the context of the provision of the appraisal is an important factor when considering whether the appraisal might constitute unsatisfactory conduct. Here, the context was that the vendor had a price requirement regardless of the licensee's, or anyone else's, appraisal views and would not accept the views of the licensee.

[55] Overall, the vendor was realistically and adequately advised by the licensee in terms of market price expectations but, technically, Rule 9.5 was not complied with as we have explained above.

[56] We emphasise that the appraisal need not give a dollar value but there must be at least a steer as to a value range or reasons, brief perhaps, as to why that is unhelpful.

[57] Having said all that, we do not consider that the licensee failed the complainant overall with his appraisal advice. Technically, Rule 9.5 was breached so that we could find unsatisfactory conduct. However, in all the circumstances, we confirm the Committee's decision to take no further action. We regard this complaint as at an end.

[58] At the end of the hearing of this case, on the application of the licensee, we made an interim order for name suppression on the basis that, otherwise, it seemed likely that the complainant would create adverse publicity in the meantime for the licensee. That interim order was to continue *"until we release our decision"*. In terms of the decision which we have set out above, we would not expect either party to seek continuation of the name suppression order but, of course, an application can always be made under s.108 of the Act.

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

_____
Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Ms C Sandelin
Member