

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 35

READT 069/14

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

**BETWEEN** **GUOMIN (GARY) GUO**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (per CAC 304)**

First respondent

**AND** **CHANJUAN (DANA) YAN**

Second respondent

**AND** **GAIL BEATON**

Third respondent

**AND** **CHRISTINE DEVER-YOUNG**

Fourth respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Ms C Sandelin - Member

**BY CONSENT HEARD ON THE PAPERS**

**DATE OF THIS DECISION** 18 May 2015

**REPRESENTATION**

The appellant on his own behalf  
Ms N Copeland, counsel for the Authority  
Mr T D Rea, counsel for the three licensees (i.e. the second, third and fourth respondents respectively)

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Guomin (Gary) Guo (“the complainant”) appeals against the 30 July 2014 decision of Complaints Assessment Committee 304 to take no further action on his

complaints against three licensees, namely, ChanJuan (Dana) Yan, Gail Beaton and Christine Dever-Young.

[2] After quite some discussion between the parties, it was agreed that we are to accept the facts as found by the CAC in its clear and comprehensive decision. The issue for the complainant is rather the interpretation or application of the findings of that Committee. We understand how there are matters of concern to Mr Guo but, as we explain below, we do not think that further action is appropriate.

[3] Broadly in this re-hearing before us, we agree with the approach of the Committee that no further action with regard to the complaint, or any issue involved in it, is the just course in this case; i.e. we apply s.80(2) of the Real Estate Agents Act 2008 (“the Act”) which (in its context of s.80) reads as follows:

**“80 Decision to take no action on complaint**

- (1) *A Committee may, in its discretion, decide to take no action or, as the case may require, no further action on any complaint if, in the opinion of the Committee,—*
- (a) *the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or*
- (b) *the subject matter of the complaint is inconsequential.*
- (2) *Despite anything in subsection (1), the Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.”*

[4] Ms Yan and Ms Beaton each currently hold a salespersons licence under the Act and, at the time of the alleged conduct, were working for Barfoot & Thompson Ltd. Ms Dever-Young currently holds a branch manager’s licence under the Act and at the time of the alleged conduct was working for Barfoot & Thompson Ltd as a branch manager.

[5] The complainant currently holds a salesperson’s licence under the Act and at the time of the alleged conduct was working for Shelter Realty Ltd trading as Harcourts New Lynn.

***Factual Background***

[6] The parties agree that we are to accept the material facts set out at [2.1]-[2.13] of the Committee’s decision of 30 July 2014 as follows:

***“Material Facts***

- 2.1 *In April 2013, licensee 1 was introduced to Mr Wang Lei and his family (the purchasers). The introduction was through a mutual friend and licensee 1 was asked to assist the purchasers in finding a suitable home close to Green Bay or New Lynn.*

- 2.2 *On 6 June 2013, the property was listed for sale by licensee 2 and Barfoots. The property was scheduled to be sold by way of auction on 10 July 2013.*
- 2.3 *The property was available for viewing from 12 June 2013 and on the afternoon of 18 June 2013 the purchasers viewed the property in the company of licensee 1, along with another interested party.*
- 2.4 *On 23 June 2013 the purchasers viewed the property for a second time, in the company of licensee 1, along with another couple who were friends of the purchasers.*
- 2.5 *A building inspection of the property was commissioned by the purchasers and carried out on 26 June 2013.*
- 2.6 *On 8 July 2013, licensee 1 provided the purchasers with amended auction terms and conditions for the property. A special condition of sale relating to unpermitted works at the property had been added by the vendors.*
- 2.7 *On 10 July 2013 the property auction was conducted in Barfoots rooms. The purchasers did not attend the auction.*
- 2.8 *The property was 'passed in' without a bid at auction.*
- 2.9 *On 11 July 2013 licensee 1 contacted the purchasers to inform them that the property had not sold at auction and was now listed at an asking price of \$639,000.*
- 2.10 *On 20 July 2013 Barfoots agreed with the vendor's request to release them from the sole agency agreement and withdraw the property from sale.*
- 2.11 *In early August 2013 the property was listed for sale by Blue Fern Realty Limited trading as Harcourts Henderson Heights (Harcourts HH).*
- 2.12 *On 17 August 2013 the purchasers signed an agreement to buy the property for \$635,000. The contract was facilitated by the complainant through Harcourts NL.*
- 2.13 *Shortly thereafter, discussions took place between Barfoots and Harcourts HH, regarding a claim on commission by Barfoots, based on prior introduction of the purchasers to the property. On 25 September 2013 an agreement was reached to split the commission between Barfoots, Barfoots HH, and Harcourts NL”.*

### ***The Allegations of the Complainant***

[7] In respect of Ms Yan, Mr Guo alleges that she:

- [a] Failed to present to the vendor a pre-auction offer on the property;
- [b] Did not act in the best interests of the vendor client, by arbitrarily deciding to decline a pre-auction offer;

- [c] Misled a prospective purchaser as to the vendor's price expectations for the property; and
  - [d] Placed undue pressure on the purchasers by contacting them after they had placed an offer on the property through another agency.
- [8] In respect of Ms Beaton, Mr Guo alleged that she:
- [a] Failed to comply with r.9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (Rules) in that, upon receipt of an agency cancellation, Ms Beaton failed to provide the client with a list of customers names in respect of whom Barfoot & Thompson Ltd would claim a commission should any of them conclude a transaction with that client;
  - [b] Failed to advise the client as to the possibility of paying two commissions when listing the property with another agency; and
  - [c] Provided false information to the client with regard to a customer's ability to arrange finance.
- [9] In respect of Ms Dever-Young, Mr Guo alleged that she:
- [a] Failed to comply with r.9.11 of the Rules in that, upon receipt of an agency cancellation, she failed to provide the client with a list of customers' names in respect of whom Barfoot & Thompson Ltd would claim a commission should any of them conclude a transaction with the client;
  - [b] Failed to confirm with the client, in writing, the cancellation of an agency agreement; and
  - [c] Failed to adequately supervise Ms Yan and Ms Beaton resulting in multiple breaches of the Rules.

### ***The Committee's Decision of 30 July 2014***

*Re: Ms Yan*

[10] Ms Yan conceded that when the ultimate purchasers first viewed the property on 18 June 2013, there were discussions about pre-auction offers. However, she maintained that her advice to the purchasers was to have a building inspection carried out first and, in any case, an offer before the first open home had been conducted was not likely to be considered by the vendors.

[11] Ms Yan also conceded that on 23 June 2013, when the prospective purchasers were viewing the property for a second time, a further discussion regarding a pre-auction offer took place. However, she stated that at that time it was a friend, accompanying the purchasers, who asked about the possibility of presenting an offer of \$620,000.

[12] The Committee noted that the complainant is correct in asserting that a licensee is obliged to present offers in writing and that an offer, once obtained, must be brought to the attention of the vendor in a timely manner. However, the Committee

noted that a licensee must also be free to make professional judgments, based on experience and prudence, in the best interest of both customers and clients. As a result, the Committee found that the conduct of Ms Yan was consistent with reasonable expectations of a licensee.

[13] In respect of the allegations that Ms Yan misled the purchasers as to the clients' expectations for the property, the Committee found that the evidence on the matter was inconclusive and unproven.

[14] Also, the Committee found no evidence of Ms Yan applying undue pressure to the purchasers. It seemed to the Committee that Ms Yan had done no more than inform the purchasers of her concerns in response to questions asked by the purchasers as to whether there was anything wrong in them purchasing the property (through the complainant's agency) previously seen by them with her.

*Re: Ms Beaton*

[15] The Committee noted that the complainant was correct in his assertion that a licensee or agency must have complied with r.9.11 should they wish to claim a commission from a vendor client subsequent to termination of their listing agreement. However, the Committee noted that, in this instance, it seemed that the two agencies had come to an amicable agreement on a commission split without involving the mutual vendor client. The Committee suggested that, if the complainant was concerned at the final split of commission, then that was a matter for him to address with his employer.

[16] In respect of advising the client as to the risk of, possibly, paying two commissions when the property was listed with another agency, the Committee found no evidence to suggest that Ms Beaton failed to apprise the client of their obligations for commission under the listing with Barfoot & Thompson Ltd.

[17] Further, the Committee found that the allegation of misleading conduct was not proven and that no further enquiry would be made.

*Re: Ms Dever-Young*

[18] In respect of the allegation that Ms Dever-Young failed to comply with r.9.11 of the Rules, the Committee found that the complaint against her did not raise any new issues that would require any further disciplinary enquiry.

[19] In respect of failing to confirm in writing the cancellation of an agency agreement with the client, the Committee noted that while it would normally be considered good agency practice to confirm agency cancellations, in writing, there is no regulation or rule to that effect. The Committee believed that the greater responsibility for checking that the property was no longer listed with another agency, and for ensuring that adequate advice was given to the purchasers with regard to multiple listings and obligations to pay commissions, lay with the new listing agency Harcourts HH. The Committee found no breach of s.50 of the Act relating to supervision by Ms Dever-Young.

[20] Accordingly, the complaints against all three licensees were dismissed.

## **Our Jurisdiction**

[21] The Committee had held a hearing on the papers, pursuant to s.90(1) of the Act, and made a determination to take no further action under s.89(2)(c).

[22] Section 111 provides a right of appeal to us for any person affected by a determination of a Committee, including a decision under s.89. The appeal is by way of rehearing and, after hearing the appeal, we may confirm, reverse, or modify the determination of the Committee.

[23] In *K v B* [2010] NZSC 112, [2011] 2 NZLR 1, the Supreme Court clarified principles articulated in *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141. The Court confirmed that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals:

*“... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.”*

[24] We have previously held that Committee determinations under s.89 are subject to general rights of appeal and the wider principles described in *Austin Nichols* apply. In *Jones v CAC 10028 & Shekell* [2011] NZREADT 15 we said at paragraph [25]:

*“... Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as ‘general appeals’. All parties agree that the Tribunal should apply the principles set out in Austin, Nichols, as reiterated by K v B (supra).”*

[25] This is said by counsel for the Authority to contrast with the position where an appeal is from the exercise of the separate discretion under s.80 to take no action on a complaint, or where an appeal is from a decision not to refer a misconduct charge to the Tribunal. In those cases, it is put that the narrower appeal grounds identified in *K v B* as appropriate on appeals from discretionary decisions will apply; see *Smith v CAC* [2010] NZREADT 13 (appeal from discretionary decision under s.80) and *Dunn v REAA (CAC 143)* [2012] NZREADT 56 (appeal from decision not to refer a misconduct charge).

## **The Submissions for the Authority**

[26] In the present case, the Committee conducted an investigation and hearing on the papers, carefully weighed the issues and the evidence, and determined to take

no further action. In the circumstances, the Authority submits that the present appeal is a general appeal as per *K v B*. We agree.

[27] The Authority therefore submits that the complainants are entitled to judgment in accordance with our opinion, notwithstanding that may involve an assessment of fact and degree and entail a value judgment. Again, we agree.

[28] However, notwithstanding that we are entitled to approach the issues afresh, the Authority submits that the Committee's decision to take no further action was appropriate in the circumstances.

[29] The Authority addressed the following central issues arising out of the appeal:

- [a] Non-presentation of pre-auction offers (Ms Yan);
- [b] Handling of a builder's report (Ms Beaton);
- [c] Alleged failure to advise of the risk of double commission (Ms Beaton and Ms Dever-Young);
- [d] Possible procedural error; and
- [e] Non-provision to Harcourts by Barfoot & Thompson Ltd of list of customers (Ms Yan, Ms Beaton and Ms Dever-Young).

### ***Presentation of Pre-Auction Offers***

[30] In respect of the failure of Ms Yan to present the vendor with the purchaser's pre-auction offer on the property, the Committee found that, in principle, the complainant was correct that a licensee is obliged to present offers in writing and that those offers must be brought to the attention of the vendor in a timely manner. However, given the circumstances of the discussions and the fact that there were no written offers made, the Committee determined that Ms Yan did not breach the Act.

[31] Counsel for the Authority noted that the Committee went on to say that it believes that a licensee must also be free to make professional judgments based on experience and prudence; but submits that this is not the effect of the Act or the Rules and that every offer made in writing must be submitted to the client.

### ***Handling of a Builder's Report***

[32] The appellant contends that Ms Beaton breached r.6.4 of the Rules when, having been asked by her vendor client about what was in the builder's report, she stated: "*I don't want to know ... because if I know then I would have to tell potential clients/buyers*". Rule 6.4 reads:

*"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."*

[33] Counsel for the Authority observes that this issue was not considered by the Committee and puts it that it will be a matter for us to deal with; but submits that there is no evidence that anything was withheld from prospective purchasers. We agree

and regard the alleged above statement of Ms Beaton as needing to be analysed in its context.

[34] Counsel observes that, depending on what is said to an agent, the agent may in fact have a disclosure obligation with prospective purchasers since it is only common sense that an agent, with the informed consent of the vendor client, should seek to find out more about potential issues identified in a builder's report so that the issue of disclosure can be dealt with appropriately.

[35] It is put that, when taken in isolation, one can understand why Ms Beaton's response is criticised by the complainant. However, the disclosure point was never reached and it cannot be said with any certainty that there was a failure to disclose.

### ***Misleading a Customer as to the Vendor's Price Expectations for the Property***

[36] The Act requires licensees to balance duties to act in the best interests of his or her client, without misleading potential purchasers, including in respect of the client's price expectations. We agree with the Authority that licensees must get that balance right and potential purchasers are not to be misled in any respect.

[37] Whether a licensee has balanced those competing duties appropriately in any given case will, of course, depend on the facts. There is a factual dispute between the complainant and Ms Yan as to what Ms Yan told the prospective purchasers about the vendor's price expectation (i.e. a price range of \$650,000 to \$680,000 as opposed to \$600,000 to \$680,000). It is put that this is a matter for us to determine on the agreed evidence.

### ***Double Commission***

[38] Having found no evidence that Ms Beaton failed to apprise the client vendors of their obligations for commission under the listing agreement, the Committee found there was no breach of rule 9.10 of the 2012 Rules which reads:

*"9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded."*

[39] In discussing this aspect of the complaint, the Committee noted that it could find no evidence that the vendor had been approached by Barfoot & Thompson Ltd to pay additional commission. Counsel for the Authority simply notes that the fact a licensee or agency does not seek commission post the cancelling of an agency agreement, and where a transaction is subsequently concluded, is not relevant in terms of compliance with r.9.10. We agree.

[40] Having accepted that Ms Beaton did discuss the issues around double commission with the client, it was open to the Committee to take no further action on this aspect of the complaint.



### ***Procedural Errors***

[41] The appellant contends that the Committee's process in reaching its decision to take no further action was flawed because it preferred the evidence of the licensees over evidence provided by the client, customer and other witnesses.

[42] Counsel for the Authority submits that the Committee is entitled, indeed required, to make evidential findings on the balance of probabilities and this will involve an evaluation of and conclusion of the evidence before it; and that there is nothing in the Committee's findings which reveals any improper departure from this process. We agree.

[43] As this appeal is by way of rehearing, it is for us to consider the evidence and come to a determination afresh. The Authority submits that the Committee was entitled to take into account the matters it did, in concluding that the complaint was not supported on the evidence, and that the Committee's decision to take no further action was appropriate. Again, we agree.

### ***List of Customers***

[44] It is accepted that rule 9.11 was not complied with because Ms Beaton and Ms Dever-Young both agree that a list of customers was not sent to the vendor when Harcourts took over the listing. However, the Committee decided to take no further action on the basis the two agencies came to an amicable agreement on a commission split without involving their mutual vendor client.

[45] It is submitted for the Authority that, while the decision not to involve the vendor client is certainly relevant to the outcome of the complaints before us, the meaning of r.9.11 is clear and it was breached in this case. From the agreed facts, we can only concur. Rule 9.11 does not provide that a list of names of each customer in respect of whom the licensee would claim a commission need be provided to a client only in circumstances where the original listing agent/agency intends on seeking payment of commission from the client (post the client cancelling the agency agreement). A list must be given in every case where a notice of cancellation of an agency agreement is given or reviewed by the agent/agency.

[46] Here, Ms Beaton did not provide a list of customers to the vendor after the Barfoot & Thompson Ltd agency agreement was cancelled. That was a breach of r.9.11. A breach of the rules is unsatisfactory conduct under s.72 of the Act, although we have always accepted that a total absence of fault defence may sometimes apply.

[47] It is submitted for the Authority that it is difficult to see how any absence of fault defence would apply on these facts because rule 9.11 was breached so that a finding of unsatisfactory conduct should follow. The Authority would accept, however, that on the facts, any penalty to be imposed for the breach of the rule may be nominal. We deal further with this aspect below.

## ***Submissions for the Licensees***

### ***Non-Presentation of Offers***

[48] With regard to the issue of the non presentation of pre-auction offers involving Ms Yan on two occasions, Mr Rea puts it that Ms Yan acknowledges that she discussed with Mr Lei (the prospective and ultimate purchaser) the option of a pre-auction offer but says that she advised him that the best time would be after the first open home and that they should arrange for a building inspection before making an offer. Mr Rea puts it that her justification for that was clearly to protect the interests of that prospective purchaser because he and his family had only recently arrived in New Zealand and she felt that their interest needed to be protected.

[49] Ms Yan also acknowledges that there was a second occasion on which she discussed a pre-auction offer with Mr Lei when Mr Lei's accompanying friends had asked about the indicative price and if a pre-auction offer of \$620,000 would be accepted by the vendor. Ms Yan says that she responded that price may not be acceptable because it was too early in the marketing process and the vendor had not received any feedback from open homes. Also she again suggested that it would be better to have a building inspection carried out first, so the parties moved on to discuss the building inspection and a pre-auction offer was not mentioned again.

[50] The Committee not only found that such conduct was consistent with the reasonable expectations of a licensed real estate salesperson but that the purchasers were not then serious about making pre-auction offers; that on the first occasion a builder's report had not been obtained and a pre-auction offer made before the first open home was unlikely to be accepted; and on the second occasion the issue of a pre-auction offer was raised by a friend of the purchasers when a builder's report had not yet been obtained and the marketing process was in its early stages still and it was unlikely that the vendor would be interested in an offer at that point.

[51] Mr Rea puts it that it was absolutely prudent for Ms Yan to advise the purchasers (i.e. Mr Lei and his family) that they should first obtain a builder's report, particularly in an auction situation, and there is no evidence to suggest that despite her advice, they wanted to proceed with a pre-auction offer. Indeed he puts it, there is evidence from Ms Yan that she asked them whether they were still interested in submitting a pre-auction offer after the building inspection, and they declined to do so. We agree with those submissions.

### ***The Price Sought by the Vendor***

[52] There is the issue as to the vendor's price expectations and the allegation from Mr Guo that Ms Yan misled the purchaser about that. He says that, when discussing a pre-auction offer with the purchasers, Ms Yan indicated that the price range entered into the Barfoot & Thompson Ltd listing system was \$650,000 to \$680,000. However, Ms Yan states that she indicated a price range of \$600,000 to \$680,000 which is what she thought was on the listing system.

[53] The CAC considered that subsequent documents from Barfoot & Thompson Ltd show that the price range was in or around the \$600,000 to \$680,000 bracket. The original listing form showed a range of \$600,000 to \$650,000; internet searches,

logged in the listing system, showed a range of \$580,000 to \$650,000; and a comparative market survey showed a range of \$600,000 to \$650,000.

[54] Unlike the usual circumstances of a complaint about misleading representations concerning vendors' price expectations, Mr Guo does not complain that the price indication was too low (i.e. that the vendors might be prepared to accept an offer that was lower than their actual expectation). To the contrary, Mr Guo alleges that Ms Yan gave an indication of the vendor's "*bottom line*" (\$650,000) that was too high, thus discouraging a prospective purchaser who wished to offer \$620,000.

[55] Mr Rea then puts it that, while there is a factual dispute between the complainant and Ms Yan as to what she told the prospective purchaser (i.e. a price range of \$650,000 to \$680,000, as opposed to a range of \$600,000 to \$680,000), the issue is immaterial.

[56] Apparently, the context for the discussion was Ms Yan telling the prospective (and ultimate) purchaser that it was premature to make a pre-auction offer at that early stage of marketing and in the absence of a building inspection report. Even if the statement by Ms Yan is taken as a representation that \$650,000 was the bottom of the range of the vendor's price expectation, such a statement could not be anything other than a statement of opinion because it related to a future fact (the price that the vendor might accept). As Mr Rea also puts it, that is quite different from a representation to a purchaser that a vendor would entertain offers in a range that the vendor had made clearly known would not be acceptable.

[57] Accordingly, with regard to this issue of price expectation, Mr Rea submits there was no misleading conduct by Ms Yan and there is no dispute that the reason the purchasers declined to attend the actual auction was as a result of the unconsented building works and not as a result of price indications.

### ***The Purchaser's Finance Situation***

[58] There is the aspect about the purchaser's ability to obtain finance. The issue arises out of a text message sent by Ms Beaton to the vendor advising that the prospective purchaser was out of contention because the bank would not lend on the property after learning about the unconsented building works. That information was conveyed to Ms Beaton by Ms Yan, but Mr Guo alleges that was false information as the prospective purchaser had never told Barfoot & Thompson Ltd that he could not obtain bank finance and the bank had never declined finance on that transaction.

[59] Ms Beaton does not dispute that she sent the vendor the said text message but emphasises that she did so because she had a duty to keep her vendor client aware of all developments and, once Ms Yan told her about that aspect, she felt obliged to relay that to her vendor client.

[60] Ms Yan had stated to the Committee that on 9 July 2013 she was informed by a mutual friend of the purchasers that the purchasers were awaiting a response from their mortgage broker following the amendment of the auction terms relating to the unpermitted building works.

[61] On the day of the auction, 10 July 2013, the ultimate purchasers informed Ms Yan that they would not attend the auction due to issues with their financing

arising out of the unconsent works clause. Ms Yan gave that information to Ms Beaton who reported to her client accordingly.

[62] Mr Rea submits that, once that information came to light, both Ms Yan and Ms Beaton felt the need to apprise the vendor of it and there was never any intention on their part to mislead the vendor and, in fact, there was no misleading conduct.

### ***Cancellation of First Listing***

[63] Mr Rea notes that a further complaint of Mr Guo against Ms Beaton and Ms Dever-Young is that they failed to confirm in writing the cancellation of the Barfoot & Thompson Ltd agency agreement with the vendor.

[64] Ms Dever-Young acknowledges that a list of customer's names was not sent to the vendor but says that Ms Beaton's feedback report had contained most of the interested parties' names and that the eventual buyers had been introduced to the vendors during the many inspections of the property which those eventual buyers had made. Mr Rea then noted that, in its decision, the CAC found:

*“the complainant is correct in his assertion that a licensee or agency must have complied with 9.11 of the rules should they wish to claim a commission from a vendor client subsequent to termination of their listing agreement; however in this instance it seems that the two agencies have come to an amicable agreement on a commission split without involving their mutual vendor client at all”.*

[65] Mr Rea continued that:

*“The CAC in its decision found that “having conceded that there had been no actual list of potential buyers provided to the clients, apart from vague references in feedback letters, Barfoots were clearly not in a position to make a claim for commission against the client and neither have they”. The key here is that this was not a claim for commission against the client and it was instead a commercial agreement reached between two agencies.”*

### ***The Inappropriate Language Allegation***

[66] With regard to a further issue of the nature of Ms Yan's contact with the purchaser, Mr Guo alleges that: *“After learning that the prospective purchaser had purchased the property through Mr Guo, Ms Yan “criticized, shouted at the customer over the phone for half hour and gave wrong information to customer about B&T's entitlement and claim of the commission, which put the customer under undue and unfair pressure”.*

[67] Mr Rea then noted that Ms Yan says in her statement that she sent the prospective purchaser a text message enquiring about the purchase, and the prospective purchaser confirmed it; that she says that she asked about the details of the offer and whether the prospective purchaser told the Harcourts salesperson (Mr Guo) that he had viewed the house with her; and it was after this text message that the prospective purchaser called her. Mr Rea observed that, in its decision, the CAC preferred Ms Yan's version of events, in that it was the purchaser who called Ms Yan to ask if there was anything wrong, to which she replied that her agency would

probably be claiming a commission on the sale because she had introduced him to the property. The CAC found that *“it was unnecessary to involve the purchaser in discussions relating to commission; however it seems that Ms Yan had done no more than inform the purchaser of her concerns, in response to questions asked by the purchaser”*.

[68] We agree with Mr Rea that there is no evidence on which we could properly depart from those factual findings of the CAC on that issue.

### ***The Builder’s Report***

[69] A further allegation from Mr Guo is that the Committee did not consider one of his complaints, namely, that Ms Beaton allegedly withheld a builder’s report containing relevant information about the property. She denies that allegation. The submission of Mr Guo on the point was:

*“When her client asked her what was in the builder’s report, Ms Beaton said: “I DON’T WANT TO KNOW ... (IF I KNOW THEN I WOULD HAVE TO TELL POTENTIAL CLIENTS/BUYERS”. He further says that “Ms Beaton wanted to withhold the information in the builder’s report with the intention NOT to disclose the information to the potential buyers” and says that his evidence in support of this allegation is a letter to the vendor.”*

[70] The prospective purchaser (for whom Mr Guo complains) sought and obtained the builder’s report so that Ms Beaton could not have withheld information from him about it. Ms Beaton further says that Ms Yan told her that such report was verbal and given to the purchaser at a time when Ms Beaton was not present so Ms Beaton could not have withheld what she had not heard.

[71] Ms Beaton also says that when the vendor later asked her about the builder’s report, she responded that she was not at the inspection to hear what was said when the builder gave his report and, until she would hear directly from the builder, she considered the builder’s views to be hearsay and did not wish to receive them on that basis. She says she took that stance because prospective purchasers might exaggerate the builder’s findings with a view to reducing the price and she did not want to provide her vendor client with incorrect information. As Mr Rea puts it, that was a prudent course of conduct.

[72] Mr Guo seems to be alleging that Ms Beaton did not wish to know what the builder had said because she did not want to disclose it to a prospective purchaser; but (Mr Rea puts it) that seems to be no more than an unfounded allegation.

### ***Double Commission Prospects***

[73] Mr Guo alleges that Ms Beaton and Ms Dever-Young did not explain to the vendor the possibility of a double commission.

[74] Mr Rea puts it that the starting point is that there was never a second claim for commission by any of the licensees against the vendor but, more importantly, Ms Beaton has stated to the Committee that *“at the time of listing Linda and Frank’s property, both my colleague, William MacLean, and I (joint listing) explained clearly to them that if they entered into another listing agreement with another company they*

*could be liable for two commissions. Linda and Frank were very aware of this, as this was the third time I had marketed properties for them”.*

[75] Mr Rea notes that the Committee found that there was no evidence to suggest that the vendor had been approached to pay additional commission or that Ms Beaton failed to apprise that vendor client of her obligations regarding commission under the listing agreement. Mr Rea submits that approach was entirely correct.

[76] It seems to us that Ms Beaton had clearly explained to the vendors that, if they entered into another listing agreement with another company, they would be liable for two commissions; and it is not in dispute that the vendors knew that. We do not think it particularly relevant that the vendors were not approached to pay additional commission.

[77] Mr Guo also alleges that Ms Dever-Young *“led a team of three to claim a commission”*, and that this was in breach of Rule 9.11. He says that Ms Dever-Young’s use of the introduction rule to claim a commission from the agency was a *“vicious breach of the rules”* and that there is no such thing as the introduction rule.

[78] Mr Rea points out that Ms Dever-Young was the only respondent involved in negotiating the commission split with Harcourts Henderson Heights. Ms Yan and Ms Beaton were not involved, and nor was the vendor. Mr Guo acknowledges that Ms Dever-Young did not involve the vendor in the claim for commission. In his initial complaint to the Authority, he said that *“when she decided to claim a commission from Harcourts, she did not do anything to communicate with the vendor regarding this and offer client care.”*

[79] The introduction rule has long been recognised as law in New Zealand, e.g. refer *Harcourts Group Ltd v McKenzie* HC Christchurch AP 129/93, 9 September 1993, where the Court said that a bare introduction will not suffice and that the agent seeking commission’s actions must have had a material bearing on the sale. The Court stated:

*“... the primary contractual stipulation is that commission will be payable if the property is sold to anyone introduced to the property through Harcourts’ agency. If the agent can show that the ultimate purchaser was introduced to the property through his agency then prima facie as a matter of construction commission is payable. The prima facie obligation to pay commission ceases only when the agent’s introduction ceases to have a material bearing on the sale. By that I mean that the agent’s introduction was no longer instrumental in any way in bringing about this sale.”*

[80] The present case was not a claim for commission against the vendor. It was a matter between the two agencies and, during negotiations, Ms Dever-Young stated that if agreement cannot be reached the matter will be referred to arbitration. Mr Guo says that, in doing so, Ms Dever-Young *“threatened that she would take the claim to a third party for expensive arbitration if Harcourts was not willing to accept her demand”*. However, the email correspondence between Ms Dever-Young and the Harcourts Henderson Heights branch manager shows that there was no such threatening behaviour but instead a robust commercial negotiation over a split of commission.

[81] Mr Rea puts it to be clear that Mr Guo's concern is with him (Mr Guo) not receiving what he considers to be his rightful share of the commission. In his submission to the CAC Mr Guo said that *"throughout the whole process, neither Barfoot & Thompson nor Harcourts listing branch had ever contacted me for any information about the sale"*. Mr Rea commented that the CAC reasonably identified this concern of Mr Guo about his share of commission in its decision, and found that *"if the complainant is concerned at the final split of commission agreed between Barfoots and Harcourts HH and Harcourts NL, it seems to the Committee that it is a matter for him to address with his employer"*.

### ***Ms Dever-Young as a Branch Manager***

[82] Mr Guo makes various allegations against Ms Dever-Young, pertaining to her role as branch manager and duty to supervise staff. He says that her actions *"confused the clients, customers and her staff, and brought the industry into disrepute"*; and further that *"clients and customers, B&T staffs and other licensees were misled by her that "introduction" is a law and could override the Rules"*.

[83] Mr Guo then asserts that Ms Dever-Young did not properly supervise her salespeople and that resulted in multiple rule breaches by her staff.

[84] Mr Rea submits that those allegations of Mr Guo are simply incorrect and that the respondents did not breach any Rules or the Act, and Ms Dever-Young was, at all times, discharging her duty to supervise the licensees in accordance with the Act.

[85] Mr Guo alleges that Ms Dever-Young failed to confirm the cancellation of the Barfoot and Thompson agency agreement with the vendor in writing and maintains that she told the vendor that she did not need to so cancel it. His rationale for alleging that to be a breach of rules is that (Mr Guo put it) *"the client could have enough reason to suspect she was leaving a loophole for her to claim the commission and did not terminate properly the listing authority, which exposed the client to the possibility of paying double commission"*.

[86] In its decision the CAC held that *"there is no regulation or rule that makes such action mandatory. Barfoot on the other hand had the right to ask the client to put their request for release in writing, as required by their listing agreement"*. The CAC further said that *"the greater responsibility for checking that the property was no longer listed with another agency and that adequate advice was given to the client with regard to multiple listings and obligations to pay commissions lay with the new listing agency – Harcourts HH"*. Mr Rea submits that the CAC was entirely correct on this issue. We agree.

### ***Reasons for Decision***

[87] It is Mr Rea's overarching submission that while Mr Guo disagrees with the CAC's decision, he has not shown any reason why it should be overturned; that Mr Guo repeats many of the allegations he made to the CAC, despite these having been dismissed, and there is no new evidence to show that the CAC arrived at the wrong decision. There is no dispute that the appeal to us is a re-hearing.

[88] We have covered the submissions of both counsel above in reasonable detail because we generally agree with them and need not repeat all their reasoning.

[89] We record that the clause in the terms of sale for auction dealing with the non-compliant building work read as follows:

*“22.0 The Purchaser acknowledges that they have been made aware that certain aspects of the property, namely garage, storage and workshop areas conversion into a rumpus, storage and toilet/shower area, may not comply with the current building code and/or that no Code Compliance Certificate has been issued in respect of the garage storage and workshop areas conversion into a rumpus, storage and toilet shower area. Accordingly, the Vendor gives no warranty as to the same and as from the date of this Agreement the Vendor shall be under no obligation to the Purchaser to achieve compliance or procure a Code Compliance Certificate nor liable for any expense, loss or liability suffered by the Purchaser in relation to such non-compliance and the Purchaser agrees that they are purchasing the property on an “as is where is” basis. The Vendor warranties contained in clauses 8.1, 8.2 and 8.3 of this agreement shall be read entirely subject to this clause and shall be deemed not to have been breached by the vendor.”*

[90] The complainant alleges that Ms Yan failed to present pre-auction offers on the property to the vendor and so failed to act in the best interests of the vendor. We take the view that, in the circumstances of this case as we have outlined them above, Ms Yan, as an experienced licensee, was wisely exercising judgment that it would have been quite premature to approach the vendor with an offer. In any case, she sensibly felt the purchasers needed to arrange for a building inspection of the property before committing themselves to an offer, particularly, where there had been non-complying upgrading works.

[91] We consider that Ms Yan was quite entitled to take the view that the vendor was most unlikely to be interested in any offers at that stage and that, in any case, the purchasers did not seem to be serious to her about that aspect as they needed a builder's report in order to obtain finance. There is no evidence that the purchasers at that stage were insistent that a pre-auction offer be prepared by Ms Yan. Indeed, it seems that when they obtained the building report they declined to proceed with a pre-auction offer.

[92] The complainant also put it that Ms Yan had initially misled the purchaser as to the vendor's price expectations for the property. We agree with counsel that licensees must balance their duties to vendor and prospective purchaser without misleading anybody. That includes obtaining a sensible balance about such matters as the vendor's price expectation. In this case there is a factual dispute between the complainant and Ms Yan as to what the latter told the prospective purchasers in that respect i.e. was the price range given as \$650,000 to \$680,000, or as \$600,000 to \$680,000? The original listing form showed a range of \$600,000 to \$650,000.

[93] Mr Guo's allegation is that Ms Yan gave an indication of the vendor's bottom line as being \$650,000 which was too high and likely to discourage a prospective purchaser. While we do not quite accept Mr Rea's submission that the difference between the two price ranges (i.e. \$650,000 to \$680,000 as opposed to \$600,000 to \$680,000) is immaterial, it is rather inconsequential in the context of this case and, in any case, we cannot be sure precisely what Ms Yan may have said to prospective purchasers about price. Also, as Mr Rea points out, Ms Yan could only have been



surmising as to what would be the bottom of the range of the vendor's price expectation because, at that point, a building inspection report had not been obtained and the issue related to a future stance by the vendor.

[94] Mr Guo also alleges that Ms Yan placed undue pressure on the purchasers by contacting them after they had placed an offer on the property through another agency (i.e. his). It seems to us that if an agent felt at that point, as Ms Yan did, that she could be helpful to the purchasers, it is not particularly relevant that another agency was also involved. The prospective purchasers were not required to take notice of Ms Yan. She was not prohibited from contacting them.

[95] With regard to Ms Beaton it does seem that, technically, she failed to comply with rule 9.11 in that, on her receipt of notice of cancellation of her agency, she did not advise the vendor in writing of the name of each customer in respect of whom she would claim a commission should such customer conclude a purchase from that vendor. We note that the Committee decided to take no further action about that on the basis that the two agencies came to an amicable agreement on a commission split without involving their mutual vendor client.

[96] It is concerning that rule 9.11 was not complied with and, technically, that is unsatisfactory conduct in terms of s.72 of the Act. While counsel for the Authority pointed out that there may be an absence of fault in terms of the intentions of the licensee, that does not alter the fact that rule 9.11 was breached. We note that, nevertheless, the Authority would accept that any penalty in that respect be nominal. We consider that no action needs to be taken regarding that particular complaint from Mr Guo.

[97] There is the further allegation against Ms Beaton that she failed to advise the vendor of the possibility of the vendor paying two commissions when listing the property with another agency. We accept that Ms Beaton did discuss the issues around double commission with the vendor. We stress that the fact that the Barfoot & Thompson agency has not sought commission is irrelevant. This issue or allegation is raised against Ms Dever-Young also but has been dealt with by Ms Beaton.

[98] Another allegation against Ms Beaton is that she provided false information to the vendor about the purchaser's ability to arrange finance. However we find no evidence to support that.

[99] Our fairly brief coverage above about non compliance with rule 9.11 also relates to Ms Dever-Young and we apply that reasoning to take no action against her for a seeming breach of that rule. A potentially concerning allegation of the complainant against her is that she failed to adequately supervise Ms Yan and Ms Beaton resulting, allegedly, in multiple breaches of the Rules. Insofar as there have been some fairly minor technical breaches of the Rules by Ms Yan and Ms Beaton, we do not think that situation arose from any failure on the part of Ms Dever-Young.

[100] For the above reasons we dismiss this appeal so that the decision of the Committee to take no further action against the licensees remains extant.

[101] It is concerning that, at least prima facie (on the balance of probability), the complaints of Mr Guo seem to emanate from rather petty business rivalry. He is fortunate that the issue of him contributing to costs has not been raised.

[102] 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