BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 39

READT 083/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**XINYUN (KELLY) ZHANG**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC 20005)**
	First respondent
AND	**LINGLI (STELLA) ZHOU**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 28 April 2015

DATE OF THIS DECISION 18 May 2015

REPRESENTATION

Mr T D Rea, counsel for the appellant licensee
Mr M J Hodge, counsel for the Authority
No appearance or participation by the second respondent complainant

DECISION OF THE TRIBUNAL

Introduction

[1] This appeal deals with an issue of alleged misleading conduct by a real estate salesperson regarding the purchase price of a neighbouring property.

[2] Xinyun (Kelly) Zhang ("the licensee") appeals against a 22 August 2014 decision of Complaints Assessment Committee 20005 finding her guilty of unsatisfactory conduct in respect of a complaint made against her by Lingli (Stella) Zhou ("the complainant").

[3] The licensee currently holds a salesperson's licence under the Real Estate Agents Act 2008 ("the Act") and works for Barfoot & Thompson Ltd.

[4] The complainant has declined to participate in this appeal.

Factual Background

[5] The complainant viewed 59A Riversdale Road, Avondale, Auckland, ("the property") with the licensee on 6 September 2013. The licensee had previously sold 59B Riversdale Road, Avondale, Auckland, an adjoining next door, property, on 5 June 2013 for $635,500.

[6] While viewing the property, the licensee advised the complainant that 59B Riversdale Road had sold for $643,000 and had a fixed term tenancy at $590 per week. She also advised the complainant that the property should earn $600 per week in rent.

[7] A sale and purchase agreement was signed for the property by the complainant on 8 September 2013, after some negotiation, at a price of $648,888. A rental appraisal was subsequently provided, on 11 September 2013, by Ming Way, a property manager at Harcourts New Lynn, opining that rent between $600 and $620 per week should be achievable for the property.

[8] The licensee claimed that, having realised she had provided the wrong sale figure for 59B Riversdale Road, she informed that to the complainant prior to the agreement going unconditional, but the complainant did not withdraw from the contract.

[9] Settlement of the complainant's purchase of the property occurred on 28 November 2013 and a tenancy agreement was signed on 2 December 2013 at a rate of $480 per week.

[10] The complainant claimed she was misled about the price expectations of the property and as to how much rent could be generated.

The Committee's Decision of 22 August 2014

[11] In respect of the expected rental income for the property, the Committee accepted that the licensee most likely indicated that the rental income achievable would be around $600 per week, but that she made it clear that she was not an expert. It was noted that an expert opinion was then subsequently obtained.

[12] In determining that the licensee had engaged in unsatisfactory conduct, the Committee considered that the licensee had misled the complainant about the sale price of 59B Riversdale Road, the said adjoining property. Its previous sale price was $634,500, not $643,000. However, the Committee accepted that this was an innocent misrepresentation by the licensee and noted that the complainant was advised of the mistake prior to the purchase agreement of 59A going unconditional.

[13] The Committee saw no proof of any detriment to the complainant and, having considered that the conduct was low level unsatisfactory conduct, imposed no further penalty.

[14] The Committee had thoroughly covered the facts and the issues to lead to the outcome of the licensee being found guilty of unsatisfactory conduct but not penalised further than the Registrar recording that. A salient part of the Committee's reasoning is as follows:

> *"4.12 The licensee's response to the complaint is as follows:*

4.13 She had listed and sold the property next door at 59B and believed the interior of that property was not in as good a condition as the subject property. 59B had a fixed term tenancy commencing 28 September 2012 at $590 per week.

4.14 The licensee says that when the complainant asked about rental income she told her it may be similar to that of 59B but that she was not a rental manager. She says that the day after the agreement was finalised the complainant rang her to say that she needed a rental appraisal for a loan application and the licensee then arranged for the rental manager from Harcourts New Lynn to provide that appraisal.

4.15 The appraisal indicated a rental of $600-$620 per week should be achievable. REINZ printouts from their rental database show that the high-end rental for a four-bedroom property in Avondale in June 2013 was $600 per week.

4.16 The same developer who built the property also built 59B. 59B is larger with four double bedrooms and 2.5 bathrooms, whereas the property has three double bedrooms and one single. The licensees maintain that when the complainant was making an offer to purchase she encouraged her to extend the settlement date, as it may not be so easy to find a tenant in November or December, but that the complainant was determined to settle earlier.

4.17 The licensee says that she had sold a lot of properties in the three months to September 2013 and could not remember the exact selling price for 59B. The licensee concedes to providing the wrong sale figure for 59B to the complainant, but says that was not her intention to mislead. The licensee says that she rectified that information by informing the complainant of the correct sale figure prior to the agreement becoming unconditional. The licensee maintains that a tenancy agreement at $580 per week was almost signed with the vendors of the property who needed somewhere to live until they found a property however this did not proceed.

4.18 After consideration of the evidence before us we believe that the licensee acted correctly in relation to her advice regarding the rental potential for the property. We accept that she most likely did indicate that the rental income achievable would be around $600 but that she made it clear that she was not an expert and then arranged for an expert opinion which came in at $600 to $620.

4.19 We cannot explain why the complainant has been unable to achieve that level but the lack of demand at the Christmas period may well be the most likely explanation for the fact that the complainant has rented it out at a lower figure.

4.20 In relation to the advice regarding sale price of 59B we accept that the licensee did mislead the complainant in this regard and find her guilty of unsatisfactory conduct because of that. We believe that the misrepresentation was an innocent one being a transposition of the numbers and given that the mistake was advised to the complainant prior to the contract becoming unconditional it would appear the complainant

had the opportunity to withdraw from the contract at that stage if she had believed the misrepresentation was material to her. Looking at the matter in the whole we do not see any proof of detriment to the complainant and the conduct may be considered at a low level of unsatisfactory conduct. Because of that we have determined to impose no other penalty than our findng."

The Issues Before Us

[15] It is put that we need to decide:

[a] whether the Committee made an error of fact in finding that the licensee misled the complainant; and

[b] if the representation was technically capable of being misleading, whether the Committee erred in not exercising its discretion under s.80(2) of the Real Estate Agents Act 2008 ("the Act").

[16] Section 80 reads:

"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."

A Summary of the Evidence of the Licensee

[17] In detailed typed evidence-in-chief the licensee covered the general facts set out above. Inter alia, she noted that at the time of listing the property on 15 June 2013 she prepared a comparative market appraisal for the vendors showing a range of $600,000 to $670,000. At auction on 10 July 2013 the reserve price of $729,000 was not met. After that the vendors reduced their asking price to $698,000 and then down to $668,000 on 4 September 2013.

[18] About that time, the complainant made contact with the licensee who referred her to the property. The complainant became very interested in it and, particularly, wanted to know about its rental potential. The licensee put it: *"I told her that it was owner occupied but that I had also listed and sold the property next door at 59B Riversdale Road a few months earlier, which had been built and developed by the same developer but was not in such good condition, and this was a rented property*

at the time with a fixed term tenancy for $590 per week. I said that the rental for the property may be similar but I was not a rental manager and, therefore, could not advise regarding this."

[19] The licensee continued her evidence-in-chief:

> *"13 Ms Zhou then asked me how much 59B Riversdale Road had sold for. I could not remember the exact amount as I had sold quite a few properties in the three month period since its sale but sake that from memory it had sold for "about $643,000". I said that 59B Riversdale Road was a larger property with four double bedrooms but that its interior was not in such good condition and it did not have the same landscaping. I also said property prices in the area had increased since this sale. There was no further discussion regarding 59B Riversdale Road or further comparison between the properties. Contrary to Ms Zhou's assertions, I did not tell her that the property was worth more than the amount paid for 59B Riversdale. I simply advised her of the differences between the properties and the movement in sale prices in the area."*

[20] The licensee said that on 8 September 2013 the complainant came to the licensee's office and signed an offer to purchase the property for $630,000 conditional on finance and a builder's report. The vendors counter-offered that day at $660,000 and, after several further counter offers that very day, a sale price of $648,888 was agreed.

[21] By 9 September 2013 the complainant needed a rental appraisal for her loan application to her bank and that was obtained from the rental manager at Harcourts New Lynn as an independent appraiser; and the latter appraised rent at *"around $600-$620 pw*" as at 11 September 2013.

[22] The licensee continued that the complainant then became distressed at having difficulties in arranging finance and prior to the unconditional date for the contract of 13 September 2013, telephoned the licensee whose evidence-in-chief continues:

> *"22. During this conversation, Ms Zhou mentioned that she had heard that the property next door, being 59B Riversdale Road, had sold for $634,000 and not $643,000. I checked on Barfoot & Thompson's system and confirmed that this property had, in fact, sold for $634,500. I apologised and explained that I had sold this property a few months earlier and could not recall, at the time of our earlier conversation, the exact sale price. Ms Zhou did not appear concerned by this and the conversation returned to the issue of the finance condition date with Ms Zhou saying that she really hoped that the vendors would agree to extend this date as she was very keen to purchase the property. I produce a copy of the Sale and Purchase Agreement for the property at 59B Riversdale Road date 5 June 2013.*
>
> *23 Ms Zhou made no mention during this conversation, or indeed at any time prior to this complaint, of any concerns over the purchase price for the property and/or that she wanted to change the purchase price or cancel the agreement.*
>
> *24 The extension to the finance condition date was subsequently agreed to by the vendors and I understand that Ms Zhou successfully obtained*

finance through another bank during this extended period. The agreement was declared unconditional on 20 September 2013.

25 I recall that Ms Zhou was very pleased at this point and asked me to look for another investment property for her. We subsequently viewed several other properties."

[23] Due to the purchaser/complainant, settlement became delayed until 29 November 2013. From 28 December 2013 the property was let for $480 per week but the rent soon increased to $500 per week. The licensee observed that the purchaser complainant was under financial pressure to obtain rent at a difficult time in the year for letting.

[24] Inter alia, the licensee strongly denies that she misled the complainant, *"intentionally or otherwise, with regards to the rental potential of the property. As stated I told Ms Zhou that I could not advise regarding this and an independent rental appraisal was later provided at her request"*. The licensee continued her evidence-in-chief as follows:

"35 Since receiving Ms Zhou's complaint, I have also checked the REINZ rental database for rentals in the Avondale area as at June 2013 (being the time of listing) and a high end four bedroom property (such as this property was, being only 4 years old and in good condition) is recorded at $600 per week. I produce a printout from this database. I am also aware that a nearby brand new 4 bedroom property at 134B Canal Road, Avondale which I sold in March 2013 was rented at $650 pw at that time.

36 I also strongly deny that I deliberately misled Ms Zhou regarding the sale price for 59B Riversdale Road or that I pressured her to purchase the property. I acknowledge that I provided an incorrect sale figure for 59B Riversdale Road to Ms Zhou. However, this figure was an approximation only based on my recollection as I did not have the information to hand at the time and Ms Zhou was aware of this. I had no intention to mislead Ms Zhou regarding this. I also do not believe that this information was relied on by Ms Zhou. It was only ever referred to by Ms Zhou in one telephone conversation, which took place prior to the initial unconditional date, Ms Zhou appeared unconcerned by the corrected sale price and sought an extension to the unconditional date to obtain alternative finance.

37 With regards to comparison of the sale prices for the properties at 59A and 59B Riversdale Road, 59B Riversdale Road is a larger property with four double bedrooms. However, it has been rented since new and is not in as good condition as the property which has been owner occupied. The property has three double bedrooms and one single bedroom (which meets the requirements for a bedroom contained in the Housing Improvement Regulations 1947 as provided by the Real Estate Agents Authority in the Continuing Education material for 2014). The property also has extra landscaping. Furthermore house prices in the Avondale area increased in the 3 month period between the sale of these properties."

[25] Before us, the licensee added that the complainant had asked her many questions but was particularly interested in the rentability of the property so that the

licensee told the complainant that the said next door property had been sold by the licensee also about three months previously and had been rented since then for $590 a week. This led the complainant to ask the licensee the sale price of that adjoining property. The licensee said to us that, because she did not have that information to hand, she told the complainant that *"from memory"* it was $643,000 but that was a few months ago and that particular property was not in as good condition as the property in question.

[26] To us, the licensee noted that the property purchased by the complainant was soon issued with a QV at $715,000. The licensee emphasised to us that, although the complainant asked her many questions, her concern was less about the value of the property and more about the rate of weekly rental which could be obtained from it.

[27] Of course, the licensee was carefully and thoroughly cross-examined by Mr Hodge for the Authority.

[28] Mr Hodge asked the licensee what was her exact response to the complainant when the latter asked at what price the neighbouring property had been sold for. The licensee responded that she told the complainant that property had been sold a few months previously *"according to my memory for about $643,000"*. That discussion was in Mandarin where, the licensee says, the same word is used for *"about"* as for *"approximately"*.

[29] The licensee added that she did not tell the complainant that the property at 59A should sell for more than $643,000; but she did tell her that neighbouring property had been tenanted and there had been much wear and tear, whereas 59A had been occupied by the owner.

[30] Inter alia, Mr Hodge put it to the licensee that must have been an important issue for the complainant to know the precise sale price of the neighbouring property. The licensee responded that, if the complainant had expressed concern, she would have checked it out.

[31] Mr Hodge put it to the licensee that the complainant did ask the licensee the sale price of the neighbouring property and, apparently, the licensee was not sure and should she not have checked it out at her office? The licensee's response was that she was asked many questions by the complainant and the price of the neighbouring property was simply one of those many questions. Mr Hodge put it to the licensee that she should have given as correct an answer as she could from her then knowledge but, in any case, should have gone and checked it out. The licensee responded that the complainant found out the correct price later as covered above and that was before the purchase contract had become unconditional so the complainant could have withdrawn.

[32] Mr Hodge pressed the licensee that the price issue was raised by the complainant with her and she did not check the matter out but, subsequently, was able to do so on her computer at her office with little difficulty. In response, the licensee maintained that the complainant had not raised the issue of price of the neighbouring property as a serious issue and only in relation to her needing to raise finance. The licensee kept emphasising to us that she had simply told the complainant that the adjoining property had sold for *"approximately $643,000"* (her emphasis).

[33] Finally, Mr Hodge put it to the licensee that, because of the advice she had given the complainant over price, would not the complainant feel she needed to offer more than $643,000? The licensee's answer to that was: *"Well, three months had passed and property prices had risen in that time"*.

The Submissions for the Appellant/Licensee

[34] The primary submission for Ms Zhang is that the Committee made an error of fact in finding that she misled the second respondent as to the sale price of 59B Riversdale Road.

[35] The secondary submission for Ms Zhang (pursued in the alternative) is that we should determine that further action is unnecessary or inappropriate in all the circumstances.

That the Second Respondent was not Misled

[36] Mr Rea puts it that the general law authorities relating to s.9 of the Fair Trading Act 1986 are relevant and applicable to disciplinary cases relating to allegedly misleading conduct by a licensee in breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[37] The leading general law authorities are *AMP Finance NZ Ltd v* Heaven (1997) 8 TCLR 144 and *Red Eagle Corporation Ltd v Ellis* (2010) 12 TCLR 526.

[38] In *AMP Finance NZ Ltd v Heaven*, the Court of Appeal set out a three part test for misleading conduct in breach of s.9 being:

[a] Whether the conduct was capable of being misleading.

[b] Whether the plaintiff was, in fact, misled by the relevant conduct; and

[c] Whether it was reasonable in all of the circumstances for the plaintiff to have been misled.

[39] In *Red Eagle Corporation Ltd v Ellis*, the Supreme Court set out an alternative approach which could be followed in a relatively simple case where there was no doubt about what was said or its meaning. In such a case, the test would be *"whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s.9 has been established"*. Whether the claimant was, in fact, misled was then a question for the award of damages under s.43 of the Act.

[40] Mr Rea submits that, on either approach, there was no misleading conduct by the appellant in this case and the second respondent (Ms Zhang) was not misled.

[41] He notes that, in its interim decision, the Committee found that the appellant had misled the second respondent by advising her that the property at 59B Riversdale Road had sold for $643,000 when it had actually sold for $634,500. However (he submits) the appellant did not, in fact, advise that second respondent that the property at 59B Riversdale Road had sold for $643,000 but rather said that from memory it had been sold for *"about $643,000"* (his emphasis).

[42] Mr Rea submits that the appellant's conduct in this regard was not capable of being misleading and that a reasonable person in the complainant's situation would not have been misled. He submits further that the sale figure provided by the appellant was clearly stated as an approximate figure and as based on the appellant's memory, because the records relating to the sale of 59B Riversdale Road were not to hand for the licensee (at the time); and furthermore, the conversation took place in Mandarin so there could be no miscommunication or misunderstanding by the complainant.

[43] It is further submitted that the second respondent was not, in fact, misled. Mr Rea puts it that the sale price for 59B Riversdale Road was clearly not a relevant consideration for the second respondent when she negotiated the price for the property. He notes that the complainant's initial offer for the property was $630,000, being $13,500 less than the approximate sale figure for 59B Riversdale Road provided by the appellant, and the eventual price of $648,000 for 59A was reached after counter-offers from the vendor whose price expectations were in the high $600,000s. Furthermore (it is put by Mr Rea), the complainant purchaser was unconcerned when informed by the appellant of the actual sale price of 59B and proceeded with a request to extend the finance date so that she could obtain alternative finance and did not attempt to vary the price agreed or cancel the agreement.

[44] Mr Rea emphasises that the complainant was also happy to subsequently re-engage the appellant to locate another property for her and (he puts it) appears to have complained about the information provided regarding the sale price for 59B Riversdale Road as an after-thought to her original complaint which related to allegedly misleading rental advice in respect of the property. It is pointed out that the complaint sent to Barfoot & Thompson Ltd did not contain any reference to the sale price for 59B Riversdale Road and this was only mentioned to the Authority in correspondence after the complaint about rental advice had been filed with the Authority. It is put that the real concern for the complainant is the lost rental for the property, in respect of which the Committee found no unsatisfactory conduct by the appellant.

Discretion under s.80(2) Real Estate Agents Act 2008

[45] Mr Rea also submits that the Committee, having regard to all of the circumstances of the case, ought to have exercised its discretion pursuant to s.80(2) of the Act to take no further action on the grounds that further action was unnecessary or inappropriate. Mr Rea puts it that relevant circumstances include:

[a] The difference between the approximate sale price for 59B Riversdale Road provided by the appellant and the actual price was de minimis (less than 2% difference).

[b] The lack of detriment to the second respondent. Given the vendor's price expectations (and the increase in sale prices in the area) it is very unlikely that the property could have been purchased for less than the sale price.

[c] As recognised by the Committee, the conduct falls at the low end of the scale of unsatisfactory conduct, if it is unsatisfactory conduct at all (which is denied).

[d] Ms Zhang (the licensee) has worked in the real estate industry for over three years and has never been the subject of any disciplinary finding at any level.

[46] We deal further below with the s.80(2) discretion or concept.

Submissions for the Authority

Misleading Conduct

Was the conduct capable of being misleading?

[47] Mr Hodge notes that there is a factual dispute as to whether the licensee advised the complainant that the property at 59B Riversdale Road had sold for $643,000 when it had actually sold for $634,500, or whether the licensee said that from memory it had been sold for *"about $643,000"*.

[48] Mr Hodge accepts it will be for us to decide, having heard the evidence, whether the licensee used the word *"about"* when advising the complainant about the sale price for 59B Riversdale Road. However, in the Authority's submission, such a finding would not be determinative of the appeal.

[49] The Authority submits that the Committee's core finding of unsatisfactory conduct was correct, irrespective of whether the licensee used the word *"about"* in advising the complainant of the sale price. Mr Hodge points out that, even if the word *"about"* had been used by the licensee, she gave a very specific price, namely, $643,000. The use of the word *"about"* (if we accept that the licensee did say *"about 643,000"*), was (he submits) negated by the specificity and gave rise to a misrepresentation. Mr Hodge emphasises that $643,000 is a specific figure, and it is not the same as referring to a general range.

[50] The Authority accepts that the misrepresentation was likely an innocent one but Mr Hodge submits that the fact the misstatement was innocent does not preclude a finding that the licensee breached rule 6.4 which provides:

> *"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."*

[51] Mr Hodge notes that, in considering unintentional misrepresentations in *Tesar v REAA & Parker* and *Armit* [2014] NZREADT 18, we held:

> *"[38] It is submitted for the Authority that the Committee was correct to find that a misrepresentation by a licensee, absent any intention to mislead, may still amount to unsatisfactory conduct; that, generally speaking, a licensee will be required to have good grounds for making a representation about land being marketed for sale; and that where a licensee makes a representation as a "mere conduit" of information from the vendor to the purchaser, the licensee must make absolutely clear to the purchaser that the information is provided on that basis and has not been verified. In principle, we agree.*
>
> *[39] Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 provided that a licensee must not mislead a customer or*

> *client. We accept that a wilful or reckless breach of rule 6.4 (which would include an intentional misrepresentation) may amount to misconduct under s.73(c)(iii) of the Act. A breach of rule 6.4 which is not Committee wilfully or recklessly (including an unintentional misrepresentation) may amount to unsatisfactory conduct under s.72(b) of the Act."*

[52] We addressed the issue of a licensee's innocent misstatement again in *McCarthy v REAA & Matutinovich* [2014] NZREADT 94 and held:

> *"[27] We have found that Mr Matutinovich did make the statement the McCarthys complained of. We make this finding despite the fact that the misstatement was innocent. The Rule is clear, any incorrect information is a breach of the Rule. We therefore conclude that there was a breach of R 6.4. The information given about the mining intentions of the mine on the adjoining property was incorrect."*

[53] Mr Hodge observed that these principles are strict for good reason; and it is trite to say that purchasing a house is one of the most important decisions many New Zealanders will make. He put it that licensees need to take care to get right the detail of what they are saying in marketing a property for sale; and, if they are not sure of a fact (such as the previous sale price), they should not give that information.

Was the Complainant Misled by the Relevant Conduct?

[54] Mr Hodge noted the submission made for the appellant that the licensee's conduct was not misleading as it was not relied on by the complainant, and submits that the primary focus of disciplinary proceedings is on the conduct of the licensee, rather than on issues of reliance or loss suffered by the complainant. He adds that issues of reliance and loss may be relevant, and will certainly be relevant to penalty, but cannot have the effect of exonerating what would otherwise be found to be unsatisfactory conduct. He noted that in *Wright v CAC & Woods* [2011] NZREADT 21 we have held:

> *"[41] … The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent."*

[55] Mr Hodge also noted that the issue of proof of loss was raised in *Wyatt v Real Estate Agents Authority* [2012] 25 NZTC 20-152 where the High Court assumed, without needing to decide, that proof of loss is not necessary.

Discretion under Section 80(2) Real Estate Agents Act 2008

[56] Mr Hodge reminded us that the appellant also appeals on the basis that the Committee ought to have made a decision under s.80 to take no further action on the grounds that further action was unnecessary or inappropriate.

[57] We have often been referred to *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 where the Supreme Court confirmed that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals stating:

> *"[32] … 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 and a value judgment does not of itself mean the decision is discretionary".*

[58] It is submitted by Mr Hodge that the narrower approach described in *K v B*, is appropriate in respect of appeals against the exercise of the discretion granted to complaints assessment committees in determining whether to take action, or no further action, on a complaint. Accordingly (he submits), in order for us to allow the appeal, the licensee will have to demonstrate that the Committee:

[a] Made an error of law or principle; or

[b] Failed to take into account a relevant consideration; or

[c] Took into account irrelevant considerations; or

[d] Was plainly wrong.

[59] Mr Hodge submits that there was no error of law or principle and no failure to take into account relevant considerations in the Committee's decision. Further, the decision did not take into account irrelevant considerations, nor was it plainly wrong. To that extent we agree; but we do not accept that, in this appeal, we are confined by *K v B*.

[60] Mr Hodge submits that s.72 of the Act does not simply catch conduct that is incompetent or negligent, but rather sanctions conduct that falls on a scale of seriousness. He puts it that a breach of the Rules simpliciter will constitute a breach of s.72 and it is then the orders imposed are to reflect whether the conduct was at the lower or higher end of that scale; that this is the mechanism Parliament has chosen to employ to raise industry standards, and moral opprobrium need not attach to conduct before it can be found to be unsatisfactory.

[61] As Mr Hodge also remarked, the Committee, having found that the licensee breached rule 6.4, determined that the licensee had engaged in unsatisfactory conduct; but accepted that the licensee's conduct was at a low level of unsatisfactory conduct, and, therefore, determined to impose no other penalty then the entry of unsatisfactory conduct in the Register.

The Final Oral Submissions from Counsel

[62] We see little point in detailing counsels' argument as already covered above.

[63] Mr Rea submits for the licensee that, overall, her conduct does not warrant a disciplinary reproof and that, if there was any failure by the licensee, it is very minor and cannot be regarded as misleading conduct.

[64] Mr Rea noted that the Committee had found as a fact that the licensee had advised the complainant that the neighbouring property was sold for $643,000 but submits that the licensee's evidence to us is credible that she said *"about"* or *"approximately"* $643,000, and in a context where it was clear that she was not giving the precise sale figure of the neighbouring property. Mr Rea accepted that best practice would have been for her to have promptly checked back on her computer at her office and advised the complainant of the precise sale figure of the neighbouring property. He correctly submits that we are not dealing with best practice but with standards of conduct in terms of the Act and its Regulations although best practice is a helpful guide in that context.

[65] Mr Rea emphasised that the complainant's question as to the sale price of the neighbouring property was one of many that prospective purchaser had raised and did not seem of particular significance to the licensee at the time. We think that it should have. He also emphasised that the complainant had herself ascertained the correct sale price of the neighbouring property before she needed to clear her purchase contract unconditional, but did not seek to alter her offer and her real concern seemed to be the rentability of the property being purchased. We regard that as of peripheral relevance. The issue is what standard should the public expect from a reasonably competent licensee and is acceptable?

[66] Mr Rea also submits that this is a clear case where we should exercise the discretion given by s.80(2) of the Act as any failure on the part of the licensee to provide the correct answer to the question of the price of the neighbouring property was a minor matter in context and not material to the complainant's purchasing decision. We consider it was not a minor matter.

[67] Mr Rea submits that we are dealing with a general appeal and not a review of a discretion in this case as the Committee found unsatisfactory conduct on the part of the licensee who has appealed that finding. We agree that we are dealing with a general appeal. He also submits that, in any case, if we take narrower approach to the issue as being in terms of *K v B* the licensee should still succeed because her evidence that she advised a price of *"approximately"* $643,000 does not seem to have been dealt with by the Committee.

[68] Overall, Mr Rea emphasises that, perhaps, in some ways the current outcome from the Committee may seem minor but that a finding of unsatisfactory conduct, even at the low end of the scale, is a black mark for the licensee and of much concern to Barfoot & Thompson Ltd. We observe that we find the ongoing concern of Barfoot & Thompson Ltd about standards to be commendable.

[69] Mr Rea emphasised that the licensee relies on the ground that there was no misleading conduct or statement by her as she made it clear that the neighbouring property had been sold a few months earlier for *"about"* $643,000.

[70] He referred to her previously unblemished career and expressed agreement with Mr Hodge that, just because an issue of unsatisfactory conduct is finely balanced, there is no need to apply the discretion given by s.80(2) of the Act and that it would be wrong to inject such an extra tier into reasoning as to whether s.72 of the Act has been breached. We entirely agree on that s.80(2) aspect. Mr Rea made it clear that he is not seeking on behalf of the licensee that we exercise a discretion but simply decide whether her conduct has been unsatisfactory in the manner alleged. That is the correct approach in our view.

[71] In the course of the hearing, we had observed to the parties that we are confronted with a situation where the complainant has taken no part in this appeal and we have heard evidence from the licensee. Mr Hodge accepts that, if we find the licensee's evidence to us as credible, that could well dispose of this appeal. We are conscious that the complainant seems to have provided evidence to the Committee but has taken no part in the appeal to us whereas we have heard the evidence and cross-examination of the licensee and it is likely we have heard evidence not available to the Committee.

[72] Mr Hodge seemed to put it that we cannot ignore statutory provisions where conduct is at a low level of offending and simply decide to take no further action under s.80(2); and that if there has been unsatisfactory conduct at any level then we should so find. We do not accept that and we recently covered this ground in *Masefield v McHugo & Donald* [2015] NZREADT 30. Mr Hodge asked us to take into account that an intention of the Act is to raise standards in the real estate industry which supports the concept that unsatisfactory conduct must be identified and dealt with even at a minor level. We consider that it is entirely for us to decide whether or not a finding of unsatisfactory conduct needs to be entered.

[73] Mr Hodge put it that the public is entitled to expect accurate answers from real estate salespersons to questions and that in this case, in particular, the licensee could very easily have ascertained the correct answer to the question sought by the complainant. We agree with Mr Hodge in that respect and that, otherwise, the licensee should have made it clear that she was not at all sure as to the price for which the neighbouring property had sold. We consider that her answer would still have been misleading if it had been prefaced by the use of the word *"about"* or *"approximately"*. The complainant purchaser knew that the licensee had been the agent for the sale of the neighbouring property so would expect that the figure of $643,000 provided would be about right and that would influence the judgment of the complainant as then the prospective purchaser.

[74] Mr Hodge put it that if we decide that the purchaser complainant was not *"misled"* then the appeal must succeed and he accepts that is a finding for us to make if we feel appropriate on the evidence and in terms of credibility. We consider that, on the balance of probability, the purchaser was misled; but, very likely, there was no detriment to the complainant.

[75] As already referred to, Mr Hodge particularly submits that just because there may be unsatisfactory conduct at a lower end of the scale does not necessarily lead to an application of s.80(2) and that, if there has been unsatisfactory conduct even at a very low level in all the circumstances, we should so find. He seemed to be submitting that if we find there has been unsatisfactory conduct, we have no discretion to make a finding under s.80(2) that there be no further action taken. As we explained in *Masefield*, we do not accept that although it has some logic.

[76] We certainly agree with Mr Hodge that neither the Committee nor us is required to address s.80(2) when dealing with the issue of whether or not the conduct of a licensee has been unsatisfactory, but we can rely on s.80(2) if we think that to be the just course. However, our focus is to deal with this appeal in terms of s.89 of the Act which requires a determination on the complaint, for present purposes, as to whether on the balance of probabilities the licensee has engaged in unsatisfactory conduct; or whether no further action be taken; or whether the Committee should refer the matter

to us on a charge of misconduct in terms of s.73 of the Act. Section 89 makes it perfectly clear that it does not limit the affect of s.80 (set out above).

[77] We record that the issue was raised by our member Mr Denley that there is the possibility that the licensee may have simply transposed figures by advising the complainant of figures 643 rather than figures of 634. It seems sensible to take that into account but, as Mr Hodge submitted on that aspect, it is still misleading to advise someone that a property was sold for $643,000 when it was sold for $634,500 even if that misleading statement is induced in any way by a transposing of figures.

Discussion

[78] We emphasise that in this appeal we have had no participation whatsoever from the complainant but she seems to have given evidence in various forms to the Committee in the usual way.

[79] We consider that the Committee has issued a clear and just decision. For all that has been so thoroughly covered before us, the licensee made a misleading statement which we accept to be innocent. She advised the complainant that the neighbouring property, which was of very similar construction to the property in question, had been sold two or three months previously for $643,000 when, in fact, it had been sold for $634,500 i.e. a monetary difference of $8,500.

[80] In some ways it may not have much influenced the complainant purchaser, although we expect that it likely did, but it was a misrepresentation and in our view, despite Mr Rea's submission to the contrary, that difference of $8,500 cannot be dismissed as de minimis.

[81] It is important that if precise figures are given by a real estate salesperson about relevant sale prices they are either correct, or it is made clear to the enquirer that they are very much from memory and are very much approximate.

[82] In any case the agent should check out the correct answer as soon as possible in such a situation and advise the enquirer accordingly. In this case the licensee failed to do that.

[83] We consider that, in this case, the figure of $643,000 as the fairly recent sale price of the neighbouring similar property was given out carelessly by the licensee to the complainant. Also, there was little effort required by the licensee to check out the correct answer on her office computer. She should have done that. That failure was quite unsatisfactory.

[84] The figure she gave was likely to be favourable for the vendor in terms of the purchaser's attitude to price. In the context covered above, we do not think that using the words *"about"* or *"approximately"* vindicate the licensee.

[85] We accept that the error was corrected, somewhat by chance at the instigation of the purchaser, before the contract became unconditional. However, consequences are more important to penalty.

[86] The issue before us is whether or not the conduct of the licensee towards the complainant at material times was unsatisfactory or not. We consider that to carelessly mislead a prospective purchaser is unsatisfactory conduct by a licensee.

[87] Having said that, we can accept that, in this particular case, no penalty is warranted. We consider that our confirmation of the Committee's finding of unsatisfactory conduct is penalty enough for this busy licensee in terms of this case. We note there has been no overall loss to the complainant purchaser but, apparently, a substantial capital gain.

[88] Accordingly we confirm the Committee's finding of unsatisfactory conduct and accept the Committee's view that such conduct is at the lower level and that no further action be taken.

[89] 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