BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 57

READT 019/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**M D COTTLE FAMILY TRUST and McBRIDE STREET CARS LTD**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**TIMOTHY BARNETT** of Dunedin, Real Estate Agent
	Second respondent

READT 020/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**TIMOTHY BARNETT** of Dunedin, Real Estate Agent
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**M D COTTLE FAMILY TRUST and McBRIDE STREET CARS LTD**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD in DUNEDIN on 22 June 2015

DATE OF OUR JURISDICTION DECISION 18 November 2014

[2014] NZREADT 91

DATE OF THIS SUBSTANTIVE DECISION 27 July 2015

APPEARANCES

Messrs R McDougall and M D Cottle for the appellants in 019/14 (and second respondents in 020/14)
Mr C S Withnall QC, counsel for second respondent licensee in 019/14 (and for appellant in 020/14)
Mr M J Hodge, counsel for the Authority

DECISION OF THE TRIBUNAL

Introduction

[1] Tim Barnett ("the licensee") appeals against the decision of Complaints Assessment Committee 20002 finding him guilty of unsatisfactory conduct under the Real Estate Agents Act 2008 ("the Act") and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules"). M D Cottle Family Trust and McBride Street Cars Ltd ("the complainants" as vendors) cross-appeal against the Committee's decision finding unsatisfactory conduct and the penalty orders imposed. They seek a charge of misconduct and a higher penalty.

[2] The main feature of this case is the absence of a listing or agency agreement in terms of s.126 of the Act.

Background

[3] In mid-2006 the licensee received a call from Mr Cottle seeking his assistance to sell the complainants' commercial property at 57-63 King Edward Street, Dunedin for $1,000,000 plus GST. There was never any written listing agreement between the parties and the licensee did not provide a market appraisal until late 2006 or sometime in early 2007.

[4] On 9 June 2007, a Mr Lorimer made an offer for $800,000 plus GST. The offer was declined but Mr Cottle and the licensee agreed on $10,000 commission should the licensee achieve a sale of the property as real estate agent.

[5] On 28 January 2009, Mr Cottle contacted the licensee and advised that he wished to formally list the property for sale and that the price was to be $850,000 plus GST.

[6] On 31 August 2011 the licensee presented an offer for $712,000 plus GST. There was no formal discussion on commission. A sale was concluded and a deposit paid on 13 October 2011. Shortly after the sale had concluded, Mr Cottle and the licensee disputed between themselves whether the $10,000 agreed commission was inclusive or exclusive of GST.

[7] On 28 October 2011, the deposit less a commission of $12,650.00 ($11,000 plus GST) was paid to the complainants by the licensee.

[8] The complainants disputed the amount of commission and sued the licensee in the Disputes Tribunal seeking a refund of $1,000 plus GST. This was on the basis that the

agreed commission was actually $10,000 plus GST (and not $11,000 plus GST). The Tribunal ruled in favour of the complainants and ordered the licensee to refund the complainants the sum of $1,150.00 so that the licensee would retain $11,500 GST inclusive as commission or a net $10,000. The vendors complained to the Authority about the licensee's conduct.

The Committee's Decision

The Unsatisfactory conduct finding

[9] The said Committee of the Authority determined that it had been proved, on the balance of probabilities, that the licensee had engaged in unsatisfactory conduct by failing to complete an agency agreement or appraisal, failing to refer to any REAA Rules or Code of Conduct on the licensees' website or to state that the licensee was licensed under the Act on his website or on a property flyer.

[10] In respect of the commission dispute, the Committee found that this matter had already been ruled on by the Disputes Tribunal, namely, there was, at least, a verbal agreement between vendors and licensee that a commission of $10,000 (plus GST) would be paid.

[11] Although not included in the original complaint, the complainants added another concern before the CAC, namely, non-disclosure by the licensee of the identity of a potential purchaser (Calder Stewart Construction) and an allegation of a conflict of interest by the licensee. The Committee found that, in the absence of any evidence provided which would substantiate the complainants' claims that the licensee had a conflict of interest, it leaned towards accepting the licensee's assurances and determined not to take this aspect of the complaint any further.

[12] The Committee also dealt with several other new issues, in its decision on penalty orders, in response to the complainant's and licensee's submissions, including that:

[a] The Committee had jurisdiction to amend party names;

[b] The issue of refunding commission had already been dealt with by the Disputes Tribunal;

[c] The Committee does not have the ability to order reimbursement of the difference between the highest offer that the licensee is alleged to have kept from the complainants and the actual amount received from the sale;

[d] The Committee saw no justification for reimbursing costs incurred by the complainants;

[e] As no evidence was provided relating to a requested 'public interest' investigation, the Committee declined to make any orders; and

[f] As the licensee had already admitted that neither an agency agreement nor appraisal was completed, the licensee's solicitor's submission that challenged such a finding was dismissed.

[13] Having found that the licensee had engaged in unsatisfactory conduct, the Committee ordered the licensee to pay a $2,000 fine; and to undertake and complete as

further education, Unit Standard 5674 “Prepare agency arrangements and appraisals of commercial and industrial sites and qualify clients”. The licensee was also censured.

Issues on Appeal

[14] The licensee appeals against two findings of the Committee, namely:

[a] That the licensee did not prepare a market appraisal; and

[b] That the licensee did not have a written agency agreement.

[15] In course of the hearing it was conceded that there was no written listing agreement. As stated in paragraph [1] above the vendors have cross-appealed.

[16] The issues in respect of the complainants’ cross-appeal have been the matter of a preliminary determination by us in *M D Cottle Family Trust v Real Estate Agents Authority [2014] NZREADT 91*. Having considered submissions from the parties, we found at paragraph [53] that we have jurisdiction only on the following issues:

[a] Whether the licensee has been guilty of unsatisfactory conduct (including whether charges should have been laid);

[b] If so (or if misconduct is found), whether the penalty orders against the licensee are appropriate i.e. fair and just;

[c] The liability of the complainants under the Act to pay the licensee commission (that is, to pay any commission);

[d] Whether the licensee failed to disclose to the complainants the identity of a potential purchaser; and

[e] Whether the *Quin* case [*Quin v CAC & Barras* [2012] NZHC 3557] can be applied in favour of the complainants.

A Summary of Salient Evidence Adduced to Us

The Evidence of Mr M D Cottle

[17] Mr Cottle is the sole director of McBride Street Cars Ltd and a joint trustee of the M.G. Cottle Family Trust together with Mr R McDougall. That company and that family trust together owned the property at 52 to 59 King Edward Road, Dunedin from which McBride Street Cars Ltd operated a licensed motor vehicle sales business.

[18] Mr Cottle said he did not set an expected price for the property and it was for sale on the basis that offers be presented by the licensee for the consideration of the vendors. He asserts that the licensee never appraised the property for the vendors although on one occasion he visited the yard at the property, spoke to Mr Cottle in his office, but did not then inspect the property nor give Mr Cottle an opinion on its value nor *“explain if the commission was related to the value”*. Mr Cottle adds that at no time was he given a list of recent sales of comparable properties.

[19] He said that he and Mr McDougall decided to offer the property for sale due to Mr Cottle’s age and desire to operate a smaller car dealership or retire. They decided upon the licensee (Mr Barnett) as their land agent. Mr Cottle continued that, shortly after having

made that decision to sell the property, he saw Mr Barnett nearby and had him visit the yard of the property later that day. Mr Cottle then conveyed to the licensee that, if he had any interested purchasers, they could present an offer but he did not want his customers to think his business was closing down so that he did not want the property to be advertised by Mr Barnett. However, Mr Cottle says that Mr Barnett did advertise the property on his website without authority nor reference to Messrs Cottle or McDougall and did not discuss with them the format of that advertisement nor the asking price put as $800,000.

[20] Subsequently, the licensee presented three offers to the appellants. One was presented on 9 June 2007 from a Mr Lorimer. One was from Design Properties on 10 January 2011. The other was from a Mr K M Arthur dated 31 August 2011 which was accepted by the vendors. Mr Cottle seemed to be saying that he now believes there was another offer dated 28 January 2009 from a Mr A Stewart (of Calder Stewart Construction) which was never referred to the vendors.

[21] Inter alia, it concerned Mr Cottle that the licensee seemed to have the area of the premises incorrect on at least one occasion showing it as 1,476 square metres when the area of the four titles to the property totalled 1,719 square metres, which is a further 243 square metres.

[22] Mr Cottle referred to an email dated 3 February 2009 sent by the licensee presumably to a prospective purchaser referring to a price of $850,000 for the property and also to a figure of $800,000. Mr Cottle says that he never gave the licensee permission to disclose offer details to any particular party.

[23] Mr Cottle said that, when the licensee visited him at the property to collect the signed Lorimer conditional contract on 9 June 2007, they discussed commission and Mr Cottle negotiated that commission as $10,000 GST exclusive and he wrote on the top of the Lorimer document *"Tim's fee $10,000 plus"*.

[24] Mr Cottle continued that when the Design Property Ltd contract lapsed in January or February 2011, he asked the licensee to put a sign on the fence of the property.

[25] He said that after the property had finally sold, he ascertained that the licensee had retained an additional $1,150 inclusive of GST for his commission i.e. $1,000 net over and above the said net $10,000 as agreed commission. He maintains that the licensee did not supply him with any real estate legislation or rules nor mention the existence of any in-house dispute procedures, and that the licensee refused to refund the extra commission. Accordingly, Messrs Cottle and McDougall brought proceedings in a Disputes Tribunal against the licensee, or his company Tim Barnett Realty Ltd, to recover the extra $1,000 plus GST which the licensee had deducted from the deposit paid by Mr Arthur.

[26] Mr Cottle seemed to state that he had no knowledge of the interest of Telfer Electrical Properties Ltd or of Calder Stewart Construction in the ultimate purchase of the property until that was mentioned by the licensee to the Complaints Assessment Committee.

[27] In particular, Mr Cottle states in his evidence-in-chief:

> *"41. When Mr Barnett presented the sales and purchase agreement for the K M Arthur offer, I asked Mr Barnett if the purchasers had anything to do with Calder Stewart. He categorically denied it did.*

42. When Mr Barnett collected the signed contract from the yard I again asked him if Calder Stewart were involved and he denied it.

43. Also at the same time I asked him if his commission was still the same at $10,000 and he said yes."

[28] In further oral evidence-in-chief to us, Mr Cottle seemed to be saying that the licensee did not tell him that if there was no signed listing agreement then the licensee had no entitlement to any commission. Mr Cottle also seemed to be expressing concern that he eventually discovered that the sale to Mr Arthur was on the basis that Mr Arthur was a nominee for Calder Stewart Construction.

[29] Mr Cottle was comprehensively cross-examined by Mr Withnall and then by Mr Hodge.

[30] It was put by Mr Withnall to Mr Cottle that he had approached Mr Barnett to sell the property in 2006 and he then expected to be charged a commission. Mr Cottle seemed to accept that and that the then law has been changed somewhat by the Real Estate Agents Act 2008.

[31] Mr Withnall referred Mr Cottle to clause 12 of the Agreement for Sale and Purchase to Mr Arthur which gave entitlement to the licensee for commission. Mr Cottle seemed very concerned that, in his view, the licensee had not observed real estate law in many respects but he accepted that the licensee had obtained a sale at an acceptable price.

[32] Mr Cottle found that an extra $1,000 plus GST had been added to the $10,000 he had expected to be taken from the deposit by the licensee as commission. Apparently he was not concerned about the commission being $10,000 until, subsequent to the Disputes Tribunal case, he concluded that at law the licensee, technically, did not seem entitled to any commission. Mr Cottle is now firmly of the view that he should not be paying any commission for the sale transaction of the property to Mr Arthur and should be able to recover the $10,000 (plus GST) which the licensee received by deduction from the deposit in the usual way.

[33] Inter alia it was put to Mr Cottle that Mr Barnett maintains that he never discussed with Mr Cottle that the vendors did not wish to sell to Calder Stewart. Mr Cottle said that such a response from the licensee would be a lie.

[34] It was also put that, effectively, Mr Cottle had been given an appraisal by the licensee; but Mr Cottle rejects that. It was put to Mr Cottle that the licensee appraised the property in 2006 and subsequently took advice about his appraisal from an independent valuer and particularly so in 2009. There was reference to the appraisal being altered in 2007 although that seemed to be because it was used as a precedent for another property by the licensee.

[35] Inter alia, it was put to Mr Cottle by Mr Withnall whether we are to accept that Mr Cottle called in the licensee to be the sales agent for the property but they did not discuss price. Mr Cottle maintained that he simply asked the licensee to advertise the property and to understand that the vendors were in no hurry to sell and to bring to them whatever offer might arise. Mr Cottle added that the question of price did not arise until the offer came from Mr Lorimer when Mr Cottle then said the vendors would accept $850,000 and that was as at 9 June 2007. Mr Withnall pressed Mr Cottle that he had sought a sale price of $1,000,000 but Mr Cottle denied that.

[36] Mr Cottle admitted to Mr Hodge that he was aggrieved that the eventual purchaser of the property was Calder Stewart Construction and not Mr K Arthur who apparently worked for Calder Stewart. What appears to irritate Mr Cottle is that in 2006 he had telephoned Mr Alan Stewart of Calder Stewart Construction and offered him the property so that as he put it *"I am unhappy when I find it seems that he was the eventual buyer"*. His point seems to be that he is annoyed that the licensee had never told him that Calder Stewart Construction was the actual buyer and he, Mr Cottle, feels that therefore the licensee was not entitled to any commission because he had contacted Calder Stewart after Mr Cottle had.

The Evidence from Mr T A Barnett (the Licensee)

[37] The licensee is a very experienced real estate agent. He has been experiencing poor health for several years which he feels affected his handling of the complaints before the Committee.

[38] The licensee states that in 2006 he was requested by Mr Cottle to assist him sell the property at $1,000,000 plus GST. The licensee was advised the property had been a car sales yard for 38 to 40 years *"which would create a large amount of good will"* as Mr Cottle then put it to him. The latter also stipulated that he did not wish the property to be advertised or any signs placed on it, but would rely on the licensee's contacts. The licensee advised Mr Cottle that the asking price of $1,000,000 plus GST was well above comparable sales. Mr Cottle responded that he was under no pressure to sell and wanted to realise the highest price for his retirement. The licensee then continued his evidence-in-chief as follows:

> *"10. I discussed value with Mr Tony Chapman, a registered valuer, but did not at that time prepare a market appraisal, which was not required under the then Real Estate Agents Act, as Mr Cottle was adamant he wanted $1 million dollars. However, I did later prepare a written market appraisal. This was on or before 4 June 2007; I still have my computer showing the date this document was last amended is 4 June 2007. I refer to the computer showing the document and the date stamp. This appraisal was given to Mr Cottle. …*
>
> *11. On 29 December 2006 I had introduced Mr Robert Lorimer to the property as a potential purchaser. On 9th June 2007, 5 days after I had produced the written appraisal, I obtained a written offer in the name of Christina Anne Lorimer in the sum of $800,000. This offer was submitted to Mr Cottle but rejected as he considered the price was too low. Although the buyer would have gone to 820,000, Mr Cottle told me that his minimum price was 850,000 + GST. The offer is at page 72 of the bundle. Clause 11 and the front page of that agreement appoint "Tim Barnett Realty" as the vendor's agent to effect a sale. On the front page Mr Cottle wrote "This fee 10,000 plus" confirming the agency and the agreed commission.*
>
> *12. I continued to work on finding a buyer, including discussions with Telfer Electrical Ltd in conjunction with M.D. Cook and Co Ltd, and Kevin Arthur as agent. These discussions did not result in an offer, as the buyers were not prepared to meet Mr Cottle's price.*
>
> *13. In January 2009 Mr Cottle contacted me and advised that he wished to market the property for sale at a price of 850,000 + GST. As a result of that, I went back to Mr Alan Stewart of Calder Stewart Industries in February 2009. Some months later I was asked to discuss with Mr Cottle a possible purchase at $700,000.*

14. Later in 2009, as the property was not selling despite the work I was putting in to it, I had a meeting with the valuer Mr Tony Chapman, who sent me a list of sales. That list is in the bundle of documents commencing at page 148, as is the email by which it was sent at page 146. I discussed this with Mr Chapman and he considered my original analysis was still optimistic. In my letter of 12 November 2012 to the Committee, at page 24 of the bundle, I mistakenly said my market appraisal was done in November 2009 but I now know from my computer that I had mixed up the dates.

15. The Committee stated that I admitted not having prepared a market appraisal. What I said was an appraisal was not done initially, but the Committee was told that I had subsequently prepared one, and it was produced. The Committee had before it my letter and the document.

16. I obtained a further conditional offer from John Hancock of Designer Windows on 10 January 2011 at $711,000 + GST, which was accepted by Mr Cottle. However, the offer was not confirmed by the purchaser.

17. On 31 August 2011 an agreement for sale and purchase was signed at $712,000 plus GST. My commission on the sale had always been agreed at $10,000 plus GST, although normal commission on that sale at a fee of $400 + 4% of the 1st 350,000 sale price and 2% on the balance, would have yielded $21,600. A few days after this agreement was signed. Mr Cottle rang me claiming that the commission would now have to be inclusive of GST. I advise that because the property was being sold plus GST, he would be able to claim the GST on the commission in his GST return as a deduction."

[39] The above evidence from the licensee was analysed carefully in his cross-examination and it became clear that no listing agreement was ever entered into regarding the sale of the property.

[40] Mr Hodge elicited that when the licensee took the Arthur offer to Mr Cottle, the licensee did not think it relevant to tell Mr Cottle that Mr Arthur was the development manager of Calder Stewart and was buying as a nominee. The licensee explained to us that he was never asked the status of the purchaser and Mr Cottle was very keen to sell the property.

[41] It was also clarified that the licensee considered he had given an appraisal of a property to Mr Cottle in 2006 and in 2009 had it reviewed by obtaining information from the valuer Mr Tony Chapman. The licensee said he referred the matter to Mr Chapman because he wanted to keep the worth of the property credible in order to look after Mr Cottle's interests. He said he knew that Mr Chapman had *"dug up a lot of data"* and considered much information at the time and, overall, that showed that the market had been weakening since 2006 so that Mr Chapman advised the licensee in 2009 that the licensee's value range of $720,000 to $740,000 in 2006 was by 2009 *"a bit high"*. That caused the licensee to tell Mr Cottle in 2009 that the market value of the property was something close to $700,000.

[42] Mr Hodge put it to the licensee that, now looking back, would it not have been better if he had updated his 2006 appraisal in writing in 2009? The licensee responded *"well my appraisal had become a little high in the meantime and I thought everyone understood that"*. It was then put to the licensee by Mr Hodge that, by the end of 2009 his appraisal was five years old and the licensee accepted that he had not *"written up an alteration to*

his appraisal but I had lots of conversations with Mr Cottle over those five years regarding the fair price of the property".

[43] The licensee then listed the various dates since 2006 when Mr Cottle had been prepared to reduce the asking price from $850,000 to $750,000 respectively with the latter being on 16 February 2011; and he said those reductions were due only to his discussions with Mr Cottle about current pricing of the property.

[44] In re-examination by Mr Withnall, the licensee asserted that the market value of the property, and of similar properties in the area, had been dropping significantly since 2006.

The Submissions of the Authority

Appraisal

[45] Mr Hodge noted that the licensee has evidence that an appraisal of the property was completed in 2007 and, while it is not dated, the licensee has evidence that the appraisal document has not been altered since 4 June 2007.

[46] Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) provides:

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

[47] It is submitted for the Authority that it is not sufficient for the licensee to rely on an appraisal from 2007, when continuing to market the property some four years later in 2011; that the real estate market in New Zealand is ever changing; that house prices started to fall in early 2008, before rising, falling and rising again between 2009 and 2011; and, therefore, an appraisal completed in 2007 simply would not reflect market conditions in 2011. We are concerned with a commercial property.

[48] Further, it is submitted that the licensee does not seem to have turned his mind to whether the appraised figure was still appropriate given the length of time that had passed, even when the complainants sought a formal listing in 2009. It is put that this would be the minimum expected of a licensee where the client relationship has spanned several years.

Listing Agreement

[49] Counsel for the Authority notes that counsel for the licensee accepts that the licensee never obtained a listing agreement to sell the property.

[50] Rule 9.15 of the Rules provided:

> *"9.15 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property."*

[51] Mr Hodge notes that we considered relevant rules in *Lee v Real Estate Agents Authority & Cho* [2012] NZREADT 65 an appeal concerning, among other issues, the failure of the licensee to obtain a listing agreement or provide an appraisal prior to bringing

prospective purchasers to a particular property. In considering the application of Rules 9.5 and 9.15 to conduct that occurred in 2010, we stated:

> *"[37] Further bringing clients to Mrs Lee's property without a signed Agency Agreement in early September 2009 was also real estate agency work and in breach of Rule 9.15. While Mrs Lee and Mr Cho seem to have been less concerned with the breach of Rule 9.15 we find that bringing a client to the property without an Agency Agreement and tendering an offer is a breach of Rule 9.15. The purpose of providing that an Agency Agreement must be entered into before a licensee can offer or market a property is for the protection of both parties. It cannot be waived at the insistence of a client and we find that this failure is a breach of s.72 and is unsatisfactory conduct."*

[52] Counsel for the Authority submits that, as in the case of *Lee*, the licensee failed to provide a listing agreement prior to showing the property to prospective purchasers and prior to selling the property in 2011. As such, (Mr Hodge submits), a finding of unsatisfactory conduct should follow.

[53] Mr Hodge dealt in some detail with the question of penalty and noted, with reference to s.126 of the Act providing that an agent is not entitled to commission or expenses without there being an agency agreement, that we may order a refund of commission where there is no listing agreement. Mr Hodge emphasised that the power to do so is discretionary and it does not follow that such an order should always be made as a matter of course.

[54] Mr Hodge then noted that both the complainants and counsel for the second respondent had addressed our ability to hear the issue of the licensee's entitlement to commission on the basis that the matter has already been dealt with in the Disputes Tribunal so that, it is argued, doctrines of res judicata and election of remedies apply. Mr Hodge accepted that the Disputes Tribunal did not rule on the issue of entitlement to commission leaving open the question of whether the complainants are nevertheless estopped from seeking a refund of commission following the reasoning at paragraph [35] in *Sim v Moncrieff Pastoral Ltd & Ors* HC, Palmerston North, CIV-2011-454-343, 13 December 2011:

> *"As established in Henderson v Henderson if a point ought properly to have been put before a Court which is the subject of litigation, a party may not subsequently at a later date re-open old wounds to raise a matter. To permit such a course would be contrary to the principle of finality in litigation."*

[55] Mr Hodge submitted that over and above that issue is the question whether, in all the circumstances of the case, we should order a refund of the commission.

[56] In his final oral submissions Mr Hodge noted that it is now accepted that in relation to the sale of the property there was never any agency or listing agreement as required under the 2008 Act and its Rules.

[57] Mr Hodge noted that the Committee have found that there had also been no appraisal but that we have heard much more evidence on that issue and it is for us to decide whether there was an appraisal document provided to Mr Cottle in 2006 or 2007 even though he now denies that. Mr Hodge put it that if we find there has been an appraisal, then Rule 9.5 has been satisfied; although there was a five year gap between any such appraisal and the sale and during that time a stricter regime for real estate agents was created by the 2008 Act.

[58] Mr Hodge accepted that it is commendable that the licensee consulted the valuer Mr Chapman from time to time but put it that it would have been reasonable to expect that the licensee's written appraisal of 2006 would be updated and it was not good practice to have not done that, especially in the light of the information as to the value of the property the licensee had received from Mr Chapman in 2009.

[59] Inter alia, Mr Hodge noted that under the 2008 Act (s.126) there needs to be a listing agreement before an agent is entitled to commission. Mr Hodge observed that our function is about the conduct and discipline of real estate agents rather than the question of a vendor's liability to pay commission, although there is also the factor of consumer protection for us to consider. He submitted that while we have power to order a refund of commission in a case where there is no listing agreement, we need to decide whether that is appropriate in terms of the concept of consumer protection. Mr Hodge also noted that there is no dispute that, from the outset, Mr Cottle agreed that the vendors pay $10,000 commission (plus GST) to the licensee should he achieve a sale of the property.

[60] Mr Hodge put it that an issue raised by Mr Cottle as to whether he was dealing with the licensee or with the licensee's company is immaterial as the licensee was appropriately licensed under the Act and is entitled to operate as a sole trader through a company. Mr Hodge observes that there may have been a mistake at complaint level as to who was the complainee but the licensee has always accepted that he is responsible to deal with the complaints of the vendors.

[61] Mr Hodge noted that the evidence shows that it was not disclosed to the vendors that Mr Arthur purchased as a representative from Calder Stewart. Mr Hodge also noted that Mr Cottle's concern is that he had at the outset spoken to Mr Stewart so that he feels that the licensee is not entitled to commission because the licensee did not introduce Calder Stewart to the property. Mr Hodge seemed to be accepting that Mr Cottle's stance has no weight at law in terms of the liability of the vendors for commission but that, as a courtesy, one might have expected the licensee to make it clear to Mr Cottle that Calder Stewart seemed to be behind the eventual sale transaction with Mr Arthur.

[62] With regard to the references to the *Quin* decision, Mr Hodge points out that the case does not really relate to this appeal because we are not concerned with any compensation issue; but with the issue whether there should be a refund of commission in all the circumstances to the vendors in terms of the specific wording of s.126 of the Act.

The Stance of the Complainants

[63] In terms of our said ruling on the justiciable issues, matters raised by Messrs Cottle and McDougall are that there was no listing agreement to in particular deal with commission, nor did the licensee provide the vendors with any information about the 2008 Act and its Professional Conduct and Client Care Rules of 2009.

[64] It is also put that the licensee did not provide any in-house procedures when a dispute arose over the amount of commission which the vendors regarded as taken by the licensee without authority in late 2011.

[65] The representatives of the vendors, inter alia, emphasised that, in terms of s.126 of the Act, if there is no signed agency agreement there is no entitlement of the licensee to commission.

[66] We note that, in the course of their submissions, the vendors made an application that Tim Barnett Realty Ltd be joined as a party to these proceedings.

[67] It is also submitted for the complainants that there has been such comprehensive breach of the 2008 Act and its Regulations by the licensee that we should consider elevating the issue to considering whether there has been misconduct rather than merely unsatisfactory conduct.

[68] There were final oral submissions for the vendors from both Messrs McDougall and Cottle. It was put that if the vendors had known that the effective purchaser was Calder Stewart, the vendors would not have sold the property. It is also argued for the complainants that the licensee has breached his fiduciary duty to them because he had previously assisted Telfer Electrical and the eventual sale to Mr Arthur caused the property to be transferred from Mr Arthur to Calder Stewart and then to Telfer Electrical.

[69] Mr Cottle emphasised that there were four or five occasions between 2006 and the sale in late 2011 when the licensee should have provided an updated appraisal to the vendors and also a listing agreement, but neither happened. They again put it that the licensee did not have a proper in-house complaints procedure nor did he assist them by advising the procedure for them to complain against him to the Real Estate Agents Authority. They assert that had they been aware of the status of the Authority, they would not have pursued their issues with a Disputes Tribunal.

[70] Mr Cottle also expressed his concern that, he says, he asked the licensee a number of times whether Calder Stewart were involved in the final purchase and, although (he asserts) the licensee knew of that concern of Mr Cottle, the licensee did not disclose that to him and indeed stated that Calder Stewart was not involved.

[71] Mr Cottle still seems to maintain that no written appraisal was ever provided to him by the licensee at any stage between 2006 and 2011.

[72] Finally, Mr Cottle emphasises that the vendors did not need to sell the property and certainly would never have sold to Calder Stewart.

[73] It concerns Mr Cottle that the licensee was able to take commission by deduction from a deposit.

The Submissions for the Licensee

[74] Mr Withnall made it clear that the licensee had appealed against two findings of the Committee, namely, that he did not have a written agency agreement; and that he did not prepare a market appraisal. Rather helpfully, Mr Withnall now acknowledges that there is no tenable ground of appeal by the licensee based on the existence of an agency agreement either under the 1976 Act or the 2008 Act.

[75] Mr Withnall refers to the licensee's evidence that he did prepare a market appraisal for the property and provided it to Mr Cottle in 2006 and he refers to the document purporting to do that. He also refers to the evidence that the licensee had the worth of the property updated in November 2009 by consulting the valuer Mr Chapman and then advised Mr Chapman's views to Mr Cottle.

[76] Mr Withnall also refers to the licensee's evidence that he had not completed an appraisal at the very outset because Mr Cottle was adamant about the price he would take. Mr Withnall put it that there is evidence of an appraisal made in June 2007 assessing the property's market value between $740,000 and $775,000 plus GST and that, on 9 June 2007 the licensee obtained an offer for the property at $800,000 plus GST but that was rejected by Mr Cottle as being inadequate.

[77] In the course of his typed submissions for the licensee Mr Withnall put it:

> *"11. … counsel would still oppose any attempt to seek a refund of the commission paid, notwithstanding the absence of an agency agreement, on the grounds that the doctrines of res judicata and election of remedies apply, the question of the payment of commission, having already been before a Court of competent jurisdiction, namely the Disputes Tribunal, at the suit of the appellant, and a judgment issued which the appellant has had the benefit of. There has been no appeal against that judgment and indeed it has been carried into effect. Not only has there been an election of alternative remedies, and a finding which is binding between the parties, but also any claim which the appellant had, has merged in the judgment of the Disputes Tribunal and is extinguished*
>
> *12. Whilst that does not affect the right of a committee and the Tribunal to find that there was a breach of section 126, it is submitted that it does mean that attempting to recover the commission agreed to be payable and paid, is an abuse of process. This Tribunal has no supervisory or appellate jurisdiction in respect of a ruling of the Disputes Tribunal.*
>
> *13. Furthermore, and in the alternative, it is submitted that the merits of the matter do not require the Tribunal to make any order in respect of the commission. The law relating to section 126 is summed up in Laws of New Zealand, Agency, area 33 as follows:*
>
> > *"The objects of the requirement of a written appointment are to prevent perjury and false claims, and to put an end to arguments about claims for commissions. The requirement is primarily for the benefit of those employing real estate agents. The effect of the statutory provision is not to make the contract of agency illegal by reason of the want of written authority, but to prevent the agent recovering any commission by action. The appointment in writing need not be given before or at the time of the agent's employment; it is sufficient if it is founded on a written acknowledgement of the appointment signed by the client before or after the transaction is complete."*
>
> *14. This is not a case of the agent bringing a case before a Court to enforce payment of the commission. Commission was agreed, and was paid. Mr Cottle himself acknowledged that the sum of $10,000 plus GST was properly payable by way of commission, both by writing that on the actual agreement for sale and purchase and by acknowledging that before the Disputes Tribunal. There is no mischief which the section was designed to remedy. The services were performed, the acknowledged fee paid, and the matter should rest there."*

[78] In final oral submissions, Mr Withnall expressed general agreement with the stance of Mr Hodge as counsel for the Authority. He accepted that s.126 of the 2008 Act provides that there must be a listing agreement for an agent to be entitled to commission but submitted that a vendor can still agree to pay commission. He put it that s.126 provides a protection for vendors who may be sued for commission where there is no listing agreement. He submitted that the fact that there has been no compliance with s.126 does not entitle a vendor to a refund of commission and it is for us to consider the matter in terms of our discretionary powers and in relation to the services performed and provided by the agent to that vendor. Mr Withnall submitted that here the services were to the complete satisfaction of the vendors and there was the initial agreement to pay $10,000

commission back in 2006 and there was an agreement under clause 12 of the final contract to pay commission in the usual way.

[79] Mr Withnall noted that the licensee was able to deduct his commission from the deposit but that what he deducted was less than half of a proper commission entitlement to the particular transaction. Mr Withnall submits that the vendors achieved what they sought from the licensee in terms of the sale of the property.

[80] Inter alia, Mr Withnall submitted that the vendors elected to argue over the commission issue in a Disputes Tribunal forum and that (he puts it) disposes of that issue. He submits that, in any case, we should not exercise our discretion to refund commission to the vendors as they have experienced no loss.

[81] Mr Withnall seemed to concede that, in some respects, there could have been better practice by the licensee, but he emphasises that the appeal before us is focused on the concept of unsatisfactory conduct on the licensee's part rather than misconduct.

[82] It seemed to be put for the licensee that if the vendors were not provided with sufficient information about the Act and its Rules, they have not been prejudiced in this case. It is also submitted for the licensee that there was an appraisal and, although that had not been updated from 2006 or 2007, it was as valid in 2011 as it had been at the outset in terms of the realistic market price of the property.

[83] With regard to penalty, Mr Withnall put it that the Committee considered there had been three breaches of the Act and the Rules when it is now clear there were only two, because there has been an appraisal.

[84] With regard to the licensee not having disclosed to the vendors that the true purchaser on 31 August 2011 appeared to be Calder Stewart Industries, Mr Withnall put it that a purchaser is entitled to purchase through a nominee on the basis of the true purchaser not being disclosed and that is common commercial practice. He put it that Mr Cottle knew that Mr Arthur was making an offer *"as agent"*, but Mr Cottle did not ask the identity of the principal. Mr Withnall also put it that at that particular time it was not clear to the licensee that Calder Stewart was necessarily behind the offer being made.

[85] Of course, Mr Cottle's evidence was that he did ask the licensee who Mr Arthur was representing and whether it was Calder Stewart, and that if he had known it was Calder Stewart Industries he would not have sold. Mr Withnall pointed out that a nominee is not required at law to disclose his or her principal and the nominee would be personally liable if a principal did not support the purchase.

[86] With regard to an issue raised by the complainants as to whether they were dealing with the licensee or his company, Mr Withnall submitted that on the evidence it is clear they were dealing with the licensee as an individual and it does not matter that on some bank papers there is reference to his company. Mr Withnall pointed out that s.122 of the Act only requires that transaction monies be paid into a general or separate trust account and emphasised that it does not matter how the relevant trust account is entituled the licensee is only required to pay deposit monies into a trust account operated by him. In any case we did not find this issue to be justiciable in terms of our said ruling.

Discussion

[87] For all the concerns put before us on behalf of the vendors Mr Cottle now, helpfully, emphasises that, at this stage, the concerns of the appellant vendors are that there had

been no appraisal, no listing agreement, and (he submits) in terms of s.126 of the Act no entitlement of the licensee to commission. It is now conceded for the licensee that there was no listing or agency agreement.

[88] The commission issue seems to be the main focus of the complainant's case to us. The vendors seek a refund of the $10,000 (plus GST) commission.

[89] Section 126 of the Act reads:

> ***"126 No entitlement to commission or expenses without agency agreement***
>
> *(1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—*
>
> *(a) the work is performed under a written agency agreement signed by or on behalf of—*
>
> *(i) the client; and*
>
> *(ii) the agent; and*
>
> *(b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and*
>
> *(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.*
>
> *(2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.*
>
> *(3) A court may not make an order described in subsection (2) unless satisfied that—*
>
> *(a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and*
>
> *(b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and*
>
> *(c) failure to make the order would be unjust.*
>
> *(4) This section overrides the Illegal Contracts Act 1970."*

[90] For present purposes, the key aspect of s.126 is that it states that an agent is not entitled to any commission unless there is a listing or agency agreement in proper form. We take that to mean that an agent has no automatic right to require commission in terms of normal practice nor from a standard commission clause in the agreement for sale and purchase as was the position in this case. The effect of s.126(4) seems to over-ride rectification pursuant to the Illegal Contracts Act 1970.

[91] However, if the agent is paid commission or been able to deduct an agreed commission, there is no requirement that same be refunded to the vendor except subject to a Court order for some reason, or by a CAC or by us pursuant to s.93(e) of the Act (set out below). An agent who has breached s.126 must be able to sue for a reasonable fee for services performed on some type of quantum meruit basis.

[92] The Disputes Tribunal decision between the parties accepted that Mr Cottle had received a service from the licensee and that *"the substantial merits and justice of this*

claim require that Mr Barnett be paid for this service ...". The referee had noted that Mr Cottle accepted that Mr Barnett be paid a commission at $10,000 plus GST.

[93] On the facts of this case, we would not apply s.93(e) because, despite some failures on the part of the licensee, he worked well on behalf of the vendors and achieved a price suitable to them as experienced business people. Also, the context was that of changing real estate law and knowledgeable vendors issuing instructions and requirements to be met by the agent. Section 93(e) reads as follows:

> ***"93 Power of Committee to make orders ...***
>
> *(e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:"*

[94] For all that has been put to us, we broadly agree with the approach taken by Mr Hodge in his final oral submissions as we have covered them above. We note that, broadly, Mr Withnall agreed with those as counsel for the licensee.

[95] We consider it simplest to refer to the issues on which we have jurisdiction as we set them out in the said paragraph [53] of our ruling on our jurisdiction in this case issued on 18 November 2014.

[96] We consider that the licensee has been guilty of unsatisfactory conduct but at a fairly modest level. There should have been a listing agreement. The failure of the licensee to do so seems to have come about because of the rather loose manner in which he received instructions from Mr Cottle in 2006 to, in effect, look out for a purchaser but not formally advertise the property for sale. The law at that stage was the Real Estate Agents Act 1976 but was considerably tightened up by the Real Estate Agents Act 2008 and its Rules. However, well before the time of sale, the licensee was expected to know the requirements of the 2008 Act and it is concerning that no listing agreement was entered into.

[97] It is puzzling that, in the circumstances, the licensee did not disclose to Mr Cottle the identity of a potential purchaser pursuant to the Arthur contract of November 2011 as being Calder Stewart. However, we find that he was not asked that directly and that he could not then be sure as to the involvement of Calder Stewart even though he knew that Mr Arthur seemed to be an employee of that business. Also, the focus of the parties at that time was on price which then seemed very acceptable to the vendors.

[98] It is currently clear law that the *Quin* case (supra) cannot be applied in favour of the complainants with regard to unsatisfactory conduct but, in any case, that is concerned with compensation and we are concerned with whether, in all the circumstances, the licensee should refund the commission or any part of it to the vendors due to breach of s.126 by the licensee.

[99] We take the view that the licensee provided an effective service for the vendors over 2006 to 2011 and the actual commission charged was much less than the normal entitlement to an agent achieving such a transaction price. Also, we can understand (but not approve) the licensee's explanation for adding a net $1,000 to the original $10,000 as agreed commission because he had provided services for some years longer than ever contemplated in 2006. We do not think he was entitled to do that unilaterally as he did. However, when we stand back and review this saga in terms of the evidence adduced to us, we do not think it fair or just to interfere with the commission which the licensee has been able to retain.

[100] There has also been unsatisfactory conduct by the licensee in that over 2006 to 2011 he did not update the original 2006 appraisal in writing. We take into account that, in the interests of vendors, he kept up to date with market values at material times. However, as at 2011, the appraisal provided by the licensee in 2006 was rough and inferential rather than clear and did not meet the expectations of Rule 9.5.

[101] It is also unsatisfactory that he did not provide information about the 2008 Act and Regulations as required and expected these days because he was under the mistaken belief that such requirement only applied to residential property and not to the commercial car yard property which this case is about. He was correct to the extent that the provision of an approved guide under s.127 only relates to the sale of residential property. He was in breach of 2009 Rules 8.1, 10.1, 10.2, and 10.3 in particular. These rules read:

> *"8.1 An agent who is operating as a business must display these rules prominently in the public area of each office or branch, and provide access to it on every website maintained by the agent for the purposes of the business.*
>
> *…*
>
> *10.1 An agent must ensure that there are written in-house procedures for dealing with complaints and dispute resolution.*
>
> *10.2 A licensee must ensure that prospective clients and customers are aware of these procedures before they enter into any contractual agreements.*
>
> *10.3 A licensee must also ensure that prospective clients, clients, and customers are aware that they may access the Authority's complaints process without first using the in-house procedures; and that any use of the in-house procedures does not preclude their making a complaint to the Authority."*

[102] We accept what Mr Barnett says about Mr Arthur being a nominee purchaser, namely, that Mr Barnett did tell Mr Cottle that Calder Stewart was involved with Mr Arthur. We prefer the evidence of Mr Barnett.

[103] Insofar as Mr Cottle asserted he was not advised to take legal advice, we can understand that Mr Cottle was so jubilant at the sale it did not seem appropriate for the licensee to refer to consulting a lawyer. Nevertheless, that was a breach of Rule 9.9 and by itself is also unsatisfactory conduct.

[104] We record that, in this case, it is immaterial whether the vendors were dealing with the licensee or Tim Barnett Realty Ltd and we decline to join that company as a party to these appeals as applied for by the vendors. In terms of in-house complaints procedures, the licensee was the real estate business and he was available to pursue an in-house complaints procedure. However, he did not advise the vendors of available procedures and of the existence of the Authority.

[105] The vendors' cross-appeal, seeking that the licensee be charged with misconduct, is dismissed. The licensee's appeal succeeds to the extent that his unsatisfactory conduct is based on grounds which are a little different from the findings of the Committee, and that may lead to adjustments to penalty which was also appealed by the vendors.

[106] In terms of penalty, we currently feel that the Committee's $2,000 fine should stand against Mr Barnett but that the Committee's censure and educational requirement are not now necessary or appropriate for the licensee. The licensee has now retired from real

estate agency work due to ill health and has voluntarily suspended his licence. Of course, the complainant vendors are entitled to raise the issue of refund of commission in submissions on penalty. The parties are entitled to a hearing over penalty. They may prefer instead to deal with that on the papers or they may accept our current views. We direct the Registrar to arrange a Directions Hearing by telephone in the usual way to progress a timetable towards our dealing with the issue of penalty.

[107] 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

_____
Mr J Gaukrodger
Member