

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 62

READT 101/14

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

CHRISTINE RATAHI

Appellant

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 301)**

First respondent

AND

LYNNE AND GARY LEGGE

Second respondents

READT 103/14

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

LYNNE AND GARY LEGGE

Appellants

**REAL ESTATE AGENTS
AUTHORITY (CAC 301)**

First respondent

AND

CHRISTINE RATAHI

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at HAWERA on 3 July 2015

DATE OF THIS DECISION

31 August 2015

REPRESENTATION

The licensee on her own behalf
Ms K H Lawson-Bradshaw, counsel for the Authority
Mr J Waymouth, counsel for the complainants

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Ms Christine Ratahi (“the licensee”) appeals against the 29 October 2014 penalty decision of Complaints Assessment Committee 301, which had earlier found her guilty of unsatisfactory conduct in respect of a complaint by Gary and Lynne Legge (“the vendor complainants”) who also cross-appeal against that penalty decision.

[2] The real issue is that the complainant vendors seek a refund of commission even though the sale outcome seems to have been very acceptable to them.

[3] We emphasise that this appeal is confined to the issue of penalty.

Background

[4] In February 2013 the complainants listed their property at 4 Denby Road, Hawera, with the licensee on a three month sole agency. The licensee was then working for McDonalds Real Estate Ltd, Hawera. The complainants say that the unsold property was withdrawn from the market in July 2013; but the licensee disputes that the property was withdrawn and claims the listing converted to a general listing after the three month sole agency.

[5] In mid-January 2014 the licensee, then about to commence work for Taranaki Property Specialists Ltd, Hawera (T/a Harcourts), contacted the complainants to advise she had an interested buyer whom she subsequently showed through the property despite not having a signed listing agreement to her new employer.

[6] The licensee, together with her daughter (also a licensee) Lisa Ratahi, presented an offer of \$350,000 to the complainants who, after some negotiation, accepted an offer of \$355,000.

The Committee’s Decisions

[7] The licensee accepted that the complainants had not signed a listing agreement with her new agency at the time the property was sold. However, she claims that a listing form was drafted by her and it was “*an innocent and regrettable mistake*” that it was not signed. We deal further with that aspect below.

[8] The Committee found that the licensee did not have a signed listing agreement, nor had she provided an adequate written appraisal at the time she sold the property in January 2014, and was consequently guilty of unsatisfactory conduct. She was fined \$1,000 and censured. The Committee found that various other complaints against the licensee were unproven.

[9] In respect of a complaint against Lisa Ratahi (the licensee's daughter), the Committee found there was insufficient evidence to support a finding of unsatisfactory conduct and decided to take no further action in regard to her.

[10] In its decision on penalty, the Committee remarked:

“3. Discussion

3.1 *The Committee in its determination of 22nd August 2014 determined under section 89(2)(b) of the Act that it had been proved, on the balance of probabilities, that Ms Christine Ratahi has engaged in unsatisfactory conduct in that she failed to prepare and have signed by the complainants a listing agreement.*

3.2 *Whilst the complainants have asked in their submission for the return of the commission paid, the Committee considers that such an order would be inequitable in that the complainants did in fact achieve a sale of their property through the efforts of the licensee at a price they were prepared to accept.*

3.3 *In considering the issue of what orders to make the Committee recognises that its responsibility is to ensure that salespersons licensed by the Real Estate Agents Authority adhere to the rules and regulations that are imposed on licensees.*

Issues on Appeal to Us

[11] The licensee appeals the level of fine imposed and the order censuring her.

[12] The complainants appeal the Committee's decision not to order a refund of commission to them.

Relevant Evidence Adduced to Us

The Evidence of the Licensee

[13] The licensee's first contact with the complainants was on 15 June 2012 when they viewed various properties in Hawera with her. On 16 January 2013 the licensee carried out a market appraisal for their said property at 4 Denby Road, Hawera, as they then wished to have her list it for sale with McDonald Real Estate Ltd which she did. Over 28 January 2013 to 17 January 2014 the licensee marketed their property holding eight open homes and 10 private viewings and also personally paid for Open2View professional photography.

[14] The licensee emphasised that the complainants did not provide a written or verbal authorisation to withdraw that property from the market.

[15] During the licensee's Christmas holidays over December 2013 and January 2014, and at the time when she was poised to leave McDonald Real Estate Ltd and commence work in the New Year of 2014 with Harcourts Taranaki Property Specialists Ltd, the licensee received an enquiry about the complainants' property. The complainants granted her permission to show the prospective (and ultimate) purchasers through it. The licensee had previously advised the complainants of her change in employer.

[16] The prospective purchasers signed a sale and purchase agreement for the complainants' property and that agreement was drafted by the licensee and presented to the complainants that day, 24 January 2014. The licensee states that she took the complainants thoroughly through the content of the agreement and recommended they seek legal advice before signing it and they acknowledged that and signed the contract. They were given the REAA booklet. There is no dispute that they held a hard copy of the licensee's appraised value of the property.

[17] The licensee recorded that Mr Legge asked about the possibility of a reduction in commission by \$5,000 which the licensee had already capped at \$16,500 after discussing that issue with her manager, and she agreed to reduce it by a further \$500 to \$16,000. Apparently, it would normally have been \$16,905. The licensee felt that the complainants were happy about that.

[18] The licensee observed that Mrs Legge then rang her sister in New Plymouth, who was a retired real estate agent, to discuss the offer and her sister advised her to accept it. The complainants did that and the property was unconditionally sold.

[19] Consequently the complainants wished to look at other properties with the licensee and, indeed, looked at about seven more properties. While viewing one of them, Mr Legge enquired whether there could be yet another commission reduction and the licensee responded that she did not have the permission to authorise that but would approach her manager about it.

[20] Inter alia, the licensee considered that she gave exceptional service to the complainants and had built up a very good working relationship with them. She was conscious throughout that Mr Legge was suffering an incurable disease which is why the complainants were selling their large home. The licensee asserts that she had the very best interests of the vendors at heart at all times and therefore cut her holidays short on 17 January 2014 to assist them. She was thrilled that on 24 January 2014 she was able to take them a very good offer in her view after they had waited a year for such an offer. The licensee felt that offer was above market value for the property.

[21] The licensee had prepared Harcourts' standard form of agency authority to be signed by the complainants but, on the morning of 24 January 2014, Mr Legge pressed her to bring the offer to him immediately so that she left the agency form on her desk when she rushed to the complainants. She asserts that, otherwise, she followed all proper procedures meticulously.

[22] Inter alia, the licensee noted that her estimated appraisal price of \$350,000 had not changed from the initial listing with McDonald Real Estate Ltd and that the complainants were well aware of the estimated commission although she negotiated reductions of that. In fact, the commission was reduced by \$905 and the licensee paid \$250 for marketing photographs of the property. The licensee feels that from very happy vendors the complainants became people disgruntled about paying commission due to prompting they received from another local real estate agent. The latter also ascertained that the complainants had not signed a listing authority and advised them they were therefore not required to pay any commission.

[23] The licensee emphasises that she overlooked taking Harcourts' listing authority to the complainants for signing on 24 January 2014 because they pressured her to come to them in a hurry; and she knew that they needed the property to be sold due to Mr Legge's health.

[24] The licensee asserts that to have been censured for overlooking the signing of the listing authority is very harsh and damaging to her career in Hawera and to her ambition to become a branch manager. However, she accepts that a fine is appropriate. She is distressed to think that she will have the concept of “unsatisfactory conduct” against her name for the rest of her career, particularly, in the circumstances of this case. She stated that in two years’ time she and her daughter, Lisa Ratahi, will own that Harcourts branch in Hawera. She observes that had she not obtained such a good sale for their property, the complainants would be still stuck with a high maintenance early 1900s villa but now they have a 1990s low maintenance brick home. She has felt pressed by the complainants to refund their commission in full. She notes that she spent considerable time and effort on marketing and selling the complainants’ property together with associated costs.

[25] Having said all that, the licensee acknowledges that it is fundamental that a listing authority be signed.

[26] The licensee was comprehensively cross-examined by Mr Waymouth and by Ms Lawson-Bradshaw. Ms Lawson-Bradshaw pressed the licensee that she had not advised the complainants of the possibility that they could incur double commission because, at material times, the property remained listed with McDonald Real Estate Ltd. That possibility had not occurred to the licensee because she felt she was only showing the purchasers the property on behalf of Harcourts. In fact, no issue of double commission has arisen. The contact from the purchasers had risen from the Open2View site paid for by the licensee. It seems that McDonald Real Estate Ltd had meant to remove the listing.

[27] The licensee responded to Ms Lawson-Bradshaw that she has never got the listing agreement signed because the complaint that a listing agreement had not been signed was made after about four weeks from the sale agreement so she felt she could do nothing about it at that stage. She added that she had thought that the whole point of a listing agreement being required was to show that the vendors authorised a sale and that, because they had signed the agreement for sale and purchase, that aspect had been covered.

[28] The licensee had said that, having arranged a \$905 reduction in commission, she advised the complainants to see a Mr Shane Rowe at Harcourts if they sought a further reduction.

The Evidence of the Complainants (Mr and Mrs Legge)

[29] Mrs Legge presented joint evidence for the complainants due to the illness of Mr Legge. She covered the above facts in general. She emphasised that at no stage did they sign any listing contract or agency agreement with Harcourts. She also asserts that the complainants were never shown or given a written appraisal as to the value of the property as they had previously received from the licensee when at McDonalds Real Estate; nor (she alleges) had they received a copy of the REAA booklet or details of any Harcourts or REAA complaints process; nor any written estimate of commission; nor were they recommended to obtain legal advice or offered other specialist advice until everything had been signed. However, as indicated above, the Committee found the extra allegations against the licensee to be unproved.

[30] The commission now in issue is \$16,000.

[31] The complainants maintain that they were pressured by the licensee to accept the said offer and that they were under the impression they would receive a discount in commission but that no one from Harcourts came back to them on that issue.

[32] Mrs Legge admitted to the licensee that the complainants had expected to pay commission in the usual way. They seemed to be now saying that they are not dissatisfied with the service from the licensee but require a refund in commission because there was no listing agreement to entitle the licensee to commission.

[33] Mrs Legge conceded to the licensee that if she had brought the listing agreement to them on 24 January 2014, as she had intended, the complainants would have signed it. Mrs Legge said that she thought she should pay for a job done but that, in this case, she was very unhappy because at the time the purchasers' offer was put to Mr and Mrs Legge by the licensee they wanted a few days to think about it and whether to sell at the price offered. The licensee put it to Ms Legge that the latter had told her not to lose the offer, although Ms Legge denies that. Mrs Legge then said "*I never said you undersold our home*". Mrs Legge insisted that she needed more time on 24 January 2014 to think about the offer. She would not accept the assertion by the licensee that "*your husband pushed you to sell*" and Mrs Legge maintained that her husband would also have liked more time to think about the price and that they felt under pressure from the licensee.

Penalty Orders

Submissions for the Authority on Penalty

[34] On finding that the licensee had engaged in unsatisfactory conduct for failing to obtain a listing agreement and complete an appraisal, the Committee censured the licensee and ordered her to pay a \$1,000 fine.

[35] The Authority submits that this penalty imposed was well within range and (arguably) generous, given the unsatisfactory conduct as found by the Committee.

[36] The Authority submits that a meaningful monetary penalty was required in this case in order to achieve the purposes of disciplinary proceedings, being the maintenance of proper professional standards and the protection of the public through specific and general deterrence.

[37] Counsel for the Authority submits that the requirements to provide a proper appraisal and only charge commission where an agency agreement has been signed are basic and provide important protection of consumers; and we must mark breaches of those provisions with a firm penalty. Counsel notes that the fine was only 10 per cent of the maximum available.

[38] Overall, it is submitted for the Authority that the penalty is not manifestly excessive but rather it appropriately recognises the gravity of the licensee's offending. It is respectfully submitted that there is no basis to intervene on appeal in a case like the present where the orders made are relatively modest and, certainly, nowhere near the high end of the scale.

Refund of Commission

[39] Section 126 of the Act provides:

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.”*

[40] Depending on the circumstances, the committee and/or we may order a refund of commission where there is no listing agreement given the fundamental nature of the obligations set out in s.126. However, it is submitted for the Authority 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; and it will be a matter for us to determine whether an order requiring the licensee to refund all or part of the commission is appropriate.

[41] The only issue identified in the complainants' Notice of Appeal was the Committee's decision not to refund the commission paid having found the licensee had not completed a listing agreement.

The Stance the Licensee

[42] Ms Ratahi simply puts it that she believes the vendors have a moral duty to remunerate her in the usual way for a job well done. She feels it unfair that she has been censured. She emphasises that she only overlooked taking the listing agreement form to the vendors for signature because of the pressure they imposed upon her to come to them immediately on the morning of 24 January 2014 when they learned she had an offer for their property. She said she then gave them a hard copy of her appraisal and followed all other procedures and she advised them to see a lawyer before they accepted the offer. She feels she has been unfairly discredited by the complainants so that they might seek a personal unexpected gain.

[43] The licensee notes the various references Mr Waymouth has made to his having proposed mediation talks. She responds that she was most willing to mediate but not on the basis required by Mr Waymouth, i.e. that the commission be fully repaid before mediation talks commenced. It seems that the attitude of Mr Waymouth (on behalf of the vendors) has been that they would pay a fair fee "*on an ex gratia basis for work undertaken and costs incurred*" (as Mr Waymouth put it to us).

The Stance for the Complainants

[44] The essential submission of Mr Waymouth is that non compliance with s 126 of the Act results in non entitlement of the licensee to commission. He also refers to Rule 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which reads: "*9.6 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.*"

[45] He submits that in this case there has been a breach of s.126 and Rule 9.6, in particular, and therefore of s.72 which defines unsatisfactory conduct, or possibly, of s.73 which defines misconduct.

[46] Mr Waymouth also refers to Rule 6.1 which reads: "*6.1 An agent must comply with fiduciary obligations to the licensee's client arising as an agent.*" He submits that fiduciary duty or relationship is brought into existence by a signed agency agreement and the failure to have that breaches the fiduciary duty. He also submits that failure goes to the root of the relationship and the transaction between the vendor and agent and is disgraceful or seriously incompetent or seriously negligent real estate agency work, and that we should treat the matter as misconduct. However, the appeal before us is not about the Committee's finding of unsatisfactory conduct but about penalty.

[47] Mr Waymouth helpfully points out that the said \$16,000 commission sum actually represents \$13,913.05 charged as commission but plus GST of \$2,086.95.

In the course of his argument, Mr Waymouth put it that the purpose of the Act is twofold, namely, first to promote and protect the interests of consumers in respect of real estate transactions and, secondly, to promote public confidence in the performance of real estate agency work. Inter alia, he puts it that the reason for requiring written authority for entitlement to a commission is to avoid the danger of perjury by an agent relying on verbal authority *“and so to obviate false claims, and also to endeavour to reduce the scope for argument over commission claims”* (as he puts it).

[48] Mr Waymouth also referred to Rule 9.7 which reads:

“9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—

- (a) recommend that the person seek legal advice; and*
- (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and*
- (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).”*

[49] He submits that the licensee has blatantly breached these rules to which he has referred. His overall submission is that, due to non compliance with s.126(1)(a), i.e. that there is no written agency agreement signed by or on behalf of the vendors and the agent, the commission must be refunded in full by the licensee.

[50] Mr Waymouth adds a submission that the licensee is also in breach of Rule 5.2 which reads: *“5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.”* He submits that the licensee has not understood the importance of needing a signed agency agreement or, if she did, she has blatantly disregarded the need for it. Mr Waymouth seemed to be submitting that the licensee’s breaches are so fundamental that she needs some re-education. He then added that she has in his submission, breached Rule 5.1 which states: *“5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.”*

[51] As already indicated, a significant portion of Mr Waymouth’s submissions is along the lines that we should be not only overturning the penalty decisions of the Authority but we should be making a finding of misconduct, rather than unsatisfactory conduct, and that we should make a determination that commission has been taken by the licensee in breach of the Act. He seems to be seeking a refund of the commission to the vendors together with an increased fine and with the orders for censure and apologies to remain. As explained above, this appeal is confined to the issue of penalty.

[52] In a later set of submissions Mr Waymouth adds:

“17. The issue is not whether or not this Tribunal does have any sympathy for or does not have any sympathy for the vendor/cross appellants or indeed

the real estate agent, the issue is whether or not the commission deducted by the real estate agents, was obtained legally, correctly, and therefore properly pursuant to the provisions of the Real Estate Agents Act 2008.

...

No Statutory Commission Entitlement

21. *Simply put, it is counsel's submission that there is no entitlement to commission at all, the real estate company, having deducted its commission illegally without a signed agency agreement, and in this respect counsel points out, that the real estate agency work leading up to and including the effecting of a sale was also undertaken without a signed agency agreement, contrary to the provisions of Rule 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.*
22. *Further, as was pointed out by Mrs Dangen, the date of the purported but unexecuted agency agreement tendered in evidence by the respondent, was not even executed by the real estate agent (as is required) and was not dated before the date when the real estate agency work first commenced. It was dated one week afterwards, subsequent to the first phone calls and visits and inspections of the property by the real estate agent with the buyer.*
23. *And again this fact is aggravated by the admission by the real estate agent that at the time the first buyer enquiry came to her it was from an advertisement with her "other" real estate agency, namely McDonald Real Estate Limited with whom she was still working.*
24. *And there is therefore a further question in law as to whether or not that commission entitlement exists, and who to in that it may well be that commission entitlement exists from McDonald Real Estate Limited and not the respondent's company.*
25. *Returning however to the issue of s.126 of the Real Estate Agents Act, it is clear that the salesperson does not have an entitlement, or a right to be paid by commission, as the strict statutory requirements of s.126 have not been fulfilled.*

...

27. *In counsel's opinion this Tribunal must make a very strong determination to send a message to the real estate industry per se.*
28. *Any other commentary other than the commission has been illegally obtained, contrary to the provisions of the Real Estate Agents Act [sect. 126], and that real estate agency work has been undertaken contrary to the provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 [Rule 9.6], would be to send a message to the industry that statutory compliance is not required.*

...

31. *This Tribunal may make a finding, in counsel's submissions, either by way of:*
- 31.1 *Declaration [which the REAA seems to believe is ultra vires of this Tribunal's powers], which counsel believes is not under sect. 93(2);*
or
- 31.2 *Pursuant to the provisions of sect. 93(1)(e) order a refund of the fees charged, the fees being illegally and improperly obtained.*
32. *It is submitted this power must be applied in toto to the fees, and this is not a situation or determination where the Tribunal can exercise its discretion over the quantum of fees to be refunded. The fees have been illegally and improperly obtained, and it is up to this Tribunal to in effect "draw a line in the sand" to the industry stating that such activities are not permitted and will not be condoned.*
33. *There cannot be a partial refund of something that has been wholly illegally obtained.*
34. *This is not a Court of equity, this is a Court of Disciplinary Tribunal enforcing the strict provisions of the Real Estate Agents Act 2008 and sending a clear message to the real estate industry, based on the precedent counsel refers to previously.*
35. *No other message is satisfactory.*
- ..."

Discussion

[53] In this case there is no dispute about the relevant facts but, in terms of any inconsistencies, we prefer the evidence of the licensee.

[54] There is no appeal against the CAC's finding of unsatisfactory conduct by the licensee (based mainly on the failure to have a listing agreement signed). This appeal is only against penalty and a cross-appeal in that respect. We must accept the CAC's findings of fact.

[55] It is well established that decisions of disciplinary tribunals should emphasise the maintenance of proper professional standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose; *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4. General deterrence is a critical consideration, even if specific deterrence is not required should we be satisfied the licensee would not repeat his or her conduct.

[56] The Real Estate Agents Act 2008 ("the Act") was introduced specifically to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation under s.93 of the Act of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee.

[57] In her oral submissions, Ms Lawson-Bradshaw referred to Mr Waymouth now submitting that the complainants sought a declaration from us to the effect that

Mrs Ratahi was not entitled to commission pursuant to s.126 and should not be in possession of it. Mr Waymouth then indicated that the complainants would use such a declaration to enforce re-payment of the full commission to Mr and Mrs Legge, presumably, in a civil Court.

[58] Ms Lawson-Bradshaw observes that a licensee does not have an entitlement, or a right, to be paid commission by a vendor client unless the requirements of s.126(1) are fulfilled, and they centre around having a compliant written agency agreement. As she said, the failure of a licensee to obtain an agency agreement breaches rule 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which reads:

“9.6 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.”

[59] As such, if a licensee does not have a signed listing agreement from the vendor then the licensee does not have an enforceable entitlement and cannot pursue the vendor for commission.

[60] Ms Lawson-Bradshaw observed that s.126(2) was discussed by us in *Gollins* [2014] NZREADT 52 where we stated:

“Counsel for the licensee appears to rely on ss.126(2) and (3) of the Act to submit that a Court has discretion to allow recovery of commission because the licensee’s failure to comply with s.126(1) was inadvertent, the claimed commission is fair and reasonable, and it would be unjust not to allow recovery of commission. However, the licensee cannot seek the relief provided in s.126(2). That provision is triggered only if a signed agency agreement is provided to the client after the 48 hour time period dictated in that same subsection. The discretion does not apply if there was no written agency agreement at all during the time the work was performed. It is therefore irrelevant whether the commission charged was fair and reasonable and whether non-recovery of commission would be unjust.”

[61] Ms Lawson-Bradshaw notes that s.126 does not provide guidance where a vendor has already paid the licensee a commission when no agency agreement is in place.

[62] Ms Lawson-Bradshaw then put it that, in accordance with s.93 of the Act, a Committee has a discretion to order the licensee to refund commission in whole or in part; a refund does not necessarily always follow as a matter of course but is instead dependent on the facts of the particular situation; a failure to meet the basic obligation of having a listing agreement in place should often result in an order for a refund; and s.126 supports this (or at least is neutral on it) but, ultimately, it is a matter for discretionary assessment by a committee or us.

[63] Ms Lawson-Bradshaw again referred to the complainants now, apparently, instead of seeking a refund of commission, asking for a declaration that the licensee was not entitled to the commission received by her agency. She stresses that this appeal is not against the Complaints Assessment Committee’s unsatisfactory conduct finding.

[64] The orders that a committee and we may make following an unsatisfactory conduct finding are dictated by s.93(1) of the Act. Section 93(1) provides an exhaustive list of orders which may be made following a finding of unsatisfactory conduct. This list does not include making declarations, such as about the legal entitlement to commission, although findings by a Committee or us may largely have the same practical effect. We are confined by the available orders referred to in s.93 of the Act. The appropriate forum for considering and making declarations of the kind sought by the complainants is in the civil courts.

[65] Ms Lawson-Bradshaw observes that it is also questionable whether or not any such declaration made by us, as sought here by Mr Waymouth, would be enforceable in a civil Court without further proof. It is difficult to see the utility of such an order. However, we have no jurisdiction in that respect.

[66] Overall, Ms Lawson-Bradshaw submits that, in light of the factual findings of the Committee with respect to the lack of a listing agreement, the appropriate orders for us to make are to uphold the fine of \$1,000 and the censure; and, perhaps, refund a portion, or the entire, commission; and that we should not make a declaration that the licensee was not entitled to commission.

[67] For all that has been said, we see the penalty issues in this case as fairly standard. As we recently stated in *M D Cottle Family Trust and McBride Street Cars Ltd v REAA and T Barnett* [2015] NZREADT 57:

“[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.”

[68] In the present appeal about penalty we accept, of course, that the defendant erred in not having a listing agreement signed in particular, and apparently in the appraisal being inadequate. In context it is quite understandable that she overlooked getting signed the listing agreement which she had prepared; although that requirement is as fundamental as having an agreement for sale and purchase signed.

[69] The licensee and her agency are fortunate to have been paid commission by deduction in the usual way so that the requirements of s.126 do not come into play in this particular case. However, in many ways, the vendors seek a windfall as they seem to have been well served by the licensee and have not been prejudiced in any respect.

[70] We agree with the Committee that it is not equitable to order a refund of commission or any part of it and, indeed, the vendors had discounted commission to a useful extent.

[71] With respect, we think the findings of the Committee were appropriate although, in the light of the further coverage before us, we remove the censure against the licensee and replace it with an order that the licensee undergo (as soon as reasonably possible) further education or training, namely, Open Polytechnic licensee course US 261 49 Demonstrate Knowledge of Licensing and the Code of Professional Conduct under the Real Estate Agents Act 2008 (or its equivalent as determined by the Registrar of the Real Estate Agents Authority). Otherwise we agree with and confirm the views and penalty orders of the Committee.

[72] 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 J Gaukrodger
Member

Ms N Dangen
Member