BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 48

READT 080/15

IN THE MATTER OF	an appeal under s111 of the Real Estate Agents Act 2008
BETWEEN	MAKETU ESTATES LTD
	Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403)
	First respondent
AND	STANLEY ROBB
	Second Respondent

Hearing:	17 June 2016, at Tauranga
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Counsel:	G Brittain, on behalf of the Appellant K Lawson-Bradshaw, on behalf of the First Respondent S Caradus, on behalf of the Second Respondent
Date of Decision:	11 July 2016

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant, Maketu Estates Ltd (Maketu) has appealed against the decision of Complaints Committee 403 (the Committee) dated 3 November 2015, in which it determined to lay a charge of unsatisfactory conduct against the second defendant

(Mr Robb) (the Committee's decision). Maketu contends that a charge of misconduct should have been laid.

[2] The Tribunal notes that shortly before the hearing of the appeal, Mr Caradus filed a memorandum on behalf of Mr Robb. Mr Caradus said:

> 1. This appeal relates to one of two charges brought against [Mr Robb] , by [the Committee].
>
> 2. Mr Robb pleaded guilty to both charges and, as such, the appeal is primarily an issue as between [Maketu] and the REAA.
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> 3. Mr Robb has read the submissions filed by the REAA and supports those submissions to the extent they relate to the [Committee's] decision to bring the charges that it did.
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> 4. While the [Committee] has also expressed views (at paragraph 6.10) on the gravity of Mr Robb's offending, it is submitted that those issues are best considered in the context of a penalty hearing, and so Mr Robb reserves his position in that regard.
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> 5. Given the above, Mr Robb does not propose to attend the hearing on Friday 17 June 2016, but will ensure that he is available through counsel to answer any questions by telephone the Tribunal may have.

[3] The Tribunal did not find it necessary to call on counsel for Mr Robb.

Background

[4] There was no dispute as to the factual background. The relevant events occurred in October and November 2012.

[5] On 5 October, Maketu entered into an agency agreement with PGG Wrightsons (Wrightsons) for the sale of its kiwifruit orchard (the property). Mr Robb was the listing agent. The property was to be sold at auction on 16 November. The property was substantial (66 hectares) but had been affected by the "Psa" disease in 2000. For that reason, the directors of Maketu (Messrs Ross and Colin Stevenson) (the directors) were unsure of the orchard's value.

[6] It was common ground that it was likely that prospective buyers would be associated with a local packhouse, as they would have a need for continuing supply, and the ability to assume the risk of such a large property affected by Psa.

[7] Mr Craig Lemon (Mr Lemon) is a director of JACE Investments Ltd, and had an association with the MPAC packhouse (MPAC). On 1 and 2 November Mr Lemon telephoned and emailed Mr Robb, seeking information about the property. Mr Lemon viewed the property on 9 November and subsequently emailed Mr Robb to say that he was interested in pursuing it further. Mr Robb had not met Mr Lemon, and did not know of his relationship with MPAC

[8] Mr Lemon asked for further information, and for a draft sale and purchase agreement. In a further telephone conversation with Mr Robb on 12 November, Mr Lemon expressed definite interest in buying the property and again asked for a draft sale and purchase agreement. In the same conversation Mr Lemon asked Mr Robb for guidance about Maketu's price expectations. Mr Lemon had a further telephone conversation with Mr Robb on 12 November. He again asked for a draft sale and purchase agreement, which he received on 13 November.

[9] At around the same time Mr Paul Jones (Mr Jones) was expressing interest in the property. Mr Jones was associated with the DMS packhouse (DMS). Mr Robb had a good relationship with Mr Jones and had done work for Mr Jones and his associates. He knew of Mr Jones' association with DMS. Mr Robb contacted Mr Jones when the property was first listed for sale, but Mr Jones did not at that time express an interest. However, he visited the property in late October or early November, and had a number of conversations with Mr Robb about the property in the period up to 13 November.

[10] The crucial events relating to the appeal occurred on 14 November. Mr Jones asked Mr Robb to arrange a meeting with the directors of Maketu. This was arranged for 14 November. Mr Robb arranged two meetings. The first meeting was between himself and the directors of Maketu, (the first meeting). This was to be followed by a meeting between the directors and Mr Jones (the second meeting).

[11] During the first meeting Mr Robb advised the directors that copies of a draft agreement for sale and purchase had been provided to two prospective buyers. Mr Robb did not tell the directors who the prospective buyers were, but they knew that Mr Jones was one of them, as they were to meet with him. They wrongly assumed that the second was a third person and, while they were aware of Mr Lemon and his association with MPAC, they did not know he was interested in buying the property.

[12] During the first meeting, Mr Robb took a telephone call from Mr Lemon, leaving the meeting with the directors to do so. In that call, Mr Lemon confirmed his interest in buying the property. When he returned to the first meeting, Mr Robb did not disclose to the directors that the call had been from Mr Lemon, and he did not disclose to them that Mr Lemon had expressed a definite interest in buying the property.

[13] The directors then moved into the second meeting, with Mr Jones. An agreement in principle was reached to sell the property to Mr Jones for $3.8 million. The directors told Mr Robb that it was a bad deal, but were told that there was no potential to raise the price. The directors then asked Mr Robb if there were other potential buyers, to which Mr Robb responded "no".

[14] In a telephone discussion after the second meeting, Mr Robb told Mr Lemon that the directors' price expectation was raised to $5 million, and that all had been put on hold. He did not tell Mr Lemon that the directors had reached an agreement in principle with Mr Jones.

[15] An agreement for sale and purchase between Maketu and Mr Jones was signed on 15 November.

[16] The directors told Mr Lemon in a telephone conversation on 16 November, that they had been told there was only one bidder. Mr Lemon told the directors he would have been prepared to pay $4-4.5 million. Mr Lemon then submitted an agreement for sale and purchase at a price that was higher than that agreed with Mr Jones. However, that could not proceed, as Mr Jones declared his offer unconditional.

Procedural history

[17] Maketu complained to the REAA in April 2013 about Mr Robb's conduct, alleging that he had deliberately misled Mr Lemon and JACE Investments Ltd, and had deliberately misled Maketu regarding Mr Lemon's expression of interest in buying the property. JACE made a similar complaint.

[18] In June 2013 Maketu issued proceedings in the High Court, pleading that Mr Robb and Wrightsons had breached s 9 of the Fair Trading Act 186 by engaging in misleading and deceptive conduct while in trade and, in the alternative, for breach of fiduciary duty. In a judgment delivered on 29 October 2014, his Honour Woolford J held that:

[a] Mr Robb had engaged in misleading and deceptive conduct in his failure to tell Mr Lemon about the agreement in principle with Mr Jones, and that, by failing to disclose Mr Lemon's interest, he had misled Maketu into believing that Mr Jones was the only interested party.[1]

[b] Mr Robb had breached his fiduciary duty of loyalty to Maketu, but his conduct fell just short of breaching a duty of good faith (if such a duty existed).[2]

[c] Maketu was awarded damages representing the difference between the sale price (less commission) and the market value.[3]

[19] The Committee's decision was issued on 3 November 2015.[4] The Committee decided to lay the following charges against Mr Robb:

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1 *Maketu Estates Ltd v Robb* [2014] NZHC 2264, (2014) 16 NZCPR 166, at [59]-[62].
2 At [63]-[68].
3 At [115].
4 A different Complaints Assessment Committee considered the complaints in July 2014, and determined that no further action be taken. Maketu and JACE appealed to the Tribunal, which ordered on 21 September 2015 that the appeals were allowed on the basis that the complaints were to be referred to CAC 403 on the expectation that appropriate charges would be laid. CAC's decision is the subject of the present appeal.

[a] Pursuant to s 73 (misconduct) of the Real Estate Agents Act 2008, of wilful breach of rr 6.2 and 6.4 of the Real Estate Agents Act 2008 (Professional Conduct and Client Care Rules 2009) (the Rules), in respect of conduct towards Mr Lemon/JACE (the first charge) ; and

[b] Pursuant to s 72 of the Act (unsatisfactory conduct), of breaches of rr 6.4, 9.1 and 9.4 of the Rules, for failing to tell Maketu of the extent of Mr Lemon's interest in the property (the second charge).

[20] Maketu's appeal against the second, "unsatisfactory conduct", charge was filed on 24 November 2015.

Issues on appeal

[21] The issues on appeal were:

[a] Whether the Tribunal on appeal has jurisdiction to examine and, if thought appropriate, interfere with, the decision of a Complaints Assessment Committee (CAC) as to the form of a charge to be laid, and if so:

[b] Whether the Tribunal should exercise that jurisdiction in respect of the Committee's decision to lay a charge of unsatisfactory conduct in respect of Mr Robb's conduct towards Maketu.

The "jurisdiction" issue

Submissions

[22] The parties accepted that the decision whether to lay a charge, and the form of such charge, involved the exercise of a discretion. The parties differed however, as to the approach to be taken by the Tribunal on appeal. In particular, Maketu contended that the "normal" approach to appeals against the exercise of a

discretionary power[5] should be followed. The Authority contended that a CAC's decision was of a "prosecutorial" nature, and for that reason the Tribunal should interfere only if it was established that the CAC had acted in bad faith or for a collateral purpose. The respective submissions are summarised below.

[23] On behalf of Maketu, Mr Brittain submitted that there is no hindrance to the Tribunal, on appeal, examining a CACs decision, and interfering in it if thought appropriate. He referred to the Tribunal's decisions in *Brown v CAC 10050* (*Brown*)[6] *Dunn v REAA* (*Dunn*)[7] in support of his submission that a CAC's determination as to whether to lay a charge, and the form of any such charge, are subject to a right of appeal to the Tribunal, pursuant to s 111 of the Act. Mr Brittain referred to the Tribunal's distinction in *Dunn* between criminal proceedings and "civil disciplinary proceedings" under the Act, to which criminal law principles do not apply, or have diminished application.[8]

[24] Mr Brittain also referred to s 110(4) of the Act. This gives a Tribunal the power, when hearing a charge, to make a finding of unsatisfactory conduct rather than misconduct, and to make any orders that a CAC may make on a finding of unsatisfactory conduct. He noted that there is no corresponding power to "upgrade" a charge of unsatisfactory conduct to a charge of misconduct. Therefore, he submitted, the only possible avenue for examining a CAC's exercise of its discretion to lay the lesser charge is by way of an appeal.

[25] Mr Brittain further submitted that if the Tribunal on appeal cannot examine a CAC's decision to lay a charge of unsatisfactory conduct rather than misconduct, that would mean the CAC has an unfettered discretion as to the charge laid. He submitted that such an outcome would be contrary to the scheme of the Act, which provides for appeals to the Tribunal.

[26] On behalf of the Authority, Ms Lawson-Bradshaw submitted that a CAC's decision as to the form of a charge is of a prosecutorial nature and, as such could be

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5 As explained by the Supreme Court in *Kacem v Bashir* [2010] NZSC 112, [2010] NZFLR 884, at [32]; followed by the Tribunal in *Dunn v REAA* [2012] NZREADT 56.

6 *Brown v CAC 10050* [2011] NZREADT 42.

7 See fn 5, above.

8 Referring to *Dunn*, above n 5, at [13].

interfered with in only rare circumstances. She referred to the judgment of Duffy J in *Cooke v Valuers Registration Board*, in which her Honour held that if a decision-maker has acted in good faith, and not for a collateral purpose, a court on judicial review will not interfere with how the power was exercised.[9]

[27] Ms Lawson-Bradshaw submitted that *Cooke* reflected a well-known line of authority in which the courts have demonstrated caution on applications to review the exercise of a discretion to prosecute.[10] Ms Lawson-Bradshaw also noted that *Cooke* post-dated the Tribunal's decisions in *Brown* and *Dunn*, so should be preferred.

[28] Ms Lawson-Bradshaw further submitted that proceedings under the Act have a significant public interest component. As such, she submitted, while an evidential threshold may strictly be met, a CAC may nevertheless consider that it is not in the public interest to prosecute, or to lay a particular charge.

Discussion

[29] As noted earlier, *Brown* and *Dunn* are decisions of the Tribunal. We consider that in the present case, we should be slow to disregard them, as they consider the relevant issues in particular context of the Act. The present case is an appeal brought under the provisions of the Act, which expressly allows for appeals against decisions of CACs. This is not the case in the judgments cited for the Authority. *Cooke* and *Osborne* were cases of judicial review under the Judicature Amendment Act 1972. We consider that the jurisdiction of the Tribunal on appeal should not be circumscribed by judgments from a different statutory context.

[30] In this respect, we refer to the Tribunal's comments in *Dunn* (in the particular context of an appeal against a CAC's decision not to lay a charge against a licensee):[11]

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9 *Cooke v Valuers Registration Board* [2014] NZHC 323, at [11] and [17].

10 For example, *Hallett v Attorney-General (No 2)* [1989] 2 NZLR 96 and *Polynesian Spa Ltd v Osborne & OSH* HC Rotorua CIV 2003-463-521, 22 December 2004, and the cases referred to therein.

11 *Dunn*, above n 5, at [13].

> Some of the [considerations relevant to prosecutorial functions] do not apply to a civil disciplinary matter under the [Act]. The civil nature of these disciplinary proceedings is an important factor in analysing the role of the Tribunal in considering an appeal under s 111 from a decision not to prosecute. …

[31] We accept Mr Brittain's submission[12] that the Tribunal's jurisdiction to examine the form of a charge is supported by s 110(4) of the Act; that is, that the only possible avenue for examining a decision to lay a lesser charge is by way of an appeal. We also accept his submission[13] that if such a decision cannot be examined by the Tribunal on appeal, that would result in the CAC having an unfettered discretion as to the charge laid, which would be contrary to the scheme of the Act's provisions as to appeals.

[32] Accordingly, we accept that the Tribunal on appeal has jurisdiction to examine decisions of CACs relating to the form of a charge against a licensee. We accept that the jurisdiction should be exercised sparingly, but the Tribunal may remit a matter to the CAC for reconsideration, in appropriate cases.

The Committee's decision in this case

[33] As this is an appeal against the exercise of a discretionary power, Maketu must satisfy the Tribunal that the Committee made an error of law or principle, took account of irrelevant considerations or failed to take account of relevant considerations, or was plainly wrong.[14]

[34] Before setting out the parties' submissions, it is helpful to return to the High Court judgment.[15] Maketu sued Mr Robb and Wrightsons on two causes of action. First, it claimed that Mr Robb and Wrightsons had breached s 9 of the Fair Trading Act 1986 by engaging in misleading and deceptive conduct. Maketu also pleaded a second, alternative cause of action against Wrightsons for breach of a fiduciary duty.

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12 See [24], above.
13 See [25], above.
14 See *Kacem v Bashir*, above n 5.
15 *Maketu Estates Ltd v Robb*, above n 1.

[35] The Judge held that Mr Robb was liable to Maketu on the first cause of action, by choosing not to tell Mr Lemon about the agreement in principle entered into by Maketu and Mr Jones, and made a substantial award of damages in favour of Maketu.[16] His Honour also held that Mr Robb had breached his duty of loyalty as Maketu's agent, by way of a "subconscious bias towards Mr Jones that materially affected his judgment over the significance of Mr Lemon's interest."[17]

[36] It is clear from the above paragraph that the focus of the High Court hearing was on Mr Robb's conduct in respect of Mr Lemon, rather than his conduct in respect of Maketu. However, both counsel made submissions concerning the following paragraph, and we will refer to those submissions later:[18]

> I regret that I have to make this finding [of misleading and deceptive conduct] as Mr Robb is a man of good character, but I have reached the view that, on this occasion, he has committed a regrettable lapse of judgment. … Mr Robb had reached the erroneous view that [Maketu] was not interested in negotiating with Mr Lemon and thought that if he told Mr Lemon about the agreement in principle it might in some way cause difficulty with the deal with Mr Jones. Mr Robb may have genuinely believed that a sale to Mr Jones at $3.8 million was the best deal that could be achieved, but it was not. Mr Jones had been authorised by his partners to offer up to $4 million at the initial meeting with [Maketu]. If there was a competing offer, Mr Jones and his partners may well have offered more. Mr Lemon thought that a successful bidder at auction would have to pay up to $5 million for the orchard. He too was keen to make an offer before the auction. He was denied that opportunity by Mr Robb deliberately choosing to mislead him that the sale was all put on hold.

Submissions

[37] Mr Brittain contended that the Committee's decision to lay a charge of unsatisfactory conduct rather than misconduct was "plainly wrong". He submitted that there was no distinction between Mr Robb's conduct in respect of Mr Lemon and his conduct in respect of Maketu: Mr Robb lied to Mr Lemon (by not telling him of the agreement in principle with Mr Jones) and he lied to Maketu (by not disclosing Mr Lemon's confirmed interest in buying the property). He submitted that Mr Robb's lies to Mr Lemon were reflected in his non-disclosure of Mr Lemon's interest, and his lie to Maketu as to the existence of other potential buyers.

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16 At [59] and [60].
17 At [67].
18 At [60].

[38] Mr Brittain submitted that Mr Robb's failure to disclose Mr Lemon's interest was a deliberate act, as was his lie as to other potential buyers. Regarding the comments set out at [36] above, regarding Mr Robb's motives for his conduct, he submitted, first, that the High Court judgment is not binding on the Committee and the Tribunal,[19] secondly, that those comments were *obiter*, and thirdly that in any event, whatever Mr Robb's motives may have been, they were irrelevant to a decision whether to charge Mr Robb with unsatisfactory conduct or misconduct. The motives did not make the non-disclosure and lies any less deliberate.

[39] Mr Brittain further submitted that as a result of the non-disclosure and lies, the directors did not know of the likelihood of competing offers (despite their specific question as to whether there were other potential buyers), they were deprived of the opportunity to benefit from competing offers, and Maketu suffered substantial loss.

[40] Mr Brittain submitted that bearing in mind that Maketu was Mr Robb's client, the Committee was "plainly wrong" to cast his non-disclosure and lies to the directors as being at the lower end of offending against the Rules, and requiring a less serious charge than that laid in respect of Mr Lemon. He submitted that if Mr Robb's conduct was not considered sufficient to found a charge of misconduct, it was hard to see what might be.

[41] Mr Brittain accepted that as a matter of principle the Tribunal should be slow to interfere with the Committee's decision, but submitted that this is one of those rare cases where interference was justified.

[42] On behalf of the Authority, Ms Lawson-Bradshaw submitted that the Tribunal should be particularly cautious before interfering with the Committee's decision. She submitted that Mr Robb's conduct in respect of Maketu was on the cusp of the range between misconduct and unsatisfactory conduct, and that it was open to the Committee, and reasonable, for it to decide to lay the lesser charge.

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[19] Although, he submitted, the facts relied on for the disciplinary charges do not diverge from the findings of fact in the High Court.

[43] Ms Lawson-Bradshaw further submitted that while the High Court's findings were clear as to Mr Robb's conduct towards Mr Lemon, they were less clear in respect of Maketu. She submitted that as such, they did not support laying a charge of misconduct in relation to Maketu. She accepted that the High Court judgment is not binding on the Committee or the Tribunal, and that the Judge's comments as to Mr Robb's motives were *obiter*, but submitted that they were properly seen as helpful to the Committee's consideration of what was the appropriate charge to lay.

[44] Ms Lawson-Bradshaw submitted that in the present case, Mr Robb's admission of guilt to the first charge, and his indication that he would admit the second charge (of unsatisfactory conduct), means that he will face a penalty hearing in the Tribunal. She submitted that this is not a a case where Mr Robb will face no penalty if the second charge remains one of unsatisfactory conduct. She accepted that there is a difference between the first and second charges, but submitted that the Tribunal is likely to impose a concurrent penalty. She further submitted that as the two charges concern the same factual matrix, it is unlikely that the penalty would be different if it was in respect of two misconduct charges from that in respect of one misconduct charge and one unsatisfactory conduct charge.

[45] Finally, Ms Lawson-Bradshaw submitted that in the light of the High Court judgment, Mr Robb's admissions, and the desirability to avoid unnecessary costs, it was open to, and reasonable, for the Committee to lay the charges it did.

Discussion

[46] Turning, first, to the High Court judgment, we note that the Judge was not required to (and did not) consider Mr Robb's obligations under the Rules and, in particular, his specific obligations to his client, Maketu. The issue of whether Mr Robb had complied with his obligations under rr 6.1, 9.1, or 9.4 was not before the Court. It will, however, be the focus of a disciplinary hearing.

[47] We accept Mr Brittain's submission (which Ms Lawson-Bradshaw accepted) that the High Court judgment is not binding on the Committee or this Tribunal, and that the Judge's comments concerning Mr Robb were *obiter*. We also accept his

submission that the comments as to Mr Robb's possible motives are irrelevant to determining the appropriate charge to lay against him. However, the Judge did make specific findings which are relevant to a disciplinary charge, as set out at [35] above (that is, that Mr Robb had breached a duty of loyalty towards Maketu).

[48] Further, there is validity in Mr Brittain's submission that if Mr Robb's conduct towards Mr Lemon was regarded by the Committee as requiring a charge of misconduct, it must be at least arguable that his conduct towards his client should be regarded as being no less serious.

[49] The foundation for the charges must lie in the fact that Maketu was Mr Robb's client, and the events of 14 November. As set out in the narrative of facts (and the High Court judgment), there would appear to be little doubt that Mr Robb did not disclose to the directors that the call he received during the first meeting was from Mr Lemon, or that Mr Lemon had confirmed his interest in buying the property, and he responded to a specific question as to the existence of other buyers by saying that there were none. We accept Mr Brittain's submission that those circumstances must arguably provide the foundation for a charge of misconduct.

[50] We turn to Ms Lawson-Bradshaw's submission that Mr Robb's conduct should be characterised as being "on the cusp". While Ms Lawson-Bradshaw may be correct in that characterisation (and we make no comment in that respect), conduct "on the cusp" should be left for the Tribunal to determine: for a CAC to decide that finely balanced circumstances should result in an unsatisfactory conduct charge is to deprive the Tribunal of its proper role in considering whether particular conduct within the industry amounts to misconduct or unsatisfactory conduct.

[51] In such a situation a CAC should lay alternative charges, or allow the Tribunal the opportunity to exercise its power, under s 110(4) of the Act, to find unsatisfactory conduct rather than misconduct, if it is not satisfied as to misconduct, but is satisfied that the licensee has engaged in unsatisfactory conduct: that is, to "downgrade" the charge from misconduct to unsatisfactory conduct.

[52] We do not accept that in this case it is in the public interest for the second charge to be limited to one of unsatisfactory conduct. To the contrary, it is in the public interest for the Tribunal to be given a full opportunity to consider Mr Robb's conduct in the context of the obligations set out in the Rules. Finally, we reject Ms Lawson-Bradshaw's submission as to the likely penalty. It is not for the Tribunal, at this stage, to speculate as to the likely penalty. That is a matter for the Tribunal to consider if and when the matter is before it.

[53] We conclude that the Committee was "plainly wrong" to lay the second charge as one of unsatisfactory conduct, only.

Result

[54] We conclude:

[a] The Tribunal has jurisdiction to examine the Committee's decision as to the form of the charge insofar as it concerns Mr Robb's conduct towards Maketu;

[b] Having examined the Committee's decision, and the circumstance surrounding it, the matter must be remitted back to the Committee to reconsider the second charge.

[55] We so order. The matter is remitted back to the Committee for reconsideration of the second charge.

[56] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

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Hon P J Andrews
Chairperson

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Ms N Dangen
Member

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Ms C Sandelin
Member