BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 40

READT 001/17

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	TRUDY BOYCE and NICHOLAS BATES Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 408) First Respondent
AND	DONALD GREENFIELD and DAVID JOHNSTONE Second Respondents
Hearing:	13 June 2017, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr T Rea, on behalf of the Appellants Mr M Hodge, on behalf of the Authority Mr Greenfield and Mr Johnstone in person
Date of Decision:	22 June 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Boyce and Mr Bates are, respectively, a licensed salesperson and a licensed agent and branch manager of Barfoot & Thompson at Pukekohe ("the Agency"). They have appealed against the decision by Complaints Assessment Committee 408 ("the Committee"), dated 22 September 2016, in which the Committee found, pursuant to s 72(a) of the Real Estate Agents Act 2008 ("the Act"), that they had engaged in unsatisfactory conduct ("the substantive decision").[1] They have also appealed against the Committee's penalty decision, dated 13 December 2016 ("the penalty decision").[2]

[2] The Committee's decisions followed its investigation into a complaint made by Mr Greenfield and Mr Johnstone.[3] The essence of the complaint was that Ms Boyce and Mr Bates[4] had failed to disclose to potential purchasers issues raised by them relating to access to a property being marketed at Pukekohe, Auckland ("the property").

Factual background

[3] The property is a section of bare land of approximately 0.87 ha, created by the vendor's subdivision of a larger block of land. For the purposes of the appeal it is sufficient to note that the property was created as Lot 1 from parts of the former Lots 21 and 22 on the larger block. Ms Boyce was engaged by the vendor in April 2015 to market the property.

[4] The second respondents own a neighbouring property ("Lot 10"). In the early 1990's a right of way easement ("the right of way") was created over the second

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1 Complaint No C13552, re T Boyce and N Bates, Decision Finding Unsatisfactory Conduct, Complaints Assessment Committee 408, 22 September 2016.

2 Complaint No C13552, re T Boyce and N Bates, Decision on Orders, Complaints Assessment Committee 408, 13 December 2016.

3 Mr Greenfield and Mr Johnstone will be referred to collectively as "the second respondents", except where it is appropriate to refer to them individually.

4 Ms Boyce and Mr Bates will be referred to collectively as "the appellants", except where it is appropriate to refer to them individually.

respondents' land, to enable access to the former Lot 22. A further right of way was created over Lot 21, for access to Lot 22.

[5] When the property was marketed, Mr Greenfield advised Ms Boyce that the indicative boundary shown on the marketing photographs appeared to show that the property included that part of the second respondents' land over which the right of way had been granted, and that the advertising wrongly indicated a right of way over the second respondents' land. This advice was also contained in a letter from the second respondents' solicitor to Ms Boyce, dated 1 May. Ms Boyce corrected the marketing photographs. The property was taken off the market while resource consent was obtained and titles issued for the subdivision.

[6] In early November 2015, the second respondents applied to Land Information New Zealand ("LINZ") to extinguish the right of way easement, on the grounds that as a result of the creation of Lot 1 the right of way could not be used to access Lot 1 and was redundant. The application was rejected. In a letter setting out its reasons for rejecting the application ("the LINZ letter"), LINZ said:

> … In order for an easement to be considered redundant under section 70(2) of the Land Transfer Act 1952 it needs to be shown that the easement no longer benefits the dominant land (ie, Part Lot 22 …) You have indicated your neighbour is still wanting to use the easement and they have a right to do so to access that part of the the land … that was formerly Part Lot 22…, though not to access that part of their land that was formerly Lot 21. We are therefore not satisfied that the easement no longer benefits the dominant tenement and cannot regard the easement as redundant. …

[7] Mr Greenfield emailed a copy of the LINZ letter to Ms Boyce. He noted that LINZ had said that the right of way could not be used for access to that part of the property that was formerly Lot 21. He asked Ms Boyce to remove from the marketing material any reference to the property having a right of way over the second respondents' land, as it did not have such a right of way. Ms Boyce forwarded a copy of Mr Greenfield's email to the vendor.

[8] The vendor referred the LINZ letter to his surveyor. The surveyor's response included:

> … We believe that LINZ are 95% correct but they have missed a key point from the letter they have replied to [Mr Greenfield] with.

Having set out his reasons why he considered that the right of way gave access to the property, the surveyor went on to suggest a solution, which would restrict use of the right of way, in order to achieve a result which "should be the best outcome for all parties".

[9] The vendor also referred the letter to his solicitor, who responded:

> I have spoken to [the surveyor] about this. It appears your neighbour has no chance of LINZ agreeing to the removal of the right of way, and if they did accept you have the right to be heard anyway.
>
> [The surveyor] and I both feel that no further action needs to be taken, and that you simply ignore any approaches the neighbour may make to you about this.

[10] Mr Greenfield emailed Ms Boyce again on 5 December, noting that the marketing material still stated "This is the R.O.W to [the property]". He said that she had been told by the second respondents, and LINZ, that there was no access to the property by way of the right of way, as the only land that benefited from it was what remained of Lot 22. Ms Boyce responded that she had been asked to market the property, and any conflict over the right of way should be referred to the vendor. The vendor advised Mr Greenfield that Ms Boyce was marketing the property and would be accessing it using the right of way.

[11] The same day, Mr Greenfield forwarded a copy of his email to Mr Bates, Ms Boyce's manager. He said that Ms Boyce was "continually" insisting that a right of way easement over the second respondents' land could be used to access the property, notwithstanding the LINZ letter "confirming that there is no r.o.w. access to [the property]". Mr Greenfield asked Mr Bates to contact him as the property was "being advertised as having a r.o.w to it when clearly it does not". Mr Greenfield emailed Mr Bates again a week later. Other than to ask him to forward a copy of the LINZ letter, Mr Bates did not respond to Mr Greenfield.

[12] Information as to the dispute as to the right of way was not included in the Agency's listing material. Nor was there any mention of it in the material available to potential purchasers through the Agency's "MyInfo" system. The property was

sold by another salesperson at the Agency, Mr Moore. Mr Moore was not aware of the second respondents' communications concerning the right of way, as the appellants did not tell him about them. The purchaser learned about the second respondents' contention that there was no right of way giving access to the property, when informed by them.

The substantive decision

[13] The second respondents' complaint named only Ms Boyce and Mr Moore. The Committee decided to inquire into it and, as it considered that the complaint raised concerns about supervision, decided to inquire also into the conduct of Mr Bates.[5]

[14] The Committee decided to take no further action on the complaint against Mr Moore. It accepted that Mr Moore had no knowledge of the dispute over the right of way, and that no disciplinary issues had been identified regarding him. It considered that Mr Moore had "been let down by [the appellants] in their decision not to inform him of the dispute. This has placed him in a situation that should not have arisen…".[6]

[15] Regarding the appellants, the Committee concluded that there should have been general disclosure of the dispute, and that there were ongoing consequences to the purchaser from the lack of disclosure. The Committee referred to the Tribunal's statement in its decision in *Wright v Complaints Assessment Committee 10056* that the emphasis in r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") is that licensees must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property.[7] We set out the following reasoning from the Committee's decision:

> 3.3 The Committee agreed that knowing of the dispute between the vendors and the [second respondents], [the appellants] were obligated to disclose this information to [Mr Moore] (and any other licensees marketing the property). [Ms Boyce] made the comment to [the Authority's investigator] that if she had placed reference to this dispute on the listing it would have "scared off" any

5 Pursuant to s 78(b) of the Act.
6 Substantive decision, at para 2.5.
7 *Wright v Complaints Assessment Committee 10056* [2011] NZREADT 21, at [41].

potential purchasers. This indicates the reason why the information was not made available, but also highlights the significance of the information to any prospective purchaser, and therefore the importance of disclosure. [Ms Boyce relied on the correspondence from the vendor's solicitor that she should ignore the [second respondents'] claims and ignore any further advances from them.

3.4 [Mr Bates] also advocated this approach after discussions with [Ms Boyce], [the second respondents][8] and after viewing correspondence from the vendor's solicitor. [Mr Bates] says the tone of the [second respondents'] correspondence was bullish and threatening and it was clear to him this was a longstanding dispute between the parties. [Mr Bates] decided it would be best if this was dealt with by the parties' solicitors.

…

3.6 [The appellants] made, in the Committee's opinion, a very poor decision to not disclose the dispute to [Mr Moore] or anyone else who might have been affected by the dispute. They both say they were satisfied after receiving advice from the vendor's experts that there was no problem with the easement. By not disclosing, [they] effectively allowed the vendor to pass his problem with the [second respondents] on to an unsuspecting purchaser, without that purchaser having the opportunity to obtain his own expert advice on the matter and to decide if he wished to become part of this ongoing dispute.

3.7 [Mr Moore] was caught up in this as, with no knowledge of the dispute, he was unable to give his client the purchaser, the information he was entitled to. It goes without saying, once a Licensee is aware of a problem, they are duty bound to disclose this, even if it is likely due to that disclosure they will have difficulty completing a sale.

3.8 The Committee considered if a reasonable person would expect the issue with the [second respondents] and the easement would simply disappear following a sale. Having seen the extent of the communications from the [second respondents], whether what they believed about the easement and the ROW access was correct or incorrect, it would be difficult to assume this situation would simply go away.

3.9 The investigator spoke with the purchaser of the Property, who confirmed that he had no knowledge of the ongoing dispute until one month after settlement when he visited the section with his wife and young son. [Mr Johnstone] approached him and advised him of the dispute and that if he used the driveway he would be trespassing. The purchaser was very shocked to receive this information. The purchaser called [Mr Moore], who directed him to speak with a manager at the Agency. The purchaser had sought advice from a lawyer prior to signing the Sale and Purchase agreement but without knowledge of the dispute over the easement ROW, he could not have known to instruct his lawyer to provide specific advice with regards to this issue.

3.10 If the purchaser had been given this opportunity he may well have completed the purchase confident in his ability to access his section properly, or he may have chosen not to become a party to this ongoing dispute. The purchaser has since sought advice on the matter and even though it is likely that he can use the ROW for access, this has affected him starting to build a house on the section as he does not know how the dispute will affect or impact

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[8] There is no mention (in either the second respondents' statements to the Authority's investigator, or Mr Bates' response to the complaint) that Mr Bates had any discussion with either of the second respondents.

> on his there and he still does not know what the final outcome of the dispute will be. This is very unfortunate for the purchaser who cannot simply sell the section to avoid the property as he is now in the same position as the vendor, in that potential purchasers will need to know of the issue until there is a definitive outcome to the dispute.
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> 3.11 [The appellants], by their conduct, have ignored the rights of others involved in this transaction, relying solely on what they were told by the vendor and his experts. Their lack of disclosure has allowed an innocent consumer to become part of the ongoing problems with the property. Both licensees were aware, when making their decision to not disclose the dispute that it had not been settled finally to the satisfaction of all parties and therefore would continue to impact on all involved. This conduct meets the threshold for a finding of Unsatisfactory Conduct and breaches Rule 5.1, 6.2 and 6.4.

The appeal against the substantive decision

Submisions

[16] There was no challenge to the fact that the second respondents disputed that access was available to the property by way of a right of way over their land. The parties' submissions focussed on whether the appellants were obliged under the Rules to disclose the fact that there was a dispute as to access.

[17] Mr Rea submitted for the appellants that they were required to, and did, act in accordance with the vendor's lawful instructions, and in reliance on the advice of the surveyor and the vendor's solicitor. He submitted that not to do so would have been in breach of the terms of the listing agreement, and their duty under r 9.1 to act in the vendor's best interests and in accordance with his instructions.

[18] He further submitted that the Committee should have, but had not, considered r 10.7 (as to the disclosure of defects). He submitted that the appellants had complied with their obligations under r 10.7, pursuant to r 10.7(a), by receiving confirmation from the vendor, supported by the advice from the surveyor and solicitor, that there was access to the property by a right of way easement over the second respondents' land.

[19] Mr Rea submitted that the Committee was wrong to find that rr 6.2 and/or 6.4 could require disclosure of the dispute to potential purchasers. He drew a distinction between r 10.7 and rr 6.2 and 6.4 by reference to r 10.8, which provides that a

licensee must not continue to act for a client who directs that information of the type referred to in r 10.7 be withheld. He submitted that the fact that rr 6.2 and 6.4 were not "backed up" by a similar provision showed a conceptual difference in their application.

[20] Mr Rea then submitted that in finding that the appellants were required by rr 6.2 and 6.4 to disclose the dispute, the Committee had failed to consider, or give adequate weight to, their duties to the vendor under the listing agreement and r 9.1, and gave too much weight to fairness to potential purchasers. He submitted that the interests of licensees' clients (vendors) and customers (potential purchasers) must be balanced, and that compliance with the specific provisions of r 10.7 should make the balance fall on the side of the vendor.

[21] Finally, Mr Rea submitted that the second respondents' allegations that there was no right of way giving access to the property "substantially lacked credibility", and had caused "only a relatively insignificant inconvenience to the purchaser in facing the meritless allegations of the [second respondents], until he was correctly advised by his solicitor that the allegations were unfounded".[9] In all the circumstances, in the light of the vendor's instructions and the advice the vendor had received, he submitted that the appellants had acted reasonably in not disclosing the dispute. He submitted that there could be no proper basis for a finding of unsatisfactory conduct.

[22] The second respondents submitted that there is no right of way allowing access to the property over their land, and submitted that the appellants had failed to comply with their duty of disclose that to potential purchasers. They submitted that the Committee had made the correct findings.

[23] Mr Hodge submitted for the Authority that the Committee's finding of breaches of r 5.1, 6.2, and 6.4 was justified on the evidence. He submitted that r 10.7 does not apply in this case, as it deals with disclosure of defects in land, not with

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[9] This submission is not in accord with the the Committee's record (at paras 3.9 and 3.10 of the substantive decision) of the purchaser's statements to the Authority's investigator, made at the time of its decision, some 18 months after settlement of the purchase. Those paragraphs are set out at [15], above.

disputes as to whether there is such a defect (being, in this case, a lack of access to the property).

[24] He submitted that even if the appellants had complied with 10.7 (pursuant to r 10.7 (a) by receiving confirmation from the vendor, supported by the advice from the surveyor and solicitor), they were well aware that it was keenly contested that there was no access to the property. On the evidence it was, or should have been, obvious to the appellants that there was a significant dispute, which was likely to be ongoing, and the Committee was right to say that whether or not the second respondents were correct on the issue of access, the appellants could not assume that the situation would simply go away.

[25] Mr Hodge accepted that there needs to be rigour applied as to what must be disclosed, and that duties to licensees' vendor clients must be considered along with duties of good faith and fairness to potential purchasers. However, he submitted that (in contrast to the position in earlier years) the Act and Rules now recognise that while licensees have duties to their vendor clients, they also deal in a significant way with, and have obligations to, potential purchasers. He accepted that it can be difficult for licensees to balance their respective obligations, but it is a key part of the obligations imposed by the Act and Rules.

[26] He submitted that the fact that a neighbour disputes a right to use his land to access a property being marketed is a clear case where fairness to the parties requires disclosure. This is particularly so where there is, as here, a significant and ongoing dispute. He further submitted that the dispute in this case was not just personal as between the vendor and the second respondents, but went with the land, and would significantly affect the purchaser. Thus, if disclosure were not given, the problem was visited on the purchaser to resolve.

[27] Mr Hodge submitted that if it is accepted that the dispute should have been disclosed pursuant to r 6.4, that obligation cannot be "trumped" by the vendor's wish that it be withheld. If vendor instructs a licensee not to disclose a matter that should pursuant to the Rules be disclosed, then that is not a "lawful instruction". He submitted that in those circumstances the licensee should explain the obligation

under r 6.4 to the vendor, and if the vendor maintains the instructions, the licensee is obliged to decline to act further for client.

[28] In any event, he submitted that in this case there is no evidence of an instruction from the vendor not to disclose the fact that access was disputed, and there is no evidence in the emails that Ms Boyce had a discussion with the vendor as to disclosing fact of the dispute, or that she was instructed not to disclose it. The evidence discloses only that she was told to continue marketing the property.

[29] Mr Hodge submitted that the appellants' submission that the second respondents' allegations "lacked credible support", and the matter of access to the property was therefore a "purported dispute" which did not have to be disclosed, is irrelevant. This was because the second respondents genuinely believed that a purchaser could not gain access to the the property over their land, and continued to assert that position. This indicated that a purchaser would be engaged in an ongoing dispute. Thus, the effect of the dispute not being disclosed was that the vendor was able to pass on the ongoing dispute for the purchaser to deal with.

[30] He submitted that whether a dispute should be disclosed depends on the circumstances in the particular case. In this case, Mr Hodge submitted, the appellants did not address whether to disclose the dispute, and only addressed whether the advertised right of way was valid. He submitted that this was not sufficient to comply with their obligations.

[31] Rather than being concerned only as to whether a potential purchaser would be "scared off", he suggested that it was open to the appellants to engage in a dialogue with potential purchasers: the appellants could have said that the issue of access had been raised and (with the vendor's agreement) disclosed detailed advice obtained by vendor that the dispute was unfounded, and recommended potential purchasers obtain their own advice. Alternatively, he suggested that the appellants could have asked the vendor to see if the issue can be resolved before the property was marketed.

Discussion

[32] We are not persuaded that the Committee was wrong, in any respect, in the reasoning (set out at [15], above], which led to its findings of unsatisfactory conduct against both Ms Boyce and Mr Bates.

[33] It is useful to refer to the purposes of the Act, as set out in s 3:

> **3 Purpose of Act**
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> (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate agency and to promote public confidence in the performance of real estate agency work.
>
> (2) The Act achieves its purpose by–
>
> (a) regulating agents, branch managers, and salespersons:
>
> (b) raising industry standards:
>
> (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[34] The focus on consumers is evident. While the Rules set out obligations to vendor clients, they also set out obligations to purchaser customers. Rules 5.1, 6.2, and 6.4 provide:

> Rule 5.1: A licensee must exercise skill, care, competence, and diligence at all times when carrying out agency work.
>
> Rule 6.2: A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
>
> Rule 6.4: A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[35] In respect of duties owed specifically to vendor clients, rr 6.1 and 9.1 provide:

> 6.1: A licensee must comply with fiduciary obligations to the licensee's client.
>
> 9.1: A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

[36] Licensees' duties under rr 6.1 and 9.1 are core duties; so, too, are their duties under rr 6.2 and 6.4. If those obligations have to be balanced, licensees must recognise and address that balance. It cannot be assumed that obligations to vendor clients will prevail.

[37] As noted earlier, the Committee referred to the Tribunal's decision in *Wright v Complaints Assessment Committee 10056.*[10] The paragraph quoted by the Committee is, in full:

> [41] The emphasis in Rule 6.4 and [10.7][11] is on the conduct of the licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent. We also agree with submissions made by Counsel that, for example, suggesting a building report should be obtained cannot avoid liability under [Rule] 6.4 or [10.7]. However, each case depends on the factual circumstances and the relationship between agent and purchaser.

[38] The Tribunal's comment that "suggesting a building report should be obtained cannot avoid liability" can be applied to the appellants' conclusion in this case that the dispute raised by the second respondents was a "purported dispute", which lacked credible support. The Tribunal rightly acknowledged that each case depends on its own factual circumstances.

[39] We accept Mr Hodge's submission that this is not a r 10.7 case of an alleged failure to disclose a "hidden defect" (such as the risk of weathertightness issues). This case can be likened to one where a licensee is aware of a dispute as to whether there are weathertightness issues. Given its importance, the existence of that dispute should be disclosed to potential purchasers.

[40] We also accept Mr Hodge's submission that there has to be some rigour as to the circumstances in which disclosure is required, and that licensees may be required to balance obligations owed to vendors and potential purchasers. This may be difficult, but that is what is required by the Act and Rules. There is no "bright line" between when disclosure is and is not required, and each case must be determined on its own facts and circumstances. For this reason, we decline Mr Rea's invitation to the Tribunal to provide guidance as to when information should or should not be disclosed.

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10 Above, n 6.

11 The Tribunal referred to r 6.5 in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, which is in almost identical terms to r 10.7 in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

[41] The issue in this case is not whether there is a valid easement allowing access to the property, and we make no comment on that point. The issue is whether the appellants should have disclosed to potential purchasers the fact that there was a dispute as to the easement.

[42] Both of the appellants were aware that there was a "long-standing" dispute over access to the property. That dispute did not stop when the sale was settled. In this case, the significance of the dispute, and the fact that it was going to be passed on to the purchaser to resolve, was clearly a circumstance pointing to a need for disclosure in order to meet the obligation to act in good faith and in fairness to all parties to the transaction. For this reason, wherever the line between disclosure and non-disclosure is to be drawn, this case falls well within the "obligation to disclose" side.

[43] We are not persuaded that the Committee was wrong to find both Ms Boyce and Mr Bates guilty of unsatisfactory conduct. The appellants were rightly found to have breached r 6.2, by failing to act in good faith and deal fairly with all parties engaged in the transaction, and to have breached r 6.4, by withholding information that should in fairness have been provided to the purchaser. The Committee's finding of a breach of r 5.1 does not, in our view, add anything to the finding of unsatisfactory conduct.

The appeal against the penalty decision

[44] The Committee assessed the appellants' conduct as being in the mid-range, noting that the purchaser had been left in a vulnerable position in which he "will likely have to fight for his rights to build on the property in other arenas."[12] It took into account the appellants' efforts to understand the problem. The Committee noted a submission that disclosure would have resulted in an inability to sell the property until the dispute was resolved, but said that the appellants owed duties to both vendor and purchasers.

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12 Penalty decision, at para 3.3.

[45] The Committee considered that it was appropriate to censure the appellants due to their lack of insight into the effects of the non-disclosure on others. Each of the appellants was ordered to pay a fine of $4,000. In ordering the fine of $4,000, the Committee recorded that it had "stepped back from imposing a higher fine of $5,000 each due to the effort made by [the appellants] to understand the problem".[13]

[46] Mr Rea submitted that if we did not uphold the appellants' appeal against the substantive decision, the Committee's assessment of their conduct as being in the "mid-range" of unsatisfactory conduct was plainly wrong, and it was appropriate that no penalty orders should be made. Mr Hodge submitted that the penalty orders should be upheld.

[47] It is necessary to consider the culpability of each of the appellants separately. Ms Boyce was the first to be contacted by Mr Greenfield. In response, she made some changes to the advertising material (as to the indicative boundary line), and she told the vendor about Mr Greenfield's contentions. When the vendor came back with instructions to continue marketing the property, she referred the matter to her manager, Mr Bates.

[48] Ms Boyce must bear some responsibility, because of the importance of the issue, and the fact that the issue was going to be passed on to the eventual purchaser. It was not for her to dismiss the second respondents' contentions as substantially lacking credibility and meritless. To say that disclosure was not required because it would "scare off" potential purchasers is entirely inconsistent with the purposes of the Act, and provisions of the Rules. Ms Boyce's statement to the investigator can be contrasted with Mr Moore's statement that if he had known of the dispute he would have informed the purchaser. However, her culpability is less than that of Mr Bates.

[49] Mr Bates, as manager, must bear the prime responsibility. Ms Boyce went to him after she had instructions to continue marketing the property. In a statement to the Authority's investigator, Mr Bates said his understanding of the "ROW access issue" at the time of the sale of the property was that it was long-standing and that

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[13] At para 3.4.

the second respondents had their own interpretation and understanding of the right of way.

[50] Mr Bates should therefore have recognised the significance of the dispute for any potential purchasers, in particular that if the dispute were not resolved before settlement, it would have to be dealt with by the eventual purchaser. Mr Bates should have advised both Ms Boyce and the vendor of the need to disclose the fact of the dispute to potential purchasers.

[51] It was not enough for Mr Bates to advise Ms Boyce to tell the second respondents to communicate directly with the vendor on the matter of the right of way, because if they could not reach an agreement, the issue would have to be resolved by the purchaser. Nor, for the same reason, was it enough for him to consider that a sensible approach to reach a satisfactory outcome would be for the solicitors for the second respondents and the vendor to talk directly with one another.

[52] Further, Mr Bates should also have ensured that information as to the dispute was included in the Agency's listing material, and on the Agency's "MyInfo" system, and he should have directly alerted other licensees involved in marketing the property. His reference to Mr Moore's having been supervised by the Agency's Sales Manager does not absolve him from culpability, given that neither Mr Moore nor his supervising agent had any knowledge of the dispute.

[53] Having reviewed all the circumstances of this case, we are not persuaded that the Committee was wrong to characterise the appellants' conduct as mid-range. Nor are we persuaded that we should interfere with the Committee's assessment of the appropriate fine to be imposed on Mr Bates. The fine of $4,000 was within the range on the appropriate penalty for mid-range unsatisfactory conduct. However, we have concluded that the Committee should have recognised Ms Boyce's lesser culpability, in mitigation of the penalty imposed on her. In Ms Boyce's case, a fine of $2,000 was appropriate.

Outcome

[54] Each of the appellants' appeals against the substantive finding of unsatisfactory conduct is dismissed.

[55] Ms Boyce's appeal against the penalty decision is allowed, to the extent only that the fine ordered to be paid by her is reduced to $2,000.

[56] Mr Bates's appeal against the penalty decision is dismissed.

[57] The fines are to be paid to the Authority within 20 working days of the date of this decision.

[58] The order for censure in respect of each of the appellants remains.

[59] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member