

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 52**

**READT 041/17**

IN THE MATTER OF	An appeal under section 111 of the Act
BETWEEN	RUNFANG LI Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC ) First Respondent
AND	HUA HUANG, Second Respondent
AND	KYUNG SUN CHAE, Third Respondent
AND	EMMA DONKIN Fourth Respondent
AND	BARFOOT & THOMPSON LTD (MAIRANGI BAY) Fifth Respondent
Hearing:	2 August 2018, at Auckland
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr Nathan Tetzlaff for the appellant Ms Stephanie Earl for the first respondent Ms Kim Burhart for the second to fifth respondents
Date of Decision:	19 September 2018

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**DECISION OF THE TRIBUNAL**

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## **Background**

### *Complaint to the Complaints Assessment Committee*

[1] A complaint was made by the appellant, Mrs Li, to the Complaints Assessment Committee (the Committee) against the licensees, Mr Huang and Ms Chae, in respect of their conduct toward Mrs Li leading up to her purchase of the property situated at 38B Rothesay Bay Road, Rothesay Bay, Auckland (“the property”). Mr Huang and Ms Chae are respectively the second and third respondent in this proceeding.

[2] Among other things, the grounds of the complaint were that:

- (a) Mr Huang failed to insert a “subject to building inspection report” clause into the sale and purchase agreement for the property (“the Agreement”);
- (b) Mr Huang misrepresented the Agreement, causing Mrs Li to believe that it was a non-binding expression of interest;
- (c) Mr Huang engaged a solicitor to act on Mrs Li’s behalf without her knowledge or consent; and
- (d) Ms Chae failed to adequately supervise Mr Huang.

[3] In addition, the Committee decided to inquire into the actions of the licensees Emma Donkin and Barfoot & Thompson Limited, trading as Barfoot & Thompson Mairangi Bay, in respect of the purchase. The latter two licensees are respectively the fourth and fifth respondent in this proceeding.

[4] The Committee made a determination to take no further action.<sup>1</sup> In particular, it decided that on the balance of probabilities the bulk of the evidence established that the respondents had not breached their obligations to Mrs Li.

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<sup>1</sup> *Complaint No C18135* [2017] NZREAA 139 at paragraph 2.7.

[5] A central part of the decision of the Committee in deciding to take no further action on the complaint was their conclusion that the evidence of Mr Huang and Ms Chae was to be preferred to the evidence of Mrs Li. The Committee was of the view that the licensees had made Mrs Li fully aware of the import of each clause of the Agreement and the fact that it was an unconditional offer which, if accepted, would be binding upon her.<sup>2</sup>

[6] As part of its findings, the Committee considered that the evidence established that an email exchange with Mrs Li demonstrated that she actually had been provided with an electronic copy of an “information pack” explaining the provisions of Agreement. She was provided with this information on 22 November 2016, before the meeting took place at which she executed the Agreement. The Committee said that it was not in a position to resolve any conflict in the evidence of Mrs Li on the one hand, and Mr Huang and Ms Chae on the other, concerning the dispute as to whether the Mrs Li had been provided with an information pack. They justified that conclusion on the basis of the email records. The Committee also expressed a preference for the evidence of Mr Huang and Ms Chae concerning the duration of the meeting. While they did not state any particular grounds for having such a preference, the Committee accepted that the meeting took some four hours, which in turn suggested that the Agreement was traversed in some detail with Mrs Li. Moreover, Mrs Li initialled each clause of the Agreement and the Committee said that:<sup>3</sup>

In so initialling, she did not indicate then the omission of a building inspection clause. The committee therefore accepts, on the balance of probabilities, that the Complainant indicated to [the agents] that she understood what she was signing (even if it transpired subsequently, by her failure to settle the transaction, that she did not so understand). The Committee also accepts that both [the licensees] recommended to the complainant that she seek independent legal advice but that she elected to sign an unconditional agreement after both types of agreement were thoroughly explained to her.

[7] The Committee said that it was not able to resolve the conflict of evidence between Mrs Li and Mr Huang and Ms Chae about who contacted the lawyer and gave instructions. The Committee recommended that in future, when a client sought a recommendation for a lawyer, Mr Huang should always give the names of three different legal advisers for the client to choose from.

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<sup>2</sup> At paragraph 3.2.

<sup>3</sup> At paragraph 3.7(b).

[8] The Committee said that it was satisfied that Mr Huang did not know anything about the immigration or residency status of Mrs Li and made no threats to her.

*Appeal to this Tribunal*

[9] On 20 November 2017, Mrs Li filed this appeal. The grounds of Mrs Li's appeal are that the Committee erred in determining that it was reasonable to prefer the evidence of the respondents over her evidence and that the Committee also erred by making determinations that were unsupported by, and contrary to, the evidence before it.

[10] The appeal in this case concerns the alleged failure by Mr Huang, a licensed real estate agent, to insert a "subject to building inspection report" clause into the Agreement. In short, Mrs Li, alleges that Mr Huang breached the obligations that he owed to her as a purchaser under the Agreement. She alleges that:

- (a) she instructed Mr Huang that a "subject to building inspection report" clause should be inserted into the Agreement;
- (b) that Mr Huang failed to explain the Agreement to her and the implications of making an offer without conditions;
- (c) Mr Huang told her that if she did not complete the transaction for the purchase of the property her application for New Zealand residency could be jeopardised.

[11] The central event relating to the complaint which Mrs Li makes on appeal is a meeting that took place on 22 November 2016 at which the licensees, Mr Huang and Ms Chae, presented Mrs Li as a buyer with an unconditional agreement to purchase a house property. The meeting took place at the residence of Mrs Li. Mrs Li asserts that when going through the Agreement with the second and third respondent, she did not understand what she was being told because she does not speak English. She said that Mr Huang was the son of her previous landlord.<sup>4</sup> He was therefore someone who she knew could speak English and assist by explaining the provisions of the Agreement to her.

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<sup>4</sup> At paragraph 1.5(b).

[12] Mr Huang, although licensed under the Act, had only recently commenced working as a licensee. The particular licensee who was the selling agent was Ms Chae. The second respondent's role in the events giving rise to the complaint on appeal was therefore as a support person, rather than as a representative of the vendor. It is accepted, though, that because he was a licensee he was bound by the Act and the regulatory regime established under it.

[13] Mrs Li agrees that she signed the Agreement which bound her unconditionally to purchase the property.

[14] The position which Mr Huang takes is that he was a Mandarin speaker and that the meeting at which the Agreement was entered into was a lengthy one of approximately four hours during which each provision of the Agreement was gone through, and in the course of which there was a detailed explanation of the effect of the Agreement and its individual provisions. He also maintains that Mrs Li had sufficient English to enable her to understand the Agreement. He further points to the fact that the information pack explaining the various provisions of the Agreement was provided to Mrs Li prior to the meeting taking place. It is interpolated that the information pack's contents were not subject to detailed discussion in the submissions of the parties. No criticism is intended of any party concerning that matter. It is assumed, though, that the information pack gave a basic explanation about matters such as the desirability of taking legal advice and the fact that an unconditional agreement once signed would oblige the parties to provide performance, which exactly reflected the Agreement's terms from which the signing parties could not expect to be excused.

[15] Mrs Li says that her native language is Mandarin and that she has little understanding of the English language. It is therefore implicit in the complaint on appeal that Mrs Li entered into the Agreement when she had an inadequate understanding of what the Agreement provided for. That lack of understanding was allegedly caused or contributed to by the second respondent, as the agent, not making appropriate arrangements for discussions about the Agreement to be explained to Mrs Li in her native tongue.

[16] Apart from the second respondent, there were other people involved in the events leading up to the signing of the Agreement who were also parties to the complaint on appeal. The agent who had responsibility for supervising Mr Huang was Ms Chae. She was also present at the key meeting at which the Agreement was entered into.

[17] There is a further link between the actions of the second and third respondents. Mrs Li alleges that Mr Huang, in effect, sought to excuse his involvement in the breach of licensees' standards which occurred in this case on the basis that the second respondent told her that the reasons why he acted as he did on the purchase was because he was acting under instructions from the third respondent.

[18] Both of the licensees disagree with the allegations made against them.

[19] The factual position asserted by Ms Chae is substantially the same as that which Mr Huang puts forward. She agreed that she and Mr Huang met Mrs Li at Mrs Li's residence. She says that the pros and cons of submitting a conditional offer for the property were discussed at this meeting. This discussion included the possibility of making the Agreement subject to a building inspection report. Ms Chae said that the meeting took place for a period of approximately four hours. She said that the Mr Huang, who was fluent in Mandarin, explained the provisions of the Agreement to Mrs Li. She said that Mrs Li also used a mobile dictionary to enable her to understand the English terms which were used in the document submitted to her for her signature.

### **Principles**

[20] We agree with counsel for the Authority, Mr Simpson, that the Tribunal is required to take the following principles into account:

- (a) The standard of proof is "on the balance of probabilities" which is applied flexibly, recognising that the strength of the evidence required will differ depending on the nature of the case. Stronger evidence will be required to prove more serious allegations.<sup>5</sup>

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<sup>5</sup> *Z v Dental Complaints Assessments Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [102].

- (b) The burden of proof is on the appellant. This means the appellant must prove that her version of events was more likely to have occurred than not.<sup>6</sup> The Tribunal will consider the nature of the evidence provided and the credibility of any persons involved. Where there are two competing accounts and an absence of supporting evidence, the Tribunal may conclude that the appellant's version of events has not been proved on the balance of probabilities. If the Tribunal reaches that conclusion, the appeal will be dismissed.
- (c) Appeals from Committee decisions to take no further action under s 89(2)(c) of the Act normally proceed on general appeal principles.<sup>7</sup>

### **Did the Licensees Fail to Include a “Subject to Building Inspection Report” Clause in the Agreement?**

[21] A central issue in this case is whether the licensees failed to include a “subject to building inspection report” clause in the Agreement despite instructions to do so. This issue involves consideration of several subsidiary points, including:

- (a) Did Mr Huang and Ms Chae tell Mrs Li that the Agreement which she was to sign included a “subject to building inspection report” clause discussed at the meeting?
- (b) Did Mr Huang and Ms Chae tell Mrs Li that the Agreement was unconditional in effect and that she would be bound by it if she signed it?
- (c) If Mr Huang and Ms Chae did not take either of those steps, would they be in breach of their duties as licensees?

*The meeting at which the Agreement was signed*

[22] The fundamental dispute between the appellant and respondents concerns whether, at the meeting which the Agreement was signed, Mr Huang and Ms Chae misled the Mrs Li as to

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<sup>6</sup> *Hodgson v Complaints Assessment Committee* [2011] NZREADT 3.

<sup>7</sup> *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, (2016) 18 NZCPR 23 at [112]. See also *Guo v Real Estate Agents Authority* [2015] NZREADT 35 at [24].

what the terms of the Agreement were and the effect of the Agreement as to whether it was immediately binding upon her.

[23] The question of the adequacy of the explanation which Mr Huang and Ms Chae provided is tied up with the question of the level of facility that Mrs Li had in the English language.

[24] We accept that the licensees in this case were required to explain some of the matters that were contentious in this case such as whether the Agreement was unconditional, whether the Agreement should have been made subject to the purchaser obtaining a building inspection report, the purchase price, deposit and possession date of the property.

[25] The contention of Mrs Li is that she does not speak English well and that she was heavily dependent upon Mr Huang and Ms Chae to explain the Agreement to her. She contends that because they did not do so, she was misled as to her legal position. She mistakenly understood, as a result, that the agreement she was signing was subject to a building inspection report and she did not in any case appreciate that on signing the Agreement she would become legally bound by it (apparently whether it was unconditional or not).

[26] Because no record was kept of what was said at the meeting, the Tribunal must attempt to decide these issues on the basis of circumstantial evidence. What inferences do the facts give rise to?

[27] The key evidence which Mrs Li puts forward is her own assessment of her level of ability in the English language. There is a dispute between the parties on that issue. Mrs Li also relies upon circumstantial factors as tending to prove her case. Some of these will be mentioned in the course of this decision. The key circumstantial factor which Mrs Li points to is the duration of the meeting which took place on 22 November 2016 at which the Agreement was signed. The contention of Mrs Li is that the meeting was too short in duration for Mr Huang and Ms Chae to have provided her with the necessary explanations and understanding of the Agreement which she was to sign.

[28] Mrs Li also refers to an email she sent to the Mr Huang two days after the meeting, which she considers is consistent with her contention that she requested that Mr Huang and Ms Chae include a “subject to building inspection report” clause in the Agreement. In the email exchange



there is a third piece of evidence which Mrs Li relies on — an apparent acceptance by Mr Huang of responsibility for Mrs Li’s alleged misunderstanding about the effect of the document which she had signed.

*The duration of the meeting*

[29] The relevance of the duration of the meeting is that if it was between licensees dealing with a person who had little understanding of English, then it might be supposed that the process of explaining the Agreement to him or her might be a lengthy one. Meeting with a person who had little understanding of English might impose greater time requirements than meeting a person who was able to read the English text without the need for interpretation, and who did not require a great deal of assistance in understanding the English text.

[30] Mrs Li claimed that the first meeting took place from approximately 11 am until 12 pm.

[31] Mr Huang has referred to the timing of the first meeting as commencing at around 11 am and finishing at around 12.30 pm.

[32] Ms Chae’s version of events is consistent with that of Mr Huang. Mr Huang ran through the Agreement again before Ms Li made her final offer at around 3 pm.

[33] It is implicit in the Committee’s decision that because adequate time was provided for the meeting, it was likely that there had been a sufficient explanation of the terms of the Agreement. This is supported by the statements which the Committee made in its decision that it was not in a position to resolve any conflict on the evidence between Mrs Li on the one hand, and Mr Huang on the other:<sup>8</sup>

The Committee ... notes simply that the process took four hours which suggests the agreement was traversed in some detail, and the complainant initialled each clause of the agreement. In so initialling, she did not indicate then the omission of a building inspection clause.

[34] However, we accept that the actual duration of the meeting is one of a number of matters that need to be considered in coming to a view on the merits of this appeal.

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<sup>8</sup> *Complaint No C18135*, above n 1, at paragraph 3.7(b).

[35] An additional issue that should be briefly mentioned concerns the contention by Mrs Li, which Mr Tetzlaff put forward, that if we concluded that she was correct in her evidence about the estimate of the duration of the meeting, then the differences between the evidence of the competing sides was such that an adverse inference could be drawn as to the truthfulness of the licensees when they gave their evidence about how long the meeting took.

[36] In its discussion of this issue, the Committee refers to “the process” taking four hours. In our view, the phrase which the Committee used reflected acceptance on their part that the parties started their discussions about the Agreement at approximately 11 am and, with or without pauses in between, concluded that meeting at approximately 3 pm when the Agreement was signed.

[37] We note that the submission on behalf of the Authority by Mr Simpson correctly summarises matters:

6.12 However, it is submitted that any ambiguity does not affect the Committee’s conclusion on this issue. The respondents have explained that the next steps after the meeting did not take place until the afternoon of 22 November 2016. As the meeting commenced at around 11am, this suggests the meeting lasted at least one hour. That does not, of itself, suggest there was insufficient time to properly explain the agreement, particularly as the agreement has been initialled in the usual manner. It remains open to find that the appellant indicated she understood the agreement. Accordingly, any allegation that the agreement was not properly explained is not established on the balance of probabilities.

[38] The approach which underlies that submission is that it does not really matter exactly how long the meeting took provided there was adequate time for the Agreement to be properly explained to Mrs Li.

[39] We are content to assume that the meeting lasted at least one hour. It could have been for a longer period. However, the more important point which we discuss next is the one that Mr Simpson notes, whether the time available was sufficient for a proper explanation of the Agreement.

*Was the meeting of sufficient duration for discussion of the necessary matters?*

[40] What amounts to an adequate explanation of an agreement that a customer is proposing to enter into must start with a consideration of what the role of the licensee is when carrying

out such an explanation. There was no dispute on the part of Mr Huang and Ms Chae that they did have an obligation to provide an explanation of the Agreement to Mrs Li.

[41] It cannot be suggested that an obligation on the part of the licensee includes a requirement to go through in detail technical provisions of the standard form agreement for sale and purchase.<sup>9</sup> The requirement, in our view, must be no more than to give a reasonable explanation, which would not require the agent to attempt to provide an analysis of what might be termed the “technical provisions” of the agreement. For example, possession and settlement provisions or <sup>10</sup> risk and insurance provisions.<sup>11</sup>

[42] We consider that the key issue is not the exact duration of the meeting. The question is whether the licensees’ conduct meets that the requirements of the Real Estate Agents Act (Professional Conduct and Client Care Rules (the Rules), including rr 9.1 (a licensee must act in the best interest of the client), 9.4 (a licensee must not mislead customers as to the price expectations of the client) and 9.8 (a licensee must not take advantage of a client or customer’s inability to understand relevant documents where such an inability is reasonably apparent).

[43] If a realistic approach is taken to the extent of the explanation that Mr Huang and Ms Chae were required to provide, it would be our view that, even if the meeting took an hour or thereabouts, there was adequate time for the central issues to be discussed. What is a reasonable period will also be influenced by questions such as whether a usual number of special or “one-off” conditions are present the contract. Some or all of those conditions may require specific explanation, and therefore may enlarge the amount of time required.

[44] In making our assessment of this matter, we have not overlooked the fact that some additional time would be required on account of the fact that the purchaser required assistance with interpretation of the Agreement. Where, as was the case here, the buyer does not speak or read English as a first language, not only must there be facilities present to ensure that a proper translation of the Agreement is given to the buyer, the process of translation, and any necessary interpretation of remarks made that are not in the buyer’s native tongue, will have to be allowed for.

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<sup>9</sup> In this case, the ninth edition of the standard REINZ/ADLS agreement.

<sup>10</sup> Clause 3.0 of the Agreement.

<sup>11</sup> Clause 5.0 of the Agreement.

[45] Plainly, to take an illustrative example, if Mr Huang and Ms Chae had allowed no more than 10 minutes to explain the contract to Mrs Li, then an issue would arise because that would be insufficient time to provide a proper explanation.

[46] However, we are not satisfied that the question of the duration of the meeting in this case has such an effect. We are of the view that the time set aside to go through the Agreement, even allowing for interpretation of the relevant provisions, is not unexceptionable or to be remarked upon. We are not persuaded that the time allotted to the task was too little for the range of tasks that the licensees were required to perform.

[47] Given that the parties spent at least an hour together and that one of them was conversant with both the English and Mandarin languages, we consider that it can be assumed that the means were present to enable Mrs Li to obtain a reasonably accurate understanding of the key points of the Agreement. This would include an understanding of whether the Agreement was unconditional so that by signing it Mrs Li would become immediately bound by it.

[48] Further, while Mrs Li may have been at a disadvantage as to use of the English language, she was not apparently under any other disadvantage and should have been able to understand any reasonably comprehensive explanation of the main points of the Agreement which were offered to her.

[49] If that view is correct, the enquiry that we are required to make is not assisted by the contention that the Agreement is an 11-page document and the licensee would be reasonably required to explain it during the time it takes to go through each page of the document. In our view, any suggestion that the licensee had an obligation to undertake an explanation of each and every provision of the Agreement would be mistaken.

[50] Conversely, the licensee would be required to explain some of the matters that were contentious in this case such as whether the contract is unconditional, whether it should be made subject to the purchaser obtaining a building inspection report, the purchase price, deposit and possession date.

*Did the Mrs Li mistakenly consider that the document she was signing was non-binding?*

[51] Mrs Li contended that she understood that the Agreement that she signed was not of a binding nature. That at least was the submission made on her behalf by Mr Tetzlaff. The first point is that it does not appear to be a contention that is based upon any evidence which Mrs Li put forward.

[52] In any event, her account is otherwise inconsistent with this argument. Mrs Li said that she required a “subject to building inspection report” condition to be inserted into the contract. Such a condition, if not satisfied, would enable her to escape what would otherwise be a binding contract. If the document she was signing was not contractually binding in the first place, then it is difficult to see why she would need such a condition inserted into the contract to protect her position. Further, we consider there is force in the submission that Ms Burkhardt has made on behalf of the respondents:

40. Mrs Li knew the agreement was binding. The submission that Mrs Li thought the agreement was a non-binding letter of offer is implausible. The agreement is clearly marked as such and Mrs Li had a degree of ability to read English. Most importantly, Mrs Li would not have agreed to pay the deposit if she had not considered the agreement binding.

[53] The claim that a person in Mrs Li’s position did not understand what the contract was (and that is the effect of her counsel’s submission) is not one that can be accepted without some explanation. Any person living in New Zealand in 2016 who engaged in the business of buying and selling properties would be unlikely to have failed to appreciate the binding nature of agreements.

[54] No supporting grounds were put forward to show how Mrs Li came to be in this exceptional position. It may be surmised that it is part of her case that her contention is supported by the fact that she allegedly had little understanding of English. Had such a point been explicitly put forward, we would have rejected it as a sufficient ground to conclude that she did not know that she was signing a binding document and, therefore, the licensees must have been at fault for not telling her this was the case.

[55] It is erroneous, in our judgement, to assume that a person who does not have English as a first language will, for that reason, not understand the concept of binding contractual arrangements.

[56] This point is not a realistic one and it is rejected.

*What is likely to have been discussed at the meeting?*

[57] Apart from the time point, there are some other aspects in the context of the case which assist the Tribunal in coming to a view about whether Mrs Li has been able to establish her complaint on appeal. While no record was kept of the meeting between Mrs Li and the licensees, it is possible for the Tribunal to draw some inferences from the circumstances of the meeting which will assist in resolving the appeal.

[58] The evidence of Mr Huang and Ms Chae is to the effect that there was a discussion at the original meeting about including a clause which made the Agreement subject to the purchaser obtaining a satisfactory building inspection report. Both of those respondents say that the pros and cons of inserting such a provision were discussed with Mrs Li.

[59] Mrs Li says that she specifically asked for a “subject to building inspection report” clause to be inserted in the Agreement. That is apparent from the email which she sent two days after the meeting. The agreement which she signed did not contain such a provision. She signed each of the pages of the Agreement purportedly adopting its provisions. It is implicit in her case that she thought that the Agreement contained such a clause. She did not know that from her own reading, she claims, because of her lack of facility in the English language.

[60] Because she was dependent upon an explanation being given to her by Mr Huang, we assume that her case is that Mr Huang failed to state whether a “subject to building inspection report” clause had actually been included in the Agreement. The fact that she signed an agreement which did not contain such a clause can be explained; first, on the basis that she did not in fact stipulate for such a clause to be included, and second, the possibility that the “subject to building inspection report” clause, having been omitted by mistake, was not picked up by her in the explanation of the Agreement. Presumably, Mrs Li explains that omission on the basis that not enough time was allowed for an explanation of the terms of the Agreement — an

explanation which we have rejected. There would have been sufficient time for Mr Huang and Ms Chae to explain to Mrs Li the essential features of the Agreement.

[61] The property was already subject to a conditional agreement which included a “cash out” clause. We understand that the effect of such a clause was that on the making of a further and unconditional offer, the vendor would be entitled to shorten the time within which the first offer would keep the contract live on an unconditional basis. It was the view of Mr Huang and Ms Chae that an unconditional offer would increase Mrs Li’s chances of acquiring the property.

[62] The case for Mr Huang and Ms Chae is that the “subject to building inspection report” clause was left out because those were the express instructions of Mrs Li. If this contention is wrong, it is necessary to look for some other explanation as to why a clause of that kind did not find its way into the Agreement.

[63] The only explanations available would seem, first, to be that Mr Huang and Ms Chae deliberately refrained from pointing out the difference between the two types of contract because if they did explain to Mrs Li that she would be immediately bound by an unconditional contract, this might have dissuaded her from proceeding. That is to say that they refrained from discussing the matter out of self-interest. Second, Mr Huang and Ms Chae may have been so incompetent or neglectful that the need to explain the difference between the two kinds of contract did not occur to them as being necessary.

[64] It is unlikely that Mr Huang and Ms Chae failed to understand the intentions of Mrs Li with the result that those two parties were at cross-purposes about what Mrs Li wanted to include in the Agreement. There is no dispute on the part of Mrs Li that Mr Huang was able to communicate adequately with her in her native tongue.

[65] One further observation made is that it is not entirely clear how the process of drawing up the Agreement came into effect. It would seem that the Agreement was prepared in handwriting at the meeting between the Mrs Li and Mr Huang and Ms Chae. What seems to have been likely is that, regardless of whose handwriting was actually inserted into the Agreement, it was a cooperative effort between the two licensees. It would appear that the primary discussion would have been between Mrs Li and Mr Huang because he was apparently to fill the role of translator and interpreter at the meeting. Presumably, this was because of his

ability to understand both English and Mandarin and the fact that his ability to cross between the two languages was greater than that of Ms Chae. Ms Chae expressly stated to the investigator that it was Mr Huang who did the translating.<sup>12</sup> While that is likely to be the case, we proceed on the assumption that both licensees were involved in the discussion about what was to go into the contract and the drawing up of the contract.

[66] We also consider it a reasonable assumption that both licensees paid attention to what actually went into the contract and both would have been aware of the fact that the document signed did not contain a “subject to building inspection report” condition.

[67] It is possible that Ms Chae was not able to follow the discussions between Mr Huang and Mrs Li in Mandarin and that she was dependent upon Mr Huang relaying to her what the instructions of Mrs Li were.

[68] If there had been a discussion concerning the possible inclusion of a “subject to building inspection report” condition at the meeting, it is possible that it was left out deliberately or as a result of oversight. We will discuss these possibilities next.

*Did the licensees deliberately omit the “subject to building inspection report” clause?*

[69] Mrs Li asserts the possibility that the licensees, or one of them, deliberately set about drafting an unconditional agreement knowing that that was not her wish.

[70] Such an assertion would be a serious matter. Conduct of this kind could well amount to misconduct pursuant to s 73 of the Act. Plainly, the Tribunal should make a finding to that effect if it were justified in doing so. In an often-quoted passage from his speech in *Re H (Minors) (Sexual Abuse: Standard of Proof)*, Lord Nicholls summarise the position in these terms:<sup>13</sup>

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the

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<sup>12</sup> BD 112

<sup>13</sup> *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1 at 17.



evidence that it did occur before, on the balance of probability, its occurrence will be established.

In another passage, his Lordship stated that this approach to applying the civil standard of proof:<sup>14</sup>

... provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.

[71] The most obvious explanation is that the licensees deliberately drafted an unconditional agreement because their chances of earning a commission would be greater with an unconditional agreement, as compared with one which contained a "subject to building inspection report" condition.

[72] We accept that it is possible that one or both of the licensees were motivated to ensure that the contract became unconditional as quickly as possible. It is also possible that two licensees who were involved in the same transaction could come to an agreement that they would mislead the client so that while she was actually signing an unconditional contract, she believed it was conditional. While those are possibilities, they are not conclusions that we would be prepared to entertain in the absence of convincing and persuasive evidence.

[73] It would seem to be the case, as well, that as part of such a deception, it would have been necessary when an explanation was given of the contract (presumably by Mr Huang who was the unofficial translator), to mislead Mrs Li by telling her that the Agreement did contain the required condition. Had the condition not been mentioned, it would seem likely that Mrs Li would have queried its absence.

[74] Whether deliberate misleading is actually the explanation in this case is a matter that we will defer until we have considered the other possibilities in the parts of this decision that follow.

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<sup>14</sup> At 17.

*Did the licensees forget to include a “subject to building inspection report” clause?*

[75] We next consider the possibility that Mrs Li told the licensees that she wanted a “subject to building inspection report” condition inserted into the contract but through oversight or confusion they failed to follow her instructions.

[76] It does not seem very likely that both of the licensees would have failed to appreciate the need to explain the difference between a conditional and unconditional contract, or the effect of the insertion into the contract of a “subject to building inspection report” clause. Nor does it seem likely that at least one of or other of them would have noted what the instructions of the Mrs Li were in that regard. Even if one had forgotten, it seems likely that the other would have remembered.

[77] The other possibility is that the error occurred in the drafting of the Agreement. If the Agreement was drafted by one of the agents, possibly Ms Chae, it does not appear to have been a collaborative undertaking. However, it is still likely that the other party would pay attention to what was inserted into the Agreement.

[78] While it is possible that both the licensees presented the Agreement knowing that Mrs Li would be signing it on the mistaken assumption that it included a “subject to building inspection report” clause, we regard that as not being likely.

[79] Even if the licensees had forgotten that the condition was to be included, when the Agreement was read back in translation to Mrs Li, there must have been a reasonable chance that she would have noticed that the condition was missing and pointed that out, thereby correcting the licensees’ mistake.

[80] Whether this is a fair and realistic explanation must be considered in light of the evidence and standard of proof which Mrs Li has to meet.

[81] The claim that the licensees forgot to include the clause means that they were negligent in a serious respect.

[82] That is to say, if it is implicit in Mrs Li's case that the condition was omitted despite express instructions on her part, some consideration has to be given to the degree of cogency of the evidence which would be necessary before that could be considered a reasonable possibility. There are some other aspects of the matter which we will consider before setting out our conclusions.

*Did Mrs Li sign the Agreement knowing that it did not contain a "subject to building inspection report" clause?*

[83] The remaining possibility is that Mrs Li came to sign an agreement which did not include the "subject building inspection report" clause because that was her choice.

[84] We consider that the overall tenor of the evidence shows that Mrs Li was, at least initially, very interested in acquiring the property at the price which she was prepared to offer. The property was subject to a price reduction and the evidence of Mr Huang is that Mrs Li was quite excited as a result. We understand that the evidence of Mr Huang was to the effect that Mrs Li said she might be able to acquire the property at a bargain price.

[85] If that is the case, it could explain what occurred on the basis that Mrs Li knew what she was doing and deliberately went ahead and signed a form of agreement that did not include a "subject to building inspection report" clause. She would not be the first buyer who subsequently regretted her choice.

*The information pack*

[86] A further point that was relied upon by the respondents was that Mrs Li had been provided with an information pack explaining the Agreement. It was said that she would therefore have understood the process she was embarking upon before she went to the meeting.<sup>15</sup> However, we agree with the point that Mr Tetzlaff made to the effect that the document was emailed to her shortly before she went to the meeting and there may not have been time to absorb its contents. As well, there is the further point that the guide was in English and so would have been of limited assistance to a person who could not read English.

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<sup>15</sup> The information pack was emailed to her in advance of the meeting.

*Significance of the fact that Mrs Li Initialled the agreement*

[87] Mrs Li initialled all the pages of the Agreement as well as the special conditions set out in the section headed “Further Terms of Sale”.<sup>16</sup> The fact that this had occurred was mentioned by the respondents in their submissions.

[88] The respondents correctly noted that where a party has adopted in writing the terms of a written document, an inference may arise that the signatory must have intended to adopt the contents of the document so signed. Any inference of this kind though is rather weak in this case where, on Mrs Li’s telling, she did not have her own independent understanding of the English text of the document and was intending to sign a document which had been described to her by Mr Huang and Ms Chae. If the document had not been correctly explained to her, then it can hardly be said that she unequivocally assented to be bound by provisions she did not know were included in it.

*The email that Mrs Li sent to Mr Huang after she had signed the agreement*

[89] The email exchange that occurred two days after the contract was entered into provides some support for the view that Mrs Li understood that she had signed a binding agreement. It is clear from the exchange that there was no attempt on the evidence to explain how she had come to that point of view by 24 November 2016, when two days earlier she signed the Agreement and said that she did not appreciate that she had entered into a binding agreement. It is noteworthy, in particular, that by the time she sent the email on 24 November 2016, Mrs Li was emphatic that she had not had legal advice about the effect of the contract.<sup>17</sup>

[90] Ms Burkhardt submitted that Mrs Li wanted to retrospectively include a “subject to building inspection” condition because she believed there was something wrong with the property.

[91] When she raised the point on 24 November 2016, Mrs Li said in her email that she was suspicious that there might be something wrong with the property and a “subject to building inspection” requirement would be a type of security:

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<sup>16</sup> BD 45.

<sup>17</sup> Submissions for appellant, para 51 and following.

... at the time I signed I wanted a house inspection. why isn't it in the contract? I think you should still try to think of a way to add the house inspection requirement in [to the contract], because I requested it at the time. I think it will be a type of security. Furthermore, the CV Price and the price you said at the beginning were not close. If the estimate of the house is the slow it makes me suspicious that there might be something wrong with it.

[92] In his response, Mr Huang replied in an apologetic manner:

Ma'am, I know what you're worried about is that there might be some problems with the house. But you can see that now the government department has inspection. Today the engineer also told you that there were no problems. Actually it was because I was not careful enough. Because once the contract has been signed by both parties, it cannot be altered. Ah, I've just followed my superiors mindlessly. So that's why I will find somebody to come and do the inspection today no matter what.

[93] However, Ms Burkhardt submitted that this did not amount to an admission of liability and pointed to the cultural expectation of deference to explain Mr Huang's response:

30. The Committee expressed concern over Mr Huang's "self-effacing and apologetic language" but they accepted his explanation. Mr Huang was a young Chinese man dealing with a much older Chinese woman. Accordingly, there was a strong cultural expectation of deference from Mr Huang towards Mrs Li. Mr Huang's apologies do not equate to an admission of liability.

[94] We consider that there is force in the submission which Ms Burkhardt made concerning the motives of Mrs Li for claiming after the event that she had required the insertion of a "subject to building inspection report" condition clause into the contract.

*Did a misunderstanding occur in circumstances where there was no fault on the part of the licensees?*

[95] The final possibility that we consider is that the licensees may not have appreciated that the Mrs Li misunderstood the position and mistakenly thought she knew that the Agreement she was signing was unconditional. If that misunderstanding arose notwithstanding reasonable attempts on the part of the licensees to explain the Agreement, and if the licensees were unaware of the misunderstanding, then they would not have breached the Rules. A simple misunderstanding does not mean that the licensee has infringed the Rules.

[96] For the reasons we set out in the next section, we do not consider that we need to examine this possibility further. Our conclusion is that Mrs Li did in fact correctly understand the position.

*Conclusions as to whether the licensees failed to insert a “subject to building inspection report” clause*

[97] We consider that there was sufficient time at the meeting for the parties to discuss the principal features of the Agreement and for the Agreement to be explained to Mrs Li with, to the extent necessary, translations and interpretations being provided by Mr Huang.

[98] The question of whether there should be a “subject to building inspection report” clause in the Agreement is likely to have been discussed. The email which Mrs Li sent two days after she had signed the Agreement indicates that she understood the significance of such a term and that she had asked for one to be included in the Agreement.

[99] Given Mrs Li’s wish that such a clause be inserted into the Agreement, we consider that she would have been vigilant to ensure that occurred.

[100] We consider that it is established that the fact that Mrs Li was aware of the possibility of inserting a “subject to building inspection report” provision into the contract indicates that she understood, in a general way, the protection that such a provision provided her, and that neither she nor the purchaser would be immediately subject to an unconditional contract.

[101] It would seem to us unlikely that an alert buyer in the position of Mrs Li, who was paying attention to the discussion, could have overlooked asking what the advantages and disadvantages of making an offer in one form or another were. In the course of such a discussion, the fact that the purchaser would be immediately bound by the terms of an unconditional offer are likely to have been discussed. It is not disputed that there was already a conditional offer in place in respect property and that that was subject to a “cash out” escape clause which was available to the vendor. The claim by the licensees that they explained what Mrs Li would be required to offer in order to obtain certainty about acquiring the property, namely that an unconditional agreement would increase the chances of her doing so, seems plausible. Therefore, our conclusion is that there was a discussion about conditional versus unconditional agreements.

[102] Not only would we have expected Mrs Li to make enquiries of the licensees concerning the effect of conditional and unconditional agreements, but we also consider it unlikely that the two licensees would have failed to appreciate the importance of the distinction between the two types of agreement from the perspective of the buyer.

[103] It is difficult to accept that Mrs Li would have emerged from a meeting in which these concepts were discussed still ignorant of what the distinction was between conditional and unconditional contracts. We also consider it unlikely that she would have failed to pick up the omission from the contract of a “subject to building inspection report” clause, given her intention to include such a clause in the Agreement.

[104] We are not prepared to accept that either the Mr Huang or Ms Chae misled Mrs Li about the fact that the Agreement did not contain such a clause.

[105] We consider it likely that the reasons that Ms Burkhardt put forward in her submission are correct in that they draw attention to a linkage between the Ms Li’s view that there was something wrong with the property and her motivation to attempt to get out of the contract or be compensated for a bad bargain.

[106] While we accept that there was some force in the submission that Mr Tetzlaff made about the apparent apology contained in the email sent after the Agreement had been signed, we agree that the overall submissive tone of the email indicates that the primary motivation of Mr Huang at that stage was to attempt to maintain a good relationship with Mrs Li. That, and the possible cultural explanation which was adopted by the Committee, explains why Mr Huang sent the email. We do not accept that this feature of the evidence is sufficient to establish that Mr Huang and Ms Chae failed to follow the purchaser’s instruction that the Agreement was to be conditional.

[107] Finally, the approach that we have taken to this evidence is that there was adequate time for the licensees to explain the main features of the Agreement. We regard it as unlikely that they failed to insert a conditional clause notwithstanding instructions to that effect. We also view it as unlikely that when the Agreement was being read back to Mrs Li before execution she did not notice that the “subject to building inspection report” clause had been omitted or draw that omission to the attention of the licensees.

### **Did Mr Huang instruct a lawyer to act for Mrs Li without her authority?**

[108] Mrs Li contends that Mr Huang instructed Ms Liu to act for her without her knowledge or consent.

[109] Counsel for Mrs Li further submitted that the Committee's determination that it was unable to reconcile the evidence between Mrs Li and Mr Huang due to the absence of a signed letter of engagement was wrong. The basis of this submission was that using the absence of such a letter as evidence would undermine the Tribunal's role in detecting misconduct. Moreover, the description of events by the parties made it more likely than not that Mr Huang instructed Ms Liu without Mrs Li's consent.

[110] Counsel for Mr Huang submitted that Mr Huang spoke to Ms Liu with the phone on speaker in Mrs Li's presence. Since all parties were speaking in Mandarin and able to hear each other, counsel for Mr Huang deemed it improbable that Mrs Li did not ask Ms Liu directly about fees and engagement. Counsel for Mr Huang also considered it implausible that Ms Liu would think it was Mr Huang who was instructing her given she thanked him for his "referral" in her email. While Ms Liu acknowledged that she did not have an accurate recollection of the call, she did hear a lady speaking Chinese. Given it would have been difficult for Mr Huang to quote legal fees to Mrs Li without referring to Ms Liu and the fact that Mr Huang respected Mrs Li, counsel for Mr Huang argued that this meant Mr Huang would not have instructed Ms Liu without Mrs Li's approval.

[111] It is a fact that subsequently communications passed between Mr Huang and Ms Liu. Mr Huang sent the Agreement by email to Ms Liu. Ms Liu also sent communications concerning the subject matter of the contract back to Mr Huang, rather than directly to Mrs Li herself.

#### *Assessment*

[112] We agree that some criticism can be made of the reasoning which the Committee based its decision on. However, we do not agree that the decision was the wrong one in the circumstances. It is uncontested, it would appear, that Mrs Li was present when the phone calls were made from the offices of the respondents to Ms Liu. As well, the conversation was conducted on a speakerphone and the conversation was in Chinese.



[113] Ms Liu, who does not recall the conversation, confirms at least that there was a Chinese speaking woman present. This evidence corroborates the account of Mr Huang that Mrs Li was present when the conversation was taking place. Mrs Li does not apparently suggest it must have been some other Chinese speaking woman.

[114] It would seem to be unlikely that the nature of the conversation could have been misconstrued by Mrs Li. She knew that a lawyer was being called. Judging by the account that Mr Huang has given of the conversation, it is difficult to understand how someone listening to the conversation would have concluded that he was discussing legal representation either for himself or for another party who was not involved in the telephone conversation.

[115] Further, given that Ms Liu does not have a good recollection of the telephone call, no weight can be placed upon her account of matters.

[116] In our judgement, the decision which the Committee came to was the right one. The appeal is dismissed against that decision.

## **Result**

[117] The appeal against the determination of the Committee is dismissed.

[118] 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 2016.

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J Doogue  
Deputy Chair

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G Denley  
Member

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N Dangen  
Member