BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 55

READT 009/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ANN LAUREN STENHOUSE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First Respondent
AND	TREVOR MACKAY Second Respondent
Hearing:	24 August 2018, at Queenstown
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Ms Stenhouse Ms E Mok, on behalf of the Authority Mr Mackay's attendance excused; written submissions filed
Date of Decision:	5 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] On 26 September 2016, the Real Estate Agents Authority ("the Authority") received a complaint from Ms Stenhouse against Mr Mackay, regarding his conduct as listing and selling agent for a property at Wanaka ("the property"). The property was owned by a Trust, of which Ms Stenhouse and her former husband, Mr Nick Busse, together with one other person, were trustees. Following an inquiry, Complaints Assessment Committee 403 ("the Committee") issued a decision on 31 January 2018 in which it decided, pursuant to s 89(2)(c) of the Real Estate Agents Act 2008 ("the Act"), to take no further action regarding the complaint ("the Committee's decision").

[2] Ms Stenhouse has appealed against the Committee's decision.

Factual background

[3] Mr Mackay was engaged on 15 November 2014 to list the property for sale. During the sale process, Mr Mackay dealt with Ms Stenhouse, who was living at the property, and with Mr Busse, who was in Christchurch. Two offers were made on the property, the first in March 2015, and the second in May 2015. Ms Stenhouse's complaint was as to aspects of Mr Mackay's conduct in each transaction. All relevant events occurred between March and November 2015.

The first transaction

[4] A conditional offer was made on the property on 1 March. Negotiations followed as to the sale price, whether the sale and purchase agreement would contain a due diligence clause, the apportionment of values for the dwelling and curtilage "the apportionment clause"), and the period of a "cash-out clause", in respect of which Ms Stenhouse and Mr Busse wanted a 5-day period, and the prospective purchaser wanted a 10-day period ("the cash-out clause").

[5] In the course of the negotiations, Mr Mackay consulted the solicitor acting for the trustees in conveyancing matters (Mr Steven), concerning the apportionment and

cash-out clauses. Mr Steven subsequently wrote to Mr Busse and to Ms Macdonald, a solicitor instructed by Ms Stenhouse to act for her personally, referring to his discussions with Mr Mackay.

[6] The prospective purchaser did not proceed with the purchase of the property.

The second transaction

[7] A second offer was made on 12 May. The second sale and purchase agreement was confirmed, with settlement occurring on 16 November.

Summary of the complaint

[8] In respect of the first transaction, Ms Stenhouse's complaint was that Mr Mackay failed to act in her best interests by:

[a] the manner in which amendments were made to the sale and purchase agreement (in particular, by consulting Mr Steven without obtaining instructions from her or advising her), and by applying undue pressure on her to accept amendments; and

[b] attending at her workplace without prior agreement.

[9] In respect of the second transaction, Ms Stenhouse complained that Mr Mackay:

[a] did not include her in arrangements for the pre-settlement inspection;

[b] misled the purchasers regarding chattels included in the second sale agreement; and

[c] was patronising, failed to demonstrate honesty and integrity, and acted inappropriately.

Committee's decision

[10] With respect to Ms Stenhouse's complaint concerning the first transaction, the Committee accepted Mr Mackay's evidence that in consulting Mr Steven he was attempting to facilitate a sale, where the parties had differing preferences regarding the amended clauses.[1] It commented that in such a situation, a licensee has a duty to both parties, and is trying to find a solution acceptable to both parties. Further, it considered that Mr Mackay's consulting Mr Steven could be seen as prudent. The Committee found that there was no evidence that Mr Mackay had failed to adhere to "the Rules",[2] or that he had placed undue pressure on Ms Stenhouse.[3]

[11] Further, the Committee accepted Mr Mackay's evidence that he was not aware of there being any issue concerning his visits to Ms Stenhouse, and was not aware that he was not to visit her at her workplace, or that he was required to ring her first.[4] The Committee found that there was nothing to suggest that Mr Mackay's visits were unreasonable, excessive, or without grounds, and that his visits were those a reasonable and prudent licensee would carry out to ensure progress.[5]

[12] With respect to Ms Stenhouse's complaint as to Mr Mackay's conduct in the second transaction, the Committee accepted his evidence that he had forgotten that an appointment had been made for the pre-settlement inspection, and that he had then arranged for the inspection to proceed later that day.[6] The Committee did not accept Ms Stenhouse's evidence that Mr Mackay's omission caused her to suffer stress, but considered that any stress had resulted from Ms Stenhouse's having not met her obligation to leave the property in a reasonably tidy state, and to ensure that her chattels had been removed.[7]

[13] It also accepted Mr Mackay's evidence that his failure to advise Ms Stenhouse of the final inspection appointment was a genuine error. However, it concluded that

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1 Committee's decision, at paragraph 4.3.
2 This is a reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.
3 Committee's decision, at paragraph 4.5.
4 At paragraph 4.4.
5 At paragraph 4.6
6 At paragraph 4.7.
7 At paragraph 4.10.

in the circumstances of the case the error, while significant, was not sufficiently so for a finding of unsatisfactory conduct. In reaching this conclusion, the Committee took into account the "particular circumstance of the lengthy settlement period": that is, changes to the settlement date with varying correspondence on what the new date would be, and confusion over chattels and assets.[8]

[14] The Committee observed that in reaching this conclusion, it had taken into account that Mr Mackay and the purchasers had respected Ms Stenhouse's request to defer the inspection to later in the day. It recorded that its decision might have been different if Mr Mackay and the purchasers had insisted on carrying out an inspection in the morning.[9]

[15] Regarding Ms Stenhouse's complaint that Mr Mackay misled the purchasers as to chattels that were included in the sale, the Committee stated that there was a dispute between Ms Stenhouse and the purchasers as to whether a sink, office bench, and a bookshelf went with the property. The Committee found that the office bench and bookshelf were recorded in the listing agreement, and the second sale agreement, as being chattels excluded from the sale. The Committee found that the sink was neither excluded nor included in either agreement. Despite Ms Stenhouse's evidence that she advised Mr Mackay that the sink was to be excluded, the Committee found that it was more likely than not that the sink would have been recorded as excluded, if Ms Stenhouse had advised him to do so. It found that Mr Mackay did not mislead the purchasers about the sink.[10]

Appeal issues

[16] The following issues are to be determined by the Tribunal:

[a] whether the Committee was wrong to find, regarding the first transaction, that Mr Mackay did not fail to comply with his fiduciary duty to act in Ms Stenhouse's interests, in particular as to consulting Mr Steven, and his visits to her;

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8 At paragraph 4.11 – 4.13.
9 At paragraph 4.14.
10 At paragraphs 4.15 – 4.19.

[b] whether the Committee was wrong to find, regarding the second transaction, that a finding of unsatisfactory conduct should not be made regarding Mr Mackay's conduct of the pre-settlement inspection; and

[c] whether the Committee was wrong to find, regarding the second transaction, that Mr Mackay did not mislead the purchasers regarding the chattels which were included in the sale.

[17] Ms Stenhouse also contended that allegations in her complaint ("the further allegations"), while included in the report by the Authority's investigator, had not been addressed by the Committee. These were that Mr Mackay had made responses during the course of the investigation that were untrue, that Mr Mackay was patronising and had failed to demonstrate honesty and integrity, and that his actions were inappropriate and he would continue to behave in that manner.

Approach to the appeal

[18] In this case, after having carried out an investigation into Ms Stenhouse's complaint, the Committee made a determination (pursuant to s 89(2)(c) of the Act) to take no further action on it. On appeal, Ms Stenhouse, as appellant, must establish that the Committee's determination was wrong. The Tribunal will make its own assessment of the merits of the complaint and if it concludes that the Committee was wrong, then it must act on its own view.[11]

First issue: the complaint that Mr Mackay failed to act in Ms Stenhouse's best interests (first transaction)

[19] This issue focusses on Mr Mackay's having consulted Mr Steven, and Ms Stenhouse's complaint that Mr Mackay put undue pressure on her to accept the amended clauses and sign the first sale agreement.

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[11] See *Austin, Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103; [2008] 2 NZLR 141, at [3] and [5]. See also, for example, *Aldred v The Real Estate Agents Authority (CAC 413)* [2018] NZREADT 32.

Submissions

[20] Ms Stenhouse submitted, first, that the Committee was wrong to accept Mr Mackay's evidence that there were differences between her and Mr Busse's preferences, as there were no such differences: she and Mr Busse agreed on the amendments they wanted made. She also submitted that the Committee was wrong to accept Mr Mackay's statement that he had Mr Busse's consent to consult Mr Steven, and was therefore free to do so, and to find that Mr Mackay's consulting Mr Steven was "prudent".

[21] Ms Stenhouse referred to email correspondence involving herself, Mr Busse, Mr Mackay, Mr Steven and her personal solicitor, Ms Macdonald, between 25 and 27 March, in which the amendments to the apportionment and cash-out clauses were discussed. She submitted that these made it clear that there were no differences between herself and Mr Busse as to the amendments, and that her instructions were that any amendments were to be negotiated and agreed before the sale and purchase agreement was signed. She further submitted that it is clear that Mr Mackay did not seek, and did not have, authority from her to consult Mr Steven.

[22] Ms Stenhouse also submitted that Mr Mackay's conduct as outlined above, and in arriving unannounced at her workplace with a sale and purchase agreement and asking her to amend clauses and sign the agreement immediately, was bullying, and placed undue pressure on her. She submitted that the only explanation he gave her was that this was what the purchaser wanted.

[23] We have noted above that Mr Mackay was excused from attending the appeal hearing. We have taken the following summary of his position on the issues from his response to Ms Stenhouse's submissions on the appeal.

[24] Mr Mackay submitted that he had not bullied or placed undue pressure on Ms Stenhouse to change the cash-out clause, but had advised her and explained the reason why the purchaser wanted a ten-day period. He further submitted that Ms Stenhouse had received advice from an independent solicitor that a ten-day period was normal, and he referred to the final sale agreement which provided for a five-day period. Mr

Mackay also submitted that he had asked Ms Stenhouse for, and received, permission to consult Mr Steven. He referred to email correspondence in support of this submission.

[25] Mr Mackay further submitted that he always tried to work in the best interests of all his clients and customers, and had negotiated with the prospective purchasers to achieve the terms Ms Stenhouse and Mr Busse wanted.

[26] Ms Mok submitted that on the basis of Mr Mackay's evidence that there was disagreement between Ms Stenhouse and Mr Busse as to the amended clauses, he had involved Mr Steven in order to assist his clients, and had permission from Mr Busse to consult Mr Steven. She submitted that the Committee had not reached the wrong decision.

Discussion

(a) Relevant evidence

[27] We have referred above to email correspondence submitted by Ms Stenhouse in support of her contention that Mr Mackay consulted Mr Steven without her knowledge and consent. Not all of this correspondence was in the bundle of the documents that were before the Committee. It is not clear to us why this was, given that much of it was in email chains, parts of which were before the Committee, and the full chains would have been available to the Committee.

[28] It is appropriate for us to consider all of the relevant correspondence, which is set out below. We note that the first four entries were referred to by Mr Mackay as evidence of his having obtained Ms Stenhouse's consent to consult Mr Steven, and the remaining entries were referred to by Ms Stenhouse as evidence that Mr Mackay did not obtain such consent:

> **2 and 3 March**: Five emails between Mr Mackay and Ms Stenhouse, in which he responded to her questions concerning the sale and purchase agreement, as to payment of the deposit, solicitors approval, approval of the LIM and Code Compliance Certificate. In one email, Mr Mackay said: "I can check with Chris Steven to confirm, if that is OK with you?"

4 March: Two emails in which Ms Stenhouse asked further questions, to which Mr Mackay responded.

9 March: Two emails from Mr Mackay to Ms Stenhouse, attaching copies of (first) an offer from the prospective purchaser and (secondly) a "complete contract".

12 March: An email from Mr Busse to Ms Stenhouse, recording two changes that he would ask Mr Steven to make as part of his review, and asking her to let him know when Mr Mackay had the initialled contract, when he (Mr Busse) would forward it to Mr Steven.

25 March: An email from Mr Busse to Ms Stenhouse at 6.55 pm, asking her to email him clauses that she wanted included in the sale and purchase agreement, or to let him know when that would be available. Mr Busse said the he was "receiving numerous text and voice mails from Trevor Mackay".

26 March: A chain of emails:

> **7.17 am**: An email from Ms Stenhouse to Mr Busse, setting out amendments she wanted made to the apportionment and cash-out clauses in the sale and purchase agreement, before it was forwarded to the purchaser.
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> **9.47 am**: An email from Mr Steven to Ms Stenhouse, Mr Busse, and Ms Macdonald in which he said "I have just spoken to Trevor Mackay. I understand there is an offer on the table. It has been signed by the purchaser and Nick. Ann has requested two amendments." Mr Steven went on to say that "Trevor is keen to get the document signed and dated today. He has asked me whether the changes proposed by Ann can be made during the solicitor approval period." Mr Steven then set out his advice on that point.
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> **2.21 pm**: An email from Ms Macdonald to Mr Steven, recording Ms Stenhouse's instructions that amendments to the sale and purchase agreement needed to be "signed and initialled now and not during any solicitor approval period", and stating that there was no compelling reason why the amendments should be left to negotiation under the solicitor approval clause.
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> **3.11 pm**: An email from Mr Steven to Ms Macdonald, in which he recorded that he had "spoken with Trevor" who would "visit Ann this evening to get the changes made and initialled".
>
> **3.14 pm**: An email from Ms Macdonald to Mr Steven, suggesting that Mr Mackay call Ms Stenhouse, and not arrive unannounced.

27 March:

> **7.48 am** An email from Ms Stenhouse to Mr Mackay, attaching a copy of the sale and purchase agreement with the amendments she had requested, initialled by her. She also said that she did not know whether Mr Busse agreed with these, and she understood that he required a further change.
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> **8.10 am**: An email from Mr Mackay to Ms Stenhouse saying that he had received the agreement from Mr Busse, with identical amendments initialled by him, but needed her to initial them in the copy he had received from Mr Busse. He asked if he could meet her just after 10.00 that morning. (We note Ms Stenhouse's statement to the Tribunal that she did not receive this email.)

[29] On 31 March 2015, another solicitor was instructed to act for the Trust in conveyancing matters.

[30] We have concluded that the email exchanges referred to by Mr Mackay do not establish that he sought and obtained Ms Stenhouse's consent to his consulting Mr Steven nor, indeed, that of the third trustee. He made an offer to do so, and Ms Stenhouse did not accept or reject that offer. We find that the emails referred to by Ms Stenhouse establish that she did not give him authority to consult Mr Steven.

(b) Was Mr Mackay in breach of his obligations to Ms Stenhouse by consulting Mr Steven without her knowledge and consent?

[31] In circumstances such as those of the present case, where the property was owned by trustees of a trust and was being sold following the end of the relationship between two of the trustees, a licensee's fiduciary obligations under r 6.1 of the Rules are owed to all parties concerned. In order to comply with these obligations, a licensee must take care to ensure that he or she has instructions from all parties, or has express authority to act on the instructions of only one party, before taking a step such as consulting the parties' lawyer.[12]

[32] Mr Mackay knew that the property was owned by the Trust, that Mr Busse, Ms Stenhouse, and another person were trustees, and that Mr Steven was acting for the Trust: these matters were recorded in the listing agreement. Mr Mackay made much of what he described as "differing preferences" between Ms Stenhouse and Mr Busse, but those differences made it important for him to ensure that he had a direction from all trustees, or had express authority to act on the direction of only one trustee, before taking a step such as consulting the Trust's lawyer. He did not have a direction from all trustees to consult Mr Steven, and he had no basis on which he could have assumed that Mr Busse had authority from all three trustees to direct him to consult Mr Steven.

[33] Having reviewed the email evidence that was before the Committee, and the additional emails provided to the Tribunal, we are satisfied that the Committee was wrong to find that Mr Mackay complied with his obligations under the Rules, and that

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[12] See the Tribunal's discussion of this issue in *Mayer v Real Estate Agents Authority (CAC 304)* [2017] NZREADT 44.

he acted prudently, in consulting Mr Steven without Ms Stenhouse's knowledge and consent.

[34] We find that Mr Mackay failed to comply with his fiduciary obligations to her (in breach of r 6.1), and he failed to comply with his duty to act in good faith and deal fairly with all parties engaged in the transaction (in breach of r 6.2).

[35] Ms Stenhouse's appeal against the Committee's finding on this aspect of her complaint is allowed.

(c) Was Ms Stenhouse put under pressure to sign the sale and purchase agreement?

[36] It is evident from the email correspondence that Mr Mackay was (as Mr Steven put it) keen to get the agreement for sale and purchase signed. It is also evident from Ms Stenhouse's evidence to the Committee and her submissions to the Tribunal that she felt she was put under pressure to the extent of being bullied into signing it. However, we are not persuaded that the Committee was wrong to find that she was not bullied by Mr Mackay and that the pressure was not undue.

[37] Nor are we persuaded that Ms Stenhouse's complaint that Mr Mackay arrived at her workplace unannounced is justified. It is evident from the email sent at 8.10 am on 27 March, in which Mr Mackay suggested that he attend at 10.00 am, gave her notice of his visit. We note Ms Stenhouse's evidence that she did not receive the email, but that does not negate the fact that the email was sent. Ms Stenhouse's appeal against the Committee's findings on these aspects of her complaint is dismissed.

Second issue: the complaint that Mr Mackay's conduct in not involving her in arrangements for the pre-settlement inspection, and in not being present at the arranged time for the inspection, was unsatisfactory (second transaction).

[38] The Committee's decision was, in summary, that the purchasers arrived at the property for an arranged pre-settlement inspection at 9.00 am on settlement day, 16 November. The Committee accepted Mr Mackay's evidence that he had forgotten about it, but when reminded by the purchaser, immediately rang Ms Stenhouse to ask for her consent to the inspection. The Committee also accepted his evidence that he

could not get Ms Stenhouse's consent to an inspection that morning, so arranged for it to be delayed until later that afternoon.

[39] In reaching its decision that Mr Mackay's omission was not significant enough for a finding of unsatisfactory conduct, the Committee took into account the particular circumstances of the lengthy settlement period. As recorded earlier, the Committee observed that its decision may have been different if the purchasers had insisted on carrying out an inspection in the morning.

Submissions

[40] Ms Stenhouse accepted that Mr Mackay forgot the appointment for 9.00 am on settlement day. However, she submitted that the Committee did not consider her evidence, and statements made by the purchaser regarding the inspection appointment, and was wrong to consider Mr Mackay's conduct on the basis of his evidence, only. She submitted that the evidence established that the purchaser in fact inspected the property in the morning, with Mr Mackay present, and the inspection was not delayed until the afternoon.

[41] Ms Stenhouse also submitted that the Committee did not consider evidence establishing that Mr Mackay did not involve her in any of the arrangements for previous pre-settlement appointments.

[42] In his response to the complaint, Mr Mackay accepted that he had not consulted with Ms Stenhouse concerning the pre-settlement inspection on 16 November. He did not refer to any other appointments for the inspection.

[43] In his submissions relating to the appeal, Mr Mackay submitted that his failure to attend the pre-settlement appointment was a mistake, and he had no intent or motivation to exclude Ms Stenhouse. He submitted that such an intention was inconsistent with the fact that he rang her immediately when the purchaser contacted him, and asked her what would be a good time to return with the purchasers.

[44] Ms Mok submitted that, having accepted Mr Mackay's evidence, the Committee was not wrong in deciding to take no further action on Ms Stenhouse's complaint.

Discussion

(a) Relevant evidence

[45] Apart from the statements by Ms Stenhouse and Mr Mackay, the Committee had before it a copy of an email from the purchaser to Ms Stenhouse, dated 12 June 2016, in which he said:

> Regarding an appointment time for the 12th [November] I have no information for that date but from memory I don't think a time was made.
>
> I sent Trevor a text on the 3rd Nov to advise that the settlement had been extended till the 26th at your request but was later changed to the 16th which I advised him of on the 4th Nov.
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> We were trying to get an appointment to have a pre settlement inspection which should have been on the 11th but due to prior commitments we had asked him to arrange that inspection for Monday 9th.
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> Once the settlement day was confirmed for the 16th we made a pre settlement inspection for 9.00am on settlement day.
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> I remember being at the gate at 9.00 am waiting for Trevor and when he did not show I assumed he was already on site so I proceeded to the house.
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> When there was no sign of him at the house I phoned him and he apologised and I think his reason was he was still thinking of the 26th which I had originally advised was the new settlement date before being changed back to the 16th.
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> I can't remember how late he was but I think it was just over half an hour mainly because I had waited before calling.

[46] On 16 June 2016, the purchaser told Ms Stenhouse that he had sent Mr Mackay a text message on 31 October 2015:

> Hey Trevor. Just talking to Sharynne about a pre settlement inspection and the 11th is our daughter's 20th.
>
> Is there an acceptable option before that date perhaps the weekend before being the 8th or Monday the 9th.

Mr Mackay responded:

> Monday should be fine

The purchaser's response was:

> Awesome, We'll lock in Monday 9th. Cheers

[47] The Committee also had a copy of an email from the Trust's conveyancing solicitor (Mr King) sent at 11.36 am on 16 November:

> I had a call from the purchaser's lawyer noting that the property was in a bit of a state. They inspected this morning with the real estate agent and were a bit surprised by the sound of it.
>
> I think Ann is still there cleaning etc. The purchasers are going back at 2.30 pm to inspect again as there [are] pallets lying around outside and an old car etc. apparently the dishwasher still had dishes in it and many of the appliances couldn't be checked to make sure they were working.
>
> The purchasers will agree to complete settlement today but have proposed a retention of funds in either their or our trust account to be released when the pallets and car have been removed. The proposal is a $10k retention, which I think is probably too much.
>
> Can you let me know as soon as possible if a retention of funds is agreed until such time as the pallets/car have been removed and the purchasers can check the chattels properly. Maybe $5k would be more realistic?

[48] However, Mr King sent a further email at 4.12 pm that day, recording that "they settled in full so no issue in the end."

[49] We note Ms Stenhouse's statement to the investigator on 15 December 2016, that she was away getting rid of rubbish when the purchaser arrived at 9.00 am, and returned to find Mr Mackay and the purchaser there inspecting the property. Further, she said that when the buyer returned to the property at 2.30 pm, the property was "ready", and she had a brief chat to the buyer about items remaining in the property which she would remove later.

[50] The Committee's investigator spoke to the purchaser on 9 October 2017. Regarding the pre-settlement inspection, the investigator recorded:

> This date was arranged with the licensee to meet at 9am in the morning; purchaser thought it had been arranged. When they arrived on site the Vendor was still frantically trying to clear out the house. The cleaners had just arrived and the Vendor was not happy. We backed out from the property and contacted the Licensee. The pre-settlement inspection was deemed necessary given the presentation of the property during the marketing and sale period. They were seeking the property to be left in a clean and presentable state.

And:

> On the morning the Licensee was not present. He was contacted by phone and attended. The Vendor was not approachable and they returned later in the day to do the inspection. The Vendor had arranged commercial cleaners for the day of settlement (4 hours) which did not include carpet cleaning that had occurred

> beforehand. The purchasers had arranged their own cleaners (2 cleaners) for a further 4 hours. Whilst the Vendors cleaners did a good job there were areas that required cleaning, The Vendor was still removing items up to two weeks after settlement and gave up trying to catch a rooster.

(b) Arrangements for the pre-settlement inspection

[51] We note that the purchaser's email to Ms Stenhouse refers to a pre-settlement inspection "which should have been on the 11th" confirmed for Monday 9th". The emails do not support a claim that Mr Mackay was asked to arrange a pre-settlement inspection on 11 November. While that date was mentioned, there is no evidence of an appointment being agreed with the purchaser for that day.

[52] However, the purchaser stated that he asked Mr Mackay to arrange an inspection for 9 November, and the date was confirmed by email. Mr Mackay should have contacted Ms Stenhouse to arrange an appointment, if for no other reason than as a courtesy as she was living in the property, and to ensure that she had notice of the day and time at which the property was expected to be in a proper state for settlement. Ms Stenhouse said that he did not do so, and there was nothing before the Committee to suggest otherwise.

[53] Mr Mackay accepted that he did not include Ms Stenhouse in the arrangements for the pre-settlement inspection on 16 November. We find on the balance of probabilities that he also failed to do so in respect of an inspection appointment on 9 November.

[54] The Committee found that it was a "genuine error" on Mr Mackay's part not to advise Ms Stenhouse of the 16 November inspection, but not sufficient for a finding of unsatisfactory conduct. We find that Mr Mackay's failure to consult her or advise her of an appointment on two occasions is a breach of his obligations under rr 5.1 (to exercise skill, care, competence, and diligence), 6.2 (to act in good faith and deal fairly with all parties), and 9.3 (to communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest).

(c) Was there a pre-settlement inspection in the morning of 16 November?

[55] We turn to Mr Mackay's failure to attend at the property at the arranged time for the pre-settlement inspection. The Committee found that he had forgotten about the inspection, and this resulted in the purchaser turning up at the property unannounced expecting to inspect it. The Committee's finding that this did not justify a finding of unsatisfactory conduct was premised on the "particular circumstance of the lengthy settlement period" and its having accepted Mr Mackay's statement that he ensured that the purchaser did not inspect the property until the rescheduled appointment later in the day.

[56] Regarding the "lengthy settlement period", we note that the relevant sale and purchase agreement (dated 12 May) stated that settlement was to occur "six months following the date of this agreement or by mutual agreement": that is, on 12 November, unless the parties agreed otherwise. The "lengthy settlement period" was explained by the purchaser as being because he was going to be overseas.

[57] The settlement period should not have been taken into account when considering whether to make a finding of unsatisfactory conduct, as it was clear in the sale and purchase agreement that settlement would not occur until six months later. We also note that the material before the Committee discloses only two changes to the settlement date (to 26 November and then to 16 November), and those changes should not cause any undue confusion on the part of a licensee.

[58] It is demonstrated by the purchaser's advice to Ms Stenhouse, and the solicitor's correspondence set out earlier, that the purchaser inspected the property in the morning. The purchaser said that when Mr Mackay was not at the gate at 9.00 am he assumed that he was already on site and "proceeded to the house", and he waited for just over half an hour before calling Mr Mackay. Mr King's email sent at 11.36 am on 16 November states that the purchaser "inspected this morning with the real estate agent". The purchaser's concern led to contact with his solicitor, then an approach to Mr King. As these occurred before Mr King's email at 11.36 am, it is clear that an inspection did take place, with Mr Mackay, in the morning of 16 November. The Committee did not refer to this evidence.

[59] The Committee was wrong to accept Mr Mackay's statement that he arranged for the inspection to be delayed until later in the afternoon. While there was an inspection during the afternoon, there had already been an inspection with Mr Mackay during the morning. The evidence before the Committee establishes that the grounds on which it said it might have reached a different conclusion existed.

[60] Ms Stenhouse's appeal against this aspect of the Committee's decision is allowed. There was an inspection on the morning of settlement day. While there was also an inspection in the afternoon, it is not correct to say that there was no inspection in the morning.

(d) Did Mr Mackay's conduct cause Ms Stenhouse stress?

[61] The Committee rejected Ms Stenhouse's submission that Mr Mackay's failure to advise her of the inspection appointment caused her stress. The Committee's reason for this conclusion was that she failed to leave the property in a reasonably tidy state and to ensure that her chattels were removed from the property.

[62] The Committee did not refer to, and therefore gave no reason for rejecting, Ms Stenhouse's statement to the investigator on 15 December 2016 that she was away getting rid of rubbish when the purchaser arrived at 9.00 am, and returned to find Mr Mackay and the purchaser there inspecting the property. Nor did it refer to her further statement that when the buyer returned to the property at 2.30 pm, the property was "ready", and she had a brief chat to the buyer about items remaining in the property which she would remove later.

[63] A further reason for rejecting Ms Stenhouse's claim that the unannounced pre-settlement inspection caused her stress, was that as the purchaser in fact settled in full on settlement day, she had suffered no loss.

[64] The Committee rightly referred to Ms Stenhouse's obligation to leave the property in good order at settlement, but it must be said that Mr Mackay's failure to advise her that the inspection was to be at 9.00 am (rather than at some time later in the day) resulted in her being taken unawares when the purchaser arrived at that time.

There was no dispute that she had cleaners at the property at the time, so was taking steps to ensure that it was in good order. Those steps were interrupted by the arrival of the purchaser, and we accept that this would have caused Ms Stenhouse to feel under stress. However, we do not consider that any stress was "undue" or "unfair" such as to justify a finding that Mr Mackay was in breach of his obligation under r 9.2.

Third issue: the complaint that Mr Mackay misled the purchaser as to chattels included in the sale

[65] We have set out the evidence considered by the Committee, and its findings on this aspect of Ms Stenhouse's complaint, at paragraph [15], above. We note that in a statement to the investigator on 9 October 2017, the purchaser said that he had been disappointed to find that the sink had been removed, as he had asked Mr Mackay about it but he had not got back to him. However, he did not think this issue was significant enough to warrant a complaint.

[66] The Committee considered the relevant evidence, and there was no complaint from the purchaser. We are not persuaded that the Committee was wrong to reach the conclusion it did. Ms Stenhouse's appeal against this aspect of the Committee's decision is dismissed.

Ms Stenhouse's submission that the Committee did not address her further allegations

[67] Ms Stenhouse referred to a number of aspects of Mr Mackay's response to her complaint which she said were proven to be untrue. She provided the Tribunal with copies of Mr Mackay's response to her complaint and his timeline of events, annotated with her comments. In some instances (in particular, concerning his having consulted Mr Steven, and the pre-settlement inspection), we have made different findings from the Committee on the material before us. However, we do not consider there to be any grounds on which we could find that Mr Mackay failed to demonstrate honesty and integrity.

[68] Ms Stenhouse also contended that Mr Mackay had been patronising, in referring to an "obvious relationship breakdown". She said there were no relationship issues between herself and Mr Busse that affected the contract negotiations and, while they

might have slightly differing views, they always agreed on what they would move forward on. She said that Mr Mackay was never required to negotiate between them.

[69] The email exchanges provided to the Tribunal (including those set out above) do not give grounds for a conclusion that Ms Stenhouse and Mr Busse disagreed as to the terms of settlement of either sale to such an extent that it was a barrier to reaching agreement for a sale. Mr Mackay's communications do not demonstrate any particular attitude to the transactions, or the parties, other than a desire to see a sale agreement reached. Having considered the material before us, we are not satisfied that there was anything in Mr Mackay's attitude towards Ms Stenhouse that would justify disciplinary action.

Assessment

[70] We have found that:

[a] In consulting Mr Steven in the course of the first transaction without Ms Stenhouse's knowledge and consent, Mr Mackay failed to comply with his fiduciary duty to her, and failed to comply with his duty to act in good faith and deal fairly with all parties;

[b] Mr Mackay's failure to include Ms Stenhouse in the arrangements for, and advise her of, the pre-settlement inspection appointment in relation to the second transaction (which resulted in the purchaser having arrived unannounced for the inspection), constituted a failure to comply with his obligations to exercise skill, care, competence, and diligence, to act in good faith and deal fairly with all parties, and to communicate regularly and in a timely manner and keep her well informed of relevant matters.

[71] We find that Mr Mackay's conduct fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(a) of the Act), and was conduct that would reasonably be regarded by agents of good standing as being unacceptable (s 72(d) of the Act).

[72] Having made that finding, we take into account that Mr Mackay believed he was doing the right thing in agreeing to instruct the trust's lawyer, and that his failure to advise Ms Stenhouse of the pre-settlement inspection was a genuine error. We have concluded that there is no need to make any further order other than that Mr Mackay should make a formal apology to Ms Senhouse in respect of the two matters in which we have found him to be in breach of his obligations.

Orders

[73] We find that Mr Mackay engaged in unsatisfactory conduct. We order him to make a formal apology to Ms Stenhouse, in terms approved by the Authority.

[74] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Ms C Sandelin
Member

_____
Mr N O'Connor
Member