BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 58

READT 020/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008 (the Act)
BETWEEN	ELAINE LETHBRIDGE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First respondent
AND	COLIN FENTON Second respondent

READT 022/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008 (the Act)
BETWEEN	COLIN FENTON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 403) First respondent
AND	ELAINE LETHBRIDGE Second respondent
Hearing:	27 August 2018, at Auckland
Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Ms E Lethbridge Appellant Ms E Mok, on behalf of First Respondent Mr R Webber, on behalf of Second Respondent
Date of Decision:	17 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] In a decision issued on 29 January 2018, the Complaints Assessment Committee (the Committee) found pursuant to s 89 (2) of the Act that the appellant licensee, Ms Lethbridge, had engaged in unsatisfactory conduct in respect of one of the matters that had been complained of. The unsatisfactory conduct related to the way in which an agreement for the sale and purchase of a property (the Agreement) had been executed. This led to confusion and lack of clarity between the parties as to whether the two copies of the Agreement had in fact been initialled by the vendor, Mr Fenton. While the Committee found that two copies of the Agreement had been initialled by Mr Fenton, it still considered that the practices adopted by Ms Lethbridge had been characterised by a lack of care.[1] The Committee expressed the view that the breach that occurred amounted to conduct in breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) "at a very low level". A fine of $1500 was imposed on Ms Lethbridge. She appeals against the finding of unsatisfactory conduct and the penalty which was imposed. Other charges which were brought against Ms Lethbridge were dismissed by the Committee and Mr Fenton has brought an appeal against that part of the decision which the Committee came to.

Background

[2] In the submissions which he filed on behalf of the Authority, Mr Simpson summarised the background to the present appeal. This statement of background which now follows is a fair summation of the facts:

> 2.1 The factual background to this appeal is outlined in the Committee's Decision on Liability.
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> 2.2 In short, Ms Lethbridge holds a branch manager's licence under the Act, and was engaged by Barfoot and Thompson Limited trading as Barfoot and Thompson Stonefields (**Agency**) at the time of the relevant conduct. She was engaged (together with her sales associate Peter Blackler) by Mr Fenton as the listing salesperson to sell a property he owned located at 120A Waitea Street, Waiuku (**Property**) in November 2015.
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> 2.3 Mr Fenton entered into an agreement for sale and purchase of the Property in January 2016 (**Agreement**). Mr Fenton subsequently attempted to get out of the Agreement, but the purchasers confirmed the Agreement as unconditional. One

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[1] BD 556.

of the grounds on which Mr Fenton sought to deny the validity of the Agreement was that he had not initialled the final sale price in the Agreement. He also alleged that he lacked capacity to enter into the Agreement.

2.4 Mr Fenton subsequently failed to settle the purchase and provide vacant possession, resulting in the purchasers filing proceedings in the High Court, and specific performance of the Agreement being ordered in December 2016.

2.5 In April 2017, Mr Fenton made a number of complaints to the Authority regarding Ms Lethbridge's conduct in the course of the transaction, including that Ms Lethbridge:

(a) Marketed and sold his Property without advising him to seek legal advice and at a time when he was seriously ill and taking prescribed opiates, rendering him incapable of making reasoned and informed decisions on his own;

(b) Did not obtain his initials on the final sales figure of $510,000 on the Agreement;

(c) Failed to provide him with a comparative market analysis (**CMA**) or letter of explanation of the appraised price range;

(d) Did not advertise the price of the Property as instructed; and

(e) Did not ensure the retro-fit wood burner was included in the Agreement or make it clear that consent for the burner was still to be obtained.

….

3.1 The Committee made one finding of unsatisfactory conduct for breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (failure to exercise skill, care, competence and diligence) (**Rules**) in relation to Ms Lethbridge's oversight and/or preparation of the Agreement. In particular, the Committee found that the final sale price should have been clearer on the Agreement, and that complications had arisen due to there being two different versions of the contract (which Mr Fenton had initialled in different places). The Committee considered that "[i]t should have been clear to an observer where the offer and counter-offer had been made and accepted".

3.2 The Committee determined that no further action should be taken in respect of the other parts of the complaint. In particular, the Committee found that:

(a) There was insufficient evidence to support Mr Fenton's claims that he lacked capacity when he entered into the Agreement. Nor was there any evidence that Ms Lethbridge knew about the medication Mr Fenton was taking or that he was suffering any side effects.

(b) A CMA had been signed by Ms Lethbridge and Mr Fenton, and Mr Fenton's claim that he had forgotten about the CMA due to memory loss from his medication was unsupported by evidence.

(c) There was insufficient evidence to support Mr Fenton's claim that Ms Lethbridge failed to obtain his consent to reduce the asking price for the Property during the marketing process.

(d) There was insufficient evidence to support Mr Fenton's claim that he had told Ms Lethbridge about the loan for the wood burner or that he wanted the purchaser to pay for it.

(Footnotes omitted)

Approach to appeals

[3] In numerous decisions of the Tribunal there has been a discussion about the correct approach to be adopted on hearing appeals of the present kind.

[4] For a finding of unsatisfactory conduct to be made, a complaint must be proved "on the balance of probabilities". This standard is applied flexibly, recognising that the strength of the evidence required will vary depending on the nature of the case. Stronger evidence will be required to prove more serious allegations before the standard is met[2]. The burden of proof in this case is on Mr Fenton. This means that he must prove that his version of events was more likely to have occurred than not.[3] 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 Mr Fenton's version of events has not been proved on the balance of probabilities. If the Tribunal reaches that conclusion, the appeal will be dismissed.

Procedure on appeal

[5] Appeals from Committee decisions to take no further action under s 89(2)(c) of the Act normally proceed on general appeal principles.[4] However, the Authority notes a number of recent Tribunal decisions suggesting that an appeal from any Committee finding will be an appeal against a discretion.[5] In *Edinburgh Realty Ltd v Scandrett*, Mander J stated:[6]

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2 *Z v Dental Complaints Assessments Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [102].

3 *Hodgson v Complaints Assessment Committee* [2011] NZREADT 3.

4 An exception is if the decision challenged is a decision not to lay misconduct charges. These challenges involve the use of prosecutorial discretion, such that an appeal to the Tribunal is properly an appeal against a discretion: *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [113].

5 *Wouldes v Real Estate Agents Authority* [2017] NZREADT 67 at [16] and *Wouters v Real Estate Agents Authority* [2017] NZREADT 72 at [9]–[10].

6 *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112] (emphasis added).

> [112] Section 111(3) of the Act provides that an appeal to the Tribunal against a determination by the Committee is by way of rehearing. Ordinarily, when applying the principles set out in *Austin, Nichols & Co Inc v Stichting Lodestar*, those exercising general rights of appeal are entitled to judgement in accordance with the opinion of the appellate Court. **If the appeal to the Tribunal is confined to whether the Committee had been correct in its determination that no further action be taken in regard to Ms Scandrett's complaint and the Tribunal had limited itself to a consideration of that decision and whether it should substitute a finding of unsatisfactory conduct, it would have been free to have substituted its own view of that issue.**

[6] This position is consistent with the Tribunal's long-standing approach before the latter period of 2017. For example, in *Guo v Real Estate Agents Authority* the Tribunal stated:[7]

> [24] We have previously held that Committee determinations under s.89 are subject to general rights of appeal and the wider principles described in *Austin Nichols* apply. In *Jones v CAC 10028 & Shekell* [2011] NZREADT 15 we said at paragraph [25]:
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> > *"... Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in Austin, Nichols, as reiterated by K v B (supra)."*
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> [25] This is said by counsel for the Authority to contrast with the position where an appeal is from the exercise of the separate discretion under s.80 to take no action on a complaint, or where an appeal is from a decision not to refer a misconduct charge to the Tribunal. In those cases, it is put that the narrower appeal grounds identified in *K v B* as appropriate on appeals from discretionary decisions will apply; see *Smith v CAC* [2010] NZREADT 13 (appeal from discretionary decision under s.80) and *Dunn v REAA (CAC 143)* [2012] NZREADT 56 (appeal from decision not to refer a misconduct charge)

Issues on appeal

[7] In this case, complications arose because Ms Lethbridge, as the agent, arranged for two separate copies of the Agreement to be drafted. There was not therefore, as is the usual case, an original and exact copy made of the Agreement. This apparently led to some confusion subsequently and there were arguments about whether the original

[7] *Guo v Real Estate Agents Authority (CAC 304)* [2015] NZREADT 35.

Agreement and the counterpart had both been executed in the same way so that amendments which were made had been verified by signatures or initials on both copies. It was said that the confusing position had arisen where there was doubt about whether amendments made to the price inserted into one of the agreements had been adopted by signature or initialling.

[8] Rule 5.1 the Rules relevantly provides: "A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work." Section 132 of the Act is also relevant, and provides that: "As soon as practicable after a person signs a contractual document and gives that document to a licensee carrying out real estate agency work in connection with the document, the licensee must give the person an accurate copy of the document."

[9] The circumstances concerning the way in which the agreement had been executed were considered in litigation between Mr Fenton and the purchasers of the property and resulted in a judgment being given in favour of the latter by the High Court.[8] The Court considered a number of defences including one which related to the question of whether there was an enforceable agreement on the grounds that Mr Fenton did not clearly initial the counteroffer which had been put to him and which was the price at which the purchasers said they had agreed to buy the property.

[10] This point does not appear to have troubled the Judge in the High Court litigation because in the course of a judgment which resulted in specific performance being ordered against the Mr Fenton, his Honour noted:

> [56] The second point is also without factual foundation, in my view, as Mr Fenton's initials are written three times on that part of the Agreement headed "Payment of Purchase Price", sufficiently adjacent to the handwritten figure of $510,000. The placement by Mr Fenton of his initials on the Agreement three times is consistent with the sequence of offer and counter-offers that preceded the final figure of $510,000 being reached.

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[8] *Kennedy v Fenton* [2016] NZHC 2927.

Assessment

[11] We would accept that there is an obligation incumbent on the selling agent to ensure that the agreement that he or she draws up should be reasonably clear in its effect. If it is not, then exactly the problem which arose in this case, in the form of difficulties on the part of the purchasers enforcing the agreement, will occur.

[12] We do not, however, agree that an agent is to be criticised for doing no more than drawing up an agreement which is untidy and not very well presented. If that were the substance of the charge against Ms Lethbridge, then it is likely that the Committee's finding would not have been interfered with.

[13] In deciding whether the requirements of the Rules as we understand them to have been met in this case, it is necessary to attempt to identify some required element in the Agreement which was omitted because of lack of care or skill on the part of licensee. In order for there to have been sufficient clarity to identify the actual bargain that that the parties came to, an agent must take reasonable care to ensure that during the process of negotiation when conditions such as the price are subject to a counter-offer the bargain is not left in a state where it is not clear what the parties actually agreed on.

[14] However, in our view, that is not the case with regard to the price which was the bargaining point over which the parties made a number of exchanges when negotiating the present contract. All of the preceding figures which had been put forward and rejected by the respective parties had been scored out in the copy of the Agreement placed before us.[9] The result was that it is reasonably clear from looking at the Agreement that the price ultimately agreed upon was $510,000. There is no dispute that that is the actual price which the parties finally negotiated. That being so, the form of the agreement was not deficient or inadequate in that area. We are not aware of any other aspects of the drafting of the Agreement which the Committee considered fell below the required standard.

[9] BD 68.

[15] We did not hear any expert evidence which might have pointed to a different conclusion being available to the Committee and to ourselves.

[16] Our conclusion is that it cannot be reasonably contended that the conduct of Ms Lethbridge in this case contravened the Rules. The appeal is allowed and the penalty imposed by the Committee is set aside.

Issues on cross-appeal

[17] A number of issues have been set out in the submissions of counsel for Mr Fenton which relate to the circumstances in which Mr Fenton signed the listing authority and those in which he signed the Agreement. We will consider these issues separately in the remainder of this judgment.

Signing the listing agreement

[18] The first part of the complaint relates to the circumstances in which Mr Fenton, as he alleges, was persuaded to sign the listing agreement. We note that a number of aspects of the circumstances in which the listing agreement was signed were put forward on compendious basis. That is to say, the argument concerning whether there had been an offer of legal advice and the issue about whether Mr Fenton, to the knowledge of the licensee, lacked capacity to sign the agency authority were mixed up together. We will deal with each of the elements separately.

[19] The first part of the complaint is that Ms Lethbridge did not encourage Mr Fenton to obtain legal advice before he signed the listing agreement or authority. The complaint of a failure to recommend legal advice would amount to a breach of the Rules regardless of whether Mr Fenton had been suffering from health or other difficulties which would impact on his understanding of the position at the time when he signed the listing agreement.[10]

[10] Rule 9.7 of the Rules.

Compliance with the requirement that the client be advised of right to seek legal advice before signing the listing agreement

[20] Mr Fenton said that he was not advised to take legal advice before he signed the listing agreement.

[21] Ms Lethbridge says that Mr Fenton was given advice as required under the rule in question and that he acknowledged that he had been given that advice by initialling a statement to that effect in the listing agreement,[11] which provided that the agency came into effect from 3 November 2015.

[22] The listing does indeed contain an acknowledgement and it does appear that Mr Fenton has initialled beside it and several other statements. However, Mr Fenton responds that he was asked to initial and sign what the agent described as a "standard document" which he had not seen before signing, and which he was given no opportunity to read. He was not encouraged to seek legal advice and was given no opportunity to seek legal advice before he signed the listing. Mr Fenton says he was discouraged from reading the listing agreement.

[23] The submissions that have been made on behalf of Mr Fenton are to the general effect that he entered into the listing agreement, and the Agreement which followed subsequently, as a result of pressure that was applied to him by Ms Lethbridge who knew that he was vulnerable. His vulnerability arose, it is said, from his poor state of health and from the fact that he was taking high-strength painkillers at the time when these events occurred.

[24] It is our view that the correct approach to this matter is to first consider whether Mr Fenton was given the required notice or advice that he should have legal advice before signing the listing agreement. It is our further view that even if Mr Fenton was actually given the advice that the law requires, it would be open to the Tribunal to come to the view that if a client plainly was not in a position to understand the notice about the need for legal advice, then the licensee would not be able to successfully assert that a recommendation of legal advice had been given pursuant to r 9.7 of the

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[11] BD 15.

Rules. Such an approach is consistent with the provisions of r 9.8 of the Rules which forbids a licensee from taking advantage of a prospective client's inability to understand relevant documents where such inability is reasonably apparent.

[25] It is our conclusion that it has not been established that Ms Lethbridge failed to recommend to Mr Fenton that he obtain legal advice before signing the listing agreement.

Was Mr Fenton obviously unable to understand the recommendation of legal advice because of his health problems?

[26] Mr Fenton's health condition stemmed from his back problems. It is not disputed that Mr Fenton was suffering from back problems and is also accepted that he told Ms Lethbridge that he would be having an operation in the New Year to rectify the problem. These matters which Mr Fenton puts forward, and are at the heart of the case, will now be discussed.

[27] Mr Fenton asserts that at the time when Ms Lethbridge first made contact with him she was made aware of the fact that he was having problems with his back and that an operation had been scheduled for December. The submission was made that:[12]

> … any competent agent would have been alerted to the likelihood that Mr Fenton was under stress and the possibility that his ability to understand and make decisions was impaired, making it imperative that he not be pressured into signing the listing and should be given plenty of time to consider if it was sensible to list at that time. It is noted the listing did not go "live" until 27 November leaving only about 2 weeks before Mr Fenton's operation. It must have been obvious that he would require significant recovery time. It was not known if the operation would be successful. A competent agent would have recommended deferring any action until Mr Fenton was out of hospital and his condition, recovery, success or otherwise, and his ability to deal with the selling of his home could be properly assessed. That did not happen. The agent took advantage of the circumstances of which she was fully aware.

[28] It was further submitted that:[13]

> … in the particular circumstances, having regard to Mr Fenton's age, state of health, undergoing and recovering from serious back surgery, use of strong opiate pain relief medication, all facts known to the agent, it should have been

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[12] Submissions on Behalf of the Complainant (10 August 2018) at [6](a).
[13] At [8].

> readily apparent that there was a higher than usual risk of a lack of understanding or misunderstanding of issues and terms, including price, which should have caused the agent to not only recommend Mr Fenton obtain legal (and possibly other) advice, but also to ensure he had an opportunity to obtain advice …
>
> It would have been prudent in the circumstances for an agent, required to act in Mr Fenton's best interests, to make sure he had in fact obtained the advice and refuse to pursue the signing of the contract until that was confirmed.
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> The matter of Mr Fenton being affected by strong opiate pain relief medication has been the focus of attention in the complaint. Mr Fenton says he was often, including around the time the contract was signed in mid-January 2016, significantly affected, and that his capacity to deal with complex matters was diminished.
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> Mr Fenton says he told the agent what medication he was taking and the side effects he was experiencing. The agent acknowledges collecting a prescription for Mr Fenton on the day the contract was signed, but says she didn't know what medication was included.
>
> The agent acknowledges they knew about Mr Fenton's back operation in December and that he would need recovery time.

[29] Mr Fenton's contentions are that even if it is established that he signed the listing agreement, he was not actually in a fit state to do so and that he did not either appreciate what he was doing or have the ability to assess whether entering into the agency agreement was in his overall interests. Further, the contention is that Ms Lethbridge knew, or ought reasonably to have known, that that was the case.

[30] Ms Lethbridge says that when she came to take instructions from Mr Fenton to list his property she had conversations with him in which he dealt in quite a complicated way with matters from his past. She said that he was lucid and clear and there was no impression that he was seriously ill or that he was impaired because of medication he was taking. It was also part of her evidence that at the relevant times Mr Fenton was driving his own car on the roads. This was said to be inconsistent with any claim that because of medication or for other reasons Mr Fenton was not functioning properly.

[31] Ms Lethbridge also dealt with another point that Mr Fenton raised in relation to her picking up a prescription for him from a local pharmacy. Mr Fenton said that the medication that Ms Lethbridge uplifted was labelled and she would have been able to

see that he was taking high potency painkilling drugs. The point was also made for Mr Fenton that Ms Lethbridge had been previously working as a nurse.

[32] However, as Ms Lethbridge points out, the prescription medication was in the package which she did not open to look at it.

[33] Ms Lethbridge was accompanied in some of her dealings with Mr Fenton by a work associate, Mr Blackler, who confirmed her observations of Mr Fenton.

Discussion of health questions

[34] The question of Mr Fenton's health at the relevant time emerged in another related litigation in which he was involved.[14] In that case, the purchasers brought an action against Mr Fenton seeking specific performance of an agreement for sale and purchase. Mr Fenton resisted the application by the plaintiff purchasers on, amongst other grounds, the fact that he did not understand the agreement for sale and purchase which he entered into.

[35] In his judgment, Davison J rejected Mr Fenton's defences. The Judge concluded that Mr Fenton knew what he was doing when he signed the agreement for sale and purchase. The Judge accepted that while it was possible that the drugs that Mr Fenton was taking could affect his ability to drive a motor vehicle, the real question was not what the potential side-effects of the medication were but whether Mr Fenton himself was actually suffering from those side-effects at the time. The Judge answered that question in the negative.

[36] While the conclusions that the Court came to in the litigation between the purchasers and Mr Fenton was not said to be binding in the present case, much of the same issues arise in this case between Mr Fenton and Ms Lethbridge.

[37] We are not satisfied that Mr Fenton has established that he did not understand the listing agreement and that it was obvious to Ms Lethbridge that that was the case. It is our opinion that both those elements would have to be established before we could

[14] *Kennedy v Fenton* [2016] NZHC 2927.

be satisfied that a breach of r 9.7 of the Rules had occurred. The following are the reasons why we come to that conclusion.

[38] While we agree that Mr Fenton was in a difficult position with his health, that did not mean that he did not wish to proceed with the sale of this property. It was not inherently irrational for him to offer his property for sale. While it was suggested that he would need recovery time to complete the sale after he had his operation, and indeed the Agreement provided for that, that does not establish that he did not understand the documents that were presented to him for execution. That would have been obvious to a licensee in the position of Ms Lethbridge. There may be reasons why it was desirable for Mr Fenton to move to more manageable accommodation, for example, after the operation, and that in itself could be a sensible reason to sell his house.

[39] The Tribunal is unable to accept that Ms Lethbridge took advantage of Mr Fenton in the way that he alleges. We find that it is not proved that Ms Lethbridge did not give the required advice of the need for legal assistance, and it is not proved that when Mr Fenton signed the listing agreement that he was in no position to sign such an agreement. It would have been obvious to Ms Lethbridge if that was the case.

[40] Before leaving this part of the judgement, we deal with some miscellaneous points which were made in connection with the complaint that Mr Fenton had not been recommended to obtain legal advice.

[41] A point that was made on behalf of Mr Fenton was that Ms Lethbridge claimed that Mr Fenton told her that he would be speaking to his solicitor the next day. This was suggested to demonstrate that Mr Fenton was pressed to proceed with the agency and the Agreement before he had a chance within which to make good upon that proposal.

[42] However, the fact that Mr Fenton proceeded without actually obtaining legal advice cannot be regarded as carrying the necessary inference that Ms Lethbridge did not provide him with advice to see a lawyer as he said he was going to.

[43] It may be that Mr Fenton, having said that he was going to ask his solicitor about the contract, then behaved in a contradictory or inconsistent way by proceeding to initial the listing agreement anyway at the figure of $525,000. But this does not establish that he was never given advice that it would be prudent to consult a lawyer. It is possible to suggest a resolution of the apparent conflict between Mr Fenton saying that he was going to get legal advice and then proceeding without doing so before he signed a cross-offer. He may have considered that there was virtually no chance of the purchasers actually accepting the cross-offer that he was going to put to them and that therefore he was not at risk of being tied to a binding contract. He may have simply changed his mind about the need for advice.

[44] In his submissions, Mr Webber actually suggested a duty on the agents that was more onerous than what the rule provides:

> It would have been prudent in the circumstances for an agent, required to act in Mr Fenton's best interests, to make sure he had in fact obtained the advice and refuse to pursue the signing of the contract until that was confirmed.

[45] We accept in some circumstances that an agent might be under a duty not to facilitate a transaction where it is severely disadvantageous to a party who does not appear to have a proper understanding of the implications of signing an agreement. That might require an agent to, for example, decline instructions from the vendor to draw up an agreement for him or her to sign.

[46] However, in the circumstances of this case, we are not able to accept that matters reached that point. Indeed, no charge was brought against Ms Lethbridge which asserted that she breached an obligation to conduct herself in the way that we have just been discussing.

[47] The charge in this case is that Ms Lethbridge failed to warn Mr Fenton to obtain advice. It is not a charge that she failed to ensure that Mr Fenton obtain such advice.

[48] However, the important point in his way of doing so when the licensee provides a directly conflicting version of what actually happened. In that case, extrinsic factors such as circumstantial evidence may be required to tip the evidential balance. Or, the proponent of the case may succeed because a consideration of the comparative

likelihood of the different versions which the parties put forward as being true is resolved in his favour. This part of the appeal is therefore dismissed.

Complaint that Ms Lethbridge caused or permitted confidential information to be released

[49] The issue that is next considered arose out of the publication in the form of an advertisement of certain information relating to the health status of Mr Fenton.

[50] In particular, the residential listing which was loaded onto the Barfoot and Thompson system contained confidential information. The information on the system, including the confidential information, was replicated in advertisements publicising the sale of Mr Fenton's property.

[51] In particular, the residential listing which was stored on the Barfoot and Thompson website contained the following statement, in addition to the usual particulars that would be expected to be noted such as the identity and legal description of the property and the amenities of the property:

> Confidential comments: the settlement date must not be before the end of January 2016 as the vendor is having an operation and need recovery (sic) and will then decide whether to stay with relatives or buy

[52] It is not disputed that the details of the listing which were stored on the Barfoot and Thompson website, including the "confidential comments", had been drawn up by Ms Lethbridge and given to the administration staff at the relevant branch office to place on the information system.

[53] The position was summarised by counsel for the Authority in the following terms:

> 6.14 Mr Fenton contends that the Committee erred in determining that Ms Lethbridge was not responsible for the privacy breach, which involved confidential information about his health issues being disclosed in the advertising for the Property.
>
> 6.15 The key issue here is whether Ms Lethbridge was under an obligation to check the listing before it was uploaded. Rule 9.17 provides that a

licensee must not disclose confidential information relating to a client unless a relevant exception applies.

6.16 Ms Lethbridge made notes relating to Mr Fenton's medical circumstances which were intended to be confidential comments, but these were not correctly transposed to the Agency's database. Ms Lethbridge's sales associate, Mr Blackler (a licensee in his own right), then sent an email containing script for the listing to the Agency's receptionist, which contained the confidential comments. Mr Blacker, in a response to the Committee, said that he asked the receptionist to make the comments confidential, but that these ended up in the advertising contrary to his instructions. Ms Lethbridge repeated this account in her response.[15] She also stated that salespersons at the Agency "cannot insert or delete items onto the internet". The Agency stated in its response to the Committee that it is the listing agent's responsibility to ensure the listing is correct before it goes live. Ms Lethbridge was recorded as the listing salesperson on the listing agreement, and appears to have been the principal salesperson for the transaction.

[54] We agree that the formulation of the issue in the passage quoted from Ms Mok's submission accurately summarises the issue that is before the Tribunal in this part of the appeal.

[55] Ms Mok also noted the Tribunal's comments in the decision of *Wang v Real Estate Agents Authority (CAC 409).*[16] In that case, Ms Wang, the licensee, was sent an email from the previous listing agent stating that her advertisement for a property was misleading. Ms Wang contended that her assistant had missed the email cautioning her. The Tribunal rejected this submission, stating:[17]

> [46] We do not accept that the fact that the email was read by Ms Wang's assistant, and that he did not notice the reference to the misleading advertisement, absolves Ms Wang from any obligation arising out of the advice contained in Mr Wilson's email … We are concerned here with Ms Wang's professional responsibilities as a licensee, carrying out real estate agency work. We accept Mr Hodge's submission that in dealing with Ms Wang's emails concerning marketing a property for sale, her assistant was carrying out real estate agency work on her behalf. Ms Wang's professional responsibility extends to real estate agency work done on her behalf.

[15] See BoD at Tab 1 (p 303).
[16] *Wang v Real Estate Agents Authority (CAC 409)* [2017] NZREADT 29.
[17] At [46].

Assessment of the confidentiality issue

[56] We consider that when approaching the question of whether Ms Lethbridge breached her obligation not to disclose confidential information, it is necessary to begin with analysing the extent of the obligation that is incumbent upon her. If a less accurate assessment is carried out of just what duty Ms Lethbridge was subject to, there is a risk that she will be called upon to answer for conduct that does not amount to a breach of any recognisable duty.

[57] While it is clear that the licensee must not disclose information, he or she is not necessarily responsible for breaches of confidentiality on the part of other persons. That statement is justified on the basis that the Act does not explicitly impose such an obligation. Therefore, unless the overall objectives of the Act require the Tribunal to recognise an implicit responsibility for the actions of other persons, the licensee will generally not be responsible for the consequences of what those other persons do.

[58] We consider that unless close focus is maintained upon the statutory language which the draughtsperson used and the statutory purpose of the Rules, it is possible for the Tribunal to lose its way. We consider that when interpreting the Rules we should keep in mind that: [18]

> The Court's task is to ascertain the meaning of the provisions from their language, read in context, and the statute's purpose informed by any relevant background material.

[59] Further, while we have an obligation to protect confidential information from unauthorised release, we are of the view that it is implicit in the Act that reasonableness and proportionality must influence decisions as to the extent of the obligation.

[60] In this case, Ms Lethbridge was responsible for preparation of the terms of the listing which included preparation of the material which would be released to the general public as part of the campaign to sell Mr Fenton's property. While there may

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[18] *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [55] per McGrath, Glazebrook and Arnold JJ. Refer also to JF Burrows and RI Carter *Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2009).

not be any explicit evidence on the point, there can be no argument that when Mr Fenton provided evidence about his health and his forthcoming back operation, he was not doing so in order to have that information included in the sales publicity that Ms Lethbridge would generate.

[61] Mr Fenton advised he did not want settlement to occur until late January as he was having an operation and needed time to recover from it.[19] The Privacy Commissioner who looked into this matter concluded that one of the failings that occurred in the processes leading up to the disclosure of the material was the failure on the part of the "listing agent/s" to ensure their notes were correctly transposed to the agency's database.[20] She also identified faults on the part of other parties involved in the administrative processes at Barfoot and Thompson as contributing to the problem.

[62] In the course of the enquiry which the Authority made, Barfoot and Thompson stated that while the branch administrator processed the text provided to her by Ms Lethbridge, the final responsibility for the correctness of the text would have been that of Ms Lethbridge.[21]

[63] Ms Lethbridge says that it was her co-licensee Mr Blackler who was apparently responsible for passing the information about the listing to Barfoot and Thompson for incorporation into the firm's records. The way in which the information was sent to Barfoot and Thompson was by way of an email which Mr Blackler, who was working on the listing with Ms Lethbridge, sent to the relevant office of the company.

[64] In our view, it would have been reasonable for the recipient of that information at the Barfoot and Thompson office to have understood that this information was not intended for inclusion in the advertising material. It is not just the fact that the information is referred to as being confidential, but it is difficult to see what relevance the reasons why Mr Fenton did not want a settlement until the end of January had to the sales campaign. We conclude that a competent and properly trained recipient of

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[19] BD 436.
[20] BD 437.
[21] BD 388.

the information who had the necessary understanding of the sales process would have immediately understood that the comments excerpted at [65] above were not intended to be included in the advertising material.

[65] The term "confidential information" used in the rule would literally prevent a licensee from passing on to anyone — even those within the organisation by which he or she is retained — information which might be viewed as confidential. In our view, the rule cannot be reasonably viewed as prohibiting literally any disclosure of confidential information.

[66] While the rule refers to restrictions on dissemination of confidential information, it does not define, of course, in any particular circumstance what is or is not confidential information. What amounts to confidential information, which comes within the purview of the rule, depends upon a number of factors including the personal circumstances of the person conveying the information, the intrinsic nature of the evidence in question and the reasonable requirements of the recipient to make use of the information. This is not to be regarded as an exhaustive list of the factors which might bear upon the question, but may be regarded as some of the matters of context which will assist a determination in a particular case.

[67] In this particular case, plainly Mr Fenton would not want an unrestricted publication of information about his condition of health to be made by the real estate agents of the kind that actually occurred. However, it would seem to be likely that, having regard to the need for the real estate company to which the licensee was contracted, it would be acceptable for that information to be kept in the company records for the guidance of staff. It is difficult to accept that Mr Fenton would have been opposed to the information being held by the real estate company, provided that he could be assured that it would not be the subject of general dissemination of the kind that occurred.

[68] Considerations such as those we have mentioned in this part of the decision would indicate that the communication of the information from the licensee to the real estate company for records purposes was not a disclosure of confidential information which breached the terms of r 9.17. It can be said though, that the onward and

accidental distribution of this information because of a mistake made by the real estate company staff may have breached r 9.17. The question that then arises is whether the second stage of dissemination of the information was a matter for which Ms Lethbridge was responsible.

[69] Because of the context in which Ms Lethbridge provided the information, particularly having regard to the fact that the information was explicitly flagged as being confidential, we do not consider that she can be reproached for passing the information to the office staff of the real estate company. We consider that, taking a realistic view of the division of responsibilities between the agent and those who have control of the administrative aspects of the selling process by preparing the database and advertising, at the point where the agents passed over the material to the office staff they were entitled to assume that it would be dealt with responsibly and competently. Plainly it was not.

[70] That said, unless a person making a communication of confidential information has reasonable grounds to suppose that precautions exist to prevent any onward dissemination from that actually made by the initial communicator, then it would not seem to be unfair for the latter to take responsibility for wider onward dissemination of the information.

[71] There was a suggestion in the submissions that were made to us that Ms Lethbridge also had an obligation to supervise the office staff who had responsibility for compiling the Barfoot and Thompson databases and website content relating to the properties which it had on its books for sale. Any such contention has to confront the evidence of Ms Lethbridge that listing or sales agents in her position did not have any authority to modify information of the kind under discussion.

[72] Nor do we consider that it can validly be argued that Ms Lethbridge had the responsibility to check that the administrative staff ensured that the correct parts of the listing were excerpted for the purposes of advertising from the Barfoot and Thompson system. We are not prepared to conclude that such a contention is in accordance with the operational reality of what happens in real estate agency offices. The fact is that firms such as the real estate agency in this case are large operations with very large

numbers of employees allocated to different duties. It is unrealistic to submit that the selling agent had a responsibility to oversee or superintend the office recordkeeping staff to ensure that the instructions that had been given concerning each listing had been faithfully implemented. It is not even known whether the terms of the contractual retainer between the listing agent and the real estate agency would permit the selling agent to interfere in such a way.

[73] For all of these reasons, we consider that the agent was not responsible for the apparent breach of confidentiality that occurred when other employees of Barfoot and Thompson advertised the property in such a way that details about Mr Fenton's health issues were inadvertently released to the public. That being so, there can have been no breach of r 9.17 by Ms Lethbridge.

[74] Before leaving this aspect of the matter, we note that, of course, in a hypothetical situation if a licensee had reason to believe from past history that even labelling data about the vendor as confidential was not sufficient to prevent it from being released to the public, then it might be that he or she had an obligation to take some further steps and that he or she was not entitled to rely upon the office staff carrying out their work accurately and competently. Just what those additional steps would be cannot be answered in the hypothetical. We do not consider that further comment on this aspect of the matter in this decision will serve any useful purpose and so we will leave the issue at that point.

[75] One further matter that we need to briefly consider is the statement which was made by the office manager that it is the obligation of the agent to ensure the accuracy of the material. The response by the office manager, in our view, oversimplifies the process. It does not confront the various factors that we have set out above which bear upon the flow of information from the selling agent to the real estate firm's office.

[76] We consider that the Committee correctly dismissed this aspect of the complaint and we similarly dismiss the appeal which Mr Fenton has brought against their decision.

Complaint that the licensee changed the asking price without the consent of Mr Fenton

[77] Mr Fenton has made complaints that the asking price for the property was changed without his consent.

Submissions of counsel for Mr Fenton

[78] Mr Webber submitted that Mr Fenton stated that "so far as he was aware" the property was to be advertised with an asking price of $575,000. This is the price that was inserted into the listing authority which he signed in favour of Ms Lethbridge on 3 November 2015. Mr Webber pointed out that there has never been any change made to the listing authority to alter the asking price.

[79] However, it is submitted for Mr Fenton that he became aware sometime after the sale of the property had occurred that the asking price had been reduced, as Mr Webber puts it in his submissions, "he believes to $550,000".

[80] It was submitted that Ms Lethbridge had admitted that a change had been made to the asking price.

[81] A further aspect of the complaint which Mr Fenton made was that he did not consent to a change in the asking price.

The position that Ms Lethbridge takes

[82] In a statement which she made to the investigator, Ms Lethbridge said that the original agreement was that the property would be marketed as "price by negotiation". She said that a "search price range of 550,000 to 590,000" would be recorded on the internet and on the Barfoot and Thompson website.

[83] Ms Lethbridge said that later when it became apparent that Mr Fenton had not tidied up the grounds and gardens as he said he would and no one was enquiring about the property, Mr Fenton became keener to sell. She then suggested that the property be listed with an asking price of $560,000, to which Mr Fenton agreed. This was to be

in substitution for the original $575,000 asking price,[22] Later, she says the asking price was reduced to $550,000.

Discussion

[84] There is a disagreement on the evidence about what instructions Mr Fenton gave as to the asking price. Ms Lethbridge, however, does agree that there was a change in the asking price from $575,000–$550,000. Based upon the evidence put forward by the parties, it appears to be the case that Ms Lethbridge did not obtain any written acknowledgement or authorisation from Mr Fenton, which confirmed that he agreed to the reduction in the price.

[85] The Committee was not prepared to make a finding of unsatisfactory conduct on the part of Ms Lethbridge because of her failure to obtain written authority to reduce the asking price.

[86] In relation to that aspect of the complaint, the submissions for the Authority continued:

> 6.20 The Authority notes that there is no express requirement in the Act or the Rules for any changes to an asking price later agreed with a client to be recorded in writing, though it is submitted that recording agreement to such changes is best practice. Rule 10.4 provides that an advertised price "must clearly reflect the pricing expectations agreed with the client", but does not statement that any such agreement should be recorded in writing.
>
> 6.21 In this regard, the Authority notes the Tribunal's observations in a number of previous cases that not every departure from best practice will amount to unsatisfactory conduct (though if the licensee is found to have breached his or her obligations, an unsatisfactory conduct finding should follow, subject to a defence of total absence of fault being available).

[87] The complaint which Mr Fenton made in regard to this matter is summarised by Ms Mok for the Authority in her submissions in the following way:

> 6.19 Mr Fenton also takes issue with the Committee's finding that Ms Lethbridge's failure to record Mr Fenton's consent to the change amounted only to "poor practice", submitting that matters concerning asking price should be recorded in writing.

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[22] BD 300.

The conclusions of the Tribunal on this part of the appeal

[88] We agree that there is no requirement in the Rules that the asking price be stated in writing. What the rule would seem to require is that the listing agent should advise interested parties what the vendor's asking price is. Obviously, also, that is the figure that should be inserted into the advertising material for the property. The rule reflects the legal requirement that an agent must adhere to the terms of her mandate from her principal.

[89] We would accept that in the present case the original asking price of $575,000 was reduced other than in circumstances where the parties were in negotiation. The evidence is that Mr Fenton wanted the property advertised at $575,000 and that is what occurred, at least initially.

[90] Mr Webber on behalf Mr Fenton reviewed other aspects of the evidence, which included whether there had been some initial agreement between Ms Lethbridge and Mr Fenton to the effect that the original mandate was for the property to be marketed on the basis that price was for negotiation. That, in our view, has little to do with what actually occurred in regard to the asking price. Mr Fenton says that the asking price was to be $575,000 and the evidence establishes that is the figure that was initially adopted for the purpose of marketing the property.

[91] It is correct that subsequently the asking price was reduced. The real nub of the case is whether there was a requirement that the reduction in the asking price ought to have been documented so that there was written evidence of the vendor's consent to the lower price.

[92] When attention is, as it ought to have been, properly focused on this aspect of the matter, we consider that there is no basis upon which the decision of the Committee could have been criticised. The Committee was of the view that it was poor practice not to keep a documentary record of price changes. It was not of the view that any breach of the Rules occurred. We agree with that conclusion.

[93] The Rules, which have been enacted no doubt after widespread consultation and on the basis of best practice, did not, on the Committee's promulgation, contain a rule

reflecting what Mr Fenton and his counsel say is a binding obligation on licensees to obtain signatures from clients on each occasion when the asking price for a property is modified. There is no rule to that effect.

[94] That said, for their own protection, it would be prudent for listing agents to obtain written confirmation that their instructions had changed.

[95] The remaining part of the complaint is that Mr Fenton did not agree with the reduction of the purchase price to $550,000. This would seem to involve a direct conflict in the evidence between that of Mr Fenton and that of Ms Lethbridge. We do not accept that a complaint to this effect is justified and the appeal in that regard is also dismissed.

Penalty cross-appeal

[96] Mr Fenton contended that the Committee ought to have made an order that Ms Lethbridge refund the commission paid and also meet the legal costs that Mr Fenton had incurred.

[97] The power to make orders of the kind that Mr Fenton seeks is only exercisable if a Committee makes a determination under s 89 (2) of the Act. Because in this case the Tribunal intends to reverse the decision of the Committee in regard to the sole charge which the Committee believed had been proved, there is no basis for making orders of the kind which Mr Fenton seeks. For that reason, the appeal on penalty which Mr Fenton has brought is dismissed.

The comparative market analysis (CMA) complaint

Complaint that no CMA was Provided

[98] In its decision,[23] the Committee noted that Mr Fenton alleged that he was not provided with an appraisal based upon sales of comparable properties in the locale

[23] BD 557.

where Mr Fenton's property was located. Such an appraisal is required pursuant to r 10.2 of the Rules.

[99] The Committee noted that it had been provided with such an appraisal or CMA signed by Ms Lethbridge, her sales associate and Mr Fenton. It also noted that Mr Fenton did not recall receiving such a document,

[100] The Committee appears to have accepted that such a document was in fact provided to Mr Fenton. The Committee made some remarks concerning the suggestion that Mr Fenton may not have recalled receiving the document and the possibility that that may have been due to side-effects of his medical condition.

[101] On appeal, Mr Fenton changed the grounds of his complaint to raise the question of whether the CMA provided was "out of date". We agree with the submissions of Ms Mok that it is not open to a Mr Fenton to put forward another complaint at the hearing of the appeal when it did not form part of the original complaint.

[102] On the state of the evidence before the Committee, the Committee were quite entitled to come to the view that it had not been proved that a CMA was not provided to Mr Fenton.

[103] We agree with the conclusion of the Committee and for that reason this part of the appeal, too, must fail.

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J Doogue
Deputy Chair

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Ms C Sandelin
Member

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Mr N O'Connor
Member