

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 73**

**READT 034/18**

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	LAURENCE NEIL BAKER Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 413) First Respondent
AND	LAN (BRENDA) YU Second Respondent
Hearing:	6 November 2018, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Mr N O'Connor, Member
Appearances:	Mr T Rea, on behalf of Mr Baker Mr M Mortimer, on behalf of the Authority No appearance by or on behalf of Ms Yu (not participating in the appeal)
Date of Decision:	19 November 2018

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Mr Baker has appealed against the decision of Complaints Assessment Committee 413 (“the Committee”), dated 9 February 2018, in which it made a finding of unsatisfactory conduct against him (“the substantive decision”). He has also appealed against the Committee’s decision, dated 31 May 2018, in which the Committee made penalty orders (“the penalty decision”).

## **Factual background**

[2] This matter had its genesis in a complaint made to the Authority by the second respondent, Ms Yu, regarding the marketing of a property at Farm Cove, Auckland. The selling salesperson was Ms Chaoyang (Ivy) Zhao, a licensed salesperson engaged at Mountfort Estate Agents Limited, trading as Ray White (“the Agency”). Ms Yu alleged that Ms Zhao represented to her that the property could be subdivided, but she learned after completing the purchase that the property could not be subdivided because of restrictive covenants on the title.

[3] Ms Yu also complained about the conduct of Mr Baker. Mr Baker is a licensed agent, and is a joint director and chief executive officer of the Agency. Ms Yu alleged that when she brought the subdivision issue to the Agency’s attention, Mr Baker obstructed the resolution process and unreasonably sided with Ms Zhao.

[4] In the course of its investigation into the complaint, the Committee decided that it raised issues as to Ms Zhao’s supervision within the Agency, and decided to inquire into those issues under s 78(b) of the Real Estate Agents Act 2008 (“the Act”). It extended its inquiry into the conduct of Mr Kenneth Ralph, a licensed branch manager of the Agency and Ms Zhao’s supervisor, and Mr Endong (Anton) Huang, a licensed salesperson at the Agency, and listing agent for the property.

## **Substantive decision**

[5] As relevant to this appeal, the Committee found that Ms Zhao failed to exercise skill, care, competence, and diligence by failing to search and understand the title to

the property, and misleading Ms Yu by representing that the property could be subdivided. The Committee found that Ms Zhao had breached rr 5.1, 6.2, 6.3, and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).

[6] Mr Ralph and Mr Huang were each found to have engaged in unsatisfactory conduct. Mr Ralph was found to have breached s 50 of the Act, and r 5.1. Mr Huang was found to have breached r 5.1.

[7] The Committee did not uphold Ms Yu's complaint against Mr Baker, regarding his handling of her complaint against Ms Zhao.

[8] However, the Committee found that while Mr Baker had given Mr Ralph actual responsibility for supervising Ms Chao, he breached s 50 of the Act by making "insufficient effort" on behalf of the Agency to ensure that Mr Ralph adequately did so, in compliance with s 50. It also found that he breached s 8.3 of the Rules, which provides that an agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed. The Committee found that Mr Baker was the "eligible officer" of the Agency, and joint director and chief executive officer, of the Agency, and therefore subject to r 8.3.

### **Penalty decision**

[9] The Committee ordered Mr Baker to pay a fine of \$2,500. It did not consider it necessary to make an order for censure or reprimand, or for Mr Baker to undertake further training or education.

### **Appeal**

[10] Mr Baker, Mr Ralph, and Mr Huang all appealed against the Committee's findings. Pursuant to a Ruling made by the Tribunal on 5 November 2018, the findings

against Mr Ralph and Mr Huang were remitted back to the Committee for further consideration.<sup>1</sup>

[11] Mr Baker's appeal proceeded to hearing before the Tribunal.

### **Appeal grounds**

[12] The grounds of Mr Baker's appeal may be summarised as being:

- [a] Rule 8.3, properly interpreted, does not apply to either Mr Baker, or an "eligible officer".
- [b] The Agency is not a party to the proceeding, but in any event has complied with its obligations under r 8.3 (and s 50).
- [c] The Committee's finding that Mr Baker was in breach of r 8.3 was inconsistent with its finding that there was no evidence of systemic failures (as to supervision) within the Agency.
- [d] Any unsatisfactory conduct by Ms Zhao arose despite proper supervision, not as a consequence of a lack of it.

### **Submissions**

[13] Mr Rea submitted for Mr Baker that there was no evidential basis for the Committee's finding against Mr Baker. He submitted that Ms Yu's complaint against him (which was dismissed) did not raise any issue of supervision, so any evidence contained in the complaint is not relevant to the finding of unsatisfactory conduct.

[14] He further submitted that the questions put to Mr Baker by the Authority's investigator were confined to naming Ms Zhao's supervisor, supervision of non-English speaking licensees, and "your supervisory plan", and he was not asked for further clarification. He submitted that these did not provide a sufficient evidential

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<sup>1</sup> *Baker, Ralph and Huang v Real Estate Agents Authority (CAC 413)* (Ruling (2)) [2018] NZREADT 71.

foundation for the Committee to find that Mr Baker had made an “insufficient effort” to ensure that Mr Ralph satisfied s 50.

[15] Mr Rea submitted that the implication of the Committee’s finding is that an agency’s “eligible officer” must supervise branch managers’ and agents’ supervision of salespersons. He submitted that this is inconsistent with s 50, under which only salespersons must be supervised. He further submitted that r 8.3 does not apply to Mr Baker, as it clearly relates to a trading entity (in this case, the Agency) and Mr Baker is not operating as a business, and does not employ or engage salespersons. He submitted that the corporate veil could not be lifted so as to find Mr Baker in breach of s 50, by way of being the “eligible officer”.

[16] Mr Rea submitted that should it be suggested that as “eligible officer” Mr Baker’s duties may have included ensuring that the Agency had an appropriate supervisory structure in place, then there is no evidence on which a finding could be made that there was no such structure in place in the Agency. He submitted that such a finding would be inconsistent with the Committee’s observation in the penalty decision that there was no evidence of any systemic failure, and there was no history of any such failure.

[17] Finally, Mr Rea submitted that there are no other grounds on which the Committee could have made a finding of unsatisfactory conduct against Mr Baker.

[18] Mr Mortimer submitted for the Authority that the questions put to Mr Baker conveyed to him that his supervision and the supervision arrangements at the Agency were under scrutiny. He submitted that the questions were wider than as characterised by Mr Rea, and clearly sought responses about supervision arrangements at the Agency, both generally and as they related to Ms Zhao.

[19] Mr Mortimer submitted that it was Mr Baker’s professional responsibility to provide as much information as he could to the Committee. He submitted that the Committee was entitled to make findings against Mr Baker on the evidential picture that emerged from the brevity of his response (a written policy document and a short letter). He further submitted that this evidential picture was, in essence, that the

Agency formally identified supervisors and communicated the importance of supervision on paper, but gave no evidence of the extent of day to day supervision (generally or of Ms Zhao).

[20] He accepted that Mr Baker was not a direct supervisor of Ms Zhao, but submitted that s 50 of the Act imposed an obligation on him to ensure that the supervision arrangements put in place were actually being carried out. He submitted that more was required than for Mr Baker to say that supervision arrangements were set out in a document. He submitted that the obligation required, for example, meeting with supervisors, and those being supervised, to check that supervision was actually occurring.

[21] Mr Mortimer submitted that the Committee did not have any evidence beyond the fact that Mr Baker had issued a supervision document, and that the Committee was entitled to find that Mr Baker's efforts (if any) were insufficient to ensure that supervision was taking place in accordance with the document.

## **Discussion**

### *“Eligible officer”*

[22] The Committee began its description of Ms Yu's complaint as follows:

1.6 The details of the complaint are that:

- (a) [Ms Yu] purchased the property. [Mr Huang] was the listing salesperson and [Ms Zhao] the selling salesperson in the transaction. [Mr Baker] was the eligible officer and joint Director and Chief Executive Officer of the Agency. [Mr Ralph] was the supervisor of [Ms Zhao].

[23] In the course of its decision regarding Mr Baker, the Committee said:

3.22 ... [Mr Baker] was the eligible officer and joint Director and Chief Executive Officer of the Agency and therefore Rule 8.3 applied to him.

[24] On behalf of the Committee, Mr Mortimer accepted that it was wrong to rely on r 8.3, as it does not apply to Mr Baker, as he is not “an agent who is operating a business”. However, he submitted that as a director of the Agency and its “eligible officer” Mr Baker bore a management responsibility. With reference to the Tribunal's

decision in *Complaints Assessment Committee 409 v Wong*,<sup>2</sup> he submitted that Mr Baker bore a management responsibility for (among other things) ensuring that arrangements exist for agents and branch managers to supervise salespersons, and monitoring to check this in fact occurs.

[25] The Tribunal received oral submissions from counsel concerning an agency's "eligible officer". We make the following observations.

[26] The term "eligible officer" is not defined in the Act, and there is no provision referring to it. Consequently, there is nothing in the Act which establishes the position in an agency, or sets out the functions and obligations of the person holding that position.

[27] We were referred to s 36 of the Act which provides (as relevant to this appeal):

**36 Entitlement to licence**

- (1) An individual may be licensed as an agent or branch manager if the individual satisfies the Registrar that he or she—
  - (a) has attained the age of 18 years; and
  - (b) is not prohibited from holding a licence under s 37; and
  - (c) is a fit and proper person to hold a licence; and
  - (d) has the prescribed qualifications; and
  - (e) has obtained 3 years' experience in real estate agency work within the 10 years preceding the application to be licensed as an agent or branch manager under this Act.
- ...
- (3) A company may be licensed as an agent if at least 1 officer of the company satisfies the registrar of the matters set out in subsection (1).

[28] Counsel submitted that the term "eligible officer" is a reference to s 36(3), and the "eligible officer" is the person in an agency (an officer of the company) whose presence makes the agency "eligible" to be licensed as an agent. However, s 36(3) does not say that.

[29] We were advised that an agency is not required to nominate a person who is to be the agency's "eligible officer". There is no prescription as to who that person may

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<sup>2</sup> *Complaints Assessment Committee 409 v Wong* [2018] NZREADT 8.

be and what qualification (if any) is required to hold the position. Nor is there any provision to the effect that an “eligible officer” carries some additional responsibility within an agency by virtue of that position.

[30] It is therefore of concern to the Tribunal that it appears from the Committee’s reference to Mr Baker’s position as “eligible officer” in the Agency that an additional, or particular, obligation in respect of (in the present case) supervision of salespersons is super-imposed on “eligible officers”. This is demonstrated by the Committee’s finding that it was because Mr Baker was the “eligible officer” and joint director and chief executive officer of the Agency that r 8.3 applied to him. It is also demonstrated by the submission for the Authority that as a director of the Agency and its “eligible officer” Mr Baker bore a management responsibility in relation to (as relevant in this case) supervision.

[31] There is no statutory authority for such an obligation to be super-imposed on the obligations that the person who is the “eligible officer” is already subject to. As a licensee Mr Baker (and any other person referred to as an “eligible officer”) is subject to the provisions of the Act and Rules made under the Act. That obligation is not increased if the licensee is an “eligible officer”, nor decreased if the licensee is not.

[32] It is understandable that it may be useful, and administratively convenient, for one licensee in an agency to be nominated as the person to whom correspondence may be addressed. It may also be useful, and administratively convenient, for that licensee to be a branch manager or a senior agent in the agency. However, such a role provides no authority or justification for imposing any additional professional obligations on the licensee referred to as the “eligible officer”.

#### *Mr Baker’s obligations as to supervision*

[33] Rule 8.3 is within Part 8 of the Rules which out “Duties and obligations of agents” and provides:

##### *Supervision and management of salespersons*

8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.



[34] We accept (as did Mr Mortimer on behalf of the Authority) that Mr Baker was not “an agent who [was] operating as a business”. In this case it was the Agency that was an “agent ... operating as a business”, having been licensed as an agent pursuant to s 36(3) of the Act. Accordingly, r 8.3 did not apply to Mr Baker so as to impose on him personally an obligation to supervise Ms Zhao. The Committee erred in finding that it did.

[35] Section 50 of the Act provides:

**50 Salespersons must be supervised**

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.
- (2) In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—
  - (a) that the work is performed competently; and
  - (b) that the work complies with the requirements of this Act.

[36] Mr Mortimer’s core submission was that as a joint director and chief executive officer of the Agency, and a co-author of the Agency’s supervision structure, Mr Baker had an obligation to ensure it was properly carried out and monitored in accordance with the structure, and there was no evidence that he had done anything beyond promulgating the structure. Against that, Mr Rea submitted that while s 50 of the Act requires salespersons to be supervised, it does not require agents and branch managers to be supervised.

[37] Mr Mortimer’s submission was based on a general management responsibility of a person in Mr Baker’s position in the Agency. He submitted that this includes such things as overseeing and ensuring compliance with continuing professional development, satisfying oneself that licensees in fact hold current licences, ensuring arrangements exist for employed agents to supervise salespersons and monitoring to check this in fact takes place, setting up policies and systems that other agents and salespersons are to follow, and training employed agents on these policies and practice issues.

[38] We accept that while s 50 of the Act requires supervision of salespersons to be carried out by agents and branch managers, it does not absolve all others from any

responsibility as to supervision. The Tribunal has held (in cases where the factual circumstances differ from those in this case) that a “general management” responsibility for general oversight of real estate agency work within an agency is consistent with furthering purpose of the Act to promote and protect the interests of consumers and to promote public confidence in the performance of real estate agency work.

[39] In *Gillies v Real Estate Agents Authority (CAC 410)*,<sup>3</sup> the Tribunal held that an agency had an overall responsibility for advertisements published in the agency’s name. In *Wong v Complaints Assessment Committee 409*,<sup>4</sup> the Tribunal held that Mr Wong, an agent, was required to exercise oversight of another agent whom he permitted to carry out real estate agency work in his name. Such a responsibility is appropriately imposed on a director and chief executive officer of an agency who has written and promulgated a supervision structure. Having put the structure in place, the responsibility is to maintain an overview of the proper application of the structure.

[40] Mr Mortimer referred to the Tribunal’s decision in *Maserow v Real Estate Agents Authority (CAC 404)*<sup>5</sup> in support of his submission that putting a written supervision structure in place would not suffice if appropriate supervision is not in fact being given. While the Tribunal set out the requirements of supervision in terms of “active involvement by the branch manager with the agent(s)”,<sup>6</sup> the case concerned the branch manager’s supervision of salespersons, not agents supervising salespersons.

[41] Similarly, other decisions concerning supervision have clearly related to the supervision of salespersons, not to the supervision of a supervisor.<sup>7</sup>

[42] The decisions referred to above do not support a proposition that Mr Baker was required to maintain supervision of Mr Ralph, so as to ensure that Mr Ralph was supervising Ms Zhao properly, in the same manner as Mr Ralph was required to

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<sup>3</sup> *Gillies v Real Estate Agents Authority (CAC 410)* [2018] NZREADT 4.

<sup>4</sup> *Wong v Complaints Assessment Committee 409* [2018] NZREADT 6.

<sup>5</sup> *Maserow v Real Estate Agents Authority (CAC 404)* [2016] NZREADT 19.

<sup>6</sup> At paragraph [25].

<sup>7</sup> See, for example, *Donkin v Real Estate Agents Authority (CAC 10057)* [2012] NZREADT 44, *Wang v Real Estate Agents Authority* [2015] NZHC 1011, and *Hardy v Real Estate Agents Authority (CAC 302)* [2016] NZREADT 52,

supervise Ms Zhao. In the present case, having put the supervision structure in place, and in the absence of enquiries from either Ms Zhao and/or Mr Ralph, Mr Baker was entitled to assume that the structure was being followed. We are not satisfied that Mr Baker failed in either any specific supervision obligation, or any general management responsibility.

[43] We have concluded that the Committee erred in making the finding of unsatisfactory conduct against Mr Baker.

[44] Although not relied upon in coming to the above conclusion, we note that the Committee investigated, and dismissed, the complaint against Mr Baker regarding his handling of Ms Yu's complaint. The Committee decided pursuant to s 78(2) to inquire into the conduct of Mr Ralph and Mr Huang. The Committee did not record in its decision the basis on which it extended its inquiry into Mr Baker's conduct in the context of the issue of supervision.

[45] When the Authority's investigator sought a response from Mr Baker regarding the complaint, he included questions relating, in a general sense, to supervision. There is no question that the investigator was entitled to ask such questions, and Mr Baker was obliged, as part of his professional obligations, to answer them.

[46] However, there was no explanation as to how those general questions related to the specific complaint against him, and it was not made clear to Mr Baker that his own conduct was under scrutiny in the context of supervision. We are concerned that as a result, Mr Baker was not properly informed of the allegations against him, and he may have therefore been denied the opportunity to respond to those allegations.

[47] When inquiring into a complaint, or undertaking an inquiry pursuant to s 78(2) of the Act, Complaints Assessment Committees should ensure that it is made clear to licensees what conduct is under scrutiny, and whether the inquiry relates to a specific complaint, or arises from a decision by the Committee to inquire into further issues. In accordance with the principles of natural justice, licensees must be made aware of what is alleged against them, or what is being inquired into, so that they can provide an appropriate response.

## **Outcome**

[48] Mr Baker's appeal is allowed. The finding of unsatisfactory conduct is quashed. As a result of that finding, the penalty orders against him are also quashed.

[49] 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.

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Hon P J Andrews  
Chairperson

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Ms N Dangen  
Member

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Mr N O'Connor  
Member