BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 6

READT 044/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	JACQUELINE GENE HAYDN DU FRESNE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First respondent
AND	WILLIAM (BILLY) WATKINS & ANTHONY (TONY) FITZSIMONS Second respondents
Hearing:	10 December 2018, at Wellington.
Tribunal:	Mr J Doogue, Deputy Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Ms J Haydn du Fresne Ms E Mok on behalf of the Authority Mr W Watkins and Mr A Fitzsimons
Date of Decision:	11 February 2019

DECISION OF THE TRIBUNAL

Background

[1] The background to the present appeal has been accurately summarised in the submissions which were filed on behalf of the Authority by Ms Mok. The following statement of background is taken from her submissions:

> 2.2 Mr Watkins is a licensed salesperson, who was the listing salesperson for the property being sold by the appellant. The property in question was located at 45 Bedford Street, Cannons Creek, Porirua (property). Mr Fitzsimons is a licensed agent and the branch sales manager of the agency which employed Mr Watkins.
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> 2.3 The appellant sought an appraisal of the property in May 2017 from Mr Watkins. Mr Watkins prepared a comparative market analysis (CMA) for the property, in which he recommended selling the property by tender. The appellant entered into a listing agreement with the agency on 29 May 2017. That agreement recorded that the property was to be sold by tender on 28 June 2017.
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> 2.4 During the course of the appellant's dealings with Mr Watkins, there were discussions between the appellant and Mr Watkins about improvements to the property and the marketing for the property.
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> 2.5 On 28 June 2017, the tender for the property closed at 2pm at the Harcourts Paremata Office. The appellant attended the office that afternoon. Both licensees were present. Mr Fitzsimons opened the tenders. The appellant instructed Mr Watkins to negotiate a higher purchase price from the highest tenderer. The appellant subsequently accepted an offer for $312,000 for the property.
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> 2.6 Prior to settlement, the purchasers attended a pre-settlement inspection at the property on 4 July 2017. Mr Watkins texted the appellant at 10.30am that day stating that he would be meeting the purchasers at the property. Settlement subsequently occurred on 1 August 2017.
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> 2.7 Following the sale of the property, the appellant alleged that Mr Watkins pressured her into selling the property using the tender process, pressured her into doing maintenance and improvement work on the property, failed to advertise the property in a professional way, failed to communicate promptly with her, misled her about the number of tender papers given out,

allowed a reduced deposit to be provided without her knowledge, and failed to supervise the purchasers during a pre-settlement inspection. She further alleged that the licensees both pressured her to accept the tender offer.

2.8 The Committee determined to take no further action on any of the grounds of the complaint, on the basis that the Committee was not satisfied that the appellant had proved the allegations on the balance of probabilities.

(footnotes omitted)

Appeal to the Tribunal

[2] The appellant now brings this appeal. Before we consider the substance of the appeal, it is necessary to briefly refer to the approach which the Tribunal is required to take when dealing with appeals of this kind from determinations of the Complaints Assessment Committee (the Committee).

[3] The Tribunal recently held in *Li v Real Estate Agents Authority* that appeals from no further action decisions proceed on general appeal principles.[1] We will therefore determine this matter as a general appeal by way of rehearing.

[4] Because the Tribunal's task is to carry out a rehearing of the matter, it is necessary for it to come to a view about the credibility of the parties who have given evidence before it. Because the burden of proof rests with the appellant, if she does not impress as being a credible witness, then it is likely that her case will fail unless there is other independent evidence which she can rely upon as establishing her case.

[5] In assessing the credibility of the Appellant, we intend to proceed as the Tribunal did in its earlier decision of *Mairs*:[2]

> As the Supreme Court explained in the decision in Taniwha it is preferable for the Court when attempting to assess the truth of the matter to take into account: (a) Whether the witness's evidence is consistent with the evidence of other witnesses which the Court has accepted. (b) Whether the

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[1] *Li v Real Estate Agents Authority* [2018] NZREADT 52, citing both *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, (2016) 18 NZCPR 23 and *Guo v Real Estate Agents Authority* [2015] NZREADT 35.

[2] *Complaints Assessment Committee (CAC 302) v Mairs* [2018] NZREADT 9.

> witness's evidence is consistent with objective evidence such as documents or text messages, and if it is not, what explanation is offered for any inconsistencies. (c) Whether the witness's account is inherently plausible-does it make sense? Is it likely that people would have acted in the way suggested? (d) Whether the witness has been consistent in their account over time and, if not, why not?

Guided by the approach set out in *Taniwha*, we now turn to consider each of the allegations which arise out of the complaint that the appellant made against the licensees.

The general allegations about pressure

[6] In none of the complaints is there any particularisation of what form the alleged pressure took. While Licensee 1 does not dispute that r 9.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) provides that a licensee must not engage in any conduct that would subject a client to undue or unfair pressure, he does not accept that there was any pressure of that kind applied to the appellant.

[7] In one instance it was alleged that Licensee 1 exerted pressure on the appellant to carry out repairs or improvements to the sales property. In another, which we shall deal with later in this decision, the appellant claims that Licensee 1 and Licensee 2 pressured her to accept the highest tender when she was reluctant to do so, considering that the price offered was less than what her house property was worth.

[8] For the appellant to simply state that she was pressured, is insufficient. Instead of the Tribunal making its own independent decision about whether the conduct as detailed amounted to illegitimate pressure, after reviewing the detailed and specific facts of the case, the appellant sets out, in effect, her own conclusion in the matter with an expectation that it should be uncritically adopted by the Tribunal. The Tribunal, and not the appellant, is required to decide whether the proven facts establish a breach of r 9.2 of the Rules.

[9] The appellant does not state how as an adult person, and one, moreover, with a lengthy and varied business career behind her, came to be vulnerable to "pressure".

After all, she was not bound to use the services of Licensee 1 if she found his approach unpalatable. She could have chosen another agent. She could have remonstrated with him. She could have complained to his employer. She does not complain that Licensee 1 had a bullying or overbearing demeanour (although she does make complaints to that effect about Licensee 2 as we shall discuss later at [58]ff).

Personal stress

[10] Coupled with the assertions of pressure which the appellant complains about in connection with remediation work, and other aspects of the transaction, is her assertion that she was under great stress. It may be that in appropriate circumstances, the Tribunal would accept that the personal circumstances of a client were such that he/she was unusually vulnerable to pressure and unable to resist unreasonable suggestions or requests, and that that could affect the issue of whether the advice given crossed the boundary from what was legitimate to what amounted to undue pressure. However, a general comment that the appellant was subject to stress, unless it is supported by particularised and detailed evidence not only of the causes of the stress and the extent of the stress but also whether that would have been apparent to the licensee, is of little assistance when considering a complaint.

[11] Rather than make further comment on the alleged pressure in general terms, we will consider the concept of "pressure" and what the appellant means by it in relation to the particular complaints.

Undue pressure on the appellant to carry out repairs to the property prior to sale

[12] In this part of her complaint, the appellant asserted that improper pressure had been brought to bear on her by Licensee 1. The investigator noted that the appellant confirmed that:

> Licensee one pressured the complainant into doing work around the property.

[13] In the usual way, we will attempt to assess the quality of the evidence by comparing it to the contemporaneous documents which came into existence during the business relationship between the parties.

Contemporaneous documents

[14] The notes which the appellant sent to the investigator on 9 April 2018 include the following:

> Noon Billy calls in. Says I must do a lot of work. Said he had tradesmen at his disposal, they would be quick to respond. Note: I had been working hard on 45 since May 4. Low[e] and Co visited May 15 and said not to do anything except perhaps cut back the large spreading tree on back lawn.

[15] On a date which is unknown, but which was prior to 23 May 2017, Licensee 1 forwarded to the appellant his CMA for the property at 45 Bedford Street, Cannons Creek. A significant part of the passage from the CMA appears in the "comments" section as follows:

> You asked me about having the place spruced up? Ok – yes it would improve the sale price but where do you stop? It could do with remedial painting in places but generally the exterior looks good. Some of the gutters need fixing. Perhaps a new carpet and refresh the kitchen and bathroom but as I said, once started … where do you stop? I say it may be more advisable to leave that to the new owners. By all means have the house professionally cleaned but I don't think you need to go as far as to have the floors sanded again, where do you stop?

[16] On the face of these two documents, there is an inconsistency or lack of harmony between them.

[17] There is a third contemporaneous document which must also be considered. The appellant sent it in response to the CMA. In that response which was dated 23 May 2017 the appellant says:[3]

> Dr Billy
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> Thank you very much for your appraisal. I have been out there cleaning/pruning etc and go again tomorrow and Thursday. Perhaps we could meet there at your

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3 BoD 40.

> convenience? Failing that a phone chat about a few aspects would be worthwhile.

[18] The first of these three documents is not a primary document in the sense that it records the understanding that the appellant had of the advice that Licensee 1 was giving her about the necessity to make repairs rather than recording what Licensee 2 said on the subject of repairs.

[19] The second document is a primary document in that it sets out the actual terms upon which Licensee 1 communicated with the appellant. The first document may or may not accurately reflect what Licensee 1 said to the appellant about the need for repairs. It is not clear from the first document what the appellant understood from the expression "a lot of work".

[20] The response by the appellant contained in the third of this series of documents is not one that would have been expected from someone who had been subjected to undue pressure to carry out an expensive or difficult step which she did not want to take. This last document is inconsistent with the allegation of the appellant that she was being pressured to make repairs.

[21] There is a fourth document, an email, which makes reference to the issue of remediation.[4] In it Licensee 1 again expressed his views on the question of remediation. Because of the way the Bundle of Documents was set up, it is difficult to fix a precise date for when the licensee made the following comment. What he said in an email was:

> You could possibly spend money on certain areas, but I do believe it's in good enough condition to go straight to market – although I would recommend having a professional cleaner go through.

This document, in our view, is not a statement by Licensee 1 that you would expect him to make if he was improperly pressuring the appellant to make repairs to the property.

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4 BoD 41.

Conclusion on pressure to repair

[22] The Tribunal is left in the position where it accepts that remediation work was discussed. The only evidence which contains any detail on the subject indicates that remediation was discussed as part of the CMA in May 2017. On the face of it, the exchange shows that Licensee 1, far from pressuring the appellant to carry out work which she was reluctant to do, was expressing a fairly negative attitude to the vendor carrying out substantial remediation work.

[23] The assertion which the appellant makes about undue pressure is not particularised. She does not put forward concrete allegations which the Tribunal can assess whether there was in fact undue pressure applied to her. We do not consider that the appellant has persuaded the Tribunal that on the balance of probabilities it should conclude that she was subject to improper pressure to carry out repairs to the house that she was reluctant to perform. The appeal against the conclusion of the Committee that the appellant was subjected to undue pressure in contravention of r 9.2 of the Rules therefore cannot succeed.

Appellant's contention that she was pressured to sell by tender

[24] The appellant says that Licensee 1 put pressure on her to sell the property via the tender process while she wanted to sell using a method described as "buyer enquiry over". Licensee 1 says he did not recommend sale by tender but he discussed the methods of sale with her. That this was what occurred is consistent with an undated email that Licensee 1 sent to the appellant in the following terms:

> Have you had any thoughts about the method of sale? My recommendation is through a three and a half week Tender campaign, but I am comfortable with any other method you choose.

[25] Subsequently, a solicitor who was acting for the appellant emailed to Licensee 1 on 31 May 2017 that "the documents are approved". At this point, when that email was sent, the agency of Licensee 1 commenced on 29 May 2017.[5] We appreciate that the date of the lawyer's email was subsequent to the date upon which the agency

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5 BoD 142.

agreement was said to commence in operation, but we also note that the agency agreement itself was undated. We consider on the balance of probabilities that the solicitor when stating that "the documents are approved" was conveying approval to, amongst other things, the agency agreement which set out that the method of sale was to be by tender.

[26] The fact that the tender documents were submitted to a legal advisor representing the appellant is not decisive on the question of whether Licensee 1 unduly pressured the appellant to sell by tender. However, the fact that the appellant did not apparently instruct her advisor to insist on a different mode of sale does suggest that, contrary to what she now says, the appellant was content to adopt the suggestion to sell by tender that Licensee 1 had made to her. That is, at a point when she was under no pressure to choose tender sale, she implicitly confirmed that sale by tender was her preferred mode of sale. It has not been suggested why Licensee 1 might have determined that the appellant should sell by tender, regardless of her wishes.

[27] The further fact is that from the beginning when Licensee 1 was instructed in May 2017 the CMA report which, although undated, must have preceded the commencement of marketing of the property, contained a recommended sale method of sale by tender. From the point in May 2017 right through the marketing period of the property, repetitive references were made to the fact that the property was being sold by tender. On 28 June 2017, when tenders closed, Licensee 1 advised that five tender documents had been sent out.[6] The appellant does not suggest that she was unaware that her property was being marketed by way of tender, she was conscious of this fact right from the commencement of marketing. The point is that the appellant had many opportunities to revoke her instruction to proceed by way of tender during the negotiation period from the commencement of the agency agreement down to the execution of the agreement for sale and purchase. She says that she was "pressured" into selling the property by tender. She does not explain what form this pressure took.

[28] Having regard to the fact that the choice of selling method, that is sale by tender, was to occur at the very beginning of her business involvement with Licensee 1, it

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6 BoD 114.

would have been obvious that if the appellant was dissatisfied with his recommendation of a sale by tender, and indeed with the fact that he was somehow "pressuring" her, she could have broken off any discussion with Licensee 1 and chosen another real estate agent to represent her. The appellant does not give any explanation as to why, notwithstanding her dissatisfaction with the actions of Licensee 1, right from the outset she did not break off discussions with him.

[29] The comments which we made earlier concerning the allegations of pressure in which the appellant advances are applicable to the type of pressure to sell by way of tender. The appellant did not particularise her complaints. They are inconsistent with contemporaneous documents. In our view, there can only be one conclusion which is that the appellant has not discharged the burden that is incumbent upon her to prove that Licensee 1 was in breach of r 9.2 of the Rules when he discussed with her the method of selling the house. That part of the appeal must therefore fail.

Complaints arising out of marketing of the property

[30] In summary, the appellant states that Licensee 1 failed to advertise the property in a professional way. The allegation seems to be that the photographs which the licensee inserted into the advertising material were of poor quality, or that Licensee 1 inserted text into the advertisements which was substandard and was in any case text which she had not approved. The Committee viewed this part of the complaint as being one in breach of r 5.1 of the Rules which relates to the required skill, care and competence which a licensee must bring to his or her work, r 9.1 which is concerned with the failure to follow instructions and r 9.3 to communicate in a timely manner.

[31] In the present case, the appellant is of the view that the advertisements which Licensee 1 composed did not reach the required standard. She has not satisfied us that that is the case. The advertisement seemed to be run of the mill and ordinary real estate publicity. Further, contemporaneous documents indicate that she approved the form of the text. After Licensee 1 changed the form of the advertisement to include some

text which the appellant had suggested, she advised "yes go ahead very good".[7] He then took steps to have it changed but he noted:

> However if you're unhappy we can change it … just can't change tomorrow's print as it's too late.[8]

[32] So far as the photographs were concerned, the appellant declined to employ a professional photographer, preferring instead to take her own photographs. Some of these, Licensee 1 told the Committee, were inadequate. For example, one had the date that it was taken superimposed on it. Because there was limited time available for taking photographs to insert into the advertisement, Licensee 1 took some photographs himself. On 21 June 2017, he emailed the appellant in the following terms:

> Hi, Jacky
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> I've tried a few photos hard to capture certain aspects, but it's all there in the text re garage and car pad. Really hard to make sleep out appear clean. Don't think having rumpus dimensions will have much of an impact.
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> Can you please pay Andrew? He's called me twice. Also the young people have asked if you would accept a 5% deposit instead of 10%.
>
> Thanks.
>
> Billy.

[33] The response from the appellant was:

> Thanks for trying.

[she then deals with the request to pay "Andrew" for work done on the property].

[34] It would seem that the appellant regarded herself as having expertise in the area of the photographs as is evidenced by a text that she sent to Licensee 1 on 12 June 2017:

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7 BoD 47-49.
8 BoD 51.

> The issue included outside late one, the softest but not sitting, dining room etc. I'm not an upstart I do know my stuff … can give my CV. Being a writer, editor, including advertorial on many top mags.

The way in which the photographs were presented in evidence before the Tribunal makes it difficult to know just which of the images was included in the advertising.

[35] When assessing whether Licensee 1 did not exhibit the required skilled care in this aspect of his instructions, a number of factors are relevant. First, there is the consideration that the time available for preparing the publicity was constrained by the relatively tight schedule to complete the marketing. This schedule had been agreed to by the appellant. Secondly, there was the unwillingness of the appellant to obtain the services of a professional photographer. Thirdly, as the Committee pointed out, the contemporaneous exchanges between the parties concerning these matters were "normal, reasonable and unremarkable".[9] They give the example of an undated email from the appellant to Licensee 1 where she says (in relation to the wording of the advertising):

> Very sweet, and you are a honey but I wonder if it is too sweet, and a bit airy fairy.

[36] The evidence does not in our view establish that there was any breach of r 5.1 of the Rules by Licensee 1 to carry out his obligations with appropriate skill and diligence. We do not accept either that he failed to communicate adequately with the appellant. There is no evidence which would establish these allegations on the balance of probabilities and accordingly the Committee was correct to take the view that no further action was called for in respect of them. These grounds of the appeal fail.

Communication shortcomings on the part of the agent

[37] The appellant complains that Licensee 1 failed to maintain adequate communication with her during the course of the agency. She attributes this, partly, to two periods when Licensee 1 was ill and the property was being marketed.

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9 Paragraph 3.21 of the Committee decision.

[38] One of the complaints that she makes is that:[10]

> He said he would phone when they had signed up and didn't. When I rang at 8.30 pm "what is happening?" he texted "apologies Jackie I'm not well.

[39] The evidence discloses that on one or two occasions Licensee 1 excused himself from communications because he was not feeling well. However, in our view, the obligation of the agent is not an unconditional one to be available each and every day of the period of the retainer and at any time of day for communications with the principal.

[40] It is necessary to bear in mind that licensees are human and that from time to time they will become unwell. The non-availability of the agent in this case did not in our view reach the point where he ought to have relinquished the agency. The appellant has not satisfied us that there is any basis for concluding that the non-availability of the principal reached the point where he was unable to discharge his obligations to give proper attention to the retainer that he had received from the principal to act as her agent in the sale.

[41] We accept that it is a usual requirement of an agency agreement that the licensee promptly advise the vendor of significant developments with regard to the agency, and a vendor signing a contract would be one such event. On the other hand, if the licensee in this case was unwell, and there is no reason to doubt that he is telling the truth in the matter, then by applying the standard of reasonableness, we are unable to accept that his failure to promptly communicate with the appellant amounted to a breach of obligation.

[42] It is also the case that the appellant must accept that she partly contributed to the problems in communication. She does not dispute the assertions that Licensee 1 makes that she was often difficult to get hold of because she did not have an answerphone service available at her landline and, from time to time, she misplaced her cell phone. Documentary evidence of these matters is detailed in the decision of the Committee.[11] We will not review all of that evidence, but each of the cases which the Committee

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10 BoD 8.
11 BoD 211.

instanced where Licensee 1 was unable to make contact with the appellant is supported by contemporaneous documents.

[43] To summarise, there were delays occasionally in communication which came about because of the non-availability of Licensee 1 principally for health reasons. However, the number of these delays and the significance of them do not, applying the standard of reasonableness, mean that he seriously breached his obligations to the appellant. Further, difficulties in communication, viewed overall, were contributed to by the appellant and her inability to maintain workable telephone communications.

The allegation that Licensee 1 misled the appellant about the number of tender papers issued

[44] As we have already observed, the process chosen for marketing the appellant's property was sale by tender. The placing of the tender is a process which begins with an interested party obtaining the required form upon which to submit a tender, completing the tender and then lodging it with the person conducting the tender in accordance with the instructions accompanying the tender form. In this case, the tenders were to be sent to the office of the real estate firm by whom Licensee 1 was employed.

[45] The appellant claims that she was misled by Licensee 1 about the number of tenders. She said that Licensee 1 advised her before the tender closed that seven people were "keen". She said that Licensee 1 told her on the day the tender closed that of the five tender documents he had sent out, he expected to receive four back that day. She stated that later the same day Licensee 1 called saying that he had expected more tenders and then rang again saying he had two tenders.

[46] It is not entirely clear what the complaint is concerning this matter. When the appellant appeared before the Tribunal, she was questioned about her complaint and it was pointed out to her that Licensee 1 did not have any control over how many tenders would be lodged with regard to the property. What he could tell her was how many people had asked for tender documents. The fact that they had asked for documents did not necessarily mean that they would proceed with lodging a tender. We are unable

to agree that the evidence establishes on the balance of probabilities that Licensee 1 misled the appellant with respect to the tenders.

The close of tenders and opening of the envelopes together with negotiations

[47] The tender for the property closed at 2:00 pm on 28 June 2017 and it is common ground that the appellant was present at Harcourts offices, as was Licensee 1 and Licensee 2, when the sealed tenders were opened. It is correct that Licensee 1 was absent from the office at the time that that occurred. The appellant states that there were a number of irregularities or improprieties in the way which the end of the tendering process was managed by the licensees.

Did appellant understand the tender process

[48] The complaint that the appellant makes is that generally she did not understand the tender process. The appellant further says:[12]

> I felt out of my depth, bewildered and unable to think. I felt I had no power to determined what was best to do.

[49] In general, the appellant's claim not to have understood the tender process is at variance with contemporaneous documents. Tender Guideline Documents were provided to the appellant and her solicitor a month prior to the tender closing and the appellant signed an acknowledgement that the tender guidelines had been explained to her.

[50] In our view, there is no substance to this complaint and this does not amount to a viable ground of appeal.

Did Licensee 1 prematurely open the tenders?

[51] The next basis of complaint which the appellant makes is that even before the stage was reached where the sealed tenders were opened, Licensee 1 had given her unauthorised and improper advance notice of what was in the envelopes. This is denied by Licensee 1.

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12 BoD 5.

[52] At the outset we note that this allegation is inconsistent with the evidence of Licensee 2 that he opened the envelopes on 28 June 2017. If that evidence is correct, it would not be logical to conclude that Licensee 1 had seen the contents of the envelopes. That is because for the allegation to be true, it was Licensee 1 and not Licensee 2 who would have had to open the sealed tenders in order to see their contents and to tell the appellant the tender figures in advance of the meeting.

[53] Licensee 1 denies that he opened the sealed tenders. He acknowledges, though, that two of the tenders were expected from persons he had introduced as possible buyers and he was aware of what they would offer.

[54] In our view, Licensee 1 may have told the appellant what the two tenderers were going to offer on the basis that he had an idea of what their offers were going to be. We do not agree that it can be established on the balance of probabilities that Licensee 1 opened the tenders prematurely.

The circumstances of the opening of the tenders

The order in which the tenders were opened

[55] The appellant asserted that Licensee 2 opened the tenders starting with the lowest and ending with the highest as a deliberate ploy to pressure her. Licensee 2 states that if they were opened in that order, it was a coincidence.

[56] In order for the explanation of coincidence not to be accepted, the licensee/s must have opened the tenders ahead of the meeting to find out what offers had been made. Presumably, they would then have had to be re-sealed and later opened at the meeting with the licensee/s purporting that they had not viewed the offers previously. Only in this way could Licensee 2 carry out his scheme.

[57] We observe that this would have constituted a breach of the tendering rules which were incorporated into the agreement with the tenderers and which bound Harcourts. More importantly, it would have involved dishonest conduct on the part of the licensees and, of course, meant that the evidence that they have given on the point is wrong.

[58] We would not be prepared to make adverse findings against the licensees in this regard solely on the basis of the unsupported evidence of the appellant. The evidence of the appellant concerning the supposed motivation of the licensees in acting this way does not add anything significant. Her evidence, in effect, consists of her telling the Tribunal what inferences she drew from the fact that the three tenders were read out in order from lowest to highest in order to prepare her for a low price.

[59] We are unable to follow the logic of the appellant's argument. There is nothing further we can usefully add. The tenders were going to be read out together. This would, presumably, only take a few minutes. Regardless of what order they were read out in, after a short period of minutes, the appellant would know what the range of tenders was. We cannot agree, that in this setting, it could have been sensibly supposed that reading the tenders out from lowest to highest would have made any difference to the impact, other than revealing the range of prices available to the appellant.

[60] This ground of appeal cannot succeed.

Absence of Licensee 1 when tenders opened and undue pressure to accept the tender

[61] The next aspect of the close of tenders which the appellant has complaints with is the fact that the tenders were opened in the absence of Licensee 1. We were told that the procedure which is followed by Harcourts involves a separate manager opening the tenders and that this is not done by the selling agent. For this reason, again we were told, Licensee 1 was absent when the tenders were actually opened. We also accept that he came back into the room shortly thereafter.

[62] The appellant says that she had a clear understanding that she and Licensee 1 would be alone to have a discussion about the situation after he opened the tender envelopes. It is not explained how this understanding came into existence. Nor is it clear why the appellant would have expressly raised this matter in advance of the opening of the tender envelopes. If, as she claims, she was surprised that a stranger, Licensee 2, came into the picture when the tender envelopes were opened, it is unlikely that she would have anticipated that a separate agent from Licensee 1 would have been involved. In those circumstances, it is difficult to understand why she would have sought an express assurance ahead of the meeting and she and Licensee 1 would have

a discussion on their own. Further, she does not indicate that at the meeting she asked for Licensee 2 to absent himself or otherwise leave her and Licensee 1 alone for a private discussion.

[63] The absence of Licensee 1, however, was explained to us on the basis that tenders may have been received from persons other than those that Licensee 1 had introduced, and it was preferred that he be absent therefore when the process took place. It is not entirely clear to us what the reasons for adopting this course of action were. The appellant, though, says that she expected that Licensee 1 would be present when the tenders were opened, and he was not.

[64] We have not been provided with any basis for concluding that Licensee 1 absenting himself when the tenders were opened contravened any requirement of the Act or the regulatory regime under it. The process of opening the tenders is essentially an administrative one. We note that certain rights are vested in the vendor by cl 2.9 of the Particulars of Sale of Real Estate by Tender form which was the form adopted in this case to confer certain rights on the vendor. These rights include the right to accept a tender in writing,[13] but also the vendor who does not accept the tender may negotiate with any tenderer after the opening of tenders.

[65] This leads us to the view that the obligations of a licensee to assist the vendor would not appear to be exhausted by the process of opening the tenders if it turns out that no tender is immediately accepted and if the vendor negotiates further with one or more of the tenderers. If that occurs, then we consider it could be the duty of the licensee to assist in those negotiations.

[66] That is exactly what occurred in this case. But the presence or absence of Licensee 1 from the room at the point when the tenders were opened did not prevent the appellant from obtaining his further help that day.

[67] It is our conclusion that the obligations of the licensee under the contract for agency were not breached in any way by Licensee 1 being absent from the room during the administrative process of opening the tenders being carried out. When the tenders

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13 Particulars of Sale of Real Estate by Tender form, cl 2.8.

were opened, Licensee 2 was the person who did so and the appellant had not previously met Licensee 2.

[68] Licensee 1 says that two of the offers were from buyers who he had introduced and that he had given the appellant the range of prices he believed those buyers would pay prior to the meeting to open the tenders. We agree with the Committee that the fact that Licensee 1 had such an understanding does not mean that he had knowledge of the actual tender offers before they were opened. We do not consider that this complaint is established on the balance of probabilities.

Improper pressure on appellant to accept offer?

[69] We have already referred to the allegation by the appellant that she was "bewildered" concerning the tender process — an assertion that we have already rejected. She claims that because of her uncertainties she was particularly susceptible to pressure which Licensee 2 brought to bear on her to conclude a sale on the 28 June 2017.

[70] The factual picture which emerges, and which is largely uncontested, though, is inconsistent with this picture that the appellant paints of her state of mind on the day. We have already stated our scepticism in regard to her claim that she did not understand the process and will not repeat what we have said on that subject. However, there are additional factors which need to be considered when deciding whether she was vulnerable to pressure and whether Licensee 2 knew, or ought reasonably to have appreciated, her vulnerability.

[71] In the first place, the appellant is obviously an intelligent person and she would have understood what the tender process involved. She has been in business. She has not led a sheltered existence (commercially speaking).

[72] Further, she involved herself in the negotiations which followed the opening of the tenders, the circumstances of which we shall now briefly review. It is the case that shortly after Licensee 2 opened the sealed tenders, the appellant authorised Licensee 1 to negotiate with the highest tenderers. There could not have been any such negotiations unless she authorised them.

[73] This would seem to be inconsistent with the state of mind she alleges she was in when she attended the opening of the tenders. We will return to the issue of the negotiations shortly.

[74] The highest tender that had been submitted was for $310,000. This was lower than the figure that the appellant considered that the property was worth. She thought it was worth $320,000 as a minimum. Licensee 2 has stated that he believed this view was based upon the CV of the property.

[75] The next issue concerns the way in which the licensees dealt with the appellant after the tenders were opened. Both licensees state that there was no pressure on the appellant. Licensee 2 accepted that while he was present in the room that he may have said to the appellant that it was a good idea to "strike while the iron is hot". Licensee 2 explained that this statement meant that, if the appellant was not happy with the price, she should take action and negotiate while the purchasers were emotionally involved.

[76] This is just what did happen and the appellant began negotiations with the purchasers shortly thereafter. We are not persuaded that Licensee 2 used improper pressure on the appellant. We accept that a probable meaning of what he said to the appellant was that rather than breaking off negotiations after the opening of the tenders it would be a good idea to maintain momentum and to go back to the highest tenderers to negotiate with them.

[77] After the opening of the tenders, both Licensee 1 and Licensee 2 have asserted that the appellant said words to the effect that it had been her hope that there would be an offer of $320,000 minimum for the property. This was higher than any of the tenders. Nonetheless, she authorised Licensee 1 to go back to the top tenderers (who we shall refer from this point onward as the "purchasers"). Licensee 1 then telephoned the purchasers and told them that the vendor wanted $320,000.[14] Licensee 2 then notes that Licensee 1 came back to the vendor and told her that the purchasers said they did not have any more money and that because of financial constraints, $310,000 was their best offer.

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[14] BoD 124.

[78] Licensee 2 says that the vendor raised the possibility of meeting the purchaser halfway at $315,000, which the licensees attempted to achieve. The response from the purchaser was that $312,000 was as high as they could go. Licensee 2 said that Licensee 1 returned and conveyed to the appellant that the purchasers would not go beyond $312,000, or words to that effect. After thinking about matters for a while, the appellant then said, according to Licensee 2:

> I'm not going to quibble over a few thousand dollars.

[79] The appellant does not dispute that she made the remark attributed to her. The appellant then accepted the offer and the agreement was executed. The statement which the appellant made is consistent with the vendor of a property making her own decisions rather than being in a state of helplessness where she was manipulated by Licensee 2.

[80] Our conclusions may therefore be set out briefly. We regard it as being unlikely that the appellant was "shocked" or "bewildered" that as she claims to have been. We consider it likely that she was disappointed that the property had not reached the pricing level which she had hoped for. Such disappointment is not an unexpected development in circumstances such as the present. The fact that she would have been prepared to sell the property at $320,000, against the best offer of $312,000, shows that there was some relatively small distance between herself and the purchasers. Of itself, it would not lead reasonable real estate agents in the position of Licensees 1 and 2 to conclude that it had come as a shock to her that $312,000 was going to be the best offer. Therefore, in the absence of any additional material, we do not consider that he ought to have appreciated that the appellant, if it is true, was experiencing shock and bewilderment and was unable to think about the situation she found herself in. After all, she had been warned that the price range would be from the late $200,000s to early $300,000s. She had had a market feedback which Licensee 1 had provided to her and that placed her on notice ahead of 28 June 2017 that even $320,000 was going to be a difficult price to achieve.

[81] We do not consider that the actions of Licensee 2 would have in any way overpowered the appellant. Nothing appears to have occurred at Harcourts' offices on

28 June 2017 when the tenders were opened that would explain why the appellant, as she complains, lost the volition to look after her own interests.

[82] Licensee 2 did not apparently notice that the appellant was overwhelmed by the circumstances after the sealed tenders had been opened. Even if it were true that the appellant was overwhelmed, it would not be reasonable to criticise him for not anticipating that that might occur. He had no reason to assume other than that the appellant, while perhaps disappointed that the tenders were not quite as high as she had wished, was fully able to look after her own interests. We accept that the evidence which Licensee 2 has given about what he said to the appellant about striking while the iron was hot is not unbelievable. His explanation of the circumstances is credible.

[83] It is no doubt not uncommon for vendors in the position of the appellant to succumb to uncertainty and indecisiveness in circumstances of the kind in which the appellant found herself. In appropriate cases where the market has been adequately tested, and there is a good chance that by persisting the vendor will achieve a price close to the true market value, it may be in the best interests of the client for the licensee to encourage the client to persevere. This, we consider, is probably what occurred in this case. We do not consider that the evidence establishes that Licensee 2 went beyond this point at the meeting on 28 June 2017. We do not accept that he crossed the line by pressuring the appellant at a time when her self-confidence had collapsed, as she apparently contends was the case.

[84] For all of these reasons, we do not accept that on the balance of probabilities it can be established that the licensees, either or both, were in breach of his obligations by applying improper pressure to the appellant on 28 June 2017. We conclude that the appellant found that the price expectations were not going to be realised and she was perhaps very disappointed that that was the case. We consider that her contentions that she was overwhelmed by the circumstances to the extent that she says she was are exaggerated. This ground of the appeal cannot succeed.

[85] There are some other miscellaneous matters relating to the opening of the tenders which we will now deal with.

The tender deposit

[86] The appellant says that instead of the standard 10 per cent deposit payable on real estate transactions applying in this case, agreement was apparently reached that only five per cent would be paid. This was said by the appellant to be disadvantageous to her and further was the responsibility of Licensee 1 who had somehow agreed to that course of action being followed. We will now consider this issue.

[87] We first note a background issue relating to the payment of deposits. Licensee 2 explained that it is standard contemporary practice for offerors at tender to arrange for an electronic funds transfer of the deposit amount required under the tender agreement. The practice of attaching a cheque for the deposit has, in the evidence of Licensee 2, fallen into disuse. In the absence of evidence to the contrary, and for the purposes of this decision, we accept that contemporary practice is as Licensee 2 has described it.

[88] The primary duty of Licensee 1 was to ensure that when the tender documents were completed that they reflected the instructions which as principal, the appellant had given to them. It is implicit in the argument for the appellant that it was intended that a 10 per cent, and not five per cent, deposit would be paid.

[89] The evidence discloses, that after the successful acceptance of tenders, the appellant had agreed to a five per cent deposit as we now explain...

[90] Licensee 1 asserts that after the contract had been signed in acceptance of the highest tender, the purchasers made a request to be allowed to pay a five per cent deposit. Licensee 1 says that he sent a copy of this request to the appellant together with the signed tender contract.[15] Licensee 1 also said that he "asked the buyer to communicate this (the five per cent) request". The object of making this request, we find, was to have the buyers through their solicitor communicate with vendors concerning the proposal for a reduced deposit.

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[15] BoD 23.

[91] The purchasers apparently did not take any further steps to progress the matter of the reduced deposit. Licensee 1 says that on 6 July 2017 he called Amelia Devine, one of the purchasers, to ask her about the deposit and she responded that "yes she was doing it now". We infer that the significance of this remark is that the purchasers were now going to take steps to have the question of whether a five per cent or 10 per cent deposit resolved.

[92] It would appear that subsequently it was agreed by communications through the respective solicitors that the deposit be only five per cent. In these circumstances, we consider the following additional facts to be relevant.

[93] So far as we are aware, the contract which was drawn up as part of the tender documents actually did provide for a 10 per cent deposit.[16] The tender documents required that a tender "must be accompanied" by a deposit of 10 per cent. Having regard to the fact that approximately a week after the Agreement for Sale and Purchase was signed Licensee 1 was still carrying out enquiries of the purchasers to see if they had initiated a discussion through the solicitors, we conclude that no deposit had actually been paid at the time the purchaser lodged their tender.

[94] It is at the least arguable that because the tender is to be submitted to the real estate agents then the deposit which must accompany the tender documents ought to have been paid to the vendor's agents, the licensees. The way in which the various complaints in this case had been formulated do not include an allegation that the agents failed by neglecting to check whether a deposit had been paid at the same time as the tender process closed. While there may be room for argument about the matter, we consider that some thought needs to be given to the question of real estate agents' obligations in circumstances of this kind. One possibility is that where the deposit has not been paid to the agent by the highest tenderer the vendor's agents should alert the vendor to the fact that the deposit has not been paid to them.

[95] However, the key question arising from the complaint as it was actually constituted, is that the agent was somehow in breach of his obligations as a result of

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16 BoD 146.

the development of discussions about whether there should be a 10 per cent or five per cent deposit payable.

[96] In the first place, the agent did not have any authority to waive the payment of a 10 per cent deposit. But Licensee 1 did not purport to do that. The agreement which Licensee 1 and Harcourts prepared actually did reflect the instructions of the vendor, that a deposit of 10 per cent was payable. The Agreement for Sale and Purchase as signed provided for a 10 per cent deposit.

[97] All that Licensee 1 did was to note subsequently that the purchasers were going to seek a relaxation of this term of the contract so that, notwithstanding the contractual requirement for a 10 per cent deposit, the purchasers would only pay five per cent. Licensee 1 gave the vendor prompt notice of the intention of the purchasers in this regard. He cannot be criticised for a failure to communicate the purchasers' wishes in the matter.

[98] For these reasons, we do not accept that there is any substance to the complaint which the appellant has made about the amount of the deposit. If the parties and/or their solicitors proceeded on the basis that a five per cent deposit was in fact all that was going to be required, that is not a matter which involves Licensee 1 who was in no position to influence the question of whether a lesser sized deposit would be acceptable.

Assertion that Licensee 1 permitted vendors to inspect the property in his absence

[99] The appellant alleges that the purchasers made a pre-settlement inspection of the subject property without Licensee 1 being present. On 4 July 2017, Licensee 1 sent a text to the appellant:

> Hi Jacky just to let you know the purchaser would like to take measurements today at 2 pm. I'll meet them on site. Billy.

[100] The appellant does not dispute that she received that text. She complains that Licensee 1 had "not okayed it with me".[17] However the text that Licensee 1 sent was not the first one that he sent on that date. An earlier text said:

> Tried calling you again, unfortunately you don't have an answer service so I can't record a message.

[101] We add by background that as we understand the evidence, the appellant was not living in the property at the time, 4 July 2017.

[102] In all the circumstances, we see nothing exceptional in an agent in the position of Licensee 1 simply advising the vendor/appellant that he is going to take the purchasers to the property. While he has not formally couched his communication as a request, it was always open to the appellant to advise him that she did not wish this to occur.

[103] However, the appellant had a further complaint to make about this aspect of the matter and she says that when she went to the property, she found one of the purchasers there without Licensee 1. Licensee 1 denies that this occurred. He apparently accepts that in these circumstances if he was to arrange for the purchaser to visit the property, he would need to be present with the purchaser when this occurred. Licensee 1 says that he was in fact present. He is supported by a text from the purchaser to Licensee 1 in which the former sets out his recollection that Licensee 1 had been at the property but had left to get his telephone. The purchaser says that he was outside the house at the back when the appellant arrived and he explained to her what had happened. By this we understand that he meant that he had explained that Licensee 1 had gone to get his telephone. Licensee 1 has himself said that he had left his telephone in his car.

[104] This allegation is not proved on the balance of probabilities and in fact is likely to be incorrect. We conclude that Licensee 1 went with the purchaser to the property to carry out the measuring on 4 July 2017.

[105] The appellant makes a further complaint that Licensee 1 did not accompany the purchasers when they carried out the pre-settlement inspection. Again, Licensee 1

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[17] BoD 6.

denies that this was the case. His position is supported by a text which the purchaser sent to him which said that:

> No you were 100% there at the pre-inspection. I remember that. Well if you need me to verify anything I can.

[106] There is a direct conflict of evidence on this point. It cannot be resolved in favour of either party. Because the burden of proving the complaint rests on the appellant, this complaint cannot succeed and is not a viable ground for appeal.

Ex gratia payment of $3,000

[107] When the appellant made her complaints to Harcourts they agreed to make an ex gratia payment to her of $3,000. Apparently, the reasons for doing so were that the appellant was disappointed with the price she had obtained but she had offered to conclude a purchase at $315,000 (as part of the process of "splitting the difference"). The appellant accepted the $3,000. She said that she considered that the payment had been made by Harcourts because they wanted to get rid of her.

[108] It is the view of the Tribunal that the making of this payment does not affect the liabilities of the licensees. The appellant is likely to have correctly identified the reasons why Harcourts did what they did, namely to make her "go away". That is to say, Harcourts were no doubt motivated by a wish to avoid further dispute with the appellant. We do not consider because Harcourts made the payment that it reflects any admission of liability by Licensee 1 and Licensee 2. There is no evidence anyway that they associated themselves with the payment or made any concession that the payment was properly called for. For that reason, the ex gratia payment does not influence our reasons when dismissing the appeal.

Conclusion

[109] The Committee determined that no further action ought to be taken in regard to the complaint which the appellant made. We have conducted a rehearing into the issues that were raised by the complaint. We consider that none of the complaints are able to be established because none of them can be proved on the balance of probabilities. The appeal is dismissed.

[110] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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J Doogue
Deputy Chairperson

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Ms N Dangen
Member

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Ms C Sandelin
Member