BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 15

IN THE MATTER OF	Appeals under section 111 of the Real Estate Agents Act 2008
	READT 049/18
BETWEEN	LYNETTE and ANDREW DOWSON Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	JILLIAN FRANKLIN Second Respondent
	READT 051/18
BETWEEN	JILLIAN FRANKLIN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	LYNETTE AND ANDREW DOWSON Second Respondents
Hearing:	12 March 2019, at Papakura
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Mr N O'Connor, Member
Appearances:	Mrs Dowson and Dr Dowson (by video link) Mr R W Belcher, on behalf of the Authority Mr T Rea, on behalf of Ms Franklin
Date of Decision:	17 April 2019

DECISION OF THE TRIBUNAL

Introduction

[1] On 3 July 2018, Complaints Assessment Committee 409 issued a decision in which it upheld a complaint made by Mrs and Dr Dowson[1] against Ms Franklin. The Committee found that Ms Franklin had engaged in unsatisfactory conduct in relation to the sale of a property at Papatoetoe ("the substantive decision").[2] In a decision issued on 2 October 2018, the Committee made an order for censure of Ms Franklin, and ordered her to pay a fine of $6,000, and to undergo further training ("the penalty decision").[3]

[2] In the appeal READT 049/18, the Dowsons have appealed against both the substantive and penalty decisions. In the appeal 051/18, Ms Franklin appealed against both decisions. She subsequently withdrew her appeal against the substantive decision.

Chronology of events

[3] The Dowsons (who live in the United Kingdom) owned the property, and Mrs Dowson's parents (Mr and Mrs Hull) lived in it. The Dowsons' intention was that Mr and Mrs Hull would live there until such time as they wished to move into a retirement village.

[4] Ms Franklin is a licensed salesperson, engaged by Barfoot & Thompson Ltd ("the Agency"). She initiated contact with Mr and Mrs Hull on 22 September 2015, as they were neighbours of a property she had recently sold at auction. The impetus for the approach was that Ms Franklin was asked by under-bidders at the auction if she had other properties for sale in the area.

[5] The property was listed for sale with the Agency pursuant to an agency agreement under which Ms Franklin was the listing salesperson. The Dowsons were

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1 For convenience, we will refer to Mrs and Dr Dowson as "the Dowsons", where it is not appropriate to refer to them individually.

2 Complaint No C19293: re Jillian Franklin, Decision finding unsatisfactory conduct, 3 July 2018.

3 Complaint No C19293: re Jillian Franklin, Decision on orders, 2 October 2018.

dealing with the sale. The primary contact was with Mrs Dowson, by email, although Ms Franklin also dealt with Mr and Mrs Hull.

[6] On 11 October 2015, Ms Franklin advised Mrs Dowson by email that Mr Sijo Thomas wanted to make a cash offer. Mr Thomas was a licensed salesperson engaged at a different branch of the Agency. On 14 October 2015, the Dowsons signed a "Form 2" consent form, giving consent to the sale of the property to a "related person".

[7] On 18 October 2015, the Dowsons and Mr Thomas signed an agreement for sale and purchase of the property, for a purchase price of $900,000. Settlement was stated as "27 May 2016 or earlier as agreed". An added "clause 19" provided that the agreement was conditional on "the Vendor entering into an agreement to purchase an alternative property of their choice and such agreement becoming unconditional in all respects …". The standard 10 percent deposit provision was amended to $50,000.

[8] On 5 November 2015, the Dowsons' solicitor advised Mr Thomas's solicitor that the satisfaction date for cl 19 was 13 May 2016.

[9] The Dowsons were subsequently provided with a valuation of the property by Morley & Associates, registered valuers, dated 11 November 2015, valuing the property at $900,000.

[10] Mr Thomas did not pay the deposit on signature of the agreement for sale and purchase. The Dowsons were not aware of this until June 2016 when their solicitor sent a letter cancelling the agreement on the grounds that the cl 19 condition had not been satisfied. He asked for release of the deposit, and was advised that no deposit had been received.

[11] The Dowsons then listed the property for sale with another licensee. They received several offers, one of which was accepted and a deposit paid.

[12] On 28 July 2016, Mr Thomas lodged a caveat on the title to the property. The caveat was eventually removed on 25 October 2016. The sale of the property to Mr Thomas was settled pursuant to a new agreement for sale and purchase, for $957,000.

The complaint

[13] The Dowsons' complaint (as summarised by the Committee)[4] was that Ms Franklin:

[a] did not act in their best interest as vendors;

[b] provided false and misleading advice that the deposit on sale had been paid, when it had not; and

[c] was a party to a fraudulent valuation for the property.

[14] During the course of investigating the complaint, the Committee, on its own initiative, investigated:[5]

[a] The drafting of the agreement for sale and purchase of the property; and

[b] The drafting of the Form 2 consent, and the advice provided about it.

Substantive decision: the Committee's findings

[15] The Committee found that Ms Franklin had engaged in unsatisfactory conduct: her conduct fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee, contravened provisions of the Real Estate Agents Act 2008 ("the Act") and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), and was incompetent or negligent.

(a) The agency agreement

[16] The Committee found that Ms Franklin initiated contact with Mr and Mrs Hull. It rejected her statement that Mr and Mrs Hull had initiated contact with her. The Committee considered that this affected Ms Franklin's credibility as a witness.[6]

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4 Substantive decision, at paragraph 1.4.
5 At paragraph 1.5.
6 At paragraph 3.11.

[17] Although they were not the owners of the property, Ms Franklin had Mr and Mrs Hull sign the agency agreement. The Committee described the agency agreement as "a shambles". There appeared to be two copies: one signed and initialled by Mr Hull, dated 28 September 2015, the other signed by the Dowsons and dated 2 October 2015 (three days after the agency was set to commence, or had commenced). Only Mrs Dowson had initialled the client acknowledgements. The Committee observed that it was unnecessary, confusing, and misleading to have Mr Hull (a non-party) sign the agreement.[7]

[18] The Committee found that the way Ms Franklin dealt with the agency agreement was in breach of r 5.1 of the Rules, which required her to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.[8]

(b) Ms Franklin's duty to act in the Dowsons' best interests

[19] The Committee upheld this complaint on two bases:

Marketing

[20] Ms Franklin did not have a meaningful discussion about the different ways of selling the property, but took steps preparatory to marketing the property, and some steps to market it (arranging for photographs to be taken, arranging a "Property Press" advertisement, and arranging for a sign to be placed outside the property). Ms Franklin took no active steps to market the property after Mr Thomas indicated that he was going to make an offer. This was a breach of rr 6.1 (which required her to comply with her fiduciary obligations to her clients) and 9.1 (which required her to act in the best interests of her clients and act in accordance with her clients' instructions).[9]

Ms Franklin put undue or unfair pressure on the Dowsons to sell

[21] Ms Franklin was in breach of her obligations under r 5.1, r 6.4 (which required her not to mislead the Dowsons, or provide false information, or withhold information

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7 At paragraph 3.12.
8 At paragraph 3.15.
9 At paragraphs 3.16–3.31.

that should have been provided), and r 9.2 (which required her not to engage in any conduct that would put the Dowsons under undue or unfair pressure).[10]

[22] The Committee accepted the Dowsons' statement that Ms Franklin told them Mr Thomas was making a cash offer, which he was not. Ms Franklin passed on misleading information from Mr Thomas (that he was making a cash offer) and failed to correct it. It was incumbent on her to do so "emphatically and in writing". Representing the offer as a cash offer may have induced the Dowsons to entertain an offer made soon after the property was listed, and must have put pressure on them to sell.[11]

[23] Ms Franklin said to the Dowsons that "we should definitely take this offer", "we have a cash offer", and "I don't want to lose this buyer so we need to keep things moving", but the evidence did not disclose any reasonable basis for saying that the market had slowed, or that there was little interest in the property.

(c) Ms Franklin's advice concerning payment of the deposit

[24] Mr Thomas was required to pay the deposit immediately upon signature of the agreement for sale and purchase, but did not do so for several months. His explanation for not paying the deposit was "vague and lacks credibility". Ms Franklin followed up on his non-payment, but he deliberately delayed paying.[12] The Committee then considered the following issues.

Did Ms Franklin tell the Dowsons that Mr Thomas had paid the deposit?

[25] The Dowsons told the Authority's investigator that Ms Franklin told Mr and Mrs Hull "on multiple occasions" or "on two occasions" that the deposit had been paid. Mr Hull told the investigator that Ms Franklin told him that Mr Thomas "was paying the deposit", then a week later that Mr Thomas "had just paid the deposit". Ms Franklin said that she could not remember her exact words to Mr and Mrs Hull, but recalled that she ".. did say something along the lines that Yes … Mr Thomas has said he will pay". She further said she never told either Mrs Dowson or Mr and Mrs Hull that the deposit

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10 At paragraph 3.68.
11 At paragraphs 3.52–3.59.
12 At paragraphs 3.78–3.79.

had been paid. The Committee was not satisfied that Ms Franklin had said that the deposit had been paid; rather, it found that Ms Franklin "represented the delay in payment of the deposit in an optimistic way – that it would be paid."[13]

Did Ms Franklin tell the Dowsons that the deposit had not been paid?

[26] Ms Franklin failed in her duty to the Dowsons, by failing to tell them that the deposit had not been paid. Further, she did not advise them of the risk associated with non-payment, and their option to make time of the essence and then to cancel the agreement for sale and purchase, and did not advise them that they should seek legal advice on the matter. Ms Franklin's failure likely led the Dowsons to believe the deposit had been paid. She failed to exercise skill, care, competence, and diligence, in breach of r 5.1.[14]

(d) The agreement for sale and purchase

[27] Ms Franklin demonstrated a high level of negligence/incompetence in the way she drafted the agreement for sale and purchase and the way she dealt with signing and initialling it. She had Mr and Mrs Hull sign and initial the agreement; she did not have the Dowsons initial it; she did not tell the Dowsons Mr Thomas had changed the deposit and the significance of this, and did not have them initial the change to the deposit; she did not indicate whether a building report was required; she did not have Mr Thomas initial a handwritten change to clause 9.2; she did not have the parties initial that the Dowsons were not registered for GST on the front page of the agreement, and completed part of Schedule 2 to the agreement after indicating that the Dowsons were not registered for GST; and she did not include a date for satisfaction of clause 19.

[28] Ms Franklin was therefore in breach of rr 5.1 and 9.1.[15]

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13 At paragraphs 3.76–3.89.
14 At paragraphs 3.89–3.93.
15 At paragraphs 3.109–3.127.

(e) The Form 2 consent and advice concerning the form

[29] Ms Franklin failed to exercise skill, care, competence, and diligence in dealing with the Form 2 consent, in breach of r 5.1. Further, her conduct demonstrated that she did not have a sound knowledge of the Act and Rules, in breach of r 5.2.[16]

[30] Because Mr Thomas was engaged by the Agency, he came within the definition of a person "related to" Ms Franklin. Therefore, under s 134(2) of the Act, the Dowsons' consent was required before Ms Franklin could market and sell the property to him. The Act provides that such consent must be given in the "prescribed form" ("Form 2"). Under s 134(3) and s 135 of the Act, the Dowsons were also required to be given a valuation, made by an independent registered valuer, either before they signed the Form 2 or, with their consent, within a further 14 days. If these provisions were not complied with, the Dowsons' consent was ineffective and they were entitled to cancel the agreement for sale and purchase, under s 134(4).

[31] The Form 2 consent was signed by the Dowsons on 14 October 2015, but it was incorrectly completed, as it recorded that they had received a valuation, when they had not. Ms Franklin was aware of the error, but did not correct the form. Ms Franklin also gave the Dowsons incorrect advice as to when the valuation was required to be provided.

[32] The valuation provided to the Dowsons was dated 11 November 2015. It was therefore 14 days late. Ms Franklin should have told the Dowsons that their consent was ineffective, and they had the option to cancel the agreement for sale and purchase. She did not do so.[17]

(f) Complaints not upheld

[33] The Committee did not uphold the Dowsons' complaint as to a "ridiculous" offer they believed had been made by a couple who had been the under-bidders at the auction of the neighbouring property. It did not uphold their complaint that Ms Franklin had

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16 At paragraph 3.141.
17 At paragraphs 3.132–3.140.

"colluded with Mr Thomas" over the sale, and improperly "endorsed" him by saying that she knew Mr Thomas professionally and that he was a trustworthy person and had an excellent reputation, and that the sale to Mr Thomas was below current market value.

[34] Further, the Committee did not uphold the Dowsons' complaint that Ms Franklin was party to a fraudulent valuation, prepared by Morley & Associates Ltd, on Mr Thomas's instructions.

[35] The valuation report was addressed (in accordance with Mr Thomas's instructions) to "Avin Lal", at the Agency's Papatoetoe branch, and identified the valuer's client as Mr Thomas. Mr Lal had not been employed at that branch for some 12 months before the report was prepared. The Committee did not consider it necessary to discover why the report was sent to Mr Lal. It was satisfied that Mr Morley was a registered valuer, and it was satisfied that the report was legitimate. The Committee recorded its understanding that there was no current practice for the valuer's client to be the vendor, and did not consider it appropriate to make any adverse finding against Ms Franklin for not ensuring that the valuer's client was the Dowsons, as vendors.

(g) Cumulative finding

[36] Having recorded its individual findings of unsatisfactory conduct against Ms Franklin, the Committee found that, cumulatively, those findings took her conduct "to the cusp of seriously negligent conduct. This places her conduct at the top of the range for unsatisfactory conduct."[18]

The penalty decision

Penalty orders

[37] The Committee recorded the Dowsons' submission that Ms Franklin was dishonest in her dealings with them and Mr and Mrs Hull, was a "rogue trader", and

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18 At paragraph 4.1.

guilty of misconduct. It noted that it had not found Ms Franklin to have been dishonest, or to be a "rogue trader". It also noted that if it had considered there was a prima facie case for misconduct, it would have referred the complaint to the Tribunal. The Committee added that although it had found Ms Franklin's conduct to be in the top of the range for unsatisfactory conduct, it had not found a prima facie case for misconduct.

[38] The Committee also recorded the submission for Ms Franklin that it had been unduly harsh in categorising her conduct as being at the high end of unsatisfactory conduct. The Committee was not persuaded to alter its assessment of Ms Franklin's conduct as at the top of the range for unsatisfactory conduct, but on reflection, retracted its comment that the conduct was "on the cusp of seriously negligent". It did not consider that comment to be helpful.

[39] The Committee reviewed its findings of unsatisfactory conduct. It summarised its conclusion as follows:[19]

> The cumulative effect of [Ms Franklin's] conduct is a very significant factor in the Committee's assessment of the conduct being at the top of the range for unsatisfactory conduct. Also, the findings relevant to [Ms Franklin] not acting in the best interests of [the Dowsons] and placing them under pressure to sell to Thomas are findings of substantial unsatisfactory conduct.

[40] The Committee highlighted Ms Franklin's having taken no steps to market the property after Mr Thomas's indication of interest, putting an unjustified "spin" on the interest of an under-bidder, telling the Dowsons, without having tested it, that the market had slowed and there was little interest, and putting pressure on the Dowsons by conveying that there was a risk of losing Mr Thomas as a purchaser when there was not.[20]

[41] The Committee also noted that matters that were not, in isolation, high level unsatisfactory conduct, were "not insignificant", and were cumulative factors in pushing Ms Franklin's conduct to the top of the scale. These matters were her failure to correct her description of Mr Thomas's offer as a "cash" offer, and her failures in relation to the agency agreement and the agreement for sale and purchase. It observed

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19 Penalty decision, at paragraph 4.10.
20 At paragraphs 4.11–4.12.

that one error in a document might be minor or inconsequential, but there was not "one error" here.[21]

[42] The Committee referred to its finding that Ms Franklin had represented "in an optimistic way" that the deposit would be paid, and failed to advise the Dowsons that it had not been paid, and failed to advise them of their options. It also referred to its finding that she failed to advise the Dowsons of their option to cancel the agreement for sale and purchase due to the delay in providing the valuation required under s 134 of the Act.[22]

[43] The Committee accepted that Ms Franklin had had no complaints made against her in a career of some 20 years.[23] It took that into account as a mitigating factor when determining that Ms Franklin was to be censured, pay a fine of $6,000, and complete further training.

Compensation sought

[44] The Dowsons sought orders for financial compensation, on the grounds that they had suffered loss because the property was sold for below market value, and their need for bridging finance because of the delay in settling the sale. They also claimed that they were required to pay additional legal fees as a result of Ms Franklin's errors.

[45] The Committee accepted that Mr Thomas's actions after their solicitor cancelled the agreement for sale and purchase caused the Dowsons, and Mr and Mrs Hull, both stress and distress. However, it found that this was caused by Mr Thomas caveating the title to the property when he had no legal basis for doing so, and Ms Franklin's pressure to sell to him was not causative of what followed after they had sold.[24]

[46] The Committee found that it had no jurisdiction to order financial compensation for any loss suffered by the Dowsons by having settled the sale to Mr Thomas, rather than to one of the prospective purchasers introduced by the salesperson they

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21 At paragraphs 4.13–4.17.
22 At paragraphs 4.18–4.19.
23 At paragraph 4.7.
24 At paragraph 4.20.

subsequently engaged. The Committee noted that such compensation has been held to be outside the provisions under which the Committee may make orders for relief.[25]

"New evidence" at the hearing

Mrs Dowson

[47] An appellant must satisfy the Tribunal that the Committee made the wrong decision. Section 111 of the Act provides that an appeal is by way of re-hearing. That is, the appeal is a reconsideration of the evidence and other material that was provided to the Committee. The appeal will be determined by reference to that evidence and material, the Committee's decision or decisions, and submissions made by or on behalf of the parties.

[48] The Tribunal may allow a party to give evidence and/or provide material to the Tribunal that was not provided to the Committee, if it is satisfied that there are proper grounds to do so. A party who wishes to give evidence or submit material that was not before the Committee must explain why it was not provided to the Committee, could not reasonably have been provided to the Committee, and should now be received by the Tribunal.

[49] In the course of her submissions regarding the Committee's decision that Ms Franklin did not tell the Dowsons that Mr Thomas had paid the deposit, Mrs Dowson said that Ms Franklin had told her that the deposit had been paid. Mr Rea (on behalf of Ms Franklin) submitted that this was "new evidence", as there was no evidence before the Committee that Ms Franklin had made the statement directly to Mrs Dowson, or anyone other than Mr and Mrs Hull. Mr Belcher (on behalf of the Authority) referred us only to a statement by Mrs Dowson that "Ms Franklin … led us to believe he had paid".

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[25] See *Quin v Real Estate Agents Authority* [2012] NZHC 3557, at paragraph [56].

Ms Franklin

[50] Mr Rea sought leave from the Tribunal to produce a statement by Ms Franklin (not provided to the Committee), in which she set out details of a "personal and sensitive nature" concerning the death of the owner (a close friend) of the neighbouring property she had sold at auction, prior to listing the Dowsons' property. She said in the statement that this was very distressing for her, and distracted her during the period when she listed the Dowsons' property. Mr Rea acknowledged that the Committee had some knowledge of the matter, but submitted that it was reasonable for the statement to be submitted as a further mitigating factor for Ms Franklin's appeal against the Committee's penalty orders.

Appeal against the substantive decision

[51] The Dowsons submitted that the "core issue" is the Committee's finding regarding the deposit. They submitted that the Committee should have accepted the evidence given by Mr and Mrs Hull that Ms Franklin told them that the deposit had been paid.

[52] There appears to have been no reference to the deposit at all, in the documents before the Committee (including email exchanges), covering the period before the Dowsons' complaint. The evidence before the Committee was:

[a] 8 June 2016 (Solicitor's letter cancelling the agreement for sale and purchase), asking for release of the deposit.

[b] 4 August 2016 (Agency letter to Mrs Dowson):

> The branch records show that no deposit was received from the purchaser.

[c] 17 August 2016 (early resolution facilitator's record of a discussion with Dr Dowson):

> [Dr Dowson] says that [Mr Thomas] was supposed to have paid the $50,000 when the contract was signed/accepted but [the Agency] confirmed the deposit was never paid.

[d] 25 July 2017 (early resolution facilitator's record of a discussion with Mr Stephen Hull (Mrs Dowson's brother):

> The [Dowsons] have also said [Ms Franklin] told their parents the $50,000 deposit for the property had been paid by [Mr Thomas] when it had not. They allege their parents asked [Ms Franklin] at least twice whether the deposit had been paid, and both times were told it had been paid into the Agency's Trust Account when it had not been paid.

[e] 15 March 2017 (emailed complaint):

> The deposit was NEVER paid. JF informed my parents on multiple occasions that this had been paid…

[f] 8 November 2017 (Mrs Dowson's response to the Authority's early resolution facilitator):

> Gill Franklin lied to my parents about the deposit being paid on two occasions.

[g] 8 January 2018 (Ms Franklin 's response to complaint):

> I don't remember well enough to say exactly what my words were but I do seem to remember that I did say something along the lines that Yes.. Mr Thomas has said he will pay…
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> …
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> At no time did I tell Ms Dowson, Mr [Stephen] Hull or George and Olga [Hull] that the deposit had been paid. I did say that Mr Thomas said he was going to pay the deposit and phoned Mr Thomas repeatedly asking him to pay the deposit. After some time, Mr Thomas stopped answering my calls.

[h] 30 January 2018 (investigator's interview with Mr and Mrs Hull):

> Mrs Hull: Oh well we, you asked her didn't you has the deposit been paid.
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> Mr Hull: Yeah I asked her, she just said the deposit had been paid, and she said he had definitely paid it, that's when we went to see [their solicitor], alarm bells started ringing, he can't pay it twice, and he wasn't paying the right amount anyway, …

[i] 26 March 2018 (Mrs Dowson's response to the Authority's investigator):

> … on 2 occasions [Ms Franklin] told mum and dad that [Mr Thomas] had paid the deposit.

[j] 23 April 2018 (Mrs Dowson's response to the investigator's report):

> We understood that the ASP was a contract that was dependent upon Thomas paying a deposit. He never paid but Jill Franklin on several occasions led us to believe he had paid. …

[53] We were not referred to any contemporaneous record in the material before the Committee of Mrs Dowson saying that she was told by Ms Franklin, directly, that the deposit had been paid. The Committee did not have before it a clear statement by Mrs Dowson to that effect. The evidence it had was of Ms Franklin telling Mr and Mrs Hull that it had been paid (see [h], above), the Dowsons' statements as to what Ms Franklin said to Mr and Mrs Hull (see [d], [e], [f], and [i], above), and Mrs Dowson's statement that Ms Franklin "led us to believe" that the deposit had been paid (see [j], above).

[54] The Committee's reasoning for not being satisfied that Ms Franklin said the deposit had been paid was as follows:[26]

> … the Committee has good reason to doubt the credibility of [Ms Franklin] as a witness. Despite its reservations about her credibility, it does not go so far as to find that she made an unequivocal statement that the deposit had been paid. There was no apparent reason for her to say the deposit had been paid when it had not (and to bare faced lie about it). Mr Hull, who has the most to say about this, made a mistake, corrected by Mrs Hull, when he said [Ms Franklin] first contacted them by phone. He accepted this correction – being that [Ms Franklin] initiated contact by a visit. Mr Hull is emphatic [Ms Franklin] said that the deposit had been paid but he is remembering what she said around 2 years after the events. His memory of what was [said] may not be reliable. There is also an inconsistency with what Mrs Dowson says she was told by the parents – that [Ms Franklin] said the deposit was paid on multiple occasions and also that [Ms Franklin] said on two occasions it had been paid.

[55] The Committee was concerned that Mr Hull had been corrected by Mrs Hull in relation to an earlier statement, and he was recalling events that had occurred two years earlier. With regard to those matters, we observe that Mrs Hull did not correct Mr Hull's statement about the deposit, but herself recalled that Mr Hull had asked Ms Franklin if the deposit had been paid. Further, in the absence of any evidence as to any particular issue as to memory failure affecting Mr or Mrs Hull, any question as to reliability in recalling events two years earlier would apply to Ms Franklin as well.

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[26] At paragraph 3.88.

[56] The Committee also referred to an inconsistency between "on multiple occasions" and "on two occasions". We accept the inconsistency, but do not consider it to be of such magnitude as to provide grounds to doubt Mr Hull's evidence.

[57] However, we are not persuaded that the Committee was wrong in not making a finding that Ms Franklin lied about the deposit, or that the Committee would have reached a different conclusion if it had Mrs Dowson's recent statement before it. The evidence before it was that the Dowsons and Mr and Mrs Hull were clear that Ms Franklin told Mr and Mrs Hull that Mr Thomas had paid the deposit. At the very least, the evidence was clear that they were all led to believe that the deposit had been paid, and that belief was never corrected by Ms Franklin. But that is not the same as finding that Ms Franklin told a deliberate lie.

[58] Had we reached a different conclusion, we could not have substituted a finding of misconduct for the Committee's finding of unsatisfactory conduct. That would require the matter to be remitted to the Committee for further consideration, and for the Committee (if it considered it should do so) to lay an appropriate charge. The charge would then have to be heard before the Tribunal. We are not persuaded that in this case we should remit the matter back to the Committee for further consideration.

[59] However, what is clear is that Ms Franklin did not tell the Dowsons that the deposit had not been paid, and that her failure to do so led them to believe that it had been paid. There is no evidence that she told them that she had repeatedly pressed Mr Thomas for payment, or that he was not responding to her calls. They were not told that in the end, she stopped trying to call Mr Thomas, with the result that the matter of the deposit was abandoned by her.

[60] The Dowsons were not told that the deposit had not been paid until after their solicitor cancelled the agreement for sale and purchase on the grounds of non-compliance with cl 19, some eight months after it should have been paid. There can be no doubt that the Committee was correct to find that Ms Franklin was in breach of r 5.1.

Decision

[61] The Dowsons' appeal against the Committee's substantive decision is dismissed.

Ms Franklin's appeal against the penalty orders

[62] Mr Rea submitted, as he had to the Committee, that the assessment of Ms Franklin's conduct as being at the top of the range for unsatisfactory conduct was unduly harsh. He submitted that most of the findings of breaches were relatively minor, and had no adverse consequences: for example, having Mr Hull sign or initial the agency agreement and the agreement for sale and purchase, Ms Franklin's description of Mr Thomas's offer as a "cash" offer, and the error in completing the Form 2 consent and the advice Ms Franklin provided in respect of it.

[63] With respect to payment of the deposit, Mr Rea submitted that the Committee found that Ms Franklin was diligent in following up non-payment of the deposit. He also submitted that the Dowsons were not prejudiced as, even if a notice had been served on Mr Thomas to pay the deposit, he would likely have paid it.

[64] Mr Rea also submitted that the Tribunal should take into account Ms Franklin's personal statement as a further mitigating factor. He sought a reduction in the financial penalty. In oral submissions, he submitted that the fine, taking these factors into account, should be reduced to $4,000.

[65] Mr Belcher submitted that the Committee's assessment of Ms Franklin's conduct was correct, and was appropriately reflected in the penalty orders. He submitted that Ms Franklin's failure to market the property, advising that Mr Thomas's offer was a good price without having tested the market, her drafting errors (which went beyond simple mistakes and put the Dowsons at risk), her failure to advise that the deposit had not been paid, and her failures regarding the Form 2 consent and valuation, cumulatively amounted to unsatisfactory conduct at the top of the range of unsatisfactory conduct.

[66] He submitted that the Committee could appropriately have taken as its starting point the maximum fine available ($10,000), then arrived at the $6,000 fine after applying substantial discounts for Ms Franklin's personal circumstances as well as her previously unblemished record, and her acknowledgement of her errors.

[67] We agree with the Committee's assessment of Ms Franklin's conduct as being at the top end of the range of unsatisfactory conduct.

[68] With regard to the Committee's comment in its substantive decision that the conduct was "on the cusp" of seriously negligent" (that is, misconduct), we repeat the Tribunal's comment made in *Maketu Estates Ltd v Real Estate Agents Authority (CAC 403)*:[27]

> … conduct that is "on the cusp" should be left for the Tribunal to determine. For a CAC to decide that finely-balanced circumstances should result in an unsatisfactory conduct charge is to deprive the Tribunal of its proper role in considering whether conduct within the industry amounts to misconduct or unsatisfactory conduct.
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> In such a situation a CAC should lay alternative charges, or allow the Tribunal the opportunity, under s 110(4) of the Act, to find unsatisfactory conduct rather than misconduct , if it is not satisfied as to misconduct, but is satisfied that the licensee has engaged in unsatisfactory conduct: that is, to "downgrade" the charge from misconduct to unsatisfactory conduct.

[69] Some of the findings against Ms Franklin (in particular, her failure to market the property after Mr Thomas expressed an interest in it, her failure to tell the Dowsons that the deposit had not been paid, and her failure to deal with and to advise the Dowsons appropriately as to the Form 2 consent and the required valuation) put the Dowsons at risk of a dispute with Mr Thomas, and justify, on their own, an assessment of unsatisfactory conduct at a high level.

[70] We do not accept Mr Rea's submission with respect to payment of the deposit, that the Dowsons were not prejudiced by Mr Thomas's failure to pay the deposit (and the fact that Ms Franklin did not persevere with following it up) as, even if a notice had been served on Mr Thomas to pay the deposit, he would likely have paid it. The difficulty with that submission is that as the Dowsons did not know that the deposit

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[27] *Maketu Estates Ltd v Real Estate Agents Authority (CAC 403)* [2016] NZREADT 48, at [50]-[51].

had not been paid, they did not have an opportunity to test whether Mr Thomas "would likely have paid it".

[71] Further, we do not accept Mr Rea's characterisation of some of Ms Franklin's breaches as being "minor", or having a "low risk of adverse consequences". With respect to the agency agreement (described by the Committee as "a shambles"), we refer to the Tribunal's statement in *Summit Real Estate Limited v Real Estate Agents Authority (CAC 10012),*[28] that the agency agreement is the cornerstone of the Act and its regulatory regime, and is the foundation of important, substantial consumer-protection provisions. Whether or not there have been any adverse consequences in a particular case, anything less than a properly drafted and executed agreement creates a real risk of not achieving those objectives.

[72] The agreement for sale and purchase was a contract for the sale of the Dowsons' land. It was intended to set out, clearly and unambiguously, the terms on which the parties agreed to sell and buy. It was intended to be legally enforceable. Its importance cannot be understated. The agreement for sale and purchase in this case (again described by the Committee as a "shambles") created a real risk of it being unenforceable. Whether there have actually been adverse consequences in a particular case does not affect the Committee's, and the Tribunal's, assessment of the risk.

[73] We are not persuaded that the Committee was wrong to regard Ms Franklin's errors in drafting these documents as being "not insignificant", and contributing to the overall seriousness of Ms Franklin's conduct.

[74] We therefore reject Mr Rea's submission that Ms Franklin's conduct should be assessed as being at the "medium to high" level of the range of unsatisfactory conduct. Further, we are not persuaded that the Committee would have been wrong to adopt a starting point for determination of the appropriate fine that was at or near the maximum fine of $10,000. A starting point at that level would be consistent with achieving the purposes of Act.

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[28] *Summit Real Estate Limited v Real Estate Agents Authority (CAC 10012)* [2011] NZREADT 88, at paragraphs [18]-[19].

[75] We accept that Ms Franklin would be entitled to a discount from the starting point on account of her previously unblemished career in the industry and, to some extent, on account of her acknowledgement of her errors. We have qualified the latter factor, as the errors were obvious on the documents (for example, the agency agreement and the agreement for sale and purchase), or not challenged (for example, not telling the Dowsons that the deposit had not been paid.)

[76] We accept that Ms Franklin's statement as to the personal stress she was under at the time she listed the property can be taken into account as a mitigating factor that was not known (in detail) to the Committee. It concerns the Tribunal that Ms Franklin did not at the time seek any assistance with her agency work. Further, we observe that Ms Franklin's involvement with the property continued after the immediate listing for a period of several months: from October 2015 until the Dowsons engaged another salesperson after cancelling the agreement for sale and purchase in June 2016, and learning that the deposit had not been paid.

[77] Having reconsidered the penalty orders, and having taken into account all mitigating factors, we are not persuaded that the fine of $6,000 was excessive and beyond what the Committee could reasonably impose. We are not persuaded that it should be altered.

Decision

[78] Ms Franklin's appeal against penalty is dismissed.

The Dowson's appeal against the Committee's decision not to award financial relief.

[79] The Dowsons submitted that Mr and Mrs Hull were deeply affected over the sale of the property. They reported Mr Hull's statement to them that he dreaded waking up each morning because of what was happening with the sale.

[80] They submitted that Mr and Mrs Hull were put in an impossible position when the caveat was lodged – of either remaining in the property and challenging the caveat

in the High Court and risk losing a place in their preferred retirement village, or reaching a settlement so that they could move into the retirement village.

[81] They further submitted that the Committee should have ordered reimbursement of legal fees they paid in relation to the caveat dispute with Mr Thomas, and compensation for the difference between the price paid by Mr Thomas and the highest offer they received after listing the property with another salesperson.

[82] The Committee's jurisdiction to make orders for financial relief is set out in s 93(1)(f) of the Act. The Committee may:

> order the licensee–
>
> (i) To rectify, at his or her expense, any error or omission; or
>
> (ii) Where it is not practicable to rectify the error or omission, to take steps to provide, at his or her own expense, relief, in whole or in part, from the consequences of the error or omission:

[83] We were not advised as to the grounds on which Mr Thomas claimed to have an interest in the property which justified his lodging the caveat to prevent the sale of the property to another person. Further, as the caveat was not tested in the High Court, we do not know whether it would have been sustained. However, we do not accept that the Committee was wrong to find that issue of Mr Thomas not paying the deposit did not cause the Dowsons to incur legal costs in relation to the caveat.

[84] When Mr Thomas failed to pay the deposit on signing the agreement for sale and purchase, the Dowsons would have been entitled to issue a three-day notice making "time of the essence" to pay the deposit. If the deposit remained unpaid, they would have been entitled to cancel the agreement. That is not, however, what occurred.

[85] The agreement was cancelled on the grounds that cl 19 (pursuant to which the agreement was conditional on "the Vendor entering into an agreement to purchase an alternative property of their choice and such agreement becoming unconditional in all respects …") had not been satisfied.

[86] Further, we are not persuaded that the Committee was wrong in not making an order compensating the Dowsons for any loss incurred by settling the sale to Mr Thomas, rather than selling the property to a subsequent purchaser.

[87] As stated by the High Court in *Quin v Real Estate Agents Authority*, the Committee does not have a general power to order a licensee to compensate a complainant for any and all loss resulting from a real estate transaction in which the licensee acted below the expected standard. The Committee's power to order relief under s 93(1)(f) does not extend to ordering a licensee to pay compensatory damages by way of indemnity for a loss, or for loss of expectation.[29]

[88] The Committee can only make an order that, if it is not practicable to rectify an error or omission, to provide relief (in whole or in part) from the consequences of the error or omission. That is, relief can only be ordered if the licensee's error or omission causes the loss.

[89] We are not persuaded that the Committee was wrong to find that there was no evidence of a causative connection between Ms Franklin's breaches, as found by the Committee, and the fact that the offers they received after the agreement for sale and purchase was cancelled were higher than the offer they accepted from Mr Thomas. As noted earlier, the agreement was not cancelled in reliance of Mr Thomas not having paid the deposit, it was cancelled because cl 19 had not been satisfied.

Decision

[90] The Dowsons' appeal against the Tribunal's decision not to order financial relief is dismissed.

Outcome

[91] The Dowsons' appeals against the Committee's substantive decision, and against the Committee's decision not to make an order for financial compensation, are dismissed.

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[29] See *Quin v Real Estate Agents Authority* [2012] NZHC 3557, at paragraph [56].

[92] Ms Franklin's appeal against the Committee's penalty orders is dismissed.

[93] 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

_____
Ms N Dangen
Member

_____
Mr N O'Connor
Member