BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 25

READT 003/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BARRY BUSTER BEATSON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First respondent
AND	JAMES CRISPIN, TIM MORDAUNT & PROPERTY BROKERS LTD Second respondents
Hearing:	15 May 2019
Tribunal:	Mr J Doogue, Deputy Chairperson Ms N Dangen, Member Mr N O'Connor, Member
Appearances:	Mr M Lawson for the appellant Mr M Mortimer, on behalf of the Authority Mr D Sheppard, on behalf of the second respondents
Date of Decision:	9 July 2019

DECISION OF THE TRIBUNAL

Background

[1] The appeal in this matter is against a determination of Complaints Assessment Committee 416 (the Committee) given on 16 November 2018 regarding a complaint which the appellant made against the respondents' involvement in the marketing and sale of a farm property near Dannevirke, Waiaruhe Station. Ten issues were raised by the appellant concerning the performance of the respondents. On 18 April 2018, the Committee considered the complaint and decided to inquire into it under s 79(2)(e) of the Real Estate Agents Act 2008 (the Act).[1]

[2] The appeal is restricted to the issues which the parties dealt with before the CAC under the headings Issue 1, Issue 5, Issue 6, Issue 9, and Issue 10. The complaints contained in the ten issues which the appellant raised traversed many circumstances relating to the sale of the property. There were complaints that the licensees did not provide a comparative market analysis as they were required to do under r 10.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). It is also said that the selling agent, Mr Crispin, who is a second respondent, undertook marketing activities in respect of the property without having a current agency agreement in effect. There were also contentions that the advertising of the property was not properly managed, that Mr Crispin did not obtain an agreement complying with the Act and Rules before marketing or selling the property (r 9.6 of the Rules), as well as other allegations.

[3] In determining this matter, we intend to be guided by the remarks of the Tribunal in *O v Complaints Assessment Committee 10028 and T* to the following effect:[2]

> [25] … Determinations pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as "general appeals". All parties agree that the Tribunal should apply the principles set out in *Austin, Nichols* as reiterated by *Kacem v Bashir*.

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1 BD 791.

2 *O v Complaints Assessment Committee 10028 and T* [2011] NZREADT 15.

[4] The result is that the Tribunal is required to consider the evidence by way of a general rehearing and give its view on the matters in issue even though that view may be different from that of the Committee.

[5] The parties agreed that the obligation of the appellant on the hearing of the appeal was to satisfy the Committee on the balance of probabilities that the factual matters which were the basis of the specific complaint were established. As well, we accept the submission that Mr Mortimer, for the Real Estate Agents Authority, made about the quality of the evidence that was to be required where serious allegations had been made. He said:

> 3.1 A complaint must be proved "on the balance of probabilities" for a finding of unsatisfactory conduct to be made. This standard is applied flexibly, recognising that the strength of the evidence required will differ depending on the nature of the case. Stronger evidence will be required to prove more serious allegations….
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> 3.2 The Authority submits that that is of particular application in this case. Mr Beatson alleged (and continues to allege) the backdating of documents. The Authority submits that the strength of evidence required to prove this on the balance of probabilities will be high. [Citations omitted]

Overview of issues

[6] As will become apparent from the discussion of the various grounds of appeal which have been advanced, Mr Beatson has asserted that the Committee came to wrong decisions largely because it either resolved factual matters in favour of Mr Crispin or because it concluded that it could not choose between the evidence of Mr Crispin and Mr Beatson.

[7] It is the contention of Mr Beatson that any factual differences between the two men could have been resolved had the Committee appreciated that Mr Crispin had demonstrated dishonesty in some of the actions that he took, the significance of which was to establish that Mr Crispin, in general, was a person of dishonesty whose evidence should not be believed. Mr Beatson's counsel took the Tribunal through a detailed review of these alleged instances of dishonesty as part of putting the case for the appellant. It does not appear that this was how the case was advanced before the

Committee. It may be that the documents were literally included in the evidence placed before the Committee but that their significance in throwing light upon the credibility of the disputing parties was not explained. The various instances of dishonest conduct on the part of Mr Crispin were not matters which the Authority put before the Committee.

[8] As we understand it, neither Mr Crispin nor the Authority contended that it was not now open to the Tribunal to consider those same points. We will have to reach our own determination on that matter, though, in the course of dealing with this appeal.

[9] We will next turn to the specific grounds of appeal and consider them.

Issue 1 — whether the respondents failed to act in the best interests of the appellant concerning advertising and marketing of the property

[10] Before commencing detailed discussion of this issue, one preliminary point needs to be made. That is that a key part of the decision which the Committee came to, was that the issue could be resolved on the basis of the fact that part of the documentation that Mr Beatson executed. This was in the form of an acknowledgement, which was essentially that the publicity program had been agreed between himself as the vendor and Mr Crispin as the agent.

[11] It will be preferable if the ground for appeal regarding this ground is set out in its entirety:

> The Committee found that the appellant approved the changes to editorials and photographs and the marketing programme. This led to a finding that the marketing programme had been accepted and approved by the complainant. This finding was based on documents that were created and fabricated after the event, and this is demonstrated from documents that were before the Real Estate Authority ("REA") but appear to have been overlooked.

Whether the marketing programme was accepted and approved by the appellant

[12] The finding of the Committee was that the marketing proposal specified what "editorials" and photographs were going to be used to publicise the sale of the farm. It further concluded that a marketing programme which correctly identified the various phases of the marketing had been approved by Mr Beatson on 22 January 2007 when he:[3]

> approved the changes and marketing programme on 23 February 2017 as evidenced by his signing of the marketing document

[13] The document to which the Committee appears to have been referring to was an "estate agency agreement" which was signed on 22 January 2017 and which contained an acknowledgement that he had been made aware of:[4]

> the various possible methods of sale and how the chosen method could impact on the individual benefits that the licensees may receive.

[14] In its decision, the Committee placed weight on the acknowledgement.

[15] The notice of appeal conveys that the agency agreement document in which the acknowledgement purportedly appeared was one of a selection of documents that were "created and fabricated after the event". In the context under discussion, that must mean that the document containing the acknowledgement was not a genuine document that came into existence as part of the marketing arrangements of the property. Instead, that document has been concocted for some collateral purpose, presumably to assist the respondents in avoiding disciplinary responsibility for their errors and in assisting them in the disputed claim for commission on the sale.[5] Further, some person must have forged the signature of Mr Beatson on the document so concocted. The significance of this last observation is that irrespective of when the document in which the acknowledgement appeared was created, either Mr Beatson has signed it or someone has placed handwriting on it in an attempt to falsely establish that Mr Beatson signed it.

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[3] BD 792.
[4] BD 560.
[5] The respondents have commenced proceedings in the District Court to recover the acclaimed commission.

[16] The decision of the Committee did not attempt to resolve the conflict of evidence about whether the material, including signage, was adequate and whether the signage was produced at the time, it was required. We note that the dispute about the marketing essentially came down to a contest between the views of Mr Beatson on the one hand and the respondents on the other. No expert evidence about whether the publicity campaign was of a suitable standard was forthcoming.

Discussion

[17] Before the Tribunal, it is incumbent upon the appellant to establish on the balance of probabilities that the respondents did not advertise the property and market it appropriately. However, if there were a marketing plan that had been signed off by Mr Beatson, then that would be a substantial obstacle in the way of proving a breach of that kind.

[18] As to the acknowledgment which was contained in the agency agreement which purports to have been signed in January 2017, Mr Beatson explains this document on the grounds that he did not carefully check the document which he signed and contained the acknowledgement in question. That is to say; he explains the position because he was careless.

[19] For Mr Beatson to counter the probative effect of the signed acknowledgement, he has to establish that it is more likely than not that the acknowledgement was signed in such circumstances. He has not done so. We will discuss briefly the reasons why we take that view.

[20] Mr Beatson is apparently a literate person. The background suggests that he gives attention to matters of detail. He went to considerable length to ensure that the marketing material reflected his wishes including the selection of "editorial" material which would add to the appeal of the property in the eye of potential buyers. At the instigation of Mr Beatson, the marketing material for the property included a considerable amount of text about the interesting history of Waiaruhe station as far back as the 19th century. He also wanted to include a quantity of material about his family and forebears.

[21] As well, Mr Beatson has not been slow to criticise what he saw as a slapdash performance of their duties by the respondents. This would suggest that Mr Beatson has little tolerance for careless work. Such a view does not sit well with a claim that he signed an important legal document through inadvertence.

[22] It has not been established that Mr Beatson, while coming from a background of farming rather than business, would not appreciate the importance of the act of putting his signature to documents that were of legal effect.

[23] None of these points on their own actually establishes that Mr Beatson is the sort of person who would not sign any document without being aware of what its contents were. They do, however, make it harder than it would be for a person who was inexperienced with business documents, a person who manifested a lack of understanding of the importance of attention to detail, for example, to dismiss the significance of a signed acknowledgement of the kind under consideration in this case. Such a person might more readily convince a Tribunal that he had mistakenly certified to something in a document that he signed.

[24] The position we are left with, assuming there is no supporting evidence, is that we have only the assertion by Mr Beatson that, that is what occurred in this case. In our assessment, such an assertion which is not sufficiently credible to require its acceptance in the absence of evidence corroborating what he says. We do not accept that the acknowledgement was of no significance.

[25] In any event, the way in which Issue 1 is framed does seek to link the question of whether the document that Mr Beatson signed containing the acknowledgement was actually signed to the issue of Mr Crispin's conduct and therefore his credibility. How his credibility is said to be relevant is because, as Issue 1 of the notice of appeal puts it, the effect of the decision of the Committee to the extent that it exonerated Mr Crispin was "based on documents that were created and fabricated after the event".

[26] We have had some difficulty in understanding the exact nature of the appeal on this point because Mr Beatson apparently agrees that he signed the renewal of agency agreement containing the acknowledgement (with his response being that he did not

appreciate the document that he signed contained the acknowledgement). As the investigator noted, the complaint was that "the extension of the agency agreement was signed after an offer had been presented and signed and was then "backdated."[6] Therefore, the real dispute about that document is when the execution took place. However, even if the document was "backdated," that does not answer the point that, regardless of when he signed it, Mr Beatson did acknowledge in writing the marketing plan which the second respondents had drawn up.

[27] Mr Beatson does not say that he did not sign the document. Rather, he says that he was mistaken as to its contents. His contention is that notwithstanding that he signed the acknowledgment, Mr Crispin did not follow the marketing instructions that the vendors gave him.

[28] We would accept that the signing of an acknowledgement, although persuasive, is not conclusive on the question of whether the marketing plan was followed or not. It is, however, evidence which weighs against the contentions of the party in this case who was putting forward the claim that his instructions were not followed. It makes it more difficult for Mr Beatson, in other words, to succeed on this point.

[29] If, however, there was other evidence which weighed the balance of probabilities in favour of Mr Beatson's account then the Committee could still have decided that there had been a failure to follow instructions notwithstanding the signing of the acknowledgement.

[30] One way in which that conclusion could have been reached in this case would have been if the Committee had accepted that Mr Beatson was a believable witness on this point and that Mr Crispin was not to be believed. In other words, an assessment of credibility would have been necessary, which came to an adverse view of Mr Crispin. To come to a resolution of this point, we need to consider the question of credibility and we will do so in the next part of our decision

[6] BD X.

The alleged dishonest conduct of Mr Crispin in respect to fabricating documents

[31] Mr Beatson says there is evidence which establishes dishonesty on the part of Mr Crispin in fabricating documents. We accept that the remaining grounds of appeal turn on the question of Mr Crispin's credibility

[32] In the case of the agency agreement to which we have already referred, there was an irregularity found by the Tribunal in that the renewal of the agency agreement occurred after the date of the agreement for sale and purchase which Mr Beatson's trust entered into with the Handyside interests. We will comment on the significance of that action to the undertaking of assessing the credibility of Mr Crispin in due course.

[33] Before we consider assessing the credibility of Mr Crispin's evidence, we consider that it is necessary to make some general remarks about how the Committee or Tribunal is required to undertake the task of assessing conflicts of evidence.

Making findings of fact where there is disputed evidence

[34] It is possible for a Tribunal to come to a preference about which party's evidence is to be preferred, without hearing oral evidence. and observing the deponents being cross-examined: *Eng Mee Yong v Letchumanan*.[7] For example, this is possible where there are contradictions in the evidence of one of the witnesses whose credibility is in question. *Eng Mee Yong* authority is a case that is frequently cited in summary judgment applications in the High Court, when there is a conflict in affidavits.

[35] The High Court considered the problem of how to choose between conflicting affidavits in the decision of *Attorney General v Rakiura Holdings Limited*:[8]

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7 *Eng Mee Yong v Letchumanan* [1980] AC 331.
8 *Attorney General v Rakiura Holdings Limited* (1986) 1PRNZ 12 at 14.

> In a matter such as this it would not be normal for a Judge to attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them. On the other hand, in the words of Lord Diplock in *Eng Mee Yong v Letchumanan* [1980] AC 331, at 341 E, the Judge is not bound:
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> > "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

[36] Therefore, the Tribunal can attempt to break the deadlock in the evidence by the traditional means including referring to any contemporaneous documents which may contradict the witness, prior inconsistent statements by the witness resort to the propensity principal or by some other means.

[37] As part of the submissions which he made, counsel for the Authority submitted:

> "9.3 In Xu v Real Estate Agents Authority, Mr Xu appealed the Committee's decision on the basis that the Committee made a credibility finding without conducting an in-person hearing. The Tribunal found that the Committee was entitled to make its decision on the papers, referring to s 90 of the Act, stating:
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> > [87] …Complaints Assessment Committee's are well used to considering complaints which involve extensive written and documentary material, and they are usually required to accept some evidence and reject other evidence. The Committee in the present case was not at fault in not directing an in-person hearing, and it set out a considered explanation for reaching the conclusions it did. As with all decisions of Complaints Assessment Committees, the Committee's decision on this was subject to scrutiny by the Tribunal, and Mr Xu exercised his right to seek such scrutiny.
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> 9.4 In *Sutton v Real Estate Agents Authority*, the Tribunal confirmed that the Committee's procedure is supported by s 90 of the Act, and that the ordinary manner in which the Tribunal considers complaints is on the papers, unless it directs otherwise. Further, the Tribunal noted that there was no suggestion that the complainants, the Suttons, sought a hearing other than on the papers.
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> 9.5 The Authority submits that in the present case, it was open to the Committee to make a credibility finding on the papers".

[38] But there will be cases where even on that approach, the contradiction cannot be resolved, and it is going to be impossible to reach any clarity on the accusation or

allegation in the absence of the parties giving oral evidence. Each case depends upon its facts.

[39] As well, it is necessary to bear in mind what the Supreme Court said in *Taniwha v R*. There, the court was required to comment on the process of determining disputed facts and about the dangers of attempting to assess truthfulness from the "demeanour" of the witness in Court. The issue of demeanour of the witness does not arise in the circumstances of this case, but the judgment of the Court has a wider application than just to cases where that is a factor. It, therefore, provides guidance in the circumstances of the present case. In *Taniwha* the Court noted that the Court processes are underlain by: [9]

> … the assumption that a fact-finder whether a Judge sitting alone or a jury, is likely to benefit from seeing and hearing witnesses give their evidence.

[40] The same considerations are reflected in Section 92 of the Evidence Act 2006 which imposes an obligation on any party to cross-examine a witness on significant matters that are relevant and in issue, and that contradict the evidence of the witness. We accept that s 92, applying as it does to "a proceeding," would not, having regard to the definition of that term in s 2 of the Evidence Act 2006, apply to a case before the Committee. But that is not to say that the Committee should not apply the spirit of the enactment in deciding credibility questions. While s 92 may not expressly apply, it says that the principle is not to be applied in proceedings before the Committee, either.

[41] Another point which needs to be noted is that a hearing is, subject to a contrary direction, to be dealt with on the papers.[10]

[42] At Tribunal level, s 109 of the Act provides that the Tribunal may receive as evidence:

> … any statement, document, information or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a Court of law.

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9 *Taniwha v R* [2016] NZSC 121; [2017] 1 NZLR 116 at [1].
10 Real Estate Agents Act 2008, s 90.

[43] Notwithstanding that provision, the Committee may take evidence on oath[11]. If it does so, we consider that the opportunity that such an approach provides for oral examination and cross-examination ought to be taken up in order to enhance the reliability of its findings when confronted by contradictions in the evidence.

[44] We consider that the same procedure ought to be followed by the Committee in appropriate cases.

[45] There is little doubt that in this case, had Mr Crispin fabricated documents in the way that is now alleged, an affirmative finding that he had done so would be a matter that was clearly helpful in determining his credibility on the other issues.[12]

[46] While we do not suggest that oral evidence should be the norm for giving evidence before a Committee, in this case, though, it is clear that assertions that the licensee had behaved fraudulently should have been notified to the licensee in advance of the hearing. He would then have been able to give evidence in defence. Further, he should have been given an opportunity to cross-examine his accuser. The Committee would also have had the opportunity to observe him under cross-examination. Quite apart from the interests of the parties, there are very real advantages to a court, tribunal or committee that arise from observing the parties giving oral evidence where there are contested matters of fact to be decided

[47] It is clear that the legislature expected that disciplinary proceedings would be dealt with a degree of procedural informality that was substantially less than that encountered in traditional court rooms. But at the same time, the outcome of proceedings before the Committee or the Tribunal can have a very real impact on the reputation and means of earning a livelihood of the people against whom complaints are made. It would seem unlikely that the legislature expected that where the outcome of such complaints depended on disputed facts that adverse findings could be made against the party without the accuser being required to put the case directly to him or her for their response.

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11 Real Estate Agents Act 2008, s 109(2).

12 The Authority did not bring a charge alleging fabrication of documents and so that issue would only have been relevant to the credibility of the parties.

[48] Further, it will often be difficult or impossible to make an accurate decision on the question of who is telling the truth without cross-examination having first taken place. If there is an accusation of misconduct which has a serious basis, but which the licensee contests, it is unreasonable to suppose that the Committee/Tribunal will generally be able to resolve the question "on the papers."

[49] If the parties have identified a particular case pending before the Committee as being one where this issue arises, then they can seek directions from the Committee[13] before it decides whether to give a direction that some of the evidence is to be heard orally with the parties having the right to cross-examine.

Can the "fabricated documents" ground be brought up on appeal when it was not pursued before the Committee?

[50] Another central question arises about the procedure in this case.

[51] When it formulated the charges against the respondents, the Authority did not set out to establish dishonest conduct in the form of fabrication of documents. It does not seem to have been a matter that was raised before the Committee.

[52] Following the issue of the decision of the Committee, Mr Beatson filed what he described as a submission in response to the decision[14]. But by then, of course, the decision had been issued. Parties are entitled to bring appeals against determinations which the Committee has made. If a party made submissions on the point at the Committee stage and the Committee did not rule on it, for example, considering the matter in question to be irrelevant, there would be an entitlement to appeal, presumably, against that determination. But the point is that the issue must have been raised at the first instance before the Committee can consider it on appeal: *Wyatt v REAA*[15] . At no point was Committee invited to making adverse findings of credibility against Mr Crispin on the basis that he had fabricated documents. It made neither a determination that there had been a fabrication or that there had not.

[13] Or the Tribunal in a case where it is hearing the complaint.
[14] BD 767
[15] [2012] NZHC 2550

[53] We consider that it was too late for the appellant to seek to introduce that matter into the proceedings at the point where the first instance hearing had concluded, and the matter was before the Tribunal on appeal.

[54] We should anticipate a possible answer from Mr Beatson that the material upon which his criticisms about fabricated documents were in the bundle at this stage of the Committee hearing. We assume as a matter of fact that that was the case.

[55] Even if the documents were in the bundle and therefore theoretically available for Mr Crispin to make a comment on, the way in which the issues that he had to meet were framed depended upon the way in which the complainant put his case. To say that a particular document amongst the large volume of papers that were filed in this case provided the basis for a complaint to be made on appeal is no answer in our view. The appellant has attempted to construct quite a different case about the fabricated documents, but he has done so too late in the day.

[56] The way in which the case at first instance was framed was of course in the hands of the Authority and not Mr Beatson. He was involved in the initial hearing as a complainant and witness. While none of the parties questioned the right of Mr Beatson to bring an appeal, we consider that he is not justified in bringing a different case on appeal than the one which the Authority brought at first instance.

[57] When considering issue 1, we acknowledge that the assertions about Mr Crispin being the originator of the idea that a dummy bidder could be relevant. They may cast light on his honesty or credibility.

[58] We will be discussing the dummy bidder matter at a later point in our decision but in anticipation of the conclusion there set out, we record that there was no basis for the Committee concluding that either Mr Beatson or Mr Crispin first came up with the the plan to organise a dummy bidder. Therefore, it cannot be said that Mr Crispin is demonstrably dishonest because he arranged a dummy bidder.

[59] Considering the fabrication point overall, our view is that that cannot be raised on appeal and because satisfying the Tribunal that Mr Crispin did dishonestly

fabricate documents is essential to the appeal, on this ground alone in our judgement the appeal must fail.

[60] However, in case we are wrong concerning that aspect of the matter, we will go on and consider whether there was in fact evidence of fabrication which ought to have persuaded the Committee to accept the evidence of Mr Beatson and reject that of Mr Crispin. Of course, the rejection of the evidence of Mr Crispin would not mean that the appeal necessarily succeeds. It would still be necessary for the appellant to put forward a case that provided convincing support for his appeal. If he was not able to do so, the appeal would follow regardless of any tainting of the evidence of Mr Crispin.

The allegedly fabricated documents

[61] We agree with the submission of counsel for the Authority who submitted concerning the required quality of the evidence to support the allegations in this case as follows:

> 3.2. The Authority submits that that is of particular application in this case. Mr Beatson alleged (and continues to allege) the backdating of documents. The Authority submits that the strength of evidence required to prove this on the balance of probabilities will be high.

[62] We will consider now whether this is a case where that result should follow.

[63] The focus of the argument about fabricated documents was on the marketing plan and the agency agreement. The marketing plan was said to contain the comparative market analysis which Mr Crispin said that he had given to the vendor or trustees including Mr Beatson at the outset of the marketing of the property.

Fabrication of the appraisal?

[64] The case that Mr Beatson puts forward is that the marketing and appraisal document which the respondents put forward on its face could not have been actually provided when they claimed it was. Mr Beatson says for example that in November 2016 when the disputed document was created, no decision had been made to sell the property by auction and yet the document which Mr Crispin said he had provided

contained a reference to an auction on 30 March 2017. We, however, do not consider that this point has any force because the reference to an auction sale was obviously part of the recommendations contained in the "executive summary" of the marketing appraisal document which Mr Crispin relies upon. The document does not purport to record an agreement having been reached with Mr Beatson in November 2016 that the sale would be by way of auction.

[65] Certainly, Mr Crispin did not help his case by providing documents which were confusing and inconsistent in the sense that it is difficult to establish in what sequence the various documents were provided.

[66] Mr Lawson submitted that the fact that the purported marketing plan included a projected auction date of 30 March 2017 was inconsistent with the plan having been completed in early November 2016. We do not accept this argument because, as we understand it, the timetable for the option which was annexed to the marketing plan was headed "Suggested Marketing Timeline"[16]. In fact, the auction ultimately took place in April 2017. We are unable to see how this material inevitably demonstrates that the appraisal did not come out as Mr Crispin said in November 2016. He was simply making a suggestion as to when the auction might take place. The fact that ultimately the auction did take place quite close to that date proves nothing in our view.

[67] There are other inconsistencies and unsatisfactory aspects of the documents which the respondents have put forward.

[68] We were referred, for example, to a document which purported to be a summary of the expenditure that would be incurred by way of the marketing campaign for the property.[17] It was pointed out that this document was dated Wednesday, 18 April 2018. What explanation could there be for this document other than it was fabricated, we were asked, having regard to the fact that it was produced more than a year after the auction sale had taken place — assuming that the document actually came into existence on the date that appeared on it?

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[16] BD 510.
[17] BD 327.

[69] Counsel for the second respondents, Mr Sheppard, stated that the explanation was that the automated document production system which the real estate company used defaulted to including on the document the date when it was printed and so 18 April 2018 was not the date that this particular document was created. It was presumably created at an earlier date but the copy that was to be found in the evidence was printed out on that date.

The marketing document with the word "sold" appearing on it

[70] A further instance of a fabricated document was said to be a document that appeared in the evidence which was a marketing schedule for the property. That document, as we understand the argument, purported to be a forward projection of the expected market costs to be spent in the period leading up to the auction sale. However, the document had the word "Sold" printed on it.[18] The significance of this was said to be that it showed that the supposed marketing schedule was only brought into existence after the date when the property was actually sold in July 2017. It was contended that this shows that the document must have been a fabrication.

[71] A further example is a letter which Mr Crispin wrote to Mr Beatson with the words "please find our proposed marketing schedule on the following page". The marketing schedule which follows and sets out what appeared to be a detailed list of the advertising that actually did occur in this case. For example, there is a reference in the marketing campaign to advertisements being placed in the "Bush Telegraph" newspaper. The marketing schedule shows, for example, that there were to be several insertions in the Bush Telegraph[19] and the documents and evidence include a copy of an advertisement from the Bush Telegraph for the farm property which refers to an upcoming auction on 6 April 2017. Mr Lawson placed considerable emphasis on the fact that this "marketing campaign" document was dated "Wednesday, 18 April 2018".

[72] As well, he pointed out the covering letter that was included in the bundle by the respondents to Mr Beatson attaching a schedule was dated 18 April 2018.[20] Both

[18] BD 317.
[19] BD 327.
[20] BD 326.

of these dates are, of course, over a year after the date when the auction actually occurred.

[73] In reply, Mr Sheppard submitted in regard to the erroneous reference to the property having been "sold", this was a case of an automated function of the second respondents' document production software inserting the status of the transaction at the time when the document was printed and not when it was created. We understand that the same explanation is advanced for the erroneous dating of the letter purportedly sent on 18 April 2018.

Fabrication of the renewal of the agency agreement?

[74] As part of the case which Mr Beatson brings on appeal, a contention is put forward that the appellant also created a false document in regard to the renewal of agency agreement, the circumstances of which we made reference to when discussing Issue 1 on the appeal.

[75] In its decision, the Committee concluded that at a time when Mr Crispin was marketing the property (in which period the Agreement for Sale and Purchase was entered into with the Handyside family interests), there was no signed renewal of agency agreement in existence.[21] Some additional reference to the background is required in order to explain the circumstances in which the agency agreement lapsed.

[76] The original period for which the agency was authorised to market and sell the property on behalf of the vendor, Mr Beatson's trust, ran from 13 February 2017 when all parties had signed an agency agreement which was to expire on 30 June 2017. The renewal agreement was to commence from 1 July 2017 and in June Mr Crispin took steps to have an updated agency agreement signed. He delivered the document to Mr Beatson on 16 June 2017.[22] It was necessary for the other two trustees of Mr Beatson's trust to sign the renewal of agency and Mr Crispin followed up on a number of occasions attempting to get Mr Beatson to precure the execution of the document.

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21 Crispin — Complaint No C24399 (16 November 2018) at [3.35].
22 At [3.31].

[77] There is no dispute that during July Mr Crispin and the other respondents continued to market the property and during this period the ultimate successful buyer, Mr Handyside, became interested.[23] The agency renewal agreement which Mr Crispin had drawn up and referred to the vendors contemplated the agency expiring at the end of September 2017, although Mr Beatson changed this to August 2017 (as he was entitled to do) and, once this had been done, the offer was presented to the other two trustees who signed it on 27 July 2017.[24] The document appears to have recorded a commencement date of 1 July 2017 but that date was some weeks earlier than the date when the agency renewal was actually signed.[25]

[78] Mr Crispin was apparently of the view that it did not matter when the renewal agreement was signed and that all that mattered was that the parties actually signed an agreement covering the period in which marketing and sale of the property actually occurred. We digress to mention that the decision of the Committee would have left Mr Crispin in no doubt that this was unacceptable and that what was required for the purposes of compliance with r 9.6 was a signed renewal agreement. We consider that they were right to take such an approach.[26] They were also correct in concluding that this amounted to unsatisfactory conduct.

[79] However, the conclusion that the Committee came to carried with it a further conclusion that no agency agreement came into effect until it had been signed by each of the trustee owners of the farm property which was on the market for sale.

[80] We are not required to express a view on whether this conclusion was correct or not. There has not been any appeal from the conclusion of the Committee in regard to that matter. But we mention that the issue may not be entirely straightforward. That is because there may be some uncertainty about the position arising from the fact that while equity trustees must act unanimously, at common law there is no reason in general terms why an agreement signed by one trustee pursuant

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23 At [1.46].

24 At [1.48].

25 The renewal agreement at BD 264 is illegible in the area where the dates are specified.

26 While we did not hear argument on the point, it would appear that agency is not implied from the fact that a trustee who is a co-owner of the property has an implied authority from the other trustee owners to carry out acts of this kind. A delegation would be required to achieve that effect.

to a purported delegation could not be enforced even though by carrying out a delegation of this kind there may have been a breach of the trustees' duties.[27] However, in this case, there was no evidence of a formal delegation or that the trustees, other than Mr Beatson, acted inconsistently with such a possibility by accepting responsibility to actually sign the agreement themselves, rather than relying upon any agency on the part of Mr Beatson to sign the document for them.

[81] The significance of the circumstances surrounding the execution of the renewal of the agency in the present case is that Mr Beatson has characterised it as an instance of fabricating a document and therefore showing a propensity for dishonesty on the part of Mr Crispin.

[82] We do not consider that it has been established that there was any dishonesty present on the part of Mr Crispin. He apparently considered it acceptable to continue to market the property and rely upon retrospectively obtaining an authority. In the end, Mr Crispin acted as though he had an authority in existence from 1 July 2017 when legally he did not. When he did obtain the signature of the last trustee to sign the renewal, he did not alter the agreement to record that the agency took effect from such date but apparently left the date of 1 July in the document.

[83] The fact that Mr Crispin may have breached the Rules does not prove that he is a "dishonest" person in the sense that the evidence that he provides is likely to be false or unreliable

Our overall conclusions on the "fabricated" documents

[84] The explanation that has been put forward by the second respondents is consistent with our knowledge that some word processing systems do in fact have a field inserted into the documents at positions where, for example, the date is to be inserted, and which by default automatically inserts the current date on each occasion when it is printed, with the date inserted being the date of the printing not the date of the creation of the document.

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[27] ADLS Webinar "The Concept of Agency", Peter Watts QC, 15.03.18

[85] Our conclusion is that it is arguable that on some occasions the dates which appear in printed out copies of documents is not when the documents first came into existence.

[86] We consider that there is a competing explanation for how these anomalies appeared in the documents which the respondents' company produced which cannot be ruled out. The result is that on the balance of probabilities it is not established that the explanation which we should adopt is that the documents were fabricated.

Mr Crispin's evidence and the "dummy bidder" issue – effect on credibility

[87] Another ground upon which Mr Crispin's credibility is attacked is because of his part in the "dummy bidder" episode which occurred during the course of his marketing the property. The circumstances in which a non-genuine bidder was introduced at the auction where the subject of a separate complaint which will be discussed in detail at the appropriate point in this decision.

[88] For the moment it is enough to say that we take the view that the question of whether it was Mr Crispin who came up with a scheme involving a non-genuine bidder, or it was Mr Beatson, cannot be resolved on the basis of the evidence which the Committee heard. Therefore, it is not possible to conclude that Mr Crispin was the originator of the scheme and from that draw conclusions as to his personal honesty. This element of the case therefore has no implications about Mr Crispin's credibility which can be extrapolated to other issues so as to assist the Tribunal to come to a decision.

Final conclusions on credibility

[89] We are unable to agree that the sum total of the circumstances just described leads to a conclusion that Mr Crispin fabricated documents and that his action so doing adversely reflects upon his credibility when there is a dispute with Mr Beatson about other collateral matters.

[90] There is therefore no clear basis upon which we can conclude that the evidence of Mr Crispin is to be regarded as unreliable.

[91] The conclusion impacts a number of the issues in this case including whether Mr Crispin complied with his instructions concerning editorial and photographic publicity for the sale of the farm. It also has relevance to the question to be discussed below of whether Mr Beatson suggested using a dummy bidder at the auction in April 2017, which Mr Crispin says was the case, or whether Mr Beatson is correct in saying that Mr Crispin originated the idea.

Conclusions on Issue 1

[92] We now return to the issue of Mr Crispin failed to act in the best interests of the vendors with respect to the advertising and marketing of the property.[28]

[93] Having regard to what we have already said about the inherent probabilities of a person such as Mr Beatson making a mistake of this kind, which is a matter that must be taken into account along with other evidence, we do not believe that Mr Beatson can successfully establish the proposition that he signed the acknowledgement by mistake on the balance of probabilities.

[94] If there had been evidence which questioned, for instance, the circumstances in which Mr Beatson signed the document (such as evidence as to whether he had the opportunity to read and consider the document before he signed it and whether it was explained to him), it might have been possible for a factual conclusion to be reached on the point that favoured Mr Beatson's account. But neither the Committee nor ourselves had background evidence of that kind before them upon which the parties were tested. We do not have any of that and therefore the point fails. Mr Beatson cannot disavow the acknowledgement that he signed, in our view.

[95] The Committee took the view that the fact that the vendors had signed an acknowledgement that they had been advised about the proposed advertising

[28] BD II.

program provided an answer to any complaints on the part of the vendors about the publicity for the sale.

[96] We have some reservations about the position that the respondents took concerning the effect of the acknowledgement. We consider that an acknowledgement clause of the kind contained in the agency agreement at 16.1.8[29] may not in fact provide a complete answer to any criticisms that are made. Decisions of detail about which photographs should be included, what perspective of the property they should show and other matters are questions of detail which are left to be resolved at a later point and are not matters that are, or can be, discussed in detail at the point where an agency agreement is signed, which is necessarily at a very early stage in the parties' working relationship.

[97] If the conclusion in the preceding paragraph is incorrect, there is still the consideration that whether or not Mr Crispin failed to meet his responsibilities in regard to the photographs and text prepared for marketing the property, the discussion reduces to one of whether Mr Beatson's evidence is correct or whether Mr Crispin's is. Contrary to the proposition put forward by Mr Beatson, there are no indications that Mr Crispin was in general a dishonest witness whose evidence should be disbelieved. On that assumption, there is no way of resolving the impasse between the evidence of the two men and it has to be concluded that Mr Beatson has not been able to establish the components of a breach of obligation on the balance of probabilities.

[98] Issue one is concerned with whether the respondents failed to act in the best interests of Mr Beatson and the other vendor's with regard to the publicity material. Mr Beatson says that he did not approve the program and that it was not adequate.

[99] It would not have been permissible for the Committee just to accept the say-so of Mr Beatson on this issue without attempting some assessment of whether what he says is persuasive.

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[29] BD 560.

[100] As the Committee noted, there is no doubt that Mr Beatson considers there were short comings in the production of both editorial and photographs which were the work of the second respondent's marketing team.[30]

[101] But the Committee's doubts that Mr Beatson had a complaint about the roadside signage amply illustrates the difficulties of undertaking an assessment of this issue.[31] There is room for differing judgements on an issue of this kind. It would be unlikely that a Committee could have correctly assessed the matter without the assistance of some evidence from an appropriately experienced and skilled person in this field establishing that the efforts of the selling agents had fallen short of the required standard.

[102] It would be difficult for a Tribunal to undertake an assessment of these matters based upon an assertion and counter assertion put forward after the event by the vendor, on the one hand, and the selling agent on the other.

[103] We do not consider that the complaint which is the nub of Issue 1 has been established on the balance of probabilities.

Issue 5 — Agency agreement and renewal not provided

[104] In Issue 5 the appellant states that the appellant was never provided with a "fully signed" copy of the listing agreement or its renewal.

[105] Given that this issue was one upon which the Committee expressed a firm opinion which is not challenged on appeal, the only reason for raising the non-signing of the authority would appear to be an order to introduce that circumstances and to the appeal as demonstrating personal unreliability on the part of Mr Crispin which impacts his credibility.

[106] The conclusion which the Committee came to agreed with Mr Beatson that there had been a breach of agreement. It was not asked to, and therefore did not, take

[30] BD 792
[31] BD 792 at [3.5].

the further step of concluding that the circumstances in which Mr Crispin breached the requirements of r 10.20, demonstrating that he was a person of poor credibility overall.

[107] For those reasons, because the Committee in fact found that there had been a breach of r 9.6 of the Rules and the matters that are raised in Issue 5 appear to cover the same ground as was the subject of the conclusions that the Committee came to, there is no ground for the Tribunal to interfere with that decision.

[108] Accordingly, no order will be made on Issue 5.

Issue 6 — appraisal not provided

[109] This issue is stated by the appellant on the following terms:

> The Licensee failed to provide an appraisal of the property. The appraisal provided to the REA has been fabricated after the event and backdated in order to provide it as evidence to the REA. On its face and from other documents provided to the REA the appraisal could not have been produced to the appellant on the date or at the time stated by the Licensee.

[110] This ground of appeal, too, is one that has already been referred to earlier in this decision when discussing the assertion that the appraisal was fabricated after the event. The point in issue 6 is a slightly narrower one in that the appellant failed to provide an appraisal of the property.

[111] However, Mr Beatson acknowledged when he signed the agency agreement that he had received an appraisal of the property in writing.[32] We will not discuss further the difficulties with accepting this evidence which we have analysed earlier in this decision other than to say that we do not consider that it is established that the acknowledgement can be explained away on the basis that Mr Beatson did not read the document that he signed[33].

[32] BD 544.
[33] BD 544

[112] The respondents took the point that in any case an appraisal had been provided in the "property description and disclosures" document.

[113] However, it was the evidence of Mr Crispin that he completed the appraisal on or about 1 November 2017 and that he provided Mr Beatson with a bound copy of it on 28 November 2017.

[114] What the appellant puts forward inevitably involves resolving a conflict of evidence between the two principal protagonists, Mr Beatson and Mr Crispin. There is no evidence extrinsic to that of the protagonist themselves which would have enabled the Committee to come to an affirmative conclusion that the complaint was justified.

[115] Accordingly, we do not consider that any order should be made with respect to issue 6 of the grounds of appeal.

Issue 9 — use of a dummy bidder at auction

[116] At the auction which took place in April 2017, a non-bona fide bidder was arranged to place bids in an effort to create competition for the property and drive the price to higher levels. There is no dispute that it was Mr Beatson who actually made this arrangement. He says that Mr Crispin came up with the idea. Mr Crispin denies that he had any involvement in arranging a so-called "dummy bidder" and that when Mr Beatson mentioned to him the possibility of having such a bidder at the auction he told him it was not permitted.

[117] In expanded form, the response by Mr Crispin was as follows:[34]

- He rejects any allegation he asked complainant 1 to arrange "dummy bidders".

- At the time of listing, when complainant 1 selected the method of sale, he introduced this idea to him (sic).

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34 BD xvi.

- Licensee 1 firmly and simply informed the complainant 1 it would be inappropriate, and he would have no part of such actions and did not want to be involved in any discussion surrounding the suggestion.

  …

- Complainant 1 has admitted to arranging a dummy bidder which was done entirely of his own volition and he was unaware the bidder on the night of auction was a "dummy bidder".

- He [Mr Crispin] had absolutely zero interest in jeopardising his career as either a real estate agent or his role as a Local Authority Councillor by acting in this manner.

[118] After setting out the contrary views of the two protagonists, the Committee stated:[35]

> 3.25 Having considered the evidence the Committee concludes licensee 1 had no involvement in such action and takes no further action.

[119] The substance of the appeal as stated in Issue 9 again centres on the Committee allegedly making a wrong assessment of the credibility of the appellant in relation to the allegation. The ground of appeal then goes on to say:

> The credibility of the opposing views on this issue cannot be assessed by the Committee who had not had the benefit of seeing the witnesses or their demeanour. The credibility of the licensees should be viewed in the light of the documents that have been fabricated after the event and backdated.

[120] Mr Beatson's appeal effectively asserts that the Committee should have come to the opposite conclusion. As with the other allegations that Mr Beatson made, reliance was placed upon the dishonesty of Mr Crispin in fabricating documents. But, as we have commented elsewhere, we do not consider that those allegations have been made out and therefore they are of no assistance in assessing the credibility of Mr Crispin.

[121] The terms in which the Committee expressed itself on this issue makes it clear that it came to an affirmative decision that Mr Crispin had no involvement in arranging the dummy bidder. They did not express their view in terms that reflected an inability to decide the question and dismissing that part of the complaint on the

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35 BD 794.

grounds that the burden of proof had not been discharged by the complainant/prosecution. In short, the Committee made a finding of fact that the evidence put forward by Mr Crispin was to be preferred to that of Mr Beatson.

[122] This again raises for consideration the fact that there are limits to the ability of a court or tribunal to make findings on contested facts where they have not seen and heard the parties giving oral evidence and being cross-examined on it.

[123] The result is that the Committee was left in a position where it was expected to resolve a dispute involving what it described as a "he said/she said" dispute on the papers alone without any guidance as to the believability of the evidence of the principal protagonists.

[124] As will be apparent from the earlier passages in this section of our decision, we agree that an affirmative decision concerning credibility was not open to the Committee. We do not consider that the Committee should have preferred Mr Beatson's account of how a dummy bidder came to be at the auction because of a general propensity for dishonesty on the part of Mr Crispin.

[125] We consider that the appropriate way to deal with the situation which has arisen is for the Tribunal to substitute for the conclusions of the Committee, a finding that it has not been proved on the balance of probabilities that Mr Crispin arranged a dummy bidder at the auction and there will be an order accordingly.

Issue 10 — quality of marketing material produced and performance of respondents

[126] Issue 10 is described as follows in the Notice of Appeal:

> The licensee used photos that were not authorised or approved by the appellant and despite complaints, these issues were not rectified and certainly not rectified in a timely manner.

[127] There are two components to this complaint. The first is that there were failings in the choice of photographs that were being used to market the property. The second

is that Mr Beatson contacted the second respondents to complain about the issue of the photographs but did not receive a satisfactory response. Having regard to the fact that the adequacy of the marketing arrangements — both the editorial and pictures used — was dealt with as part of issue one, the Committee correctly confined itself to focusing on the assertion that the second respondents did not react appropriately to the complaints that Mr Beatson made.

[128] The original summary by the investigator carried out in this case noted that the original complaint was that after the vendor, Mr Beatson, contacted the Managing Director of Property Brokers, Mr Mordaunt, and the regional manager, Paul Roache, to express concerns regarding this problem, they failed to acknowledge the complaint or take any action to rectify the matter.[36]

[129] Mr Roache said that he made contact with the appellant and followed up with the "marketing team" who said that they were aware of the situation and had it under control by re-writing what had been given to them by Mr Beatson. There was no apparent acceptance that there is any problem with the material, but that in any event they redrafted the publicity material. After setting out a brief discussion of the positions of the parties, the Committee gave short reasons for its decision which effectively regarded the complaint as not made out. It recorded the position of Mr Beatson as being that there were mistakes and errors with photographs and editorial comment and that despite his getting in touch with the manager and the respondent Mr Roache, the problems remained unresolved. On the other hand, Mr Roache says that after the complaint he followed up the call with the respondent's "marketing team" and was assured that matters were in hand, he further had a conversation with licensee one who likewise reiterated what the marketing team had told him".

[130] The Committee then sets out its conclusion:

> 3.28 While acknowledging that complainant one had issues with the agency on initial production of both marketing material and photography the Committee is satisfied the agency took the complaint seriously, rectified the errors and what was finally produced was signed off by the complainant.

[36] BD XXVII.

[131] The Notice of Appeal both rejects this conclusion (because it says that the position was not rectified) or reflects a partial acceptance of the views of the Committee (because it says that the faults were not rectified in a timely manner which suggests they were rectified, but late).

[132] We can only repeat that this is an instance where there is a conflict of evidence which the Committee was not able to resolve and which we cannot either. The result is that the matters referred to in Issue 10 do not support a finding of unsatisfactory conduct. This part of the appeal must be dismissed as well.

[133] Pursuant to s 113 of the Act 2008, the Tribunal draws the parties' attention to s 116 of the 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 (s 116A). The procedure to be followed is set out in part 20 of the High Court Rules.

Mr J Doogue
Deputy Chairperson

Ms N Dangen
Member

Mr N O'Connor
Member