BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 54

READT 028/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	STEPHEN IAN HOULISTON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	DWAYNE LOHMANN & GORDON WEBB Second Respondents
On the papers	
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Mr Neil O'Connor, Member
Submissions received from:	Mr S Houliston, Appellant Ms S Carlyle, on behalf of the Authority Mr D Lohmann & Mr G Webb, second respondents
Date of Decision:	10 December 2019

DECISION OF THE TRIBUNAL

Background

[1] This decision is concerned with an appeal Mr Houliston has brought against the decision of the Complaints Assessment Committee 1901 (the Committee). On 8 July 2019, the Committee decided under s 89 of the Real Estate Agents Act 2008 (the Act) to take no further action with regard to a complaint that had been filed by Mr Houliston against the second respondents.

[2] The background to the complaint is as follows. Mr Webb and Mr Lohmann were involved in the sale of a property at 32 Hunter Avenue, Richmond through a company by which they were engaged, Summit Real Estate Ltd, Richmond. Mr Webb was the branch manager of the business and Mr Lohmann was a salesperson employed at the branch. Both persons held the required licenses under the Act.

[3] Mr Houliston saw a listing for the property on the TradeMe site on 11 December 2018. He contacted Mr Lohmann by email inquiring about the property. Mr Lohmann responded on 11 December 2018 and, as part of his email reply, stated: "Also just to let you know that this is my mums place which is in our family trust". Mr Houliston replied to Mr Lohmann asking when offers were due and for some information about the driveway.

[4] Mr Lohmann followed this email with a further one on the following day, 12 December 2018, and told Mr Houliston that there was another potential purchaser who intended to submit an offer the next day. Mr Lohmann asked if Mr Houliston intended to submit an offer. Mr Houliston replied saying that he was interested in making an offer but expressed concern that a conflict of interest might be driving the desire for a quick sale. As part of this communication, Mr Lohmann included a copy of the certificate of title to the property. The certificate of title to the property was in the name of the mother of Mr Lohmann, Rosalie Jan Lohman and Mr Lohmann himself.

[5] Mr Lohmann replied that the situation was now a multi-offer one and offered to have his manager, Mr Webb, present the offers. Mr Houliston agreed with this proposal.

[6] Mr Houliston says that it was his expectation that offers were to be presented on either the 18th or 19th of December 2018 but that changed with Mr Lohmann fixing 17 December 2018 as the date when offers were to be presented. The reference to "offers" contemplated that there would be another person making an offer on the property.

[7] As part of a complaint that he made to the Authority at a later date, Mr Houliston told the investigator that while he was annoyed at being pressured with regard to the date for offers, he decided nonetheless to make an offer. On either the 15th or 16th of December 2018, Mr Houliston told Mr Lohmann that there was a "conflict of interest" arising from the fact that he was selling his mother's property. Mr Houliston stated in his email of 14 December 2018 that "I think to be impartial it's best to have your manager take our details and present our offer". It was after this conversation that Mr Lohmann arranged for Mr Webb to manage the offer process.

[8] Mr Houliston also says that after he had made an offer, apparently on 17 December 2018, Mr Webb telephoned him to tell them that the amount would not be sufficient and in the course of that conversation, he, Mr Houliston, asked if Mr Lohmann was the other person listed on the certificate of title, to which Mr Webb replied "yes".

[9] The negotiations that ensued between Mr Houliston and the vendors did not result in an agreement being reached. On 27 December 2018, Mr Houliston sent an email to Mr Webb raising a number of complaints which were in the following terms:

[a] He felt as though he was pressured into a quick sale.

[b] He was annoyed that the time to present offers had been brought forward from 18-19 December 2018 to 16 December 2018.

[c] He stated that, in his opinion, the other potential purchaser was fictitious and made up to gain a quick sale.

[d] That the process for managing a conflict of interest was not followed and that the Act had been breached

[10] The licensees state that there was genuinely another couple who were potential offerors but they decided not to make an offer.

[11] Subsequently, Mr Houliston emailed his concerns to Mr Webb on 27 December 2018 asking that Summit conduct an in-house review. After some delay, Mr Houliston had not heard back from the director of Summit, Mr Nalder, and so he advised Mr Webb that he would be dealing directly thereafter with the Authority.

[12] The complaint which Mr Houliston made to the Authority was that:

[a] Mr Lohmann breached s 136 of the Act;

[b] Mr Webb failed to protect Mr Houliston throughout the sales process and failed to disclose Mr Lohmann's "conflict of interest";

[c] the licensees had misled Mr Houliston about whether or not there was a competing party who was intending to make an offer.

[13] On 26 February 2019, Mr Houliston advised the Authority that there were two additional complaints:

[a] Summit Real Estate failed to acknowledge his complaint and advise they would perform an in-house review.

[b] That there had been a breach of the Fair Trading Act 1986 in that there had been misleading and deceptive conduct on the part of the licensees.

[14] In a further discussion that he had with the Authority on 17 February 2019, Mr Houliston said that Mr Lohmann had said that the property was owned by his mother and a family trust but that Mr Lohmann had never said "he has part of the trust and often referred to them as the 'vendors'". Amongst other things, Mr Houliston also said that he did not receive anything in writing to confirm any conflict of interest.

[15] On 19 February 2019, Mr Houliston further advised the Authority that he had carried out research and he had found out that Mr Lohmann, the director of Summit Real Estate, Mr Nalder, and Ms RJ Lohman, mother of Mr Lohmann, were shareholders in a property investment company which had the same registered address of Summit Real Estate, Stoke.

[16] In a subsequent email, the Authority advised the licensees that the complaint from Mr Houliston raised the following issues:

[a] Whether Mr Lohmann met the requirements of s 136 of the Act and explained his conflict of interest in writing.

[b] Whether Mr Webb acted in good faith and dealt fairly with Mr Houliston.

[c] Whether there was other "interest in the property".

[17] Section 136 of the Act is central to the complaint which Mr Houliston made and the appeal which he now brings. Section 136 provides as follows:

> **136 Disclosure of other benefits that licensee stands to gain from transaction**
>
> (1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.
>
> (2) Subsection (1) does not apply to any matter disclosed under section 128 or 134.
>
> (3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.
>
> (4) For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.
>
> (5) A contract entered into in contravention of this section may not be cancelled merely because of that contravention.

Committee decision

[18] The Committee decision first dealt with the question of whether Mr Lohmann had breached s 136 of the Act by not fully disclosing the fact that he or any person related to him may have benefited financially from the relevant property transaction.

It also dealt with the complaint that Mr Webb had failed to protect Mr Houliston throughout the sale process and failed to disclose the conflict of interest on the part of Mr Lohmann.

[19] In regard to this part of the complaint, the Committee determined that Mr Lohmann had disclosed in his email of 11 December 2018 that the property belonged to his mother, and that the statement that the property was in "our family trust" conveyed that Mr Lohmann belonged to that trust. Disclosure also was made when Mr Lohmann provided the certificate of title for the property which showed Mr Lohmann was one of the owners. The Committee also noted that consistent with the policy of the agency and in order to protect Mr Houliston from any possible conflict of interest, Mr Lohmann had handed over the presentation of offers to Mr Webb.

[20] The next matter that the Committee dealt with was the assertion that the licensees did not provide any proof that there were multi-offers and progress with regard to the property.

[21] After again noting the responses of the licensees, the Committee concluded that there was another prospective purchaser as evidenced by the emails that had been made available to the Authority investigator.

[22] The Committee then dealt with the complaint that there had been delays on the part of Summit Real Estate in responding to the complaint of Mr Houliston.

[23] In regard to this part of the complaint, the Committee found that the complaint was received by the agency on 27 December 2018. It also stated that Mr Webb did not return to the office until after the Christmas break on 10 January 2019. He responded to Mr Houliston on receiving the complaint and advised that it would be handled by the managing director, L3, as he was named in the complaint. L3 attended to the complaint but became distracted with urgent issues including the fires in the Wakefield area.

[24] The Committee determined that while it was possible to have some sympathy for Mr Houliston, his complaint had been lodged over the summer holiday period and

further, in the circumstances, they considered that the complaint had been actioned as soon as practical.

[25] The Committee also made reference to the assertion which Mr Houliston had made in the course of communications with the Authority to the effect that the licensees had breached the Fair Trading Act 1986 (FTA). In regard to that complaint, they stated that they did not have jurisdiction to determine breaches of the FTA and that there were other suitable fora available to Mr Houliston should he want to pursue that part of the complaint.

Principles governing appeals to Tribunal

[26] The correct approach which the Tribunal is required to adopt when dealing with an appeal from a decision to take no further action under s 89(2)(c) of the Act is to consider the matter itself and make its own determination whether the decision to take no further action was correct.

[27] This approach is mandated by cases such as *Guo v Real Estate Agents Authority* where the Tribunal stated:[1]

> [24] We have previously held that Committee determinations under s.89 are subject to general rights of appeal and the wider principles described in *Austin Nichols* apply. In *Jones v CAC 10028 & Shekell* [2011] NZREADT 15 we said at paragraph [25]:
>
> > "... Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in *Austin, Nichols,* as reiterated by *K v B* (supra)."

Submissions

Submissions by Mr Houliston

[28] The contention put forward on appeal by Mr Houliston is that contrary to the conclusions of the Committee, Mr Lohmann did not comply with s 136.

---

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

[29] The point which Mr Houliston makes is that while Mr Lohmann disclosed to Mr Houliston that that the property was "my mum's place which is in our family trust", he did not tell Mr Houliston that he was one of the owners on the title.

[30] Mr Houliston stated in his submissions to the Tribunal that it was of importance to appreciate that not only was the house that was being sold the property of the licensee's mother but that it was being sold by a trust and that Mr Lohmann was "part of" that trust.

[31] While he accepted that he received the email from Mr Lohmann stating that he was selling his mother's property, Mr Houliston stated:[2]

> … it is very important to note here, that the conflict of interest charged against Mr Lohmann, it is not a conflict with him selling his mother's property, but against himself for being one of the vendors and keeping that unknown.

[32] Mr Houliston also submitted that it would be obvious to someone looking at the title to the property (as he did), where there appeared to be a man and woman's name on the title, that the natural assumption would be that it was a married couple or de facto relationship or something of that kind. As well, the fact that Mr Lohmann provided a copy of the title which showed a person with the same name as him on the title did not necessarily convey to an intending purchaser that Mr Lohmann and the person on the title were one and the same person. It could have been the father of Mr Lohmann who had the same name as him.

[33] In his submissions, Mr Houliston said that the property was actually owned by Mr Lohmann's mother and Mr Lohmann. Mr Houliston said:

> I say it was purely because (the complainant, myself) mentioned to licensee 2 that there is a conflict of interest. That conflict of interest known to us being licensee 2 selling his mother's property. There is no mention of licensee being the conflict of interest.

[34] Mr Houliston further submitted that, even if disclosure was made, the disclosure was not effective. Mr Lohmann, he submitted, was required to give "disclosure in writing", but because the information had been transmitted by email, and Mr Houliston

[2] Notice of Appeal, Bundle of Documents at 42.

had not given his consent to receive the material in electronic form, in accordance with s 224(1) of the Contract and Commercial Law Act 2017 (CCLA) which provides:

> **224 Legal requirement to give information in writing**
>
> (1) A legal requirement to give information in writing is met by giving the information in electronic form, whether by means of an electronic communication or otherwise, if —
> (a) the information is readily accessible so as to be usable for subsequent reference; and
> (b) the person to whom the information is required to be given consents to the information being given in electronic form and by means of electronic communication, if applicable.

[35] Mr Houliston also contends that the mode in which Mr Lohmann gave notice of the fact that it was his mother's property was done in an inadequate and unprofessional way.

Submissions of Mr Lohmann & Mr Webb

[36] The position that the second respondents took was that full disclosure was made in the email sent to Mr Houliston on 11 December 2018.

[37] Mr Lohmann also took the position that disclosure was not required to be made in any particular form and using any particular type or format of document.

Submissions of the Authority

[38] Counsel for the Authority noted that while there were a number of points which Mr Houliston raised before the Committee, the remaining issue which was being dealt with on appeal was that the Committee erred in finding that s 136 had been complied with and that there were two main arguments which Mr Houliston put forward in support of that contention.

[39] As to the first, which was that Mr Lohmann ought to have used a formal written disclosure document of the kind suggested in an earlier case decided by the Tribunal, *N v Real Estate Agents Authority (CAC 2002)*,[3] counsel submitted that the Act does

[3] *N v Real Estate Agents Authority (CAC 2002)* [2013] NZREADT 22.

not require that any particular form should be used, only that the disclosure be made "in writing".

[40] Further, Counsel for the Authority, Ms Woolley, summarised the further arguments for Mr Houliston that there was a lack of clarity surrounding the disclosures which Mr Lohmann made with the result that it had not been made clear that Mr Lohmann was an owner of the property, or otherwise had a personal interest in the property. Mr Lohmann's interest was therefore not disclosed in accordance with the requirements of s 136. Ms Woolley helpfully summarised the contentions which Mr Houliston made in the following submissions:

> (a) Mr Lohmann often referred to the vendors as separate from himself, and the language used in the advertising material suggested that the house was owned by a couple, i.e. Mr Lohmann's mother and her partner.
>
> (b) The above statements would lead someone to believe that Mr Lohmann's name on the certificate of title was in fact Mr Lohmann's father, as it is common for sons to be named after their fathers.
>
> (c) Mr Lohmann did not state his name was on the certificate of title.
>
> (d) That the use of the word "our" in the statement "this is my mums [sic] place which is in our trust" is ambiguous.
>
> (e) That "families can be big as with trusts", and there is no guarantee that Mr Lohmann was a member of his family trust.
>
> (f) The certificate of title was provided in the context of Mr Lohmann answering a question about the property's driveway, and the words "please see attached certificate of title" did not constitute disclosure.
>
> 5.6 Based on those points, Mr Houliston contends that it is not clear from the disclosures that Mr Lohmann himself was an owner of the property or otherwise had a personal interest in the property, and so Mr Lohmann's interest was not disclosed in accordance with the requirements of s 136.

[41] However, she submitted, the specific requirements of s 136 are clear, that is the licensee must disclose in writing to every prospective purchaser to the transaction, whether or not the licensee, or any person related to the licensee, may benefit

financially from the transaction. Further, such disclosure was provided in writing on three occasions:

> [i] First, on 11 December 2018, when Mr Lohmann said in an email to Mr Houliston that the property "is my mums [sic] place which is in our family trust."
>
> [ii] Second, on 12 December 2018, when Mr Lohmann emailed Mr Houliston a copy of the certificate of title, which listed his mother, Rosalie Jan Lohmann and himself, Dwayne Thomas Lohmann, as the registered owners of the property.
>
> [iii] Third, on 14 December 2018, when Mr Houliston was first provided with a draft sale and purchase agreement for the property, with Rosalie Jan Lohmann and Dwayne Thomas Lohmann listed as the vendors of the property.

[42] Ms Woolley further noted that Mr Houliston also contended that the interest of the agent or the related person was not noted with sufficient specificity to comply with the section. It was her response to that submission that, as in *Dunham*,[3] while Mr Lohmann's interest was not disclosed in the clearest terms and manner possible, the fact that Mr Lohmann and his mother were the vendors of the property was nevertheless disclosed in writing in accordance with the requirements of s 136.

[43] Ms Woolley also noted that Mr Houliston had made claims that Mr Lohmann was subject to conflicts of interest. In broad terms the response of the Authority was that there had been disclosure of the relationship between Mr Lohmann and his mother, and the fact that Mr Lohmann was one of the owners of the property, and steps were taken to ensure that a different agent, Mr Webb, took over the transaction.

Issues

[44] The question that arises in this case is whether the Committee, having charged Mr Lohmann with a breach of s 136 of the Act, came to a correct decision when they determined that a breach had not been proved. It is necessary to keep in mind that that is the scope of the current appeal.

---

[3] *Complaints Assessment Committee (CAC 402) v Dunham* [2016] NZREADT 26.

[45] Mr Lohmann was required to disclose that he may benefit financially from the transaction: s 136(1). The first sub-issue is whether Mr Lohmann made the disclosure of the matters that he was required to under s 136. The point for determination is whether disclosing that the property belonged to the mother of Mr Lohmann and that the family trust of Mr Lohmann's family was involved in ownership was sufficient disclosure for the purposes of s 136. Alternatively, was Mr Houliston correct when he submitted that disclosure would not have been sufficiently comprehensive because Mr Lohmann did not disclose this particular fact? Also, whether Mr Lohmann was required to go further and specifically spell out that the ownership arrangements in respect of the property included Mr Lohmann being one of the vendors of the property, without leaving the impression, as Mr Lohmann did, that he had no connection to the sale other than that it was his mother's property. Further, it was asserted that the description of the property which Mr Lohmann gave, which was that it was part of "our" family trust, did not impliedly provide the information that he was actually an owner. It therefore did not cure the alleged defective disclosure by making it clear that Mr Lohmann was a legal owner and was on the title.

[46] The second sub-issue was whether the purported disclosure that he did make by sending an email to the complainant satisfied the requirement that disclosure be made "in writing". One matter that arises in regard to this issue is whether the Electronic Transactions Act 2002 has relevance to this issue.

[47] The other main issue that the appeal gives rise to is the question of whether Mr Lohmann acted inconsistently with his obligations in that he was subject to a conflict of interest.

Discussion

[48] In order to assess the issues that Mr Houliston raises, and the question whether there has been a breach of obligation under s 136, it is necessary to consider the statutory objectives that the legislature apparently had in mind when enacting the section.

[49] Section 136(1), like other parts of the Act, needs to be considered in the light of the objectives which are set out in s 3. It is there stated that the objective of the Act is to:

> … promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

[50] The reason why disclosure is required under s 136 requires brief explanation in light of that statement.

[51] In the first place, the obligation to make disclosure is owed to any potential party to the contract. That is, the agent must make disclosure to both a potential purchaser as well as a potential vendor. The rationale for requiring disclosure has different aspects depending upon which of those parties is the particular one that is under consideration. In this decision, we are only considering the question of the disclosure that is owed to a purchaser. In order to understand that matter, and therefore the extent of disclosure, it is necessary to consider the objectives which the legislature had in mind when enacting such an obligation.

[52] Real estate agents have obligations, amongst other things, to provide information to prospective purchasers of properties which the licensees have an agency to sell. The weight which the representee will attach to that information will be affected by the assessment that he or she makes of the reliability of that information.[4]

[53] Licensees acting as the agent for vendors will nearly always have an interest in the outcome of the proposed sale because it is only if an agreement for sale and purchase (ASP) actually becomes unconditional that an agent will have an enforceable right to commission. Naturally, there are concerns that that factor could induce some agents to provide information concerning the property which is unjustifiably favourable because they are unduly influenced by their desire to recover a commission. Their motivation to earn a commission can potentially cause them to subordinate their obligation to give accurate information to their interest in remuneration. As a result,

---

[4] *Clark v Real Estate Agents Authority (CAC 2004)* [2014] NZHC 1611.

there is a risk that they will lose sight of their obligation to provide objective and fair information to the intending purchaser. The greater the interest that the licensee has in seeing the transaction completed, then potentially, the greater the risk will be that the information being presented is coloured by the self-interest of the licensee.

[54] While such an inherently conflicted position cannot be avoided if real estate agents are to carry out their functions, such a justification does not extend to the direct obtaining of personal benefits from transactions in which they have a personal interest. It is important that in such cases an intending purchaser be given information which spells out these circumstances with sufficient exactitude. This will enable the intending purchaser to make an accurate assessment of the extent to which statements that the licensee makes may need to be treated with reservation because the licensee or a family member is going to derive advantage from the transaction.

[55] Of course, the fact that a licensee will usually have a financial interest in the transaction in the form of a commission payment is something that a buyer needs to take into account. However, because buyers will assume, without being expressly told, that a commission will be payable, the legislature presumably decided that there was no need to include this factor as a matter that needs to be disclosed pursuant to s 136.

[56] But it is important that a purchaser has sufficient understanding of factors which might induce the licensee to present information about the property in the most favourable light, to the extent that it might not be reliable. It is only when the purchaser has been provided with reasonably complete information about the licensee's interest in the outcome that the purchaser will be able to give due weight, if any, to the information provided by the licensee.

[57] It is important when considering if the required disclosure about the state of the property had been made to Mr Houliston to consider the meaning of the actual words and terms of which disclosure was made. The meaning to be attributed to those words is to be arrived at by considering what those words would have meant to the average person, taking into account the meaning of the words and what was known about the context in which they were used.

[58] There is no dispute that in this case Mr Lohmann disclosed that the property was his "mum's place which is in our family trust". The ordinary understanding that most people would have of such a statement was that the property was occupied and possibly owned by Mr Lohmann's mother. What most people would ordinarily understand from the statement overall would depend upon what they knew about trusts. However, the statement that Mr Lohmann made that the property was "in our family trust" would indicate that the trust was the owner of the property. Additionally, the statement by Mr Lohmann that it was "**our** family trust" (emphasis added) was suggestive of some involvement on the part of Mr Lohmann in the trust which owned the house. That is to say, the presence in the background of the family trust, most people would understand, would not affect the fact that there was a familial connection between the property and the licensee's family.

[59] We consider therefore, that in this case, it would have been apparent to Mr Houliston from what Mr Lohmann said that his mother, and possibly his wider family, had an interest in the property.

[60] The evidence which was put forward did not justify any different or wider disclosure. The contentions which Mr Houliston put forward appear to assume that the fact that Mr Lohmann was on the title, and was therefore required to sign any contract as a vendor, made a difference to the extent of disclosure required. We do not consider that these requirements made any difference to the necessary scope of disclosure. That conclusion results from the fact that trustees as such do not have any beneficial entitlement to the property. By loose but not entirely accurate analogy, the way in which they function when transacting on behalf of the trust, as in this case, are similar to those of an agent for the trust. Their cooperation is necessary in order to carry out transactions for the trust. They do not, however, sell the property in their own right, but on behalf of the trust. It does not follow from the fact that they have the status of vendors of the property that they are personally entitled to the property or the proceeds of its sale. Such property is held on trust for the ultimate beneficiaries of the trust.

[61] Another way of viewing the question is that an understanding that the signature of the agent, as vendor, is required is not an additional factor which would materially affect the assessment by purchasers of the reliability of what the agent had told them.

[62] Therefore, Mr Lohmann correctly disclosed the matters that he was required to disclose. He had done enough to alert Mr Houliston to the existence of a potential conflict of interest. That potential conflict was not affected by his status of trustee/legal owner of the property, which did not therefore need to be disclosed.

[63] The principal requirement is to make disclosure that is appropriate to achieve the objectives which we have been discussing. Section 136 does not impose any terms on the form in which the communication is to be provided, other than that it be in writing. The need for writing aside, the only requirements are that the disclosure must be sufficiently clear to achieve the requirements of s 136, which are to identify the benefits that the agent or his family may receive from the sale. The form that such disclosure takes is of subsidiary concern. There is an unqualified obligation to provide the disclosure under s 136. An attempt, even a conscientious but unsuccessful one, will not be sufficient. A disclosure statement which is so poorly expressed as to fail in its purpose of informing a purchaser of the representee's interest will not satisfy the requirements of s 136. That is not, however, the case here.

[64] We conclude that the form of the communication in this case was sufficient in all the circumstances to provide the required information. We note a further subsidiary argument that Mr Houliston put forward which was that that the requirements of s 136 will not be satisfied by sending an email from a cell phone. A minor point to note is that Mr Houliston does not accept that any communication he sent was from his cell phone but was from a PC. We have difficulty understanding how the means of communication adopted should have anything to do with whether the section was complied with. The question about whether communication in electronic form can satisfy the requirements of the section will be dealt with next.

Electronic communications

[65] Mr Houliston has submitted that the notice that is required under s 136 of the Act must comply with s 220 of the CCLA. The result would be that a notice provided by a real estate agent to a purchaser under that section would be ineffective in electronic form unless the person to whom it was sent consented to it being sent in electronic form.

[66] It is our view that the section does not apply to notices of this kind.

[67] The stated purpose of the CCLA is to update certain requirements of legislation dealing with:[5]

(a) contracts; and

(b) the sale of goods; and

(c) electronic transactions; and

(d) the carriage of goods; and

(e) various other commercial matters, including mercantile agents and bills of lading.

[68] The terms of the legislation are intended to apply to the form of transactions between parties in the above subject areas.

[69] The provisions of the CCLA which Mr Houliston relies upon are located in pt 4 of that Act which, as its heading suggests, is concerned with "electronic transactions". That reference in the heading is relevant to interpreting the legislation.[6]

[70] The Authority is a provision for the licensing discipline and other matters concerning real estate agents. The subject matter of the Act is different from the categories described in the preceding paragraph. The giving of notice under s 136 of the Act is not something which affects the rights or obligations of the parties pursuant to a "transaction". A transaction includes a bilateral process taking the form of a contract. In the context of real estate transactions, it usually involves a transfer of property. The function of the notice that is required under s 136 of the Act is to satisfy a requirement of the Act, not of a contract. There is no "transaction" (or contract) between an agent and the class of persons to whom the notice is to be given under the Act, which is every "prospective party" to a contract — that contract being one that the agent is not involved in or a party to.

[71] For the foregoing reasons, we do not accept that the CCLA has any application to the notice that the agent was required to provide in this case and therefore there was

[5] Contract and Commercial Law Act 2017, s 3.
[6] Interpretation Act 1999, s 5(3).

no requirement for consent under s 220 on the part of Mr Houliston to receiving notice in electronic form.

Conflict of interest

[72] In his allegations against the licensees, Mr Houliston made numerous references to a conflict of interest on the part of Mr Lohmann. It is correct that licensees have statutory obligations such as that set out in r 6.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 which requires a licensee to act in good faith and deal fairly with all parties engaged in a transaction. There are other relevant rules, including r 6.4 prohibiting a licensee from providing false information. We consider that it is more helpful to refer to such rules rather than to generalised concepts of "conflict-of-interest" in the present case.[7]

[73] If that approach is correct, then Mr Lohmann cannot be reproached for not providing information which was substantially correct to Mr Houliston about his connection to the owner of the property. As we have already observed, the fact that Mr Lohmann may in addition have performed the role of trustee for the family trust, which we infer is the case, was not something that was required to be expressly pointed out as part of providing the necessary information required under s 136 of the Act. In any case, the fact that as trustee he was one of the vendors of the property was apparent because of the form of the agreement for sale and purchase which Mr Lohmann drew up.

---

[7] Conflicts of interest are typically owed by agents to the principals, which in this case would not extend to the appellant. That of course does not derogate from what we have mentioned about the need for the licensee to comply with Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 such as r 6.2

Summary and Result

[74] We consider that the Committee was correct in deciding under s 89 of the Act that no further action should be taken on the complaint by Mr Houliston. The appeal is dismissed.

[75] 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.

_____I_____
Mr J Doogue
Deputy Chairperson

_____
Mr G Denley
Member

_____
Mr N O'Connor
Member