BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 59

READT 010/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	WAYNE KEENE and KAMAL SHARMA Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	GRANT ADAMS Second Respondent
On the papers	
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin Member Mr N O'Connor, Member
Submissions received from:	Mr T Rea, on behalf of Mr Keene and Mr Sharma Mr M Mortimer and Ms A Davies, on behalf of the Authority Mr Adams
Date of Decision:	17 December 2019

DECISION OF THE TRIBUNAL

Introduction

[1] In a decision dated 12 November 2018, Complaints Assessment Committee 521 found that both Mr Keene and Mr Sharma[1] had engaged in unsatisfactory conduct ("the substantive decision"). In a decision dated 18 April 2019, the Committee made penalty orders ("the penalty decision"). The appellants have appealed against both decisions.

Background

[2] Mr Keene is a licensed agent and Mr Sharma is a licensed salesperson, engaged at Resort Brokers Ltd ("the Agency").

[3] Mr Adams was a director and shareholder of Howard's Lodge Limited ("HLL"), which owned a backpackers' accommodation business in National Park, on leased land. In the course of the events to which this proceeding relates, HLL acquired the freehold title to the land. The land and business will be referred to as "the property".

[4] The relevant events all occurred between April and October 2017. In April, Mr Sharma was approached by a prospective purchaser of backpackers accommodation ("the purchaser"). Mr Sharma advised Mr Keene of the purchaser's interest. The appellants met with the purchaser on 24 May to discuss what backpacker opportunities were available in the market. The purchaser advised that he was interested in something in the Ohakune/National Park area. Mr Keene advised him that he was aware of a business that had been on the market for some time, and would call the owner to see if he was interested in selling.

[5] Mr Adams had previously listed the property with the Agency for sale. It was not listed with the Agency at the time of the purchaser's approach. On 24 May, Mr Keene telephoned Mr Adams and asked if he were interested in selling the property. Mr Adams responded positively.

---

[1] Except where it is appropriate to refer to them individually, we will refer to Mr Keene and Mr Sharma collectively as "the appellants".

[6] Following an exchange of emails, Mr Sharma took the purchaser to view the property on 1 June. The exchange of emails included Mr Adams' advising Mr Keene that he was not prepared to pay commission to the Agency at 6 percent (being the rate advised by Mr Keene), for the reason that the Agency and the purchaser had come to him, and that the Agency had incurred little or no costs with listings and advertising.

[7] On 2 June, Mr Keene advised Mr Adams that the purchaser was "definitely interested", and they would be drafting an offer.

[8] On 7 June, Mr Adams advised Mr Keene that he had bought the freehold title. On 8 June, Mr Keene advised Mr Adams by email that the purchaser understood that Mr Adams needed to take advice regarding the sale of the business and/or the freehold going concern, and he looked forward to receiving Mr Adams' instructions.

[9] Mr Adams responded to Mr Keene by email on 9 June, providing a price for the property as a freehold going concern. He noted three vehicles that were available for purchase. Mr Sharma forwarded Mr Adams' email to the purchaser. Mr Adams emailed Mr Sharma on 12 June, apologising for not mentioning his purchase of the freehold earlier. He said it had "been in the works so long I really didn't think it would happen and then suddenly … all done".

[10] On 16 June, Mr Adams advised Mr Sharma that he was in Rarotonga, but would respond to emails. Mr Sharma then emailed Mr Adams an agency agreement and asked Mr Adams to print, sign and scan it to him "asap". He advised that he had done the offer for the purchaser and hoped to have it signed "by Monday" (three days later).

[11] Mr Adams responded, referring to his having told Mr Keene that he would not pay commission "in the normal way", given that the Agency's services had not been requested by him, and the sale had not involved "the usual work at your end". He went on to say:

> I would be willing to pay a finders fee as a %, perhaps matched by [the purchaser]. I know when we had just the lease for sale we upped the price slightly to cover this but I don't think that's fair given the scale of things has jumped considerably.

[12] The agency agreement sent to Mr Adams provided for commission to be payable to the Agency comprising a "base fee" of $500.00 plus 6.00 percent on the consideration (being less than $3 million), together with a web listing fee and marketing campaign as agreed. The agreement provided that the fees and charges were GST exclusive.

[13] On 20 June, Mr Adams emailed Mr Sharma advising that he was unable at his current location to send a properly completed agency agreement. He continued:

> However, this email should act as my approval of the listing agreement sent to me on 16 June with the stipulated change that the commission clause(s) shall change to flat payment of $60,000 as finders fee.
>
> Should the current sale being discussed not proceed I am happy to sign the agreement for sale at the rates as stated in the listing agreement for future transactions.

[14] Mr Sharma responded on 20 June, confirming Mr Adams' agreement to "a flat fee of $60,000 plus GST". Mr Sharma added:

> With reference to a previous email from you dated 16th June and your suggestion to ask [the purchaser] to contribute towards our commission. We have taken the opportunity to do that and I can confirm that [the purchaser] has agreed to pay $30,000 plus GST. [The purchaser] is also aware that you are paying Resort Brokers a commission.

[15] Mr Adams and Mr Sharma then exchanged emails as to whether the $60,000 "finders fee" was GST exclusive (as Mr Sharma maintained) or GST inclusive (as Mr Adams maintained). This was eventually resolved with the provision as to commission being recorded as "a flat fee of $55,000 plus GST". Mr Adams and his wife (co-director of HLL) signed the agency agreement. Although they signed the agreement in late June, the Agency dated it 26 May 2017.

[16] Agreements for sale and purchase were subsequently entered into for the sale of the property: namely an agreement for the sale and purchase of the land and an agreement for the sale and purchase of the business. The transactions were settled in October 2017.

[17] On 25 October 2017, Mr Adams emailed a letter of complaint to Mr Keene:

> Your company and broker [Mr Sharma] recently had dealings with me regarding the sale of the above business and premises.

> I am writing as suggested to me by the REAA to advise of a complaint I have about these matters, namely:
>
> 1. Despite having a contract where [Mr Sharma] was supposedly my agent and acting on my behalf he at no time behaved that way, he was in fact an agent for the buyer.
>
> 2. [Mr Sharma] received commission from both myself as vendor and the buyer, this is not legal and is a clear conflict of interest.
>
> 3. I felt strong armed by [Mr Sharma] to agree to a finders fee or he would not reveal what the offer on the premises was.
>
> I am writing to you with this complaint to see if we can fix the issue without further action on my part.

[18] The matter was not resolved, and Mr Adams subsequently made a complaint to the Authority. He complained that:

[a] The agency agreement was signed in late June but backdated to 26 May 2017;

[b] Mr Sharma was acting as agent for the purchaser and there was a conflict of interest as the Agency acted as agent for the purchaser during the same period;

[c] The appellants took commission from both him and the purchaser, and he did not know that this was illegal; and

[d] After his complaint to the Agency, Mr Keene gave him false information about the Authority's complaints process.

The Committee's substantive decision

[19] The Committee found that the appellants had breached r 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") and engaged in unsatisfactory conduct by failing to obtain a listing agreement before offering and endeavouring to sell the property. The Committee did not accept that having "verbal authorisation" from Mr Adams was sufficient, and said that having an agency agreement in place is a fundamental requirement of real estate transactions and

a key safeguard tor clients and licensees. The Committee expressed its view that the failure to obtain a valid authority could not be dismissed as a matter of little substance.[2]

[20] The Committee noted that it was not disputed that there was one transaction, and that commission was paid by both Mr Adams (as vendor) and the purchaser in unequal amounts, nor that each party was aware that the other was paying commission. It recorded that the dispute was as to whether the commission represented a single commission paid by both parties or two separate commissions.

[21] The Committee found that there were two separate commissions, and that the appellants were in breach of r 9.14 of the Rules and had engaged in unsatisfactory conduct, as follows:[3]

> 3.11 The agency agreement clearly records the commission as being $55,000 (plus GST). This is also the amount the complainant paid the licensees. In our view this amount represents the full commission payable for the transaction. It follows that any other payment must be a second commission. In other words, the Licensees obtained a full commission as recorded in the agency agreement from the complainant and what amounted to a separate commission from the purchaser for the same transaction without an agency agreement.
>
> 3.12 For the reasons set out above we reject the Licensees' submission that the payments by the complainant and the purchaser represented a single commission. If we were to accept that agents could receive payment from vendors and purchasers in the same transaction under one agency agreement that would amount to a significant departure from the purpose of the Act which 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.

[22] The Committee also found that there was a significant amount of self-interest in the appellants receiving commissions from both the vendor and the purchaser, and that they could not be regarded as having met their fiduciary obligation to Mr Adams under r 6.1 when they received a commission from the purchaser. The Committee found that the appellants had breached r 6.1, and had engaged in unsatisfactory conduct.[4]

[23] The Committee further found that it was likely that reasonable members of the public would consider that other licensees should not condone the appellants having received a commission from both Mr Adams and the purchaser, or find it acceptable.

---

2 Committee's substantive decision, at paragraphs 3.3–3.8
3 At paragraphs 3.11–3.12.
4 At paragraphs 3.14–3.16.

The Committee said that recognition that such a practice was acceptable would lower the standing and reputation of the industry. Accordingly, it found that the appellants' conduct was likely to bring the industry into disrepute, in breach of r 6.3, and was unsatisfactory conduct.[5]

[24] The Committee did not find that Mr Keene's response to Mr Adams' complaint was a breach of the Rules. It found that he had not engaged in unsatisfactory conduct in this respect.[6]

The Committee's penalty decision

[25] The Committee censured Mr Sharma and ordered him to refund half of his commission share to Mr Adams. It recorded that although Mr Sharma had failed to have an agency agreement in place for several weeks during which time he sought to bring about the sale of the property, and was complicit in the arrangement where the purchaser also paid a commission for the same transaction, there was no evidence that in other areas of his service he failed to provide the services expected of a licensee (for example, negotiating the sale).[7] The Committee did not order Mr Sharma to pay a fine, noting that it was conscious that it had ordered him to refund half of the commission he had received, and of the need for proportionality between the unsatisfactory conduct and the totality of the orders made.[8]

[26] The Committee also made an order for censure of Mr Keene. It recorded that he had not received a share of the commission paid by Mr Adams, so an order for refund could not be made. The Committee made an order that Mr Keene pay a fine of $4,000 (40 percent of the maximum available fine), on the basis of its assessment of his unsatisfactory conduct as being approximately mid-level on the scale of seriousness, and his previously unblemished career in the real estate industry.[9]

---

5 At paragraphs 3.17–3.18.
6 At paragraphs 3.19–3.22.
7 Committee's penalty decision, at paragraphs 4.5–4.11.
8 At paragraph 4.12.
9 At paragraphs 4.14–4.17.

The appeal

[27] The appellants did not appeal against the Committee's finding of unsatisfactory conduct in respect of their failure to have a signed agency agreement in place before offering the property for sale, in breach of r 9.6. Their appeal against the substantive decision was on the grounds that the Committee was wrong to find that:

[a] there were two commissions charged on the transaction, and they were therefore in breach of r 9.14;

[b] by receiving two commissions on the transaction they were in breach of their fiduciary obligations to Mr Adams, in breach of r 6.1; and

[c] their conduct in receiving two commissions brought the industry into disrepute, in breach of r 6.3.

[28] The appellants sought modification of the penalty decision, in accordance with the Tribunal's decision as to the substantive decision.

Was the Committee wrong to find that the appellants received two commissions, and breached r 9.14?

Submissions

(a) Mr Rea

[29] Mr Rea submitted that only one commission was charged on the transaction, and it was split between $55,000 (plus GST) paid by the vendor and $30,000 (plus GST) paid by the purchaser. He submitted that the evidence before the Committee was that Mr Adams said he would only agree to commission of $55,000 plus GST, and suggested that Mr Sharma contact the buyer for further payment. He noted that Mr Adams had referred in correspondence with the Agency to a "$80k to $90k combined" commission. He also submitted that there had been no challenge by Mr Adams to Mr Sharma's characterisation of the purchaser's payment as a "contribution" until his complaint to Mr Keene.

[30] Mr Rea submitted that the evidence established that both the appellants and the purchaser clearly understood that the purchaser's payment was a contribution to a shared commission, not a separate commission. He referred to a statement by the purchaser (provided through the Agency) confirming that he had agreed to a proposal that his company would "split or share the commission" with the vendor, and that it was clear to him that "we were sharing/splitting commission with the vendor to defray the portion of the overall commission that he would otherwise be liable for".

[31] Mr Rea acknowledged it would have been preferable if the agency agreement had specified that payment of a portion of commission would be made by the purchaser, but submitted that the appellants had relied on their understanding of communications with Mr Adams and the purchaser. He submitted that the Committee was wrong to rely solely on the written agency agreement, and not consider the surrounding circumstances (the email correspondence with Mr Adams and the purchaser's statement). He submitted that the Committee's analysis did not recognise the commercial reality of the situation, but was a matter of form over substance.

[32] In the alternative, Mr Rea submitted that the Committee was wrong to find that the appellants had breached r 9.14. He submitted that the wording of r 9.14[10] plainly requires that the licensee is acting as agent for both parties to a transaction, and in the present case the appellants were not acting as agent for the purchaser. He submitted that the purchaser did not engage the appellants to act as his agents, and neither they nor the purchaser intended that any agency relationship should arise as a result of the purchaser's payment.

[33] He further submitted that the payment made by the purchaser was not in the nature of commission, as it was not a payment for work done, or services provided, on behalf of the purchaser. He submitted that there was no evidence that any real estate agency work was conducted by the appellants on behalf of the purchaser.

---

[10] "A licensee must not act in a capacity that would attract more than 1 commission in the same transaction."

(b) Mr Adams

[34] Mr Adams submitted that the Committee was correct to find that there were two commissions charged on the transaction. He submitted that the appellants' submissions relied on cherry-picked snippets from emails which were themselves open to interpretation, and in places directly contradictory. By way of example, he referred to an internal Agency communication in which Mr Sharma said: "Please note that apart from the $55,000 plus GST agreed with Vendor for this deal we have also agreed with [the purchaser] that he will pay the company $30,000 as Buyers fees".

[35] Mr Adams submitted that it is to avoid such misunderstandings and a subsequent requirement for interpretation that real estate transactions rely on written documents. He submitted that in the present case, the agency agreement referred only to the commission paid by HLL. He submitted that if the Agency intended there to be a single commission, that would have been referred to in the agency agreement. He submitted that the submission for the appellants that the lack of any reference to a combined commission in the agency agreement is "form over substance" is trite, and should be rejected.

[36] Mr Adams also referred to contemporaneous documents concerning the transaction, none of which referred to any commission payment other than the commission charged to HLL as vendor, and submitted that the omission of any mention of a combined commission arrangement from the routine follow-up documents could not be explained by "form over substance":

[a] An Agency transaction record, dated 2 September 2017, which refers only to the fee charged to HLL;

[b] An Agency tax invoice regarding the commission, and the portion payable to Mr Sharma, dated 14 September 2017;

[c] An invoice from the Agency to HLL's solicitor, dated 13 September 2017, recording the "agreed set fee" for commission of $55,000 plus GST; and

[d] A statement from the Agency to HLL's solicitors, dated 14 September 2017, recording the reduction of the commission from the deposit received.

[37] Mr Adams submitted that if there were any contemporaneous documents which recorded the payment by the buyer as part of a combined commission then they would have been put before the Committee.

[38] Mr Adams also submitted that there was no evidence that he agreed to a "combined" commission. He submitted that his email to Mr Sharma on 16 June was his drawing a line in the sand as to how much commission HLL would pay, and he was surprised that the appellants would have asked the purchaser to pay commission. He submitted that the Tribunal should reject their submission that he did not challenge or question the purchaser's payment. He submitted that he was simply informed that the purchaser was making a payment, and was not asked to approve it. He further submitted that it was not until he later read r 9.14 that he appreciated that it had not been correct for the appellants to take two commissions.

[39] Mr Adams further submitted that he did not "suggest" a combined commission, and did not make the arrangement for a contribution payment by the purchaser, as submitted by Mr Rea. He submitted that the buyer's payment was entirely "arranged" by the appellants.

[40] Mr Adams submitted that the payment by the purchaser did not mean that HLL paid less commission than it otherwise would have. He submitted that the amount HLL paid was unrelated to any funds received from the purchaser, and there was no quid pro quo between a payment by the purchaser and the commission he was willing to pay.

[41] Mr Adams agreed that there was no purchaser's agency agreement between the Agency and the purchaser, but submitted that a failure by the Agency to document its relationship properly does not mean that such a relationship did not exist. He submitted that the purchaser approached the appellants and they approached the owner of a property that was not currently for sale.

(c) Ms Davies

[42] Ms Davies submitted for the Authority that the first issue for the Tribunal to consider is whether the appellants performed "real estate agency work" for the purchaser. She submitted that an understanding of whether the appellants blurred their roles as between the purchaser and Mr Adams is vital to a proper analysis of any breaches of the Rules. After referring to the definition of "real estate agency work" in s 4 of the Act,[11] she submitted that the appellants had performed "real estate agency work" for the purchaser:

[a] The purchaser approached the Agency to assist him with the purchase of backpackers accommodation in the National Park/Ohakune area.

[b] On the basis of endeavouring to bring about a potential transaction for the purchaser, the appellants approached Mr Adams, as part of an endeavour to bring about potential transaction.

[c] Mr Sharma travelled with the purchaser to National Park, and set up a meeting with Mr Adams, following which negotiations began, ultimately leading to the purchaser purchasing the property. Ms Davies did not submit that this is a decisive factor, but submitted that it lent support for her submission that the appellants took the purchaser to look at a property they had identified for him.

[d] The appellants referred to the purchaser as a "client" in communications, including to Adams. Ms Davies referred to the following:

[i] Mr Keene's email to Mr Adams, on 25 May 2017: "Thank you for the opportunity to quote your property to our client. I had a good meeting yesterday with that client and he would be very interested to consider the opportunity if you would like to sell …"

---

[11] "Any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction".

[ii] A further email from Mr Keene to Mr Adams, on 25 May: "… We appreciate the opportunity to sell this to a client we have. …"

[iii] Mr Sharma's email to Mr Adams, on 1 June: "I will be in around 10am with my client [the buyer];

[iv] Mr Sharma's email to Mr Adams on 16 June: "… Please note my client [the purchaser] is now ready to present you the signed offer on the Freehold as well as the Business …"

[e] On the day of his visit to the property with the purchaser, Mr Sharma was given information by the purchaser concerning his acquisition of a property in Taupo, but withheld it from Mr Adams. Ms Davies submitted that this only made sense if the appellants felt they owed fiduciary duties to the purchaser as, had they been acting solely in Mr Adams' interests at that time, they would have been under a fiduciary obligation to disclose that information.

[43] Ms Davies submitted that Mr Sharma's statement that he "never acted as buyer's agent for purchaser" cannot be determinative, just as Mr Adams' evidence of his impression that Mr Sharma "was in fact an agent for the buyer" cannot be determinative. She submitted that the question is whether, objectively, the steps taken by the appellants in the initial approach constituted real estate agency work. She submitted that the genesis of the transaction was the purchaser's approach to Mr Sharma, and Mr Sharma's taking steps as a result of that approach to facilitate the sale of the property to the purchaser, with the sale ultimately being brought about by the services provided by the appellants to both Mr Adams and the purchaser.

[44] Ms Davies submitted this did not undermine the conclusion that the appellants were also doing real estate agency work for Mr Adams.

[45] Ms Davies referred to the definition of "commission" in s 4 of the Act, and submitted that the Committee correctly found that the payment by the purchaser was a "second commission". She submitted that if the Tribunal is satisfied that the

appellants provided services to the purchaser as well as to the vendor for the purposes of bringing about a transaction, then they acted in a "capacity that would attract more than 1 commission", had that commission been sought. She submitted that the policy of r 9.14 is to prevent licensees from acting for both parties to a transaction, and thereby potentially receiving payments from both parties.

[46] Ms Davies submitted that the appellants' role was blurred from outset; they introduced themselves to Mr Adams as people who could act in his interests and sell the property, but in fact they were trying to find properties for the purchaser. They performed real estate agency work for both parties, and were therefore "acting in a capacity that would attract more than 1 commission".

[47] She submitted that it is not relevant for purposes of her argument that the appellants did not have a buyer's agency agreement. She submitted that they should have done, but they cannot rely on their own default to evade liability.

(d) Mr Rea's reply submissions

[48] Mr Rea submitted in reply that it is commonplace for prospective purchasers to contact real estate agencies looking for properties, regardless of whether the properties are listed with the agency. He submitted that the Tribunal had dealt with many cases involving "letterbox drops" by salespersons, attempting to solicit potential clients with words to the effect that "we have buyers in your area".

[49] He submitted that if the Authority's submission is found to be correct, then the natural extension of it would be that all potential purchasers not seeking a specific property listed with the agency would be required to enter into buyer's agency agreements. He submitted that there is no proper reason that should prevent an agency from receiving contact from a potential purchaser and then attempting to obtain an agency agreement from a vendor.

[50] Mr Rea submitted that the fact that the appellants referred to the purchaser as their client is of no consequence, and is a semantic argument which does not affect the legal position. He repeated his submission that there was only one commission in the

present case, and submitted that while it is not recorded in the agency agreement, it is supported by contemporaneous evidence and by subsequent evidence by the appellants and the buyer.

Further submissions

[51] The Tribunal requested further submissions concerning the application of r 9.14. Mr Rea submitted that the application of r 9.14 is restricted to circumstances where a licensee is acting as agent for both parties, so does not apply in the present case. He further submitted that no evidence had been identified either by Mr Adams or the Authority, that the appellants had carried out real estate agency work for the purchaser after Mr Adams suggested they seek a contribution from the purchaser (let alone after the purchaser agreed to contribute to the commission), that would have attracted a commission.

[52] Mr Mortimer submitted for the Authority that r 9.14 may be given a narrow or wide interpretation. The narrow interpretation is that it imposes a blanket prohibition on acting for more than one party in a manner that would attract more than one commission, and the wider interpretation is that it provides guidance for licensees as to how far they may assist a party other than their client. He submitted that on this interpretation, the line is to be drawn by reference to a potential entitlement to commission. As Mr Mortimer put it, "puffery" from a licensee would be permitted, but if a licensee acts in a way that would (in theory) attract commission, then the line is crossed and r 9.14 is engaged.

[53] Mr Rea filed submissions in reply. He submitted that the Authority's interpretation of r 9.14 had the effect of (wrongly) replacing the word "would" with "might". He submitted that in the present case (at worst), any services provided to the purchaser "at early stages" of the transaction "might" have resulted in the appellants' receiving more than one commission. He submitted that the suggestion of the appellants' receiving a payment from the purchaser only arose after the purchaser had been introduced to the property, and there was no connection between that introduction and the payment the appellants later received from the purchaser.

Discussion

[54] As recorded earlier, there was no dispute that the appellants received separate payments of $55,000 from HLL and $30,000 from the purchaser (both GST exclusive). Looked at objectively, was the Committee wrong to find that the appellants received two separate commissions, rather than a single commission, contributed to by both HLL and the purchaser?

[55] Mr Rea pointed out in his submissions that the wording of r 9.14 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 is different from the equivalent Rule in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the 2009 Rules"). In both cases, the rule is the first under the heading "Conflicts of Interest". Rule 9.19 of the 2009 Rules provided:

> A licensee must not act in a capacity that would attract a commission from both a client and customer in the same transaction

[56] Rule 9.14 of the current Rules provides:

> A licensee must not act in a capacity that would attract more than 1 commission in the same transaction

[57] In order to consider the parties' submissions, it is necessary to set out the following definitions, taken from the Act and Rules:

[a] "Commission" (in s 4 of the Act):

> **commission** means remuneration by way of a commission, fee, gain, or reward for services provided by an agent in respect of a transaction

[b] "Transaction" (in s 4 of the Act, as relevant):

> **transaction** means any 1 or more of the following:
>
> (a) the sale, purchaser, or other disposal or acquisition of a freehold estate or interest in land:
>
> …
>
> (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

[c] "Client" (in s 4 of the Act):

> **client** means the person on whose behalf an agent carries our real estate agency work

[d] "Customer" (in r 4 of the Rules):

> **customer** means a person who is a party or potential party to a transaction and excludes a prospective client and a client

[58] As is evident from the wording of the definition, a "commission" can be any form of payment for services provided in respect of a transaction. It is not a term of art; a commission is simply a payment for work done. Further, the change in wording from r 9.19 in the 2009 Rules to that of r 9.14 in the current Rules makes it clear that a "commission" is not limited to a payment received from a "client" or a "customer". There no such restriction: the purpose of r 9.14 is to prohibit licensees from receiving payments from more than one person or entity in respect of a transaction. Its scope is broader than that of the superseded r 9.19.

[59] The rationale for r 9.14 is clear. It is the first rule appearing under the heading "Conflicts of Interest". The drafters of the Rule clearly considered that the receipt of payment (whether as a "commission", "fee", "gain", or "reward") for services in respect of a transaction would give rise to obligations owed to the maker of that payment. Receipt of more than one payment would give rise to obligations to the makers of each payment, and therefore a conflict of interest. That conflict of interest is avoided by prohibiting licensees from receiving more than one payment. That is consistent with the purpose of the Act, as set out in s 3, of protecting the interests of consumers, and protecting public confidence in the performance of real estate agency work.

[60] In the present case, the appellants received two payments, one from Mr Adams, the other from the purchaser. There was only one transaction: the sale of HLL to the purchaser. Whether the appellants were in breach of r 9.14 is determined by a factual analysis: were the payments for services in respect of the transaction?

[61] There is no question that the appellants provided services to Mr Adams in respect of the transaction. His payment was clearly a "commission". We have concluded that the appellants also provided services to the purchaser. The appellants were dealing

with the purchaser before they approached Mr Adams. The property was not on the market when they first approached the appellants. The appellants approached Mr Adams on the purchaser's behalf, and introduced him to the property. They were preparing an offer for Mr Adams to consider at the time they sent him an agency agreement to sign. The fact that these services were provided by the appellants at an early stage of the transaction does not alter the fact that they were provided.

[62] The appellants clearly considered that they were providing services to the purchaser. They referred to him as "our client", "my client", or "a client we have" in communications with Mr Adams. Further, the appellants included background information on the purchaser in their approach to Mr Adams, and recommended the purchaser as a prospective purchaser, saying that "he moves quite quickly if he likes what he sees", and "he has demonstrated to us to be very professional in his dealings". The appellants' approach to Mr Adams was on behalf of a specific prospective purchaser, intended to result in the transaction that eventuated. This was not a case of a "letterbox drop" by a licensee advising of potential purchasers of properties in a general area.

[63] It is reasonable to assume that the appellants would not have asked the purchaser to make a payment unless they were satisfied that they had a proper basis to do so. That is, they must have been satisfied that they had provided services, or carried out work, which supported their request for payment. Similarly, it is reasonable to assume from the fact that the purchaser agreed to make the payment to the appellants that the purchaser would not have agreed to the payment unless he, too, accepted that there was a proper basis, in the form of services provided in respect of the transaction, on which to make the payment.

[64] The proper interpretation of r 9.14 excludes the concept of a "shared" commission. However, we turn to consider Mr Rea's submission that the two payments received by the appellants were in fact a shared commission, agreed to by Mr Adams.

[65] On 16 June 2017, Mr Adams told Mr Sharma that he would be willing to pay a "finders fee as a %, perhaps matched by [the purchaser]". On 20 June he told Mr

Sharma he would sign the agency agreement with a stipulated change in that the commission clause was to be changed to a payment of $60,000. Mr Sharma then told Mr Adams that the purchaser had agreed to pay "$30,000 plus GST" and the purchaser was "also aware that you are paying Resort Brokers a commission".

[66] We do not accept Mr Rea's submission that Mr Adam's email of 16 June 2017 must be read as an agreement to share commission. Rather, it is no more than a suggestion (at most, tentative), that Mr Sharma look to the purchaser. Mr Adams subsequently advised Mr Sharma on 20 June 2017 that the commission clause in the agency agreement was to be changed to a payment of $60,000, which was to be paid by HLL. He did not make any reference to the purchaser sharing or contributing to the commission. Mr Sharma's email advice of the purchaser's agreement to pay $30,000 was sent to Mr Adams on 21 June 2017, after Mr Adams had stipulated the change to the commission clause. Mr Adams was not asked if he agreed to the payment by the purchaser.

[67] Nor do we accept Mr Rea's submission that Mr Adams "arranged" for a shared commission. There is no evidence to support that submission. The wording of Mr Adams' email of 16 June 2017 could not be elevated to his having "arranged" for a shared commission.

[68] In any event, the appellants could not rely on Mr Adams' having "suggested", or "agreed to" or "arranged for" a shared commission in order to avoid a disciplinary finding if they were in breach of r 9.14. Nor could they rely on Mr Adams not having raised any objection when told that the purchaser was paying $30,000 commission. It is not the responsibility of a licensee's client to know the provisions of the Act and Rules, so as to prevent the licensee from breaches of those provisions. That is the responsibility of the licensee.

[69] We also reject Mr Rea's submission that the fact that there is no reference to a shared commission (or indeed any commission beyond that paid by HLL) in the agency agreement can be dismissed as being a matter of form not substance. The agency agreement set out the terms of the Agency's engagement with HLL for the

purpose of marketing the property. As the Tribunal said in in its decision in *Summit Real Estate Ltd v Real Estate Agents Authority (CAC 100012)*:[12]

> … an agency agreement is "the foundation upon which transactions involving the sale and purchase of a property rest and, as such, is the cornerstone of the current Act and its regulatory regime.
>
> … these provisions together cannot be categorised as merely technical; they are important substantive consumer provisions to promote and protect the interests of consumers in relation to real estate transactions.

[70] The finding that the agency agreement defined the commission paid on the transaction is supported by the evidence of the Agency's advice of deduction of the commission from the deposit paid by the purchaser (referred to in paragraph [36], above). The relevant documents refer only to the payment by HLL. There is no reference to the commission being "shared" or "split".

[71] While it is clear that the purchaser agreed to pay commission, and knew that HLL was also paying commission, that does not prove that the two payments were contributions to a single shared commission, rather than two separate payments of commission. Further, the appellants could not rely on the purchaser's perception of the payment he agreed to make as being determinative of there being a single shared commission, rather than two separate commissions.

[72] We are not persuaded that the Committee was wrong to look to the agency agreement as the source of the Agency's authority to receive a commission on the sale of the property. Nor are we persuaded that the Committee was wrong to find that it followed from the fact that the appellants received the commission as recorded in the agency agreement, that any other commission payment received by the appellants must be a second commission.

[73] Accordingly, we conclude that each of the two payments received by the appellants was a "commission" as defined in the Act, in respect of the same transaction. We are not persuaded that the Committee was wrong to find that the appellants received two commissions from the sale of the property, and were therefore in breach of r 9.14.

---

[12] *Summit Real Estate Ltd v Real Estate Agents Authority (CAC 100012)* [2011] NZREADT 88, at [18] and [19].

[74] Mr Rea's further alternative argument was that the appellants could not be found in breach of r 9.14, because they did not "act in a capacity that would attract more than 1 commission". He submitted that r 9.14 "plainly requires that a licensee is acting as agent for both parties to a transaction" and that there was no breach of r 9.14 because there was no relationship of principal and agent as between the appellants and the purchaser.

[75] We accept that there is no evidence of a written agency agreement having been entered into with the buyer. However, we accept Ms Davies' submission that on the evidence before it, the Committee would have been entitled to conclude that the appellants carried out real estate agency work for the purchaser. The purchaser approached the appellants for assistance in buying backpackers' accommodation in the central North Island. That led Mr Keene to make a specific approach to Mr Adams, on behalf of the purchaser, notwithstanding that the property was not on the market.

[76] For the reasons set out above, we are not persuaded that the Committee was wrong to find that the appellants received two commissions in respect of the sale of the property, and were in breach of r 9.14.

Was the Committee wrong to find that the appellants breached r 6.1?

[77] Rule 6.1 provides:

> A licensee must comply with fiduciary obligations to the licensee's client.

[78] The Committee found that the fact that the appellants received a commission from the buyer "prima facie presents a clear conflict of interest".[13] It found that there was a "significant amount of self-interest in the [appellants] receiving commission from both parties".[14]

[79] The duty to comply with fiduciary obligations to the licensee's client (in this case, Mr Adams as director of HLL) requires licensees not to put themselves in a position where they have a conflict of interest. The Committee's conclusion that the

---

13 Committee's substantive decision, at paragraph 3.15.
14 At paragraph 3.16.

appellants were in breach of r 6.1 followed from its earlier conclusion that they received two commissions. We have set out our reasons for not accepting the appellants' submissions that the Committee was wrong to make that finding. We are not persuaded that the Committee was wrong to find that, by receiving commissions from the vendor and purchaser in a transaction, they put themselves in a conflict of interest, in breach of r 6.1, and engaged in unsatisfactory conduct.

Was the Committee wrong to find the appellants breached r 6.3?

[80] Rule 6.3 provides:

> A licensee must not engage in any conduct likely to bring the industry into disrepute.

[81] This finding also followed from the Committee's conclusion that the appellants received two commissions. We are not persuaded that the Committee was wrong to conclude that members of the public would think that licensees should not condone receiving two commissions from the same transaction, or find it acceptable. Members of the public would not expect licensees to condone conduct that is in breach of the Rules. Nor are we persuaded that the Committee was wrong to conclude that the appellants' conduct in receiving two commissions was likely to bring the industry into disrepute, in breach of r 6.3, and therefore unsatisfactory conduct.

The appeal against the Committee's penalty orders

[82] As we have not found in favour of the appellants on their appeal against the Committee's substantive decision, we are required to consider only one aspect of Mr Rea's submissions, which concerns the Committee's order that Mr Sharma was to refund commission of $14,405.90 to Mr Adams.

[83] Mr Rea submitted that the Committee acknowledged that although Mr Sharma failed to have an agency agreement in place for several weeks, during which time he sought to bring about the sale, and was complicit in the arrangement whereby the buyer also paid a commission on the transaction, there was no evidence that he failed to provide the services expected of a licensee. Mr Rea submitted that in exercising its

discretion to order Mr Sharma to refund commission, the Committee failed to take into account that:

[a] The arrangement for a contribution payment by the purchaser was made by Mr Adams, himself;

[b] The appellants were completely transparent as to the payment by the purchaser, in that Mr Adams was informed of it before any agreements for sale and purchase were completed, and he did not raise any objection to it;

[c] Mr Adams is an intelligent and commercially savvy businessman, well able to understand and negotiate commercial arrangements;

[d] The commission paid by the vendor was only $55,000 plus GST, in contrast with the sum for which it would ordinarily have been liable ($123,500 plus GST);

[e] There are civil remedies available to Mr Adams, if he wishes to pursue them; and

[f] There is no evidence of any loss to the vendor or Mr Adams: in contrast, an excellent outcome was achieved for the vendor, as the purchaser agreed to pay approximately 99 percent of the vendor's asking price.

[84] We are not persuaded that the Committee erred in exercising its discretion. First, as we have recorded earlier, there is no evidence that Mr Adams "arranged" for the "contribution payment by the purchaser". That "arrangement" was made by the appellants, and Mr Adams was informed of it after it was made. Secondly, as also recorded earlier, it was not for Mr Adams to know that the appellants' arrangement was in breach of the Rules, and to raise an objection for that reason. It was the appellants' responsibility to ensure that they complied with the Rules.

[85] Thirdly, other than as may be implied from the fact that he asserted that he was not prepared to pay the appellants the commission they sought (for the reason that they had approached him, with the purchaser, and had not been required to incur costs

normally associated with marketing a property), Mr Rea did not provide any evidence to support his assertion that Mr Adams is "a commercially savvy businessman". Mr Adams has provided details of his experience in real estate transactions. It is limited to the purchase of the lease of the property in 2006, the purchase of the freehold in 2017, the sale of the property in 2017, and the purchase of his own home in 2015. In any event, the fact that Mr Adams is intelligent, and may have demonstrated some ability in negotiation, is not relevant to whether an order should be made for a commission refund. Further, as the Agency agreed to the commission payment made by the vendor, it is not relevant that the vendor would "ordinarily" have paid a greater sum.

[86] The same point may be made in relation to Mr Rea's submission that an "excellent outcome was achieved for the vendor". It is not relevant to the issue whether, as a result of the appellants' failure to comply with the Rules, an order should be made to refund commission. We also observe that both sides of the transaction achieved a good outcome. As the purchaser said in an email to the Agency on 20 May 2018 (provided by the Agency to the Authority), when commenting on his agreement to pay commission:

> I considered this request [by the Agency] in the light of the overall outcome and that we had been successful in getting the freehold as well as the business in this tightly held market, a better outcome than expected – agreed. I felt it was an acceptable proposal in the circumstances …

[87] We further note that when considering the penalty orders against Mr Sharma, the Committee took into account the fact that it had ordered him to refund commission when deciding not to order him to pay a fine.

[88] Accordingly, we are not persuaded that we should interfere in the exercise of the Committee's discretion to order Mr Sharma to refund commission of $14,405.90.

[89] However, we accept, as did Mr Adams, that the Committee erred in ordering that the commission was to be refunded to Mr Adams. The vendor was HLL, the commission was deducted from the deposit on the purchase price. The order for refund will be varied to allow for the refund to be made to HLL.

Outcome

[90] The appellants' appeal against the Committee's substantive decision is dismissed.

[91] The Committee's penalty decision is varied so as to provide that Mr Sharma is to refund commission of $14,405.90 to Howards Lodge Ltd, within 21 working days of the date of this decision.

[92] 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.

_____
Hon P J Andrews
Chairperson

_____
Ms C Sandelin
Member

_____
Mr N O'Connor
Member