BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 31

READT 031/19

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	EWEN TUROA and OSBORNE REALTY LIMITED Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 519) First Respondent
AND	JANNA GILLIGAN and ROBERT MILLS Second Respondents

On the papers

Tribunal:	Mr J Doogue (Deputy Chairperson) Ms C Sandelin (Member) Mr N O'Connor (Member)
Submissions filed by:	Ms M Mason on behalf of the Appellants Ms A-R Davies, on behalf of the Authority No submissions by or on behalf of the Second Respondents
Date of Decision:	30 July 2020

DECISION OF THE TRIBUNAL

Introduction

[1] The appeal in this matter arises out of the involvement of Ewen Turoa **(Mr Turoa)** who was, together with another licensee, Lance Parker, the listing sales person for the sale of 225 Whiriwhiri Road, Waiuku (**the property**). An auction for the sale of the property was scheduled for 17 February 2018. The complainants are Janna Gilligan and Robert Mills **(the complainants).** They were interested in possibly acquiring the property. They had said that they were interested in the property but they would not be able to attend the auction and if the property did not sell at auction, they would like to hear back. They were advised to call back after the 18th (by which time the outcome of the auction would be known).

[2] On the night of 17 February 2018, the complainants were apparently absent from their usual home and were staying in a hotel. What then happened was that on the evening of the 17th Mr Turoa phoned and said the property had not sold at auction. He asked the complainants if they were interested in making an offer. He said that if they wanted to make an offer they would have to move fast and put it in that night, that is the night of Saturday, 17 February. This phone call took place at approximately 9.00 pm. Mr Turoa in that, or another, call gave them information including the price at which the property had been passed in at auction and advice as to the approximate level of any offer they would have to go if they would have a chance. The upshot was that the complainants decided they could go to $850,000. At 10.00 pm, Mr Turoa again phoned the complainants at their hotel and asked if they could sign the contract that night.

[3] At approximately 10.00 pm that night Mr Turoa sent an offer form to the owner of the hotel where the complainants were staying, asking him to print it and bring it to the attention of the complainants.

[4] The complainants allege, that in addition to taking the steps referred to in the previous paragraph Mr Turoa persistently contacted the complainants by telephoning them and messaging them.

[5] Because the complainants considered that the steps that he took were excessive, they complained to the agency to which Mr Turoa was contracted, the second appellant, (**Osborne Realty**). They requested that Mr Turoa have no further contact with them. Osborne Realty

instructed Mr Turoa not to have any further dealings with the complainants and instructed Mr Parker that he was to be the contact person.

[6] One important feature of the arrangements was that the contract in its original format provided for payment of the deposit on the unconditional date under the contract.

[7] The offer which the complainants made was initially rejected. Mr Turoa apparently concluded that changing the offer so that the deposit was payable instead on signing of the contract, would be likely to persuade the vendors to accept the offer which the complainants had made. He attempted to obtain authority from the complainants to do this but when he was unsuccessful, he amended the agreement himself and inserted the date for payment of the deposit as "signing date". The offer with the amendment made to it, but without any initialling or other endorsement by the complainants, was forwarded to the vendors and they accepted it. Mr Turoa advised them on the morning of 18 February 2018 that he had gone ahead and made the change to the clause concerning the timing of the deposit himself because he had not been able to contact them.

[8] The vendors accepted the amended offer on 18 February and Mr Turoa called the complainants in the afternoon to tell them that their offer had been accepted.

[9] In due course, the conduct of the various parties was investigated by the Complaints Assessment Committee (**the CAC**) and charges were brought.

The Complaints Assessment Committee enquiry and decision

[10] After the matter had been investigated by the Real Estate Agents Authority (**the Authority)** the CAC found that Mr Turoa and Osborne Realty had engaged in unsatisfactory conduct pursuant to S 89(2)(b) of the Act.

[11] When the complaint about Mr Turoa was referred to the CAC, it formed the view that in addition to the charge arising out of the excessive contact, there may have been other breaches of obligations under the Real Estate Agents Act 2008 (**the Act**) by Mr Turoa, Mr Parker and Osborne Realty.

[12] In summary the CAC concluded that Mr Turoa placed the complainants under undue and unfair pressure by repeatedly contacting them on 17 February to make an offer and sign the ASP. While the CAC accepted that Mr Turoa had a duty to make contact with the complainants, it found that the number and frequency of calls, texts and messages was excessive. This placed the complainants under undue or unfair pressure, in breach of r 9.2. The CAC also found that Mr Turoa made further contact with the complainants after being told on 20 February by the Agency not to contact them. The CAC found this would have resulted in further undue or unfair pressure on the complainants in breach of r 9.2.

[13] As well, the CAC concluded that there was no evidence that Mr Turoa had recommended to the complainants that they should obtain legal advice concerning the contract and did not allow the complainants sufficient time to obtain advice and seek information before signing the ASP on 17 February. The CAC considered that Mr Turoa also breached r 9.7 in the following respect. The ASP had been received by the complainants on the evening of 17 February 2018. There was no evidence that Mr Turoa told the complainants at this time that they could seek legal, technical or other advice before signing the ASP. The ASP was returned to Mr Turoa on the morning of 18 February 2018. The urgency of the multi-offer did not relieve Mr Turoa of his obligation to allow the complainants a reasonable opportunity to seek advice in contravention of Rule 9.7.

[14] The CAC further concluded that that there was no evidence that after Mr Turoa amended the deposit provisions of the ASP that he recommended the complainants seek legal advice on the amendment and its implications, or advised the complainants that the amendments were not binding until it had been initialled.

[15] The CAC further concluded that Mr Turoa's conduct in amending the ASP without the complainant's instructions was a failure to act in good faith and deal fairly with the complainants, and was therefore a breach of r 6.2.

[16] It also found that Mr Turoa’s actions in dating the amended ASP as 19 February 2018 was in breach of Rule 6.2. The amended ASP was actually initialled by the complainants on 20 February 2019. The CAC found this back-dating to be a failure to act in good faith, to be misleading, and was also a failure to act with skill, care and competence, in breach of Rules 5.1, 6.2 and 6.4.

[17] Lastly, Mr Turoa was found to have breached s 133(2) of the Real Estate Agents Act 2008 in that he did not provide the approved REA guide before the complainants signed the ASP.

[18] In relation to the Agency, the CAC found it did not properly supervise and manage Mr Turoa in his conduct in dealing with the complainants. No evidence was provided by the Agency of day to day management and supervision of Mr Turoa in respect of the transactions for the property. The Agency was either not aware that Mr Turoa dated the ASP before it was signed and before the acknowledgement was signed, or took no action if it was aware.

[19] A charge brought against Mr Parker was dismissed and there is no need to mention that matter further in this decision.

Appeal

[20] Mr Turoa's appeal stated:

> It is submitted that the facts were incorrectly assessed in relation to the complaint against Mr Turoa and even if they were not incorrectly assessed that Mr Turoa place the complainant under undue pressure with the amount of calls he made especially due to the fact that when his contact was responded to it the contract was consistent with the complainant wanting to pursue making an offer in a multi-offer situation. Given the multi-offer situation Mr Turoa had an obligation to contact the complainant to make sure they were fully informed about the requirements of making an offer in the circumstances.

[21] Mr Turoa did not file any submissions in support of his appeal. There was no indication given that his intention was to also appeal against the conclusions that the CAC came to that he had also engaged in unsatisfactory conduct for other reasons including making the unauthorised change to the agreement in relation to the deposit and also backdating the agreement.

[22] Notwithstanding these omissions from the notice of appeal, counsel for the authority framed her submissions on the basis that those other grounds were also challenged on appeal.

[23] In our view an appellant will normally be required to clearly identify what aspects of the CAC conclusions are under challenge and the grounds upon which that challenge is mounted.

However, given that counsel for the authority does not apparently have any concerns about responding in relation to the other grounds, notwithstanding that the appeal was not explicitly based upon them, we will briefly consider those additional grounds on the assumption that the appellant intended to challenge the correctness of the findings of the CAC in regard to them.

Principles

[24] Counsel for the Authority made the following submission concerning the approach which the Tribunal is required to adopt when considering an appeal from findings which have been made by a CAC:

> 3.1 This is an appeal against a finding of unsatisfactory conduct under s 89(2)(b). The appeal is a general appeal that requires the Tribunal's own assessment on the merits consistent with the principles in Austin Nichols & Co v Stitching Lodestar[1]. The Tribunal will determine this matter as a general appeal by way of rehearing.

[25] We accept that is a correct statement of the principles and will approach the appeal on the basis so stated.

Finding that Mr Turoa improperly pressured complainants by making excessive contact or attempting to contact them

[26] Rule 9.2 provides:

> 9.2 A licensee must not engage in any conduct that would put a prospective, client, or customer under undue or unfair pressure

[27] The basis for the finding of unsatisfactory conduct against Mr Turoa was that he placed undue pressure on the purchasers by making excessive contact with them.

[28] The complainants said there were approximately 30 phone calls and messages from 17-18 February, and a further 18 calls, 11 messages and several emails over the following days.[2] between 17 and 20 February 2018, many of which occurred late at night and in the early morning.

[29] Mr Turoa provided the REA investigator with a summary of land line, mobile calls, texts and voice messages made to the complainants from 17 February 2018 until 20 February 2018.

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1 *Austin Nichols & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
2 BOD at 9.

This showed 34 calls and messages from Mr Turoa to the complainants over the period of 17-18 February 2018.

[30] A further aspect of the facts needs to be mentioned and that concerns the circumstance that Ms Gilligan contacted the principal of the second appellant expressing her dissatisfaction about the number of times that Mr Turoa had called them about the proposed offer. It does not seem to be disputed that the principal, Ms Osborne, instructed Mr Turoa not to make further contact with the complainants and that instead another agent, Mr Parker, was to have responsibility for bringing the transaction to completion. As it turned out, the contract did not become unconditional. Notwithstanding the direction to Mr Turoa, he in fact made contact with the complainants to discuss the matter further. He did this by way of a text to Ms Gilligan with the asserted purpose of following up to obtain feedback as to whether the complainants had been satisfied with the service that he had provided and also offering his further services to help bring the matter to conclusion. It is not clear on what date he sent this text. The wording of the text[3] made it clear that it was sent after the vendor had accepted the complainant's offer and in it, he said that this purpose in contacting the complainants was to just check to see if his service to them had been up to standard and:

> hopefully I was very courteous and not to pushy. Also may I continue to be of service and process your contract to completion.

[31] It is Mr Turoa's case, in summary, that it was necessary for him to deal with the complainants in the way that he did because they were under pressure of time to submit any offer. Offers had to be submitted by the end of the weekend. As well, after the property had been passed in at auction, there had been multiple offers made and the special procedure which was applicable to that situation had to be followed. We infer from this, although it is not clear from the evidence, that the offers that the different parties had made would all be placed before the purchaser for its decision and that it was necessary, if the complainants wished to make an offer, that it be put forward before the time scheduled for offers to be received. We again infer that this point of time was going to be very soon after the property had been passed in at the auction on 17 February.

[3] BOD 43

[32] Mr Turoa also states that had he not taken the steps that he did, and the complainants had missed out on a binding agreement, he could have been the subject of a complaint for that reason.

[33] He further said that while he made quite a number of calls, only a few of them resulted in his making contact with the complainants. He said that when the complainants did answer their response was positive and they took the steps that he advised them to.

[34] The first matter we will consider is the question of just how many contacts Mr Turoa made with the complainants.

[35] Counsel for the Authority, pointed out that the evidence demonstrates that Mr Turoa called and messaged the complainants 34 times from 17-18 February 2018. That is not disputed. We agree. The number is based upon Mr Turoa's own phone records which were put in evidence.

[36] She also said that, based on the evidence, there may well have been even more contacts than this which were sent to the complainants through other telephone numbers. She said there was evidence that could justify a finding there were a further 18 calls.

[37] Mr Turoa's alternative ground of appeal was that even if he was wrong about the number of calls, then calls that it did make were all justified because of the factual circumstances that developed in regard to the proposed purchase. The assertion made is that it became clear to him after the property was passed in at auction on Saturday, 17 February 2018, a multi-offer process was going to be required. We understand that Mr Turoa puts forward the argument that because there were other competing offerors participating, there was a risk that if the complainants did not respond promptly, they would miss out to one of those other offerors.

Our conclusions

[38] Mr Turoa's grounds for appeal assert that the CAC made incorrect findings of fact concerning the number of contacts that he made to the complainants. If there is any area of dispute between the parties, it consists of differences as to the exact number of calls and text messages which Mr Turoa sent. What is beyond argument, because it is based on Mr Turoa's

own records, is that there were at least 34 calls and messages. Even if there were no additional contacts, the number of contacts that Mr Turoa made was excessive.

[39] We do not accept that the fact that this was a multi-offer situation excuses Mr Turoa. In our assessment, the responsibility of an agent finding himself in the position that Mr Turoa did was to communicate to the proposed purchaser all material circumstances including providing accurate and honest information as to the number of other genuine contending potential vendors and providing a balanced and accurate assessment of the risks that they might miss out if they delayed their decision to proceed and any consequent delay in executing the necessary documents to secure the sale property. Once the licensee had done so, he had done all that was necessary to discharge his responsibilities. To go further was not something that the licensee was genuinely required to do in the circumstances of this case.

[40] Further, it is our assessment that the effect of the excessive number of phone calls was to harass the complainants with the objective that they would as a consequence make decisions which suited the purposes of Mr Turoa.

[41] We have mentioned that Ms Osborne instructed Mr Turoa not to make further contact and that notwithstanding that instruction he did so. The CAC regarded this as having significance. In our assessment, the significance of Mr Turoa making further contact after he had been instructed not to meant that he must have appreciated by this stage that he had gone too far and yet he was not deterred from making still further contact with the complainants. The wording of the text which we have set out above indicates that he was still attempting to participate in the sales process and to be involved in bringing it to completion.

[42] These matters persuade us that it is clearly established that Mr Turoa engaged in unsatisfactory conduct. In our assessment, the conduct placed undue pressure on the complainants and the CAC was correct to find that the charge under Rule 9.2 had been established.

The issue concerning legal advice for the complainants before they signed the ASP

[43] The CAC made two findings in their decision [4] that Mr Turoa did not comply with the rule. The first finding was that before the complainants signed the agreement for sale and purchase on 18 February the licensee did not recommend that they seek legal advice in accordance with Rule 9.7. The second finding was that the licensee did not give that advice to them when the change was made to the contract so as to provide for the deposit to be paid on execution.

[44] Rule 9.7 provides:

> 9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—
>
> (a) recommend that the person seek legal advice; and
>
> (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
>
> (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b)

[45] Counsel for the Authority submitted:

> 4.25. Generally speaking, the requirement to advise purchasers to seek and receive advice before they enter into a contract preserves a consumer's best interests. Entering an ASP can have significant implications for their lives and finances, among other things. A licensee's failure to make this recommendation, or give an opportunity to do so, will be unsatisfactory conduct.

[46] We accept that that is an accurate summary of the purposes of the rule.

[47] Analysis of the material that has been filed indicates that there are some problems with the finding that the CAC made in regard to this charge. In the first place, it does not appear that a breach of Rule 9.7(3) was ever raised with Mr Turoa at any time prior to the decision of the CAC dated 26 April 2019. The reason for that would seem to be that the complainants never made a complaint about that aspect of his conduct. When the investigator communicated with Mr Turoa to advise him of the matters that were under consideration, she did not raise that question either. The possibility that Mr Turoa was misled in this regard is strengthened by the

[4] Paragraph 3.13 and following

letter which the REA the investigator sent to him on 26 September 2018[5] setting out a statement of the issues which appeared to be the relevant ones upon which a response from Mr Turoa was sought. The statement of issues did not include a possible breach of Rule 9.7.

[48] The focus of her enquiries was Mr Turoa's alleged excessive contact and attempts to contact the complainants and also the circumstances in which he provided the agreement with the alteration as to the timing of the deposit to the vendors. There were other matters as well contained in the email of 26 September 2018 which the investigator sent to Mr Turoa but the question of whether he advised the complainants to obtain legal advice was not one of them.

[49] We consider that it is a fundamental requirement of procedure before the CAC that the licensee ought to be informed in reasonable detail of what the charges are that he/she faces.

[50] We also consider that the evidence is equivocal as to the charge that the licensee failed to recommend that the complainants seek legal advice. In *Hodgson v CAC and Arnold* [6] the Tribunal held that the onus of proving the complaint rests on the complainant which must establish on the balance of probabilities that a breach occurred.

[51] The evidence which was available to the Tribunal on the rehearing on appeal has not been supplemented by any additional material which touches on the point about the alleged failure to recommend to the complainants that they obtain legal advice.

[52] We conclude that the evidence relevant to this charge was equivocal. The complainants signed a form[7] **(the form)** which acknowledged that they had been provided with the REAA Sales and Purchase Guide. That guide contains a recommendation that legal advice should be obtained. The form also included an acknowledgement by the complainants that the licensee had drawn their attention to the advice on the last page of the sales and purchase agreement recommending that they obtain professional advice regarding the effect and consequences of any agreement entered into and further that the complainants had read those notes.

[53] If there was explicit evidence from an apparently credible complainant that despite signing that acknowledgement, its contents were not true, then it would have been open to the

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[5] BOD 41
[6] *Hodgson v CAC and Arnold* [2011] NZREADT 3
[7] BOD 76

CAC to go behind the acknowledgement. The existence of an acknowledgement of the kind to be found in this case would not have prevented them coming to such a factual conclusion even if it were inconsistent with that acknowledgement. The acknowledgement is only one part of the evidence and all of the evidence needs to be considered. However, we do not consider that there is countervailing evidence which overcomes the effect of this acknowledgement. The fact that the complainants signed an acknowledgement of this kind cannot be completely ignored.

[54] A significant factor is that one version of the Customer Buyer Acknowledgement which we are discussing has the hand-written words "was left blank!" written on it. There is an inference that it was possibly the complainant who wrote that endorsement on the form. However, the significance of that remark is to be assessed in the light of the fact that the agreement was not one that needed to be completed by the purchasers other than by putting their signatures on it and, anyway, in addition to the unsigned version of the acknowledgement form there is another version on the file which they indisputably signed.

[55] For all these reasons, we do not accept that it has been established on the balance of probabilities that Mr Turoa did not give the complainants the advice which they acknowledged receiving when they signed the acknowledgement form. The tribunal considers that the finding against Mr Turoa in paragraphs 3.12 and following ought therefore to be set aside on this ground.

The alleged failure to comply with s 133(2) of the Act

[56] Mr Turoa was found to have breached s 133(2) of the Real Estate Agents Act 2008 in that he did not provide the approved REA guide before the complainants signed the ASP.[8]

[57] The evidence of the complainants was that the licensee had sent a written offer form at 10.00 pm on Saturday night to the owner of the property where the complainants were staying as paying guests for the night. The licensee asked the owner to print the document and to bring it to the attention of the complainants.

[8] Liability decision at [3.26].

[58] Mr Turoa supplied a timeline of the events which had occurred to the REA investigator which included the following two entries[9]:

> 8:36 PM Sent complainant sale and purchase agreement from Osborne Realty office scanner.
>
> 10 PM sent complainant another sale and purchase agreement from Osborne Realty office scanner to camping ground of complainant and asked if management would inform them

[59] The CAC was apparently of the view that this evidence could be construed as meaning that the only document that the licensee sent to the complainants was the offer form and therefore it could be concluded that the absence of any reference to sending the REA approved form meant that he did not send it.

Assessment

[60] Prior to when Mr Turoa responded to the complaint by sending the timeline above, he was not advised that the matters being investigated included the failure to provide the complainants with the approved REA guide before they made their written offer.

[61] We consider that the statements which the licensee made are equivocal in this area. They could amount to an implicit admission that he did not send the approved form but they do not make it more probable than not that such was the case. Further, the complainants signed a written acknowledgement that they had been provided with such a form[10].

[62] In our view, there are therefore two grounds for allowing an appeal against the conclusion of the CAC that section 133 had not been complied with. The first is that there are doubts that the licensee was given a fair and reasonable opportunity to respond to such an allegation. The second is that on the material available, we cannot regard it as being established on the balance of probabilities that the licensee acted in contravention of the section.

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[9] BOD 34
[10] BOD page 77

Did Mr Turoa fail to act in good faith and fairly by altering the ASP?

[63] As the CAC stated in its decision[11] Mr Turoa was subject to the requirements of Rule 6.2 to act in good faith and deal fairly with all the parties engaged in the transaction.

[64] The CAC found that after Mr Turoa had relayed the complainants' offer to the vendor, he altered the form of the offer by changing the arrangement for payment of the deposit so that it would now be payable on signing of the ASP. He then gave the amended offer to the vendor. Further, because he was unable to contact the complainants, he did this without first obtaining their authority. It appears that the conclusion of the CAC in regard to this part of the complaint of unsatisfactory conduct was based upon these actions.

[65] Mr Turoa dealt with this point in his timeline where after recording the offers that had been received from the various interested parties[12]:

> we suggested that we contact the purchases and see if they would change their offers verbally and then have the changes signed later as their offer was accepted.
>
> …..
>
> Complainants' offer of $850,000 with deposit payment being done upon signing was accepted by the vendors. The deposit paid from unconditional to upon signing was changed by us, with the price staying the same at $850,000. We tried to contact the complainants to no avail, to inform them of this. It was pointed out to the vendor's that final initialling of changes to the contract would be required by the complainants to complete the contract

[66] The reference to the attempts to contact the complainants being to "no avail" establishes that the change was made without the prior authority of the complainants.

[67] Mr Turoa sent an email to the complainants on 20 February in which he said:

> Hi Janna, could you please send through the adjusted signed sale and purchase agreement for 335 Whiriwhiri Rd.
>
> This should have an alteration to the deposit to say 5% Purchase Price Payable to Osborne Realty Ltd Trust account upon signing (original stated 5% Purchase Price Payable.. Upon unconditional date.) This should be initialled by you both.

[11] At paragraph 3.17 and following
[12] BOD 38

[68] It is correct that subsequently the complainants did provide authorisation to that effect

[69] Based upon these facts, the CAC concluded that the licensee had breached rule 5.1 which requires a licensee to exercise skill, care, competence and diligence. Further, they viewed his conduct as amounting to a breach of Rule 6.2 which requires a licensee to act in good faith and deal fairly with all parties engaged in the transaction. They were also of the view that his conduct breached Rule 6.4 which prohibits a licensee misleading a customer or client and from providing false information.

Discussion

[70] Mr Turoa made the change to the written offer, without first obtaining the authority of the complainants.

[71] The vendor, it can be assumed, acted in the belief that the change to the offer was put forward with the authority of the complainants. As it turned out, the complainants decided to go along with the proposed change. The change to the deposit was sufficient to get the offer "across the line". However, the licensee was not to know that the complainants would accept that change. Had they in fact changed their mind about proceeding with the transaction, the rejection of their initial offer by the vendor would have given them an exit from the transaction. It seems likely that had they been minded to proceed in such a way, they would have been able to legitimately take the position that the actions of the licensee were not binding upon them and that from their point of view the transaction was at an end. If this had occurred, at the very least, there would have been a need to reopen the multi-party negotiations.

[72] For these reasons, we see no reason for interfering with the CAC conclusion that Mr Turoa acted in a misleading manner and other than in good faith contrary to Rule 6.2. We consider that the CAC was correct to take the view that a breach of one or more of the stated regulations occurred and that for that reason the licensee engaged in unsatisfactory conduct as defined in section 89(2)(b) of the Act.

Did the appellant deal with the complainants in good faith in backdating the ASP?

[73] The CAC considered that because he inserted the wrong date into the agreement Mr Turoa breached the requirement of rule 6.2 that a licensee act in good faith and deal fairly with

all parties engaged in a transaction. The date that was inserted into the agreement was19 February. But it would appear that the complainants did not initial the change until 20 February[13]. The CAC concluded that the agreement did not come into effect, therefore until the complainants initialled the change on the 20th. If that were so, dating the agreement so that it appeared to have been entered into on 19 February was to make a false statement.

[74] Because of that conclusion, it would follow from section 72 of the Act that because he contravened a provision of the regulations, Mr Turoa was guilty of unsatisfactory conduct[14].

[75] There would seem to be two matters that should be placed in the balance when deciding whether this complaint has been established. The first issue concerns whether Mr Turoa had been notified that he was under investigation in respect to this aspect of the matter. Neither the original complaint of the complainant dated 4 April 2018 (which was copied to Mr Turoa) nor the summary of issues contained in the letter which the investigator sent to him on 26 September 2018, made reference to this point. We consider that Mr Turoa ought to have had his attention directed to this issue so that any response which he could have put forward, be taken into account by the CAC.

[76] The second point concerns whether there is proof that it was Mr Turoa who inserted the incorrect date into the agreement. The CAC decision at paragraph 3.23 stated that it was undisputed that it was Mr Turoa who dated the ASP 19 February 2018 even though it was not actually completed until 20 February 2018.

[77] It is unclear whether the evidence establishes that this was what actually happened. It would appear that on the 18th Mr Turoa was directed to cease his involvement in the transaction. The investigator mentioned that that occurred but also noted that notwithstanding that direction, Mr Turoa contacted the plaintiffs for feedback on 18 February 2018[15].

[78] The point, though, is that during the course of this transaction, Mr Turoa was required to stand aside and another licensee, Lawrence Parker, was designated to manage the sale process. Mr Turoa says that Lance Parker took over from 18 February 2018 at 2 PM. It is not known at what point the date of 19 February 2018 was inserted into the contract.

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[13] See email that Mr Turoa sent to the complainants 20 February 2018 BOD 40
[14] S 72(b)
[15] BOD 43

[79] Given these uncertainties, we do not consider that it has been proved that it is more likely than not that Mr Turoa inserted the date into the contract. The appeal is therefore allowed in regard to this particular allegation.

Appeal by agency against finding that they did not properly supervise and manage conduct of Mr Turoa

[80] The level of supervision which is required of a salesperson is stipulated in section 50 of the Act. It is there provided[16] that:

> In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure-
>
> (a) that the work is performed competently; and
>
> (b) that the work complies with the requirements of this Act.

[81] Rule 8.3 is to similar effect.

[82] The CAC observed that no evidence was provided by the agency of day-to-day management and supervision of the licensees in respect of the transaction.

> Finding s have been made against [Mr Turoa] in respect of his conduct in relation to the ASP and it is clear that the agency was either not aware that the ASP was dated before it was signed, and before the acknowledgement was signed, or it took no action if it was aware.[17]

[83] They also made the following observations:

> 3.37 the committee also notes its concern that the agency allowed the licensee to be the facilitator for the final signatures on the ASP by the complainants, as his inexperience meant he was unable to give any form of advice about rights or obligations in respect of the amendments made and the committee has found that [Mr Turoa] gave no advice in that respect either.

[84] The CAC was of the view that the fact that there had been unsatisfactory conduct by Mr Turoa which had not been picked up by the agency provided evidence of a lack of proper supervision. This remark was based upon the actions of Mr Turoa putting forward an amended offer for which the authority of the client had not been obtained and also inserting the wrong

[16] S 50(2)
[17] Paragraph 3.36

date into the agreement. Although we do not consider that the backdating allegation has been proved against Mr Turoa, the fact is that one of the agency's personnel made that change to the agreement and it was apparently not detected by the agency principal.

[85] There was also another instance referred to in the evidence in an email which the solicitor for Osborne Realty sent to the Authority's investigator 7 February 2019[18]. This concerned a separate complaint that was made in regard to the way in which Mr Turoa/Osborne had managed the sales process. Ms Mason stated in that email that Ms Osborne had attended the auction and:

> as stated in the response to the Vendor's complaint where the Vendor said she didn't want any pushiness and in reply Ms Osborne said to call her if the Vendor had any issues at all with the offer process. So in that respect, there was supervision of the file.

[86] This seems to amount to a concession that there had already been a complaint of "pushiness" made by the vendor to Osbornes, presumably relating to the actions of the licensees who were carrying out the marketing of the property.

[87] The CAC noted the contention that Osborne Realty put forward a contention that Mr Turoa was a senior agent with some 14 years' experience and that it trusted him to comply with the agency's procedures when presenting a multi-offer. Ms Osborne said she attended the auction for the property and advised the vendor to call her if "she had any issues at all with the offer process" and that "in that respect, there was supervision of the file". Ms Osborne also pointed to the fact that when the complainants complained about the excessive level of contact from Mr Turoa, she took steps to have him removed from active management of the sale process.

[88] The CAC also noted that after Osborne Realty had directed Mr Turoa not to have further involvement in completing the transaction, they left it to Mr Parker who was an inexperienced agent to take matters to conclusion. This would have involved Mr Parker in obtaining the signature or initialling of the complainants to the changes that had been made to the date for payment of the deposit under the amended agreement. As the CAC pointed out, it was necessary for a licensee undertaking that task to be equipped to provide advice to, and deal

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with queries from, the purchasers. The CAC concluded from the fact that Mr Parker only had limited experience that he was not a suitable person to undertake that task alone. Presumably if Mr Parker was to be involved in the initialling or additional signing, it was the view of the CAC that he should have been supervised.

[89] Counsel for Osborne Realty, Ms Mason, submitted:

> 1.2 In relation to the second appellant Osborne Realty Ltd ("Osborne's) it is submitted that the actions of the agent are 'rogue' in relation to their ability to supervise what occurred in the time between the first contact with the complainants by Mr Turoa and the time that they ordered Mr Turoa to have no further contact with the complainants. The Authority submit that there was no supervision of the sale and purchase and that the Appellant was on notice given the earlier complaint by the Vendor.

[90] The Authority submitted:

> 5.19 The Authority's submission aligns with the Committee's finding that while the Agency may have considered Mr Turoa a senior agent, Mr Turoa holds a salespersons licence. The Agency is required under r 8.3 and s 50 to provide proper supervision and management of Mr Turoa, as a salesperson, and this should occur on a day to day basis. The Authority submits that this supervision policy was not adequate to discharge the Agency's supervision obligations. The gap highlighted by this complaint in the supervision practice of the Agency of its salespeople can be seen to form the basis of this aspect of the unsatisfactory conduct finding made against the Agency.[19]

[91] Further, Ms Davies submitted on behalf of the Authority:

> 5.10 Of course, the Agency cannot be expected to be with a licensee all the time during every transaction, and that licensees can make mistakes even when well supported and well supervised. The Tribunal has recognised that good management systems may be in place but nevertheless human errors will occur. For example, in Hutt City, the Tribunal emphasised that an agency must have adequate systems in place, but is not responsible if an agent goes "rogue" and deviates from those systems.
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> 5.11 In Vining Realty Group Limited, the Tribunal adopted the findings in Hutt City Realty, observing that an agency needs to have "adequate" systems in place to

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[19] To be clear, this submission is not that the Agency's multi-offer process was inadequate, or that Mr Turoa did not follow it. An appropriate multi-offer process appears to have been observed, i.e. Mr Turoa presented all the offers at the same time to the vendor. This submission is in respect of the Agency's supervision of licensees and dealing with ASPs is at issue.

> alert it when the licensee's obligations may not have been complied with. It does not absolve the agency if a licensee's conduct does not raise a "red flag".

[92] The Authority in its submissions put forward another basis upon which unsatisfactory conduct could in its view be supported. The submission was as follows:

> 5.24 The Committee decided to take no further action on the complaint against Mr Parker. Mr Parker has not appealed this finding.
>
> 5.25 Insofar as that finding operated as a part of the unsatisfactory conduct finding against the Agency, the Authority submits that Mr Parker, having less than six months experience as a licensee could not legally finalise preparing the sale and purchase agreement for the property, or give any advice about legal rights and obligations arising from the agreement for sale and purchase. This is because Mr Parker did not have the requisite six months experience required to take advantage of the exception in s 36(2A) of the Lawyers and Conveyancers Act 2006. Mr Parker was legally unable to give advice even on a minor variation of an ASP. For this reason, the Committee's finding in this respect should be upheld.

Discussion

[93] When considering whether there had been a failure to properly supervise a licensee, one would logically expect that it would be relevant to consider whether the licensee requiring supervision had previously departed from appropriate standards. If there had been previous instances of this kind, then, depending on the number and seriousness of those instances, it would be fair to conclude that the agency should be aware that the licensee was at risk of contravening his/her obligations. The proper response in such a circumstance could include providing further training and instruction to the agent and following up on subsequent dealings to make sure that the problem had been resolved.

[94] In this case, though, we do not know whether there had been previous problems with Mr Turoa with the possible exception of the circumstances of his dealings with the vendor which took place in December 2017.

[95] Even if there has not been any previous problem with the licensee, in order to comply with its obligations, the agency which has retained him/her will be required by the rules to review the performance of the person in question. In other words, the agency should do more than react to complaints that have been made. It is required to have processes in place which will prevent any problems which it could fairly and reasonably be expected to anticipate. It will

not be sufficient for a supervising agent to rely on the fact that there have been no previous complaints against the licensee. A licensee may be in breach of the Act and the rules but no formal complaint may arise. And in any case, even an agent who has generated an unsatisfactory history must have started at the point where he/she had no previous record.

[96] Counsel for the agency referred to *Hutt City Ltd and Ross v REAA and Nickless* [20] which was concerned with an agent releasing keys to a property that was for sale without the necessary. The Tribunal said:

> [46] We think that strict compliance with the requirements of s.50 of the Act is fundamental to the real estate industry functioning properly. However, it needs to be applied in terms of sensible business practice and common sense. It cannot be that supervisors and managers need to have reserve backups in their own office when that is available 5 to 15 minutes away by car. In any case, the necessary and proper systems, with training systems, were in place but, perversely, a normally sensible real estate agent succumbed to human pressure from purchasers and prematurely handed over keys to the property in good faith.

[97] Therefore, the fact that a licensee who is contracted to an agency infringes the rules does not necessarily lead to the conclusion that there has been a lack of required supervision by the responsible real estate agency. Had there been previous instances of Mr Turoa improperly pressuring customers and putting forward offers without their authority, there would have been a "red flag" alerting the agency to the need for a review of the licensee's actions. This would entail providing corrective measures such as advice and, if appropriate, warnings. It would also involve the supervisor following up future cases to ensure that the corrective action had had the required effect.

[98] For an allegation of this kind to be proved, it is necessary for there to be evidence which enables a comparison to be made of what the agency should have done with what it actually did. The evidence must establish these elements with reasonable clarity.

[99] We deal first with the matter of whether there had been a culpable lack of supervision of Mr Turoa on the 17th and 18th of February when he engaged in conduct which constituted undue pressure on the complainants. As, Ms Davies has submitted, it is not possible for a supervising agent to be in the presence of a licensee every hour of the day. We do not consider that the previous record of the licensee would reasonably have indicated to the principal that Mr Turoa

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[20] *Hutt City Ltd and Ross v REAA and Nickless* [2013] NZREADT 109 at [46]

would need to be supervised in his dealings with the complainants during this phase. We do not overlook that it has been suggested that there had been previous problems with Mr Turoa being too "pushy" when dealing with the vendor some months previously. However, we do not know if there was any substance to this complaint. The fact that the agency apparently gave him a direction not to contact the vendor is consistent with the making of a complaint but it does not necessarily resolve the question of whether the complaint from the vendor was justified.

[100] The next possible basis upon which Osborne Realty could be liable is that it can be assumed that as the supervising agent licensee, it should have detected the occurrence of Mr Turoa's unilateral actions in changing the due date for the deposit. An alternative basis supporting the charge was that the principal should have noticed that the wrong date was put into the agreement. However, as we have already noted, the evidence does not clearly establish that it was Mr Turoa who inserted that date. We therefore consider only the first possible basis for the charge which we have mentioned in this paragraph.

[101] Our conclusion is that the failure to notice that the deposit date had been changed but not initialled by the complainants may have amounted to a lack of oversight. However, there is no evidence establishing that the licensee's supervisor would reasonably be expected to peruse individual contracts with sufficient attention to detail to pick up irregularities of this type. Further, it must be remembered that in regard to this aspect of the charges, there has been no evidence put forward that Mr Turoa had engaged in an irregularity of this kind previously.

[102] A further basis upon which the Authority appears to support the lack of supervision charge against the agency is that Mr Parker was involved in completion of the agreement for sale and purchase at a time when he did not have the requisite experience to allow him to do so in terms of the Lawyers and Conveyancers Act 2006.

[103] We are not clear whether the CAC relied upon this point to establish that there had been a breach of supervision requirements. What appears to have happened is that in the course of dealing with an allegation against the agency of not providing proper supervision of Mr Turoa, the CAC stated[21] that it noted its concerns that Mr Parker had been the facilitator for the final signature. The point which the CAC made appears to be correct. What we are not clear about

[21] At paragraph 3.37

is how the Authority considers it relates to the complaint against the agency in regard to the supervision of Mr Turoa.

[104] In any case, it does not appear that the agency was informed that part of the unsatisfactory conduct charges against it included an allegation that it had improperly allowed Mr Parker to complete the agreement for sale and purchase when he had less than six months experience. The decision of the CAC makes it clear that the lack of supervision which it was considering related to Mr Turoa and not to Mr Parker[22]. We conclude that Osborne Realty was not warned of the possibility of a finding of unsatisfactory conduct may be made against it on this basis. The agency did not therefore have an opportunity to put forward possible answers to such a complaint.

[105] To conclude, the agency has appealed against a finding that it failed to properly supervise Mr Turoa. The material produced in support of the allegation did not establish a case which the agency was required to answer, failing which the charge would be taken as established. It is correct that Mr Turoa applied improper pressure to the complainants. The fact that he has done so, does not amount to evidence that he was not properly supervised by the agency. It has also been established that he unilaterally put forward an offer for the purchase of the property on terms which changed the date when the deposit would be required to be paid. He did not have appropriate authority to do so. But neither does that on its own establish that there was a lack of supervision. Further, the delegation of the responsibility to complete the agreement for sale and purchase was apparently left to an agent, Mr Parker, who was not properly qualified because of a lack of experience to undertake that task. However, there was no separate charge preferred against the agency in respect of this last issue. The agency was not told that it was at risk in regard to such an allegation when the investigation was in progress.

[106] Our conclusion is that the appeal by Osborne Realty against the finding allegation that licensee one was not properly supervised and managed in his conduct in dealing with the complainants should be allowed and there is an order accordingly.

[22] See paragraph 3.58

Penalties

[107] We agree with the Tribunal decision in *Century 21 Wellington Limited v Real Estate Agents Authority*[23] where it was stated

> [18] The High Court in *Morton-Jones v Real Estate Agents Authority* has confirmed that appeals against penalty decisions under the Act are an appeal against the exercise of a discretion. The High Court held:
>
> [86] What this conclusion means is that the principles summarised by the Court of Appeal in *May v May* apply: The Tribunal's decision on penalty should not be overturned on appeal unless the Tribunal has made an error of principle, considered irrelevant matters, or was plainly wrong. The practical task is to identify matters that limit the discretion to determine whether the Tribunal has acted within it.
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> [19] This does not mean that the Tribunal substitutes its own view for that of the Committee but that the Appellant must identify an error of law or principle, or that the Committee took into account irrelevant considerations, or that they failed to take into account relevant considerations, or that the decision is plainly wrong.

[108] However, in this case, it is necessary for the Tribunal to carry out its own assessment of the appropriate penalty because the basis upon which a review of penalty is now required is that the charges which have been sustained against Mr Turoa are different from those which was the basis of the penalty imposed by the CAC.

[109] One feature of the case which is relevant for the purposes of penalty is that the central aspects of Mr Turoa's conduct which the CAC rightly regarded as being relevant to penalty, have not been disturbed as a result of the appeal. We are of the view that the excessive level of contact between Mr Turoa and the complainants over the weekend of the 17th 18th February was excessive. It was excessive because it was not justified. There was no need for Mr Turoa to "bombard"[24] the complainants with calls and messages. All that was required was for him to provide a succinct summary of the position that they were in. He needed to communicate with them that the vendor was now seeking offers from interested parties and that because of the timeline that the vendor had set, if the complainants wished to put forward an offer to be considered, they would need to do so promptly and not later than 19 February. He could also have told them that he was available to discuss the matter further with them if they sought

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[23] *Century 21 Wellington Limited v Real Estate Agents Authority (CAC 412)* [2017] NZREADT 47 (31 July 2017) at [17]–[19]. Citations omitted.

[24] The word was used by the complainants to describe the number of messages and calls from Mr Turoa

additional guidance. Having informed the complainants of these matters, he should then of left matters to the complainants to consider what steps they might wish to take from that point.

[110] We conclude that Mr Turoa deliberately pressured the complainants so that if they were wavering, they would be persuaded to make an offer and thus help ensure that the property sold. Such an objective was not a legitimate matter which would justify the licensee communicating with the complainants to the extent that he did. That conduct constituted a breach of Rules 6.2, 6.3, and 9.2. It amounted to unsatisfactory conduct in accordance with Section 72(b) of the Act.

[111] In our decision we have upheld another central finding of the CAC in regard to Mr Turoa changing the form of the offer without the prior approval of the complainants. This was a serious matter. Mr Turoa appears to have lost sight of the fact that his part in this transaction was that of an agent and that his function was to implement the wishes of the vendor and the purchasers. It was not his position to make decisions about the transaction for them. The fact that changing the date when the deposit in fact apparently caused no harm to the complainants is irrelevant to assessment of the overall gravity of Mr Turoa's unsatisfactory conduct. However, he was not to know whether the complainants had the available funds to pay the deposit immediately. His unilateral action in changing the deposit date could have caused them financial embarrassment at the very least.

[112] The penalties which we are required to consider must reflect the fact that Mr Turoa is not being penalised in regard to the complaint that he did not advise the complainants of the need to obtain legal advice before they signed the agreement and before the initialling of the amendment to the agreement in regard to the deposit. Nor is the penalty to reflect the assertion that he failed to provide the complainants with a copy of the Authority's approved guide. The same can be said of the allegation that he backdated the agreement to 19 February.

[113] In its decision fixing the penalty, the CAC correctly applied the relevant principles which included promoting and protecting the interests of consumers and the public while at the same time maintaining professional standards[25]. We will primarily be guided by those same factors when considering the penalty that is appropriate in the changed circumstances where some of the charges have not been sustained on appeal.

[25] Paragraph 5.2 and following of "Decision on Orders' dated 8 August 2019

[114] We note that Mr Turoa had not previously been found to have contravened the Act and regulations. Just as the CAC did, we are required to take this fact into account when assessing the appropriate penalty.

[115] The maximum financial penalty in respect of unsatisfactory conduct, the CAC noted, was a fine of up to $10,000. The CAC considered that the unsatisfactory conduct lay in the mid to high range of gravity. We consider that was a correct assessment. As well, we agree that the CAC made the correct decision when imposing a fine on Mr Turoa $4000 and making an order censuring him for his conduct.

[116] In our view when imposing penalty for the lesser number of contraventions that remain in place following the appeal process, the penalties to be imposed should reflect mid to high range unsatisfactory conduct. We consider that the penalty that should be imposed, in the changed circumstances resulting from our decision on this appeal, is that Mr Turoa should be censured and that a fine of $4000 should be imposed. In our view, these penalties properly reflect the gravity of the unsatisfactory conduct and there will be an order to that effect.

[117] Pursuant to s 113 of the Act 2008, the Tribunal draws 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.