

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 38

READT 041/19

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

HENRY BARFOOT
Appellant

AND

THE REAL ESTATE AGENTS AUTHORITY
(CAC 1902)
First Respondent

AND

LEJUN (JAMES) WU and SHUNYI (CANDY)
CAO
Second Respondents

On the papers:

Tribunal:

Mr J Doogue (Deputy Chairperson)
Ms C Sandelin (Member)
Mr N O'Connor (Member)

Submissions filed by:

Mr T Rea, on behalf of the appellant
Ms L Lim, on behalf of the Authority

Date of Decision:

26 August 2020

DECISION OF THE TRIBUNAL

Introduction

[1] The brief background to this appeal is that Complaints Assessment Committee 1902 (**the Committee**) found that Mr Barfoot (**the Appellant**) breached his supervisory duty under section 50 of the Real Estate Agents Act 2008 (**“the Act”**) in relation to real estate agency work conducted by two salespeople, Lydia Feng and Peter Dunne.

[2] Ms Feng and Mr Dunne were both salespeople engaged by Barfoot & Thompson working at its Milford branch office. Mr Barfoot was the branch manager of the Milford branch office and was, as he accepts through his counsel Mr Rea, responsible for supervision of Ms Feng and Mr Dunne under section 50 of the Act.

[3] Ms Feng and Mr Dunne were found to have breached various of the Real Estate Agents (Professional Conduct and Client Care) Rules 2012 (**“the Rules”**). The matter was the subject of a complaint that was made in regard to Mr Dunne following errors being made in the description of a residential property which he was marketing. The errors related to the description that he provided an advertising and marketing material and concerned the calculation of the floor area of the house in question and also involved a failure to disclose that there had been unpermitted alteration work undertaken by the vendors. The appellant was the supervising agent under section 50 of the Act of the two other licensees.

Background

[4] The statement of background which follows is largely taken from the comprehensive submissions that were filed on behalf of the appellant by his counsel, Mr Rea which accurately summarised the circumstances leading up to the appeal.

[5] The property in issue is 51 Ravenwood Drive, Forest Hill, Auckland (**“the Property”**). Mr Dunne was the listing salesperson for the Property. Ms Feng who was a salesperson with less than 6 months experience was assisting with the sale of the property.

[6] The Property was listed for sale with Barfoot & Thompson by an agency agreement dated 12 February 2019.

[7] Mr Dunne prepared a Comparative Market Appraisal (“CMA”) that incorrectly recorded the floor area of the dwelling on the Property as 280 square metres¹. Mr Dunne later explained that he had referred to the Property Guru website which identified the floor area of 140 square metres². He had assumed that was the “footprint” meterage of the dwelling. As the dwelling was two in two levels, Mr Dunne explained that he assumed, incorrectly, that the total floor area was 280 square metres, and he arranged for the Property to be advertised accordingly³.

[8] On 11 March 2019, Mr Dunne viewed the Property with a prospective buyer who queried whether the dwelling was 280 square metres. This prompted Mr Dunne to physically measure the floor area of the dwelling which was found to be approximately 180 square metres.

[9] Mr Dunne then contacted the prospective buyer with whom he had viewed the Property the previous day to advise the buyer of the correct floor area. Mr Dunne also arranged for the advertising to be corrected.

[10] Mr Dunne also contacted Ms Feng, being the only other licensee with a known interested purchaser, and informed her of the corrected floor area. Ms Feng told Mr Dunne that she would advise the complainants, Mr Wu and Ms Cao who had expressed interest in the property.

[11] The Committee accepted the evidence of Ms Feng that she informed Ms Cao by telephone on 12 March 2019 that the correct floor area was 180 square metres, and in the same discussion, Ms Feng said that the garage conversion may have been unpermitted. Ms Feng did not confirm this advice in writing.

[12] A suitable clause was then drafted and inserted into the agreement for sale and purchase (**ASP**) to deal with the consenting issue. However, Ms Feng did not send a copy of the ASP to the complainants before the auction which took place 14 March 2019. She said that she was confused prior to the auction about what documents she was required to send to the

¹ BOD page 109

² It appears that the floor area shown on Property Guru was also incorrect, based on Mr Dunne’s subsequent physical measurement of the floor area as 180 square metres. See below.

³ BOD page 54

complainants and sent them only a copy of the title, the LIM report and the Buyers Guide to Auction publication.

[13] Mr Wu and Ms Cao claimed, amongst other things, that they had been misled about the floor area and also about unconsented work of converting a garage into a bedroom. It was when this matter was raised by the complainants that the appellant learned about the problems that have arisen.

[14] The agreement for sale and purchase of the Property was subsequently cancelled by agreement between the parties, with Mr Wu and Ms Cao agreeing to pay compensation to the vendors, and Barfoot & Thompson agreed to refund the commission that it had charged to the vendors.

[15] Neither Mr Dunne nor Ms Feng informed Mr Barfoot of any problem regarding an error in calculation of the floor area or the unconsented alterations at any stage prior to the auction.

[16] The appellant was not told about the floor area issue or the possible unconsented additions prior to the auction which took place on 18 March and following which Mr Wu and Ms Cao entered into a contract to buy the property.

[17] The appellant was present at the auction of the subject property along with other properties. Prior to the commencement of the auction, the auctioneer announced that the correct floor was 180 square metres, more or less. The appellant however did not apparently hear that announcement.

The Committee's findings

[18] The Committee found that Ms Feng had engaged in unsatisfactory conduct in that she did not follow up the correction of the misleading advertising about the area of the house by telling interested parties in writing.

[19] The Committee found that Mr Dunne failed to exercise skill, care and competence in respect of establishing the floor area prior to marketing, in respect of clearly notifying the corrected floor area in writing, and in respect of failing to change the description of the property

in the signboard outside the property and misled customers in respect of the floor area. He also misled the vendor clients in respect of the appraisal and marketing of the property⁴.

[20] However, the Committee concluded that the appellant made a major contribution to the error that Ms Feng made in not confirming the floor area changes in writing. He did so because of his failure to provide her with active and proper day-to-day supervision and management. They concluded that the lack of proper day-to-day management also contributed to the finding against Mr Dunne.⁵

[21] The appeal is concerned with the finding against the appellant of a failure to properly supervise the other two licensees in regard to the matters which the Committee discussed when considering the charges against them.

Appeal Principles

[22] Counsel for the respondent, Ms Paterson, submitted that appeals of the present kind are general appeals that require the Tribunal's own assessment of the merits consistent with the principles in *Austin Nichols & Co v Stitching Lodestar*.⁶

[23] In *Austin Nichols & Co*, Elias CJ stated that the appellate court must reach its own opinion "even where that opinion is an assessment of fact and degree and entails a value judgment".⁷

[24] We accept that the foregoing is a correct statement of the legal position.

The grounds of appeal

[25] The principal argument which is put forward in support of the appeal is that the appellant did not neglect his obligation to supervise Ms Feng or Mr Dunne.

⁴ Because the market appraisal was based on an incorrect meterage which was higher than the actual floor area of the house.

⁵ Committee decision at [3.50].

⁶ *Austin Nichols & Co Ltd v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 131. See for example *Guo v Real Estate Agents Authority* [2015] NZREADT 35 at [24].

⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

[26] The failings of the part of Ms Feng included a general lack of understanding of the responsibilities of a salesperson. She was also at fault together with Mr Dunne for failing to notify the branch manager of the problems with the contract as soon as they emerged and to provide correction in writing of the incorrect material that had been distributed in the marketing and advertising material with respect to the property.

[27] In regard to Ms Feng, whom he described as a “sales associate”, he said that most of her work was working with buyers and helping them view properties. This activity, he said, is of a routine nature and did not require his supervision. In his response to the REA questions, the appellant stated that Ms Feng was an associate to Ms Li “who is her day-to-day manager”.

[28] He said that from the commencement of her employment, Ms Feng had not drafted contracts for the two sales which took place at auction. He said that Ms Feng was present and assisted Ms Li to complete the contract after sale, which is merely adding the buyer’s details and obtaining signatures.

[29] One of the important passages that appears in the CAC decision in relation to the appellant is that the appellant, while saying that he was responsible for supervision of all salespeople at the agency, goes on to say that day to day supervision of Ms Feng was by licensee Li. The Committee “strongly cautions” the appellant in respect of relying on salesperson licensees for day to day supervision of other licensees⁸.

[30] On behalf of the appellant, Mr Rea put forward the submission that this was an erroneous finding. He submitted that the Committee had misquoted the appellants evidence regarding supervision of Ms Feng being by Ms Li and further submitted that there was no evidence from which the Committee could reasonably have inferred that there was any abrogation of supervisory responsibility by the appellant.

[31] He also submitted that

[184] Mr Barfoot had no reason to question Ms Feng’s competence, and as an associate assisting Ms Li, Ms Feng would not have been expected to undertake anything other than routine day-to-day tasks, under Ms Li’s oversight. Like Mr Dunne, Ms Li was also a very experienced salesperson.

⁸ BOD 116

[185] Even if Mr Barfoot had selected this transaction to undertake a random check, as envisaged by Barfoot & Thompson’s Management and Supervision Best Practice Manual, this would not have revealed any issue, as relevant conversations between Mr Dunne and Ms Feng concerning issues identified regarding the floor area and unpermitted works were by telephone, and Mr Barfoot was not informed of these issues or these discussions. Mr Barfoot could not reasonably have been expected to have discovered these issues, which were not disclosed to him by the salespeople, and which were issues that clearly should have been disclosed to him.

[32] The further submission was made that the High Court had confirmed that nothing in section 50 of the Act precludes experienced salespeople from being involved in the supervision of junior salespeople.⁹

[33] The appellant said that there are literally thousands of potential situations or issues that can crop up during the course of a salesperson’s role. He said that it was impossible to cover everything before it happens. On that basis he said the most effective learning is done “on the job” and is needs based as the situation arises. Further he tried to make himself available for salespersons to ask questions as much is possible.

[34] He also said that he looked at all signed agreements and also from time to time directed that particular draft agreements be brought to him for his attention before they had been signed.

[35] The appellant said that in carrying out his functions the priority gives to different areas is based on ensuring compliance with the legal requirements of the agency “and my own experience with common mistakes and issues that may arise”.

[36] In regard to Mr Dunne, the appellant said that he had never known a salesperson to make a mistake entering the floor area or land area for a listing, therefore they are not normally things he would check on particularly with an experienced salesman like Mr Dunne.

The REAA response on appeal

[37] In the submissions which were put forward on appeal, counsel for the REAA summarised the position in the following terms:

2.14 The Committee considered that while Mr Barfoot was not expected to know of the mistake Mr Dunne, who is an experienced salesperson, made in respect of the

⁹ *Wang v Real Estate Agents Authority* [2015] NZHC 1011, at paragraph [36]

floor area of the property, Mr Barfoot was responsible for how the mistake was handled after discovery.

2.15 Overall, the Committee considered that Mr Barfoot's failure to provide Ms Feng with active and proper day-to-day supervision and management was a major contributor to the finding against her, and that the lack of proper day-to-day management also contributed to the finding against Mr Dunne.

[38] The position which the REAA adopted on appeal was to that the decision which the Committee had made was the correct one. The REAA identified, first, a failure to supervise Ms Feng who lacked important understanding of her responsibilities. Secondly, the failure of either Ms Feng or Mr Dunne to follow-up in writing concerning the error that had been made with respect to the floor area was an area in which the licensees' conduct fell short of the required standard. Thirdly, the fact that Mr Dunne did not report the problem to the appellant promptly was another failing on his part.

[39] The REAA accepted that while it was legitimate for junior salespeople to learn from their senior colleagues, that should not be taken too far and there could not be any justification for viewing that kind of assistance and instruction as displacing the statutory obligation of a person such as the appellant in this case under section 50 of the Act.

Analysis

[40] Section 50 of the Act provides

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.
- (2) 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.

[41] We accept that the decision of the Tribunal in *Maserow v Real Estate Agents Authority* and *Hutt City Ltd v Real Estate Agents Authority*¹⁰ set out matters that are likely to be

¹⁰ See references above

applicable in most cases when the Tribunal is determining whether it has been established that the obligation to supervise under section 50 has been breached.

[42] As counsel for the authority stated:¹¹

The main thrust of [the appellant's] submission is that his supervision did comply with the requirements of s 50 of the Act, and that once he was informed of the issues of the sale, he acted appropriately in his supervisor capacity by stepping in and assisting Mr Dunne and Ms Feng in dealing with the vendors, and purchasers (second respondents).

Failure in regard to Ms Feng

[43] We agree that it is relevant that Ms Feng seemed to lack fundamental knowledge about her responsibilities, that, in the Committee's words, she "was inexperienced and did not know what she was doing". This last conclusion seems to have been based upon an earlier finding by the Committee that Ms Feng said that she was confused pre-auction as to which option documents she was required to send to the complainants and just sent the title, LIM and Buyers Guide to Auction documents. As the Committee put it:

She says she thought that the auction sale documents were non-negotiable and was not aware that the Particulars and Conditions of Sale of Real Estate by Auction, which contained the vendors' warranty exclusion clause, was the ASP or the contract of sale and should have been provided to the complainants pre-auction.

[44] We agree that such the misunderstandings on the part of Ms Feng which the Committee referred to¹² were basic ones.

[45] The Committee noted¹³ that the appellant accepted that it was a concern that Ms Feng was not aware that she should have sent the ASP to the complainant prior to the auction, and that despite the fact that she had worked with an experienced agent, Ms Li, the agency did not realise Ms Feng was unaware of her responsibility around provision of contracts prior to auction. The Committee further concluded that Ms Feng was inside her first six months period

¹¹ Submissions paragraph 4.2

¹² Such as the lack of understanding of the function of the Particulars and Conditions of Sale of Real Estate by Auction document containing the vendors' warranty exclusion clause and that that document should have been provided to the complainant "pre-auction": BOD 213

¹³ BOD 217

at relevant times and, by her own admission, was inexperienced and did not fully understand what she was doing.

[46] The obligation under section 50(2) requires proper supervision and management which means that the agency work is carried out under such direction and control as is sufficient to ensure -

....

- (a) that the work is performed competently; and
- (b) that the work complies with the requirements of this act

[47] We consider that the discharge of the obligations under section 50 requires the branch manager to not only provide supervision and management but also to satisfy himself that such has had the desired effect to achieve the goals in subsection (2).

[48] The fact that a licensee lacks proper understanding of the process she is engaged in may reflect that there has been a failure to properly supervise and manage her. On the other hand, it may be that a supervising licensee under section 50 has made a wrong, but understandable, over-estimate or assessment of the licensee's understanding and knowledge. This may have come about because, for amongst other reasons, the supervisor misunderstood how much of the training material provided that the agent had taken on board. Another explanation may be that notwithstanding satisfactory instruction having been provided, the salesperson still did not grasp what her responsibilities were. The appellant in this case does not put forward these possible explanations for the unacceptably poor state of Ms Feng's understanding.

[49] In any case, even if the instruction had failed to convey to the salesperson what her job involved, that did not bring the supervisor's responsibilities to an end.

[50] We consider that it is a necessary element of the required supervision and management that the supervisor actually evaluates the performance of each staff member to ensure that they are able to perform their work competently and that they are complying with the requirements of the Act. It will not be possible to discharge the obligations under section 50 unless this is done. The appellant here did not say that this had been done either.

[51] We do not overlook that the burden of proving the charge rests with the Authority and not the appellant. But the appellant would have understood that he was being asked about the training and supervision of Ms Feng. It is assumed that he answered honestly. He did not take the position that the agency had ensured that Ms Feng was suitably knowledgeable and trained to undertake her tasks. Rather, his explanation was that suitable arrangements had been made for her to work with a senior salesperson. The inference was that should have been sufficient oversight to ensure that she required skill and knowledge about her job.

[52] Particularly, given that the agent was in her first six months, scrutiny of her work by the supervisor was required. The appellant did not claim that he had taken any such steps. He may have reacted to other problems that were brought to his attention concerning Ms Feng¹⁴ but there is no evidence of any systematic and proactive review of her performance.

[53] The question is whether Ms Feng's limited understanding of her responsibilities could only have continued in the absence of the type of supervision which is spoken of in a decision to which counsel for the Authority referred, *Hutt City Ltd v Real Estate Agents Authority*:¹⁵

[42] Simply put, in terms of s 50 of the Act a salesperson must be properly supervised and managed by an agent or a branch manager in the sense that the salesperson's work is carried out under some experienced direction. This is to ensure that the salesperson's work is performed competently and complies with the requirements of the Act. (Emphasis added)

[54] In our view, the problems in regard to Ms Feng came about because of a lack of systematic and regular reviews and assessments. Her performance reflects the standard of her training.

[55] The reason why she did not receive adequate training and supervision was also the result of the appellant as branch manager adopting the view that most of the work which Ms Feng carried out was of a routine nature and did not require his supervision¹⁶.

[56] We conclude that the evidence overall supports the conclusion of the Committee that there had been a breach of section 50 in regard to Ms Feng.

¹⁴ Such as leaving a door unlocked on the property which she had visited in the course of her work

¹⁵ *Hutt City Ltd v Real Estate Agents Authority* [2013] NZREADT 109 at [42].

¹⁶ BOD 9

Instruction that agents and salespeople must report serious problems to branch manager

[57] The appellant said was that it was unfortunate that he had not been that informed of the misrepresentation of the floor area at the time was discovered and that he was out of Auckland at the time:

.. or no doubt [Mr Dunne] would have mentioned it while we are in the office together. I imagine in my absence he took what he believed were the necessary steps to correct the mistake.

25. I have since told [Mr Dunne] that he should have made me aware of the issue at the time. Had he done so, I would have advised both [agents] to make sure their updates to their buyers were recorded in writing. It is not a legal requirement to do so, but is best practice, and in this case would have saved the vendors considerable stress as the buyer and her family would not have used the initial misrepresentation as a potential escape route from the contract¹⁷

[58] We agree that the appellant should have been advised of the problem and that advice should have been given promptly on the problem emerging. We consider that to be so because of the seriousness of the misrepresentation. There was a need to take immediate measures in response to the mistakes in the advertising and marketing material. The branch manager should have been told so that he could check that accurate communication was made and that a corrective statement was disseminated as widely as necessary and as practically possible.

[59] In order for this to happen, standing instructions and training should make it clear to sales personnel what their obligation is in the circumstances that occurred in this case.

[60] The facts are that on 12 March Mr Dunne knew conclusively from measuring the property that the floor area was less than that that had been advertised. He had still not contacted the appellant about the problem by 18 March when the appellant left for Christchurch. In the end it was only because Ms Feng independently reported the problem that it came to the attention of the appellant.

¹⁷ BOD 90

[61] The appellant's explanation for Mr Dunne not alerting him to the problems was that he, the appellant, had been away from the office at the time and that if he had not been, Mr Dunne would have mentioned the problem while they were in the office together¹⁸. He said that he expected that in his absence Mr Dunne took the necessary steps to correct the problem. He said that he had since told Mr Dunne that he, the appellant, should have been made aware of the issue at the time and that had he done so, the appellant would have advised both him and Ms Feng to make sure that their updates to their buyers were recorded in writing¹⁹.

[62] We note, in passing, that the appellant's expectation that Mr Dunne would report the matter of the mis-advertising when they encountered each other in the office, does not seem to fit with the six-day delay that intervened before the appellant learnt of the problem-and then from another agent.

[63] In his evidence the appellant did not assert that instructions and training material which had been provided to staff made it clear to them that if a problem of this kind arose, they were under an obligation to keep the branch manager informed of what had happened. We would have expected that if there was such evidence available, the appellant would have referred to it before the Committee.

[64] Further, the appellant did not explain on what he based his hope or expectation that Mr Dunne would tell him about the problem when the two next encountered each other. Given that it was apparently some four or five days after the error had been discovered that the appellant was told about it, and that by then Mr Dunne had still not informed the appellant of it, the confidence of the appellant would appear to have been misplaced.

[65] We accept that the standard by which the appellant is to be judged does not require him to foresee all of the myriad problems that might arise in the future and to devise a rule or instruction for the staff telling them how they are to deal with such matters.

[66] On the other hand, the purpose of the Act including protection of the interests of consumers²⁰, will not be served by assuming that that the problem of the kind that arose here

¹⁸ BOD 90

¹⁹ BOD 90

²⁰ S 3 of the Act

was not sufficiently foreseeable to require him to anticipate it and have procedures in place to deal with it. While we have not had the assistance of any expert evidence on the question, it would seem to be important that agencies acting through their managers should ensure that sales staff understand that in every case where serious problems arise, such as those that arose in this case, they must notify the branch manager promptly. Further, notification of this requirement and training providing examples of when it would take effect, should have been included in the training program.

[67] In this there case no standing instruction to the staff about what they were to do in such circumstances. It was the appellant's responsibility to make arrangements of the kind we have discussing and by not doing so he breached the requirements of s 50 of the Act.

The failure to follow up in writing the change in the advertised floor area

[68] The appellant accepted in evidence that where a serious issue had arisen such as misdescription of the property it was desirable that once they became aware of its existence, sales staff should set out in writing a correction and circulate it to interested parties. The appellant described this as "best practice".²¹ He said it was also not a legal requirement to do so.

[69] The reference to it not being a legal requirement for agents to correct misdescriptions in writing does not provide a complete answer to the issue. If this is to convey nothing more than that there is no specific client care rule or other regulatory requirement to that effect, then we would agree. But the Act and rules do not set out to provide a detailed code of all the procedures that are to be adopted. The objective of the training and instruction that a branch manager is required to give is intended to result in detailed operational practices being adopted which implement the purposes of the Act. That section says that the Act achieves its purpose in the following way:

- (2) The Act achieves its purpose is by-
 - (a) regulating agents, branch managers and salespersons

²¹ BOD 90

[70] When it dealt with Ms Feng, the Committee found that she breached her obligations by not correcting the misdescription of the property in writing and that a lack of supervision had contributed to her omission²²

[71] We interpret the appellant's response as being to the effect that if Mr Dunne or Ms Feng had told him that a problem had been encountered in the description of the Ravenwood property, he, the appellant, would have advised them they should set out in writing to all interested parties the corrections that had been made in the advertised floor area.

[72] The Committee noted that the appellant had stated as part of this instructions to the staff that that the appellant had emphasised that "if it is not in writing it does not exist". We believe we understand what he was trying to convey which is the importance of having a contemporary written record of advice that agents have given to customers about important matters relating to the property that they were interested in. Generally, we would agree that that is a good policy.

[73] Once it has been discovered that a major mis-description of the floor area of property has occurred, it is vital that prompt and effective notification is provided to all persons who could be affected by the problem. This requires that methodical steps are taken to ensure that the correction is given and that it is given accurately and in such a way that there can be no argument subsequently about what information interested parties were given with regard to the property. There can be no question that the only acceptable way to attempt to provide provide a correction is in writing. The legal consequences of not effectively correcting the situation do not need to be spelt out.

[74] It is our conclusion that the Committee was correct in concluding that the training and supervision of Ms Feng was therefore inadequate and did not satisfy the requirements of s. 50 of the Act.

Delegation of supervision to Ms Li?

[75] In the material which he provided to the Committee; the appellant stated²³;

2. I became branch manager of the Milford branch in December 2018. The office employs approximately 30 licensees, with around 13 of these being

²² Committee decision paragraph 3.15

²³ BOD 86

“associates” working in conjunction with a lead salesperson. Peter Dunne works independently. Lydia Feng is an associate to Cathy Li. As branch manager I am responsible for supervision of all licensees. Day to day management of Lydia is by Cathy Li

[76] The Committee stated:

3.44 [The appellant] says he is responsible for supervision of all salespeople at the Agency but goes on to say that day to day supervision of [Ms Feng] is by licensee Li.. The committee further notes that licensee Li is not a party to this complaint, is licensed as a salesperson so cannot be held responsible for supervision of [Ms Feng] and it strongly cautions [the appellant] in respect of relying on salesperson licensees for day to day supervision of the licensees.

[77] Mr Rea submitted that-

The Committee misquoted Mr Barfoot’s evidence regarding “supervision” of Ms Feng being by Ms Li, and there was no evidence from which the Committee could reasonably have inferred that there was any abrogation of supervisory responsibility by Mr Barfoot.

[78] The apparent reason why the appellant raised the question of Ms Feng’s association with Ms Feng with Ms Li was because the appellant sought as being relevant to a complaint that he had not properly supervised Ms Feng. It appeared to the Tribunal that it was put forward as a factor that explained the extent or degree of supervision that the appellant exercised over Ms Feng. The Committee responded, properly in the Tribunal’s view, by stating that the appellant’s obligation to supervise were not could not be excused on account of that factor. That is what the Committee appears to have been saying and we agree with them.

Conclusion

[79] The next question is whether the failures on the part of the appellant amounted to unsatisfactory conduct pursuant to section 72 of the Act. We consider that they did, because the omissions on the part of the licensee contravened section 50 of the Act.

Summary

[80] We have concluded that the appellant was rightly found to be in breach of his obligations under section 50 of the Act because he did not properly supervise and manage Ms Feng. Her lack of knowledge ought to have been apparent to the appellant if he had carried out his obligations properly. We consider that the conclusion of the committee that he thereby engaged

in unsatisfactory conduct was justified. We do not consider that the concerns about Ms Feng's performance were properly answered by the fact that she was linked to a senior agent, Ms Li.

[81] We have also concluded that the appellant breached his obligations under section 50 by failing to provide training and instruction to the staff requiring them to promptly report to him any substantial problems that might arise, including where there had been a mis-description of a property in the advertising material.

[82] We have concluded that the lack of understanding on the part of Mr Dunne and Ms Feng of the need to follow-up in writing the correction to the floor area of the property revealed that there was a lack of adequate guidance provided to sales staff.

Penalty

[83] The appellant was fined the sum of \$4000. The appellant submitted that the fine was excessive having regard to fines imposed in other cases.

[84] We have not found any of the other cases to which Mr Rea referred in his thorough review assists with the question of penalty. While we agree that consistency is required and penalties, every case is different and is to be decided on its own facts.

[85] We consider that in this case there the following factors are influential with regard to penalty.

[86] The first is that the appellant provided instances of other cases where he had competently supervised salespersons whose conduct did not meet the required standard or who apparently needed some guidance. We accept that these cases were evidence of a conscientious approach being adopted by the appellant.

[87] We did however note some apparent complacency on the part of the appellant in that he apparently thought that he did not need to give much attention to the supervision of Ms Feng, whom it was his responsibility to manage and supervise, because Ms Feng was receiving the required guidance from another salesperson Ms Li.

[88] While the example of competent agents is no doubt of value in the training of junior salespersons, there is an obligation under section 50 to provide a structured and recurring review of how the salesperson is managing the transactions she is involved in. That obligation rests with the branch manager alone. That remains the case even if a salesperson such as Ms Feng is teamed with another responsible sales person.

[89] While the appellant tended to minimise the importance of the work that Ms Feng was carrying out because of her junior status²⁴, her involvement with the complainants in this case indicates that she was the primary link person between the complainants and the agency. In any case, junior salespersons such as Ms Feng are not excluded from the ambit of section 50 and the appellant was mistaken if he considered that because of the low-level nature of her responsibilities he did not have to put any great effort into supervising her.

[90] If the objects of the Act set out in section 3, which include protecting the interests of consumers in promoting public confidence in the performance of real estate agency work are to be achieved, agencies and their managers such as the appellants in this case must put the necessary time and resources into providing supervision and training which has a meaningful result. That would include identifying cases where a junior salesperson such as Ms Feng is carrying out their role without having a proper understanding of what they are doing.

[91] The next matter that we refer to is the previous record of the appellant. He has not previously faced charges. He is entitled to credit in regard to that matter.

[92] Taking those matters into account, we consider that the appropriate outcome in this case would be to impose a penalty of \$3000 in place of the penalty which the committee imposed. No orders for costs have been sought so we will not make any.

²⁴ That is, she was prohibited from drawing up contracts in her own right until she had six months experience

[93] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Mr J Doogue
Deputy Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member