

**PURSUANT TO S 108(1)(C) OF THE REAL ESTATE AGENTS ACT 2008,
PUBLICATION OF THE NAMES OR ANY IDENTIFYING PARTICULARS
OF THE APPELLANTS IS PROHIBITED**

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 51

READT 016/20

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	[APPELLANT] Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1904) First Respondent
AND	PRUDENCE FOSTER and WINSTON KIDD Second Respondents
Hearing:	5 October 2020, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Ms F Mathieson, Member
Appearances:	Appellant Ms E Woolley, on behalf of the Authority
Date of Decision:	21 October 2020

DECISION OF THE TRIBUNAL

Introduction

[1] [The appellant] has appealed against the decision of Complaints Assessment Committee 1904 (“the Committee”), dated 28 April 2020, to take no further action on his complaint against Ms Foster and Mr Kidd (“the Committee’s decision”).¹

[2] We record that Ms Foster and Mr Kidd advised the Tribunal that they did not wish to participate in the appeal proceeding, or to appear at or be represented at the Tribunal hearing. However, Mr Lyn Beere, the National Compliance Manager of Sotheby’s International Realty, the agency at which Ms Foster and Mr Kidd are engaged at its Takapuna office (“the Agency”), was present throughout the hearing. Mr Kidd was also present at the hearing and left with Ms Foster at the end of her cross examination.

[3] Pursuant to a Tribunal Ruling dated 10 August 2020, Ms Foster attended at the hearing for cross-examination.² [The appellant] was also cross-examined.

Background

[4] [The appellant] and his wife were the owners of a property at Takapuna, Auckland (“the property”). On 25 October 2018, they entered into a 90-day sole agency agreement with Mr Kurt Piper, a licensed salesperson engaged at the Agency, to market the property for sale (“the initial agency agreement”). The initial agency agreement was due to expire on 25 January 2019.

[5] The property was not sold during the term of the agency. As Mr Piper was away at the time, [the appellant and his wife] met with Ms Foster and Mr Kidd on 22 January 2019 at the Agency’s offices, to discuss how to proceed. After some discussion, which included discussion of a six-week marketing programme (to cost \$5,042.80), [the appellant and his wife] signed a one-page document headed “Amendments to Existing Agency Agreement” (“the amendment agreement”). This document set out their names and the property’s address, had a tick inserted in the “By Negotiation” box

¹ Complaint No: C33362, Decision to take no further action, 28 April 2020.

² *[Appellant] v Real Estate Agents Authority (CAC 1904)* [2020] NZREADT 32.

under the heading “sale Method”, and had the following handwritten in the section headed “All Other Amendments, As Follows”:

Extending Agency to:
25/1/19 – 25/4/19

[6] The amendment agreement was also signed by Ms Foster. They then left the Agency and walked the short distance to the property.

[7] About 30 minutes later, they were working in the garden at the property when Ms Foster visited them. She said they had signed the wrong form. She had a two-page document with her, which she said had the same information on it, and asked them to sign it. This document was headed “Renewal of Real Estate Agency Agreement” (“the renewal agreement”). It had the names of [the appellant and his wife] handwritten on it, together with the property’s address, but also named Mr Piper and Ms Foster as “licensees”. It also contained a section headed “Exclusive Agency”, which provided that the “client” “re-appoints the Agent as sole agent”. “25/1/19” was handwritten as the commencement date and “25/4/19” as the end date.

[8] The renewal agreement also contained handwritten additions relating to the calculation of commission, and providing that [the appellant and his wife] agreed to pay the sum of \$15,309.76 “for marketing and advertising the Property as agreed in the attached Marketing Plan upon signing this agreement”.

[9] [The appellant and his wife] initialled the first page of the renewal agreement and signed the second page.

[10] [The appellant] provided the Committee with screenshots of text communications between himself and Ms Foster. On 24 January 2019, [the appellant] sent Ms Foster a text message, asking her to email him a copy of “the contract we signed on Tuesday”. Ms Foster emailed him a copy of the renewal agreement. On 7 February 2019, he sent Ms Foster the following text:

Hi Prudence
When we met you and Winston on 22nd Jan we signed a document. Could you please send me a copy?
Thanks [Appellant]

[11] In response, Ms Foster sent [the appellant] a copy of the renewal agreement. [the appellant] sent her a further text the same day:

Hi Prudence that document is the one I already have.

We first signed another document on a smaller piece of paper, when we were talking to you and Winston. That is the one I want to view.

Regards [Appellant]

[12] Ms Foster did not respond to this text. Her next text communication with [the Appellant] appeared directly below the text quoted above, and was on 9 February 2019, reporting as to interest in the property.

The complaint

[13] On 13 September 2019, [the Appellant] complained to the Authority that:

- [a] Ms Foster had concealed parts of the amendment agreement when he and [his wife] signed it;
- [b] They understood that the agency was to be renewed for six weeks, but found that it was renewed for 90 days, and Ms Foster failed to explain that the renewal agreement was for 90 days;
- [c] When the amendment agreement and the agency agreement were signed, Ms Foster failed to recommend that they seek independent legal advice, and failed to give them a reasonable opportunity to do so;
- [d] Ms Foster failed to provide him with a copy of the amendment agreement, when asked to do so; and
- [e] Mr Kidd had witnessed Ms Foster's conduct in concealing the amendment agreement but failed to report it to the Authority, and had failed to supervise and manage Ms Foster effectively.

[14] In their response to the complaint, Ms Foster and Mr Kidd said that at the meeting with [the appellant and his wife] at the Agency, when the amendment agreement was signed, “concepts of marketing and timeframes” were discussed, including that the agency extension would come to a conclusion on 25 April 2019. They “absolutely refuted” the allegations that they had deliberately concealed portions of the amendment agreement, describing the allegations as “preposterous”.

[15] Ms Foster and Mr Kidd accepted as “partially correct” that Ms Foster did not “verbally” recommend that [the appellant and his wife] seek legal advice before they signed the renewal agreement, but said that the information was “clearly stated” on the renewal agreement, and that [the appellant and his wife] had been advised to seek legal advice “verbally and in writing” when they signed the initial agency agreement in October 2018. They also said that Ms Foster sent [the appellant] a copy of the renewal agreement when requested by him, but that she “missed” the text from him later that day asking for a copy of the amendment agreement, and the request was never repeated.

[16] They further said that Mr Kidd had not witnessed any concealment of the amendment agreement, and therefore had nothing to report to the Authority, and that he had demonstrated good management by picking up the error in having the amendment agreement signed, and having Ms Foster contact [the appellant and his wife] at home to explain the error and have the correct renewal agreement signed.

The Committee’s decision

[17] The Committee found that [the appellant] had not proved the complaints that Ms Foster had concealed parts of the amendment agreement, and had not explained when the agency was to end.³ It also found that Ms Foster had recommended that [the Appellant] obtain legal advice when the initial agency agreement was entered into and, while it would have been best practice to remind [the Appellant and his wife] of this when the renewal agreement was signed, Ms Foster’s failure to do so did not meet the threshold of unsatisfactory conduct.⁴ The Committee further found that Ms Foster’s

³ Committee’s decision, at paragraphs 3.5 and 3.8.

⁴ At paragraphs 3.14 and 3.17.

failure to provide [the Appellant] with a copy of the amendment agreement was inconsequential, as it was replaced later the same day with the renewal agreement, a copy of which was provided to him.⁵

[18] With respect to Mr Kidd, the Committee found that as it was not proved that Ms Foster had concealed parts of the amendment agreement, there was nothing he could have reported to the Authority. It also found that as Mr Kidd is not “an agent who is operating as a business”,⁶ he had no obligation to supervise and manage Ms Foster.⁷

Appeal issues

[19] Ms Woolley identified of the issues to be determined on appeal as being whether the Committee erred in finding that:

- [a] the appellants had not proved that Ms Foster concealed the contents of the amendment agreement when it was being signed;
- [b] the appellants had not proved that Ms Foster did not explain when the agency period ended;
- [c] it was sufficient to discharge Ms Foster’s obligation to recommend that the appellants seek legal advice in relation to the renewal of the agency agreement that the appellants had been given this advice orally when the initial agency agreement was signed, and there was a written recommendation in the renewal agreement;
- [d] it was inconsequential that Ms Foster had failed to provide [the Appellant] with a copy of the amendment agreement, as it was replaced the same day by the renewal agreement;
- [e] Mr Kidd was not obliged to report Ms Foster’s conduct to the Authority;
and

⁵ At paragraph 3.29.

⁶ See r 8.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

⁷ Committee’s decision, at paragraphs 3.33 and 3.36.

[f] Mr Kidd did not fail to supervise Ms Foster.

[20] [The appellant] submitted that his appeal was in respect of the Committee's findings on three key complaints: that Ms Foster was not supervised by a suitably qualified person, that he and [his wife] were not advised of the end date of the agency agreement at the meetings on 22 January 2019, and that he and [his wife] were not advised to seek legal advice before they entered into the amendment and renewal agreements.

Relevant evidence

The amendment agreement

[21] [The appellant] told the Tribunal that when he and [his wife] met Ms Foster and Mrs Kidd at the Agency, there was no oral advice given to them as to the end date of the agency agreement. He said the discussion covered only the six-week marketing period, and its cost. He said the meeting was "very pressured", as he and [his wife] were confused and not sure how to proceed. The property had not sold during the term of the initial agency agreement and offers received had been around \$1 million less than they wanted. He said he did not ask for an extension of the agency agreement for six weeks but accepted that he did not ask how long the agency agreement would continue for.

[22] [The Appellant] said that neither he nor [his wife] saw the dates written on the amendment agreement and suggested that they were possibly distracted. He said that after the meeting, he thought the agency agreement had been extended for the six weeks of the agreed six-week marketing programme (which he could live with), while [his wife] thought it had been extended for one month. He was adamant that they were not orally advised that the agency agreement was being extended for 90 days.

[23] Ms Foster told the Tribunal that she was handed the amendment agreement form to use and believed that it was the correct form for a renewal of the agency. She said there was no discussion as to whether it was correct.

[24] She said she believed that the beginning and end dates were inserted onto the amendment agreement when [the Appellant and his wife] were at the Agency. She said that all of the Agency's listings are for a standard 90-day period, but that if [the Appellant] had had issues about that, and did not want a 90-day agency, that could easily have been changed. She said that "we" wrote the beginning and end dates and [the Appellant and his wife] did not object to them.

[25] Ms Foster agreed that in a statement to the Committee, the Agency stated that an "agreement on a 6 week marketing plan was agreed at \$5,042.80" in setting out the matters covered in the meeting at the Agency on 22 January 2019, but she did not know why no specific time period was stated in its reference in the statement to "Agency extension and renewal". She said that the marketing period and the renewal form were both talked about. She said that it was normal to have a six-week marketing period in a 90-day agency.

[26] Ms Foster accepted, in answer to a question from the Tribunal, that she had relied on [the Appellant] to object if he did not agree to the Agency's standard 90-day period of the extension of the agency agreement, but said that the start and end dates of the extension to the agency agreement had been explained to [the Appellant and his wife], and they did not object to signing the amendment agreement.

The renewal agreement

[27] [The Appellant] said that he and [his wife] went to the property after the meeting at the Agency and were both working in the garden when Ms Foster visited them some 30 minutes later. He said she told them they had signed the wrong form, and that the information on the new form was the same as on the previous form and asked them to sign it. He denied that he was in the shower when she arrived, or that he met her dressed in a towel. He said he would never do such a thing. He further said that they had moved out of the property, and there were no towels there, and that there was no need for him to have showered, as they had been working in the garden for only a short period of time.

[28] [The Appellant] also said that he was not wearing his reading glasses when Ms Foster gave them the renewal agreement to sign and could not read it properly. He did not get his glasses before signing it, and it was a very quick meeting. He said that he and [his wife] are not experienced buyers and sellers of properties. They had lived in the property for 25 years, had owned his [] for 35 years before selling it, and their only other property transaction was to buy a holiday property some six years previously. He said that they trusted Ms Foster.

[29] [The appellant] said that he first realised that the agency agreement had been extended for 90 days when he received a copy of the renewal agreement on 24 January 2019. He said he and [his wife] were really upset about it, but because they were committed to the marketing programme, he found it difficult to raise an issue as to the period of the agency. They wanted to maintain a good working relationship until the property was sold.

[30] Ms Foster said that [the Appellant's wife] was in the garden when she arrived at the property, and [the Appellant] was in the house. She said that she told [the Appellant's wife] that the renewal agreement was the same as the agreement she had signed earlier, and [the Appellant's wife] then signed it. She said that [the Appellant] then walked out of the house, wearing a towel around his waist, went to the hall table, found his glasses, put them on, and signed the renewal agreement. She said there was no possibility that she was confused as to what occurred.

[31] Ms Foster agreed that the marketing costs were incorrectly stated on the renewal agreement.

Recommendation and opportunity to take legal advice

[32] Ms Foster accepted that she had not recommended that [the Appellant and his wife] take legal advice before signing the amendment agreement and the renewal agreement and did not turn her mind to the fact that they were not given any opportunity to take legal advice before signing the agreements. She accepted that she did not go through section 5 of the renewal agreement, which sets out ten "Client Acknowledgements", with [the Appellant and his wife].

[The Appellant's] request for a copy of the amendment agreement

[33] [The Appellant] accepted that he did not telephone Ms Foster to ask for a copy of the amendment agreement when she did not respond to his text message, but said he thought it was her duty as licensee to provide it, and not his responsibility to chase her for it. He said that when he did not get a response to his text message he suspected there was something amiss with the amendment agreement but did not want to make a fuss about it, so put the issue to one side.

[34] Ms Foster maintained her evidence that she missed [the Appellant's] text message which clarified that he wanted a copy of the amendment agreement, not the renewal agreement. She said she has a good system for dealing with texts and it is very unusual for her to miss one. She said she was not thinking that [the Appellant] wanted to be sent the incorrect document, and he did not telephone her to ask for it.

Appeal submissions

[35] [The Appellant] submitted that as a consequence of not being advised as to the end date of the renewed agency agreement, he and [his wife] were locked in with the Agency for longer than they wished to be. He submitted that the Tribunal should recognise that the consumer-protection procedures and processes set out in the Real Estate Agents Act 2008 ("the Act") and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") were not followed.

[36] He submitted that Ms Foster had acknowledged that she did not advise him and [his wife] to take legal advice when they signed the amendment and renewal agreements, and the Committee was wrong to determine not to make a finding of unsatisfactory conduct in respect of that failure. He also submitted that the Committee made an error in saying that Ms Foster had advised them to obtain legal advice when the initial agency agreement was signed; he submitted that this advice was given to them by Mr Piper.

[37] With respect to the Committee's finding that his complaint that Ms Foster did not tell him that the agency agreement was being extended for 90 days was not proved,

[the Appellant] submitted that the Committee reached the wrong conclusion on the facts. He submitted that the Committee should have accepted his evidence that he and [his wife] were not told that the agency agreement was being extended for 90 days.

[38] Ms Woolley submitted that the allegation in their complaint that Ms Foster asked [the Appellant and his wife] to sign a folded piece of paper, on which they could only see the portion where they were to sign was a serious allegation. As such, stronger evidence will be required before the Committee could be satisfied that were proved. She submitted that on the evidence before it, the Committee was correct to find that the allegation was not proved. She submitted that on appeal, [the Appellant] accepted that the amendment agreement had not been folded. Accordingly, she submitted, this is no longer an issue for determination on appeal.

[39] With respect to the Committee's finding that it was not proved that Ms Foster failed to explain to [the Appellant and his wife] that the agency agreement was being extended for 90 days, Ms Woolley referred to r 10.6 of the Rules, which provides (among other things) that before a client signs an agency agreement, a licensee must explain, and set out in writing, when the agency ends. She submitted that both the amendment agreement and the renewal agreement were "agency agreements", as defined in the Act, and the advice as to the end date of the agreement was required to be given in writing, and explained to the client.

[40] She submitted that while the fact that each of the agreements sets out the end date of 25 April 2019 is evidence that advice was given in writing, the Tribunal has now had the benefit of hearing oral evidence from [the Appellant] and Ms Foster as to whether there was any oral explanation of the end date. She submitted that the Tribunal will be required to make a credibility determination as to whether the required oral explanation was given.

[41] With respect to the Committee's finding as to Ms Foster's admitted failure to advise [the Appellant and his wife] to take legal advice before signing either the amendment agreement or the renewal agreement, Ms Woolley referred to her admission that she did not draw their attention to, and go through, section 5 of the renewal agreement. She submitted that Ms Foster's failure to recommend legal advice

could not be regarded as a *de minimus* breach of her obligation to do so under r 9.7 of the Rules.

[42] In relation to the Committee's finding that Ms Foster's failure to provide [the Appellant] with a copy of the amendment agreement was "inconsequential", Ms Woolley submitted that the Tribunal might take into account the difference between the amendment agreement and the renewal agreement that replaced it. She submitted that when considering whether the Committee was wrong to characterise Ms Foster's breach as inconsequential, the Tribunal could take into account that the latter document was signed on Ms Foster's advice that it was the same as the former, when it was not.

Approach to the appeal

[43] The Committee recorded that its decision to take no further action on [the Appellant's] complaint was made under s 89(2)(c) of the Act. An appeal against a Committee's decision under s 89(2)(c) proceeds as a "general" appeal: that is, the appellants are required to establish that the Committee was wrong to make that decision.

Discussion

Was the Committee wrong to find that it was not proved that Ms Foster failed to explain when the agency would end?

[44] We accept Ms Woolley's submission that both the amendment agreement and the renewal agreement meet the definition of "agency agreement" in s 4 of the Act:

agency agreement means an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction

[45] Both agreements authorised Ms Foster (and Mr Piper, in the case of the renewal agreement) to market the property for sale. Accordingly, Ms Foster was required to comply with all of the obligations set out in the Act and Rules as to entering into an agency agreement when having each agreement signed by [the Appellant and his wife] The fact that they had previously entered into the initial agency agreement did not absolve her from complying with those obligations.

[46] Rule 10.6 of the Rules provides (as relevant to this appeal):

10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing–

...

(b) when the agency agreement ends: ...

[47] As recorded earlier, the Committee found that this element of the complaint was not proved. It referred to the evidence before it by [the Appellant] and Ms Foster then concluded:⁸

3.8 As mentioned earlier, the Committee is required to determine material facts on the balance of probabilities, that is, what is more likely than not to have occurred. [The Appellant] has therefore to prove that his allegation that there was no explanation of when the agency period ended, more likely than not, happened. He is unable to do that. ...

[48] As is customary, the Committee’s decision was made following a hearing on the papers. We have had the benefit of hearing evidence from [the Appellant] and Ms Foster.

[49] With respect to the amendment agreement signed at the Agency, Ms Foster was adamant that the end date of the agency was made clear to [the Appellant and his wife] before they signed it. [The Appellant] was equally certain that the end date was not orally explained to them, and that he believed that the agency had been extended for six weeks (that is, the period of the marketing programme), not 90 days. Ms Foster acknowledged that a 90-day agency was “standard” for the Agency, and that (while also saying that she explained the start and end dates) she relied on [the Appellant] raising an objection if he did not want that.

[50] As the amendment agreement consisted of a single A4 page, with only four numbered provisions (other than the details as to the vendors’ names, the address of the property, and the signature section), logic might suggest that a person who signed it was aware of, and agreed to, what was written on it. However, the signature section had large red arrows alongside the place where [the Appellant and his wife] were required to sign. There was nothing similar on the form directing them to the “amendment” they were agreeing to (that is, the extension of the agency to 25 April

⁸ Committee’s decision, at paragraph 3.8.

2019). Further, as [the Appellant and his wife] did not initial the extension date, there is nothing on the form that confirms that their attention was expressly drawn to the extension.

[51] [the Appellant] was adamant that he and [his wife] did not go into the meeting at the Agency wanting an extension of the agency. They were uncertain as to how to proceed. They were considering listing with another agency. We conclude that in the circumstances, it is more likely than not that they would not have agreed to a further 90-day sole agency if they had appreciated that that was what they were being asked to do. Further, we conclude that it is more likely than not that if it had been made clear to them that the amendment agreement provided for a 90-day extension, they would have raised an objection, and would not have signed it.

[52] There was no dispute that Ms Foster's attendance at the property when they signed the renewal agreement was very brief. Her evidence was that she told [the Appellant and his wife] that the information on the renewal agreement was the same as that on the amendment agreement, which had been signed in error, and asked them to sign the renewal agreement.

[53] Notwithstanding that both included the names of [the Appellant and his wife], the address of the property, and the commencement and end dates of the agency, the renewal agreement was different from the amendment agreement. It included a statement as to calculation of commission, a statement as to marketing costs, and a section headed "5.0 Client Acknowledgements – PLEASE READ CAREFULLY".

[54] Ms Foster did not suggest that she took [the Appellant and his wife] through the renewal agreement before they initialled the first page and signed the second page. Had she done so, she no doubt would have realised that the marketing costs were incorrectly stated as being \$15,309.76. Further, she accepted that she did not take them through the "Client Acknowledgments".

[55] The word "explain" in r 10.6 conveys an obligation that the licensee who gives the required explanation should ensure that it is heard and understood by the client. It may require more than simply an iteration of words. We accept [the Appellant's]

evidence and have concluded on the balance of probabilities that Ms Foster did not explain to [the Appellant and his wife] that the end date of the amendment agreement and the renewal agreement was 25 April 2019. Her failure to do so was a breach of r 10.6 and was unsatisfactory conduct.

Was the Committee wrong to find that Ms Foster did not breach r 9.7 by failing to recommend that [the Appellant and his wife] take legal advice before signing the amendment agreement?

[56] Rule 9.7 provides (as relevant to this appeal):

- 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
 - ...
 - (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

[57] The Committee’s finding on this element of the appeal was as follows:⁹

3.14 The Committee concludes that [Ms Foster] did not contravene Rule 9.7. this is because the renewal agreement renewed the [initial] agency agreement, the effect being to extend the sole agency period for a further term of 90 days. Nothing else of significance had changed. Accordingly the Committee concluded that the renewal agreement was an extension of the agency agreement rather than a new agency agreement. [Ms Foster] said she complied with Rule 9.7 before the [initial] agency agreement was signed. There is no evidence to suggest that she didn’t.

3.15 The amendment agreement was replaced the same day as the renewal agreement (because it was the wrong document) therefore not recommending legal advice in relation to the amendment agreement is not in any event consequential.

3.16 There is insufficient evidence to say that [the Appellant] and his wife did not read the “Client Acknowledgement” above where they signed which included that they had been recommended to seek legal advice.

3.17 Even assuming [Ms Foster] should have verbally made the recommendation before [the Appellant] and his wife signed the renewal agreement, the Committee considers the failure to give a verbal recommendation, in addition to the recommendations on the renewal agreement itself, in that instance would not meet the threshold of unsatisfactory conduct particularly given:

- (a) The dealings [the Appellant] and his wife had with the Agency with a recent purchase through the Agency.

⁹ Committee’s decision, at paragraph 3.14.

(b) That the “client Acknowledgements” in the [initial] agency agreement had been individually initialled which included the recommendation to seek independent legal advice. [The Appellant] and his wife would have been aware of their rights.

(c) [The Appellant and his wife signed a further renewal with the Agency from 26 April to 27 May 2019. Had they felt aggrieved they would not have re-signed. They had a copy of the renewal agreement in January 2019. If they thought they were misled about the terms of the agency it would have been highly unlikely they would have re-signed, notwithstanding [the Appellant’s] comment that it was an “off market” agreement because he and his wife were travelling overseas.

[58] We note that the evidence before the Committee (as set out in the Agency’s response to the investigation findings) was that:

... When initially listed approximately 90 days prior [the Appellant] and [his wife] were advised verbally and in writing as per clause 9.7 of the [Rules]

[59] [The Appellant’s] evidence was that Mr Piper advised them to take legal advice. Ms Foster did not dispute this. Ms Foster did not suggest that she advised [the Appellant and his wife] to seek legal advice before they signed the amendment agreement. She accepted that she did not “verbally” recommend that they take legal advice. She relied on the “Client Acknowledgement” in clause 5.1 of the renewal agreement, that they had been “verbally” advised to take legal advice when they signed the initial agreement”, and the fact that [the Appellant and his wife] were “savvy purchasers and sellers with recent real estate transaction experience”.

[60] As set out in relation to the previous appeal issue, both the amendment agreement and the renewal agreement were “agency agreements” as defined in the Act. The Committee erred in finding that “the renewal agreement was an extension of the agency agreement rather than a new agency agreement”. The fact that both the amendment agreement and the renewal agreement had the effect of extending the agency period set out in the initial agency agreement did not result in their not being “agency agreements”, and did not affect Ms Foster’s obligation to comply with r 9.7 and to recommend that they seek legal advice before signing each of them, and provide them with the opportunity to do so.

[61] The Committee also erred in finding that Ms Foster’s failure to give a “verbal” recommendation, in addition to the recommendations on the renewal agreement itself, would not meet the threshold of unsatisfactory conduct, for the following reasons:

- [a] The Committee’s reference to [the Appellant’s and his wife’s] previous dealing with the Agency appears to be a reference to the Agency’s statement that they were “savvy purchasers and sellers”. Such a characterisation may apply to a person who has frequently been involved in real estate transactions. [The appellant and his wife] had lived in the house being marketed by the Agency for 25 years. Their “recent” transactions comprised the sale of [the Appellant’s] [] building which he had owned for 35 years, and the purchase of a holiday property some six years previously. We accept [the Appellant’s] submission that they were not “savvy purchasers and sellers”.
- [b] While the “Client Acknowledgements” were initialled in the initial agency agreement (and they had been orally advised by Mr Piper to take legal advice), they were not advised to take legal advice before signing the amendment agreement, and there was no evidence (for example, by way of initials alongside the acknowledgements) that their attention was directed to the acknowledgement that they had been advised to take legal advice and given an opportunity to do so in the renewal agreement. As both [the Appellant] and Ms Foster said, the signing of the renewal agreement took only a very short time.
- [c] The fact that [the Appellant and his wife] signed a further extension of the agency agreement when they went overseas is irrelevant to the issue of whether Ms Foster complied with her obligations.

[62] As Ms Woolley submitted, the obligation to advise clients and customers to take legal advice is fundamental to real estate practice. We accept her submission that a breach of r 9.7 in relation to an extension of an agency agreement should not be regarded as a *de minimus* matter. In its decision in *Xu v Real Estate Agents Authority (CAC 412)*, the Tribunal said in relation to the obligation to recommend legal advice:¹⁰

¹⁰ *Xu v Real Estate Agents Authority (CAC 412)* [2018] NZREADT 63, at [66]. See also the Tribunal’s discussion of the obligation to recommend legal advice in *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52, at [50]-[55], and in *Lethbridge v Real Estate Agents Authority (CAC 403)* [2018] NZREADT 58, at [20]-[25].

While it is open to a client or vendor not to seek legal advice before signing an agreement for sale and purchase or other contractual document, the obligation on a licensee to recommend that such advice is sought is a fundamental requirement in the purpose of meeting the Act's consumer-protection objectives.

[63] We conclude that Ms Foster breached r 9.7 by failing to recommend to [the appellants] that they take legal advice before signing the amendment agreement and the renewal agreement, and the Committee erred in *determining* not to make a finding of unsatisfactory conduct in respect of Ms Foster in respect of that breach.

Was the Committee wrong to determine that Ms Foster's failure to provide [the Appellant] with a copy of the amendment agreement was inconsequential?

[64] There was no dispute that Ms Foster did not provide [the Appellant] with a copy of the amendment agreement: she said she "missed" his email in which he made it clear that that was the agreement he wanted, she was not thinking he wanted the "incorrect" document, and he did not telephone her to repeat the request. The Committee's determination on [the Appellant's] complaint was as follows:

3.29 The Committee concludes that:

- a. The failure by [Ms Foster] to provide a copy of the amendment agreement was inconsequential as it was replaced the same day by the renewal agreement. The renewal agreement was provided as soon as practical after signing.

[65] Section 132 of the Act provides:

132 Licensee to give copy of contractual document

As soon as practicable after a person signs a contractual document and gives that document to a licensee carrying out real estate agency work in connection with the document, the licensee must give the person an accurate copy of the document.

[66] Ms Foster may have taken the view that [the Appellant] did not in fact want a copy of the "incorrect" document, but it was not for her to assume that. The amendment agreement was a contractual document signed by him and his wife, and under s 132 of the Act, Ms Foster was required to give him a copy of it. Even if Ms Foster "missed" the email on 7 February 2019, when it was sent, she must have seen it when she sent [the Appellant] a text on 9 February 2019. She could not assume that if he had not telephoned to repeat his request, he no longer wanted the document.

[67] Nor was it for the Committee to decide that because another agreement had been signed later, there was no need for Ms Foster to provide a copy of the earlier agreement. We have concluded that the Committee was wrong to find that Ms Foster's failure to provide [the Appellant] with a copy of the amendment agreement was inconsequential.

[68] The evidence before the Committee was that the renewal agreement was signed on the basis that it was the same as the amendment agreement and contained the same information. In fact, the two documents were not identical, and they did not contain the same information. While there was no need for [the Appellant] to provide a reason for his request for a copy of the amendment agreement, his request was reasonable on the basis that he wanted to check what was in the amendment agreement. Ms Foster's failure to provide [the Appellant] with a copy of the amendment agreement was a breach of s 132 of the Act.

Supervision of Ms Foster

[69] As recorded earlier, the Committee found that Mr Kidd had no obligation to supervise Ms Foster, so could not be found in breach of any obligation of supervision. At the hearing, Ms Foster confirmed that Mr Kidd supervises her on a day to day basis, and that Mr Beere, who is based in the Agency's head office in Parnell, not the Agency's office at Takapuna, provides oversight of Mr Kidd and the Takapuna office.

[70] [The Appellant] submitted that there was a failure of supervision, relating in Ms Foster using the wrong form to extend the term of the agency, inserting incorrect dates in documents, missing text messages, and in failing to go through the amendment agreement and renewal agreement with him and [his wife].

[71] In the course of hearing submissions from Ms Woolley, the Tribunal discussed with her whether an issue arose as to whether the supervision arrangements meet the requirements of s 50 of the Act, and whether the issue is within the scope of [the Appellant's] complaint and the appeal.

[72] The Tribunal received supplementary submissions from Ms Woolley after the hearing. The Tribunal accepts Ms Woolley's submission that [the Appellant's] complaint did not raise the issue of any non-compliance with s 50 of the Act, and the Agency was not a party to the complaint or the appeal. We accept that the Tribunal has no jurisdiction to make any finding as to whether there has been compliance with s 50 of the Act by either Mr Kidd or the Agency.

[73] The Tribunal observes that in the light of Ms Foster's evidence as to her day to day supervision, and the Committee's finding that Mr Kidd (being neither an agent or branch manager) had no obligation to supervise her, there appears to be an issue as to whether s 50 has been complied with.

Outcome

[74] The Tribunal finds as follows:

- [a] Ms Foster breached r 10.6 of the Rules by failing to explain to [the Appellant and his wife] the end date of the extended agency agreement, as set out in the amendment agreement and the renewal agreement. The Committee's decision to take no further action on that element of the complaint is quashed and replaced by a finding of unsatisfactory conduct.
- [b] Ms Foster breached r 9.7 of the Rules by failing to recommend that [the Appellant and his wife] take legal advice before signing the amendment agreement and the renewal agreement. The Committee's decision that she was not guilty of unsatisfactory conduct is quashed and replaced by a finding of unsatisfactory conduct.
- [c] Ms Foster breached s 132 of the Act by failing to provide [the Appellant] with a copy of the amendment agreement. The Committee's decision that her failure to do so was inconsequential is quashed and replaced by a finding of unsatisfactory conduct,

[75] The Tribunal will receive submissions from the parties as to penalty. Submissions by or on behalf of [the Appellant] are to be filed and served within 10 working days of the date of this decision. Although she did not participate in the appeal, Ms Foster may file and serve submissions, within a further 10 working days. Submissions on behalf of the Authority are to be filed and served within a further 10 working days.

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

Hon P J Andrews
Chairperson

Ms C Sandelin
Member

Ms F Mathieson
Member