

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 06

READT 015/20

IN THE MATTER OF

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

BETWEEN

DARYL ROSE SILCOCK
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1904)
First Respondent

AND

MURRAY KYLE WATSON
Second Respondent

On the papers

Tribunal:

Hon P J Andrews, Chairperson
Mr N O'Connor, Member
Ms F Mathieson, Member

Submissions filed by:

Ms Silcock, Appellant
Ms L Lim, on behalf of the Authority
Mr J Waymouth, on behalf of Mr Watson

Date of Decision:

22 January 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Silcock has appealed to the Tribunal pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1904 (“the Committee”), dated 1 May 2020, in which it decided to take no further action on her complaint against the second defendant, Mr Watson (“the Committee’s decision”).¹

[2] Ms Silcock’s complaint was made to the Authority on 2 September 2019, and made allegations against Mr Watson (a licensed salesperson), Ms Roslyn Coombes (a licensed agent) and Mr Sean Foster (a licensed agent), of Eves Realty Ltd (“the Agency”). Her complaint may be summarised as being that Ms Coombes had not marketed the property adequately and had not followed Ms Silcock’s instructions, that Mr Watson had not brought prospective purchasers for a second viewing of the property when they requested one, she had given him permission to take the prospective purchasers to the property for a viewing, and told him where the key was, and that Mr Foster was dismissive of her concerns and did not provide her with text messages relating to the prospective purchasers’ request for a second viewing.

[3] After having inquired into the complaint, the Committee decided to take no further action on any element of Ms Silcock’s complaint, pursuant to s 89(2)(c) of the Act.

[4] Ms Silcock appealed in respect of the determinations in respect of Ms Coombes and Mr Watson. She subsequently withdrew the appeal insofar as it related to Ms Coombes. This decision is therefore concerned only with the Committee’s decision to take no further action on Ms Silcock’s complaint against Mr Watson.

Background

[5] Ms Silcock was the vendor of a property in Hamilton. On 20 March 2019 she signed a listing agreement Ms Coombes to market the property for sale by negotiation.

¹ Complaint C33151, “Decision to take no further action”, 1 May 2020.

The property was appraised at \$850,000, but Ms Silcock was hopeful of selling at \$900,000.

[6] On 30 April 2019, Ms Silcock accepted an offer to purchase the property for \$890,000, conditional on the purchasers' selling their existing property by 7 June 2019, and obtaining satisfactory finance. The time for satisfying the conditions was extended, and the property remained subject to the conditional sale agreement at the time of the events which led to Ms Silcock's complaint.

Events of 25 – 30 July 2019

[7] On Thursday 25 July Mr Watson showed the property to a prospective purchaser. The prospective purchasers were aware that the property was subject to a conditional contract. Ms Silcock told Mr Watson that she would not consider any offer less than \$900,000 as it risked losing the conditional contract. When this viewing was arranged, one of the prospective purchasers asked Mr Watson if the vendor would consider a cash offer of \$850,000. Mr Watson advised that \$850,000 would not be acceptable for the vendor to break the conditional contract.

Mr Watson's communications with Ms Silcock

[8] At 9.18 am on Saturday 27 July 2019, Ms Silcock sent Mr Watson a text message in which she told him where the key to the property was, in case the prospective purchasers wanted to view the property that day. She also told him that she was going to a funeral at Tokoroa, so would have her cellphone switched off from 11am. She further said that the purchaser under the conditional contract had sent her a text to say that they were very close to going unconditional, so if the prospective purchasers were keen, they would have to work fast. At 9.20 am, Mr Watson advised Ms Silcock by text that he would be speaking with the prospective purchasers that morning. At 9.35 am, Ms Silcock sent Mr Watson a further text asking him not to discuss anything with, or in front of, her boarder. Mr Watson acknowledged this text at 9.51 am.

[9] Ms Silcock did not hear further from Mr Watson before she switched her cellphone off. When she turned it on shortly after 6 pm, she found a message from Mr

Watson asking if the prospective purchasers could view at 3.30 pm that day. Ms Silcock responded at 6.11 pm that she had just seen the message and had been expecting that Mr Watson would bring the prospective purchasers to the property. She also said that it was fine for them to view the property the next day. Mr Watson responded at 7.24 pm, thanking her. Ms Silcock did not receive any further texts, or other communication, from Mr Watson, notwithstanding having left a message on his phone on Monday 29 July.

[10] Ms Silcock submitted the call log for her cellphone over the relevant period, pursuant to leave given by the Tribunal in a Ruling issued on 2 September 2020.² The log does not disclose any telephone calls or messages from Mr Watson.

Mr Watson's communications with the prospective purchasers

[11] Mr Watson's contact with the prospective purchasers on Saturday 27 July 2019 began with a text message from them at 7.25 am advising that they could go to \$880,000, with settlement in late August/September, and asking if the vendor would consider this. Mr Watson responded to this text at 9.18 am, saying that he would "put it to her".

[12] Mr Watson sent a text to the prospective purchasers at 11.13 am to confirm that their offer would be a cash unconditional offer, with a deposit of 10 percent due immediately, and settlement in August/September. The prospective purchasers responded by text at 11.22 am, saying they would need to do due diligence (builder and LIM) "asap", then it would be an unconditional offer with a deposit of \$20,000. Mr Watson advised the prospective purchasers by text at 12.01 pm that he would let them know "asap".

[13] At 12.31 pm, Mr Watson advised the prospective purchasers by text that he could not get hold of the vendor. He said he would like to put their offer on paper and go and see her. He asked what was the easiest way of doing that. The prospective purchasers responded at 12.35 pm asking whether, if they drove in now, they could also view the property at the same time. They suggested that otherwise Mr Watson

² *Silcock v Real Estate Agents Authority (CAC 1904)* [2020] NZREADT 39.

could draw up an offer and send it to them, which they could print and sign, then scan it and return it.

[14] Mr Watson responded at 12.46 pm that he had open homes from 1 pm to 3 pm, and that he could send an offer to them or meet at the property at 3.30 pm. The prospective purchasers responded at 12.50 pm agreeing to meet at the property at 3.30 pm and “do the paperwork then”. Mr Watson said in his response to the complaint that he “received a phone call asking if the vendor would accept the offer, otherwise they did not want to waste their time driving into town”.

[15] Mr Watson sent a further text to the prospective purchasers at 1.16 pm, saying that he had “txt and phoned. I will confirm asap”. It would appear that Mr Watson’s text to Ms Silcock, asking if the property could be viewed “at 3.30 pm today” (referred to in paragraph [9], above), was sent at around this time. The prospective purchasers thanked him at 1.16 pm, then at 2.07 pm sent him a further text suggesting “let’s try for Sunday or next week sometime after you’ve got hold of her. Too rushed on both parts otherwise”. Mr Watson responded at 2.14 pm that he would “let you know”.

[16] At 10.42 am on Sunday 28 July, Mr Watson sent the prospective purchasers a text asking if they wanted to view the property at 3.30 pm that day. They responded at 10.43 am, asking if he had managed to speak with the vendor about their proposed offer. They sent him a further text at 11.35 am saying they were happy to meet at the property if the owner would accept their offer, and if not, they asked that he let them know the outcome of the current contract on the property. Mr Watson responded at 1.00 pm saying “OK. I can’t get hold of her at the moment”.

[17] At 10.39 am on Tuesday 30 July, the prospective purchasers sent Mr Watson a text to “clarify our conversation yesterday”, asking if the vendor “would sign at \$890k with the other contract having 5 working days to go unconditional”. Mr Watson responded at 11.52 am, suggesting “let’s put it on paper and present it”. There were exchanges between Mr Watson and the prospective purchasers as to the terms of the proposed offer through the afternoon of 30 July, until a text from Mr Watson at 7.43 pm, in which he said that “we can present your offer tomorrow at 9.30 am” if they were in a position to get it to him before then, and the prospective purchasers replied

at 7.48 pm, advising that there had been “an unexpected breakthrough with another property so we will have to hold off until the end of the day”.

[18] On Wednesday 31 July at 8.34 am, Ms Coombes forwarded this text to Ms Silcock.

Ms Silcock’s complaint

[19] Ms Silcock complained to Ms Coombes, copied to Mr Foster, (the compliance manager at the Agency) on 7 August 2019. She was told that the prospective purchasers had cancelled the appointment to view the property, but for privacy reasons, was not given copies of any communications from the prospective purchasers to establish that.

[20] In her complaint to the Authority, Ms Silcock said that Mr Watson “failed to bring buyers through when he had prior permission from me and cancelled their appointment thereby directly costing me that sale as follows...” and set out details of the prospective purchasers’ request for a second viewing, her instructions to Mr Watson as to the key, and advice that her phone would be switched off from 11 am as she was going to a funeral in Tokoroa. She recorded that copies of the text messages from the prospective purchasers, which she had requested from the Agency, had not been given to her. Her complaint included the following:

Those [prospective purchasers] knew there was an existing contract on my property and had been advised it could go unconditional at any time. I maintain that time was of the essence and if [Mr Watson] had brought them through on the Saturday as they’d requested, those buyers would have made their decision to make a second offer sooner – and before the “unexpected breakthrough” on Wednesday morning occurred. ... I firmly believe [Mr Watson’s] cancellation of the Saturday viewing clearly delayed their decision making by several days and because I’d advised [Mr Watson] I would not consider anything under \$900,000 I believe he cost me a minimum of \$10,000 if not more in failing to act when requested by the buyers and when he had prior written and verbal permission from me to show them through my property.

[21] In the course of the Committee’s investigation, Ms Silcock asked the investigator to contact the prospective purchasers in order to “find out the truth about who cancelled the viewing” of her property. It appears from the material before the Tribunal that the

prospective purchasers were not contacted, but the Agency provided copies of text messages between the prospective purchasers and Mr Watson.

[22] On 25 October 2019, after receiving copies of the prospective purchasers' text messages to Mr Watson, Ms Silcock amended the summary of her complaint (to be provided to the Committee) to read:

That [Mr Watson] cancelled a second viewing with prospective buyers through the property on the date they had arranged when you had given prior permission for this. This resulted in a delay of several days before those buyers had an agreement drawn up and ready to be presented. At the last minute another property became available to them and their offer was never presented. You believe the failure to bring the buyers through in a timely manner and the consequent time delay resulted in the potential loss of a sale of the property at a higher price than the existing conditional contract.

[23] This document was provided to the Tribunal by Ms Silcock. It was not included in the bundle of documents before the Committee, which was filed in the Tribunal by the Authority. However, counsel for the Authority, Ms Lim, advised the Tribunal that it was included as an annexure to the Authority's Initial Referral Report, which was provided to the Committee.

The Committee's decision

[24] As noted earlier, we are concerned only with the Committee's decision in respect of Ms Silcock's complaint against Mr Watson.

[25] The Committee set out Ms Silcock's complaint against Mr Watson as follows:³

[Mr Watson] did not bring prospective buyers for a second viewing on the date they had requested.

[26] It set out Mr Watson's response as follows:⁴

[Mr Watson's] prospective purchasers cancelled the viewing.

[27] We set out the Committee's reasoning in respect of the complaint against Mr Watson in full:

³ Committee's decision, at paragraph 1.7(f).

⁴ At paragraph 1.9(g).

3.1 There is conflicting evidence presented by the parties about many of the events surrounding the complaint. To make a finding against the Licensees the Committee is required to determine that the conduct meets the threshold of unsatisfactory conduct under the Act on the balance of probabilities. This means that the Committee has to make a finding as to what is more likely than not to have occurred taking into account all the evidence presented. In this case the Committee concluded as follows.

...

3.8 The evidence does not support the finding that [Mr Watson] refused to bring prospective buyers for a second viewing.

...

3.23 The Committee recognises [Ms Silcock's] desire for as many prospective buyers as possible to view the property but does not see any evidence of [Mr Watson] trying to deliberately refuse to take prospective buyers for a second viewing. It is clear from the correspondence that the prospective buyers decided not to have a second viewing themselves. There is no evidence that [Mr Watson] acted in bad faith or failed in his duty to act in the best interest of [Ms Silcock].

3.24 The Committee therefore found that the evidence does not support this aspect of the complaint and will therefore be taking no further action.

Appeal submissions

[28] Ms Silcock submitted that the Committee had reached the wrong decision by preferring Mr Watson's evidence over hers, notwithstanding that he had not presented any evidence of texts and calls he claimed to have made to her. She submitted that the Committee failed to take into account that:

[a] Mr Watson failed to advise her of the oral offers made by the prospective purchasers on 27 and 30 July.

[b] Mr Watson lied to the prospective purchasers by telling them that he needed to get hold of her in order to take them through the property when she had already given permission to do so, and told him that her phone would be switched off on 27 July from 11 am.

[c] Mr Watson did not make any contact with her and delayed securing a signed agreement for sale and purchase for several days, when the prospective purchasers clearly indicated they wanted to sign one, costing her a sale.

[d] The Committee did not address why Mr Watson said he could not contact her, and text messages from the prospective purchasers made it clear that they cancelled the viewing on 27 July as a result of Mr Watson saying he could not get hold of her to obtain permission (when he already had permission), and they ran out of time to drive in to view it. She submitted that the Committee ignored the evidence that apart from Mr Watson's saying he could not get hold of her, there was nothing preventing the prospective purchasers viewing the property either on Saturday 27 or on Sunday 28 July.

[29] Mr Waymouth submitted on behalf of Mr Watson that the evidence before the Committee does not disclose any refusal by Mr Watson to bring the prospective purchasers for a further viewing. He submitted that it is clear from the text messages that the viewing was cancelled solely at the instigation of the prospective purchasers.

[30] He submitted that viewed objectively, the texts and conversations show that Mr Watson was in fact acting in accordance with his obligation to exercise skill, care, competence, and diligence under r 5.1:

[a] The prospective purchasers offered \$850,000 on Thursday 25 July, then \$880,000 at 7.25 am on Saturday 27 July;

[b] The terms of the prospective purchasers' interest were qualified by Mr Watson at 11.13 am on Saturday 27 July;

[c] Mr Watson sought further clarification at 12.21 pm on 27 July with the intent of converting a "verbal" offer into a written offer, in accordance with his duties under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), in particular rr 5.1, 6.1, and 6.2.

[31] Mr Waymouth submitted that the agreement to meet at the property at 3.30 pm on 27 July "to do the paperwork" confirms Mr Watson's intent to proceed on that basis, and is further evidence that he was attempting to get the prospective purchasers' interest in written format, and the prospective purchasers' text at 2.07 pm on 27 July

“let’s try for Sunday or next week sometime” was clear evidence of the prospective purchasers themselves withdrawing. He further submitted that the subsequent texts (including his response to the prospective purchasers’ agreeing to increase their offer to \$890,000 on Tuesday 30 July) clarify the extent of Mr Watson’s attempts to obtain a written offer from them.

[32] Mr Waymouth submitted that Mr Watson was actively seeking to prepare an offer to present to his client, when the prospective purchasers withdrew from the process as another property became available. He submitted that the cumulative effect of the texts and phone logs shows nothing other than a real estate licensee acting in accordance with the interests of his vendor, while maintaining his obligation of good faith and fair dealing to the customers. He submitted that the Committee’s decision was correct in fact and law.

[33] Ms Lim submitted on behalf of the Authority that the issue on appeal is whether the Committee erred in finding there was insufficient evidence that Mr Watson prevented the prospective purchasers from viewing the property a second time. She submitted that some of Ms Silcock’s submissions were in relation to matters that are outside the Tribunal’s appeal jurisdiction:

- [a] That Mr Watson lied to the prospective purchasers about whether he could get in contact with Ms Silcock in relation to their oral offers;
- [b] That Mr Watson did not tell Ms Silcock about the oral offers between 27 and 30 July; and
- [c] That Mr Watson’s delays in providing the prospective purchasers with a written agreement for sale and purchase resulted in losing a potential offer on the property.

[34] She submitted that Ms Silcock’s initial complaint against Mr Watson was that he “failed to bring buyers through when he had prior permission from me and cancelled the appointment thereby directly costing me that sale”: that is, that Mr Watson cancelled the appointment to view the property, which resulted in the a sale not

proceeding. She submitted that the matters set out at paragraph [33], above, were not part of the original complaint, and were not determined by the Committee, so the Tribunal cannot consider them on appeal.

[35] Ms Lim submitted that the Committee correctly found that there was no evidence that Mr Watson deliberately refused to take the prospective purchasers for a second viewing, as the evidence showed that the prospective purchasers decided for themselves not to have a second viewing.

[36] She further submitted that the text message correspondence shows that Mr Watson advised the prospective purchasers that he could not get hold of the vendor in relation to offer of \$880,000, and this was prior to their request to visit that day. Mr Watson then asked for the offer to be put on paper. She submitted that it is not clear whether Mr Watson meant in his text at 1.16 pm on 27 July “I have txt and phoned. I will confirm asap” that he would confirm that the property could be viewed, or that the vendor would accept the \$880,000 offer. She submitted that in any event, the prospective purchasers decided to view the property another day, as it was “too rushed on both parts otherwise”.

[37] Ms Lim submitted that this does not establish that Mr Watson refused to take the prospective purchasers through the property, or that it was the content of his messages that caused them not to proceed with viewing, or had any effect on the prospective purchasers’ decision not to make a written offer. She submitted that this cannot be inferred from the text messages.

[38] With reference to the call log for Ms Silcock’s cellphone, Ms Lim submitted that this confirms text messages between Ms Silcock and Mr Watson, but it is not clear whether attempted calls made when the phone was turned off would be recorded. She submitted that the gap in the log between 9.51 am and 6.07 pm suggests that the call log does not show data from when the cellphone was turned off. She submitted that in any event, whether Mr Watson tried to contact Ms Silcock is irrelevant to determination of the appeal.

[39] Ms Silcock filed submissions in reply to the submissions by Mr Waymouth and Ms Lim.

[40] In reply to Mr Waymouth's submissions, Ms Silcock submitted that all of the prospective purchasers' texts on 27 and 28 July expressed their wish to view the property (making offers, asking for an agreement for sale and purchase to sign, and still wanting to view up until the last minute), and Mr Watson's messages infer that he required permission to show them the property. She submitted that this was false: he did not need permission as he already had her permission to take them to view the property. She further submitted that the context of the "cancellation" text on 27 July is important, and the final text that day cannot be looked at alone.

[41] Ms Silcock submitted that it is apparent from the text messages that Mr Watson told the prospective purchasers that he had phoned and texted her, when he knew her phone would be switched off from 11.00 am. She submitted that no explanation had been given for what Mr Watson did, and that if he had acted on her permission, the viewing would have gone ahead on 27 July.

[42] Ms Silcock also referred to the fact that the call log shows that there were no calls to her cellphone before 11 am on 27 July, when it was still switched on. She submitted that that, and the fact that Mr Watson did not send her any texts about the prospective purchasers' wish to view the property, or their indicated offers, invites an inference that he waited to call her when he knew the phone would be switched off.

[43] She further submitted that Mr Watson had offered no evidence to contradict any of the evidence in the texts and call log that he lied, resulting in his failure to conduct viewings from 27 July onwards, and he failed to get an agreement for sale and purchase to the prospective purchasers in a timely manner when they had requested one.

[44] She also submitted that Mr Watson failed to provide any evidence in support of his claim that he received a phone call from the prospective purchasers after 12.50 pm on 27 July saying that if she did not accept their offer they would not bother driving in to view the property. She submitted that his claim that they did so is inconsistent with their saying in their text immediately before this that "we could meet you there and do

the paperwork then” and the fact they still wanted to view on Sunday 28 July. She further submitted that as Mr Watson never advised her of the prospective purchasers’ offer he would not have been able to confirm whether it would be accepted.

[45] In response to Ms Lim’s submissions for the Authority, Ms Silcock submitted that the Committee had the power to order Mr Watson to supply call logs.⁵ She submitted that the Committee did not do so here, but should have done. She submitted that as the Committee has this power it is not fair if it does not use it to ensure it is fully informed before making decisions. She noted that she could not herself obtain logs of calls from Mr Watson’s cellphone.

[46] With respect to Ms Lim’s submissions as to matters being outside the Tribunal’s appeal jurisdiction, Ms Silcock submitted that her complaint was corrected and updated after she received copies of the text messages between the prospective purchasers and Mr Watson. She submitted that her complaint that Mr Watson failed to bring the prospective purchasers through the property encompassed all the reasons and actions which led to that failure, and this incorporates the lies, texts, and call log as evidence of his supposed inability to contact her, and as to requiring her permission when that had already been given.

[47] Ms Silcock submitted that she was unaware of the content of the prospective purchasers’ texts until she received copies of them during the investigation. She submitted that she could not be held responsible for the Agency’s failure to provide her with this evidence until after her complaint was made, and she should not be penalised for the Agency’s having withheld it.

[48] She submitted that the Committee should have found on the balance of probabilities that had Mr Watson confirmed the requested viewing at 3.30 pm on 27 July (on the basis of permission having been given) it would have gone ahead; that is, the prospective purchasers would not have cancelled it.

⁵ Ms Silcock referred to s 93(1)(h) of the Act, which applies only if a Complaints Assessment Committee has made a determination against a licensee. However, the Committee is given the power to obtain specific information under ss 83(c) and 85 of the Act.

[49] Ms Silcock submitted that an honest and genuine licensee would not have withheld from a customer that permission had already been given for the property to be viewed, would have acted in a timely manner to discuss the prospective purchasers' indicated offer with her, and would have sent a draft agreement for sale and purchase when the prospective purchasers requested it. She submitted that after Mr Watson failed to get back to them on their requests for him to discuss their second, then third, offers with her, and waiting for him to draft an agreement, the prospective purchasers put the matter into the "too hard basket", and backed off. She submitted that over a period of five days, Mr Watson failed to act on any of the prospective purchasers' requests.

Discussion

Approach on appeal

[50] This is an appeal against a determination under s 89(2)(c) of the Act to take no further action on a complaint, following an investigation. It proceeds as a "general appeal". That is, the Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's decision was wrong.⁶ Ms Silcock has the onus of satisfying the Tribunal that the Committee was wrong to decide to take no further action on her complaint.

Scope of appeal

[51] We have referred to Ms Silcock's statement of her complaint in paragraph [20], above, and her amendment of the summary of the complaint (for presentation to the Committee), in paragraph [22]. In both cases, Ms Silcock expressed her complaint in some detail as to circumstances and consequences.

[52] In its decision, the Committee reduced the complaint to one sentence "[Mr Watson] did not bring prospective buyers for a second viewing on the date they had requested", then further narrowed its focus from "did not bring the prospective

⁶ See *Austin Nicholls & Co Ltd v Stichtung Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141, and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112].

purchasers” to “deliberately refused to bring” in its reasons for deciding to take no further action, saying “the Committee ... does not see any evidence of [Mr Watson] trying to deliberately refuse to take prospective buyers for a second viewing”.

[53] The Committee erred in narrowing its consideration of the complaint to whether Mr Watson had tried “to deliberately refuse to take prospective buyers for a second viewing”. Ms Silcock complained that Mr Watson “failed to bring buyers through...”.

[54] Ms Silcock’s complaint in fact had a number of elements. In summary, these were that Mr Watson:

- [a] failed to bring the prospective purchasers for a second viewing (encompassing his failure to act on the permission she had given him to bring the prospective purchasers to the property);
- [b] failed to advise her of indicated offers by the prospective purchasers;
- [c] lied to the prospective purchasers by saying that he could not get hold of her, when it was not necessary for him to do so in order to take them to the property; and that
- [d] Mr Watson’s failures cost her a potential sale.

[55] All of those elements of the complaint were stated in Ms Silcock’s initial complaint.

[56] While the allegation that Mr Watson’s failures cost Ms Silcock a potential sale necessarily requires there to be a finding that the allegations as to failures were proved, it was incumbent on the Committee to consider Ms Silcock’s complaint in full. It failed to make determinations on all elements of the complaint. That failure is open to scrutiny on appeal and the Tribunal may undertake its own assessment of the merits of the elements of the complaint.

Relevant regulatory provisions

[57] This appeal raises issues as to Mr Watson's compliance with rr 5.1, 6.1 and 6.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. These provide as follows:

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

Did Mr Watson fail to bring the prospective purchasers for a second viewing?

[58] As already recorded, Ms Silcock told Mr Watson at 9.18 am on Saturday 17 July where she had left a key, in case the prospective purchasers wanted to look at the property that day. She also advised him of a communication from the purchasers under the conditional contract and commented that if the prospective purchasers were keen they would "have to move fast". Given that permission, we accept Ms Silcock's submission that there was no need for Mr Watson to request permission to take the prospective purchasers to the property.

[59] The prospective purchasers requested a second viewing of the property, but Mr Watson did not take them to the property. He exchanged text messages with the prospective purchasers, then (it appears in the early afternoon) sent Ms Silcock a text message asking if he could take the prospective purchasers to the property at 3.30 pm. Ms Silcock had told Mr Watson that her phone would be switched off as from 11 am, but he did not text her for permission to visit before it was switched off, his text message was sent at a time at which he had been told it would be switched off.

[60] We note that Mr Watson did not offer any reason for his having sent this text to Ms Silcock when he knew her phone would be switched off, and the matter does not appear to have been raised with him by the investigator during the course of the Committee's investigation. In the circumstances, we are not prepared to accept Ms Silcock's submission that Mr Watson deliberately waited to send her a text when her phone was switched off.

[61] However, we accept that a competent licensee acting in accordance with industry best practice, would have ensured that (if he felt it necessary to confirm the permission) he would do so before the time when the phone would be switched off. Mr Watson did not do this.

[62] We note Mr Waymouth's submission that Mr Watson was trying to get a formal written offer from the prospective purchasers. However, the prospective purchasers were happy to view the property and "do the paperwork" at the same time, and suggested that this occur, but Mr Watson did not pursue a viewing. The fact that the text message Mr Watson sent to Ms Silcock on Saturday 27 July referred only to whether the property could be viewed (with no mention of whether she would consider an offer as indicated by the prospective purchasers or the preparation of a written offer being a prerequisite), suggests that permission to view was the only matter preventing a viewing.

[63] Similarly, on Sunday 28 July, when the prospective purchasers requested a viewing, Mr Watson did not arrange it, although he knew that the property could be viewed that day, Ms Silcock having told him this the previous evening.

[64] We are satisfied on the balance of probabilities that the prospective purchasers' decision not to view the property on Saturday 27 July resulted from Mr Watson's failure to act on the permission given to him by Ms Silcock and to take them to view the property when they requested it. The prospective purchasers had requested a viewing, and Mr Watson had Ms Silcock's permission to take them to view, but he did not take them for a viewing.

Did Mr Watson fail to advise Ms Silcock of the prospective purchasers' oral offers?

[65] Mr Watson could have advised Ms Silcock of the prospective purchasers' oral offer of \$880,000 (conveyed to him at 7.25 am on Saturday 27 July) before she switched her cellphone off at 11.00 am, but he did not do so. Although he sent text messages to Ms Silcock at 9.19 am and 9.51 am (when her cellphone was still switched on), he did not mention the contact he had had with the prospective purchasers that morning. In particular, he did not mention that he had told the prospective purchasers

that he would put to her that they would go to \$880,000. Nor did he mention it in his text requesting permission to visit the property at 3.30 pm that day, or when Ms Silcock acknowledged receipt of the text after switching her phone on that evening.

[66] Further, he did not advise Ms Silcock, at any time, of the prospective purchasers' indication of an offer at \$890,000 on Tuesday 30 July.

[67] We do not accept that Mr Watson was acting in bad faith in not advising Ms Silcock of the offers, but we accept Ms Silcock's submission that a competent licensee exercising due skill, care, competence, and diligence would have informed the licensee's vendor client of the offers and indications, and the steps being taken to present them as formal written offers. While Mr Watson may have formed the view that it was not worth mentioning the prospective purchasers' indications of higher offers, as they were outside Ms Silcock's parameters, the safest course, in order to comply with his obligations to the vendor, would have been to mention the offers.

Did Mr Watson lie to the prospective purchasers?

[68] Mr Watson sent a text message to the prospective purchasers at 9.18 am on Saturday 27 July saying that he would put their indicated offer of \$880,000 to Ms Silcock. He did not do so before Ms Silcock switched her cellphone off, but sought confirmation of the terms of the offer in a text message at 11.13 am, and at 12.01 pm he sent them a message saying "Ok great. I will let you know asap". As Ms Silcock had told him would be the case, her cellphone was switched off at that time. At 12.01 pm he sent the prospective purchasers a text message saying "I can't get hold of her" and that he would like to put the offer on paper.

[69] The statement at 12.01 pm that Mr Watson could not get hold of Ms Silcock was in fact true, as her cellphone was switched off.

[70] At 12.50 pm on 27 July, the prospective purchasers suggested meeting at the property at 3.30 pm, and "doing the paperwork" then. At 1.16 pm, Mr Watson sent them a message that he had "txt and phoned" and would "confirm asap". At that time, Ms Silcock's cellphone was still switched off while she was attending the funeral in

Tokoroa. While the text appeared on the cellphone when Ms Silcock switched it on around 6.00 pm, the call log for the phone gives no indication of any missed telephone call during this time.

[71] We accept Ms Lim's submission that it is not clear whether a call to Ms Silcock's cellphone would be recorded if it were made when the cellphone was switched off. However, if Mr Watson had left a message for Ms Silcock, we would expect that to have been shown on her call log, and there is no record of Mr Watson having left any such message.

[72] An allegation that a licensee has lied is serious, and would have to be supported by sufficient evidence, in particular establishing that there was a deliberate lie, rather than an innocent (albeit possibly negligent) mis-statement. We are not satisfied that there is such evidence before us. We are not satisfied on the balance of probabilities that Mr Watson lied to the prospective purchasers.

Did Mr Watson's failures cost Ms Silcock a potential sale?

[73] Ms Silcock said in her initial complaint that if Mr Watson had brought the prospective purchasers through the property on Saturday 27 July, as they requested, they would have made their decision to make a second offer sooner, and "we would have had a signed contract" before the "unexpected breakthrough" with another property occurred on Tuesday 30 July".

[74] It is reasonable to infer from the text messages between the prospective purchasers and Mr Watson that if Mr Watson had confirmed the requested viewing for Saturday 27 July, and not told them that he could not get hold of the vendor, the prospective purchasers would have viewed the property that day. The text messages indicate that the prospective purchasers were keen to view the property, and were prepared to complete a written offer while doing so.

[75] However, we are not satisfied that it is a reasonable inference that if the prospective purchasers had viewed the property, a signed contract would have followed. A signed contract would require Ms Silcock and the prospective purchasers

to agree as to its terms, and even at their last indicated offer of \$890,000, they had not reached \$900,000. Ms Silcock said in her complaint that she had told Mr Watson that she would not consider anything under that figure. A signed contract would therefore require either Ms Silcock or the prospective purchasers, or both of them, to move on the price, and we could not find it proved on the balance of probabilities that the prospective purchasers would have further increased their offer, or indeed satisfied their indicated conditions of due diligence, builder's report and LIM report.

Should the Tribunal make a finding against Mr Watson?

[76] We have found that Mr Watson did not take the prospective purchasers for a second viewing of the property (when he had Ms Silcock's permission to do so), and did not advise Ms Silcock of the indicated oral offers from the prospective purchasers.

[77] The Tribunal's jurisdiction on appeal is set out in s 111 of the Act. Section 111(4) and (5) provide:

111 Appeal to Tribunal against determination by Committee

...

- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

[78] The Committee's jurisdiction as to complaints is set out in s 89 of the Act, as follows:

89 Power of Committee to determine complaint or allegation

- (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
- (2) The determinations that the Committee may make are as follows:
 - (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:
 - (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct:
 - (c) a determination that the Committee take no further action with regard to the complaint or allegations or any issue involved in the complaint of allegation. ...

[79] If the Tribunal is persuaded that the Committee was wrong to determine to take no action on Ms Silcock's complaint, it may reverse that decision and substitute a finding of unsatisfactory conduct or, if it considers it appropriate that a charge of misconduct is considered, it may refer the matter back to the Committee for further consideration.⁷

[80] The Tribunal's findings in relation to Mr Watson's conduct must be considered against the Act's expression of its purpose, in s 3 of the Act:

3 Purpose of Act

- (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
- (2) The Act achieves its purpose by—
 - (a) regulating agents, branch managers, and salespersons;
 - (b) raising industry standards;
 - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[81] We have concluded that Mr Watson's conduct does not meet the standards of best real estate practice. If Mr Watson considered he required further permission from Ms Watson to take the prospective purchasers to the property, he should have ensured that he sought it before he knew her cellphone would be turned off, and he should have informed her of the offer indications given by the prospective purchasers. Ms Silcock was entitled to better communication from Mr Watson.

[82] However, we note Mr Watson's statement to the Committee that he was advised by his manager, Ms Coombes, that any offer on the property would have to be on paper (we assume, signed) and then Ms Coombes would present it to Ms Silcock.

[83] In the circumstances, we are not satisfied that Mr Watson's failures reached a level where a finding of unsatisfactory conduct is required in order to achieve the purpose of the Act.

⁷ See *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [104].

Outcome

[84] Ms Silcock's appeal is dismissed.

[85] 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

Mr N O'Connor
Member

Ms F Mathieson
Member