BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 10

READT 022/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MICHELLE BAKER and RODNEY BAKER Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	HAMISH DRUMM, MARK COFFEY, and SAFARI REAL ESTATE (t/a TOMMY'S REAL ESTATE) Second Respondents
Hearing:	24 February 2021, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Mr Baker Ms C Paterson and Mr T Wheeler, on behalf of the Authority Mr Drumm and Mr Coffey
Date of Decision:	9 March 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Baker[1] have filed an appeal under s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1901 ("the Committee") dated 24 July 2020. In that decision the Committee decided to take no further action on their complaint made against Mr Drumm and Mr Coffey[2] on 8 March 2018, and the Committee's "own motion" inquiry into the conduct of Safari Real Estate ("the Agency").

[2] This is the appellants' second appeal to the Tribunal. The Committee issued a decision on 19 December 2018 ("the Committee's first decision"), in which it decided to take no action on the complaint. The appellants appealed to the Tribunal and in a decision dated 12 August 2019, the Tribunal referred the complaint back to the Committee for fresh consideration of the evidence (which included evidence the appellants submitted to the Authority but which was not provided to the Committee).[3] The Committee's decision dated 24 July 2020 ("the Committee's second decision") followed its reconsideration of the evidence and further submissions from the appellants and the licensees.

Appeal hearing

[3] The appeal was originally set down for an oral, in-person, hearing in Wellington on 12 November 2020. Written submissions were filed by Mr Baker, and on behalf of the Authority. The licensees advised the Tribunal that they did not wish to make any submissions to the Tribunal. That hearing did not proceed, as Mr Baker suffered an accident at work early that morning. The oral hearing was re-scheduled for 24 February 2021.

[4] Shortly before the hearing was to commence, Mr Baker advised the Tribunal's case manager that he would not be able to participate in it. He advised that he is deaf,

---

1 Except where it is appropriate to refer to them individually, Mr and Mrs Baker will be referred to as "the appellants".

2 Except where it is appropriate to refer to them individually, Mr Drumm and Mr Coffey will be referred to as "the licensees".

3 *Baker v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 34.

and he did not have either of his hearing aids. He said that one was under repair and the other had got wet and he had not been able to dry it. He said that without a hearing aid, he could only hear if a speaker stood close to him and spoke loudly. He could not hear words spoken from the Tribunal bench, or from counsel, or other parties.

[5] The Tribunal chairperson put to Mr Baker that the oral hearing might proceed if all speakers spoke as loudly as possible, or (as written submissions had been filed, and the appellants and the licensees had advised that they had no further submissions to make) the Tribunal could consider and determine the appeal on the papers. Mr Baker advised that he preferred the appeal to be determined on the papers. Ms Paterson advised that the Committee was content for the appeal to be determined on the papers. Mr Drumm and Mr Coffey also agreed to a determination on the papers

Background to the complaint

[6] The relevant events occurred between November 2017 and February 2018.

[7] The appellants were the owners of a residential property at Gracefield, Lower Hutt. They decided to sell it and buy a "live aboard" launch. They wanted to raise as much money as possible from the sale of the property, and were attracted by an offer from an agency, Tall Poppy, of a flat commission fee of $10,000 plus GST, regardless of the price the property sold for.

[8] The appellants did not list the property with Tall Poppy, as they had an introduction to a salesperson at a Ray White agency who offered them a "friends and family" commission rate, and listed the property with Ray White for a "deadline sale". The property did not sell, although one prospective purchaser was at the stage of seeking mortgage finance, prior to making an offer. They decided to terminate the Ray White agency and sell the property privately. They purchased a TradeMe listing for $630, which started on 29 November, and referred to their "expected sale price" of $600,000.

[9] Mr Drumm is a licensed salesperson, engaged at the Agency. Mr Coffey is his manager. Mr Drumm first left messages on the appellants' answerphone, as from 1

December, then visited them at the property on Monday 4 December. He gave them a Comparative Market Appraisal which he had already prepared, noting an appraisal value of $540,00 to $620,000. He was aware of the existing Ray White agency.

[10] The appellants say that Mr Drumm had an agency agreement with him, which he went through section by section. They said they told Mr Drumm:

[a] they were very clear about their price expectations, they had listed the property on TradeMe at $600,000 and that was the price they wanted to achieve;

[b] Mr Drumm had to match the Tall Poppy flat fee for commission, of $10,000 plus GST, and they were non-committal as to Mr Drumm's proposal that he could charge a commission of $10,080 if the property sold for $560,000, with a bonus for every $10,000 the property sold for above that figure; and

[c] the marketing section of the agreement was left blank, and they told Mr Drumm that if he took over the listing, he was to use their TradeMe advertisement, as they did not want to spend more money on marketing.

[11] Before leaving the property, he asked them to sign the agreement, but they adamantly refused, as they were still waiting to receive an offer through Ray White.

[12] Mr Drumm sent Mrs Baker a message later that evening, in which he said he would:

> … honour that other agency on 30% off the top of the $10k plus gst (for that buyer only) or other buyer through that agency. …

[13] In a message sent on Tuesday 5 December), Mr Drumm said:

> That $10k plus gst fee I will even match this time .. but if we sell next year it's 3 percent of the sale price. …

[14] That evening, Mr Drumm sent Mrs Baker a message asking if their then agent had presented them with "a good unconditional offer". He asked to be advised by the end of the day if nothing had materialised, or if they had sold.

[15] In the morning of Wednesday 6 December, Mrs Baker sent Mr Drumm a message "Go go go do what you have to". Mr Drumm advised that he would be at the property with his photographer that afternoon, and that there would be open homes at the property the following evening and on Sunday 10 December.

[16] After the photographer's visit, Mr Drumm gave the appellants an agency agreement to sign. Their evidence was that Mr Drumm was in a rush, they didn't get a chance to read it, and Mr Drumm did not highlight any changes from what he had offered them previously. There was no discussion of the agreement, and they assumed that it would be in accordance with their discussion with Mr Drumm. They signed and dated the agreement. They said Mr Drumm took the signed agreement away with him and did not leave them a copy.

[17] The appellants said that during a discussion after an open home on 17 December, they told Mr Drumm he had not given them a copy of the agency agreement. They said Mr Drumm then left the property, but returned shortly thereafter, carrying mail from their mailbox. This included a copy of the agency agreement, which had apparently been posted to them.

[18] Regarding commission, the agency agreement did not set out a flat fee of $10,000 plus GST, regardless of price. It contained handwritten insertions as to the commission payable by which the pre-printed rate of "3.95% of the sale price + $600 + GST" was altered to "1.8% of the sale price + $600 + GST", and "$10,080" was inserted as the commission payable on the "recommended/appraised buyer enquiry value of $560,000". There was also a handwritten addition "*for every 10k over $560,000 a bonus of —— + gst". The copy Mr Drumm gave the appellants had a further insertion, in that "TBA" inserted and initialled by Mr Drumm in a handwritten addition (in a different colour) in the space marked "——".

[19] Mr Drumm prepared printed flyers for the property. The appellants said that he did not provide these to them for checking before they were printed. The flyers contained errors, in particular, the rateable value ("RV") of the property was stated as $435,000, when it was in fact $445,000. Mr Drumm gave the appellants copies of the flyers to distribute around the neighbourhood. The appellants' evidence was that they

pointed out the errors, and while the on-line advertising was subsequently corrected, they were never given any reprinted flyers.

[20] Mr Drumm also insisted that the appellants deleted their TradeMe listing, and placed his own listing, which he said would be at no cost to them. The appellants expressed their particular concern at the following wording inserted by Mr Drumm:

> …
>
> Opportunity knocks today, with our vendors having bought elsewhere and committed to bringing down the auction hammer on the 16th December 2pm. Their instruction "we are on the market with no plan B".
>
> …
>
> With a GV of just $435k OMG! get your skates on ladies and gentlemen & make no mistake come the 16th December there will be a proud new owner of [the property].

[21] The appellants said that this wording, focusing on the (incorrect) RV, was written specifically to target those looking for a bargain or a quick sale, and attracted property investors looking to re-sell and make a quick profit. They said it painted a very clear picture that they had no alternative but to sell, which misrepresented their situation, and made them sound desperate. They said they did not instruct Mr Drumm that they were "on the market with no plan B", but had in fact instructed him that if they did not achieve their expected price, they would not sell. They also said they instructed Mr Drumm not to refer to the RV, as it dated from before significant modifications had been done to the property. They said Mr Drumm's response was that he was the professional, and they should trust him.

[22] Mr Drumm arranged for a property staging company to submit a quote for staging. The appellants said in their complaint that they did not need, and could not afford, staging, but Mr Drumm insisted that it was the right thing to do, and they felt railroaded into it. The staging installation involved moving the appellants' heavy marble and glass table. The complainants said that during the installation, the wooden laminate floor was scratched, and the table was damaged, and that dealing with the home staging company was very difficult. Their complaint was that Mr Drumm was present and involved in the process when the floor was damaged, but later denied it, and that he suggested putting a rug over the damaged floor to conceal the scratch from potential buyers.

[23] The auction sale of the property was scheduled for Saturday 16 December. On 15 December, Mr Drumm provided the appellants with a marketing report giving feedback from the marketing period. They said he had not previously provided any feedback, despite requests. Most of the reported price indications were less than $500,000 (averaging $485,385), well below their expectation of $600,000. Price indications from prospective purchasers introduced by Ray White were not included in the report. The appellants say that those indications were all well above $500,000 (averaging ($560,000). They considered that the marketing report confirmed their view that Mr Drumm was not acting in their best interests.

[24] Mr Baker signed a Reserve Price form, stating a reserve of $590,000. However, as there were no registered bidders, the auction was re-scheduled for 21 December.

[25] The on-line marketing of the property was altered to correct the RV figure. The appellants provided a printout of the amended form of the marketing. The wording set out at paragraph [20], above, was amended to read:

> …
>
> Opportunity knocks today, with our vendors having bought elsewhere and committed to bringing down the Auction hammer on Thursday 21st December at 6.15 pm. Their instructions are "We are on the market with no plan B".
>
> …
>
> With a GV of just $445K, get your skates on ladies and gentlemen and forget any previous price expectations. Make no mistake, come Thursday 21st of December there will be a proud new owner of [the property].

[26] One bid was received at the re-scheduled auction on 21 December 2017. The bid was for $500,000, increased to $501,000 on the basis that certain chattels would be included. The appellants rejected this offer. There then followed a number of heated exchanges between the appellants and Mr Drumm and his manager, Mr Coffey.

[27] The appellants then determined to take control of the marketing themselves. They declined offers by the Agency to terminate the agency agreement, as they considered that a change of agency would send a negative message to prospective purchasers, and hinder their efforts to sell their home for the best price. They also saw benefit in using the Agency to co-ordinate open homes, while they undertook the viewings. They prepared a revised TradeMe advertisement, which did not highlight

the RV, and stated a "BEO" (Buyer Enquiry Over) figure of $579,000. They say that Mr Drumm insisted on this figure being used, rather than a BEO of $590,000, which was their preference.

[28] An open home was held on 7 January 2018. An offer to buy the property for $603,300 was made the same day, which the appellants accepted.[4]

[29] On 16 January, Mr and Mrs Baker received a "settlement invoice" from the Agency, recording that $13,559.92 had been deducted from the deposit paid by the purchasers, comprising a "real estate fee" of $11,449.50 (which was stated to be commission charged at 1.8% of $602,750 and a further charge of $600,) GST of $1,717.42, and "marketing" charged at $393.00. In a covering email, the Agency's office administrator noted that "the full advertising spend was $1,430 – as discussed we have only charged $393 as per the marketing schedule initialled by Michelle".

[30] In an email to the Agency the same day, Mr Baker complained that he had not agreed to pay any more than $10,000 commission. In an email to the Agency on 18 January, Mrs Baker stated that she did not "have a copy of the initialled marketing schedule you are referring to in support of your claim, please can you send me a copy". In response, the Agency sent the appellants copies of a document headed "The Advertising campaign for Drumm, Tommy's Real Estate", which has Mrs Baker's initial on it, and a copy of a document headed "Marketing schedule for [the property]"

[31] The appellants said in their complaint that the Agency's commission invoice was fabricated, and that they were charged $1,430 for marketing, which they had not agreed to. They further said that while the marketing charge was reduced to $393 after they challenged it, they were in fact charged for TradeMe advertising, which they had expressly rejected, having paid for a TradeMe advertisement two days before Mr Drumm approached them.

[32] At the first hearing before the Tribunal, Mrs Baker said that she accepted that her initials are on the "advertising campaign" document, but she did not know when she initialled it, or when the entries were made on it. She reiterated that she would

---

4 The purchase price was later reduced to $602,750 by agreement.

never have agreed to pay anything for a TradeMe advertisement, and made it clear that the advertisement they had paid for was to be used. She further said that she saw this document for the first time when it was sent to her by the Agency, after the property was sold.

[33] One of the appellants' neighbours ("Mr P") was recorded by Mr Drumm as having attended an open home on 7 December. The appellants' evidence was that after the sale, Mr P told them that Mr Drumm (having asked what price Mr P saw the property at) said to him: "What if I told you, you could have it for $520k", and Mr P felt this was unfair to them. The investigator referred to the appellants' evidence in his investigation report, but said that they had failed to identify the neighbour, and the neighbour had not provided any material for the enquiry.

[34] After reading the investigator's report, the appellants met with the investigations team leader. He confirmed that they had provided Mr P's contact details to an Early Resolution Team member, who had saved them in the file management system for the complaint. However, they were not brought to the investigator's attention. The investigations team leader conducted a telephone interview of Mr P, on 16 November 2018 and prepared a record of the interview. Mr P said he knew the appellants wanted "$600,000 plus" for the house. Mr P is recorded as saying:

> …
>
> [Mr Drumm] was lowballing what the Bakers wanted. He was offering a lower price. I can't remember what words he said as it was near the beginning of the year. I can't remember the figures he mentioned. It may have been around $450,000 to $500,000 but it was so long ago I'm not sure if this is right or not.
>
> I told [Mr Baker] about this but this was after the house was sold. He told me he wasn't happy with the other agents as well.
>
> I hope the agent doesn't get into trouble because he was a nice guy. I just felt what he was saying about the price wasn't right as I knew the Bakers wanted more and he shouldn't have offered a lower price.

The appellants' complaint

[35] The appellants set out their complaint to the Authority in a lengthy document, with copies of relevant documents attached as appendices.

[36] We paraphrase the Committee's summary of the appellants allegations against Mr Drumm in its second decision:[5]

[a] Mr Drumm misled them about the commission rate on the sale and failed to honour the agreed rate;

[b] he amended the agency agreement after it was signed and failed to provide them with a copy until after several weeks;

[c] he misled prospective purchasers about the price the appellants would accept for the property;

[d] he included the RV in the marketing material when instructed not to by the appellants;

[e] he was present when the wooden floor of the property was damaged and later claimed it could not be determined when it happened; and

[f] he incurred and charged the appellants for marketing costs they had not agreed to.

[37] The appellants also contended that the Agency failed to honour an offer of complimentary membership at a local golf club for one year. This complaint was maintained at the time of the Committee's second decision, but not pursued by the appellants in their second appeal. We are not required to give any further consideration to this issue.

---

5 Committee's second decision, at paragraph 1.4.

The licensees' response

[38] Mr Drumm responded to the appellants' complaint as set out below.

[a] At the time he listed the property, the appellants had been on the market for some time, had not received any offers, and were extremely anxious about missing out on buying the boat.

[b] He made a point of giving the appellants a copy of the agency agreement at the time of listing, because they had complained that their previous agent had failed to give them one. He said he gave the appellants a green "Tommy's" file box at the same time to keep their documents in.

[c] Although the appellants indicated they only wanted to pay $10,000 commission, they discussed options and eventually agreed on commission of 1.8% of the purchase price plus an administration fee of $600 and GST, and the commission charged was in accordance with that agreement.

[d] While the first print of flyers for the property had the incorrect address and RV, as a result of the rapid 24-hour turnaround required to have them ready for the open home, the errors were rectified with a reprint as soon as he was made aware of them, at no cost to the appellants.

[e] The appellants were able to review the advertising at any time, and did so while the Agency had the listing. The RV was included as a matter of fact and was readily available online. He had discussed with the appellants that a low RV would draw more interest.

[f] He had discussed with the appellants that an auction close to Christmas was going to need a serious call to action, and a campaign stating "highly motivated vendors" was the best way to make things happen. He said it was only after he gave feedback from buyers who did not see the value of the property at the appellants' expected level that they questioned the advertising.

[g] He had no way of knowing when the damage to the floor occurred, and suggested it could have been when the appellants themselves moved the table later. We note that Mr Drumm later told the Authority's investigator that he was present when the floor was scratched.

[h] He did not know who the neighbour was who the appellants said attended an open home, however, he always asks purchasers where they see the value of a property. He said he would never make a statement that someone would be able to own the property for any amount.

[i] The amount the appellants were charged for advertising was what was "verbally" agreed at the time of listing, but the auction fee of $600 was put into advertising and he paid everything other than $393, which had been signed for by Mrs Baker.

[39] Mr Drumm made a further statement to the Committee prior to its second decision. In addition to repeating the statements summarised above, he made the additional comments summarised below.

[a] A commission of $10,000 is below the average real estate fee in Wellington. Mr Drumm said that given the already heavily discounted agreed commission, the suggestion of fraud and fabricating an agreement is absurd and ignores the work that goes into marketing and selling a property. He said that if the appellants' property had sold for $580,000 (a figure suggested by the appellants), the difference between the agreed commission and the flat fee claimed by the appellants would have been $440, which would have been completely absorbed by marketing costs that he funded himself.

[b] He had spoken in depth about many facets of the agency agreement, including the risk of paying double commissions, as the property had been listed with another agency. Mr Drumm said that the complainants are self-employed people and he would have expected them to be familiar with reading and understanding contracts.

[c] The agency agreement set out the agreed commission rate and there was no reference to a flat fee of $10,000. There was no evidence that anything material to the contract had been changed. He said that the Agency's agency agreements have carbon copies, so it is simply a matter of separating them and leaving a copy with the vendor client. He said that the "TBA" note on the bonus commission structure was most likely a result of discussions at the time the agreement was signed, in being a note he made on his copy of the agreement as he and the appellants were discussing it, and had no impact on the commission charged.

[d] At no stage were the appellants' instructions not followed, the appellants sent emails and texts critiquing the marketing, and the marketing was an organic situation with new images being updated and scripts being refreshed and added intermittently.

[e] Typically, there would be at least one week to prepare to take a new listing to market, and it was unfortunate that in the 24 hours between obtaining the listing and marketing the property, a couple of mistakes were not picked up in the flyers. He was unsure what the issue was about the on-line marketing, or whether the claimed issue was in the digital or print copy, but if he had been informed of any errors, they would have been corrected immediately.

[f] Moving the appellants' table was carried out under Mrs Baker's supervision, and nothing was said about the floor being scratched when the table was first moved.

The appeal issues

[40] The Committee's decision to take no further action on the appellants' complaints against Mr Drumm, and to take no further action on its "own motion" investigation into the Agency, was made pursuant to s 89(2)(c) of the Act. We will address the Committee's reasoning in its second decision by reference to the appeal issues, that is, whether the Committee erred in finding that:

[a] it would not uphold the appellants' complaint that the agency agreement was fraudulently altered, and the signed agency agreement was prima facie evidence that Mr Drumm and the appellants agreed to commission at the rate stated in the agreement;[6]

[b] it was not satisfied that Mr Drumm misled prospective purchasers as to the appellants' price expectation;[7]

[c] on the balance of probabilities, it was satisfied that the flyers were corrected after the errors were pointed out;[8]

[d] it was not satisfied that Mr Drumm ignored their instructions as to marketing the property;[9]

[e] it was not satisfied that Mr Drumm had fraudulently charged the appellants for advertising;[10]

[f] it considered that Mr Drumm had acted in good faith in relation to recommending the staging company;[11] and

[g] it was satisfied that Mr Coffey and the Agency had complied with their obligations as to supervision.[12]

[41] The issues in the present case are factual: whether the Committee reached the right decision on the evidence before it. Pursuant to s 111(3) of the Act, the appeal to the Tribunal is by way of rehearing. That is, the Tribunal considers the material that was before the Committee, together with submissions made by or on behalf of the parties. An appeal against a decision to take no further action under s 89(2)(c) is a "general appeal". The Tribunal is required to make its own assessment of the merits

---

6 Committee's second decision, at paragraphs 3.1–3.13.
7 At paragraphs 3.14–3.24.
8 At paragraphs 3.25–3.26.
9 At paragraphs 3.27–3.30.
10 At paragraphs 3.31–3.32.
11 At paragraphs 3.33–3.35.
12 At paragraphs 3.41–3.42.

in order to decide whether the Committee's decision was wrong.[13] It is for the appellants to satisfy the Tribunal, on the balance of probabilities, that the Committee's decision was wrong.

The complaint that Mr Drumm fabricated the agency agreement

The Committee's second decision

[42] The Committee found that the handwritten note on the agency agreement "for every 10k over $560,000 a bonus of —— + gst" was an indication that Mr Drumm had had a discussion with the appellants and was attempting to procure an incentive payment. It found that as the amount of the incentive was never agreed, it was reasonable to assume that no incentive payment was agreed upon. It further found that the insertion of "1.8%" aligned with the "estimated commission payable" of $10,080 on a sale at $560,000. It also referred to Mr Drumm's evidence that the insertion of "TBA" on the appellants' copy of the agreement was to ensure that there was no ambiguity that a bonus commission payment had not been agreed.[14]

[43] The Committee found that Mr Drumm's evidence regarding the commission rate and amendments to the agency agreement was, on the balance of probabilities, the most likely scenario: that while a bonus fee structure was not successfully negotiated, the agreement reflected agreement reached on commission of 1.8% plus $600 plus GST. The Committee accepted Mr Drumm's assertion that it would have been absurd to commit fraud and fabricate a deal for such a small additional monetary gain.[15]

[44] It found confirmation of Mr Drumm's having acted in a professional manner in other aspects of the formation of the listing agreement: his having advised the appellants as to the risk of paying double commission and as to the steps needed to be taken to cancel the existing contract, and his having taken advice from the Authority regarding cancellation of the existing contract.[16]

---

13 See *Austin Nicholls & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141, and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112].
14 Committee's second decision, at paragraphs 3.5, 3.6, and 3.10.
15 At paragraph 3.11.
16 At paragraphs 3.11 and 3.12.

Submissions

[45] Ms Paterson submitted that an allegation of fraud is a serious matter and requires evidence to prove it. She submitted that the appellants' evidence had not satisfied the onus of proof for the serious allegation that Mr Drumm fraudulently altered the agency agreement.

[46] Ms Paterson further submitted that it would not make sense to make a fraudulent amendment to the agency agreement for a small additional monetary gain (the difference between a flat fee of $10,000 plus GST, and commission at 1.8% plus $600 plus GST). She submitted that it is more likely than not that the statement of commission at 1.8% plus $600 plus GST was the outcome of an agreement between the appellants and Mr Drumm.

[47] However, Ms Paterson also submitted that the Committee had not addressed whether Mr Drumm had complied with r 9.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") which required him to give the appellants time to consider the agency agreement before signing it, and whether he failed to give the appellants a copy of the agency agreement after it was signed (as required by ss 126(1)(c) and 132 of the Act).

[48] Mr Baker submitted that the appellants had not agreed to pay commission at 1.8%. He questioned why, if there were such an agreement, Mr Drumm would have inserted "TBA" on his copy of the agency agreement. He further submitted that Mr Drumm was either lying about having given the appellants a copy of the agreement, or he had not told them that the agreement provided for commission at 1.8%.

[49] As recorded earlier, Mr Drumm submitted to the Committee that he had explained all facets of the agency agreement to the appellants, and that he had taken pains to give them a copy, as they had said they had not been given one by their previous agent. He did not wish to add to those submissions.

Discussion

[50] The Committee was required to consider whether Mr Drumm had breached any of his professional obligations under the Act and Rules. We accept Ms Paterson's submission that the Committee did not address whether he was in breach of those obligations. The appellants' complaint regarding the agency agreement required consideration of rr 9.7 and 10.6 of the Rules, which provide:

> **9.7** Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must–
>
> (a) recommend that the person seek legal advice; and
>
> (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
>
> (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).
>
> **10.6** Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing–
>
> (a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual $ amount) or commission payable by the client, based on the appraisal provided under rule 10.2:
>
> (b) when the agency agreement ends:
>
> (c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur:
>
> (d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c):
>
> (e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

[51] Sections 126(1)(c) and 132 of the Act also required consideration:

> **126 No entitlement to commission or expenses without agency agreement**
>
> (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless–
>
> …
>
> (c) A copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.

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.

[52] We accept Ms Paterson's submission that an allegation that a licensee fraudulently created or altered an agency agreement (or any other document) is a serious allegation. While the standard of proof for such an allegation remains the balance of probabilities, the Tribunal will require there to be sufficient evidence before being satisfied that the allegation has been proved to that standard.

[53] As recorded at paragraph [10], above, the appellants say they told Mr Drumm on 4 December that he had to match the Tall Poppy flat fee of $10,000 plus GST and were noncommittal as to his proposal of a 1.8% fee. Mr Drumm agreed that the appellants had indicated they only wanted to pay $10,000 but said that they discussed and negotiated options and eventually agreed on the 1.8% structure.

[54] It is evident that there were discussions as to the fee. As recorded at paragraph [12], above, Mr Drumm first offered to "honour that other agency on 30% off the top of the $10k plus gst (for that buyer only)…" then (as recorded at paragraph [13]) on 5 December offered "that $10k plus gst fee I will even match this time .. but if we sell next year it's 3 percent of the sale price". The latter offer indicates that Mr Drumm was prepared to accept the flat fee, albeit for a restricted duration. There is no mention of a 1.8% fee in these offers.

[55] The only evidence of an agreement to pay a 1.8% fee is that that is what is stated on the handwritten insertion on the agency agreement, and both appellants signed the agreement. The appellants say that Mr Drumm was in a hurry when he brought the agreement to them to be signed on 6 December, they did not have time to read it, and there was no discussion about it. While Mr Drumm said that he "spoke in depth about many facets of the agreement", he did not say that he did so at the time the appellants signed the agency agreement, or that he specifically referred to the wording as to commission. He did not challenge the appellants' statement that he was in a hurry when he came to get the agency agreement signed. Further, he did not have any separate written record of the appellants' having agreed to a 1.8% commission.

[56] We have concluded that it is more likely than not that Mr Drumm completed the agency agreement with handwritten insertions (including as to the 1.8% commission) when he first visited the property on 4 December. We accept that Mr Drumm explained some facets of the agency agreement, but we are satisfied on the balance of probabilities that he did not make clear to the appellants that they were agreeing to a 1.8% commission structure. It is clear that the commission rate was important to the appellants and, as Mr Drumm recognised, they did not want to pay more than a flat fee of $10,000. We find that it is more likely than not that had the 1.8% commission been made clear to them, the appellants would have challenged Mr Drumm on the point.

[57] We accept the appellants' evidence that the signing was hurried. That conclusion is supported by the fact that while both appellants signed it, they did not both initial all pages. They both initialled alongside the handwritten addition of the reference to the termination of the Ray White agency, but neither initialled the additions relating to the commission.

[58] We also accept the appellants' evidence that Mr Drumm did not leave a copy of the agency agreement with them after it was signed, and they did not have a copy until asking for it after an open home on 17 December (as recorded at paragraph [18], above.)

[59] We find on the balance of probabilities that if the appellants had been given a copy of the agency agreement on 6 December when they signed it, they would have noticed the commission provision and would have challenged Mr Drumm about it. The fact that they did not do so lends support to their claim that they did not have a copy. Further, as they were not given a copy of the agency agreement at the time, they were not given the opportunity to obtain legal advice.

[60] We note Mr Drumm's submission that the appellants are self-employed, and he expected that they would be familiar with reading and understanding contracts. Whatever knowledge and understanding the appellants had in relation to contracts did not relieve Mr Drumm of any of his obligations under the Rules.

[61] However, we are not satisfied that the evidence supports a finding that Mr Drumm fabricated the agency agreement in a fraudulent attempt to charge a higher commission. The commission was clearly set out on the agency agreement. It was not concealed from the appellants, and they could have noticed it and challenged it before they signed it.

[62] The fact that the copy of the agency agreement Mr Drumm provided to the appellants on 17 December had "TBA" inserted and initialled by Mr Drumm in the bonus provision in a different colour does not establish that the agreement was fabricated, as it had no effect on the commission payment. We accept as reasonable Mr Drumm's comment in his statement to the Committee before its second decision that it was most likely a note made by him at the time the agency agreement was signed, noting the possibility of a bonus commission.

[63] However, on the basis of the findings set out above, we find that Mr Drumm was in breach of ss 126(1)(c) and 132 of the Act and rr 9.7 and 10.6 of the Rules.

The complaint that Mr Drumm misled prospective purchasers as to the appellants' price expectations and failed to follow their instructions as to marketing the property

[64] We consider the Committee's findings summarised at paragraph [40] [a] to [c], above, together.

The Committee's second decision

[65] The Committee referred to Mr Drumm's marketing wording, which the appellants alleged specifically targeted those looking for a bargain or quick sale, by focussing on the RV and the appellants' need for instant action.[17] It noted Mr Drumm's evidence that he had discussed the need for an intense campaign (as the auction was being held close to Christmas), and that using the wording "highly motivated vendors" was acceptable to them.[18]

---

17 Committee's second decision, at paragraph 3.15. We note that the wording of the on-line advertisement set out by the Committee included the amended wording set out at paragraph [25] of this decision.

18 At paragraph 3.16.

[66] The Committee considered that Mr Drumm commenced the "incentive" advertising as a means to attract as many buyers as possible, within a tight timeframe. It also considered that Mr Drumm was confronted with a buyers' market that was closing due to the closeness of the Christmas holidays and that, despite having had 29 groups through the property, and 18 referrals from the previous Ray White agency, was not able to generate market value to the level of the appellants' expectations.[19]

[67] The Committee also found that while it was clear that Mr Drumm had his own ideas about advertising, there was insufficient evidence that this took place without discussion or contrary to the appellants' initial agreement.[20] It considered it to be "not uncommon" for a marketing strategy of enticing the greatest number of bidders to an auction, to "ultimately push bidding up the extra few percentage points to finalise a sale". It considered that while, in retrospect, the strategy had not worked as expected, it did not follow that Mr Drumm was not using appropriate endeavours to achieve a satisfactory outcome for the appellants.[21]

[68] The Committee concluded that Mr Drumm was acting in the appellants' best interests and was not actively endeavouring to undersell the property. It considered that he was using appropriate endeavours to generate as much interest in the property as possible, to give the auction of the property its best chance of success.[22]

[69] In reaching this conclusion, the Committee referred to the evidence of Mr P, the appellants' neighbour. It described his evidence as "hearsay, not remembered clearly due to the length of time since the event and not reported in context". The Committee went on to say that even if accepted as correct, the form of encouragement used by Mr Drumm was part of his "catch-all" strategy in the hope that a reasonable number of bidders would attend the auction and push the price up towards the appellants' hoped-for figure.[23]

---

19 At paragraphs 3.17 and 3.18.
20 At paragraph 3.29.
21 At paragraph 3.30.
22 At paragraph 3.24.
23 At paragraph 3.23.

[70] The Committee also referred to the appellants' complaint that Mr Drumm failed to give them corrected copies of the marketing flyers after they pointed out errors in the marketing material. The Committee found that it was more likely than not that the errors had been rectified immediately. It considered that without evidence of continued mistakes in the marketing material, there was insufficient evidence to tip the balance of probabilities in favour of the complainants' allegation.[24]

Submissions

[71] Mr Baker's submissions focussed on the issue of the incorrect flyers. He submitted that the Tribunal found in its first decision that there were no hard copies of the reprinted flyers used in the auction campaign before the Committee, and that it was not clear on what evidence the Committee had found that the flyers had been reprinted, as Mr Drumm claimed. Mr Baker submitted that Mr Drumm had still not provided hard copies of the flyers.

[72] On the issue as to whether Mr Drumm misled purchasers, Ms Paterson submitted that there was insufficient evidence to prove the appellants' allegations, and that the Committee did not err in concluding that Mr Drumm's marketing of the property should not attract a finding of unsatisfactory conduct. She submitted that it did not follow from the fact that the offers received were lower than the appellants' expectations that Mr Drumm included the RV in the marketing material, and undertook a marketing strategy with the purpose of misleading prospective purchasers.

[73] Regarding the evidence of Mr P, the neighbour, that Mr Drumm was "lowballing" what the appellants wanted for the property, and offering a lower price, Ms Paterson submitted that it was open to the Committee to prefer Mr Drumm's "clear and specific" evidence over Mr P's "vague and non-specific" evidence.

---

[24] At paragraphs 3.25 and 3.26.

Discussion

[74] The appellants' complaint as to Mr Drumm's conduct required consideration against the following Rules:

> **5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
>
> **9.1** A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.
>
> **6.4** A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer.
>
> **9.4** A licensee must not mislead customers as to the price expectations of a client.

We observe that the Committee did not refer to any of these Rules.

[75] It is clear that the appellants' price expectation for the property was $600,000. That was the price they put on the property when they advertised it on TradeMe, and it is the price they told Mr Drumm they wanted. It cannot be said to have been an unrealistic price, as it was at the mid-point of Mr Drumm's appraisal range of $540,000 to $620,000. Mr Drumm knew that was their expectation.

[76] In *Commerce Commission v Whitehead*,[25] her Honour Justice Mallon held that it is misleading conduct to indicate a price for a property that is below the vendor's price expectation. Her Honour said, concerning a "BEO" price of $380,000 (where, on the seller's evidence, she had made it clear that she wanted to receive, net of commission, $400,000):[26]

> That [BEO] guide cannot be misleading. … the BEO price sets the seller's lowest possible acceptable price. The BEO price will be misleading if there is no prospect of an offer over the BEO price, but below some higher desired price, being accepted (just as a Buyer Enquiry Range is misleading if there is no prospect of an offer being accepted at the lower end of the range indicated). (The same would apply to "negotiation from $380,000" or Buyer Budget Over $380,000" advertising.)

[77] Her Honour said as to determining whether price guidance is misleading:[27]

---

25 *Commerce Commission v Whitehead* HC Wellington, CIV 2006-485-88, 4 July 2007.

26 At paragraph [49]. "Buyer Enquiry Over" (BEO) is analogous to "Buyer Budget Upwards of" (BBU)).

27 At paragraph [72](b).

> … If the seller has indicated that, although she hopes and expects to get a higher price, she is prepared to consider any offer that is over the BEO price, then the advertising is not misleading. If, on the other hand, the seller has said that she will not go below her expected price, then a BEO price that is below her expected price is misleading.

[78] The Tribunal applied *Commerce Commission v Whitehead* in its decision in *Mabruk v Real Estate Agents Authority (CAC 409)* when finding that a Complaints Assessment Committee had not erred in finding that a licensee had engaged in misleading conduct, and found him guilty of unsatisfactory conduct, in referring to a "BBU" of $595,000 when the vendor's bottom line was $700,000 and there was no prospect of an offer being accepted at the indicated level.[28] Similarly, in *Complaints Assessment Committee 2001 v Sheldon*, the Tribunal found a licensee had breached rr 9.1 and 9.4 when he sent texts to prospective purchasers of a property advising that "interest is expected in excess of $1.1 million", when the vendors' instructions were that they would not sell the property for less than $1.2 million.[29]

[79] In both of these cases, the licensee's strategy gave prospective purchasers the incorrect impression that the property could be purchased for a sum that was considerably less than the vendors' expectation.

[80] In both cases the licensee employed a strategy aimed at bringing prospective purchasers to the property. The Tribunal accepted that the licensees intended to generate offers from which they could negotiate with the offerors in order to achieve an acceptable sale price. The Tribunal also accepted that this may have been a reasonable marketing strategy. However, if licensees want to employ such a strategy they should ensure that their client vendors are aware of, and agree to, the strategy. Good practice would require licensees to obtain written confirmation of the vendors' agreement.

[81] In the present case, both versions of the on-line marketing (as set out at paragraphs [20] and [25], above) convey the very clear message that the property could be purchased for less than the appellants' expectation of $600,000. The revised version set out at paragraph [25] even invited prospective purchasers to "forget all

---

28 *Mabruk v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 74, at [34]–[36].
29 *Complaints Assessment Committee 2001 v Sheldon* [2021] NZREADT 08, at [32]–[34].

previous price expectations". The fact that the only offer received was for $501,000, which was not acceptable to the appellants, demonstrates that prospective purchasers were misled as to their expectations.

[82] We have referred at paragraphs [33] and [34], above, to the evidence of the appellants' neighbour, Mr P. The appellants gave the Authority his contact details, but the attention of the Authority's investigator was not drawn to them. The appellants were not made aware of this until they saw the investigator's report to the Committee, in which he said that the appellants had failed to provide contact details for the neighbour.

[83] The neighbour was spoken to by the Authority's investigations team leader prior to the Committee's second decision. By the time the neighbour was spoken to, some 11 months had passed since the neighbour had attended an open home at the property. While Mr P was uncertain as to the figure mentioned by Mr Drumm, his statements that Mr Drumm "was lowballing what the Bakers wanted" and "was offering a lower price" were clear.

[84] The Committee characterised Mr P's evidence as "hearsay" and gave it little weight. It was a statement of evidence taken by an Authority investigator as to what Mr Drumm said to Mr P. There was nothing in the circumstances relating to the statement that would suggest that it was inherently unreliable. It was evidence that could have been put to Mr Drumm for response. Even if Mr P's evidence was inadmissible hearsay (and we are not required to rule on the point) it could be admitted by both the Committee and the Tribunal pursuant to their respective powers under ss 88(1) and 109(1) of the Act.

[85] We are satisfied that the Committee erred in giving little weight to Mr P's statement. In dealing with any concern as to the clarity of Mr P's memory the Committee should have taken into account that the delay in obtaining his evidence was not caused by the appellants. Having taken that factor into account, we accept Mr P's evidence that Mr Drumm conveyed to Mr P that the property could be bought for well below the appellants' price expectation.

[86] We find that Mr Drumm breached rr 6.4 and 9.4.

[87] We turn to the issue of whether Mr Drumm failed to follow the appellants' instructions. They made it clear that they did not want him to emphasise the RV of the property, and they had not instructed him that they "had no plan B". We accept that Mr Drumm was employing a marketing strategy in which he hoped that by suggesting that the property would be obtained for a lesser price, he could bring prospective purchasers to the property, secure offers from them, and negotiate with the offerors to obtain a sale at a price at or near to the appellants' expectation. We accept that that may be a reasonable marketing strategy.

[88] However, as noted earlier, if Mr Drumm wished to employ such a strategy, he had to ensure that the appellants were fully aware of it and agreed to it. Reasonable licensees would ensure that they had a written record of the vendor's agreement to pursue such a strategy.

[89] Mr Drumm did not suggest that he provided the marketing material to the appellants for their approval in advance. Nor did he suggest that he obtained written confirmation from the appellants agreeing to his marketing strategy. He said that the appellants agreed to a strategy of "highly motivated vendors", but that was not what the marketing material said. Further, it is clear from the communications from the appellants to Mr Drumm that they were not happy with his marketing strategy, and that they asked him to take the on-line marketing down. He did not do so, and the marketing strategy was not changed until after the failed auction.

[90] We note the Committee's reference to the number of groups who viewed the property before the auctions. However, the fact that Mr Drumm's strategy resulted in a number of parties going through the property before the auctions does not absolve him of liability to comply with his obligations under the Rules.

[91] We are satisfied that in pursuing his marketing strategy Mr Drumm failed to act in accordance with the appellants' instructions, in breach of r 9.1.

[92] We turn to the appellants' complaint that Mr Drumm failed to provide them with copies of corrected marketing material. It is evident from the wording set out at paragraphs [20] and [25], above, that the GV of the property was corrected from $435,000 to $445,000. It is also evident, from the fact that Mr Baker complained to Mr Coffey about the corrected flyer, that he was aware of the corrections. No disciplinary response is required in respect of the errors.

[93] However, there was no evidence before the Committee (either before its first or second decision), or the Tribunal, of hard-copy of the corrected marketing material. The Authority's investigations team leader asked Mr Drumm for a copy of the corrected marketing flyer. In his response dated 10 January 2020, Mr Drumm said a link had "been emailed prior to Christmas" (we assume Christmas 2019). While the Bundle of Documents filed by the Authority for the second Tribunal hearing includes copies of email exchanges which appear to refer to corrections to the on-line marketing, there are no hard copies of the corrected flyers. Mr Drumm also explained that the Agency seldom keeps flyers for reference, in part because they are moving to a paperless office, and also because keeping copies of flyers that have been changed or updated may lead to the possibility of mistakes.

[94] We are not persuaded that the Committee was wrong to decide to take no further action on this aspect of the appellants' complaint, as it is apparent that the errors in the flyers (in particular the error as to the GV figure) were corrected. We accept as reasonable Mr Drumm's explanation for the absence of hard copy of the flyers, in his email of 10 January 2020.

The complaint that Mr Drumm incurred and charged the appellants for marketing costs

The Committee's second decision

[95] The Committee considered that the fact that Mrs Baker initialled the bottom corner or the document "The Advertising campaign for [the property]" "next to the handwritten addition "Client pays 393 on settlement/withdrawn" confirmed that agreement was reached for payment of that sum. It considered that although the

appellants submitted that the additional wording could have been added at any time, there was no evidence before the Committee to persuade it that that was the case.[30]

Submissions

[96] We have recorded earlier that the appellants told the Committee that they had not agreed to any marketing costs and that they were adamant that they would not pay for TradeMe advertising, as they had withdrawn their own TradeMe listing at Mr Drumm's insistence. They challenged the marketing invoice (totalling $1,430) they were sent after the sale of the property. They said the Agency told them the "advertising campaign" document had been initialled by Mrs Baker at the time they signed the agency agreement. They challenged the authenticity of this document and Mr Coffey reduced the amount payable by them to $393.

[97] Mr Drumm submitted to the Committee that the initial marketing invoice sent to the appellants was for what was "discussed and verbally agreed" with the appellants at the time of listing. He said that once the appellants made him aware that they had no intention of paying the full marketing invested ($1,430), they were only invoiced for the amount Mrs Baker had signed for ($393), and he paid the balance of $1,037 himself. He also said that he had discussed with the appellants that instead of their paying the auction fee of $600 he, as auctioneer, would forgo that fee so that they could put that amount towards marketing. He said that he committed to the advertising plan they discussed but failed to get the appellants to sign off on it.

[98] Ms Paterson submitted that the Committee was correct to decline to make a finding as to whether the advertising document was fraudulently altered after Mrs Baker initialled it. She submitted that from the appellants' account, it appears that the marketing invoice was corrected when the issue was raised, and it was unlikely that the Agency set out to charge the appellants for unauthorised advertising. As to the appellants' contention that they did not authorise any spending on advertising, at all, she submitted that the Authority relied on the signed marketing campaign document.

---

30 At paragraph 3.32.

Discussion

[99] We have already referred to r 9.1, which provides that a licensee must "act in accordance with the clients' instructions". Rule 10.9 of the Rules is also relevant. It provides:

> **10.9** A licensee must not advertise any land or business on terms that are different from those authorised by the client.

[100] Ms Paterson referred the Tribunal to the decision in *Swain v Real Estate Agents Authority (CAC 20008)*.[31] In that case, the licensee deducted $133 from the deposit paid by a purchaser of a property and held by the licensee, for advertising.[32] The licensee had not obtained written authority from his vendor client for the expenditure. The vendor client alleged that it had been agreed that paid advertising for the property was unnecessary. The licensee claimed that he had oral agreement for the advertising from the client, following a meeting with the client. A Complaints Assessment Committee found that the licensee did not have authority for the advertising and found him guilty of unsatisfactory conduct.

[101] On appeal, the Tribunal found that the licensee did have authority for the expenditure, albeit not in writing. The Tribunal accepted that an important principle was involved, and that the licensee had breached s 122(3) of the Act by making a deduction from funds held by the licensee on trust, without proper authorisation. However, the Tribunal also considered that the amount involved ($133) could be regarded as *de minimis* in the context of the property having sold for $430,000, and a finding of unsatisfactory conduct was not required.[33]

[102] The present case is similar. Here, the appellants have submitted that they did not agree to marketing expenditure and Mr Drumm has submitted that they were charged for what they had agreed to pay.

---

31 *Swain v Real Estate Agents Authority (CAC 20008)* [2014] NZREADT 13.

32 The sum of $266 was initially deducted, for two advertisements, but the agency concerned refunded the cost of one advertisement, on the basis that the client's agreement was given after one advertisement.

33 *Swain*, at [47]–[48].

[103] The documents provided by the Agency are difficult to follow. The "advertising campaign" document is initialled by Mrs Baker. We have concluded that it is more likely than not that she initialled the document at the time she initialled and signed the agency agreement. However, without forensic examination of the original document, it is not possible to determine what was handwritten on the document when Mrs Baker initialled it.

[104] In particular, we cannot determine whether the calculations on the document and the handwritten statement "Client pays 393 on settlement/withdrawn" were written on the document before or after Mrs Baker initialled it. While we would not accept Ms Paterson's submission that the sum of $393 may be regarded as *de minimis* in the context of the eventual sale price, we are not persuaded that the Committee erred in finding that the appellants agreed to pay $393 for marketing, and that that is the amount they were ultimately charged.

[105] Accordingly, we are not persuaded that the Committee was wrong to decide to take no further action on this aspect of the appellants' complaint.

The complaint as to damage caused during staging

The Committee's second decision

[106] The Committee recorded that the appellants had clarified their complaint as not being a disagreement over costs, but "a moral issue about being honest and taking responsibility for your actions" and about the licensees being more cautious about who they recommend to provide services. It found that it was unclear from the evidence whether or not Mr Drumm was aware when the damage to the floor occurred.[34] The Committee also found that Mr Drumm acted in good faith in recommending the staging company and in assisting with lifting when asked to do so.[35]

---

34 Committee's second decision, at paragraph 3.34.
35 At paragraph 3.35.

Submissions

[107] In their submission to the Tribunal in support of their first appeal, the appellants submitted that had the Committee read the evidence, it would immediately have found that Mr Drumm "was heavily involved and by his own admission, responsible for the scratched floor". They also submitted that Mr Drumm had made inconsistent statements as to how and when the damage had occurred.

[108] Ms Paterson submitted that the Committee's conclusions as to the aspect of the complaint were correct, there was no evidence of intent by Mr Drumm to cause damage to the appellants' home, and it appeared that he had assisted where he could.

Discussion

[109] We note that the appellants did not suggest that Mr Drumm (or anyone else) intentionally scratched the floor. Their complaint, as recorded by the Committee, was that he had not been honest and taken responsibility. The appellants raised the issue in their complaint submitted on 8 March 2018 as follows:

> During the [home staging] installation our laminated flooring was scratched …

[110] We accept that Mr Drumm's evidence in relation to the scratched floor was inconsistent, as is evident from the following examples:

> … the vendor, staging company and myself … moved a table outside with towels under the legs … [the appellants] later complained that someone had scratched the floor. I have no way of knowing if the floor had been scratched when we first moved the table and it is possible the vendors or the homes stager could have scratched it swapping the table back. …[36]

> [Mr Drumm] is not certain he scratched the floor and could not discount that the [appellants] had scratched the floor themselves.
>
> …
>
> The [appellants] were present when he moved the table with the Home Staging employee.
>
> [Mr Drumm] has no independent recollection of scratching the floor at this time.
>
> …

---

[36] Mr Drumm's response to the complaint, May 2018

> [Mr Drumm] recalls the [appellants] alerted him to [the] scratch on the floor which he described as being 4–6 inches but cannot specifically recall when he was alerted to it.
>
> [Mr Drumm could not dismiss, that the damage may have occurred when the table was returned to its original position
>
> It is possible the damage occurred after the Open Home when the [appellants'] table was being returned to its original position.[37]

> When the floor was scratched, were you present? Yes[38]

> I was present when the table was first moved with [the home staging company]. This was carried out under [Mrs Baker's] supervision. What cannot be determined is at what point the scratch happened. I accept that it is possible that the scratch occurred when we first moved the table but I was not aware of this happening at the time. It is also possible that it happened when the table was moved again later by the owners or home stagers. …
>
> The staging company and myself were there together when we moved a table outside with towels under the legs and measured for a smaller table. This was carried out under [Mrs Baker's] supervision at the time. … I was not informed at the time of any issue and it was only a day or so later after the vendors' own table was reinstated they complained that someone had scratched the floor. I have no way of knowing if the floor had been scratched when we first moved the table as nothing was noticed or said at the time.[39]

[111] In the light of Mr Drumm's acknowledgement, in answer to a direct question from the investigator, that he was present when the floor was scratched, we find that the Committee erred in finding that it was unclear from the evidence when the damage occurred. We are satisfied that the floor was scratched when the appellants' table was first moved, and that Mr Drumm was present.

[112] Licensees have an obligation to be honest with clients, customers, and the Authority as the regulatory body for the industry. Honesty is essential to achieve the purpose of the Act, in particular, the purpose of maintaining public confidence in the industry. They also have a duty to co-operate with an investigation of an alleged breach of the relevant rules of professional conduct, to acknowledge error or wrongdoing, and to accept responsibility for their conduct.[40]

---

37 Record of interview of Mr Drumm by the Authority's investigator, 23 August 2018.

38 Mr Drumm's answer to a question from the Authority's investigator, prior to the Committee's first decision.

39 Mr Drumm's statement to the Committee, prior to its second decision.

40 See *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 19, at [115], and *Bolton v The Law Society* [1994] 2 All ER 496 (UKCA).

[113] However, we are not persuaded that the inconsistency in Mr Drumm's statements establishes that he was deliberately seeking to mislead the Committee, or that it requires a disciplinary response. We have concluded that a disciplinary finding is not required on this aspect of the appellants' complaint.

Disciplinary finding against Mr Drumm

[114] We have found that Mr Drumm:

[a] breached ss 126(1)(c) and 132 of the Act as to providing a copy of the agency agreement, and rr 9.7 and 10.6 of the Rules, by failing to recommend that the appellants seek legal advice, and provide them an opportunity to do so, before signing the agency agreement, and failing to explain adequately the commission provisions of the agency agreement;[41]

[b] breached rr 6.4 and 9.4 of the Rules, by misleading customers as to the appellants' price expectations for the property;[42] and

[c] breached r 9.1 of the Rules, by failing to act in accordance with the appellants' instructions as to marketing the property.

[115] We have concluded that the appropriate disciplinary response is a finding that Mr Drumm engaged in unsatisfactory conduct, pursuant to s 72(a) and (b) of the Act.

Mr Coffey

[116] As the appellants did not pursue the complaint regarding the Golf Club membership, the only remaining matter concerning Mr Coffey is the Committee's finding on its "own motion" inquiry as to supervision. The Committee found that both Mr Coffey and the Agency had complied with its obligations as to supervision.

---

41 See paragraph [62], above.
42 See paragraph [85], above.

[117] The Committee had before it statements from the appellants and Mr Coffey, and documents setting out the Agency's supervision policies. It also had copies of email correspondence between the appellants and Mr Coffey.

[118] We are not persuaded that the Committee erred in its determination to take no further action.

Observation: onus of proof

[119] We record that the appellants raised an issue as to the onus of proof; specifically, that the burden of proof was on them to prove their complaint. Lay complainants are often not legally represented and are unaware of the significance of the burden on them to prove their complaint. Many complainants believe that if a complaint is investigated, then all relevant evidence will be obtained by the investigator.

[120] We have reviewed the information on the Authority's website, and the printed information provided in the present case to the appellants. There appears to be nothing in writing advising complainants that it is their responsibility to prove their complaint, and (if a complaint is investigated) their responsibility to ensure that all relevant evidence is put forward. We commend to the Authority that it ensures that this information is provided to complainants.

Outcome

[121] We find Mr Drumm guilty of unsatisfactory conduct under ss 72(a) and (b) of the Act.

[122] The Tribunal directs that submissions as to penalty are to be filed as follows:

[a] by or on behalf of the appellants, **no later than Tuesday 23 March 2021.**

[b] by or on behalf of Mr Drumm, **no later than Friday 9 April 2021.**

[c] on behalf of the Authority, no later than **23 April 2021.**

[123] The Tribunal will consider the penalty submissions on the papers and issue a decision in due course.

[124] 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 G Denley
Member

_____
Mr N O'Connor
Member