

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 22

READT 027/2020

IN THE MATTER OF

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

BETWEEN

GLENN and MARY ANN JENKINS
Appellants

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 2001)
First Respondent

AND

MITCHELL ROBERTS and PEHIMANA
TAI RAKENA
Second Respondents

Hearing:

16 April 2021, at Christchurch

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances:

Mr Jenkins
Mr T Wheeler, on behalf of the Authority
Mr C Child, on behalf of Mr Roberts and
Mr Tai Rakena

Date of Decision:

14 May 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Jenkins (“the appellants”) have appealed against the decision of Complaints Assessment Committee 2001 (“the Committee”) issued on 5 June 2020, in which the Committee made a finding of unsatisfactory conduct against Mr Roberts and Mr Tai Rakena (“the Committee’s substantive decision”).¹ They have also appealed against the Committee’s decision issued on 25 August 2020, in which it made orders as to penalty (“the Committee’s penalty decision”).²

Factual background

[2] The appellants were the owners of a property in Christchurch (“the property”). In April 2018 they entered into an agency agreement with Mr Roberts and Mr Tai Rakena (“the licensees”) to market the property for sale, after they entered into an agreement to purchase another property. The licensees are licensed salespersons engaged at Twiss & Keir Realty Ltd, trading as Harcourts Twiss-Keir Realty (“the Agency”).

[3] The neighbouring properties of the appellants’ property are No 1 and No 9. At the time the property was marketed, construction was under way for a new house on No 9, with a concrete slab in place. We will adopt the Committee’s reference to this property as “the slab”. No 1 had an old villa on it, and the appellants were aware that the owners of No 1 had plans to demolish it and build a new house in 2019. We will adopt the Committee’s reference to this property as “the villa”.

[4] The appellants told the Committee that they advised the licensees as to the construction on the slab and of the plans to demolish and re-build the villa. They said they had received legal advice that they should disclose the construction on the slab and the planned rebuild of the villa. They also considered it to be a positive marketing point that the villa was to be rebuilt, as it had been damaged in the Christchurch earthquakes, it had an old fence and unsightly garage, and the villa and surrounding

¹ Complaint C32246 re Mitchell Roberts and Pehimana Tai Rakena, *Decision finding of unsatisfactory conduct*, 5 June 2020.

² Complaint C32246 re Mitchell Roberts and Pehimana Tai Rakena, *Decision on Orders*, 25 August 2020.

trees restricted sunlight to the appellants' property. They believed that this information could be used constructively in marketing the property, to provide assurance to prospective purchasers that the environment around it would be significantly enhanced in the near future.

[5] The licensees presented only one offer to the appellants, at \$1.5 million. The appellants' counter-offer of \$1.65 million was accepted on 12 June 2018. The appellants believed the property had been undersold.

[6] The appellants became concerned as to whether the purchaser had been told about the construction on the slab and the planned rebuild of the villa. On 27 June 2018 Mr Jenkins sent an email to the purchaser's solicitors, enquiring as to whether the "sales agents had given this information [that the slab was to be built on that year beginning in September, and that the villa was to be demolished and rebuilt later in the year] as they were instructed to do". The purchaser's solicitor responded (through the appellants' solicitors) that he had not been given any such information, he expected that something was going to happen at the slab, but was not aware of the situation regarding the villa. The solicitor recorded the purchaser's concern at the lack of information and non-disclosure. The purchaser then sought a reduction in the purchase price, and threatened to issue Court proceedings against the appellants.

[7] Mr Jenkins raised the issue with the licensees and the Agency. The licensees (through their solicitors) denied any knowledge of the "proposed development" and denied that the appellants had advised them of it.

[8] Settlement of the sale (scheduled for 27 July 2018) was delayed as the appellants initially refused to settle unless the purchaser withdrew the threat of Court proceedings. While the purchaser did not pursue a reduction in the purchase price, \$1,952.88 was deducted from the purchaser's settlement payment as interest for late settlement. Further, the purchaser reserved his rights to issue proceedings in relation to alleged misrepresentations as to the development of the villa.

Complaint

[9] Mr Jenkins complained to the Authority that the licensees had failed to follow their instructions to disclose pending construction on the slab and the pending demolishing and rebuild of the villa. He also complained that the manager of the Agency, Mr Twiss, provided an unsatisfactory response to their complaint to the Agency.

The Committee's substantive decision

[10] The Committee accepted the appellants' evidence. It rejected the licensees' contention that by signing "client warranties" in cl 13 of the listing agreement, the appellants were acknowledging that there was nothing relevant to disclose about the slab and the villa, and that if disclosure had been made to them it would have been recorded on the listing agreement. The Committee noted that cl 13 related to the "property being sold", not "neighbouring properties". The Committee concluded that cl 13 of the listing agreement did not assist the licensees.³

[11] The Committee found that the appellants' explanation as to why they wished to disclose what was happening with the neighbouring properties was credible: they considered the information would be beneficial to the sale, and had taken legal advice as to how best to disclose the information and what detail would be required.⁴

[12] The Committee also referred to an email provided by Mr Jenkins, from the salesperson who was the selling agent for the property they purchased who had visited the property on 5 March 2018 (shortly before the property was listed with the licensees). He had recorded being told about construction on the neighbouring properties. The Committee considered that this evidence supported the appellants' evidence that the pending construction on the neighbouring properties was disclosed to the licensees.⁵

³ Substantive decision, at 3.12–3.15.

⁴ At 3.23–3.25.

⁵ At 3.28.

[13] The Committee found that by not documenting and confirming in writing the appellants' instructions to disclose the pending construction at the slab, and the pending demolition and rebuild of the villa, and by not disclosing these to the purchaser, the licensees had failed to exercise skill, care, competence, and diligence in carrying out real estate agency work (in breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")), failed to provide information which should in fairness have been provided to the purchaser (in breach of r 6.4), failed to act in the appellants' best interests and in accordance with their instructions (in breach of r 9.1), and had breached their fiduciary duty to the appellants (in breach of r 6.1).⁶

[14] Except where it is necessary to refer to them individually, we will refer to the licensees' failure to document, confirm, and disclose the pending construction at the slab and the pending demolishing and rebuild at the villa as the licensees' "disclosure failures".

[15] The Committee was not satisfied that any unsatisfactory conduct had been established against the manager of the Agency, and determined to take no further action on the complaint against him. A Notice of Appeal against that determination was filed, but it was out of time and could not be accepted by the Tribunal.

The Committee's penalty decision

[16] The Committee placed the licensees' conduct in the range of moderate-level unsatisfactory conduct.⁷ It rejected the licensees' submission that their conduct was a "miscommunication" and that the failure to disclose the impending villa demolition was "an unfortunate mistake", due to a "discrete failure to record" the appellants' instructions. The Committee said that the licensees had failed to understand the seriousness of their conduct: they had not recorded in writing instructions given to them, or confirmed them in writing with the appellants, they had not disclosed the

⁶ At 3.32–3.33 and 3.38–3.39.

⁷ Penalty decision, at 5.11.

pending construction at the slab, and they had not disclosed the pending demolition and construction at the villa.⁸

[17] The Committee noted that while construction at the slab did not have an impact on the sale of the property, as it was apparent to anyone viewing it and there was no evidence that the purchaser had raised any issues as to the slab, that did not diminish the significance or importance of the licensees' disclosure obligations.⁹

[18] The Committee found that the licensees' failure to disclose the pending demolition and construction at the villa did have an impact on the sale, as the purchaser sought a reduction in the purchase price and threatened litigation. The Committee noted that the licensees' conduct put the appellants into a position where they did not want to settle the sale while there was a threat of litigation.¹⁰

[19] The Committee noted its power pursuant to s 93(1)(f) of the Act, to order a licensee to rectify an error or omission or (where it is not possible to rectify an error or omission) to order the licensee to make a payment as relief from the consequences of the error or omission. It recorded that the appellants had sought orders that the licensees reimburse them for legal fees due to late settlement (\$6,822.25), penalty interest due to late settlement (\$1,952.88), and for a refund of the full commission paid (\$47,552.50), compensation for their anticipated loss if the purchaser made a claim against them (\$50,000), and compensation for underselling the property (\$150,000).¹¹

[20] The Committee recorded that it had no jurisdiction to make an order for compensation for an "anticipated loss", or for "underselling" the property.¹² It also recorded that while it accepted that there was a direct causal connection between the licensees' disclosure failures and the legal costs resulting from the purchaser's request for a reduction in the purchase price and threat of litigation, it was not prepared to make an order for reimbursement of the appellants' legal costs as it was not clear from an invoice submitted by their solicitors what proportion of the costs were directly

⁸ At 5.5–5.6.

⁹ At 5.7.

¹⁰ At 5.8–5.9.

¹¹ At 5.14–5.18, 5.23.

¹² At 5.19–5.21.

attributable to the licensees' failures. However, the Committee took that into account in making an order for a partial refund of commission.¹³

[21] The Committee recorded that it had no jurisdiction to consider a refund of the Agency's share of the commission, as there was no complaint against the Agency. It concluded that ordering a refund of commission was a proportionate response to the licensees' failures. It ordered that each of the licensees was to refund \$3,000 of their commission share. The Committee noted that the level of fine that would otherwise have been imposed on the licensees had been reduced to reflect that order.¹⁴

[22] In its discussion of the level of fines, the Committee recorded that Mr Roberts had two previous disciplinary findings against him, and took them into account as aggravating factors. It recorded that there were no previous disciplinary findings against Mr Tai Rakena. It also recorded the licensees' submission that they had revisited their practice and had adopted a procedure for obtaining detailed instructions from vendors and recording those instructions in writing. It ordered Mr Roberts to pay a fine of \$3,000, and Mr Tai Rakena to pay a fine of \$1,500. It also ordered that each licensee was censured.¹⁵

The Jenkins' appeal

[23] The appellants have appealed against the Committee's substantive decision, contending that the licensees are guilty of misconduct. They have also appealed against the Committee's penalty orders. They contend that the fine ordered against Mr Roberts was too low, and that the Committee wrongly rejected their requests that the licensee be ordered to pay their full legal costs and penalty interest, and to pay compensation for under-selling the property and for their anticipated loss.

Principles as to appeals against decisions of Complaint Assessment Committees

[24] Pursuant to s 89(2) of the Act, having investigated the appellants' complaint, the Committee could determine:

¹³ At 5.17.

¹⁴ At 5.23–5.29.

¹⁵ At 5.32–5.40.

- [a] that the complaint be considered by the Tribunal (by way of a charge of misconduct under s 73 of the Act);
- [b] that it was proved that the licensees had engaged in unsatisfactory conduct (under s 72 of the Act); or
- [c] to take no further action on the complaint.

[25] The essence of the appellants' appeal against the Committee's substantive decision is that the licensees' conduct constituted misconduct, and the Committee was wrong to make a finding of unsatisfactory conduct. As is clear from s 89(2) of the Act (and as was explained to Mr Jenkins at the appeal hearing), the Committee did not have the power to make a finding of misconduct. If the Committee considered that there was evidence before it on which (if accepted by the Tribunal), the Tribunal could reasonably find the licensees guilty of misconduct, it could have referred the matter to the Tribunal on a charge of misconduct, pursuant to s 89(2)(a).¹⁶

[26] Mr Wheeler submitted on behalf of the Authority that the determination not to lay a charge of misconduct involves the exercise of a "prosecutorial discretion". He further submitted that the public interest does not support conduct being referred to the Tribunal, and the associated cost of a full evidential hearing, if "there is only a marginal prospect of misconduct being established". He submitted that a decision to lay misconduct charges is properly made where there is a "realistic prospect of those charges being established".

[27] That is not the correct approach. In its discussion of a submission as to prosecutorial discretion in its decision in *Maketu Estates Ltd v The Real Estate Agents Authority* (CAC 403), the Tribunal referred to its statement in *Dunn v Real Estate Agents Authority* (CAC 10043) that:¹⁷

Some of the [considerations relevant to prosecutorial functions] do not apply to a civil disciplinary matter under the [Act]. The civil nature of these disciplinary proceedings is an important factor in analysing the role of the Tribunal in considering an appeal under s 111 from a decision not to prosecute. ...

¹⁶ See *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [106].

¹⁷ *Dunn v Real Estate Agents Authority* (CAC 10043) [2012] NZREADT 56, at [13].

[28] To that we add that it would not be consistent with the consumer-protection focus of the Act to take a restrictive approach to appeals against Committees' determinations not to lay charges of misconduct. We consider that Complaints Assessment Committees routinely adopt the correct approach as to when a matter is to be referred to the Tribunal on a charge of misconduct, by considering whether there is before the relevant Committee evidence on which (if accepted by the Tribunal) a licensee could reasonably be found guilty of misconduct.

[29] An appeal to the Tribunal against a Complaints Assessment Committee's exercise of its discretion whether to lay a charge of misconduct will be allowed if the Tribunal is satisfied that the Committee erred in the exercise of its discretion by making an error of law or principle, taking irrelevant considerations into account or failing to take relevant considerations into account, or by making a decision that was plainly wrong.¹⁸ A decision that is "plainly wrong" is one that was not open to the Committee to make on the evidence before it.

[30] In the present case, if the Tribunal is not satisfied that the Committee erred in the exercise of its discretion in one or more of the ways set out above the appeal will be dismissed. However, if the Tribunal is satisfied that the Committee erred in the exercise of its discretion the appropriate outcome is that the unsatisfactory conduct finding is quashed and the matter referred back to the Committee for reconsideration. The Tribunal could not make a finding of misconduct against the licensees, as such a finding could only be made if the Committee had laid charges of misconduct.

[31] A Complaints Assessment Committee's decision as to penalty orders also involves the exercise of a discretion. Accordingly, the same principles will apply: the Jenkins' appeal will be allowed if the Tribunal is satisfied that the Committee made an error of law or principle, took into account irrelevant matters or failed to take relevant matters into account, or was plainly wrong.

[32] As with all appeals, the onus is on the appellant (in this case, Mr and Mrs Jenkins) to satisfy the Tribunal that the Committee erred.

¹⁸ See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, at [32], *Edinburgh Realty Ltd*, at [111], and *Maketu* at [32].

The appellants' application to submit further evidence

Submissions

[33] The appellants sought leave to submit a number of “then” and “now” photographs with their appeal submissions. These comprised photographs of the property and the villa at the time the licensees marketed the property, and photographs of the new construction following demolition of the villa. Mr Jenkins submitted that the photographs support the basis of their complaint against the licensees: that replacement of the villa with a brand new modern house, positioned differently on the site, has added significant appeal and value to the property by improving the outlook from the property, allowing more sunlight into it, and improving its general aesthetics and street appeal.

[34] The licensees opposed leave being given for the photographs to be submitted on the grounds that the application was filed very late in the appeal proceeding (ten working days before the hearing) and that the photographs would not substantially assist the Tribunal to determine the appeal. Mr Child submitted on behalf of the licensees that the photographs would not assist in determining the appeal against the Committee’s substantive decision, as they would serve only as evidence of the condition of the villa and in no way related to the conduct of the licensees. He further submitted that the photographs would not assist determination of the appeal against the Committee’s penalty orders, because whether or not the villa was rebuilt should not influence the extent of the licensees’ culpability for failing to disclose information.

[35] Mr Wheeler submitted for the Authority that the “then” photographs were before the Committee and are already before the Tribunal. He submitted that the “now” photographs will not have a material effect on the issues the Tribunal has to consider and leave should not be given for them to be submitted. He submitted that the photographs appear to be directed towards the penalty orders made by the Committee, in order to support a submission that had the prospective purchasers been informed of the plans to demolish the villa and rebuild on the site, they would have valued the property more highly. Mr Wheeler submitted that the photographs do not constitute

valuation evidence, so will not assist the Tribunal to determine that element of the appeal.

Discussion

[36] Pursuant to s 111(3) of the Act, an appeal against a determination of a Complaints Assessment Committee is by way of a re-hearing of the material that was before the Committee. That is, the Tribunal hears submissions by or on behalf of the parties and considers the evidence and other material that was provided to the Committee.

[37] However, in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)* the Tribunal accepted that it may give a party to an appeal leave to submit evidence to the Tribunal that was not before the Committee, if the Tribunal considers that it is just to do so. An applicant for leave must satisfy the Tribunal that:¹⁹

- [a] the evidence could not have been obtained by the party with reasonable diligence and provided to the Committee;
- [b] the evidence is relevant to the issues to be determined on appeal and will assist the Tribunal to determine the issues;
- [c] the evidence is cogent – that is, it would have an important influence on the outcome; and
- [d] the evidence is apparently credible.

[38] As Mr Wheeler submitted, the “then” photographs were before the Committee, and have been provided to the Tribunal. Leave is not required to refer to them on appeal. Leave is, however, required in respect of the “now” photographs.

[39] It is accepted that the “now” photographs could not have been provided to the Committee. It is also accepted that there is no issue as to the authenticity of the

¹⁹ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

photographs. However, the Tribunal accepts the submissions for the licensees and the Authority that admission of the “now” photographs would not assist the Tribunal to determine the issues on appeal.

[40] The essence of the appeal against the Committee’s substantive decision is that the licensees should have been charged with misconduct. The appellants do not challenge the Committee’s factual findings. The Committee accepted their evidence that they instructed the licensees to disclose the proposed construction at the slab and the demolition and rebuilding at the villa. It also accepted their evidence as to their reason for those instructions: that they had been advised to disclose the construction, and that the information would be beneficial to the sale, given that the villa was old and damaged, the fence was also old, the garage was unsightly, and the villa and trees on the site impacted adversely on sunlight at the property. The “now” photographs would not assist the Tribunal to determine whether the Committee was wrong not to charge the licensees with misconduct.

[41] Nor would the photographs assist the Tribunal to determine the appellants’ appeal against the Committee’s penalty orders. In particular, the photographs would not assist the Tribunal to determine whether the Committee erred in the fines it imposed, in ordering a partial refund of commission, or in declining to make orders as to reimbursement of legal costs or penalty interest, or in finding that it had no jurisdiction to make an order for compensation. Accordingly, leave is not given for the “now” photographs to be submitted on appeal.

The appeal against the Committee’s finding of unsatisfactory conduct

Submissions

[42] Mr Jenkins submitted that the licensees’ conduct (in particular that of Mr Roberts, in light of his previous disciplinary findings) constituted misconduct, not unsatisfactory conduct. He submitted that the disciplinary process appeared to be working in the best interests of the licensees as opposed to the public. He submitted that even when the decision was in favour of a member of the public, the consequence for the licensees was “miniscule”, and there is little incentive for the licensees to improve their behaviour.

[43] Mr Jenkins further submitted that as a result of the licensees' conduct, he and Mrs Jenkins remain exposed to being sued by the purchasers of the property for the licensees' misrepresentations and failures to disclose, as the purchaser refused the appellants' offer to cancel the agreement for sale and purchase and insisted on reserving their right to issue proceedings. He noted that only two years had passed of the six-year limitation period for issuing proceedings.

[44] Mr Child submitted that the appellants had failed to prove that the licensees' failures constituted misconduct. He submitted that there was no evidence before the Tribunal that the licensees anticipated or were aware of a risk that they might breach the Rules, and no evidence of any collusion or incentive that might have caused them to disregard the Rules. He submitted that this case involved an oversight and a failure to take reasonable care, which placed it squarely within the parameters of unsatisfactory conduct.

[45] Mr Wheeler submitted for the Authority that in determining whether the Committee erred in making a finding of unsatisfactory conduct rather than laying a charge of misconduct, the Tribunal should focus on the licensees' overall culpability, whether the licensees' conduct was "plainly sufficiently serious to establish a prima facie case of seriously incompetent or seriously negligent real estate agency work", and whether any evidence suggests wilfulness or recklessness in breaching professional obligations, such that "a prima facie case [for misconduct] under s 73(c) is established".

[46] Mr Wheeler further submitted that if the Tribunal agrees with the Committee's factual findings, it should find that the Committee was correct to determine that the licensees' conduct did not warrant referral to the Tribunal on misconduct charges.

Discussion

[47] We do not accept Mr Child's submission that the appellants were required to "prove that the licensees' conduct constituted misconduct". The onus on them when their complaint was before the Committee was to establish the facts of their complaint. The Committee's finding of unsatisfactory conduct against the licensees shows that

the Committee was satisfied that they had met that onus. On appeal, they are required to satisfy the Tribunal that the Committee erred in the exercise of its discretion to make findings of unsatisfactory conduct rather than lay a charge of misconduct. That does not require them to establish that the licensees are in fact guilty of misconduct.

[48] Nor do we accept Mr Child's submission that as there was no evidence before the Tribunal that the licensees anticipated or were aware of a risk that they might breach the Rules, and no evidence of any collusion or incentive that might have caused them to disregard the Rules, a charge of misconduct was not available. That submission may reflect the wording of s 73(c) of the Act, under which a finding of misconduct may be made where there is a wilful or reckless breach of the provisions of the Act or Rules.

[49] However, Mr Child did not refer to s 73(b) of the Act, under which a finding of misconduct may be made where there has been seriously incompetent or seriously negligent real estate agency work. His submission that the licensees' conduct involved "an oversight and a failure to take reasonable care, which placed it squarely within the parameters of unsatisfactory conduct", conflates the issue as to whether the failure constituted "mere" incompetence or negligence (in which case a finding of unsatisfactory conduct could be made under s 72) or "serious" incompetence or negligence (in which case a finding of misconduct could be made under s 73(b)).

[50] Further, we do not accept Mr Wheeler's (implicit) submission that a matter should be referred to the Tribunal on a charge of misconduct only where "the conduct is plainly sufficiently serious to establish a prima facie case" of seriously incompetent or seriously negligent real estate agency work. As stated above, the correct approach is that routinely followed by Complaints Assessment Committees, which is to refer a licensee's conduct to the Tribunal if the Committee is satisfied that there is before it evidence on which (if accepted by the Tribunal) the licensee could reasonably be found guilty of misconduct.

[51] In its substantive decision in the present case, the Committee did not give any indication that it had considered whether the evidence against the licensees could

reasonably lead to a finding of misconduct. It made a finding of unsatisfactory conduct, which it said was in the range of moderate-level unsatisfactory conduct.

[52] The Committee accepted:

- [a] the Jenkins' evidence that having discussed the matter with their solicitor, they disclosed the pending construction at the slab and the pending demolishing and rebuilding of the villa to the licensees, and instructed the licensees to pass this on to prospective purchasers;
- [b] the Jenkins' evidence that they considered that disclosure of the pending construction at the slab and the villa would be beneficial to the sale, as the villa was old and had been damaged by the Christchurch earthquakes, the fence between the property and the villa was old, the garage on the villa property was unsightly, and the villa and trees around it impacted adversely on sunlight on the property, supported by photographs of the property, the slab, and the villa;
- [c] that the Jenkins' evidence as to why they disclosed the pending construction at the slab and the villa to the licensees and instructed them to pass the information on to prospective purchasers was credible, consistent, and supported by another licensee who said he had also been told about the work;

[53] The Tribunal is satisfied that there was evidence before the Committee on which, if accepted by the Tribunal, the licensees could reasonably be found guilty of misconduct. An appropriate charge to reflect the Committee's view of the evidence would have been one under s 73(b) of the Act. The Tribunal is satisfied that it would have been open to the Committee to refer the licensees' conduct to the Tribunal in a charge of misconduct. If such a charge were to be heard by the Tribunal, it would be open to it (under s 110(4) of the Act) to make a finding of unsatisfactory conduct if it were not satisfied that the licensees were guilty of misconduct.

[54] However, in the light of the Committee’s characterisation of the licensees’ conduct as “moderate-level unsatisfactory conduct”, we cannot be satisfied that the Committee’s decision to find unsatisfactory conduct, rather than charge the licensees with misconduct, was plainly wrong. Accordingly, the appellants’ appeal against the Committee’s substantive decision must be dismissed.

The appeal against the Committee’s penalty orders

[55] Mr Jenkins submitted that the penalty orders against the licensees were insufficient, given the gravity of their conduct and its financial and emotional impact on them. We consider the penalty orders in the order in which the Committee addressed them.

(a) The appellants’ claim for reimbursement of legal costs, penalty interest and commission

Submissions

[56] Mr Jenkins submitted that the Committee was wrong not to order the licensees to reimburse the appellants for the penalty interest for late settlement and the legal costs associated with the licensees’ disclosure failures. He submitted that the Committee had not asked any questions to clarify their claims, when the appellants had thought their claims were clear.

[57] Mr Child acknowledged that pursuant to s 93(1)(f) of the Act the Committee could make an order that the licensees “rectify” their “error or omission” or (if rectification is not practicable) that they “provide relief in whole or in part from the consequences of the error or omission”. He submitted that there must be a direct causal connection between the findings of unsatisfactory conduct and any loss suffered by the appellants. He submitted that the licensees’ “error or omission” in the present case was their failure to confirm and record in writing the appellants’ instructions as to disclosure of the pending construction at the slab and villa. He submitted that the “consequence” of the “error or omission” was that the purchasers were not advised of the “prospect that the villa may be rebuilt at an unspecified time”.

[58] He submitted that the appellants' intervention by unilaterally contacting the purchasers about the pending demolishing and rebuilding of the villa, without involving the licensees, was a mitigating factor which should reduce the amount of relief available to the appellants. He submitted that the Committee's decision to order that each licensee refund a portion (\$3,000) of the commission received by them was an appropriate response, and reflected the fact that the licensees had facilitated the sale of the property and, save for the discrete findings in relation to their disclosure failures, their conduct was appropriate.

[59] Mr Wheeler submitted that although the licensees satisfied their engagement by assisting with the sale of the property, their conduct breached their duties to the appellants. He submitted that the Committee's order that the licensees refund part of their commission was an appropriate order, and met the principles as to penalties in disciplinary proceedings. He submitted that an order to refund a greater portion of the commission would have been overly punitive and would not have reflected their conduct.

Discussion

[60] Mr Child's characterisation of the licensees' "error or omission" does not reflect the Committee's decision. As is clear from the substantive decision the Committee found that the licensees failed to document and confirm in writing the appellants' instructions to disclose the pending construction at the slab and demolishing and rebuild at the villa and failed to carry out the appellants' instructions to disclose the pending construction to the purchasers. The consequences of the licensees' "error or omission" was that the purchasers first sought to lower the purchase price, then completed settlement reserving their rights to make a claim against the appellants.

[61] We are not persuaded that the Committee was wrong to refuse the appellants' claim for reimbursement of legal fees due to late settlement. The appellants submitted a copy of an invoice from their solicitors in support of this claim. As the Committee noted, the invoice contains no narrative as to the work done for which the fee was charged. The Committee accepted that there was a direct causal connection between the licensees' failure to disclose the pending demolition and rebuilding of the villa and

“extra-legal costs caused by the purchaser’s request for a reduction and price and threat of litigation”.

[62] We are not persuaded that the Committee was wrong to find that it was unable to determine what that cost was. We do not accept that the Committee should have asked the appellants for clarification of the costs: it was the appellants’ obligation to provide sufficiently detailed evidence to support their claim. Accordingly, the appeal in respect of the Committee’s refusal to order reimbursement of legal costs must be dismissed.

[63] We take a different view in relation to the appellants’ claim for reimbursement of the penalty interest deducted from the purchase price because of the late settlement (\$1,952.88). The Committee found that there was no direct causal connection between the licensees’ conduct and the late settlement, on the grounds that the late settlement resulted from the appellants’ initial refusal to settle while the purchaser maintained a threat of legal proceedings relating to the non-disclosure of the pending construction.

[64] As the Committee accepted, there was a direct causal connection between the licensee’s disclosure failures and the purchaser’s threat of legal proceedings. It is inconsistent with that finding to treat the appellants’ initial refusal to settle because of that threat, and the penalty interest deducted from the purchase price when the sale was settled, as not having been caused by the licensees’ conduct. The amount of penalty interest was quantified, and clear from the settlement statement provided to the appellants. The Committee erred in declining to order the licensees to reimburse it.

[65] Accordingly, the appellants’ appeal against the Committee’s penalty refusal to order reimbursement of penalty interest deducted from the purchaser’s settlement payment will be allowed.

[66] We turn to the appellants’ request that the Committee order that they be refunded the entire commission paid by them (\$47,552.50). Pursuant to s 93(1)(e) of the Act, the Committee had the power to order that the licensees “reduce, cancel or refund fees charged for work where that work is the subject of the complaint”. The Committee

ordered each of the licensees to make a part refund of the commission received (in the sum of \$3,000 each).

[67] We are not persuaded that the Committee was wrong to exclude commission payable to the Agency (as opposed to the licensees) from consideration. However, the Tribunal has no information available to it as to the breakdown of the total commission as between the Agency and the licensees. There is no indication in the Committee's penalty decision that it had this information either, and its assessment of the quantum of the order appears to have been based on what it considered to be proportionate to the licensees' failures, and to take some account of the "extra-legal costs" that must have been caused by the licensees' conduct.²⁰

[68] In the circumstances, while it was open to the Committee to order a part refund of commission, there is no basis on which we could find that the Committee was plainly wrong to order a refund of \$3,000 for each licensee. The appellants' appeal against the Committee's refusal to order refund of the entire commission must be dismissed.

(b) The appellants' claim for compensation for anticipated litigation loss and for under-selling the property

Submissions

[69] Mr Jenkins submitted that the penalty orders failed to protect them, as members of the public, against the licensees' conduct, as a result of which the appellants remain exposed to being sued for "upwards to \$50,000" by the purchasers of the property.

[70] He further submitted that the Committee was wrong to not make an order that the licensees pay compensation for under-selling the property. He submitted that this was the "actual crux of the complaint". He referred to the Committee's finding that the appellants could not show what the property would have sold for (but for the licensees' disclosure failures), and submitted that the appellants' evidence made it clear that the value of the property would have been enhanced had the information as

²⁰ Penalty decision, at paragraph 5.28.

to the pending construction at the slab and the pending demolishing and rebuilding at the villa not been hidden from buyers, and that this is a “common sense issue”.

[71] Both Mr Child and Mr Wheeler submitted that the Committee had no jurisdiction to make orders for compensation, either for any anticipated loss if the purchasers issue proceedings or for any under-selling of the property.

Discussion

[72] Section 93 of the Act, which sets out the Committee’s power to make orders following a finding of unsatisfactory conduct, does not include any power to make a general order for a licensee to pay compensation.²¹ The Committee does not have any power to make an order for compensation.

[73] Section 93(1)(ha) of the Act was inserted pursuant to the Tribunals Powers and Procedures Legislation Act 2018. It provides that:

...

if the Committee is satisfied that the unsatisfactory conduct involves more than a minor or technical breach of this Act or any regulations or rules made under this Act, make an order referring the matter to the Disciplinary Tribunal for the Tribunal to consider whether to make a compensation order under s 110(5).

[74] Section 93(1)(ha) did not come into force until 29 October 2019. It does not have retrospective effect. As the licensees’ conduct occurred between April and July 2018, the Committee did not have jurisdiction to refer the matter to the Tribunal for the Tribunal to consider an order for compensation.

[75] The appellants appeal against the Committee’s refusal to order the licensees to pay compensation must be dismissed. It is not necessary to consider the Committee’s comments as to whether it would have referred the matter, if it had jurisdiction.

²¹ See also *Quinn v Real Estate Agents Authority* [2012] NZHC 3557.

(c) The fines imposed

Submissions

[76] Mr Jenkins submitted that the fines imposed were too low, and are a “paltry” figure against the commission charged on the sale of \$47,000. He submitted that the fine ordered against Mr Roberts did not adequately take account of the fact that he had two previous disciplinary findings against him. He submitted that the penalties imposed on the licensees will not deter either the licensees or the industry in general from such conduct.

[77] Mr Child submitted that the fines imposed on the licensees were within the usual parameters for fines imposed following unsatisfactory conduct findings, and were in accordance with the principles as to penalty.

[78] Mr Wheeler submitted that the levels of fine imposed on the licensees were both open to the Committee, and were appropriate in the circumstances. He submitted that the fines imposed reflected the seriousness of the licensees’ conduct, while sufficiently acting as both a general and specific deterrent.

Discussion

[79] The principal purpose of the Act 2008 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.”²² The Act achieves these purposes by regulating agents, branch managers, and salespersons, by raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.²³ When imposing penalty in the present case, the Committee was required to bear in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

²² Section 3(1) of the Act.

²³ Section 3(2).

[80] Pursuant to s 93(1)(g) of the Act, the Committee had jurisdiction to impose a fine up to \$10,000 against each of the licensees. As a result of its assessment of the licensees' conduct as being "moderate-level" unsatisfactory conduct, the Committee appears to have adopted a starting point for the fines to be imposed at the mid-point of the available range (that is, \$5,000). It then took account of Mr Roberts' two previous disciplinary findings as an aggravating factor (thus increasing the fine to be imposed), and took account of Mr Tai Rakena's absence of any previous disciplinary findings as a mitigating factor (thus reducing the fine). It also took account of the licensees' submission that they had altered their practices and procedures as to receiving instructions.

[81] We are not persuaded that the Committee erred in following such a process. In particular, Mr Roberts' two previous disciplinary findings were relevant to penalty and were properly taken into account as aggravating factors.

[82] The Committee then took account of the orders it made for part refund of commission when determining the final quantum of the fine to be imposed on each licensee. This resulted in the fines imposed being less than the Committee would have imposed, had it not made the orders for a part refund of commission. The Committee did not set out its reasoning as to the quantum by which it reduced the fines.

[83] Orders for refund of commission and fines serve different purposes. A commission refund directly addresses the impact of a licensee's conduct on the client. A fine addresses the purposes and principles of penalties, which include both specific and general deterrence. While it is appropriate for the Committee to give consideration to the overall financial impact of the penalties imposed, it would not generally be the case that an order to refund commission should result in a "dollar for dollar" reduction in a fine ordered.

[84] Following the process for assessing the fine to be imposed set out in paragraph [81] above, the Committee could reasonably have adjusted the starting point for Mr Roberts' fine to \$6,000 or \$6,500, to take account of his previous disciplinary findings, and reduced that for Mr Tai Rakena to \$3,500 or \$4,000 for the mitigating factor of his clean disciplinary record. A reduction of \$1,000 each would also have been

appropriate for the steps taken to improve their procedures. That would have resulted in a fine of \$5,000 to \$5,500 for Mr Roberts, and \$2,500 to \$3,000 for Mr Tai Rakena.

[85] The actual fines imposed were \$3,000 against Mr Roberts, and \$1,500 against Mr Tai Rakena. This suggests that while the reductions in the fines to take account of the part refund of commission were possibly generous to the licensee, we are not persuaded that the Committee erred in the exercise of its discretion, or that its decision was plainly wrong. Accordingly, we are not persuaded that the appeal against this element of the penalty orders should be allowed.

Outcome

[86] The appellants' appeal against the Committee's refusal to make an order that the licensees reimburse them for the interest for late settlement (\$1,952.88) is allowed. The reimbursement is to be made by both licensees, in equal shares. In all other respects, the appellants' appeal is dismissed.

[87] 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

Ms C Sandelin
Member