BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 27

READT 021/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MICHAEL HENRY HARVEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 2001) First Respondent
AND	RICHARD LOWE and PETRONELLA LOWE Second Respondents

Hearing:	9 April 2021, at Nelson (further submissions filed after the hearing)
Tribunal:	Hon P J Andrews, Chairperson Mr N O'Connor, Member Ms F Mathieson, Member
Appearances:	Mr P B McMenamin, on behalf of Mr Harvey Ms S A H Bishop, on behalf of the Authority No appearance by or on behalf of Mr and Mrs Lowe
Date of Decision:	10 June 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Harvey has appealed against the decision of Complaints Assessment Committee 2001, issued on 17 July 2020, in which it made a finding of unsatisfactory conduct against Mr Harvey ("the Committee's substantive decision").[1] He has also appealed against the Committee's decision issued on 30 November 2020, in which it made penalty orders ("the Committee's penalty decision").[2]

[2] We record that the second respondents, Mr and Mrs Lowe, did not wish to participate in the appeal. Except where it is necessary to refer to them individually, we will refer to the second respondents as "the Lowes".

Factual background

[3] The Lowes, together with Mr B P Smith (a solicitor) were the trustees of two trusts and as such were the registered owners of two properties in Nelson. We will refer to the properties as "No 28" and "No 26". Each trust owned a half-share of each property. No 28 had a house on it (in which the Lowes lived), which had extensive views of the sea and mountains. No 26 was a bare section in front of No 28, between No 28 and the view.

[4] Mr Harvey is a licensed agent, engaged at Results Real Estate Ltd, trading as Green Door Top of the South ("the Agency"). The Lowes met Mr Harvey in December 2017 when they were considering whether to make an offer on another property being marketed by him. The Lowes said that at that time they had no intention or plans to build on No 26, but they asked Mr Harvey to give them a market valuation for No 28 and No 26 as they were considering whether they had the funds to submit an offer on the other property. About three or four days later they decided not to pursue the other property and advised Mr Harvey of this.

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1 Complaint C33008, re Michael Harvey *Decision finding of unsatisfactory conduct*, 17 July 2020.
2 Complaint C33008, re Michael Harvey *Decision on Orders*, 13 November 2020.

[5] On 29 December 2017 Mr Harvey visited the Lowes. He wanted to know if they wanted to sell No 28, as he had a prospective purchaser (Mr S) he was keen to show through the property that day. Mr Harvey completed an agency agreement, which they both signed. Mr S viewed No 28 that afternoon. Mr Harvey drew up a draft agreement for sale and purchase. This included as one of the "Further Terms of Sale" the following provisions dealing with the bare section at No 26:

> 20.0 This agreement is subject to and conditional upon the purchaser being satisfied in all respects with the covenants and restrictions that apply to the bare section at [No 26], within five (5) working days of the date of this agreement.
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> 20.1 For the purposes of clarity the intention of this clause is to give the purchaser the ability to gain satisfaction that any future dwelling established on [No 26] (currently a bare section, owned by the vendors subject to this agreement) does not unduly or reasonably impact on the view, sun, or quality of living of the property subject to this offer.
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> 20.2 Further, under the terms of this agreement the purchaser shall have first right of refusal to purchase [No 26] in the event that the vendor chooses to sell that section.

Mr S did not submit an offer for No 28.

[6] Mr Harvey contacted the Lowes in early January 2018, as he wanted to show another prospective purchaser (Mrs Crowe) through No 28. There was some discussion about the Lowes' plans for No 26. The Lowes said that Mr Harvey was aware that they would consider building on No 26 if they sold No 28, but had not made any decisions or plans of any sort, and they told him that if they were to build on No 26, they would be mindful and considerate when planning any build, and that it would have to comply with Council and subdivision requirements.

[7] Mr and Mrs Crowe viewed No 28 on 7 January 2018. The Lowes accepted an offer to purchase No 28 from Mrs Crowe on 8 January 2018. The agreement for sale and purchase did not contain any provisions relating to No 26 or any proposed development on the section. Mr Harvey said that this was because Mrs Crowe wanted to present a "clean" purchase offer.

[8] On 10 January 2018, before the agreement for sale and purchase was made unconditional, Mr Harvey arranged for Mrs Crowe to visit the property to meet with the Lowes. The Tribunal understands that Mrs Crowe met with Mr Lowe. Mr Harvey was not present at this meeting.

[9] The sale was settled on 6 April 2018. The Lowes began building on No 26 in January 2019. Mr and Mrs Crowe became concerned about the height of the building and issued proceedings in the High Court against the Lowes on 14 May 2019. They alleged that Mr Harvey (as the Lowes' agent) and Mr Lowe had made misrepresentations as to the effect on the view from No 28 of any building on No 26. They sought a permanent injunction restraining the Lowes from further building on No 26 and ordering dismantling of any building work that had already occurred over a certain height or, in the alternative, damages.

[10] An affidavit sworn by Mr Harvey was filed in support of the Crowes' proceeding. He said that the Lowes had told him that they would not build a structure on No 26 that negatively impacted on No 28, and that he passed this on to the Crowes. He also said that the intention of the meeting between Mrs Crowe and the Lowes was so that Mrs Crowe could be given confirmation as their intentions for building on No 26.

[11] Mrs Crowe said in an affidavit that Mr Lowe met with her at the property and confirmed that the house on No 26 would not have an impact on the view from No 28, and it would have a low profile roof.

[12] In statements provided to the Committee, Mrs Lowe denied that either Mr Harvey or the Crowes had been told anything other than that they would be mindful and considerate of the view and that they would build within Council and subdivision requirements, and she believed that they had fulfilled that promise. She also said that they were surprised that Mr Harvey had not included provisions in the agreement for sale and purchase, such as had been included in the agreement drafted for Mr S.

[13] The Tribunal understands that the High Court proceedings have been settled.

Complaint

[14] The Lowes lodged a complaint with the Authority on 23 August 2019. As summarised by the Committee, they complained that Mr Harvey:

[a] did not have the third trustee (Mr Smith) sign the agency agreement or the agreement for sale and purchase;

[b] did not recommend that they obtain legal advice or give them a reasonable opportunity to obtain that advice before they signed the agency agreement;

[c] did not follow their instructions and misrepresented to the Crowes the Lowes' plans for building on No 26;

[d] misled the Crowes by not informing them that Mr S's interest in No 28 had ended before they made an offer on that property; and

[e] disclosed information that was confidential to them in the affidavit filed in the High Court proceedings issued by the Lowes.

The Committee's substantive decision

[15] The Committee decided to take no further action on the elements of the Lowes' complaint summarised in paragraph [14][d] and [e], above. It found that Mr Harvey had breached his professional obligations in respect of the remaining elements of the complaint, and made a finding of unsatisfactory conduct against him.

Signatures on agency agreement and agreement for sale and purchase

[16] The Committee recorded that there was no dispute that the Lowes and Mr Smith owned No 28 as trustees, and that only the Lowes signed the agency agreement and agreement for sale and purchase. The Committee rejected a submission made on behalf of Mr Harvey that it was not necessary for Mr Smith to sign the two agreements, as each contained a clause to the effect that the Lowes warranted that they were authorised to sign them, and that (in the case of the agreement for sale and purchase)

the agreement was subject to solicitors' approval, such that the sale could not proceed unless Mr Smith agreed to it.[3]

[17] The Committee found that all registered owners of the property were required to sign the agency agreement and the agreement for sale and purchase, unless written authority was provided to the Licensee giving the Lowes authority to act on behalf of the non-signing owner. It found that by failing to have all three registered owners sign the two agreements, or to verify with Mr Smith that the Lowes had authority to act for him, Mr Harvey was in breach of his duty to act with skill, care, competence, and diligence under r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules), his duty to comply with his fiduciary obligations to the Lowes under r 6.1, and his duty not to market a property without authorisation through an agency agreement, under r 9.6.[4]

Recommendation and opportunity to take legal advice

[18] The Committee recorded that whether Mr Harvey had recommended that the Lowes take legal advice, and gave them a reasonable opportunity to do so (as required by r 9.7 of the Rules) is a fact-specific enquiry, and that Mr Harvey had not refuted the Lowes' evidence that Mr Harvey did not recommend that they take legal advice before signing the agency agreement, or give them a reasonable opportunity to do so. The Committee found that the fact that the Lowes had signed the agency agreement (which contains acknowledgements as to legal advice) did not answer the allegation, as Mr Harvey had not said that he had drawn their attention to the acknowledgements, and the Lowes had not initialled alongside the acknowledgements.[5]

[19] The Committee did not accept a submission for Mr Harvey that the fact that the Lowes did not want the agency agreement sent to their lawyer absolved him. It considered that sending an agency agreement to a lawyer after it has been signed is different from recommending that a client take legal advice before it is signed. The

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3 Committee's substantive decision, at paragraphs 3.8–3.12.

4 At paragraphs 3.5 to 3.18 (see also the Committee's penalty decision at 5.12–5.13).

5 At paragraphs 3.27–3.29 (we observe that in its penalty decision, the Committee recorded that the evidence did not establish that Mr Harvey had clear instructions from the Lowes not to contact Mr Smith about the transaction prior to agency agreement being signed, Mr Harvey's evidence was that the Lowes did not want the agreement sent to Mr Smith: penalty decision at 5.14).

Committee accepted the Lowes' evidence that they were not recommended to seek legal advice, or given a reasonable opportunity to do so, before signing the agency agreement, in breach of r 9.7.[6]

Not following instructions and misrepresenting the Lowes' building plans

[20] The Committee recorded that there was no documentary evidence which supported either the Lowes' or Mr Harvey's version of what instructions the Lowes gave Mr Harvey regarding their plans for building on No 26. It considered that Mr Harvey's evidence as to what he told the Crowes was substantially consistent with Mrs Crowe's evidence. It noted, however, that it did not follow that because Mr Harvey told the Crowes something, he had instructions from the Lowes to do so.[7]

[21] Having noted that the Lowes had the onus of proving the allegation, and having reviewed the evidence, the Committee was not satisfied that they had established that Mr Harvey gave information to the Crowes that he was not instructed to give. The Committee's reasons for this conclusion included that Mr Lowe had not responded to Mrs Crowe's evidence as to what he said in their meeting at No 28, the Crowes' concerns about preservation of the view from No 28 was logical and credible, it was not credible that Mr Harvey would not have discussed the Crowes' expectations and concerns about the view from No 28 with the Lowes, and where the view was a significant feature of the property, it was not credible that a purchaser would be satisfied with a general assurance as to being mindful and considerate of the view from No 28.[8]

[22] However, the Committee found that that was not the end of the matter, and it went on to discuss specific questions it had raised with Mr Harvey, regarding what the Lowes had said to him about the height of the structure they intended to build and how they intended to preserve the view, whether he had confirmed the disclosures by the Lowes in writing (and if not, why not), and whether he had caveated or qualified the

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6 At paragraphs 3.30–3.31.
7 At paragraphs 3.28–3.40.
8 At paragraph 3.41.3.49

information he provided to the Crowes. The Committee received responses to its questions from Mr Harvey's counsel.

[23] The Committee concluded that:[9]

[a] despite recognising that the view from No 28 and what the Lowes might build on No 26 were significant issues, it was remarkable that Mr Harvey did not attend the meeting between Mr Lowe and Mrs Crowe;

[b] Mr Harvey should have confirmed in writing with the Lowes how they intended to preserve the view from No 28 and what he was authorised to disclose to prospective purchasers, and it did not accept Mr Harvey's explanation as to why he did not do this;

[c] the information he and Mrs Crowe said he gave her could easily have been confirmed in writing with the Lowes and if he had done so, the complaint might not have eventuated; and

[d] it was concerned that in the circumstances of the sale of No 28, Mr Harvey did not suggest to the Lowes that there should be something in the agreement for sale and purchase dealing with the issue so that both the Lowes and the Crowes were clear as to the extent to which the view would be preserved.

[24] The Committee found that Mr Harvey was in breach of r 5.1 of the Rules, in that he failed to exercise appropriate skill, care, and competence by not confirming in writing with the Lowes what was to be disclosed to prospective purchasers, and/or by not capturing that disclosure with an appropriate clause in the agreement for sale and purchase.[10]

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9 At paragraphs 3.46–

10 At paragraphs 3.50–3.51.

The Committee's penalty decision

[25] The Committee assessed Mr Harvey's conduct as being moderate-level unsatisfactory conduct. It made orders censuring him, and to pay a fine of $2,500. The level of the fine took into account that Mr Harvey had been in the real estate industry for many years, and no disciplinary findings had previously been made against him.[11]

[26] The Committee also made an order that Mr Harvey refund $5,000 of the commission charged to the Lowes. It gave as its reason for doing so that although Mr Harvey had effected a sale of No 28, he had failed in his duties to the Lowes. It said that the most significant failing related to the way he dealt with what was to be built on the section at No 26, and if he had dealt with that competently, the dispute between the Lowes and the Crowes might have been avoided. The Committee concluded that the Lowes had had very poor service from Mr Harvey.[12]

[27] The Committee declined to make any order for rectification or relief, or that Mr Harvey pay costs to the Lowes.[13]

Appeal issues

[28] Mr Harvey contended that in its substantive decision the Committee erred in finding that:

[a] all registered owners were required to sign the agency agreement and agreement for sale and purchase and that Mr Harvey was in breach of rr 5.1, 6,1 and 9.6 of the Rules in failing to have all three trustees sign the agreements, or have written authority for the Lowes to act on behalf of Mr Smith;

[b] Mr Harvey breached r 9.7 by failing to recommend that the Lowes obtain legal advice before signing the agency agreement and to provide them with an opportunity to do so; and

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11 Committee's penalty decision, at 5.47–5.53.
12 At 5.37–5.42.
13 At 5.27–5.36 and 5.43–5.46.

[c] Mr Harvey failed to exercise appropriate skill, care, and competence, in breach of r 5.1, by failing to confirm in writing what was to be disclosed to prospective purchasers about the Lowes' intentions as to building on No 26 and/or not capturing the same in an appropriate clause in the agreement for sale and purchase.

[29] Mr Harvey also contended that the Committee erred in its penalty decision in ordering him to refund $5,000 of the commission charged, and to pay a fine of $2,500.

Did the Committee err in its findings as to the signatures on the agency agreement and agreement for sale and purchase?

Submissions

[30] Mr McMenamin submitted that there was no authority to the effect that all registered owners must sign an agreement unless the licensee (as opposed to the other owners) has a written authority from the non-signing owner, and that the proposition stated by the Committee is simply wrong. He submitted that it was sufficient that the Lowes certified that they had the power to enter into the agreements and had authority from Mr Smith.

[31] Mr McMenamin also submitted that the Committee erred in saying that trustees must act unanimously. He referred to s 38 of the Trusts Act 2019 (in force as from 30 January 2021), which permits modification or exclusion of the unanimity requirement by express or implied terms of the relevant trust deed. He submitted that this codifies the prevailing common law principle, and that without knowing the provisions of the trust deeds in the present case, the Committee had no evidence from which it could conclude that unanimity rather than majority was required.

[32] He further submitted that "unanimity" requires trustees to agree on a course of action, but does not require that each trustee physically signs the relevant documents. He also submitted that the Lowes specifically prohibited Mr Harvey from contacting

their lawyer, as they did not wish to incur legal fees.[14] He submitted that there would be grounds for complaint if Mr Harvey had contacted Mr Smith for evidence of authority for the Lowes to sign the agreements, contrary to the Lowes' instructions.

[33] Mr McMenamin also submitted that the Committee was wrong to conclude that the warranty at cl 6.1 of the agency agreement would not assist Mr Harvey's argument if the Lowes did not have authority from Mr Smith: he submitted that the only evidence on the point is the written confirmation by the Lowes that they did have such authority.

[34] Ms Bishop submitted for the Authority that the Committee accurately assessed and applied the law. The registered owners of No 28 were Mr and Mrs Lowe and Mr Smith. She submitted that the submissions for Mr Harvey conflated the fact that the registered owners were trustees with the trusts being the registered proprietors. She referred to the Committee's statements in its penalty decision[15] (after this argument was raised in the penalty submissions for Mr Harvey) where the Committee said that the issue was that Mr Harvey did not verify with Mr Smith that the Lowes had authority to act for him.

[35] Ms Bishop also submitted that the argument put forward for Mr Harvey (that the trusts were his client, and that he could rely on (unknown) terms of the trust deeds) is contrary to the consumer-protection purpose of Act. She submitted that if accepted, licensees would be able to absolve themselves of the well-established requirement that they seek signatures of all registered owners, or express written authority that someone else can sign.

[36] She referred to the decisions of Complaints Assessment Committees in *Ledger*,[16] and *Beaufill*,[17] and the judgment of his Honour Justice Lang in *Robinson v Real Estate Agents Authority* allowing an appeal from a decision of the Tribunal upholding a

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14 As recorded in fn 5, above, the Committee noted in its penalty decision that the evidence did not establish that Mr Harvey had clear instructions not to contact Mr Smith before the agency agreement was signed, and that Mr Harvey's evidence was that the Lowes did not want the agency agreement sent to Mr Smith.

15 At paragraphs 5.10–5.13 of the Committee's penalty decision.

16 Complaint C04690 re Michael Ledger *Decision of Complaints Assessment Committee 301*, 17 December 2014.

17 Complaint C16132 re Graham Beaufill *Decision finding of unsatisfactory conduct (CAC 413),* 8 May 2107.

Complaints Assessment Committee decision that a licensee had failed to exercise skill, care, competence and diligence by not obtaining the signatures of both trustee owners of a property on an agency agreement.[18] She submitted that his Honour had accepted the Tribunal's reasoning "without reservation". Ms Bishop also submitted that the Tribunal's in decision *Stenhouse v The Real Estate Agents Authority (CAC 403)* supports the principle that Mr Harvey ought to have obtained instructions from Mr Smith, or express written authority from him that the Lowes could act on his behalf.[19]

[37] Ms Bishop submitted that the core issue is whether Mr Harvey breached his professional duties by relying on the signatures of two of the three registered owners. She submitted that the Committee accurately characterised Mr Harvey's conduct as a breach of the Rules, but one that did not have any adverse consequences.

[38] She further submitted that the Lowes' advice to Mr Harvey that they did not want the agency agreement sent to Mr Smith, and that he would "do as they instructed"[20] should have raised a red flag for Mr Harvey. She submitted that it was established in *Robinson* that licensees cannot simply rely on their clients' "say so", as it is insufficient proof of authority. She submitted that reasonably competent licensees should take steps to satisfy themselves as to the true state of affairs. She submitted that this is not an onerous obligation as it would have required only a simple email to Mr Smith, or email from the Lowes forwarding Mr Smith's confirmation.

[39] In reply, Mr McMenamin submitted that the Authority's submissions oversimplified the argument for Mr Harvey. He submitted that the issue is not only that the trusts were the owners of the property, it is also that the proposition that all registered owners must sign an agency agreement or agreement for sale and purchase unless the licensee has a written authority from a non-signing owner is wrong, and not supported by a requirement that all trustees must be unanimous.

[40] Mr McMenamin acknowledged that the Lowes were wrong in law to believe that Mr Smith was essentially irrelevant, but submitted that it can readily be understood

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18 *Robinson v Real Estate Agents Authority (CAC 20006)* [2014] NZHC 2613. See also *Robinson v The Real Estate Agents Authority (CAC 20006)* [2014] NZREADT 47.

19 *Stenhouse v The Real Estate Agents Authority (CAC 403)* [2018] NZREADT 55.

20 Noted in the Committee's substantive decision, at 3.14.

that they regarded themselves as the "owners" of the property, and considered that the trusts were a somewhat artificial construct which did not derogate from their entitlements as "owners". He submitted that in circumstances where there was "an explicit prohibition" to consult Mr Smith and the Lowes' written certification that they were authorised to sign the agreements, Mr Harvey's reluctance to challenge them was understandable – he would effectively be saying they were lying.

[41] Regarding the agreement for sale and purchase, Mr McMenamin submitted that Mr Smith had the opportunity to countersign the agreement but saw no need to do so, and he had absolute veto power because the contract could not proceed to settlement without his active approval of it. He also submitted that the standard REINZ/ADLS agreement for sale and purchase form contemplates signature by a limited number of trustees.

[42] He further submitted that *Robinson* does not support the proposition that it is "well-established" that signatures of all registered owners should be obtained, or written authority received.

Discussion

[43] The Rules considered by the Committee were as follows:

> **5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
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> **6.1** A licensee must comply with fiduciary obligations to the licensee's client.
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> **9.7** Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including putting details on any website or by placing a sign on the property.

[44] The agency agreement contained the following provision in bold print, which was initialled by Mr and Mrs Lowe on a line marked "CLIENT INT":

> **6.1 The person signing this form on behalf of the Client confirms that if not the sole owner of the Property he or she has the authority of all owners to sign this agreement on their behalf.**

[45] The Tribunal accepts, as did the Committee, that while "client" is not defined in the agency agreement it is intended to refer to the owners of the property.

[46] The agreement for sale and purchase contained the following provision:

> **17.0 Limitation of liability**
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> 17.1 If any person enters into this agreement as trustee of a trust, then:
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> (1) that person warrants that:
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> (a) the person has power to enter into the agreement under the terms of the trust;
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> (b) the person has properly signed this agreement in accordance with the terms of the trust;
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> (c) the person has the right to be indemnified from the assets of the trust and that right has not been lost or impaired by any action of that person including entry into this agreement; and
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> (d) all of the persons who are trustees of the trust have approved entry into this agreement.
>
> …

[47] While cl 17.1(d) provides a warranty that all trustees have approved entry onto the agreement, it does not clearly provide authority for one trustee to sign the agreement on behalf of another trustee. We are not persuaded that the Committee was wrong to find that cl 17 does not envisage that the signatures of some but not all of the trustees is required.

[48] The judgment of his Honour Justice Lang in *Robinson* is a judgment of a superior Court on an issue that is directly relevant to the issue presently before the Tribunal. In that case, a property was owned by a couple in their capacity as trustees of a trust. The couple separated and became involved in an acrimonious relationship property dispute. They entered into a heads of agreement which included, among other things, provisions as to the sale of the property, to the effect that each party was to appoint an agent, who were to have a joint sale agency. There was further dispute when one of the couple appointed a sales agent by the required dated but the other did not. Eventually, salespersons from the same agency were appointed pursuant to two agency agreements, each signed by one of the couple.

[49] Justice Lang noted there is no express requirement in either the Act or Rules that an agent must obtain either the express authority or signatures of all owners of a property listed for sale, but accepted a submission for the Authority that a licensee's obligations to act with skill, care, competence, and diligence under r 5.1 meant that "ordinarily", an agent would be "wholly remiss if he or she had not obtained the

express authority of all owners of a property when it is listed for sale". However, he found that the case before him was not an "ordinary case" as the owners of the property had reached their own agreement as to the process for selling the property.[21]

[50] The judgment in *Robinson* is authority for the principle that "ordinarily" reasonable licensees exercising skill, care, competence, and diligence will ensure that contractual agreements such as agency agreements or agreements for sale and purchase will be signed by all registered owners of a property, or that that they have written authority from a non-signing owner that another person may act on that owner's behalf. However, as his Honour found, not all cases are "ordinary". In the circumstances of the present case the issue is whether Mr Harvey was remiss in not having all registered owners sign the agency agreement and agreement for sale and purchase, or obtaining written authority from Mr Smith.

[51] We note that in the present case, the Tribunal does not know the terms of two trusts concerned, and there is no evidence as to whether Mr Harvey was aware of the terms of the trusts, or whether the Committee was advised of the terms of the trusts. We observe that in light of the fact that neither the agency agreement nor either of the agreements for sale and purchase he created in the course of this matter reflected that the property was owned by two trusts, it would appear that Mr Harvey was not aware of the terms of the trusts.

[52] The Committee should have taken into account the following:

[a] The Lowes comprised the majority of owners in each trust and they told Mr Harvey that the third owner, Mr Smith, would do as they instructed him to do and that they did not want Mr Harvey to contact him.

[b] The Lowes initialled cl 6.1 of the agency agreement, confirming that they had the authority of "all owners" of the property to sign the agreement on their behalf.

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21 *Robinson*, above n15, at [20]–[22].

[c] The agreement for sale and purchase contained a warranty at cl 17.1 that all of the trustee owners approved entry into the agreement.

[d] It was intended that once any agreement for sale and purchase was signed as a result of the listing, it would go to the third trustee owner, Mr Smith, who as solicitor for the Lowes had responsibility for approval of the agreement for sale and purchase as to form and content.

[53] We have concluded that these circumstances created an exception from the "ordinary" case, and the Committee erred in finding that Mr Harvey was in breach of the Rules. Mr Harvey's appeal against the Committee's finding that he breached rr 5.1, 6.1 and 9.6 will therefore be allowed.

[54] The Tribunal observes that a similar situation should not now arise, due to the compliance requirements under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, to which (pursuant to s 6 of that Act) the real estate industry became subject to as from 1 January 2019.

Did the Committee err in finding that Mr Harvey failed to recommend that the Lowes take legal advice before entering into the agency agreement and to provide an opportunity for them to do so?

Submissions

[55] Mr McMenamin submitted that the issue is whether Mr Harvey could rely on the warranties and acknowledgments given by the Lowes in the agency agreement. These were that they had been recommended to seek legal or other advice, and been given reasonable opportunity to do so, and that they had read and understood and agreed to the terms of the agreement. Mr McMenamin noted that in the present case, the Lowes' signatures impinge on the warranty set out at cl 6.1 of the agency agreement.

[56] He submitted that the burden of proof was on the Lowes to establish that they were not recommended legal advice and not given an opportunity to take legal advice, on the balance of probabilities. He submitted that it was not Mr Harvey's obligation to refute the evidence, or to provide evidence as to availability of legal advice.

[57] Mr McMenamin submitted that there were significant weaknesses in the Lowes' evidence. He contrasted the evidence in support of Mr Harvey which was in the form of sworn affidavits (filed in the High Court proceeding) which were detailed as to dates, places, and particular words, with the unsworn statements made by the Lowes in their complaint, their summary of the issues raised against Mr Harvey, and their statements to the Committee.

[58] He submitted that the best evidence as to this issue is the Lowe's written acknowledgement in the agency agreement. He submitted that the Committee was faced with a bare assertion by the Lowes that they had not been given a recommendation to take legal advice, which was contradicted by the acknowledgement and warranty in the agency agreement. He submitted that the Committee ignored this evidence, on the basis that Mr Harvey did not say he had drawn the Lowes' attention to the acknowledgements, and that the Lowes did not initial the acknowledgements. He characterised that as a "quite extraordinary conclusion."

[59] Mr McMenamin also submitted that the acknowledgements themselves constituted the provision of advice. He submitted that r 9.7 does not spell out the method by which the required recommendation and advice may be given, and there is no reason to believe that [oral] advice is to be preferred to written advice.

[60] He also submitted that the Committee wrongly referred to lawyers' offices being closed over the Christmas/New Year period, as there was no evidence before it on the point. He submitted that if the Lowes had wanted to allege that a lawyer was unavailable, they had to give evidence of that. He submitted that it is evident from the documents before the Committee that a lawyer was available to the Lowes on 4 January 2018 as on that date the Lowes advised Mr Harvey that they had forwarded a "proposed offer" to their lawyer, and submitted that there is no reason to believe a lawyer could not have been available on 29 December 2017. He referred to the Lowes' evidence that there were only two hours between signing the agency agreement and the arrival of Mr S to view No 28, but submitted that they had given no reason why they could not have telephoned their lawyer while Mr Harvey was preparing the agency agreement.

[61] Mr McMenamin submitted that the Committee discounted the fact that the Lowes did not want to have their lawyer involved and suggested that they may have made that comment after the agency agreement was signed, then (wrongly) drew an adverse inference that sending an agreement to a lawyer after it has been signed is different from recommending advice before signing the agreement.

[62] In any event, he submitted, Mr Harvey had paid attention to the fact that all registered owners of the property were not signing the agency agreement and had the Lowes initial the acknowledgement in cl 6.2. He submitted that this showed that involvement of the Lowes' lawyer was clearly discussed before the agency agreement was signed. He submitted that the Committee reached the wrong conclusion.

[63] In response to Mr McMenamin's submissions based on the quality of the Lowes' evidence, Ms Bishop submitted that it was clearly open to the Committee to accept the Lowes' evidence on some matters, and reject it on others. She submitted that the Lowes had provided a detailed account of their complaint against Mr Harvey, including their allegation that he failed to recommend they take legal advice or provide an opportunity to take legal advice. She submitted that the Committee had the relevant material before it and it was for the Committee to assess its weight.

[64] Ms Bishop submitted that the fact that the Committee noted that Mr Harvey had not provided a response to the allegation and did not say he had drawn the Lowes' attention to particular clauses of the agency agreement did not mean that it shifted the burden of proof to Mr Harvey. She submitted that in the absence of any explanation from Mr Harvey, it is unsurprising that the Committee favoured the Lowes' account and the evidence in support of it.

[65] Ms Bishop submitted that the question of compliance with r 9.7 involves a fact-specific enquiry. She submitted that in the present case the Committee considered the Lowes' evidence that there was no recommendation and no opportunity to take legal advice, the fact that there was only a two-hour gap between signing the agency agreement and Mr S's visit, and the likelihood that it would be more difficult to obtain advice over the Christmas/New Year period. She submitted that the closure of legal offices at this time is a matter of common knowledge, and the Committee could take

notice of it. She further submitted that evidence as to whether the Lowes' lawyer was in fact unavailable would not have assisted the Committee, because the allegation was that Mr Harvey did not recommend that they take legal advice.

[66] She submitted that the Committee appropriately inferred that the process of entering into the agency agreement before Mr S came to view No 28 was rushed, and that if Mr Harvey had in fact recommended the Lowes take legal advice, it was unlikely that the agency agreement would have been signed on 29 December 2019.

[67] She further submitted that there was no indication on the face of the agency agreement that any special attention was paid to the clauses relating to legal advice. She submitted that the Committee was entitled to find that despite the Lowes' signatures being on the agency agreement, Mr Harvey did not comply with r 9.7. She submitted that it cannot be sufficient, to avoid the strictures of r 9.7, for there simply to be a clause saying that the licensee has complied with his or her obligations. She submitted that such a technicality would undercut the protective function of the rule.

[68] Ms Bishop also submitted that whatever the Lowes said to Mr Harvey as to sending the agreement to Mr Smith does not detract from Committee's decision, as it could not amount to Mr Harvey telling the Lowes that they could receive legal advice, or giving them the opportunity to do so.

[69] In reply Mr McMenamin reiterated that the Committee failed to give any weight to what was clearly the best evidence available: the agency agreement itself. He submitted that the acknowledgments in the agency agreement are in themselves the provision of the required advice. He further submitted that there is no reason to believe that the Lowes could not have telephoned their lawyer before signing the agency agreement and the Committee's reliance on speculations as to accessibility of lawyers and the time of signing the agency agreement was improper.

Discussion

[70] The relevant Rule is r 9.7, which provides:

> **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).

[71] Clause 5.1 of the agency agreement (comprising paragraphs 5.1.1 to 5.1.13) is headed "CLIENT ACKNOWLEDGEMENTS" "PLEASE READ CAREFULLY". Clauses 5.1.1 to 5.1.3 provide:

> 5.1 You, as the Client, acknowledge that prior to signing this agreement you have been:
>
> 5.1.1 Recommended to seek independent legal advice,
>
> 5.1.2 Recommended that you can, and may need to, seek technical or other advice and information,
>
> 5.1.3 Given a reasonable opportunity to obtain the advice referred to in 5.1.1 and 5.1.2 above,
>
> …

[72] There is no marked place on the agency agreement for the above acknowledgements to be initialled by the clients, and the Lowes' initials do not appear alongside any of the acknowledgements.

[73] At the foot of the final page of the agency agreement there is a section headed "Disclosure by Agent – Consent & Acknowledgement by Client(s) or Authorised Person", as follows (in bold print):

> **The parties acknowledge and agree that the terms of this agreement are the full terms and conditions of the appointment of the Agency and confirm that details contained in this document are a fair and accurate representation of the property and acknowledge that the information contained in this document may be disclosed by the Agent to third parties showing interest in the property during the term of this agreement without further notice to the Client. Further, the Client confirms, warrants and acknowledges the following: I/We confirm that I/We have read, understood & agreed to all terms of this agreement and have received the REAA Approved Guide. I/We warrant that I/We have had a reasonable opportunity to seek legal, technical and/or other advice or information and I/We have either obtained that advice or information or have decided not to do so of My/Our own accord.**

IMPORTANT – This is a legally binding document. Please ensure that you have read, understood and agreed to all the clauses & contents contained herein before signing.

[74] The signature of one of the Lowes is on the line provided for signatures and the other signature is above that signature, in the space before the paragraph beginning "IMPORTANT", extending over the print above and below it.

[75] We do not accept Mr McMenamin's submission that Mr Harvey was not obliged to refute the Lowes' evidence, or to provide evidence as to recommending and the availability of legal advice. A professional disciplinary proceeding is not a criminal proceeding, and as a licensee subject to a professional disciplinary proceeding Mr Harvey had an obligation to participate fully in the Committee's investigation, to provide information in the course of the inquiry, and to answer questions put to him.[22]

[76] In its decision in *Complaints Assessment Committee 403 v Goundar*, the Tribunal considered a submission for the licensee that the fact that prospective purchasers had signed an agreement for sale and purchase (which contained a statement that professional advice should be sought before entering into the agreement) was evidence that they had been given that advice.[23] The Tribunal rejected that submission on the grounds that there was no evidence that the licensee took the prospective purchasers through the agreement and directed their attention to the statement as to seeking professional advice.[24]

[77] In *Xu v Real Estate Agents Authority (CAC 412)*, the Tribunal noted that the "obligation of a licensee to recommend that [legal] advice is sought is a fundamental requirement for the purpose of meeting the Act's consumer-protection objectives".[25] In that case, there was conflicting evidence from the licensee and prospective purchaser as to whether the licensee had actually recommended that the purchaser

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22 See *Bolton v The Law Society* [1994] 2 All ER 496 (UKCA); *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189], and *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [103].

23 *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52.

24 *Goundar,* at [54]–[55].

25 *Xu v Real Estate Agents Authority (CAC 412)* [2018] NZREADT 63, at [66].

obtain legal advice, and the Tribunal upheld a Complaints Assessment Committee's decision that such advice had been given.[26]

[78] The importance for the consumer-protection purposes of the Act of the obligation to recommend that a person takes legal advice before signing an agency agreement, agreement for sale and purchase, or other contractual document was also stressed in the Tribunal's decision in *Appellant v Real Estate Agents Authority (CAC 1904)*.[27] In that case, the licensee admitted that she did not "verbally" recommend that the clients take legal advice, but relied on "client acknowledgements" in an agency agreement. The Tribunal noted that there was no evidence (for example by way of initials alongside the acknowledgements) that the clients' attention had been directed to the acknowledgement, and did not accept that the client acknowledgements were sufficient evidence of compliance with r 9.7.[28]

[79] Mr Harvey was advised of the Lowes' complaint that he did not recommend that they obtain legal advice and did not allow them a reasonable opportunity to do so before they signed the agency agreement. He was invited to respond to the allegation. Mr Harvey's response (through his counsel) referred to the acknowledgements in the agency agreement, but did not include any statement that he drew the Lowes' attention to the provisions or otherwise recommended that they take legal advice or gave them an opportunity to do so.

[80] We accept Ms Bishop's submission that in the absence of any statement or explanation from Mr Harvey, it is unsurprising that Committee favoured the Lowes' account and the evidence in support of it. We are not persuaded that the Committee was wrong to do so. We also accept her submission that there is no indication on the face of the agency agreement (for example, by way of initials alongside the relevant acknowledgement) that any special attention was paid to the clauses relating to legal advice.

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26 *Xu*, at [68].
27 *Appellant v Real Estate Agents Authority (CAC 1904)* [2020] NZREADT 51.
28 *Appellant*, at [56]–[63].

[81] We are not persuaded that the Committee was wrong to find that despite the Lowes' signatures being on the agency agreement, Mr Harvey did not comply with r 9.7. We agree with Ms Bishop's submission that it cannot be sufficient, to avoid the strictures of r 9.7, for there simply to be a clause saying that a licensee has complied with his or her obligations, as that would undercut the consumer-protection function of the Rule.

[82] We also agree with Ms Bishop's submission that in the absence of a recommendation to obtain legal advice it is irrelevant whether the Committee reasonably inferred that lawyers' offices were likely to be closed over the Christmas/New Year period, as the issue as to taking legal advice never arose. Further, it is irrelevant that a lawyer was available on 4 January 2018, when the Lowes and the Crowes entered into the agreement for sale and purchase.

[83] Mr Harvey's appeal against the Committee's finding that he breached r 9.7 will be dismissed.

Did the Committee err in finding that Mr Harvey was in breach of r 5.1 by failing to confirm in writing the Lowes' instructions as to their intentions regarding building on No 26 and/or to incorporate an appropriate clause in the agreement for sale and purchase?

Submissions

[84] McMenamin submitted that it was common ground that the possibility of the view from No 28 being obstructed by building on No 26 was a matter of concern. However, at the time No 28 was sold, there was no concept of what shape any building on No 26 would take, and it was not even certain that Lowes would build on the section. He submitted that Mr Harvey considered that the best course was for Mr Lowe to meet with Mrs Crowe at No 28 to physically demonstrate what was intended. He submitted that Mr Harvey considered that it was not possible to provide an accurate description in a clause in the agreement for sale and purchase, and that to try to do so might give rise to, rather than prevent, litigation in the future.

[85] Mr McMenamin referred to the statements made by Mrs Crowe and Mr Harvey in their affidavits filed in the Crowes' High Court proceeding, and submitted that to

insert a clause such as that suggested by the Committee would create a legal minefield. He submitted that the information provided by the Lowes was far too inadequate and subjective to allow for a comprehensive description, and it would be reckless for a licensee to engage in writing such a clause, which would have to be highly complex and detailed. He submitted that the Committee also overlooked the fact that both parties wanted a "clean" contract without conditions.

[86] Mr McMenamin also submitted that there was difficulty with the Committee's proposition that Mr Harvey should have confirmed what he was authorised to disclose concerning preserving the view from No 28. He submitted that the Committee had overestimated the particularity of the information provided by the Lowes, and did not take account of the fact that at time of the sale to the Crowes, the Lowes had not decided to build on No 26.

[87] Ms Bishop submitted that all parties accepted that the view from No 28 was an important feature, as any building on No 26 could adversely affect the view and therefore the value of No 28. She submitted that the Committee was not wrong to conclude that Mr Harvey had breached r 5.1 by not confirming in writing with the Lowes' what was to be disclosed about their build intentions and/or not capturing the same in an appropriate clause in the agreement for sale and purchase.

[88] Ms Bishop submitted that it was contended for Mr Harvey that the Committee reached the wrong conclusion because it would have been too difficult to take the steps the Committee considered appropriate. She submitted that this focussed on the potential ambiguity of any hypothetical clause in the agreement for sale and purchase as to the Lowes' building intentions, and ignored the Committee's finding that Mr Harvey should have confirmed in writing what he was able to disclose.

[89] She submitted that it is not disputed that Mr Harvey did not record in writing how the Lowe's intended to preserve the view. She submitted that logically, if Mr Harvey had recorded what the Lowes had said, he would have been well-positioned to incorporate their position into the agreement for sale and purchase. She submitted that Mr Harvey cannot escape this finding.

[90] She submitted that Mr Harvey cannot simultaneously rely on the Lowes' evidence that they had no firm plans to build while at the same time relying on Mrs Crowe's and Mr Harvey's evidence that Mr Lowe made specific representations as to the dimensions of the proposed building.

[91] Ms Bishop also submitted that Mr Harvey's submissions focus on the complexity involved in outlining building intentions in writing, which assumes that the building concepts were detailed and could be reflected to such a degree. She submitted that Mr Harvey could have recorded what limited intentions the Lowes' had at the time, for example as "best endeavours" to ensure views of sea and mountains were preserved. She submitted that Mr Harvey was able to record his evidence as to the Lowes' baseline intentions in his affidavit, and that if it were beyond his skill set to record them in the agreement for sale and purchase, he should have recommended that the Lowes' take expert advice, and deferred drafting of the relevant clause to a solicitor. She submitted that Mr Harvey never reached this stage, and it was inadequate and a breach of his obligations to leave such an important issue unaddressed. She submitted that Mr Harvey's failures appeared to have led to the very outcome of a "legal minefield" he said he was trying to avoid.

[92] Mr McMenamin submitted in reply that the submissions for the Authority omit any reference to the very significant feature that Mrs Crowe did not want to include such a condition in the agreement for sale and purchase as she wanted a "clean" contract, and the Lowes were emphatic that they gave no undertaking as to the dimensions or placement of the building, as no such specifications were even in contemplation.

[93] He submitted that the result of the Committee's finding is that Mr Harvey is being penalised for not including a clause in the agreement for sale and purchase that neither party wanted or would have consented to, and for failing to record the Lowes' intentions in writing, which would have had no contractual value and for which the sole purpose would have been a personally defensive measure to use against the Lowes in the event of default.

[94] He further submitted that the Authority had given no example of the clause they said should have been inserted, and that given the positions of both the Crowes and the Lowes neither party wanted, or would have consented to, such a clause in the agreement for sale and purchase. He submitted that Mr Harvey may have been in breach of his fiduciary duties to the Lowes if he had inserted a clause which was contrary to what they wanted.

[95] Mr McMenamin submitted that a further difficulty with the Committee's finding on this point is that it did not accept the Lowes' evidence that they gave no undertaking as to the dimensions or placement of the building, as no such specifications were ever in contemplation. He submitted that if the Committee had accepted the Lowes' evidence, it could not have held Mr Harvey responsible for not recording specifications which the Lowes said had not been communicated to him. He submitted that in order to uphold the Committee's decision, the Tribunal would also have to conclude that the Lowes' evidence on this point was not true and having made such a finding, the Tribunal could not (without giving reasons) reasonably prefer the Lowes' statements on other matters to the evidence of Mr Harvey which, he submitted, was not susceptible of any criticism whatsoever.

Discussion

[96] We have set out r 5.1 in paragraph [43], above. It required Mr Harvey to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work. We note that the Committee's findings on this issue arose out of an inquiry on the Committee's own motion. The Committee had the power under s 78(b) of the Act "on its own initiative, to inquire into and investigate allegations about any licensee".

[97] There can be no doubt that the Committee was entitled to consider whether Mr Harvey had complied with his obligations under r 5.1 in dealing with the significant issue of the view from No 28 and the effect on that view of any building on No 26, as part of its role in achieving the purpose of the Act, as set out in s 3 of the Act:

> **3 Purpose of Act**
>
> (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

(2) The Act achieves its purpose by–

(a) regulating agents, branch managers, and salespersons:

(b) raising industry standards;

(c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[98] It was appropriate for the Committee to consider Mr Harvey's conduct in respect of this issue in the context of raising industry standards, and providing accountability through the disciplinary process.

[99] The Tribunal does not accept Mr McMenamin's submission that "both parties" wanted a "clean" agreement for sale and purchase, and would not have agreed to an agreement which included a clause similar to that included in the agreement Mr Harvey drafted for Mr S (set out in paragraph [5], above). While Mrs Crowe said that she wanted to submit a "clean" offer, there is no evidence that the Lowes were of the same view. As Mrs Lowe said in a statement to the Committee, when they signed the Crowes' agreement for sale and purchase they were surprised that Mr Harvey had not included "view conditions" such as were in the draft agreement for Mr S. There is no indication that the Lowes would not have consented to such a clause.

[100] Nor do we accept Mr McMenamin's submissions as to the "difficulty" he saw arising out of the Lowes' evidence. The Committee recorded that the Lowes and Mr Harvey diverged on what the Lowes told Mr Harvey about their building plans for No 26, what impact their building plans would have on the view from No 28, and on what Mr Harvey was authorised to disclose to prospective purchasers.[29]

[101] The Committee's finding was that given the significance of the view from No 28, Mr Harvey failed to exercise skill, care, competence, and diligence by not confirming the Lowes' instructions regarding No 26 in writing and/or by not capturing them in an appropriate clause in the agreement for sale and purchase. For the purposes of the finding, the Committee was not required to make a finding as to whose evidence it preferred as to what was said to Mr Harvey, as it found that Mr Harvey should have confirmed the Lowes' instructions, whatever they were.

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[29] Committee's substantive decision, at 3.33.

[102] We are not persuaded that the Committee was wrong to conclude that, as part of his obligations both to his vendor client and to the purchaser, given how critical the issue of the view from No 28 was, a reasonably competent licensee complying with r 5.1 and exercising skill, care, competence, and diligence would have recorded instructions from the Lowes as to what their building plans were at the time of sale, and the disclosures he was authorised to make as to their building plans, and would have attended the meeting and made notes of what was said. Mr Harvey did not do this.

[103] Further, in fairness to both parties (particularly in light of the Lowes' evidence that they had not decided whether to build on No 26 or sell the section at time of sale of No 28) a reasonably competent licensee exercising skill, care, competence, and diligence would have recommended the inclusion of a clause in the agreement for sale and purchase reflecting the Lowes' instructions. This may have been along the lines of placing a restrictive covenant on the title to No 26 to protect the view from No 28, which would have the effect of binding not only the Lowes, but any future purchaser of No 26. Again, Mr Harvey did not do this.

[104] We are not persuaded that it was not practicable for Mr Harvey to confirm the Lowe's plans for No 26 in writing. Further, having reviewed the clauses inserted into the draft agreement for sale and purchase for Mr S, we are not persuaded that it was not practicable for him to draft a clause to be inserted into the Crowes' agreement for sale and purchase. We agree with Ms Bishop's submission that if Mr Harvey considered it to be beyond his skill set, the significance of the issue as to the view from No 28 was such that Mr Harvey could (and should) have recommended that the Lowes' obtain legal advice on the point.

[105] We are not persuaded that the Committee was wrong to find Mr Harvey in breach of r 5.1 in relation to the issue as to the view from No 28, and the appeal against the Committee's decision will be dismissed.

Did the Committee err in its penalty orders against Mr Harvey?

Submissions

[106] Mr McMenamin's submissions as to penalty focussed on the order that Mr Harvey refund $5,000 of the commission charged to the Lowes. He submitted that the Lowes are the authors of their own undoing, as they either deliberately misrepresented their intentions as to building on No 26 or wilfully breached an undertaking given to Mrs Crowe. He submitted that it is conspicuous that the Lowes withheld all and any documentation relating to the Crowes' High Court proceedings and the terms of settlement. He submitted that the Lowes should not be compensated by a payment of $5,000 for not being restrained from their own dishonest conduct.

[107] Mr McMenamin also submitted that there was no causal connection between Mr Harvey's actions and any loss or inconvenience to Lowes.

[108] Ms Bishop submitted that the submissions for Mr Harvey incorrectly treated the Committee's order to refund fees as a compensatory issue, requiring a causal connection between the Lowe's loss from the sale of property and the subsequent building on the section, and Mr Harvey's conduct. She submitted that the reduction in commission was expressly linked to the Committee's finding that the Lowes had had "very poor service" from Mr Harvey and that if Mr Harvey had acted competently, the "dispute … may have been avoided".[30]

[109] Ms Bishop submitted that it is not necessary to show a causative link between Mr Harvey's conduct and any loss caused by that conduct, and the Committee expressly did not make a compensatory award. She submitted that the level of commission reduction adequately reflected Mr Harvey's poor service, and no grounds had been put forward for Mr Harvey as to why this was in error.

[110] In reply, Mr McMenamin acknowledged that the Committee directly attributed the reduction in commission to Mr Harvey's failure to include a clause defining the Lowes' building intentions. However, he submitted, Mrs Crowe's affidavit is

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30 Committee's penalty decision, at 5.27–5.36.

uncontested and unequivocal evidence that the reason for the dispute was the Lowes' failure to honour the undertakings they gave her, not any conduct on the part of Mr Harvey.

Discussion

[111] As recorded earlier, Mr Harvey's appeal against the Committee's finding that he was in breach of his obligations by failing to obtain the signatures of all registered owners on the agency agreement and agreement for sale and purchase will be allowed. The appeals against the Committee's finding that Mr Harvey failed to recommend that the Lowes obtain legal advice, and provide an opportunity for them to do so, before they entered into the agency agreement, and that he was in breach of r 5.1 in the manner he dealt with the Lowes' building plans for No 26 and disclosures to prospective purchasers, will be dismissed.

[112] In making penalty orders under s 93 of the Act, the Committee is exercising a discretionary power. An appeal against the Committee's exercise of a discretionary power will be allowed if the Tribunal is satisfied that the Committee made an error of law or principle, took irrelevant considerations into account or failed to take relevant considerations into account, or if the decision was "plainly wrong".[31] A decision that is "plainly wrong" is one that was not open to the Committee to make on the evidence before it.

[113] The Tribunal is not persuaded that the Committee was wrong to conclude that Mr Harvey's most significant failing related to the way he dealt with what was to be built on No 26.[32] Notwithstanding the Tribunal's decision to allow one element of Mr Harvey's appeal, we are not persuaded that the Committee erred in assessing Mr Harvey's conduct as being in the moderate level of unsatisfactory conduct.

[114] The Committee's order to refund $5,000 of the commission paid by the Lowes was made pursuant to its power under s 93(1)(e) of the Act to order a licensee to "reduce, cancel or refund fees charged for work where that work is the subject of the

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31 See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, at [32].
32 Committee's penalty decision, at 5.39.

complaint". The Committee did not refer to any relevant authorities as to the application of s 93(1)(e), and none were cited to the Tribunal.

[115] The Tribunal accepts that had Mr Harvey recorded the Lowes' instructions (whether that was that they would be "mindful and considerate" as the Lowes maintained, or more detailed as Mr Harvey claimed) there would have been less chance of a dispute as to what the Lowes' instructions were. However, against Mrs Crowe's evidence as to what Mr Lowe said to her as to their building plans, that may not have been of assistance to them. In particular, it does not appear that the dispute with the Crowes and the High Court proceedings could have been avoided.

[116] The Committee expressly based its decision to order a refund of commission on Mr Harvey's having given "very poor service" to the Lowes, but did not outline how that "poor service" justified a reduction in commission. It did not set out why a reduction in commission was justified in this case, as opposed to a fine which appropriately met the principles as to penalty,[33] including personal and general deterrence.

[117] We accept that the Committee's decision to order a refund of commission was plainly wrong, and that the order to that effect must be quashed.

[118] We note that the Committee took its order for refund of commission into account in assessing the fine ordered against Mr Harvey. While that might indicate that in the absence of an order to refund commission a higher fine would be appropriate, we have concluded that the fine of $2,500 is appropriate. We have however, concluded that Mr Harvey should be directed to complete an appropriate course of training in consumer-protection law related to real estate transactions.

Outcome

[119] Mr Harvey's appeal against the Committee's substantive decision is allowed to the extent that the Committee's finding that he breached rr 5.1, 6.1, and 9.6 in relation

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[33] Set out at 4.1–4.9 of the Committee's penalty decision.

to the signatures on the agency agreement and the agreement for sale and purchase is quashed. In all other respects, the Committee's substantive decision is upheld.

[120] Mr Harvey's appeal against the Committee's penalty decision is allowed to the extent that the Committee's order that Mr Harvey refund $5,000 of the commission paid by the Lowes is quashed. The Committee's order that he pay a fine of $2,500 is upheld. If not already paid, the fine is to be paid to the Authority within 20 working days of the date of this decision.

[121] Mr Harvey is further ordered to complete Unit Standard 23136 "Demonstrate knowledge of consumer protection law related to real estate practice" within six months of the date of this decision.

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

_____
Hon P J Andrews
Chairperson

_____
Mr N O'Connor
Member

_____
Ms F Mathieson
Member