BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 41

IN THE MATTER OF	Appeals under s 111 of the Real Estate Agents Act 2008
	READT 003/2021
BETWEEN	VICTORIA ANN LONDON and MATTHEW TOOLE Appellants
AND	REAL ESTATE AGENTS AUTHORITY (CAC 1906) First Respondent
AND	BENJAMIN CARTWRIGHT Second Respondent
	READT 004/2021
BETWEEN	BENJAMIN CARTWRIGHT Appellant
AND	REAL ESTATE AGENTS AUTHORITY (CAC 1906) First Respondent
AND	VICTORIA ANN LONDON and MATTHEW TOOLE Second Respondents
On the papers	
Tribunal:	Hon P J Andrews (Chairperson) Mr G Denley (Member) Ms C Sandelin (Member)
Submissions filed by:	Mr C Matsis, on behalf of Mr Cartwright Mr T C Bain, on behalf of the Authority Ms V London, for herself and on behalf of Mr Toole
Date of Ruling:	3 August 2021

RULING OF THE TRIBUNAL
(Applications by Mr Cartwright)

Introduction

[1] On 4 February 2020 Ms London and Mr Toole ("the complainants") made a complaint to the Real Estate Agents Authority ("the Authority") concerning the conduct of Mr Cartwright in marketing a property for sale. On 24 September 2020 Complaints Assessment Committee 1906 ("the Committee") issued a decision in which it made a finding of unsatisfactory conduct against Mr Cartwright ("the Committee's substantive decision"). On 15 February 2021 the Committee issued a decision as to orders, in which it ordered Mr Cartwright to pay a fine of $7,500 to the Authority and to provide the complainants with an apology ("the Committee's penalty decision").

[2] On 11 March 2021 the complainants appealed to the Tribunal against the Committee's penalty decision. On 15 March 2021 Mr Cartwright filed a cross-appeal against both the Committee's substantive decision and its penalty decision.

[3] Mr Cartwright has made two applications:

[a] for leave for him to provide evidence to the Tribunal; and for an oral hearing at which witnesses may be cross-examined; and

[b] for an order prohibiting or restricting publication of the Committee's substantive and penalty decisions pending the outcome of his appeal.

[4] Submissions in respect of the applications were filed by the complainants and by Mr Bain, on behalf of the Authority. In his submissions, Mr Bain noted that Mr Cartwright had not set out in any detail the evidence he wished to submit in support of his appeal, and suggested that a timetable be set for such evidence to be filed, and further submissions filed. Counsel for Mr Cartwright, Mr Matsis, agreed with that suggestion and noted that Mr Cartwright also sought to include matters relating to his application for an order restricting publication.

[5] In a Minute issued on 29 June 2021 the Tribunal gave Mr Cartwright leave to file an affidavit and made timetable directions as to the filing of the affidavit and submissions.

Background

[6] Mr Cartwright is a licensed salesperson and at all relevant times was engaged by Leaders Real Estate Limited Johnsonville, trading as Ray White Johnsonville ("the Agency"). He was the salesperson for a housing development at the southern end of Tawa, Wellington. ("the development")

[7] In June 2019 the complainants responded to an advertisement for Lot 21 in the development ("the property"). The property was advertised at Buyer Enquiry Over ("BEO") $485,000, and that its estimated completion date was July 2019. The complainants attended an open home at the property, at which they say Mr Cartwright reiterated that the estimated move in date for the property was July 2019, and that if they could pay $510,000 the property would be theirs.

[8] The complainants' offer of $510,000 was accepted (following the vendor cancelling an existing offer on the property) but the complainants' contract was cancelled in late November 2019 pursuant to a "sunset" clause in the agreement for sale and purchase. The property was then relisted for sale at BEO $560,000 then, as at February 2020, at BEO $605,000.

[9] In its substantive decision the Committee found that Mr Cartwright was deceptive in promoting the property, in that he would have known that it was nowhere near completion because title for the property had not been issued and consents had not been granted by the relevant local authorities (Upper Hutt City Council ("UHCC") and Wellington City Council ("WCC")), but indicated a move in date that was never going to be possible.

[10] The Committee further found that Mr Cartwright continued to mislead the complainants as he did not pass on to them information relating to the sunset clause, and by telling them that they should not worry about the sunset clause as it would not

affect them. In its penalty decision the Committee ordered Mr Cartwright to pay a fine of $7,000 and to provide a written apology to the complainants.

Mr Cartwright's appeal

[11] In his notice of appeal Mr Cartwright contended that the Committee was wrong to find that the property was nowhere near to completion in June 2019 and that it should have been obvious to him that the complainants would not be able to move in in July 2019. He also contended that the Committee was wrong to find that his communication was poor, he was entitled to express an honestly held opinion as to the impact of the sunset clause, and it was appropriate that not all information given to him by the vendor was passed on to the complainants.

[12] Mr Cartwright also contended that the order that he pay a fine of $7,000 was based on incorrect facts and was wrong in law, and the Committee proceeded on the incorrect assumption that the move in date was "never going to be possible".

Mr Cartwright's application for leave to give evidence

Relevant legal principles

[13] Section 111 of the Real Estate Agents Act 2008 ("the Act") provides that an appeal is by way of re-hearing. That is, the appeal is a reconsideration by the Tribunal of the evidence and other material that was provided to the Committee. The appeal is determined by reference to that material, the Committee's decision or decisions, and submissions made by or on behalf of the parties to the appeal.

[14] Pursuant to s 105(1) of the Act, the Tribunal may regulate its procedures as it sees fit. The Tribunal may, on application, give leave for witnesses to be cross-examined and for evidence to be submitted to the Tribunal that was not provided to the Committee, if it considers it to be in the interests of justice to do so.

[15] An applicant for leave to submit evidence must set out the evidence to be submitted and satisfy the Tribunal that it is apparently credible and that it is "fresh" – that is, that it could not with reasonable diligence have been provided to the

Committee. An applicant must also establish that the evidence is cogent and material to the issues on appeal – that is, that it would have had an important influence on the outcome of the appeal. The Tribunal may also consider whether allowing the evidence to be submitted will require further evidence from other parties and cross-examination.[1]

[16] We accept that the Tribunal's discretion to allow further evidence to be submitted is limited, and that the Tribunal should not be drawn away from the material that was before the Committee unless the interests of justice require it.[2]

Mr Cartwright's application

[17] Mr Cartwright applied for leave to provide evidence to the Tribunal as to:

[a] what he knew of timeframes for completion at the time of showing the property to the complainants in June 2019;

[b] what his knowledge of timeframes was based on at that time;

[c] his understanding of the local authority consents;

[d] his understanding of what changed after showing the property to the complainants in June 2019 that led to the delays with the complainants' property;

[e] whether he had been involved in other sales in the development; and

[f] what he said to the complainants about the status of the offer for the property in place at the time he showed the property to them.

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1 See the Tribunal's decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3 (affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

2 See *Nottingham*, at [81].

[18] Mr Matsis stated in the application that Mr Cartwright was not asked by the Committee to address the above issues before the Committee made findings against him.

[19] Mr Matsis submitted that Mr Cartwright also wishes to provide evidence in relation to an allegation by the complainants that the developer never intended to honour the agreement with the complainants but simply wanted property sales to show to its bank, and that he and the developer colluded together. He stated that neither he nor the developer was asked by the Committee to address this issue.

[20] Mr Cartwright's affidavit was filed on 9 July 2021. He said that when he showed the property to the complainants he understood that the development was near practical completion, after which the developer would seek sign-off from the WCC. He said that his understanding was that all that needed to be done was for driveways to be concreted, the last remaining units in the development (already constructed off site in Upper Hutt and transported to an empty lot next to the development) to be lifted into place, pre-engineered decks to be bolted on, sign-off from the WCC, and landscaping works. He said he believed from discussions with the developer (Mr Hannah) that this would be completed within two weeks. He also said that after the property was shown to the complainants the WCC required work to be done and this caused delays.

[21] Mr Cartwright denied that the developer never intended to honour the sale and simply wanted an executed agreement to satisfy its bank, and that he had been involved in an earlier round of cancellations of agreements for sale and purchase in the development. He also denied an allegation by the complainants that he told them that the developer would cancel an existing agreement for the property and accept their offer instead. He said there was no active agreement, but another prospective purchaser had made an offer which contained conditions that were not acceptable to the developer. He said he told the complainants that if they submitted along the lines they were suggesting, that offer would be acceptable to the developer and negotiations with the other prospective purchaser would not be continued.

[22] An unsworn affidavit by Mr Hannah was also filed. Mr Hannah stated that he is resident in Poland and that it was difficult to swear an affidavit before a Commonwealth representative or notary public, given current COVID19 restrictions. He said he would swear the affidavit and forward it to the licensee's solicitor for filing in the Tribunal as soon as practicable. A sworn affidavit had not been received as at the date of this Ruling.

[23] Mr Hannah said that there were significant problems over the course of the development, including difficulties in dealing with the UHCC and WCC. Mr Hannah said he could not remember the exact status of matters as at June 2019 as he had not had time to go through his files, but said he would not have accepted an offer in June 2019 unless he believed there was a good chance that all vendor conditions could be met. He also denied that he was executing sale agreements to satisfy his bank, and that the licensee was involved in earlier sales that were cancelled pursuant to their sunset clauses.

Submissions

[24] Mr Matsis submitted that it is in the interests of justice that leave be given for the evidence to be given, and that there be an oral hearing at which there can be cross-examination of the complainants, Mr Cartwright, and the developer.

[25] On behalf of the Authority Mr Bain submitted that Mr Cartwright's affidavit evidence is not "fresh" as it could, with reasonable diligence, have been provided to the Committee, and it should not be admitted on appeal. He submitted that Mr Matsis' submission that Mr Cartwright was not asked to comment on the status of UHCC and WCC consents and the cause of subsequent delays was not tenable. He submitted that Mr Cartwright was on notice that this issue was at the centre of the complaint against him, as it was specifically raised by the complainants, in strong terms. He referred to the complainants' original complaint in which they stated:

> The move in date of July 2019 was reiterated by [Mr Cartwright] when he showed us the property on June 17 2019 so acting [in] reliance [on] that, we submitted a bid on the property. … He would have known that the property was nowhere near completion because consents were not granted as confirmed by the Upper Hutt City Council as well as the Wellington City Council. If he

> were honest and told us that completion was not for another 6-10 months, we would not have bid.

[26] Mr Bain also submitted that Mr Cartwright had addressed these points in his submissions to the Committee, and in a written chronology provided on his behalf had asserted the he was aware that the property had previously been the subject of a cancelled sale but he did not know the circumstances, he was told by the developer when he listed the property that settlement was anticipated in July 2019, and that at that stage the development had substantial work in progress and there were no known local authority consent issues or any reason to suspect or anticipate any such issues.

[27] Mr Bain also submitted that the balance of Mr Cartwright's affidavit also related to matters that were originally raised in the complainants' complaint, where they alleged that the development was "strapped for cash" and "wanted to show their bank sales … they never intended to honour our contract", and that Mr Cartwright had "been engaging in activities with the developer to act in bad faith", and annexed screenshots of text messages from Mr Cartwright where he advised the complainants that the developer "will cancel the current offer on [the property] in due course".

[28] Mr Bain submitted that the process followed by the Committee was orthodox and Mr Cartwright was on notice as to the complainant's allegations and responded to them with his version of events. He submitted that the Committee had no obligation to conduct an oral hearing and there was no evidence that Mr Cartwright had sought an oral hearing.

[29] Mr Bain further submitted that Mr Hannah's affidavit should not be admitted, for the same reasons. He submitted that Mr Cartwright was on notice as to the allegations relevant to Mr Hannah's statement and could with reasonable diligence have provided it to the Committee. He further submitted that Mr Hannah's evidence is not cogent, as he candidly admits he does not recall the sale in question, or the status of the development in June 2019, and had not reviewed his filed. He submitted that Mr Hannah's general recollections about the development are of limited assistance to the Tribunal. Finally, he noted that a sworn copy of the affidavit had not been filed,

despite Mr Hannah having had ample time to swear it before a person authorised by the laws of Poland to administer oaths.[3]

[30] The complainants submitted that when the complaint was before the Committee Mr Cartwright waited until the last minute, or was late, when providing responses to the Committee. They further submitted that the Authority's instructions as to responses were made very clear, and there was nothing preventing Mr Cartwright from responding to any of their complaints. They submitted that there is nothing in Mr Cartwright's affidavit that was new and not previously available for him to respond with when they lodged their complaint.

[31] They submitted that Mr Cartwright is seeking to run his case afresh, because he wishes he had conducted it differently in the first instance, and that this is not permissible.[4] They submitted that they should not be punished by further delays because Mr Cartwright did not know how to respond to the complaint sufficiently, or did not take it seriously enough.

[32] The complainants submitted that Mr Hannah's affidavit is not relevant to the issue on appeal, which is as to Mr Cartwright's ethics and selling practices. They also noted that Mr Hannah's affidavit is unsworn, so does not assist the Tribunal.

Discussion

[33] Mr Cartwright was provided with a copy of the complainants' complaint. Following the Committee's decision to inquire into the complaint the Authority's investigator wrote to him on 20 April 2020, noting the issues raised in the complaint as being:

1. The licensee's selling practice was deceptive in promoting the property as having a July 2019 move in date.
2. The licensee continued to provide misleading and conflicting information about the move in date for the Property and the reasons for the delays.

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3 Citing r 9.86 of the High Court Rules 2016, and noting that the Tribunal has accepted that it can be guided by the High Court Rules: *Complaints Assessment Committee 409 v Kemp* [2020] NZREADT 54, at [16].

4 Citing *Eichelbaum v Real Estate Agents Authority* fn 1, above.

[34] Mr Cartwright was told that he needed to provide a written response/explanation in relation to the complaint, in the form of:

1. A general narrative describing your involvement in this matter.
2. A chronological timeline of events.
3. Please then address each of the above issues under a separate heading and provide your response to each issue.
4. Specifically can you also respond to the following questions:
    1. Did the Property advertised on TradeMe have a move in date of July 2019 when the Complainants responded to the advertisement?
    2. Was the Licensee aware other Sale and Purchase agreements had been cancelled by the vendors?
    3. Was the Licensee aware that the vendors were using the "Sunset clause" to cancel unconditional agreements?
    4. Was the Licensee aware why the vendors were using the "sunset clause"?
    5. Did the Licensee at any stage during the selling process ever advise the Complainants they may be subject to their agreement being cancelled?
    6. Did the Licensee ever draw the Complainants' attention to the Sunset clause or explain what the clause meant?
    7. What did the Developers advise the Licensee about any move in date?

In addition please also provide the following documents:

1. The full property file
2. All correspondence including e-mails and text messages relating to this matter
3. The initial TradeMe advertisements the Complainants responded to showing DOP 19 July 2019
4. Any documents/emails between the Licensee and the Developers advising about any move in date.

[35] Mr Cartwright's response to the Committee was provided on 11 June 2020, with a covering letter from the Agency's Director, Mr Garlick. Included with the response was a letter from Mr Hannah, in which he confirmed the accuracy of sections of Mr Carwright's response.

[36] We accept Mr Bain's and the complainants' submissions that the nature of the complainants' complaint, and in particular the issue as to UHCC and WCC consents, was made clear in the complaint. Mr Cartwright specifically addressed the "consent" issue and the reason why the sunset clause was invoked in his response.

[37] We also accept that Mr Cartwright could have submitted his response in the form of an affidavit, had he so chosen. There was no restriction placed on the form in which his general narrative describing his involvement in the matter was to be provided. As a licensed salesperson it was his obligation to co-operate fully and participate in the disciplinary process. He was obliged to provide the Committee with a full response to the matters raised in the complaint.

[38] We reject Mr Matsis' submission that the Committee breached natural justice by making credibility findings without hearing from the witnesses in person at an oral hearing. Section 89(1) of the Act provides (as relevant):

> **89 Power of Committee to determine complaint or allegation**
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> (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
>
> …

Section 90 of the Act provides:

> **90 Hearings on papers**
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> (1) A hearing conducted under s 89(1) by a Committee is to be a hearing on the papers, unless the Committee otherwise directs.
>
> (2) If the Committee conducts the hearing on the papers, the Committee must make its determination on the basis of the written material before it.
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> (3) Consideration of the written material may be undertaken in whatever manner the Committee thinks fit.

[39] The Committee was clearly entitled to determine the complaint on the papers. Committee hearings on complaints are routinely conducted on the papers, and there was no requirement that the Committee hold an oral hearing. Further, as Mr Bain submitted, there is no suggestion that Mr Cartwright sought an oral hearing.

[40] We find that the evidence Mr Cartwright seeks leave to give is not "fresh, as it could with reasonable diligence have been provided to the Committee. Leave to submit that evidence on appeal is declined.

[41] With respect to Mr Hannah's unsworn affidavit, we also find that his evidence is not "fresh". It is clear that there was no impediment to his providing evidence to

the Committee, as a statement from him was provided with Mr Cartwright's response. Leave to submit his evidence is also declined.

Mr Cartwright's application for an order prohibiting publication

Relevant legal principles

[42] Section 108 of the Act provides (as relevant):

> **108 Restrictions on publishing**
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> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make 1 or more of the following orders:
>
> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[43] Proceedings before the Tribunal focus on the fundamental purpose of the Act, as set out in s 3(1) of the Act, 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. Section 3(2)(c) provides that one of the ways in which the Act achieves its purpose is by "providing accountability through a disciplinary process that is independent, transparent, and effective".

[44] The starting point for any application for an order restricting publication is the principle of open justice. There is a clear public interest in disciplinary proceedings being transparent and open to public scrutiny.[5] The principles, and their relevance to proceedings before the Tribunal, were discussed in *X v Complaints Assessment Committee 10028*,[6] and *Graves v Real Estate Agents Authority (CAC 20003)*.[7] In those

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5 See *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21, at [61].
6 *X v Complaints Assessment Committee 10028* [2011] NZREADT 2.
7 *Graves v Real Estate Agents Authority (CAC 20003)* [2012] NZREADT 4.

decisions, the Tribunal referred to the principles expressed in *Lewis v Wilson and Horton Ltd*,[8] *Director of Proceedings v I*,[9] and *S v Wellington District Law Society*.[10]

Submissions

[45] Mr Matsis submitted that Mr Cartwright understands that the Committee's substantive and penalty decisions have been published on the Authority's website, notwithstanding that both decisions are the subject of appeals. He submitted that Mr Cartwright seeks an order for non-publication pending the outcome of the appeal or, alternatively, an order prohibiting publication of Mr Cartwright's name and that of the Agency, pending the outcome of the appeal.

[46] He submitted that Mr Cartwright is particularly concerned about the impact of publication on his and the Agency's reputation and business where, he submitted, in breach of natural justice:

[a] the Committee made findings of dishonesty against him;

[b] the Committee's decision refers to allegations of Mr Cartwright and the developer acting in unison (that is, collusion) for which there is no evidence other than the complainants' speculation; and

[c] there has been sensationalist media reporting of other aspects of the development, unrelated to Mr Cartwright and the Agency, which may unfairly reflect on them.

[47] As recorded earlier, prior to the Tribunal granting leave to Mr Cartwright to file an affidavit setting out the evidence he wished to have admitted on appeal, Mr Matsis advised the Tribunal that Mr Cartwright wished to include in his affidavit matters in support of his application for non-publication. He asked that the application for non-publication not be determined until after receipt of the affidavit. Mr Cartwright's affidavit is stated to be "in support of application for leave to call further evidence".

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8 *Lewis v Wilson and Horton Ltd* [2000] NZCA 175, [2000] 3 NZLR 546.
9 *Director of Proceedings v I* [2004] NZAR 635 (HC).
10 *S v Wellington District Law Society* [2001] NZAR 465 (HC).

It does not contain any evidence or matters relating to his application for an order restricting publication.

[48] The complainants submitted that it is in the public interest that the Committee's decision is published. They submitted that it would be "extremely irresponsible" for it not to be published

[49] Mr Bain submitted that open justice is crucial to maintaining public confidence in the profession. He referred to the observation of Sir Thomas Bingham MR in *Bolton v The Law Society*, that "a profession's most valuable asset is its collective reputation and the confidence which that inspires".[11]

[50] He submitted that an order restricting publication should not be made in this case. He submitted that the grounds advanced are somewhat general and do not displace the strong presumption in favour of open justice. In particular, he submitted, while the application expresses concern for Mr Cartwright's and the Agency's reputation following adverse findings by the Committee, such hardship arises in many, if not most, licensees' appeals to the Tribunal against Committee decisions.

[51] He also submitted that while concern was expressed, this was not supported by affidavit evidence from either Mr Cartwright or the Agency. Accordingly, he submitted, it is difficult to weigh the potential impact of publication, and the submission that Mr Cartwright's and the Agency's reputations and businesses would be jeopardised by publication is not founded in evidence, and should be treated as speculative.

[52] Mr Bain further submitted that to the extent that the application criticises "sensationalist media reporting" of other aspects of the development, the Tribunal has previously confirmed that it is:[12]

> .. not in a position to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media.

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11 *Bolton v the Law Society* [1994] 2 All ER 492.

12 *Ryan v Real Estate Agents Authority (CAC 10067)* [2013] NZREADT 51, at [10].

[53] Finally, Mr Bain submitted that a non-publication order is not warranted, as the Committee's decision has already been published on-line.

Discussion

[54] The Committee's substantive and penalty decisions contain advice directing publication of the decision. Had Mr Cartwright been concerned as to publication of the Committee's decision, the appropriate time to raise the point was at the time the decisions were issued (the substantive decision was issued on 24 September 2020 and the penalty decision was issued on 15 February 2021). Mr Cartwright's application was not filed until 21 May 2021)

[55] We accept Mr Bain's submission that without evidence in support, Mr Cartwright's concern as to the potential impact on his and the Agency's reputations and businesses is speculative, and does not provide a foundation for an order restricting publication.

[56] It is accepted that it is a consequence of the publication of a disciplinary finding that there may be some impact on the relevant licensee's reputation. That does not, in and of itself, displace the presumption of open justice in the public interest of disciplinary proceedings being transparent and open to public transparency. It is not grounds for an order restricting publication.

[57] We are not persuaded that there are grounds to make an order restricting publication of the Committee's decisions. According Mr Cartwright's application for such an order is declined.

Outcome

[58] Mr Cartwright's application for leave to submit evidence on appeal is declined.

[59] Mr Cartwright's application for an order restricting publication of the Committee's decision is also declined.

[60] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member