

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 55

Reference No: READT 11/2021 & 23/2021

IN THE MATTER OF

Appeals under s 111 of the Real Estate Agents Act 2008

READT 011/2021

BETWEEN

**DAVID JOHN LAMMAS and
JANET ISOBEL LAMMAS**
Appellants

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1901)**
First Respondent

AND

**CATHERINE ANN FREEAR and
CRAIG ANTHONY FREEAR**
Second Respondents

AND

**CRAIG FREEAR REAL ESTATE LTD,
t/a REAL ESTATE NOW**
Third Respondent

READT 023/2021

AND BETWEEN

**CATHERINE ANN FREEAR and
CRAIG ANTHONY FREEAR**
Appellants

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1901)**
First Respondent

AND

**DAVID JOHN LAMMAS and
JANET ISOBEL LAMMAS**
Second Respondents

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
G Denley (Member)
C Sandelin (Member)

Representation:

Counsel for the Lammases:

D C Calder

Counsel for the Authority:

S A H Bishop

Counsel for the Freears and agency:

S McEwen, T O'Regan

DECISION

Dated 6 December 2021

INTRODUCTION

[1] Catherine Ann Freear is a licensed salesperson and Craig Anthony Freear is a licensed agent (collectively known as the licensees). They were engaged by Craig Freear Real Estate, trading as Real Estate Now (the agency). David John Lammas and Janet Isobel Lammas were the vendors of a property (the property). The licensees were unsuccessful selling the property, so the Lammases appointed another agency (the new agency).

[2] The new agency successfully sold the property to a buyer who had first been introduced to the property by the Freears. The Freears accordingly claimed a commission. Mr Freear did so by serving a letter of demand on Mr Lammas at his front door, an event photographed by Ms Freear who was sitting in a car on the road.

[3] The Lammases made a complaint to the Real Estate Agents Authority (the REAA). A Complaints Assessment Committee (CAC 1901) (the Committee) found Ms and Mr Freear both to have breached s 127(1) of the Real Estate Agents Act 2008 (the Act) and rr 5.1, 5.2 and 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the rules). They had failed to provide the REAA's guide when the agency agreement was signed and had failed to provide a list of the prospective purchasers when their agency ended. This amounted to unsatisfactory conduct. The Freears were each censured and fined \$3,000. The Committee decided to take no further action on the privacy complaint concerning the photograph and a complaint against the agency for failing to properly supervise Ms Freear.

[4] The Lammases appeal to the Tribunal against the Committee's dismissal of the photography and supervision complaints. The Freears cross appeal against the upholding of the breaches of rr 5.1 and 9.11 (but not r 5.2) and against the Committee's penalty order.

BACKGROUND

[5] The property is in Churton Park, Wellington. A sole agency agreement with the agency was entered into by the Lammases on Sunday, 7 April 2019 at about 1–1:30 pm, with the Freears being the named licensees. The agency commenced on that day and would expire on 7 July 2019. At the time the agreement was signed, the Freears did not have with them the REAA guide for buyers and sellers.

[6] Mr Freear sent an email to Mr Lammas that evening at 9:02 pm attaching:

1. The signed agency agreement

2. The REAA guide.

[7] The eventual purchasers of the property were introduced by the Freears and inspected the property three times from about 26 May to about 2 June 2019. On an unknown date, the purchasers made an offer which was not accepted by the Lammases (unseen by the Tribunal). On about 21 July 2019, another agreement for sale and purchase was drawn up for the purchasers by the Freears. A price was inserted, but it was not signed by any party. Text messages exchanged between the purchasers and Mr Freear show that they were not then prepared to meet the price expectation of the Lammases, so the purchasers' second written offer was not formally presented.

[8] In the meantime, the Freears' sole agency was extended on 21 June 2019, until 21 July 2019. It was extended as a general agency on 7 August 2019 until 18 August 2019.

[9] There were further texts between the purchasers and Mr Freear about a possible revised offer on about 7 August 2019.

[10] On 19 August 2019, the Lammases signed a sole agency agreement with another agency (the new agency). The agency was to commence on 1 September 2019 and expire on 1 December 2019. The following provision was inserted in manuscript:

We, the vendors are not legally or financially liable for any issues over double commissions.

[11] On 28 October 2019, the Lammases and the purchasers signed an unconditional sale agreement, through the new agency. Settlement appears to have been on 14 November 2019. An invoice from the new agency (dated 10 August 2020) showed commission of \$27,010.

[12] Mr Freear sent a text to the purchasers on 28 November 2019 enquiring as to whether they were still house hunting. They advised in reply they had bought the property.

Freears claim commission

[13] On Saturday, 7 December 2019 at about 1 pm, the Freears went to the property. Mr Freear knocked on the front door. It was answered by Mr Lammas. Mr Freear handed over an envelope. In it was a letter to the Lammases of the same date, on the agency's letterhead and signed by Mr Freear. It claimed a commission of \$30,000. The letter reminded the Lammases of the clause in the agency agreement providing for a

commission to be paid if the purchaser was introduced by the agency. The envelope also contained an invoice from the agency (6 December 2019) for \$30,000 (incl GST).

[14] The hand delivery of the envelope was photographed by Ms Freear sitting in a car parked on the road opposite the front door of the property.

[15] Mr Lammas sent an email to the manager of the new agency on 8 December 2019. He advised him that the purchasers had made an offer in June 2019. In the intervening period, no offers had been received from them. The successful offer was \$35,000 more than the June offer. They considered the earlier offer to be dead, as Mr Freear told them the purchasers had no more money. In their listing agreement with the new agency, they stated they would not be liable for any double commissions.

[16] According to Mr Lammas' email, the Freears arrived at their property without notice on 7 December 2019. Mr Freear handed him a letter and invoice. Ms Freear, who was across the road in their vehicle, took photographs or a recording. This breach of privacy was concerning, unnecessary and unprofessional. He did not think that a double commission could be sought.

[17] In another email to the manager on the same day, Mr Lammas queried why the Freears did not give them a written list of prospective purchasers, if they thought they were entitled to a later commission.

[18] The manager sent an email to Mr Freear on 9 December 2019. It was the manager's view that the Lammases did not owe a double commission.

[19] Mr Freear replied to the manager on 13 December 2019. He said that the new agency had put the Lammases at risk of two commissions. The purchasers had been introduced by his agency and had made an offer. Mr Freear did not agree with the claim that they had not complied with r 9.11 of the rules. The buyers were named on the online portal to which the Lammases had access. He intended to vigorously pursue the Lammases and he suspected they would join the new agency to the proceedings.

[20] On 20 December 2019, Ms Freear sent an email to the Lammases with an attached statement (statement not sent to the Tribunal). The covering email stated that \$30,000 was overdue and the failure to pay would result in legal proceedings.

[21] The Lammases replied by email on the same day. They were referring correspondence from the Freears to the new agency. They requested a copy of the recording taken by Ms Freear of Mr Lammas while he was standing at the front door of his private property.

[22] Mr Freear responded by email on 24 December 2019. He said the matter was not with the new agency, but was with the Lammases, as they had signed the contract. Payment was requested as soon as possible. As for the asserted breach of privacy, no video recording was made.

[23] The manager of the new agency sent an email to Mr Freear on 30 January 2020 stating that the latter had not complied with r 9.11 of the rules. He had not provided a written list, so he was not entitled to a commission.

[24] In his email of 13 February 2020 to the manager, Mr Freear stated that Mr Lammas was well aware of the rules regarding introductions. He was aware of the names of purchasers from the vendors' portal. Mr Lammas had said he gave the new agency the list of names. Mr Freear strongly refuted not complying with r 9.11 of the professional rules. His agency was therefore legally entitled to a commission and he would pursue the Lammases through the courts.

THE COMPLAINT

[25] On 7 January 2020, the Lammases wrote a letter to the REAA alleging breaches of the professional rules by the Freears. To the extent relevant, the Lammases alleged:

1. They were not provided with the REAA guide when they signed the agency agreement.
2. They were not advised in writing of each prospective purchaser for whom a commission could later be claimed.
3. Mr Freear served a letter and invoice on Mr Lammas at their front door, while Ms Freear was holding an iPad facing him.

[26] On 14 January 2020, Mr and Ms Lammas made a formal complaint to the REAA against Ms and Mr Freear (unseen by the Tribunal).

[27] On 12 March 2020, an investigator from the REAA advised the Freears that the Committee would conduct an inquiry. An explanation from them of the identified issues was invited.

[28] On 21 May 2020, the Freears sent a statement of response to the REAA. Relevantly, they stated:

1. Prior to the agreement being signed, they realised they did not have a copy of the guide. The Lammases granted them permission to send it by email

later that evening. This was not the correct process and they had made changes to their internal processes.

2. The Lammases were aware at all times of the introduced names. They had copies of the offers. There were numerous discussions and texts concerning the offers. There was an online portal which the Lammases visited 96 times.
3. The agency introduced the purchasers and was entitled to a commission.
4. The photograph was taken for evidential purposes.
5. The Lammases asked for a video, but there was no recording. A photograph was not a video recording.
6. There was court action for the recovery of the commission.

[29] A Lammas' family member wrote to the REAA on 12 June 2020. He set out various complaints. To the extent relevant to the matters before the Tribunal, he alleged there was an illegal breach of his privacy. A photograph was taken inside a private home without consent. The overall experience of working with the agency had affected his own personal mental health, resulting in increased visits to the doctor for severe anxiety, depression and chronic pain.

[30] On 15 June 2020, the Lammases replied extensively to the statement of response of the Freears.

[31] On 17 September 2020, the REAA's investigator requested from the new agency a copy of the list of interested parties supplied to it by the Lammases at the time of listing.

[32] The manager of the new agency replied to the REAA on the same day advising that to his knowledge the Lammases never received a list of the buyers that went through the agency.

[33] On 18 September 2020, Mr Freear sent an email to the REAA's investigator to say that the Lammases were well informed about introduced parties (via texts, the portal, emails, offer documents, verbal discussions and the provision in the agency agreement explaining commissions). They had a reasonably clear understanding of the rules by providing the new agency with the names of interested parties and by their insertion of the clause into their agreement with that agency about double commissions. The Lammases complain that the Freears never gave them the names of interested parties,

but the new agency will have a diary note of the information the Lammases gave them at listing.

[34] On the same day, 18 September 2020, the Lammases sent additional information to the REAA. They stated they were not provided with the REAA guides on the day of listing and were asked to sign for them, despite not receiving them. The Freears had admitted not providing them until the evening. As for the commission, it was their understanding they would be liable only if an offer was accepted during the contracted period. They also knew they could not sell the property privately afterwards.

[35] Furthermore, the Freears did not give them a formal notice of potential buyers at the end of the contract. Instead, the Freears rely on a portal system containing a long list of 60 or more people who had been through the property. At the end of the contract, there were no active buyers lined up to submit offers, otherwise they would have been told. The Freears had failed to follow the process under real estate law. The Lammases stated that when they signed with the new agency, they informed them of two serious offers.

[36] According to the Lammases' communication of 18 September 2020, Mr Freear arrived at their home without any notice. Ms Freear recorded Mr Lammas standing in his doorway while Mr Freear handed him an envelope. This was totally inappropriate and an invasion of his personal privacy while in his own home. When he requested a copy of the recording, they denied taking any recording and it was only eight months later on 7 September 2020 that the photograph was received.

[37] The Lammases state that this incident raised a question as to the total lack of supervision of Ms Freear, a new salesperson, by Mr Freear, her manager.

[38] On 10 October 2020, the Freears provided additional information to the REAA's investigator. They stated that the whole complaint derived from the agency's claim against the Lammases for a commission in relation to a party introduced by them.

[39] The Freears accepted they failed to provide the guide before the agency agreement was signed, but the Lammases had given their permission for the guide to be emailed later. It was duly emailed that evening. The Freears had made improvements to their processes to ensure the error would not be repeated.

[40] As for the photograph, the Freears say the Lammases requested only a "recording" on 20 December 2019. The denial by them (the Freears) of making a recording was truthful.

[41] On 21 October 2020, Mr Freear advised the REAA that he claimed a commission under a certain clause of the agency agreement.

[42] On an unknown date, Mr Freear sent another response to the REAA's investigator.¹ He stated that the Lammases were well versed in the rules regarding introduced buyers and the agency's right to claim commission. They had added a rider to their agreement with the new agency.

[43] The Lammases sent a further comprehensive submission to the investigator on 10 November 2020.² Relevantly, they stated that they did not have access to the portal after the agency ended.

[44] A "Post Disclosure Video" was provided by a party to the REAA.³ It is a marketing video and has been viewed by the Tribunal.

Decisions of Complaint Assessment Committee (CAC 1901)

[45] On 19 March 2021, the Committee issued its decision partially upholding the complaint and relevantly concluding:

1. Ms and Mr Freear both did not fulfil the obligations in s 127(1) of the Act and rr 5.1 and 5.2 of the rules, in failing to provide the guide, this amounting to unsatisfactory conduct.
2. Ms and Mr Freear both breached r 9.11, in that they did not advise the Lammases in writing of the name of each prospective purchaser, this amounting to unsatisfactory conduct.
3. There was no breach of privacy when a photograph was taken in a public space, so no further action would be taken.
4. The agency's supervision policies were carried out appropriately, so no further action would be taken.

¹ REAA's bundle of documents at 605.

² Sent to the Tribunal by counsel for the Lammases on 18 October and 26 November 2021. An initial objection to the admissibility of this document as evidence before the Tribunal was withdrawn by counsel for the Freears on 1 November 2021.

³ Email REAA to Committee (5 October 2020).

REAA Guide

[46] It was acknowledged by the Freears that the guide was not provided at the time the agency agreement was entered into, but it was emailed later that evening. While a client may consent to a later delivery, that does not release a licensee from the obligation under s 127. The purpose of the guide was to enable clients to be fully informed before entering into an agreement. Rules 5.1 and 5.2 had been breached. This was unsatisfactory conduct at a low level.

List of Names

[47] It was found that the Lammases had not been advised in writing of the name of each prospective purchaser in respect of whom the agency could later claim a commission. The provision of the buyers' names on a portal accessible by the Lammases did not satisfy r 9.11. The Lammases ought to have been notified in writing of the name of each prospective purchaser on the termination of the agency agreement. The breach of r 9.11 amounted to unsatisfactory conduct. It was, however, further found that the Lammases had advised the new agency of the names of the agency's buyers who had shown an interest.

Photograph

[48] The explanation from the Freears that there was no intentional breach of privacy was accepted by the Committee. There was no privacy breach when the photograph was taken in a public space. The Lammases did not raise this at the time of "reporting". Furthermore, they were willing to continue with a general agency at the end of the agency's sole agency.

Supervision

[49] Mr Freear supervised Ms Freear. The agency's supervision policies were carried out appropriately. No further action would be taken.

Orders

[50] On 3 August 2021, the Committee issued a decision on the consequential orders. Ms and Mr Freear were both censured and ordered to pay the REAA a fine of \$3,000.

[51] The Committee noted the Freears' statement that the Lammases gave permission for the guide to be emailed later that day. The Freears had acknowledged

the human error. The Lammases had been given the draft agency agreement two days earlier and could have taken legal advice before signing the agreement.

[52] As for the breach of r 9.11, the Lammases had access to the Freears' database of buyers and had accessed it 96 times. It showed the names of buyers who had made offers. The Lammases were well aware of the identity of all interested buyers. They had added a rider to the agreement with the new agency.

[53] The Committee found that the unsatisfactory conduct was not deliberate and was not done in the Freears' self-interest. There were mistakes by experienced licensees who did not follow good real estate practice by providing a copy of the guide before signing, and omitting to provide a list of buyers thereby exposing the Lammases to a double commission.

[54] The breaches of the rules were regarded by the Committee as in the "mid-level" of unsatisfactory conduct and as "low to mid-level" unsatisfactory conduct.⁴ It would not therefore refer the matter of compensation to the Tribunal.

APPEALS

Appeal by Mr and Ms Lammas (READT 011/2021)

Submissions from Mr and Ms Lammas

[55] The Lammases appealed to the Tribunal on 10 May 2021 against certain conclusions of the Committee in its decision of 19 March 2021:

1. Taking no further action on being photographed.
2. Taking no further action regarding the supervision of Ms Freear.

[56] In their submissions (10 May 2021), the Lammases say they had no prior warning the Freears would come to their private home, nor did they give authority to be photographed. They were left feeling that their personal privacy had been breached. They requested a copy of the recording, but it took many weeks for the Freears to provide it. The photograph clearly identifies Mr Lammas at the front door of their then home. It is contended that no good standing member of the public or licensed agent would see this as acceptable conduct.

⁴ CAC 1901 orders decision (3 August 2021) at [4.11] & [4.12] respectively.

[57] The Lammases submit that the Committee has failed to grasp the nature of the complaint. It is not just about taking the photograph. Mr Freear sought to impose himself on the doorstep of older and retired people on the pretext of effecting service. In the normal course of events, that would be done by mail or other means. This conduct could be deemed to be intimidatory and bullying. The conduct of both of them was unsatisfactory and quite possibly misconduct.

[58] The conduct was a breach of privacy law by the Freears and their company.

[59] The Lammases are also of the view that Ms Freear was not being adequately supervised by Mr Freear on the day she photographed Mr Lammas. The incident concerns more than just supervision policies, since it also relates to the actual behaviour of Ms Freear and her supervisor.

[60] In further submissions (10 August 2021), the Lammases emphasise that the photography felt very personal. The Freears are company directors and have responsibilities over the collection and storage of information such as the photograph. They did not abide by those responsibilities, as agents and as directors. Additionally, the agency did not provide them with the photograph when the request was made.

[61] There are additional submissions (7 September 2021) from the Lammases. They state that they did not receive the agency agreement in draft form before Sunday, 7 April 2019. They signed it that day at 1–1:30 pm. Mr Freear did not have the guide, but he said it would be forwarded later. He did so that night at 9:03 pm. They were not fully informed about the real estate process and were not able to take independent advice about the contents of the guide before signing the agreement. That was important as they had not sold a house since 2003.

[62] In their additional submissions, the Lammases say the Freears had not made any attempt to discuss the commission with them prior to their unannounced arrival on 7 December 2019. The Freears now say there is no breach of r 9.11 because they are not pursuing any commission, but they were pursuing it on 7 December 2019. The appeal should not be an opportunity for the Freears to run their case afresh because they have changed their story. The feedback portal for open homes is not a notice.

[63] There are submissions (8 October 2021) from Mr Calder, counsel for the Lammases.

[64] As for the photograph, it is submitted there was a breach of personal privacy. Furthermore, the Committee erred in not considering whether there was unsatisfactory conduct even if there was no breach of privacy. There were no investigation findings in

relation to this matter. Settling a dispute concerning a commission is real estate work and therefore within s 4 of the Act. There was a breach of r 6.3 (bringing the industry into disrepute). It amounts to unsatisfactory conduct under s 72(a), (b) and (c) of the Act.

[65] The photograph was taken from a public space (the road), but it was taken of a private space (inside the property at the front door). Residential property has the highest expectation of privacy, though the publicly visible areas have a lesser expectation. It is contended that licensees ought to be held to a higher standard than members of the public.

[66] The Committee did not consider whether the whole conduct of the Freears, in relation to the letter of demand and the photograph, was unprofessional. It went beyond what would reasonably be regarded as acceptable to agents of good standing. They did it for a judicial process, but there was no requirement to serve a demand in this way. The taking of a photograph sitting in a vehicle parked across the road conveys a sense of surreptitiousness and is more intrusive than if simply observed with the naked eye. In addition, it took the Freears months to admit they had taken a photograph and to produce it.

[67] Mr Calder observes that Mr Freear is physically imposing. The Lammases are both retired superannuants. Mr Freear's arrival unannounced at their front door to serve a letter of demand, with Ms Freear sitting in a vehicle pointing an iPad at him, was intimidatory and bullying behaviour. A proper and courteous licensee would at the very least have called them in advance. Mr Freear has been in the industry for 31 years and ought to have known better.

[68] Mr Calder submits that in considering whether there has been a breach of the Act or the rules, the overarching purpose of the Act must be borne in mind. It is to promote and protect consumers and to promote public confidence in the performance of real estate work.

[69] It is further submitted that, in respect of the supervision of Ms Freear, while the agency may have appropriate policies in place, if she has not in fact been properly supervised and has breached her obligations then there ought to be a finding of unsatisfactory conduct.

[70] The Lammases contend that the agency failed its responsibility to ensure that the company's culture in terms of professional competence and ethical behaviour were maintained, in order to promote public confidence in the industry. It also had the

responsibility to ensure this was understood by all its licensees. The Committee has already found that the Freears' conduct was unsatisfactory in two respects:

1. They failed to provide the Lammases with the guide.
2. They failed to advise the Lammases in writing of the names of the prospective purchasers.

[71] Given Mr Freear's 31 years in the industry, these were not inadvertent slips, but at best were reckless.

Submissions from the REAA

[72] There are submissions (26 October 2021) from counsel for the REAA, Ms Bishop. Counsel submits that the Committee's decision to take no further action in respect of the letter of demand, the invoice and the photograph, was correct.

[73] Ms Bishop notes that the photograph shows Mr Freear and Mr Lammas. The interior of the property can be seen to a very limited extent, through an open door and only what is not obscured by Mr Lammas. It is a photograph of the Lammases' private space in only the most technical interpretation. The interior is indistinguishable. No private detail is captured. There is no more information than any visitor would see through the open front door.

[74] Counsel observes that the Lammases raise on appeal an argument that the Committee erred when it did not consider whether there was unsatisfactory conduct even if there was no breach of privacy. It is submitted that it is implicit in the Committee's decision to take no further action on this matter that it encompassed a wider concern about professionalism. Throughout the process, the Lammases' concern about privacy and professionalism were inextricably linked. On the evidence before the Committee, it was open for it to decide not to take any further action in respect of the delivery of the letter and the photography.

[75] According to counsel for the REAA, at the time of the delivery, the Freears thought they had a valid commission claim. The photograph was to assist in the pursuit of that claim. The agency agreement states that notices could be hand delivered. The Lammases submit that because of their personal characteristics, the Freears should have taken an especially cautionary approach and should have called them beforehand. The REAA submits that the absence of a phone call is an insufficient foundation for a finding of unsatisfactory conduct.

[76] As for the agency supervision, Ms Bishop submits that the Committee did not err in deciding to take no further action in respect of Ms Freear's photograph. If the Committee was correct to take no action in respect of the photograph, it follows that there was no failure to supervise. It was essentially non-private photography.

[77] Ms Bishop further notes the Lammases' third ground of appeal, namely that the Committee erred in taking no action against the agency. The Committee inquired into whether there had been a failure to supervise by the agency, but it did not directly consider the agency's liability in other respects. There is no foundation for this third ground. Such wider issues concerning the agency were not investigated and were not the subject of a decision by the Committee.

Submissions from Ms and Mr Freear and the agency

[78] Ms McEwen and Mr O'Regan are counsel for the Freears and the agency. In their supplementary submissions (1 November 2021), they note the Lammases' submission that the Committee incorrectly characterised the setting of the photograph as taken in a public place. The Lammases say it was a photograph of a private space, taken from a public place. According to the courts, private spaces are such areas as drawers and cupboards, particularly those with private correspondence or intimate clothing.⁵ Whether a reasonable expectation of privacy will arise may depend more on the contents than on the location. The Freears respectfully agree with the REAA that the photograph does not capture any private detail.

[79] Counsel for the Freears further note the submission from the Lammases as to a wider concern about the Freears' professionalism in serving the demand, beyond any privacy breach, which the Committee failed to consider. The Freears agree with the REAA that these concerns were inextricably linked in the complaint and that appeals are by way of a rehearing. This novel amendment to the complaint goes beyond what is permissible on appeal.

[80] In terms of the merits of this novel argument, there are a number of factors to note:

1. Service by hand is expressly allowed in the agency agreement.
2. It is also a common practice in debt collection.
3. The Freears believed at the time they had a valid commission.

⁵ *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207; *R v Fraser* [1997] 2 NZLR 442 (CA).

4. That the Lammases subjectively found Mr Freear's stature intimidating or the way the photograph was taken surreptitious is regrettable, but they cannot make objectionable, conduct which is otherwise unobjectionable.

[81] As for agency supervision, this ground of appeal is dependent on the success of the issue concerning the photograph. The Committee was correct on both matters.

[82] Finally, counsel for the Freears agree with the REAA that the supervision issue was the only one before the Committee, not any wider issue as to the company's liability. It cannot now be raised on appeal.

Appeal by Ms and Mr Freear (READT 023/2021)

Submissions from Ms and Mr Freear

[83] On 31 August 2021 (notice amended 10 September 2021), Ms and Mr Freear appealed to the Tribunal against certain conclusions of the Committee in its decisions of 19 March and 3 August 2021:

1. Breach of r 5.1.
2. Breach of r 9.11.
3. Alternatively, the Committee's orders.

[84] In the appendix (31 August 2021) to the notice of appeal, the Freears state they are not appealing the finding on r 5.2, except to the extent that the breach is so minor as not to trigger a breach of the overarching obligation of skill, care and competence under r 5.1. The Freears did not deprive the Lammases of the ability to seek independent advice. The latter received the guide well within the time during which they were able to cancel the agency agreement for any reason. The Freears did not fail to exercise skill, care, competence and diligence. They treat this incident as a learning experience.

[85] As for r 9.11, it is noted that the rule is aimed at the situation where "notice of cancellation of an agency agreement [is] given or received by the agent under the agreement". No party cancelled the agency agreement, rather it expired.

[86] In the alternative, it is submitted by the Freears that the Committee's orders were wrong. The common thread in the orders is the gravity of exposing a client to a risk of a double commission, yet despite their previous statements to the contrary, they are not pursuing any claim for commission against the Lammases. There can therefore be no question of the Freears profiting from their own breach of r 9.11. A finding that the

Lammases were exposed to the risk of a commission assumes a causative link between the alleged breach of r 9.11 and a financial risk faced by the Lammases. There is no such link. They were not left in any doubt as to the position as a result of the Freears' conduct.

[87] Counsel for the Freears produced submissions (8 October 2021) in support of the cross-appeal. They record that the Freears have no disciplinary history. Counsel confirm that there is no appeal on the finding that r 5.2 was breached. They did not provide the guide at the correct time. This was acknowledged early in the complaint process and they have put in place systems to ensure the problem will not be repeated.

[88] It is submitted that the breach of r 5.2 is sufficiently minor as not to trigger a breach of the overarching obligation of skill, care and competence under r 5.1. The Freears did not deprive the Lammases of the ability to seek independent advice. The latter were verbally recommended to do so. The Lammases received the guide well within the time during which they could cancel the agreement. The Freears did not therefore fail to exercise skill, care, competence and diligence, despite the technical breach of r 5.2. Given the Act's primary consumer protection purpose, the minor breaches of s 127 and r 5.2 do not automatically trigger a breach of r 5.1. There is no such presumption expressed in the rules.

[89] As for r 9.11, the Freears submit that it was not applicable as no party purported to cancel the agency agreement. Rather, its agreed duration simply expired. An expiry cannot be equated with cancellation, which is an active step before the agreement has run its course.

[90] In this case, the Lammases can have been in no doubt as to which purchasers might attract a double commission. They had actual knowledge of the position as underscored by the provision in their agreement with the new agency. Furthermore, the ongoing provision of the online portal containing all the relevant information would appear to satisfy r 9.11.

[91] In respect of the orders made on 3 August 2021, counsel for the Freears submit, in the alternative:

1. The common thread of the orders and the Tribunal's disciplinary cases is the gravity of exposing a client to the risk of a double commission. The cases involve an element of preventing licensees from benefitting from their unsatisfactory conduct. That issue is not in play here. There can be no causative link between the alleged breach of r 9.11 and any financial risk.

The Lammases were not left in any doubt as to the position as a result of the Freears' conduct.

2. Globally the breaches were minor, so the fines of \$3,000 are plainly excessive and should be reduced by \$1,500 or such amount as the Tribunal thinks fit.

[92] In supplementary submissions (1 November 2021) on behalf of the Freears, Ms McEwen and Mr O'Regan say it is insignificant whether the Committee treated r 5.1 as being contingent on r 5.2. The key argument is that to the Committee they were clearly interdependent. Whether one or both were breached, the overall gravity of the infringement was negligible. The Committee magnified the perceived significance in light of there being purportedly two infringements. The Act's purpose is consumer protection, but there was minimal prejudice to the affected consumers.

[93] There are further submissions (29 November 2021) from Ms McEwen and Mr O'Regan, on behalf of the Freears and the agency.

[94] It is contended that the majority of the statements by the Lammases are fabricated, slanderous and defamatory. The Freears do not accept their version of the events.

[95] The Freears and the agency acknowledge their technical breach of s 127 of the Act and r 5.2 of the rules.

[96] Counsel submit that the fines ordered by the Committee are excessive. The Committee was strongly influenced by its view of the breach of r 9.11. If the Tribunal accepts the submission on r 9.11, the penalty decisions relied on by the Committee regarding r 9.11 would be of limited assistance.

[97] Counsel set out a number of decisions of Committees regarding the penalty for breaches of certain rules or sections of the Act. We note two decisions concerning the breach of s 127:

1. Julie McGrail (CB6205565, 22 May 2012). Failure to provide guide. Unsatisfactory conduct with no penalty.
2. John Nelly (CB6868352, 19 November 2012). Failure to provide guide. Unsatisfactory conduct. Reprimand and \$500 pecuniary penalty.

Submissions from the REAA

[98] Ms Bishop, in her submissions (26 October 2021) on behalf of the REAA, submits that the Freears mischaracterise the breach of r 5.1 as being entirely contingent on the breach of r 5.2. Their failure to provide the guide demonstrated a lack of knowledge in respect of s 127 of the Act. However, it was the failure to provide the guide which breached r 5.1. There is no basis to depart from the Committee's assessment of the breaches of rr 5.1 and 5.2.

[99] As for r 9.11, the REAA submits that the Committee erred. The rule is triggered on a notice of cancellation of the agency agreement, not termination due to the expiration of the agreement. The Committee's approach would impose an additional burden on licensees to provide a list of prospective purchasers when agency agreements expire.

[100] As for the Freears' appeal against the orders, the REAA considers that they should be fined a lesser amount, as the breach of r 9.11 pushed their culpability from "low" (for rr 5.1, 5.2) to "mid-level". The appropriate penalty would be censure and a lower level of fine.

Submissions from Mr and Ms Lammas

[101] There are submissions (26 November 2021) from Mr Calder, on behalf of the Lammases.

[102] In respect of the breach of s 127 of the Act, it is submitted that it does not make sense to describe non-compliance as either minor or a technical breach. Such a description suggests a dismissive attitude to compliance. Either the mandatory statutory requirement has been complied with or it has not. The requirement in the Act is clear and binary. It follows that the failure to provide the guide is a breach of the requirement to exercise skill, care, competence and diligence.

[103] Furthermore, rr 5.1 and 5.2 are not interdependent. Where both are breached, they should be viewed as an aggravating factor warranting a greater penalty.

[104] As for r 9.11, a purposive approach to interpretation must be adopted. It is to protect vendors from unknowingly becoming liable for a double commission. Whether a vendor is liable is a matter of contract between the vendor and agent. The wording of "on notice of cancellation..." should be read widely to include situations in which the contract has come to an end by effluxion of time and where the former agent may claim a commission.

[105] Furthermore, the Freears' submission that no party purported to cancel the agreement is directly at odds with their evidence. Their letter of demand of 7 December 2019 references a clause in the agreement concerning commission following cancellation. The letter of demand strongly implies the Freears considered the agreement had been cancelled.

[106] In a further memorandum (26 November 2021) from Mr Calder, it is submitted that the Lammases were not given a reasonable opportunity to take legal advice before signing the agency agreement.⁶ They also say they were never given a draft agency agreement and the first time they saw the agreement was on Sunday 7 April 2019 when they signed it.

Bundle of documents

[107] It is recorded that the Tribunal received a paginated bundle of documents from the REAA in READT 011/2021, but which contains the relevant documents concerning both appeals.

JURISDICTION AND PRINCIPLES

[108] These are appeals pursuant to s 111 of the Act.

[109] An appeal is by way of a rehearing.⁷ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁸ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁹ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁰

[110] A hearing may be in person or on the papers.¹¹ A hearing in person may be conducted by telephone or audiovisual link.

[111] These appeals are against the determination of the Committee under s 89(2)(b) and (c). They are general appeals. The Tribunal is required to make its own assessment

⁶ This memorandum seeks leave to admit new evidence. The 10 November 2020 submissions of the Lammases are admitted in evidence. The 5 April 2019 email has been read, but it is immaterial.

⁷ Real Estate Agents Act 2008, s 111(3).

⁸ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

⁹ At s 111(4).

¹⁰ At s 111(5).

¹¹ At ss 107, 107A.

of the merits in order to decide whether the Committee's determination is wrong.¹² An appellant has the responsibility of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.

[112] The appeal by the Freears also includes an appeal against the Committee's penalty orders. There is some controversy as to whether such appeals are general appeals or appeals against the exercise of a discretion, the latter essentially requiring that the Tribunal find an error in the Committee's decision before it can interfere with the decision.¹³ Without deciding the matter, we propose to take the narrow view of our jurisdiction for the purpose of the appeal against the orders here and will not interfere with the Committee's decision without an error.

Directions from the Tribunal

[113] The Tribunal issued a Minute (20 July 2021) in the first appeal (READT 011/2021) accepting the late appeal.

[114] A further Minute (10 September 2021) was issued in both appeals. An oral hearing was directed and a timetable was set out as to filing submissions.

[115] The Tribunal issued a Ruling (10 September 2021) declining an order prohibiting the publication of names.

[116] The COVID-19 restrictions on the Tribunal's ability to hold hearings led to the form of hearing being revisited. Following submissions from the parties, the Tribunal issued Directions (22 October 2021) directing the appeal to be heard on the papers and setting a timetable for supplementary submissions.

DISCUSSION

[117] The Tribunal will assess the Lammases' appeal first.

Photograph

[118] This aspect of the complaint concerns a photograph Ms Freear took on 7 December 2019 sitting in a car on the road outside the Lammases' residential property. The photograph depicts Mr Lammas standing immediately inside his front door holding an envelope. Mr Freear has his back, more or less, to the photographer. The envelope

¹² *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹³ *Walker v Real Estate Agents Authority (CAC 1907)* [2021] NZREADT 12 at [17]–[18].

contained a demand for a commission for the sale of the property by another licensee to a purchaser originally introduced to the property by the Freears.

[119] The Committee found there was no breach of privacy as the photograph was taken in a public space. It decided to take no further action.

[120] The Lammases say there was a breach of their personal privacy. While taken from a public space, it was of a private space, inside the property at the front door. A residential property has the highest expectation of privacy. There was a sense of surreptitiousness in the way it was done and it was more intrusive than being observed with the naked eye.

[121] The REAA submits that it is a photograph of the Lammases' private space only in the most technical interpretation, as the interior is indistinguishable. The Freears submit that an expectation of privacy depends more on the contents of private spaces, such as drawers and cupboards, than on location. The photograph did not capture any private detail.

[122] Furthermore, say the Lammases, the Committee should have considered whether there was unsatisfactory conduct, even if there was no breach of privacy. The whole event – the unannounced visit, the personal demand, the photograph and even the delay in acknowledging its existence – was unprofessional. There was no requirement to serve a demand in this way. Additionally, Mr Freear is physically imposing and the Lammases are retired superannuants. The whole incident was intimidating and bullying. A courteous licensee would have called in advance.

[123] As for the wider concern about the Freears' professionalism, the REAA submits that it is implicit in the decision to take no further action that the Committee dealt with this. The Lammases inextricably linked the event to the privacy issue. According to the REAA, it is relevant to note that the Freears thought they had a valid claim to a commission, with the photograph being in pursuit of that claim. Furthermore, the absence of a phone call was an insufficient foundation for a finding of unsatisfactory conduct.

[124] In respect of the wider concern about professionalism, the Freears say that the Lammases linked that to privacy in their complaint. Furthermore, service by hand is expressly allowed under the agency agreement and it is common practice in debt collection. The Lammases' subjective reaction to Mr Freear's stature and to the way the photograph was taken, while regrettable, cannot make objectionable what is unobjectionable.

[125] Whether or not the Committee implicitly rejected a wider issue as to the professionalism of the event as a whole, we intend to review the entire event.

[126] Our starting point is that there was a genuine dispute as to whether the agency was entitled to a commission. In the circumstances, we find that unsurprising. The Freears introduced the purchasers and believed they were entitled to a commission from the Lammases. That factor is relevant.

[127] It is also correct that personal service is expressly permitted under the agency agreement.¹⁴ It is a common practice in debt collection. It is not unprofessional to effect personal service of a demand because it could have been done just as effectively by some other means, though for that reason the whole event might be seen by some as unnecessary. It is also correct that it would have been courteous to arrange a time to meet Mr Lammas, rather than arrive unannounced. However, that the goal of making and evidencing a demand for the purpose of a judicial process could have been achieved in a less confrontational way, does not render the incident objectionable or unprofessional.

[128] Mr Freear's physical stature cannot, of itself, make the event objectively intimidatory or bullying. That would depend more on his conduct, body language and speech at the time. We are not aware they were inappropriate.

[129] As for the photograph, the issue for us is whether that was unprofessional rather than whether the technical requirements of privacy rights have been infringed. If Mr Lammas believes his privacy rights have been breached, there is a statutory mechanism and other bodies, including a specialist tribunal, which are established to determine such matters.

[130] We have no expertise in the law of privacy nor any jurisdiction to rule on such matters. We do not even see privacy law as the issue on the complaint, though it is accepted that the general concept of privacy as viewed by the public is an important consideration. What has to be kept in mind is the statutory definition of unsatisfactory conduct, or even misconduct. Aside from negligence or the breach of any rule, this is about how reasonable members of the public and agents of good standing would view the event.¹⁵

[131] In terms of what the public would view as an infringement of "privacy", we note the following:

¹⁴ Agency agreement (7 April 2019) at [14.1], REAA bundle at 237.

¹⁵ Real Estate Agents Act 2008, ss 72, 73.

1. The photograph was taken from a public place.
2. The presence and purpose of the photographer were clear to Mr Lammas. Ms Freear was not hiding. The action was not surreptitious.
3. The facial features of Mr Lammas are not visible on the paper image before the Tribunal.¹⁶ We accept though that the original digital image may show his features.
4. The interior of the house is not visible. We can discern only dark and light patches immediately inside the front entrance.

[132] As for the Freears' denial of a "recording" and late acknowledgment and provision of the photograph to the Lammases, we find the Freears' literal accuracy to be less than candid, but not to be conduct justifying a disciplinary response.

[133] Accordingly, while some would view the entire event as unnecessary and discourteous, we find that neither the event as a whole nor specifically taking the photograph to be unprofessional. Such conduct would not be regarded by reasonable members of the public as falling short of the expected standard of a reasonably competent licensee, or regarded by agents of good standing as unacceptable. It did not breach r 6.3 or any other rule. It was not unsatisfactory conduct, let alone misconduct.

Supervision

[134] Ms Freear was presumably relatively new to the profession at the time. She was supervised by Mr Freear. The Committee found that the agency's supervision policies were carried out appropriately.

[135] On appeal, the Lammases contend that, while the agency may have had appropriate policies, Ms Freear was not adequately supervised on the day she took the photograph.

[136] As counsel for the REAA and the Freears submit, this ground of appeal is dependent on the success of the photography ground. As we have found no breach of professional standards in relation to Ms Freear's photograph of the event on 7 December 2019, it follows that there has been no failure by Mr Freear or the agency to properly supervise her.

¹⁶ Bundle at 415.

[137] The Lammases raise on appeal a wider concern about the agency's culture in terms of professional competence and ethical behaviour, as evident from the Committee's finding of failures by the Freears in relation to the guide and the names of prospective purchasers. We deal below separately with the guide and the names. No other matters are raised by the Lammases. In any event, this complaint was not put to the Committee and cannot be raised for the first time on appeal.

[138] This brings the Tribunal to the appeal by the Freears.

Guide

[139] The Committee found that Ms Freear and Mr Freear did not fulfil their obligations in s 127(1) of the Act and rr 5.1, 5.2 of the rules, in failing to provide the REAA guide to the Lammases at the time the agency agreement was entered into by them. This amounted to unsatisfactory conduct, albeit at a "low level" as the breach was rectified later on the same day.

[140] The Committee accepted that the guide had been emailed later that evening. According to the Committee, while a client could consent to a later delivery, that did not release a licensee from the obligation under s 127. The purpose of the guide is to enable clients to be fully informed before entering into an agreement.

[141] Section 127(1) of the Act states:

127 Approved guide to be provided before agency agreement for residential property signed

- (1) An agent must not enter into an agency agreement with a person for the sale of residential property unless the agent or a licensee on the agent's behalf—
- (a) has provided the person with a copy of the approved guide before the agreement is signed by or on behalf of the person; and
 - (b) has received a signed acknowledgment from the person that the person has been given the approved guide.

...

[142] Rules 5.1 and 5.2 state:¹⁷

5 Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

¹⁷ Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

- 5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

[143] On appeal, the Freears state that they do not appeal the finding on r 5.2, though they say the breach is so minor as not to trigger a breach of the overarching obligation of skill, care and competence under r 5.1. They point out that the Lammases received the guide well before the deadline for cancelling the agreement for any reason. There is no presumption in the rules that a minor breach of r 5.2 triggers a breach of r 5.1.

[144] The Freears resile from the linkage between the rules in their submissions of 1 November 2021. It is said to be insignificant whether r 5.1 is contingent on r 5.2. It is submitted that whether it is one or two rules breached, the overall gravity of the infringement is negligible. The Committee magnified the perceived significance in light of there being two infringements. There was minimal prejudice to the affected consumers.

[145] The REAA submits that the Freears mischaracterise the breach of r 5.1 as being contingent on a breach of r 5.2. It was the failure to provide the guide which was the breach of r 5.1 and not the lack of knowledge which was the basis of the breach of r 5.2. The Lammases agree that rr 5.1 and 5.2 are not interdependent.

[146] The Tribunal is of the view that, if the Freears' explanation for the failure to hand over the guide at the signing of the agency agreement is accepted, as it is, it is not apparent what alleged lack of knowledge founded the breach of r 5.2. The Committee does not say what it was. The Freears were plainly aware of the obligation to provide a guide. They realised they did not have it and sought the consent of the Lammases to provide it later by email. The Lammases do not contest that. If so, the Freears appear to have the requisite knowledge of the substance of the s 127(1) obligation and to have therefore complied with r 5.2.

[147] As the Freears accept they breached r 5.2, we take that no further. It will be seen from the analysis below that, whether the failure to provide the guide at the required time was a breach of one or two rules, it was minor.

[148] There is no doubt that s 127(1) was breached. The Freears entered into the agency agreement with the Lammases at about 1 pm on 7 April 2019 without providing the guide before then. Hence, self-evidently, they did so without obtaining an acknowledgement that they provided the guide.

[149] As the REAA and the Lammases contend, r 5.1 is not contingent on a breach of r 5.2. The failure to produce the guide prior to the signing, seemingly because they had

forgotten to take a copy when they went to see the Lammases, shows a lack of diligence. This is a breach of r 5.1.

[150] The guide is important for the reason given by the Committee. It is to ensure the client is well informed in plain English of the consequences of signing. However, the Freears had the permission of the Lammases to provide it later and did so that evening. The Lammases therefore had a full working day to review the guide, seek legal or other advice and cancel the agreement.¹⁸

[151] The Committee was right to uphold the breaches of rr 5.1 and 5.2. The Committee was also right to find this amounted to unsatisfactory conduct under s 72(a) and (b) of the Act.

List of names

[152] The Committee found that the Lammases had not been advised in writing, at the time the agency terminated, of the name of each prospective purchaser in respect of whom the agency could later claim a commission. This was a breach of r 9.11 and amounted to unsatisfactory conduct.

[153] Rule 9.11 states:

9 Client and customer care

...

Agency agreements and contractual documents

...

9.11 On notice of cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

...

[154] It is not relevant to our assessment that the agency is apparently no longer pursuing the Lammases for a commission. At the relevant time and throughout this complaint, until the appeal to the Tribunal, the Freears were asserting their entitlement to a commission from the Lammases. There are or were court proceedings concerning this. We do not know the details. Nor is it relevant whether the agency is legally entitled to a commission from the Lammases.

¹⁸ Agency agreement (7 April 2019) at cl 2.1, reflecting s 130(1) of the Real Estate Agents Act 2008.

[155] The Freears contend that r 9.11 is aimed at a situation where notice of cancellation of the agency agreement is given, but in this case it expired. The REAA agrees with the Freears.

[156] The Lammases submit that a purposive reading of the opening words of r 9.11 is needed to protect vendors from liability for a double commission. The opening words should therefore be read widely to include situations where the agency agreement ends by effluxion of time.

[157] The Freears are plainly correct. Rule 9.11 is contingent on a notice of cancellation being given. A purposive approach to interpretation cannot be used to rewrite the clear wording of the rule. The Freears' misunderstanding as to their entitlement to a commission set out in the letter of 7 December 2019 does not somehow turn the expiry of a contract (which occurred before the letter) into a notice of cancellation. A notice requires a proactive step. Rule 9.11 covers the premature termination of the agreement. It does not cover what happened here, which is the expiry of the agreement by effluxion of time.

[158] The Committee was wrong to find a breach of r 9.11. There is no unsatisfactory conduct in relation to the Freears' failure to give the Lammases a list of the names of prospective purchasers.

Orders

[159] On 3 August 2021, the Committee made orders censuring both Ms and Mr Freear and directing each to pay a fine of \$3,000 to the REAA. This was cumulatively for the breaches of rr 5.1, 5.2 and 9.11. The Committee had earlier characterised the breaches of rr 5.1 and 5.2 as "low level" unsatisfactory conduct.¹⁹ In the orders decision, the Committee described the cumulative breaches as "mid-level" unsatisfactory conduct and as "low to mid-level".²⁰ It would seem the Committee saw the breach of r 9.11 as mid-level.

[160] The Freears contend that the breaches were minor. In particular, the overall gravity of the breaches of rr 5.1 and 5.2 was negligible. The fines are therefore excessive and should be reduced by \$1,500.

¹⁹ Committee decision (19 March 2021) at [3.3].

²⁰ Committee decision (3 August 2021) at [4.11] & [4.12] respectively.

[161] The REAA also considers the Freears should be fined a lesser amount, as the wrongful finding of a breach of r 9.11 pushed the Committee's view of culpability from low to mid-level. A lower level of fine would therefore be appropriate.

[162] The Lammases contend that the breach of a mandatory statutory requirement cannot be minor. They regard the breach of two rules (rr 5.1 and 5.2) as an aggravating factor.

[163] The guide was, with the consent of the Lammases, provided to them later the same day. As the Freears point out, there was minimal prejudice to the Lammases, as the affected consumers, since they still had a full working day to obtain advice and cancel the agreement for any reason.²¹ For this reason, we do not accept the contention of the Lammases that a breach of a mandatory statutory obligation cannot be minor. It would have been more serious if they had failed to provide the guide at any time, but that did not occur. We agree with the Committee that the breaches here are low-level or minor. While two rules were breached, there was only one failure, being to hand over the guide prior to signing.

[164] It has been found that the Committee was wrong to find a breach of r 9.11. We also agree with the REAA that the Committee saw the breach of r 9.11 as the more serious. It follows that in assessing the orders, we find that the Committee took into account an irrelevant consideration, the breach of r 9.11.

[165] Since the Committee made an error, we can form our own view as to the appropriate orders. In the circumstances here, the minor breaches of rr 5.1 and 5.2 warrant no more than censure and a small fine. We have obtained some assistance from the Committee's decisions in *McGrail* and *Nelly*, cited by the Freears.

OUTCOME

[166] The appeal by the Lammases is dismissed.

[167] The appeal by the Freears is partially allowed:

1. The Committee's decision to find unsatisfactory conduct on the part of both Ms Freear and Mr Freear, as to the list of names and the breach of r 9.11, is reversed.

²¹ In the decision of 3 August 2021 (at [4.8]), the Committee found that the Lammases had two days to take advice before signing the agreement because they had earlier received the agreement in draft. The Lammases deny receiving a draft copy. We do not need to resolve this dispute, as the Lammases could have taken advice after signing the agreement.

2. The Committee's decision to find unsatisfactory conduct on the part of both Ms Freear and Mr Freear, as to the guide and the breach of s 127 and rr 5.1 and 5.2, is upheld.
3. As to the orders, the Tribunal upholds the decision to censure both Ms Freear and Mr Freear, but it vacates the fine ordered by the Committee and substitutes an order that both of them pay \$500 to the Authority within 21 days of the date of this decision.

[168] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, which sets out the right of appeal to the High Court.

D J Plunkett
Chair

G Denley
Member

C Sandelin
Member