BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

	[2021] NZREADT 07
	READT 049/19
IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	VISHAL and MONISHA SHARMA Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	JULIE BRAKE and SUCCESS REALTY LIMITED t/a BAYLEYS ROTORUA Second Respondents
	READT 001/20
BETWEEN	JULIE BRAKE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	VISHAL and MONISHA SHARMA Second Respondents
On the paper:	
Tribunal:	Mr J Doogue – Deputy Chairperson Mr N O'Connor – Member Ms F Mathieson – Member
Submissions filed by:	Mr W Lawson for the Sharmas Ms S Earl for the first respondent Mr J Weymouth for Ms Brake
Date of Decision:	12 February 2021

DECISION OF THE TRIBUNAL

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[1] Mr V Sharma and Mrs M Sharma appeal against the decision of Complaints Assessment Committee 1901. The Complaints Assessment Committee (the **Committee)** found that Julie Anne Brake (**Ms Brake**) had engaged in unsatisfactory conduct under s 89(2)(b) of the Real Estate Agents Act 2008 (**the Act**).

[2] The charges against Ms Brake arose out of the sale of a property at 308 Old Taupo Road, Rotorua (**the property**). The Committee considered that Ms Brake in responding to a question about the property from Mr and Mrs Sharma, had given a misleading answer and by so doing had breached Rule 6.4. As a result, they further found that Ms Brake had engaged in unsatisfactory conduct under s 72 of the Act. The Sharmas contend on appeal that the correct conclusion would have been that Ms Brake's conduct constituted misconduct on under s 73 of the Act. They also appeal against the penalty. The Committee imposed a fine of $1,000 for each breach, amounting to $2,000 in total. They censured Ms Brake and they also ordered that Ms Brake should pay the Sharmas' legal costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee to the amount of $1,395.00. The Sharmas say these penalties were insufficient.

[3] Ms Brake cross appeals with respect to the liability decision and the penalty decision.

Background

[4] Mr and Mrs Sharma purchased the property on 29 March 2019. They dealt with Ms Brake who in addition to being a licensee under the Act, was one of the owners of the property. The Sharmas also dealt with another licensee from the same real estate company as Ms Brake. They said that both licensees assured them that the property was safe. However, after taking possession of the property they discovered it was not safe. They suffered an attempted home invasion and assault. As a result of that incident, the Sharmas learnt from a locksmith or other repair person who had come to repair the damage, and from the Police, that the property had been burgled a number of times in the past.

[5] The Sharmas also say that prior to their purchase of the property a building report revealed that repairs were required to the shower, the bathroom and the roof tiles. They say that before they took possession, Ms Brake assured them that both the shower linings and the roof tiles had been repaired. But they discovered that the shower linings had not been repaired.

[6] A further element of the complaint is that the Sharmas say that contrary to section 136 of the Act, they never received anything in writing advising them that Ms Brake was the vendor of the property.

[7] In her response to the complaint Ms Brake stated that:

[a] She did not mislead Mr and Mrs Sharma by not mentioning two burglaries that had taken place at the property approximately six months before they acquired it;

[b] She did not mislead the complainants about the shower linings as they had been repaired. She said that she had made it clear that the roof tiles would not be repaired;

[c] Ms Brake said that although there was no formal written communication to that effect, they knew by their association with the other licensee and through verbal and text message communications with them that Ms Brake and her husband were the vendors.

[8] Ms Brake denied giving assurances to the Sharmas about the safety of the property.

[9] The Committee concluded that Ms Sharma asked about the safety issue because they had a child with special needs. In more detail, the Committee accepted that while vendors could not be expected to disclose "every incident that may have happened in relation to the property" but second respondent had been specifically asked about the safety of the property and in those circumstances and given the complainants' stated interest in knowing the safety of the property because of the child's needs, Ms Brake was required in fairness to disclose the fact of the two prior burglaries.

[10] They said that Ms Brake breached Rule 6.4 by not telling the Sharmas about the two burglaries that had taken place in the previous six months. Rule 6.4 provides:

> A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[11] They concluded that Ms Brake had engaged in unsatisfactory conduct under s 72 as a result.

[12] We interpolate that it is a little unclear just what the dispute about the repairs consists of. There are references to there being a dispute about repairs to the shower linings that allegedly were not carried out. Ms Brake, on the other hand, responds to the question of roof repairs by taking the position that apart from some repairs they carried out by mortaring some parts of the roof, they were not under any obligation to repair the roof. In any case, as will become apparent, the Committee took the view that whether or not any undertakings about carrying out repairs were adhered to, it was a matter of contractual law and not something that the Committee was required to go into.

[13] In relation to the failure to disclose a financial interest in the transaction pursuant to s 136 of the Act, the licensee, the Committee noted, accepted that no disclosure had been made in writing but that disclosure had been made by other means. Further, the Committee accepted that Mr and Mrs Sharma knew in fact that Ms Brake was the vendor of the property. Nonetheless they said there had been a breach of the requirements of s 136 of the Act which required that a licensee who carries out real estate agency work in respect of a transaction must disclose in writing whether or not the licensee or any person related to the licensee may benefit financially from the transaction.[1]

[14] They found that this amounted to a breach of the Act amounting to unsatisfactory conduct[2].

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1 Section 136(1).
2 CAC decision paragraph 3.13.

Issues on appeal

[15] We accept that the issues on appeal had been correctly summarised by counsel for the first respondent, Ms S Earl as follows:

> 3.1 The Sharmas appeal against the liability decision on the grounds that the Committee:
>
> (a) Miscategorised Ms Brake's conduct in relation to Property safety as unsatisfactory conduct only when it ought to have been misconduct;
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> (b) Not taking further action with respect to the shower and roof tiles;
>
> (c) Not considering an allegation of Unfair Pressure by Ms Brake on Mr and Mrs Sharma.
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> 3.2 The Sharmas appeal against the penalty decision on the basis that:
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> (a) The Committee erred in not awarding the actual and expected costs of the licensee's conduct.
>
> (b) If a finding of misconduct is made a more serious penalty should reflect that.
>
> 3.3 Ms Brake cross-appeals against the liability decision on the basis that:
>
> (a) The Committee miscategorised Ms Brake's conduct in relation to Property safety as unsatisfactory when it was not.
>
> (b) The Committee was wrong to find Ms Brake had not complied with section 136 of the Act.
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> 3.4 Ms Brake cross-appeals against the penalty decision on the basis that:
>
> (a) Ms Brake paid a penalty in respect of what was mischaracterised as unsatisfactory conduct.
>
> (b) Legal costs should not have been awarded.

The alleged representations about "safety"

[16] There is a factual dispute between the Sharmas and Ms Brake concerning the form of any representation that was made. Essentially the Sharmas say that they asked about whether the property was "safe". Ms Brake asserts that she was only asked about whether the area was safe – meaning the area in which the house was located. We also understand that Ms Brake submits that because there had been burglaries in the area generally, it could not be said that the particular house which was the subject of the transaction was unsafe.

[17] We are clear that if that is the point that is being made, it is not a viable argument for Ms Brake to put forward. It appears to be that an argument along the lines that because the subject property was not singled out for burglaries but was subject of a more generalised spate of burglaries in the neighbourhood there was no need for Ms Brake to disclose these occurrences when she was asked about the safety of the house or the area.

[18] The Committee accepted that the two burglaries in the six months prior to possession being given did actually occur.

[19] We consider that they were entitled to come to such a conclusion because statements which Ms Brake made in response to the complaint are not inconsistent with what the Sharmas allege she said.

[20] There was evidence available to that effect. The complainants say that a window repairer came to the property after they had suffered a burglary. He told the complainant, she says, that he had been to the property four times before to repair other windows from break-ins. She also said that the police told her there had been two reported instances of the property being broken into. Further, the complainant, Ms Sharma, said that the window repairer said that Ms Brake had told him that she had suspicions about whether the neighbours were responsible for the break-ins[3].

[3] BoD 13

[21] The Authority recorded the following response to the complaint:[4]

> Licensee 1 states that she was asked by the complainants when they were visiting the property if the house safe, (sic) to which she replied: Yes Monisha this house is very safe I have been living here for 10 years, I've never had any issues.
>
> Licensee1 says that "it didn't enter her (sic) mind to tell them that we had two burglaries within two weeks of each other six months prior"

[22] Part of the response to the complaint, which Ms Brake made[5] was as follows:

> "In my son Reegan's room, the front bedroom Monisha asked if it was a good area, I said yes we love it,
>
> It did not even enter my mind to tell them we had been x2 burglaries within two weeks of one another approximately six months prior, due to the length of time it had been it certainly wasn't top of mind and an incident that had no effect on our family including our young children…"

[23] We conclude that the Committee was correct in coming to the conclusion that it did because it must have been clear that the Sharmas were asking about issues that could affect the safety of their persons and property. The concession on the part of Ms Brake that there had been two burglaries, and the fact that previous burglaries of the property were known to the police and the locksmith, made it clear that it had a history of being burgled. In the absence of some change of circumstances, it could be expected that that pattern would continue in the future (as the Sharmas discovered shortly after they took possession when there was another burglary). Such matters directly impacted the question of safety.

[24] We do not accept the submission which Mr Waymouth on behalf of Ms Brake put forward to the effect that his client was not required to reveal the previous burglaries because the enquiry that was put to her was "about the area" and how she found the safety and security of the area". We understand that the meaning of the submission was that any statements that were made were not related to the actual house but to the wider area in which it was situated. In our view this is not a distinction of any substance. A residential property will be affected by the quality of the

[4] BoD 9. This is an extract from the complaint which the Sharmas made – BoD 5.
[5] At Bod 103

neighbourhood in which it is situated and it cannot be contended that problems in the locality can be separated out from the individual properties which make up the neighbourhood.

[25] An enquiry, whether in the form of a question about the safety of the property, or whether the house was in a good area, therefore called for these matters to be revealed but they were not.

Were the representations in the course of "real estate agency work"?

[26] The next issue concerns the question of whether the Ms Brake in making the statements that she did was doing so as part of "real estate agency work". This point has significance because the definition of unsatisfactory conduct in s 72 of the Act states that a licensee is guilty of unsatisfactory conduct "if the licensee carries out real estate agency work" and in doing so fails to meet the required standards.

[27] But, as counsel for the first respondent noted:

> 5.2 It is submitted that the approach advanced for Ms Brake in this appeal wrongly seeks to put form above substance by relying on the reference to other licensees in the listing and agreement for sale and purchase documents. As a matter of fact, Ms Brake undertook the work of a real estate agent in the sale of the property, including showing the Sharmas through the home. That is work that is normally the function of the agent rather than the vendor. In a context where the property was being marketed for sale by the agency at which Ms Brake worked, it is submitted that she cannot seek to say she was acting as vendor and not agent in her conversations with the Sharmas - at least not without very clear information on that point from her and the other agents being given to the Sharmas at the time (and even then that information might be overridden by Ms Brake's conduct).

[28] That submission has force in our view. It correctly analyses the actions of Ms Brake with the result that, realistically, she has to be regarded as carrying out part of the usual activity of a real estate agent who is engaged in promoting the sale of a residential property.

[29] Disagreements as to whether the Sharmas enquired about whether the property or the area was safe or whether the area was a "good area" are not material to the question of whether Ms Brake misrepresented the property. Whatever exact form of

words was used, they essentially all come down to the same thing and amounted to Ms Brake describing the house in terms that were in fact not applicable to this property given the history of burglaries.

Real estate work done in representative capacity?

[30] The only question mark that arises is whether the definition of "real estate agency work" in s 4 of the Act includes a requirement that the work done or service provided should be "in trade" and "on behalf of another person". This reflects the consideration that the Act is concerned with misconduct by agents when acting in their representative capacity on behalf of principals.

[31] However, the broad objectives of the Act that are stated in s 3 could well meet this point. The Act specifically provides:

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

[32] The Act seeks to discourage conduct on the part of licensees which militates against the objectives of promoting and protecting the interests of consumers or promoting public confidence in the performance of real estate agency work. Conduct of a licensee can have that effect regardless of whether or not the agent also happens to be a party who has an interest as a principal in the transaction which constitutes the real estate agency work.

[33] It is our view that based upon the facts established, a finding of unsatisfactory conduct was properly arrived at by the Committee because the conduct breached Client Care Rule 6.4 which establishes a charge of unsatisfactory conduct under section 72(b).

[34] A more substantial issue arises whether Ms Brake could have been charged with misconduct rather than unsatisfactory conduct. That is, a question arises whether the same facts could have been used as the basis for a charge of misconduct under section 73 of the Act. We will deal with that issue next.

Did the representations concerning the safety of the property amount to misconduct

[35] The Sharmas' appeal raises the question of whether the evidence would support a charge of misconduct which is more serious than the charge of unsatisfactory conduct which the Committee found was proved. Counsel for the Sharmas, Mr Lawson, submitted:

> 35. It is acknowledged that the threshold for a finding of misconduct is a high one. However, it is submitted that when the entirety of the Licensee's conduct is considered on the basis of the First Appellant's evidence, the conduct was serious and went beyond deficiencies in practice and technical breaches of the rules.
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> 36. It is submitted that if the Disciplinary Tribunal does not consider the Licensee's conduct to be deliberate or reckless, it would at the very least be reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful and/or seriously negligent, thus warranting a finding of misconduct. Her actions display a careless attitude towards the obligations and privileges that accompany practice as a real estate professional.

[36] The other parties to the appeal did not dispute that the Tribunal has jurisdiction to review the appropriateness of the licensee being dealt with by way of a charge of unsatisfactory conduct rather than one of misconduct. We accept that we have power to review the decision of the Committee.

[37] The Tribunal must determine whether the decision of the Committee to deal with the matter itself rather than referring charges onto the Disciplinary Tribunal for a possible finding under s 73 was the correct decision.

[38] In making a decision about what charge should be brought, the Committee was exercising a discretion. We consider that the principal factor that it was required to consider was what were the appropriate and proportionate that charges could be established on the basis of the evidence that was available.

[39] Undercharging a licensee could, depending on the facts of the case, be inconsistent with the objects of the Act, promoting public confidence in the

performance of real estate agency work[6] and providing a disciplinary process that is transparent and effective[7]. A case of under-charging could give rise to the perception, for example, that the disciplinary process was unduly favourable to licensees or that it lacked independence.

[40] In the present case, there appears to be some credible evidence available that would establish that Ms Brake knowingly gave an untruthful reply to the questions of the safety of the property. The Committee could have concluded that the allegations, if proved, amounted to misconduct under S 73 and could therefore have prosecuted Ms Brake on the basis of that section.

[41] However, the Committee decision did not mention the possibility of the proceeding being referred to the Tribunal in order for the question of misconduct on the part of the licensee to be examined. It is our view that it ought to have considered that possibility and given the reasons why it came to the decision that it did. The outcome of the appeal, therefore, ought to be that the matter is reconsidered by the Committee so that it can review that question.

[42] We can deal briefly with the cross-appeal which Ms Brake brought. In our view the Committee did not materially err in finding that the conduct of Ms Brake breached section 72 of the Act. We have already dealt with this issue[8]. The only live issue on the appeal is whether the conduct should have been regarded as being more serious than meriting a charge of unsatisfactory conduct only. That part of the appeal will therefore be dismissed.

Issues regarding the roof and shower

[43] We deal next with the Sharmas' complaints that Ms Brake failed to comply with what they say were promises to effect repairs to the roof and to the shower.

[44] The Sharmas obtained a builder's report which identified that the shower and roof tiles required repair. They say that they informed Ms Brake and she repeatedly

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6 Section 3(1),
7 Section 3(2).
8 At [17] above.

said that the repairs would be done on settlement. They accepted these assurances, they say, and on the strength of them confirmed the builder's report condition.

[45] The Committee considered that the evidence showed that Ms Brake's husband did some work on the roof but failed to complete the repairs prior to settlement.

[46] The Committee considered that the complaint against Ms Brake did not come within the ambit of "real estate agency work". They saw the alleged failure to remedy the building in accordance with those assurances was a contractual matter between the vendor and purchaser and for those reasons determined to take no further action in respect of that part of the complaint[9].

[47] We agree with the Committee's assessment of this part of the complaint. The Act is concerned, amongst other things, with the way in which real estate agents discharge their responsibilities when they are appointed as agents of one or other of the parties to an agreement for sale and purchase. The reference to work done or services provided "in trade" in s 4 of the Act is to the trade or business of a real estate agent. Even if it is accepted that assurances were given that the house would be repaired, the vendors in so doing were not engaging to carry out real estate agents' typical functions. They were, rather, agreeing as parties to a contract for the sale of real estate to undertake certain responsibilities to the purchasers. The fact that Ms Brake was not only a part owner of the property, but happened also to be a licensed agent, does not mean that any assurances given by her or on her behalf as part of the contract for sale of the real estate could be enforced under the Real Estate Agents Act 2008. We conclude that the Committee came to a correct decision in this regard.

Breach of s 136 of the Act

[48] The next issue is whether the Committee came to a correct decision on the point of whether Ms Brake had breached s 136 of the Act which provides, in effect, that a licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee may benefit financially from the transaction.

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9 Committee decision paragraph 3.3.

[49] The Committee noted that the obligation on s 136 was enacted in order to protect the public. They also found that Ms Brake accepted that no disclosure was made in writing although the complainants, she said, knew from contact that she had had with them by attending their restaurant and through verbal conversations and text messages that she was in fact a licensed agent.

[50] The penalty which the Committee imposed was a fine in respect of the breach of s 136 of $1,000. In addition, the Committee censured Ms Brake in relation to this and the other proved charges.

[51] Ms Brake cross-appeals against the orders which the Committee made in regard to section 136.

[52] We are in agreement with the Committee that the actual knowledge of the Sharmas that Ms Brake was a licensee did not excuse the licensee from giving the written advice which section 136 requires. We consider that the purpose of requiring a written notice was to reduce the chance of the parties later disputing whether or not the licensee had given the required advice. It does not logically follow that such an objective can be dispensed with on the grounds that the client finds out by other means that a party to the contract is a licensee.

[53] We will defer consideration of the penalty appeal on the basis set out below.

Complaint of undue pressure

[54] The Sharmas made a complaint that Ms Brake had exerted undue pressure leading up to the purchase of the residence. The Committee did not make any mention of that complaint in its decision. We accept the submission which was made to us by Ms Earl that the Tribunal on appeal is required to deal with matters which were raised by the parties but not dealt with in the Committee decision.

[55] The Sharmas' case in regard to this matter was that they felt pressured during the sales process by the Licensee to the point that they instructed their legal

representative to request that the Licensee stop phoning them directly. Mr Lawson submitted that that correspondence between lawyers provides clear corroboration to their evidence on this point.

[56] We accept that the obligation to deal fairly with parties to the transaction under rule 6.2 would prohibit conduct which amounted to the imposition of undue pressure. However, the Sharmas did not specify any particular parts of the evidence which would support a claim that the licensee through excessive persistence in contacting the Sharmas went further than she was entitled to. For that reason alone, the Tribunal would find it difficult to uphold the appeal on its merits.

[57] As well, counsel for the first respondent submitted that the Tribunal might regard as relevant the Purchaser Consent form signed by the Sharmas on 21 January 2019 which states:

> I/We further confirm and acknowledge that at the time of entry into this contract I/we did so freely and voluntarily, without any undue influence or duress and confirm that I/we were recommended to obtain legal advice and offered the right or other technical or specialist advice before we entered into the same.

[58] Counsel also noted that as a result of that ASP and subsequent offers, a multi-offer situation occurred, which resulted in the Sharmas on the following day executing a Multi-offer Purchaser acknowledgement where they stated again:

> I/We further acknowledge at the time we entered into this offer I/we did so freely and voluntarily without any influence or duress and I/we confirm that I/we were recommended to obtain legal advice and advised to obtain any necessary technical or other specialist advice before submitting this offer.

[59] Counsel referred to the fact that those documents were executed by the Sharmas privately with their lawyers, not in front of Ms Brake or another real estate agent. Rule 9.7, which provides as follows, was complied with:

> a) Recommend that the party seeks legal advice; and
>
> (b) Ensures they are aware that they can and may need to seek technical and other advice and information; and

(c) Allow them reasonable opportunity to do so;

[60] Finally, counsel for the first respondent noted that real estate negotiations are inherently stressful and the application of some degree of persistence and pressure on the part of the agent is to be expected as part and parcel of the transaction. This is why the rule prohibits "undue" pressure only. That is necessarily an assessment of fact and degree that the Tribunal would be required to make if it considers this issue does arise for consideration.

[61] Because the committee did not deal with the complaint of undue pressure, there is no decision dealing with liability and penalty decisions which, had they considered the matter, the Committee would have come to. The only point which the Tribunal is able to enquire into is the fact that the Committee did not consider that part of the complaint. For these reasons, the Tribunal is limited to expressing a view on the propriety or otherwise of the Committee's omission. We accept that the Committee ought to have dealt with the matter. Because it has not, there is no power for the Tribunal under s 111 to embark upon an appeal by rehearing[10].

Compensation

[62] The Sharmas submit that the Committee erred in not awarding relief for expenses incurred in securing the property. The costs include fitting alarms and acquiring a dog in order to enhance the security of the property. The Sharmas say that these precautions were recommended by the police. The Tribunal declined to make compensation orders.

[63] The compensation provisions in the Act have been changed as a result of statutory amendments, but it is not disputed that those changes only took effect from October 2019.[11] They do not therefore apply to the transaction which has given rise to these proceedings.

[64] Mr Lawson submitted on behalf of the Sharmas that:

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[10] S 111(3)

[11] Tribunal Powers and Procedures Act 2018.

> 56. It is not possible for the Licensee to rectify her conduct and it is submitted that there is a direct causal link between the Licensee's failure to disclose this fact and the security measures that have been taken (and accordingly the costs incurred) as a result of the First Appellants receiving the information that ought to have been disclosed in accordance with r 6.4.

[65] s 93(1)(f) which they rely upon provides that if the Committee finds unsatisfactory conduct it may:

> order the licensee-
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> (i) to rectify, at his or her or its own expense, any error or omission; or
>
> (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission;

[66] The Sharmas assert that there is a direct causal link between the plaintiff's failure to disclose the burglaries and the adoption of security measures and the costs thereof which the Sharmas have had to incur.

[67] The approach to making orders under s 93(1)(f) was considered in the case of *Quin v REA*[12]. However, the principles engaged were reviewed in earlier Court of Appeal cases dealing with the similar compensator provisions in the Fair Trading Act. One such case was *Harvey Corporation Limited v Barker*[13], In the *Harvey* case a real estate licensee had made misrepresentations in relation to a property that was for sale. In substance, the licensee had misrepresented the location of the entrance gateway and part of the drive and failed to point out that they were actually situated on a paper road which belonged to the local authority and were not on the Title of the property that was for sale. The purchaser's compensation claim was advanced on the basis that the purchasers suffered loss in reliance on their expectation that Harveys would provide them with reliable information about the property which Harveys failed to do. As a result, they had unwittingly purchased a property with defects. As a consequence, the claimant suffered loss which, according to counsel, included being deprived of the

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12 *Quin v REA* [2012] NZHC 3557.

13 *Harvey Corporation Limited v Barker* [2002] 2 NZLR 213. This authority was referred to in *Quin*.

opportunity to refuse to buy the property, of negotiating to purchase it at a reduced price or of negotiating for the vendors to construct a new entranceway.

[68] In its judgment, the Court of Appeal judgment[14] pointed out that there could be no question of the licensee being liable to provide what was promised in the contract between the vendor and purchaser. The Court referred to the judgment of Gault J in *Cox and Coxon* at page 22 that:

> "… loss of bargain or of expected future returns flows not from the conduct that is wrongful, but from the failure to implement a promise. Where no promise exists between the person who engaged in the conduct and the person who suffered the loss, there is no promise which failure to implement deprives the other party of expected benefits.

[69] The Court in Harvey's stated that the real question under s 43 was whether the Barkers were worse off as a result of the making of the representation – by changing their position in reliance on it: not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of.

> The Barkers accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss. Normal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure.

[70] We accept that a similar approach has to be taken in this case. On that approach in this case, while the Sharmas may have suffered relevant claimable loss, they have not produced relevant evidence proving such was the case.

[71] No evidence was put forward, for example, concerning whether the price which the Sharmas paid for the property took account of it being located in an area where there was an increased risk of it being burgled. There is no valuation or other evidence either way.

[72] Such evidence would be necessary before the Tribunal could infer that the Sharmas suffered financial loss in that they had paid the market price for a property

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[14] Per Blanchard J at [14].

situated in a "safe" area, only to find that the it was actually located in a burglary-risk area.

[73] It cannot be ruled out that the Sharmas actually acquired the property at the current market value appropriate for a property situated in a less "desirable" area. In such a case, they have received no less than they paid for and will not have suffered financial loss.

[74] If this was actually the case, it would rule out the vendor having any obligation to contribute to the cost of security additions (such as cameras),

[75] In summary, because of the lack of information we cannot make the judgement that Ms Brake caused the Sharmas to suffer loss by misrepresenting the quality of the area. It may be that the price that they paid for the property was a fair one and that therefore they did not suffer any loss. That being so, even after paying for their security measures, it could be that the total amount the Sharmas expended still totalled to less than a fair market value.

[76] We should add that we are not critical of the Sharmas or their advisors in regard to the evidence put forward. The concepts that were raised in the discussion of the correct approach in cases such as *Harvey's* are not straight forward and producing evidence in support of a claim for compensation under the Act is likely to be an expensive process.

Penalty and Cross-appeal on penalty

[77] Part of our decision includes an order referring these proceedings back to the Committee to consider whether they should bring a charge of misconduct pursuant to section 73 of the Act. If such a charge was brought and sustained, it is possible that a greater penalty than that which has previously been imposed for unsatisfactory conduct would result. The effect of these considerations is that the issue of penalty is still at large. That being the case, the penalty appeal cannot be realistically disposed of until the outcome of the possible misconduct charge has become known. Rather than proceeding to deal with the penalty appeal and cross-appeal at this stage, it may be

preferable to defer finalisation for the time being and to review matters subsequently. We would not wish to take that step, however, without hearing further from the parties. We deal with this issue in more detail below.

Appeal against order that Ms Brake pay Sharmas' costs

[78] The Sharmas obtained legal assistance in bringing their complaint against Ms Brake. They sought and obtained an order directing Ms Brake to pay their costs. Ms Brake was critical of the application for costs and expressed the view that there had been no need for the Sharma's to take such a step having regard to the fact that the proceedings against Ms Brake were in fact brought by the REA.

[79] We do not agree with that criticism. The Sharma's were central parties involved in the complaint against Ms Brake. Further, their interests would be directly affected by the outcome of the compensation application. If such an application were granted, they would be the direct beneficiaries of it rather than the REA. For that reason alone, we consider that there was justification for the Committee allowing the costs application. The cross-appeal relating to the costs order is dismissed.

Disposal of the appeal

[80] Before finally disposing of this appeal, we seek additional submissions from the parties. Specifically, the matters that we invite the parties to comment on are the following.

[81] While we have been able to come to conclusions on all parts of the appeal and cross-appeal that it is possible for us to deal with at this stage, the question of whether a misconduct charge should be brought has yet to be disposed of.

[82] As a result, we would not deal with the penalty on the unsatisfactory conduct charge arising out of Client Care Rule 6.4 because we do not know if that finding by the Committee is going to be overtaken by a finding of misconduct which raise potentially different penalty options. As well the totality of penalties will not finally be known until the misconduct matter has been finalised.

[83] The approach that may be preferable from this point is to defer making orders on the appeal other than referring back to the Committee the question of whether a reference should be made of a misconduct charge pursuant to section 91. Whether such an order would be desirable (or is permissible) are matters on which the parties' views would be helpful as would the question of any alternative mode of disposal of the appeal the Tribunal should adopt.

[84] The question that we seek submissions from the parties on is whether we should in the meantime refrain from making orders and determine the appeal until the outcome of the section 91 reference is known. If that is not the correct outcome in the view of the parties, then how should the Tribunal proceed?

[85] We would be grateful of the parties could file any supplementary submissions on these points within 15 working days. The appeal is adjourned until further order of the Tribunal.

[86] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Mr J Doogue
Deputy Chairperson

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Mr N O'Connor
Member

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Ms F Mathieson
Member