

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2022] NZREADT 9

Reference No: READT 024/2021

**IN THE MATTER OF**

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

**BETWEEN**

**BT and ST**  
Appellants

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2104)**  
First Respondent

**AND**

**FG**  
Second Respondent

Hearing on the papers

Tribunal:

C Sandelin (Deputy Chairperson)  
G Denley (Member)  
N O'Connor (Member)

Submissions received from:

Mr Laubscher, on behalf of the Appellants  
Ms Wisniewski, on behalf of the Authority  
Mr Abrie, on behalf of FG

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION**  
**Dated 12 May 2022**

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## **INTRODUCTION**

[1] BT and ST (the Appellants) have appealed pursuant to s 111 of the Real Estate Agents Act 2008 (the Act) from a decision of Complaints Assessment Committee 2104 (the Committee) to take no further action on their complaint against FG (the Licensee).

[2] The Licensee is a licenced real estate agent and is the managing director of a business broking firm based in (City), EM (the Agency).

[3] The Appellants are the directors and shareholders of 12 companies that operated 12 early childhood centres (the centres) in (City) which operated under the name EF. In 2019 the Appellants decided to sell the centres including one centre at [Address], the subject of these proceedings (the Property).

## **BACKGROUND**

[4] In July 2019 the Licensee approached the Appellants about selling the centres on their behalf. Initially the Appellants asked the Licensee to act without a signed agency agreement, however the Licensee made it clear that she was “ethically bound” from acting without a signed agreement in place.

[5] From July to November 2019 the parties negotiated the terms of the sale and on 12 November the Appellants signed a listing agreement with the Licensee for the sale of the Group (the Listing Agreement). The Appellants had experience buying and selling businesses and had legal assistance throughout the negotiations, and a signed copy of the Listing Agreement was provided to the Appellants by the Licensee.

[6] It should be noted at this stage that following the Committee hearing, the parties became aware that the Property was inadvertently left out of the Listing Agreement. This matter was not dealt with by the Committee and will be addressed later in this decision.

[7] The Appellants were unable to sell the centres as a whole and on 19 November 2019 they instructed the Licensee to try to sell some of the centres individually including the Property.

[8] The centres were also having licencing issues with NF. On 24 October 2019 NF advised of its intention to cancel the licence for the Property (the licence).

[9] On 6 January 2020, an agreement was entered into between NKs and the Appellants for the sale of the Property (the ASP). The ASP was conditional on due diligence, finance and landlord’s consent. A 10 per cent deposit was payable when the ASP became unconditional. The ASP also included extra clauses which the Appellants

instructed the Licensee to handwrite into the ASP. One of these clauses, clause 24.5 read as follows:

Should the status of the licence change before the settlement date, either party has the right to cancel this agreement.

[10] There were ongoing negotiations between the Purchasers and the Appellants including an extension in timeframes and a reduction in purchase price. The Purchasers were aware of the issues relating to the licence and NF.

[11] On 24 February 2020 the Purchasers' solicitors wrote to the Licensee asking for trust account details for the Agency for payment of the deposit once the ASP was unconditional.

[12] On 5 March 2020 (a day before the ASP was to be declared unconditional), the Purchasers requested the insertion of another clause (clause 26) which attempted to make the ASP conditional upon the Purchasers obtaining and being satisfied with a licence from NF. This read as follows:

Clause 26: In addition to the rights conferred under clause 24, this Agreement is conditional upon the Purchaser being satisfied with the status of NF licence ("Licence") for the Business. If a Licence has not been obtained for the Business by 15 April 2020, the Purchaser has a right to cancel this agreement and will be entitled to immediate return of its full deposit. This clause is inserted for the full benefit of the Purchaser and the Purchaser is under no obligation whatsoever to supply any reasons for the Purchaser's dissatisfaction with the status of the Licence.

[13] The Purchasers expressed concern as to the status of the NF licence and that the provisional licence had expired and the business was currently operating without a licence. The Appellants' solicitors declined to add this clause on the basis that "Clause 26 is not warranted due to Clause 24". They advised that the Appellants had received advance funding from the NF.

[14] On 6 March 2020 the Appellants sent an email to their solicitors saying:

As we all know today is [the] last day to get [the] agreement unconditional and we [are] all working towards that...

[15] Later that day the Appellants' solicitors advised the Licensee by email that the Purchasers' solicitors had confirmed the ASP was unconditional, the Purchasers' rights under clause 24 were reserved and the Purchasers were arranging for payment of the deposit that day. The deposit of \$65,000 was duly paid by the Purchasers' solicitors into the trust account of the Agency.

[16] The Licensee notified the Appellants of receipt of the deposit on 7 March. On 11 March the Appellants notified all employees at the Property that their employment had been terminated.

[17] After holding the deposit for 10 working days the Licensee released the deposit on 23 March 2020 and sent a statement to the Appellants' solicitors showing the commission, the balance of the deposit being released and requesting bank account details for transfer of the funds.

[18] On 24 March there was a telephone discussion between the Appellants' solicitors and the Licensee. The Licensee says the purpose of the call was for the Appellants' solicitors to update her as to the progress with the NF as to the licence and to provide their trust account details. The Licensee said the solicitor pointed out a minor miscalculation in relation to the commission but raised no issues with her taking the deposit.

[19] The Licensee said she asked the Appellants' solicitor for his view on whether the Purchasers could get their deposit back if they cancelled pursuant to clause 24.5 as she did not believe they could. She said he avoided answering the question and at no time said he believed the ASP was not unconditional. The Appellants say that during that conversation their solicitor told the Licensee he was not authorising her to deduct her commission.

[20] The Appellants' solicitors subsequently wrote to the Licensee that same afternoon advising:

We note the above agreement is unconditional in all respects except for the transfer of licence which is still pending.

As per your phone conversation with [ ] of earlier today, we are not authorising you to deduct your commission

[21] They went on to deal with the miscalculation in commission and attached a deposit slip for payment. The Licensee replied apologising for the errors in calculation and confirming that:

I already have authorisation to deduct the commission pursuant to clause 1.5.2. The transfer of the licence is not a condition it is the potential loss of an intangible asset prior to settlement and does not affect our commission being due and payable

[22] On 3 June 2020 (following further negotiations and attempts to obtain a new licence) the Purchasers cancelled the ASP pursuant to clause 24.5. They had tried to negotiate a licence with NF to no avail.

[23] On 11 June 2020 the Purchasers' solicitors wrote to the Appellants' solicitors and the Licensee requesting refund of the commission. The Appellants' solicitors confirmed they had repaid the deposit, the remaining amount being the commission was still with the Licensee. The Licensee responded advising that the refund of the deposit was a matter for the Appellants and not the Agency and her commission was not refundable.

[24] The Appellants have submitted that they repaid to the Purchasers the balance of the deposit, being the commission, from their own funds.

#### *The Complaint*

[25] On 10 July 2020 the Appellants complained to the Real Estate Agents Authority CAC 2104 (the Authority) that the Licensee:

- (a) had taken her commission before the ASP was unconditional, as clause 24.5 allowed the Purchasers to cancel the ASP up until settlement, should the status of the licence change before settlement date;
- (b) should have held the deposit in the trust account until the ASP was fully unconditional or cancelled; and
- (c) when the ASP was cancelled, should have refunded the full deposit to the Purchasers.

[26] The Committee decided to inquire into the complaint.

#### *Committee decision*

[27] In a decision dated 6 August 2021, the Committee determined to take no further action on the complaint. It found that:

- (a) The Appellants could not have intended that clause 24.5 of the ASP was a condition able to be satisfied up to the date of settlement as this was inconsistent with their requiring the Purchasers to pay the deposit when the ASP became unconditional. Clause 24.5 was not expressed as a condition but rather gave rise to a right to cancel in the event the status of the licence changed.
- (b) The due diligence condition of the ASP was satisfied as the Purchasers had received disclosure around the status of the licence and their solicitors had confirmed the condition satisfied.

- (c) The Licensee was entitled to deduct commission and expenses from the deposit, then release the balance of the deposit to the Appellants after holding the deposit for 10 working days following the ASP becoming unconditional as declared by the Purchasers' solicitors on 6 March 2020.
- (d) Clause 24.5 was silent on the effect cancellation under that clause had on the deposit. Whether or not the deposit is refundable is a contractual dispute between the Appellants and the Purchasers.

## APPEAL

[28] In respect of the findings on their complaint against the Licensee, the Appellants have appealed on the grounds that (in summary) the Committee erred by:

- (a) Deciding to take no further action on the complaint as the Licensee was not a party to the Listing Agreement that authorised the commission payment, and therefore breached s 126 of the Act.
- (b) Failing to take into account the gravity of the alleged conduct in making its no further action finding by not referring the complaint to the Tribunal under s 89(2)(a) of the Act, or alternatively, by not finding the Licensee guilty of unsatisfactory conduct.
- (c) Deciding to take no further action on the complaint as the Licensee did not comply with her fiduciary obligations under r 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and the requirements as stakeholder under s 124(2) of the Act to ascertain who was lawfully entitled to the payment of the deposit before the balance was paid to the Appellants, less the commission payable.

[29] An appeal is by way of a rehearing.<sup>1</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>2</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.<sup>3</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>4</sup>

[30] As counsel for the Authority submits, the Tribunal should treat this appeal as a general appeal. This involves the Tribunal looking at the issues afresh, consistent with

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<sup>1</sup> Real Estate Agents Act 2008, s 111(3).

<sup>2</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

<sup>3</sup> Section 111(4).

<sup>4</sup> Section 111(5).

the general principles set out by the High Court in *Austin Nichols & Co Ltd v Stichting Lodestar*,<sup>5</sup> and confirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority*.<sup>6</sup>

[31] When considering an appeal from a decision to take no further action, the Tribunal will assess the merits of the complaint in deciding whether the Committee's decision was wrong. The Appellants bear the onus of satisfying the Tribunal that the Committee's decision was wrong.<sup>7</sup>

## DISCUSSION

### *Applications to admit new evidence*

[32] Both the Appellants and the Licensee have applied for leave to adduce new evidence.

[33] The Appellants have annexed to their submissions a letter dated 16 April 2020 from NF cancelling the licence issued to the Property as of 30 April 2020 (NF letter A).

[34] The Appellants submit that whilst the document is not really relevant to the issues, it provides the Tribunal with a more complete picture of further developments and provides context for the subsequent correspondence.

[35] The Licensee in response has not opposed the admission of NF letter A, and has sought herself to admit a further three documents as follows:

- (a) Letter dated 24 October 2019 from NF to the Appellants notifying their intention to cancel the licence (NF letter B).
- (b) Two emails dated 24 July 2019 at 2.25 pm and 6.11 pm (the 24 July emails).
- (c) A copy of the trust account statement for the Agency for the period 28 February 2020 to 31 March 2020 (the trust account statement).

[36] The Licensee submits that NF letter B is useful for the Tribunal to have as further background in the event the Tribunal is minded to admit NF letter A.

[37] The Authority opposes the admission of all the documents requested to be adduced by the Appellants and the Licensee. The Appellants oppose the admission of

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<sup>5</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

<sup>6</sup> *Nottingham v Real Estate Agents Authority* [2015] NZHC 1616.

<sup>7</sup> *Watson v Real Estate Agents Authority* [2021] NZREADT 37 at [22].

NF letter B and the 24 July emails but not the trust account statement as the Appellants challenged the Licensee to supply this.

[38] As noted earlier, an appeal against a determination of a Complaints Assessment Committee is by way of a re-hearing of the material that was before the Committee. That is, the Tribunal hears submissions by or on behalf of the parties, and considers the evidence and other material that was provided to the Committee.

[39] However, in its decision in *Eichelbaum v Real Estate Agents Authority* the Tribunal accepted that it may give a party to an appeal leave to submit evidence to the Tribunal that was not before the Committee, if the Tribunal considers that it is just to do so.<sup>8</sup> An applicant for leave must satisfy the Tribunal that:

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

[40] However, the Tribunal also accepted that material that would merely elaborate or improve upon the evidence already available in the material before the Committee is unlikely to meet the test for leave, and that its power to allow a party to submit evidence on appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.<sup>9</sup>

[41] The Authority submits that the NF letters A and B should not be admitted as evidence as the *Eichelbaum* criteria have not been met in respect of the proposed further evidence. Both documents comprise further evidence available at first instance to be provided to the Committee.

[42] We agree. Both these documents are simply further evidence of accepted facts that the licence was cancelled by NF following advice given of the NF's intention to cancel. The documents are not relevant to the issues on appeal and do not assist us in our determination of the appeal. The Appellants acknowledge that NF letter A is not directly relevant and has been provided by way of background. The Licensee in reply

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<sup>8</sup> *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [48]–[49] and [52].

<sup>9</sup> At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35]).



submits that if leave is granted to adduce NF letter A, then NF letter B should be adduced as it provides further background.

[43] In *Eichelbaum* the Tribunal accepted that material that would merely elaborate or improve upon the evidence already available before the Committee is unlikely to meet the test for leave, and that its power to allow a party to submit evidence on appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.<sup>9</sup> For these reasons we decline the application for leave by the Appellants to admit NF letter A and the application by the Licensee to admit NF letter B.

[44] The Licensee also seeks leave to admit the 24 July emails to counter a fresh argument raised by the Appellants that the Property was not included in the listing agreement. The 24 July emails relate to a fresh allegation that was not before the Committee, that the Licensee was not authorised to act in the sale of the Property.

[45] The fresh allegation is discussed in paragraphs [47] to [54] below. For the reasons set out, we do not regard the 24 July emails as relevant to the Appeal before the Tribunal and decline the application to adduce the emails as evidence.

[46] Leave is also sought by the Licensee to introduce as further evidence the trust account statement. This statement could easily have been provided to the Committee and whilst it shows the commission payment was made before the conversation between the Licensee and the Appellants' solicitor, we are satisfied that this evidence would not have a significant influence on our decision. We therefore decline the application to admit the trust account statement as evidence.

*The Appellants' contention that there was no listing agreement for the Property*

[47] As noted earlier, the Appellants have raised a new argument that the Licensee was not entitled to any commission for the sale of the Property as the Property was not the subject of an agency agreement with the Licensee or the Agency. The Property was not mentioned in the Listing Agreement and therefore neither the Licensee nor the Appellants were a party to the Listing Agreement. They submit that this was evident from the documents before the Committee. As a result, they submit that the Licensee was in breach of her obligations pursuant to s 126 of the Act.

[48] The Licensee submits that this is a new complaint that was not raised before the Committee. She submits that this was simply an inadvertent omission and has only now been picked up by the Appellants in preparing for this appeal.

[49] The Authority concurs and says further that the Appellants' initial complaint, investigated and determined by the Committee, did not indicate that the Appellants believed there was an absence of a valid agency agreement. The Authority and the Licensee submit that the Appellants' new argument therefore falls outside the scope of the Tribunal's jurisdiction on appeal.

[50] Section 111(1) of the Act provides:

**111 Appeal to Tribunal against determination by Committee**

- (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which the notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.

[51] In *Wyatt v Real Estate Agents Authority*, the High Court confirmed that the Tribunal's jurisdiction under s 111 does not extend to consideration of an appeal where there has been no determination of a Committee.<sup>10</sup>

[52] In the present matter, the complaint before the Committee was whether the Licensee had deducted commission from the deposit despite the ASP not being unconditional, due to the operation of clause 24.5 as a condition not having yet been satisfied.

[53] The Appellants did not dispute that they had engaged the Licensee to act on their behalf in relation to the sale of the Property. This issue was not before the Committee when it made its decision and we therefore have no jurisdiction to consider their new complaint.

[54] In any event, it is important to note that both the Appellants and the Licensee proceeded on the basis that the Listing Agreement did cover the Property. Neither the Appellants, their solicitors, nor the Licensee raised any issue as to the Listing Agreement's application to the Property. We accept the Authority's submission that the Licensee's compliance or otherwise with s 126 of the Act was not before the Committee and therefore this issue should not be addressed in these appeal proceedings.

*Did the Committee err in finding that clause 24.5 of the ASP was not expressed as a condition and the ASP was declared unconditional?*

[55] The Appellants submit that the Committee should have referred the matter to the Tribunal under s 89(2)(a) of the Act, as there were reasonable grounds that the Licensee

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<sup>10</sup> *Wyatt v Real Estate Agents Authority* [2012] NZHC 2550 at [62] and [64].

may have been guilty of misconduct. Alternatively, they submit that the Licensee was guilty of unsatisfactory conduct pursuant to s 89(2)(b) of the Act. They submit that despite requests to do so, no evidence was provided that the Appellants or Purchasers ever declared the contract unconditional.

[56] The Licensee submits that she had reasonable grounds to consider the ASP was unconditional and that these grounds went beyond just the wording of clause 24.5 and included the correspondence and the parties' actions.

[57] The Authority agrees with the submissions on behalf of the Licensee and submits that the Committee was correct to find that clause 24.5 was not expressed as a condition and the Licensee was entitled to take her commission following the ASP being declared unconditional by the Purchasers' solicitors on 6 March 2020.

[58] The Authority submits that the Committee did not err in making a finding of no further action. The evidence does not indicate conduct that was at the level of unsatisfactory conduct and certainly not warranting of a referral to the Tribunal to lay misconduct charges.

[59] In their reply submissions, the Appellants submitted that it was not the case that both the Appellants and the Purchasers "declared" the ASP unconditional. It was further submitted that there was no evidence that the Purchasers' solicitors "unconditionally stated" that the ASP had become unconditional.

[60] The Purchasers' solicitors wrote to the Licensee on 24 February 2020 asking for her trust account details:

for payment of the deposit once the agreement is unconditional.

[61] On 6 March they again wrote to the Licensee confirming that the deposit had been paid to the Agency's account.

[62] The Purchasers had requested the insertion of a new clause into the ASP the day before the ASP became unconditional. That clause would have made their satisfaction with the licence a condition of the ASP. The Appellants declined to add this clause. The Purchasers would not have requested the addition of this clause had they considered clause 24.5 to be a condition that was required to be satisfied prior to the ASP becoming unconditional.

[63] There is evidence that the Appellants considered the ASP unconditional. On 6 March 2020 the Appellants wrote to their solicitors saying:

as we all know today is last day to get agreement unconditional...

[64] The same afternoon their solicitors advised the Appellants that:

The purchaser's solicitor has confirmed the finance and landlord conditions have been satisfied. The purchaser's right under clause 24 is reserved, but the agreement is otherwise unconditional.

The purchaser is arranging the deposit to be paid today.

[65] This email was copied to the Licensee that same afternoon.

[66] Following the payment of the deposit the Appellants did not raise any objections or assert that the ASP was not unconditional. It was only after the Licensee had already deducted the commission on 24 March and there was correspondence and discussions relating to a miscalculation that the Appellants raised an issue that the ASP was not unconditional.

[67] The Committee concluded on the basis of this evidence that the Licensee was entitled to take her commission when the ASP was declared unconditional by the Purchasers' solicitors.<sup>11</sup> We are not persuaded that the Committee was wrong to reach that conclusion.

[68] We agree with the submissions made by the Licensee and the Authority. This ground of appeal must fail. Clause 24.5 was not expressed as a condition. On this basis, the Licensee was entitled to release the deposit and deduct her commission before paying the balance to the Appellants.

#### *The Licensee's obligations as stakeholder*

[69] The Appellants submit that the Licensee had an overriding duty as stakeholder to preserve the funds during the intervening period until there was certainty about who was entitled to receive the funds. They submit that the Licensee failed to comply with her fiduciary obligations under r 9.1 of the Rules and also the requirements as stakeholder under ss 122(2) and 124(2) of the Act to ascertain who was lawfully entitled to the payment of the deposit before the balance was paid to the Appellants. They submit that when the Licensee received the deposit on 6 March 2020, she should have sought clarification and/or agreement from the parties before dealing with the funds.

[70] The Appellants submit that the Licensee's obligations as stakeholder are independent from the question as to whether the ASP had become unconditional. They submit that the issue is what she should have done during the period between 6 March 2020 and 23 March 2020 (when she held the money in her trust account).

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<sup>11</sup> Committee's decision (6 August 2021) at [3.1].

[71] Clause 2.4 of the ASP states:

Where this agreement is entered into subject to any condition(s), the person to whom the deposit is paid shall hold it as a stakeholder until the agreement becomes unconditional or is cancelled for non-fulfilment of any condition(s) in accordance with subclause 8.

[72] Section 122 of the Act provides statutory recognition of the duties of a stakeholder regarding all moneys received by an agent in respect of any transaction. It provides:

**122 Duty of agent with respect to money received in due course of business**

- (1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.
- (2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.

[73] Section 124 of the Act provides:

**124 Agent to furnish account to client**

- (1) As soon as an agent is asked by his or her client to do so, and in any case not later than 28 days after the agent receives any money in respect of the transaction in his or her capacity as an agent, the agent must render to the person lawfully entitled to the money an account in writing, setting out the particulars of all such money, and its application.
- (2) If an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to any money, the agent must take all reasonable steps to ascertain as soon as practicable the person who is entitled and is not required to render an account under this section until the person lawfully entitled has been ascertained.

[74] Rule 9.1 of the Rules states as follows:

**9 Client and Customer Care**

*General*

- 9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

[75] The Appellants submit that when the Licensee received the deposit on 6 March 2020, she should have been aware of certain "red flags" which should have led her to seek clarification and/or agreement from the parties before dealing with the funds.

[76] They submit that pursuant to clause 2.4 of the ASP the Licensee's "overriding duty was to preserve the funds during the intervening period until there was certainty

about who was entitled to receive the funds”, the Purchasers or the Appellants. They submit that at the very least she should have made further enquiries of the parties pursuant to s 124(2) of the Act before releasing the deposit and taking the commission.

[77] The Licensee submits that this argument comes down to whether the ASP was “actually unconditional”. She submits that if the ASP was unconditional at the time she took the commission (as the Committee found), then there was no period of uncertainty and the deposit could be released to the Appellants and the Licensee could take the commission. She submits that if the ASP was not unconditional, then she would have been obligated to hold the deposit until settlement or cancellation. At the point at which the ASP was declared unconditional (6 March 2020), the Licensee can have had no doubt in her mind who was entitled to the money.

[78] The Licensee submits that it follows that the Appellants’ submissions about the Licensee’s obligation to ascertain who was entitled to the funds and consideration of the “red flags” is redundant and the Licensee’s conduct cannot be found to be in breach of the Act.

[79] The Authority agrees and submits that the requirement in s 124 of the Act does not apply to the facts here as the Licensee was not in doubt as to who was entitled to the funds.

[80] We agree. As we have upheld the Committee’s finding that the ASP was unconditional from 6 March 2020, and therefore that the Licensee was entitled to take her commission, we do not accept the Licensee has breached her obligations as a stakeholder pursuant to ss 122 and 124 of the Act, or her fiduciary obligations under Rule 9.1 of the Rules. The requirement to act in the best interests of her clients, the Appellants, does not disentitle the Licensee to the commission to which she was contractually entitled once the ASP was unconditional.

### *Conclusion*

[81] We find no evidence of unsatisfactory conduct, or of misconduct by the Licensee which would warrant a referral by the Committee to the Tribunal pursuant to s 89(2)(a) of the Act.

### **OUTCOME**

[82] The Appellants’ appeal is dismissed. The decision of the Committee is confirmed.

[83] The Appellants sought an order for costs in their favour. As their Appeal has been dismissed, there are no grounds for such an order.

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

## **PUBLICATION**

[85] The Committee directed publication of its decision without the names or identifying details of the Appellants (including the address of the Property), the Licensee and any third parties.

[86] In light of the outcome of this appeal, and the interest of the parties and the public, it is appropriate to order publication without identifying the Appellants, the Property, the Licensee or any third parties.

Ms C Sandelin  
Deputy Chairperson

Mr G Denley  
Member

Mr N O'Connor  
Member