

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 57

READT 045/16

IN THE MATTER OF

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

BETWEEN

VINING REALTY GROUP LIMITED
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 408)
First Respondent

Hearing:

16 August 2017, at Wellington

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms N Dangen, Member

Appearances:

Mr J Waymouth, on behalf of the Appellant
Ms N Copeland, on behalf of the Authority

Date of Decision:

4 October 2017

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant, Vining Realty Limited, trading as Bayleys Nelson (“the Agency”), has appealed against the decision of Complaints Assessment Committee 408 (“the Committee”) dated 1 July 2016, in which the Committee found that the appellant had engaged in unsatisfactory conduct (“the substantive decision”).¹ The Agency has also appealed against the Committee’s penalty decision, dated 20 September 2016.²

[2] The Committee’s decisions arose out of an investigation undertaken by the Committee under s 78(b) of the Real Estate Agents Act 2008 (“the Act”) after receiving a complaint (“the complaint”) from the vendors of a property at Tasman, near Nelson (“the property”), about the conduct of one of the Agency’s salespersons, Mr Daniel Reed. The Committee laid charges against Mr Reed.

[3] The appeal was heard on 16 August 2017. Further submissions were submitted after the hearing.

Background facts

[4] Mr Graham Vining is the Principal of the Agency.

[5] The relevant factual background is set out in the Tribunal’s decision in *Complaints Assessment Committee 408 v Reed*.³ What follows is a brief summary, as relevant to this appeal. The relevant events occurred during 2014.

[6] The vendors listed the property with Mr Reed on 10 July (“the vendors’ listing”). The listing agreement provided for a sole agency until 30 September, commission of \$35,000, and marketing costs estimated at \$3,828.15, for a six-week marketing campaign. The vendors had obtained a valuation which valued the property at \$1.135 million.

¹ *Re Vining Realty Group Ltd (t/a Bayleys)* Complaint 8720 [2016] NZREAA 226.

² *Re Vining Realty Group Ltd (t/a Bayleys)* Complaint 8720 [2016] NZREAA 227.

³ *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 6. (The hearing of this appeal was deferred until after the charges against Mr Reed had been dealt with.)

[7] The first Open Home was held on 3 August. On 4 August, Mr Reed reported to the vendors by email that five groups had gone through the property and that there had been some telephone and email enquiries.

[8] Two offers were made on the property on 4 August 2014. The vendors rejected both of them. The vendors learned subsequently that Mr Reed had told the prospective purchasers that the property was not expected to sell for more than its registered valuation of \$1.1 million.

[9] Later on 4 August 2014, Mr Reed advised the vendors that he was interested in the property, and offered them \$1.1 million. The vendors accepted his offer. Mr Reed did not comply with the provisions of s 134 and 135 of the Act.⁴

[10] Mr Reed sent the vendors a sale and purchase agreement by email on 5 August. He had drawn a line through the box at the bottom of the agreement which stated that the sale was made by Vining Realty Limited and written “PRIVATE SALE” under the box. The vendors signed the agreement and returned it to Mr Reed on 6 August. The vendors’ listing was removed from the Agency’s listings.

[11] The sale was settled on 3 October. The vendors were not charged commission on the sale.

[12] Mr Vining was not aware that the vendors’ listing had been withdrawn when the vendors accepted Mr Reed’s offer. He did not become aware that Mr Reed had bought the property until after the purchase was concluded, and Mr Reed told him he had bought a property. Mr Vining asked Mr Reed who he had bought the property through and Mr Reed responded that he had bought it privately. Mr Vining did not become aware that Mr Reed had bought his client vendors’ property until they complained to the Authority.

[13] Mr Reed was found to have breached ss 134 and 135 of the Act, and r 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the

⁴ Sections 134 and 135 of the Act places restrictions on licensees’ acquisition of a client’s land and sets out a process that must be followed.

Rules”).⁵ He was also found to have breached r 10.2 and 10.3.⁶ He was found guilty of misconduct under s 73 (b) of the Act (in that his conduct constituted seriously incompetent or seriously negligent real estate agency work).

The substantive decision

[14] As noted above, the Committee commenced an investigation into the Agency’s conduct during its investigation of the complaint against Mr Reed. The Committee considered that the complaint raised issues concerning the Agency.

[15] The Committee recorded that the Agency had advised the Authority (as relevant to this appeal) that:⁷

- a) There was proper supervision and management of employees and this transaction.
- b) ...
- c) ...
- d) The sale between [Mr Reed] and [the vendors] was done without the Agency’s knowledge and was contrary to Agency policy, ... The Agency became aware of the sale when [Mr Reed] told Mr Vining the Principal that he had purchased the Property privately. As Mr Vining understood it to be a private sale he did not enquire further about s 134 compliance. Mr Vining did not detect that it was an Agency listing and if he had he would have insisted on compliance with s 134.
- e) The Agency has proper procedures and policies in place and provides in-house training. ...

[16] The Committee found that:⁸

... the Agency’s actions in allowing a sale to be concluded in contravention of ss 134 and 135 of the Act are incompetent or negligent and would reasonably be regarded by agents of good standing as being unacceptable.

⁵ Rule 10.1 provides that a licensee must act in the best interests of a client.

⁶ Rules 10.2 and 10.3 provide that a licensee must provide an appraisal of a client’s property, which reflects current market conditions and is supported by comparable sales information.

⁷ Substantive decision, at paragraph 1.9.

⁸ At paragraph 3.1.

[17] The Committee accepted Mr Vining’s evidence on behalf of the Agency that:⁹

... had he known about the sale, and realised that it was not a private sale as characterised by [Mr Reed], he would have enquired further and required compliance with ss 134 and 135 of the Act.

[18] The Committee accepted that the Agency had policies and procedures in place relating to staff purchases, and that it took the application of ss 134 and 135 seriously. It also accepted that specific training on the topic had been given in 2014. However, the Committee considered that:¹⁰

... the failure to detect that the Sole Agency listing was purchased by [Mr Reed] without commission being charged and in consequence the failure to make further enquiries into the transaction is in breach of Rule 8.3 and s 50 of the Act. The Committee considers that the Agency did not have the necessary safeguards and checks in place to ensure oversight of all transactions to ensure oversight of all transactions and compliance with the Act in particular ss 134–135. This systems failure, allowing a Sole Agency listing to simply disappear is unacceptable and reaches the threshold of unsatisfactory conduct.

Submissions on the appeal against the substantive decision

[19] Mr Waymouth referred to the statement of evidence prepared by Mr Vining for the hearing of the charges against Mr Reed. Mr Vining said that the Agency operates under a Bayleys Process and Policy Manual, the process is treated very seriously by himself and the Agency, and there was CE verifiable training on ss 134 and 135 during 2014. Mr Vining referred to two occasions, one of which involved a salesperson expressing an interest in purchasing a property being assessed for listing, and the other where one of the Agency’s salespersons was purchasing a property through another real estate agency. On both occasions, Mr Vining insisted on the “processes and practices” under ss 134 and 135 being undertaken.

[20] Mr Waymouth referred to the Tribunal’s decision in *Hutt City Realty Limited v Real Estate Agents Authority (CAC 20002)* (“*Hutt City Realty*”).¹¹ That case concerned a “rogue” salesperson who, contrary to the policy of the agency she worked for, her training, and applicable policy and procedure manuals, handed over the keys to a property when she should not have. The salesperson was found to have

⁹ At paragraph 3.3.

¹⁰ At paragraph 3.4.

¹¹ *Hutt City Realty Limited v Real Estate Agents Authority (CAC 20002)* [2013] NZREADT 109.

engaged in unsatisfactory conduct. A Complaints Assessment Committee found that the real estate agency had engaged in unsatisfactory conduct by breaching s 50 of the Act. The Tribunal quashed the finding. It found that the agency had “more than adequate” management structures in place.¹² Mr Waymouth also referred to the Tribunal’s statement that:¹³

... strict compliance with the requirements of s 50 is fundamental to the real estate industry functioning properly. However, it needs to be applied in terms of sensible business practice and common-sense.

[21] Mr Waymouth submitted that when determining whether there has been a breach of s 50 of the Act, or r 8.3 of the Rules, the focus is not on whether the salesperson has breached the provisions of the Act or Rules, but on whether the appropriate management processes are in place, together with systems, policy and procedure manuals, and training, to ensure that the particular issue is always at the forefront of salespersons’ minds.

[22] Mr Waymouth submitted that the Committee was wrong to make a finding of unsatisfactory conduct against the Agency, and should have accepted that the Agency had proper standards, processes, procedures, and practices in place, and the fact that a salesperson was acting of his own volition in a “rogue capacity” did not automatically lead to a finding that the Agency failed to manage and supervise the salesperson.

[23] Ms Copeland submitted that it can be accepted that a real estate agency cannot always be held accountable for the actions of a “rogue” licensee who has ignored the policies and procedures put in place by the agency, and there may be cases where no reasonable steps would have led to the detection of a licensee’s misconduct. However, she submitted that in the present case, there was a lack of safeguards and checks, and the Agency should be held accountable at the low level of unsatisfactory conduct.

[24] She submitted that the distinction between the present case and *Hutt City Realty*, is that in that case, the “rogue” licensee acted outside the confines of the

¹² *Hutt City Realty*, at [45].

¹³ At [46].

agency's systems and policies, whereas in the present case Mr Reed was able to purchase a property listed by the Agency without complying with ss 134 and 135 of the Act.

[25] Ms Copeland submitted that it should not be possible for a licensee to be able to remove a listing from the Agency's system, and that the Agency should have been alerted that Mr Reed was treating the sale of a property listed with the Agency as a private sale. The fact that Mr Vining did not find out about Mr Reed's purchase showed that the necessary checks and balances were not in place. She submitted that the Agency's systems should have been robust enough to detect Mr Reed's error.

[26] Ms Copeland also challenged a submission by Mr Waymouth that there was no obligation on the Agency to comply with ss 134 and 135 of the Act. She referred to s 137(2)(c), which provides that for the purposes of ss 134 to 136, a person related to a licensee includes "a branch manager or salesperson engaged by the licensee". She submitted that while Mr Reed was clearly required to comply with s 134 and 135 (as a licensee buying his clients' property) Mr Vining, as branch manager of the Agency, owed the vendors the same obligations under ss 134 and 135.

Further evidence and submissions

[27] Mr Vining gave evidence at the appeal hearing. He told the Tribunal that he receives an email each morning which records movements on any property listed by the Agency. The email is generated by the Agency's "Property Suite" system ("the PS system"). If a withdrawal is entered into the system, the reason for the withdrawal is required to be stated, and it triggers a number of processes, including withdrawal of all marketing material, and generation of an invoice for marketing costs up to the withdrawal.

[28] We note that Mr Vining appeared to be uncertain as to whether a reason for a withdrawal was required, as in cross-examination and in response to questions from the Tribunal, he said that it was possible that a withdrawal could be loaded on to the PS system without a reason for it being given, and there was no check in the system

that ensured that a reason is given for a withdrawal. We accept, however, that the reason for a withdrawal must be entered.

[29] A screenshot was provided of the PS system record of the withdrawal of the vendors' listing in the present case. The system recorded that Mr Reed's personal assistant had entered the withdrawal of the vendors' listing on 7 August 2014. The reason for the withdrawal was given as "sold privately". Mr Vining said that there are more than 200 listings on the system, and he is not able to review every entry on the morning email, and he would only follow up on a "significant" withdrawn listing. He did not follow up on the withdrawal of the vendors' listing.

[30] Mr Vining said that when the withdrawal of the vendors' listing came up on the system, he did not ask Mr Reed about it, Mr Reed did not mention it at the Agency's weekly sales meeting, and neither Mr Vining nor any other person asked him about it.

[31] He further said that there was no "red flag" about the withdrawal, as the vendors did not raise any issue as to Mr Reed's buying the property, they paid the marketing costs, and the sale and purchase was settled. Mr Vining said that from the time the sale and purchase agreement was signed, nothing further occurred that linked it to the Agency: for example, the deposit was paid to the vendors' solicitors, not Bayleys, and the solicitors did not raise any issue concerning Mr Reed's position.

[32] This evidence was new. Mr Vining had not mentioned the PS system in his statement to the Authority during the investigation, or in his statement of evidence to the Tribunal in relation to the charge against Mr Reed, or in his appeal submissions to the Tribunal. Mr Vining should have referred to the PS system, as it would have been relevant to the investigation. At all times prior to the appeal hearing, Mr Vining said that Mr Reed had not mentioned the withdrawn listing at the Agency's weekly sales meetings, and that Mr Reed did not tell him he had bought the property.

[33] The Tribunal therefore asked counsel to submit further submissions on the matter of the PS system.

[34] Mr Waymouth submitted that because the withdrawal was recorded on the PS system, the CAC's decision that the listing had "simply disappeared" was wrong in fact and in law.

[35] He also submitted that because the PS system requires the reason for a withdrawal to be entered (in this case, that the property was "sold privately"), it was reasonable for Mr Vining to rely on the entry, and there was therefore no failure of supervision and management.

[36] He cited as reasons for this Mr Reed's position as a trusted, experienced member of the sales team, his qualification as a branch manager, and his having previously been a shareholder and director of the Agency, and considered to be truthful. He also submitted that Mr Reed was a very successful salesperson in the area in which he operated (which Mr Vining described as "Daniel's patch") and had developed a reputation within the Agency such that there was a sensitivity as to his position, and he would not normally be questioned on matters affecting his listings. He further submitted that Mr Vining and others were reluctant to raise issues with Mr Reed, as he was dealing with difficulties in his marriage at the time.

[37] Mr Waymouth also submitted that the withdrawal of the vendors' listing would not normally trigger an enquiry. He referred to the evidence that Mr Reed had at that time over 200 listings and that the market was in a "slow state". He submitted that the listing at "\$1million +" was one of the few listings in the particular area in Nelson at the time in that price range, and there had not been a property sale at that level in the previous eight or nine months and that an earlier offer had failed.

[38] Ms Copeland submitted that the PS system described by Mr Vining was still not sufficient to alert Mr Vining to a potential purchase by a person related to the Agency. Therefore, she submitted, Mr Reed could buy the property, fail to comply with ss 134 and 135, and not charge commission, without the Agency being alerted.

[39] She submitted that the PS system relies on licensees and staff being forthcoming about an intended purchase. Thus, the Agency's policy concerning property purchases by salespersons relies entirely on their readiness to self-report.

Short of self-reporting, the PS system had no mechanism to detect transactions that might require compliance with the provisions of ss 134 and 135 of the Act, and the system allowed Mr Reed to purchase the property undetected, and without being required to comply with those provisions.

[40] Ms Copeland further submitted that while Mr Vining said he would follow up “significant” matters, there were no criteria defining “significant”, and Mr Vining could not explain what he would classify as “significant”. She submitted that Mr Vining gave no priority to withdrawn listings, he had not considered the withdrawal of the vendors’ listing to be significant, and was therefore not aware of the withdrawal of the vendors’ listing in August 2014, and he was not aware of the transaction at all until Mr Reed told him he had “bought a house”.

[41] Ms Copeland also referred to Mr Vining’s acknowledgement that except for a requirement that salespersons had to comply with ss 134 and 135, salespersons were never advised, or trained, that they were required to report to the Agency if they were considering buying a property listed by the Agency, nor was there an Agency policy to that effect (although he believed there was an instruction to that effect in the salespersons’ contracts). She also submitted that Mr Vining had acknowledged that the Agency’s policies only kicked in after a salesperson had self-reported.

[42] Ms Copeland submitted that the Committee’s finding of unsatisfactory conduct should be upheld, on the basis that the Agency failed to have appropriate systems, policies and checks in place that would have alerted Mr Vining to a potential purchase by a related person.

Discussion

[43] For reference, s 50 of the Act provides:

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or branch manager.
- (2) In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—

- (a) that the work is performed competently; and
- (b) that the work complies with the requirements of this Act.

[44] Rule 8.3 provides:

Supervision and management of salespersons

- 8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

[45] We refer, first, to the Tribunal's decision in *Hutt City Realty*. In that case, a transaction was due to settle on the Thursday before Good Friday. At the last minute, the purchasers were told they could not get insurance on the property, therefore settlement could not take place. This placed the purchasers in a difficult position, as the sale of their own property had settled, so they therefore had nowhere to live. It was accepted that out of stress and sympathy for the purchasers the salesperson had "gone rogue" and uplifted the keys from the Agency and given them to the purchasers.

[46] At the time, the salesperson's manager had had to leave the office to go to a funeral, and her supervisor was out on business. Neither was aware of the pressure (described by the Tribunal as "intense pressure as a human being") the salesperson was under. The purchasers' position was, however, resolved by the salesperson and her supervisor by virtue of a suitable rental arrangement.

[47] The Tribunal recorded that it had much more information before it than was presented to the Complaints Assessment Committee, in particular as to the reason for the Manager's absence. The Tribunal found that the Agency had "more than adequate" systems in place, but the salesperson had taken matters into her own hands.

[48] There is a marked distinction between the circumstances of *Hutt City Realty* and the present case. In *Hutt City Realty* the salesperson, having taken matters into her own hands, did not give the agency any opportunity to apply its policy and established procedures. Further, the agency quickly became aware of the situation

and the salesperson and her supervisor provided an appropriate solution to the purchaser's dilemma.

[49] In the present case, the Agency's PS system was not able to detect a salesperson buying a client's property, and the Agency (that is, Mr Vining) did not use the PS system available to him to make any enquiry, such that Mr Reed's purchase would have been identified, and his failure to comply with ss 134 and 135 rectified. Had Mr Vining become aware of Mr Reed's purchase before the sale was settled, he could have directed Mr Reed to comply with ss 134 and 135 before settlement.

[50] We do not accept Mr Waymouth's submission that *Hutt City Realty* supports a finding that the Committee was wrong in this case to make a finding of unsatisfactory conduct against the Agency.

[51] In particular, we cannot consider it to be "sensible business practice and common-sense" for a real estate agency not to notice a withdrawal of a sole agency listing for a private sale and not to enquire as to the circumstances of such a withdrawal. Nor can we regard it as sufficient to have a system in place, but then fail to make any enquiry because of "sensitivity" towards a high performing salesperson, or sympathy for his personal situation.

[52] We do not accept that an Agency can be said to have adequate (let alone "more than adequate") systems in place when the system does not alert the Agency to matters that indicate that licensees' obligations under the Act and Rules, and the Agency's policies and processes, may not have been complied with. When the withdrawal of the vendors' listing came up on the system, Mr Vining or another senior management person should have asked Mr Reed about it. When Mr Reed did not mention the withdrawal at the Agency's weekly sales meeting, Mr Vining or another senior management person should have asked him about it.

[53] It does not absolve the Agency if there was no "red flag" about the withdrawal, that the transaction did not appear on the Agency's PS system after the withdrawal, or that neither the vendors nor the solicitors raised any question as to Mr Reed's

position as licensee and purchaser in a “private sale”. The fact that the transaction did not appear in the Agency’s records after the sale and purchase agreement was signed is simply a reflection of the listing having been withdrawn. Further, the Agency cannot rely on the intervention of other people to ensure compliance. The Agency must itself ensure that it has systems and process in place that can be relied on to provide adequate supervision and management, if such supervision and management is not maintained on a face to face basis, and cannot rely on being alerted by external sources.

[54] The inadequacy of the PS system to detect a salesperson’s purchase of a listed property, and Mr Vining’s failings in using the PS system, led to Mr Reed being able to complete the purchase without any corrective action by the Agency to ensure compliance.

[55] We are not persuaded that the Committee was wrong to find that the Agency did not have the necessary safeguards and checks in place to ensure that Mr Reed was under such direction and control as would have ensured that he complied with the Act, in particular, ss 134 and 135, and was in breach of s 50 of the Act, and r 8.3 of the Rules. That finding was open to it on the information before it.

[56] As recorded earlier, the Committee was not aware of the Agency’s PS system. However, if it had been aware of the system, it would still have been open to the Committee to find that the system did not provide the Agency with the ability to detect Mr Reed’s failure to comply with ss 134 and 135, and that the Agency did not use such information as the system did provide in order to exercise the required direction and control, in order to ensure that one of its salespersons did not fail to comply with a fundamental obligation, in breach of s 50 and r 8.3. Accordingly, we dismiss the Agency’s appeal against the Committee’s substantive finding.

The appeal against the penalty decision

[57] In the penalty decision, the Committee referred to a disciplinary finding against the agency by the Tribunal in 2013, that the Agency had provided insufficient supervision of a licensee and thereby exposed a client to a double commission. In

that case, the Committee ordered Mr Vining, as Principal of the Agency, to undergo training as to supervision of salespersons under the Act, and to complete Unit Standard 26149 of the Authority's training courses.

[58] The Committee said that while the circumstances of the earlier case were not exactly the same as the present case, it was “unsettling” that the Agency still did not appear to have ensured that its systems provided protection to the consumer and that, “again, the agency claims to have been unaware of the conduct and to have acted in good faith.” The Committee noted that:¹⁴

... the Agency is obliged under the Act to provide adequate supervision and to have systems in place to ensure a consumer is not placed in the position [the vendors] have found themselves in.

[59] The Committee censured the Agency, ordered it to refund fees charged for advertising the property, and ordered it pay a fine of \$8,000.

Submissions

[60] Mr Waymouth submitted that the penalty imposed was grossly disproportionate to the high standards, processes, and practices of the Agency, which were compromised by a “rogue” salesperson.

[61] He submitted that the Committee failed to give proper consideration to the applicable principles on which penalties are imposed: protecting the public, maintaining professional standards and confidence in the industry, punishment, rehabilitation, maintaining consistency in penalties for similar conduct to the extent that is possible, and imposing the least punitive penalty that is appropriate.¹⁵ He submitted that the Committee instead focussed on an unrelated earlier finding of unsatisfactory conduct against the Agency.

[62] Mr Waymouth further submitted that the fine of \$8,000 was excessive, given that even in *Hutt City Realty* the fine was \$5,000. He submitted that the marketing

¹⁴ Penalty decision, at paragraph 3.6.

¹⁵ The principles as to penalty were most recently set out in the Tribunal's decision in *Complaints Assessment Committee v Robb* [2017] NZREADT 39, at [51].

costs were properly expended and charged, and an order should not have been made for them to be refunded, as the vendors were properly charged for marketing costs.

[63] Ms Copeland submitted that the fine imposed was appropriate in the circumstances, which concerned a breach of the fundamental obligations set out in ss 134 and 135. She submitted that the agency's conduct here was more serious than that discussed in *Hutt City Realty*, as Mr Reed's conduct exposed serious failings in the Agency's systems and procedures, which allowed an employee to buy a listed property and breach the fundamental obligations set out in ss 134 and 135, without the Agency becoming aware of his purchase until the vendors complained to the Authority.

[64] Ms Copeland also submitted that the order for the Agency to refund the marketing costs was appropriate under s 93(1)(e) of the Act, in that the vendors were left in the position of negotiating with an experienced salesperson without the benefit of a salesperson acting on their behalf.

Discussion

[65] We have already noted that the circumstances in the present case are different from those considered in *Hutt City Realty*. In that case, the Tribunal quashed the finding of unsatisfactory conduct and the fine imposed by the Complaints Assessment Committee. We are not persuaded that the circumstances in *Hutt City Realty* were more serious than in the present case. There, the "rogue" salesperson and her supervisor promptly took steps to deal with the matter. In the present case, the Agency's systems were not adequate to disclose Mr Reed's purchase, and the Agency had the opportunity, on the information the system did give it, to ask questions about, and rectify, Mr Reed's purchase and non-compliance with ss 134 and 135 before settlement. The Agency did not do so.

[66] Further, we accept his submission that the marketing costs were expended up to the time of the sale, and properly charged pursuant to the listing agreement, and that an order should not have been made for them to be refunded.

[67] We also accept that the fine of \$8,000 was not appropriate. Having considered the circumstances of the case, we consider the appropriate fine is \$6,000.

[68] With respect to the Tribunal's earlier finding against Mr Vining and the Agency, we accept Mr Waymouth's submission that the facts of that case are different from the present one: in the earlier decision, the conduct complained of concerned the handling of a potential double commission issue (in particular, as to what information was given to the vendors of a property). However, the relevance of the earlier case lies in the consideration by the Committee and the Tribunal of the supervision by Mr Vining of the licensee concerned. In the earlier case, the Tribunal found that there was "a lack of supervision by the Agency" of the licensee, and that "the potential issue of double commission should have been dealt with by Mr Vining on behalf of his real estate company". The Tribunal upheld the Complaints Assessment Committee's order that Mr Vining undergo training related to the supervision of salespeople.

[69] The Tribunal has found a lack of supervision by Mr Vining in the present case. We are not persuaded that the Committee erred in taking the earlier case into account in the penalty decision. However, the proper course would have been for the Committee to order Mr Vining to repeat the order for training, rather than to order the Agency to pay a higher fine. The Tribunal will modify the Committee's order accordingly.

Outcome

[70] The Agency's appeal against the Committee's substantive decision is dismissed.

[71] The Agency's appeal against the Committee's penalty decision is allowed to the extent that:

- [a] The order for the Agency to pay a fine of \$8,000 is quashed. The Agency is ordered to pay a fine of \$6,000 to the Authority, within 20 working days of the date of this decision.

[b] The order for the Agency to refund marketing costs (\$2,463.90) to the vendors is quashed. In the event that the Agency has already refunded the costs, that sum is to be deducted from the fine ordered at [a], above.

[c] Mr Vining is ordered to undergo training related to the supervision of salespersons under the Act, and to enrol in and achieve competency in Unit Standard 26149, within 12 months of the date of this decision.

[72] For the avoidance of any doubt, the order that the Agency is censured remains.

[73] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, 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.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member