

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 24

READT 052/18

IN THE MATTER OF

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

BETWEEN

AKHIL CHAND CHAUDHARY
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 414)
First Respondent

AND

SUBARMANI RAJAN and SUMINTRA
DEVI
Second Respondents

On the papers

Tribunal:

Hon P J Andrews, Chairperson
Ms C Sandelin, Member
Mr N O'Connor, Member

Submissions received from:

Mr D Purusram, on behalf of Mr
Chaudhary
Ms E Mok, on behalf of the Authority
(Second Respondents not participating in
the appeal)

Date of Decision:

7 June 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Chaudhary has appealed to the Tribunal pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 414 (“the Committee”), dated 17 September 2018, in which it made a finding of unsatisfactory conduct against him. He has also appealed against the Committee’s decision dated 31 October 2018, in which it made penalty orders.

[2] The genesis of this appeal proceeding is in a complaint made against Mr Chaudhary by Mr Rajan and Mrs Devi,¹ the vendors of a property at Otahuhu, Auckland, concerning Mr Chaudhary’s conduct during and after his marketing the property. It is Mr Chaudhary’s second appeal to the Tribunal against the Committee’s decisions arising out of the complaint.

Factual background

[3] At the relevant time, Mr Chaudhary was engaged as a licensed salesperson at Sega Realty (“the Agency”). The vendors were friends with Mr Chaudhary and his wife. On 8 November 2012 Mr Chaudhary entered into a sole agency agreement with the vendors in respect of the sale of the property. The property did not sell during the period of the sole agency, which expired on 8 February 2013. Pursuant to the agreement, the listing reverted to a general agency.

[4] Around 23 February 2013 one of Mr Rajan’s work colleagues told him she wanted to buy the property. They negotiated a price. Mr Rajan then introduced his colleague to Mr Chaudhary, and she entered into an agreement to buy the property on 27 February 2013. The Agency and Mr Chaudhary were named on the agreement as selling agency and salesperson. The agreement was settled on 13 March 2013.

[5] Mr Rajan subsequently contended that Mr Chaudhary had not honoured an oral agreement made between them that the commission payable on the sale of the property would be reduced by 50 percent, because Mr Rajan had introduced the buyer to Mr

¹ For convenience, we will refer to Mr Rajan and Mrs Devi as “the vendors”, except where it is appropriate to refer to them separately.

Chaudhary after the sole agency had expired (“the commission agreement”). He contended that the full commission (\$8,890) was deducted from the sale proceeds.

[6] Mr Rajan first raised the matter of an alleged commission agreement with Mr Chaudhary when he learned that the full commission had been deducted. He said that Mr Chaudhary said that he would talk to Mr Sega, the manager of the agency where he was engaged, and sort it out. He also said that Mr Chaudhary assured him that he would get 50 percent of the commission back, but this never happened.

[7] In March 2016, Mr Rajan made a complaint to the Real Estate Agents Authority that Mr Chaudhary had failed to honour the alleged commission agreement. The Authority facilitated mediation between the vendors and Mr Chaudhary. An agreement was reached on 1 August 2016, pursuant to which Mr Chaudhary was to pay the vendors \$4,000. Mr Chaudhary’s manager, Mr Sega, attended the mediation, but was not party to the mediation agreement.

[8] In November 2016, Mr Rajan advised the Authority that Mr Chaudhary had not complied with the mediation agreement, and asked for the complaint to be referred to a Complaints Assessment Committee. An Authority investigator, Mr Gooch, was assigned to investigate the complaint.

The evidence before the Committee.

[9] Mr Rajan set out his complaint as follows:

... I have gone through Sega Realty for listing my property so signed a contract with them. In the meanwhile I have come across a friend of mine ... who agreed to purchase my property and so I have contacted Akhil (Sega Realty agent) to not to charge full commission as it is firstly my referred buyer and secondly the property was sold out of the agreed 90 day period in the contract. Akhil confirms me verbally that he will charge only 50% of their commission, but they failed to do so and charged me their full commission.

On the same day of the settlement, as soon as I know that they have charged me their full commission, I spoke to Akhil on phone so they called me to their office to sort it out. I went to the office the same day. Akhil told me that he will talk regarding this matter with Inea and sort it out. But this never happened ...

[10] Mr Rajan answered a series of questions put to him by Mr Gooch regarding his complaint, as follows:

- Q Did you discuss a referral fee or reduction in commission with the listing agent when you introduced the buyer to the agent?
- A Yes.
- Q What was discussed and what was the agreement?
- A I told Akhil my work colleague who works with me, she wants to buy my property and she negotiated with me to reduce the selling price which I did. Then I spoke to Akhil and told him I got my work colleague who wants to buy my property and you make 50% of commission which he agreed.
- Q When your property settled did the agency deduct the full commission or give you a reduction?
- A Deduct the full commission.
- Q Are you aware if the agency manager Mr Inia Segal knew the listing agent had agreed to reduce the commission?
- A Akhil told me that he already spoke to his boss (Inia) about 50% commission and he mentioned me it's all good, his boss agreed.

[11] The investigator took a statement from Mrs Devi. She said that she was present when Mr Chaudhary told her and Mr Rajan, at their house, that he would reduce the commission by 50 percent. She could not remember if this was after he sold the house, or before, as it was so long ago.

[12] Mr Gooch telephoned Mr Chaudhary on 30 January 2017 and advised him of Mr Rajan's complaint. Mr Gooch made a file note of this conversation, as follows:

I ring 027 212 6426 and speak to Akhil Chaudhary about complaint made against him by Mani Rajan.

Chaudhary states he is a good friend of Rajan and they had tea together last week. He admits he agreed to reduce commission by 50% when he sold Rajan's house and he would pay Rajan \$4000.00.

He admits he has not honoured this agreement due to financial and personal issues. He admits he attended a mediation meeting last year and agreed to pay the complainant \$4000.00.

He states his previous employer Inia Segal knew about the reduction in commission.

He states he is committed to paying the complainant the \$4000.00 and is now in a position to do this. He will start paying the \$4000.00 in instalments starting on the 15th of February 2017. He now works for L G Hooker [sic] Otahuhu Branch and his manager is Ram Ramparjash,

I advise Chaudhary that I will send him an email covering our conversation today. I advise him that the CAC has directed an inquiry into the complaint and I will be sending him a list of questions to answer.

[13] The Authority sent Mr Chaudhary formal advice of the complaint, and set out a number of questions for his response, on 8 February 2017. Mr Chaudhary responded on 28 March 2017. The following questions and answers are relevant to this appeal:

a. (Question): Provide details of agreement, verbal or written, you made to [Mr Rajan] regarding a reduction in commission.

(Answer): No written agreement in reduction in commission with the complainant during the listing process. Any commission reduction is endorsed in the listing sheet and initialled by licensee and vendor and authorisation taken from business owner/Principal. No verbal agreement. We do act if we have agreed to give discount.

b. (Question): What was the percentage of commission reduction you agreed with [Mr Rajan].

(Answer): No absolutely nothing as there was no agreement to reduce commission. If there had been one we would have given discount.

...

f. (Question): Did you attend a mediation meeting with [Mr Rajan] and Mr Sega on the 1st of August 2016.

(Answer): Yes I did.

g. (Question): Did you agree to pay [Mr Rajan] \$4000 during this meeting.

(Answer): [The mediator] called me telling me Mr Sega would not pay so to keep the friendship which is very dear to us I agreed to sign and pay Mr Rajan.

...

k. (Question): Did you tell REAA Investigator Chris Gooch on the 30th January 2017 that you will start paying [Mr Rajan] \$4000 in instalments, starting on the 15th of February 2015.

(Answer): [Marked "j" in Mr Chaudhary's response] Yes I signed the agreement to pay \$4000 to Mr Rajan as a goodwill gesture as we are very close family friends. I swear on my holy Ramayan/Geeta that I agreed to keep the vital friendship intact and me and my wife ... that was the reason we agreed to pay ... I have now honoured the payment while initially I had some financial hardship where the payment was delayed for a few weeks. ... I like to reiterate that the payment was done to make Mr Rajan and his wife happy which is important to us ... there was nothing in writing or verbally to reduce commission.

l. (Question): Did you tell REAA Investigator Chris Gooch that you were good friends with [Mr Rajan] and you had met him last week.

(Answer): [Marked "k" in Mr Chaudhary's response] Mr Rajan and his wife are our good friends. [Mrs Devi] and my wife are classmates from Fiji. We do visit each other often. I did meet Mr Rajan on the week mentioned.

(Further Answer): [Marked "m" in Mr Chaudhary's response] I did tell Mr Gooch that I will pay Mr Rajan in instalments which I did on 15th February 2017. Since then I have paid him \$4400.

m. (Question): Why have you not honoured any of the agreements to pay [Mr Rajan] \$4000.

(Answer): [Also marked “m” in Mr Chaudhary’s response] I have paid \$4400 to Mr Rajan.

[14] The investigator also obtained a response from Mr Sega. Mr Sega said that at the time the sale was settled, Mr Chaudhary confirmed that the normal commission would be charged, although basic office fees would not be charged. He said that when Mr Rajan phoned the office in March 2013 demanding a refund of 50 percent of the commission (on the basis of the alleged commission agreement), he clarified the matter with Mr Chaudhary, who said there was never an agreement that Mr Rajan would be paid any part of the commission. Mr Sega further said that he told Mr Rajan that Mr Chaudhary had never asked or instructed him to pay 50 percent of the commission to Mr Rajan.

The Committee’s first decisions

[15] In its first substantive decision, dated 12 June 2017, the Committee found that Mr Chaudhary’s actions fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee, and constituted unsatisfactory conduct under s 72(a) of the Act.²

[16] The Committee also found that Mr Chaudhary had breached r 5.1 (which required him to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work), r 6.3 (which required him not to engage in any conduct likely to bring the industry into disrepute), and r 6.4 (which required him not to 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) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.³

[17] These findings were made on the Committee’s factual findings that Mr Chaudhary had lied to his supervisor and the Authority by denying that he had agreed

² Committee’s first substantive decision, at paragraph 3.1.

³ At paragraph 3.1.

to reduce commission and that he had failed to honour the mediation agreement, pursuant to which he had agreed to make a payment to Mr Rajan.

[18] On the first issue the Committee said:⁴

It was during a call to [Mr Chaudhary's] mobile phone on 30 January 2017 that [Mr Chaudhary] admitted to the investigator he had agreed to reduce commission by 50% when he sold [Mr Rajan's] property, and that he would pay [Mr Rajan] \$4,000.00.

This was compelling evidence, to which the Committee concluded that [Mr Chaudhary's] continued denial to both [Mr Segal] and the Authority was unsatisfactory and breached rules 5.1 and 6.4 of the Rules.

[19] On the second issue the Committee said:⁵

[Mr Chaudhary] signed a mediated agreement that he would pay to [Mr Rajan] the sum of \$4,000.00 by 15 September 2016.

Mr Chaudhary failed to pay, stating he had personal and financial issues which prevented this from happening.

... if [Mr Chaudhary] had personal and financial issues at the time of signing the mediated agreement, he should have disclosed this and come to alternative arrangements with the mediator. He did not do this, and it was only after the intervention of the Authority's officers and some 7 months' time that [Mr Chaudhary] finally paid \$4,400.00 to [Mr Rajan].

The Committee concluded that [Mr Chaudhary] had breached Rule 6.3 in failing to honour the signed mediated agreement.

[20] In its first penalty decision, the Committee made an order censuring Mr Chaudhary, imposed a fine of \$2,000, and ordered him to undertake further training as to the principles of ethics applying to real estate practice.

Mr Chaudhary's first appeal to the Tribunal

[21] Mr Chaudhary appealed to the Tribunal. Pursuant to leave given by the Tribunal, Mr Rajan, Mrs Devi, Mr Gooch, and Mr Chaudhary were cross-examined on the statements they made to the Committee. The Tribunal accepted the submission on behalf of the Authority that the appeal should be limited to considering whether the Committee erred in relying on the mediation agreement, and in determining that Mr Chaudhary had lied to the Authority and to Mr Segal about the commission agreement

⁴ At paragraphs 3.6 and 3.7.

⁵ At paragraphs 3.8–3.11.

(in breach of rr 5.1 and 6.4), and that Mr Chaudhary's failure to honour the terms of the mediation agreement amounted to a breach of 5 6.3.

[22] In a decision dated 1 May 2018 ("the first appeal decision"), the Tribunal allowed the appeal, on the grounds that compliance with a mediation agreement, and responses to the Authority during an investigation, could not be said to be real estate agency work, as defined in s 4 of the Real Estate Agents Act 2008 as "... any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction".⁶

[23] The Tribunal found that in the circumstances, it was not open to the Committee to make a finding of unsatisfactory conduct under s 72 of the Act, under which a licensee can only be guilty of unsatisfactory conduct in relation to real estate agency work. However, the Committee could have considered whether there was evidence on which it could refer the complaint on a charge of misconduct under s 73 of the Act. The Tribunal remitted the complaint to the Committee for further consideration.

The Committee's second decisions

[24] In its second substantive decision dated 17 September 2018, the Committee again made a finding of unsatisfactory conduct against Mr Chaudhary. It found that Mr Chaudhary "had made an agreement with [Mr Rajan] and then lied to his supervisor and the Authority about the existence of the agreement", and "failed to meet the terms of a mediated agreement."⁷

[25] As to the first finding, the Committee said (after referring to Mr Gooch's record of Mr Chaudhary's admission that he had entered into a commission):⁸

This was compelling evidence from which the Committee concluded that [Mr Chaudhary's] continued denial to both his supervisor and the Authority of the existence of the agreement reached the threshold for a finding of unsatisfactory conduct, and breached Rules 5.1, 6.3 and 6.4 of the Rules. [Mr Chaudhary] made much of being good friends with [Mr Rajan and Mrs Devi] and that he only agreed to pay them the disputed amount because of their friendship. The Committee found this to be very unlikely, and on the balance of probabilities it

⁶ *Chaudhary v The Real Estate Agents Authority (CAC 414)* [2018] NZREADT 12.

⁷ Committee's second substantive decision, at paragraph 3.2.

⁸ At paragraph 3.7.

is more likely than not [Mr Rajan], having introduced their own buyer to [Mr Chaudhary], negotiated the commission agreement with him prior to the sale as recompense for their part in securing a buyer for their property. The Committee found it particularly aggravating that [Mr Chaudhary] had denied the existence of the agreement for such a long period, before finally paying [Mr Rajan] what they had agreed during the transaction.

[26] With respect to its finding that Mr Chaudhary had “failed to meet the terms of a mediated agreement”, the Committee viewed this conduct afresh in the light of the Tribunal’s finding that this was not real estate agency work. It concluded that the conduct, while dishonourable, and could be said to have brought the industry into disrepute, did not meet the “very high threshold for misconduct under s 73 of the Act”. On the basis that “there is effectively no sanction for that activity”, the Committee dismissed that part of Mr Rajan’s complaint.⁹

[27] In its subsequent penalty decision, the Committee ordered that Mr Chaudhary be censured, imposed a fine of \$1,000, and again ordered him to complete further training as to the principles of ethics applying to real estate practice.

Mr Chaudhary’s second appeal to the Tribunal

[28] Mr Chaudhary appealed against the Committee’s second decisions on the grounds that (in summary) there was no oral or written agreement to reduce the commission by 50 percent, and overall, it had not been proved to the required standard that Mr Chaudhary breached his obligations under s 72, or any other provision of the Act. His Notice of Appeal stated that:

[a] There was no commission agreement, and the mediation agreement was not evidence of an agreement to reduce commission by 50 percent;

[b] in cross-examination at the first hearing before the Tribunal, the investigator acknowledged that Mr Chaudhary may have misunderstood the conversation on 30 January 2017;

⁹ At paragraph 3.10.

- [c] the Committee failed to consider the possibility that the evidence given by Mr Rajan and Mrs Devi may have been concocted, and/or that there were credibility issues as to their evidence;
- [d] the Committee failed to consider the evidence that emerged during the first appeal to the Tribunal; and
- [e] the Committee was wrong to find that Mr Chaudhary lied to his supervisor.

[29] The Tribunal sought submissions as to whether, in light of the Tribunal's finding in its first decision that conduct in "lying to a supervisor and to the Authority" and "failing to honour a mediation agreement" was not within the definition of real estate agency work, the Committee had jurisdiction to make a finding of unsatisfactory conduct under s 72 of the Act that Mr Chaudhary "had made an agreement with [Mr Rajan] and then lied to his supervisor and the Authority about the existence of the agreement". The submissions filed on behalf of the Authority focussed on the alleged commission dispute, and whether the failure to honour a commission dispute was within the definition of real estate agency work. Further submissions were requested on that issue.

[30] Having considered counsel's submissions, the Tribunal will consider Mr Chaudhary's second appeal under the following headings:

- [a] Was the Committee wrong to find (at paragraph 3.7 of its second substantive decision) that Mr Chaudhary agreed that the vendors would be charged 50 percent of the commission payable on the sale of the property to Mr Rajan's colleague?
- [b] If the answer to question [a] is "yes":
 - [i] did Mr Chaudhary fail to honour the agreement? and
 - [ii] are (a) reaching an agreement as to the commission to be paid in respect of a sale (or other disposition), and (b) failing to honour such

an agreement, within the definition of “real estate agency work” in s 4 of the Act?

- [c] Was the Committee wrong to find (at paragraph 3.7 of its second decision) that Mr Chaudhary lied to his supervisor about the existence of a commission agreement?
- [d] If the answer to question [c] is “yes”, is making a statement to a licensee’s supervisor as to the existence of a commission agreement within the definition of “real estate agency work” in s 4 of the Act?
- [e] In the light of the answers to the above questions, did Mr Chaudhary engage in unsatisfactory conduct under s 72 of the Act in failing to honour the commission agreement.

[31] This will require the Tribunal to make a factual determination: as to whether there was a commission agreement, as alleged by Mr Rajan. While the factual foundation of his complaint was that there was such an agreement, the issue of whether that was established to the required standard (the balance of probabilities) appears to have been conflated during the course of the investigation and in the Committee’s decisions with the issues of whether Mr Chaudhary lied to his supervisor about whether there was a commission agreement, and failed to comply with the mediation agreement.

Was the Committee wrong to find that Mr Chaudhary agreed that the vendors would be charged 50 percent of the commission payable on the sale of the property to Mr Rajan’s colleague?

Evidence

[32] We have set out earlier, the statements made by Mr Rajan and Mrs Devi, Mr Gooch’s record of his conversation with Mr Chaudhary on 30 January 2017, and Mr Chaudhary’s statements in response to the complaint. We understand that the transcript of the evidence heard by the Tribunal was not put before the Committee, which referred only to the original material before it when reconsidering its decision

on the complaint. The Tribunal has had the advantage of hearing the witnesses' oral evidence and cross-examination.

[33] Mr Rajan was cross-examined by Mr Purusman. He agreed that the Agency listing agreement did not provide for a reduction in commission and said that that was why he talked to Mr Chaudhary about it when his colleague said she wanted to buy the property. He said:

... before I brought the girl, before I took it, talked to Akhil otherwise I can sell it because I understand if I sell it myself, if I go to my lawyer and talk to him and he'll just make the sale and purchase agreement and the deal is there but I just, he told, he was trying all the time to sell it and he was not but he was a friend then I said, "Oh okay, I'll give you some money", so that's why I made it, you know, like just helping him out.

[34] Mr Rajan repeated this evidence during the course of his cross-examination. Mr Purusman put to him that "so basically, my understanding is it's your idea then to reduce the fees because you did the whole work of finding the client?", to which Mr Rajan responded:

The lady was working with me, like, my colleague, and that, if I wanted, I can sell it to her, like, talking to her and take it to my lawyer, and we can make the sales and purchase agreement. But he was selling all that 90 days, he was not able to sell it, as I said before. Then I had a talk to him that, "You sell it but you did not made it, but my friend who worked with me, she want it, she wants the property", and he agreed about, with, I talked to him, just charge me 50% commission, and he said yes. That's what I'm telling you all the time.

[35] Mr Purusman put to Mr Rajan that instead of going to a lawyer to prepare an agreement for sale and purchase, he went to Mr Chaudhary. Mr Rajan responded:

No. What I am saying, that when this one was expired, he was not able to sell it, then I was, a lady who works with me, my friend, my colleague, and I talked to her, I got a property, my friend Akhil he was not able to sell it, and she was in touch to buy. Then I thought, oh okay, you want to buy, then I give him, gave her some price, like, I dropped the price down, what Akhil was selling was 200-something, and I'd reduced the price, and he said, "Okay, she's interested to buy." Then I had a call, talked to Akhil, "I've got my friend who wants to buy it but I'm giving her reduced price, but only the thing, if you want, you're going to sell it for me? You're going to make the agreement" you're not going to charge me full commission. You're going to charge me only 50%." And he said, "Yes, brother, okay, bhaiya", just like that. That's what he told me. And I said, "Okay, I'll bring her, then she can have a look, and then we can make the agreement." And the lady, my friend of mine, she came to see the property and Akhil came also there. And after that, he came to my place, then we make the paper, like, agreement was signed for me and my wife.

[36] Mr Rajan agreed that there was no written agreement to reduce commission, describing it as “verbal”, and he agreed that there was no reference to a reduction in commission in either the agency listing agreement, or the agreement for sale and purchase of the property. He also confirmed that he had realised that he had been charged the full commission on the settlement date, and then telephoned Mr Chaudhary. He said that Mr Chaudhary asked him to go to the Agency office. He said that Mr Chaudhary said that he would talk to Mr Sega and sort it out. He denied that when he went to the Agency office on settlement day he was offered (and declined) a referral fee of \$250.

[37] It was not put to Mr Rajan that he had concocted his evidence.

[38] Mrs Devi was cross-examined in relation to her statement recorded by Mr Gooch that she could not remember whether Mr Chaudhary told her and her husband that he would reduce the commission before or after the house was sold:

Q You said to Mr Gooch that you do not remember when Mr Chaudhary said he would reduce the commission, is that right? You can't remember when he said that?

A I remember the day he came to do the sales and purchase agreement, that day, I'm telling you that that day there was a communication between him and my husband and that day I was present there during that time.

Q And you said to Mr Gooch you can't remember if it was before or after the sale of the property?

A During that time.

Q What do you mean during that time?

A I mean during the, when the sales and purchase agreement was supposed to be written, just before that, before this sales and purchase agreement was written, before that they had a conversation.

Q Then you said you can't remember when it was, say whether Mr Chaudhary said he will reduce commission, that happened before the sale of the house or after?

A Before the sale of the house.

...

Q Right, so is it right that your husband has reminded you it was before sale of the house am I right?

A No he didn't remind me. Actually I was present there because as you can see it's one of my signatures on that sales and purchase agreement.

Q Right.

A After speaking to him we were all sitting there and then after I speaking then this paper work was done. So just before this papers were done, then there was a verbal agreement then this paper was done then I signed it.

[39] Mrs Devi said in answer to questions from the Tribunal that she heard the discussion about the commission during the time that Mr Chaudhary came to her house to do the sale and purchase agreement.

[40] Mrs Devi agreed that the commission agreement was not mentioned in the sale and purchase agreement. She said that “Mr Chaudhary was the one writing all this information, right, because he’s the agent, he knows better I think”.

[41] Mr Purusram put to her that she had not personally understood or heard what was said. She said:

I knew about the commission very clearly, I’m 100% sure, that verbal communication happened, 50% commission reduction conversation did happen. I was very much aware

...

I understood what was happening. I understood about that commission. The only thing is, is then my husband sitting by my side, he was explaining to me this is going to happen and that 50% we have spoken about it. I said okay.

[42] Mr Purusram then put to Mrs Devi:

Q ... it is just now that you have come up with a story about the date when Mr Chaudhary explained about the commission redaction?

A When this sales purchase agreement was stated, I don’t recall the time but I did recall about the verbal talk about that commission that I do recall but I didn’t, I said I don’t know the date when this agreement was written by hand.

[43] In answer to questions from Mr Purusram, Mr Gooch said that while he could not say “100 percent”, his normal practice is that he would have introduced himself to Mr Chaudhary at the start of the telephone call, explained the reason why he was calling, and asked Mr Chaudhary if he had the time to speak to him. He was confident that he heard Mr Chaudhary clearly, and correctly recorded his statement.

[44] Mr Gooch accepted that Mr Chaudhary’s response to his questions (by email on 28 March 2017) did not contain an admission that he had agreed to reduce commission by half. He accepted that at that point he had two sets of information: his record of

the telephone conversation on 30 January 2017, and Mr Chaudhary's response to his questions on 28 March. He further accepted that he had not asked Mr Chaudhary to confirm that he had admitted that he had agreed to reduce the commission payable by the vendors by half, and he agreed that Mr Chaudhary had continued to deny that there was any agreement in place with the vendors to reduce the commission.

[45] Mr Chaudhary was cross-examined by Ms Mok on his statements to the Committee. Regarding the alleged commission agreement, he said:

Q I put it to you that Mr Rajan did ask you for a reduction in commission because he was the one [who] had introduced you to the purchaser, isn't that correct?

A He didn't ask for commission reduction, he only introduced the buyer to us, we offered him referral fee. We never, ever, talked about commission reduction.

[46] Mr Chaudhary further said that the agency and he had given commission reductions previously, but it was very clearly stated in the listing agreement and signed by both the listing salesperson and the vendor. Ms Mok put to him that the present situation was different, in that the listing agreement had expired. She put to him that it was more easily possible that there could have been a friendship agreement with Rajan about splitting the commission. Mr Chaudhary responded:

No, it doesn't happen like that. ... if we have to give commission reduction it only happens at the beginning at the sign of the listing ... and even if afterwards there is a commission reduction to be given it has to be put in a letter, normally we write in the contract, ..., sale and purchase agreement, we write in front...

... but that's very rare but normally when there is a commission reduction vendor tells us up front at the time of the listing then we write it in the listing form. Here ... there was a 90 day period for exclusive urgency ... After that it went to general. The commissions structure remains same, it remains same.

[47] The Tribunal asked Mr Chaudhary if he had completed a transaction report for the sale of the property. He responded that he did not complete transaction reports, they were normally done by his manager, following a question and answer session with him. He could not remember whether this had occurred after the sale of Mr Rajan's property, or if there were any transaction notes as to the sale.¹⁰

¹⁰ A transaction report was not included in the material provided to the Committee.

Submissions

[48] Mr Purusram submitted that there is no credible and reliable evidence proving the existence of a commission reduction agreement. He submitted that the only evidence was that Mr Rajan was offered a referral fee for introducing the purchaser, but he declined it.

[49] He submitted that Mr Rajan's and Mrs Devi's evidence was not credible and/or not reliable. He submitted that there is a high likelihood that they had tried to corroborate each other's evidence. He submitted that credibility and reliability of their evidence was lessened by virtue of the fact that there was no written variation of the listing agreement (under which the the Agency was entitled to the full commission), the agreement for sale and purchase for the property contained no clause dealing with a reduction in commission (but did contain other clauses pertaining to the agency, for example an acknowledgement as to the recommendation to take legal advice).

[50] Mr Purusman submitted that "more importantly", Mr Rajan did not instruct his solicitor to question the commission statement, and the solicitor did not himself question it. He submitted that "the absence of any concern with the balance of deposit which was paid indicates the danger and risk with the vendor having concocted this story at a later stage."

[51] Mr Purusman further submitted that Mr Rajan's evidence of his discussion with Mr Chaudhary showed that he had used unilateral and authoritative words, and demanded a reduction in the commission, because he had incurred a loss by reducing the price, and because he had found the potential buyer. He submitted that Mr Rajan's statement that he agreed to give Mr Chaudhary 50 percent of the commission was illogical. He submitted that if Mr Rajan indeed thought that the agency agreement had expired (as he said in evidence) he would simply have taken the purchaser direct to his solicitor to complete an agreement for sale and purchase.

[52] Mr Purusram submitted that Mrs Devi's evidence as to the conversation about commission was hearsay, and inadmissible. He further submitted that her evidence that Mr Rajan explained about the commission reduction to her clearly indicated that

she never heard any conversation about commission. He submitted that Mrs Devi has a good command of English, and it did not make sense that she had to have an explanation about the commission, if she was sitting with Mr Chaudhary and Mr Rajan at the time the conversation occurred.

[53] Mr Purusman also submitted that Mrs Devi's oral evidence was inconsistent with her statement to Mr Gooch, in which he recorded her as saying that she could not remember if the commission agreement was made before or after the sale of the property. He submitted that her evidence was therefore unreliable.

[54] Mr Purusram further submitted that Mr Gooch's file note of his conversation with Mr Chaudhary on 30 January 2017 could not be relied on. He submitted that Mr Gooch did not properly question Mr Chaudhary during that conversation. He further submitted that as the file note of the conversation was inconsistent with Mr Chaudhary's statements to the Authority, and his oral evidence, it would be prejudicial and unfair to Mr Chaudhary to rely on it to establish that there was an oral agreement to reduce commission. He submitted that Mr Chaudhary never admitted to Mr Gooch that he had agreed to reduce the commission payable.

[55] Finally, Mr Purusman submitted that the fact that Mr Chaudhary agreed in the mediation agreement to make a payment to the vendors is not evidence that he agreed to reduce the commission. He submitted that the sum Mr Chaudhary agreed to pay (\$4,000) did not equate to half of the commission, and that the sum was not referred to in the agreement as being a refund of commission, or having anything to do with commission.

[56] Ms Mok submitted that the Committee was correct to conclude on the evidence before it that Mr Chaudhary agreed with Mr Rajan to reduce the commission payable on the sale of the property. She submitted that it was open to the Committee to prefer the evidence given by Mr Rajan, Mrs Devi, and Mr Gooch over Mr Chaudhary's account of events.

Discussion

[57] We record that during his cross-examination before the Tribunal, Mr Chaudhary alleged that the complaint had been concocted by Mr Rajan and Mrs Devi, it was all lies, and that someone had incited them to do so, in order to embarrass Mr Chaudhary and damage his career. Such allegations were not recorded in the material before the Committee, and they were not put to Mr Rajan and Mrs Devi. We disregard these allegations.

[58] We refer to Mr Chaudhary's evidence during his cross-examination that when Mr Gooch rang him on 30 January 2017 he was at his doctor's surgery, and he told Mr Gooch he could not hear very clearly, or could not hear anything. Although Mr Gooch gave evidence that his normal practice would be to have asked Mr Chaudhary if he had time to speak to him, it was not put to him expressly that Mr Chaudhary told him he could not hear him. On the basis of his evidence as to his normal practice, we find that if Mr Chaudhary had said to Mr Gooch that he could not hear him, Mr Gooch would have terminated the call and called back later. We do not accept Mr Chaudhary's evidence.

[59] Like the Committee, the Tribunal is presented with Mr Rajan's and Mrs Devi's evidence that Mr Chaudhary agreed to reduce commission on the sale by 50 percent, and Mr Chaudhary's evidence that there was no such agreement. Both sides steadfastly maintained their evidence. Having reviewed the evidence before the Committee, and having heard the witnesses cross-examined, we are not persuaded that the Committee was wrong to find that it was more likely than not that Mr Rajan, having introduced his own buyer to Mr Chaudhary, negotiated the commission agreement with him prior to the sale.

[60] It is evident from the agreement for sale and purchase that there was no negotiation over the purchase price for the property after Mr Chaudhary became involved in the sale process. There is no evidence that Mr Chaudhary's involvement extended beyond preparing the agreement, on an Agency-branded form, and sending a pro-forma invoice for the deposit (from which the full commission was deducted) to Mr Rajan's solicitor.

[61] We accept Mr Rajan's evidence that his colleague told him she wanted to buy the property, and he negotiated the price with her before Mr Chaudhary was involved. We also accept his evidence that he understood that as the sole agency had expired, he could get his lawyer to prepare the sale and purchase agreement, without any involvement by Mr Chaudhary or the agency, but considered that as Mr Chaudhary had tried without success to sell property during the sole agency, it was appropriate to share the commission with him.

[62] We accept Mr Purusman's submission that Mr Rajan's discussions with Mr Chaudhary about a commission reduction appear to have been prompted by the facts that Mr Chaudhary had not been able to sell the property during the sole agency, Mr Rajan introduced the buyer, and he had negotiated a price which was less than that sought by Mr Chaudhary. We do not accept his submission that Mr Rajan "imposed" on Mr Chaudhary, or "demanded" the reduction, but the essential point is whether Mr Chaudhary agreed to the reduction, however it was put to him.

[63] Mrs Devi's evidence as to what she heard Mr Rajan and Mr Chaudhary say, in her presence, is not hearsay. It is direct evidence of statements made by them, in her hearing. In her evidence to the Tribunal she was clear that she knew that an agreement as to commission was reached, she was present when Mr Rajan and Mr Chaudhary discussed it, and she agreed to it. Mrs Devi was not certain when it was that the agreement for sale and purchase was signed, but she was clear that the discussion in her presence concerning the commission agreement occurred when Mr Chaudhary brought the agreement to her house to be signed by her and Mr Rajan. We do not accept that her inability to remember when the discussion occurred when speaking to Mr Gooch affects her credibility or reliability to the extent that we should reject her oral evidence.

[64] We also reject the proposition put to Mrs Devi (but not Mr Rajan) by Mr Purusram that it would have been prudent to record a commission agreement in the agreement for sale and purchase. On the contrary, it would have been inappropriate for there to be any mention of commission in an agreement for sale and purchase, which is a contract between vendor and purchaser. Any financial arrangements between vendor and salesperson are irrelevant to the dealings between the vendor and

purchaser. The fact that there was no record of a commission agreement in the agreement for sale and purchase has no bearing one way or the other as to whether there was an agreement between Mr Rajan and Mr Chaudhary to reduce the commission payable on the transaction.

[65] Further, we reject Mr Purusman's submissions as to an "absence of any concern with the balance of the deposit paid", and the "risk with the vendor having concocted this story at a later stage". Mr Rajan's evidence, not challenged in cross-examination, was that he raised the issue of the commission agreement with Mr Chaudhary on the day of settlement, as soon as he realised that the full commission had been deducted. This is supported by Mr Chaudhary's and Mr Sega's evidence that Mr Rajan demanded a refund of half of the commission.

[66] Nor does it assist Mr Chaudhary's case that there was no reference to a commission reduction in the Agency's listing agreement. The listing agreement was entered into some months before Mr Rajan introduced the buyer and (on Mr Rajan's evidence) made the commission agreement with Mr Chaudhary. While it would be expected that any agreement as to commission made at the time the listing agreement was completed would have been recorded in the agreement, that was not the case here.

[67] The buyer was introduced some months later, after the sole agency had expired. Mr Rajan was at liberty to sell the property without any involvement by Mr Chaudhary. If that had occurred, Mr Chaudhary would not have been entitled to any commission. Equally, the parties could have entered into an agreement that in the circumstances, the commission should be shared. There is nothing inherently unreasonable or unlikely in a vendor and listing salesperson entering into an agreement as to the commission payable in circumstances such as those in the present case, where Mr Chaudhary played no part in finding the buyer for the property, and his involvement in the sale process was limited.

[68] We do not accept that it would be prejudicial and unfair to rely on Mr Gooch's file note of his conversation with Mr Chaudhary. We accept his evidence as to his normal practice in conversations that are part of his investigation of complaints. While Mr Gooch could have recorded his preliminary question as to whether Mr Chaudhary

was free to talk (and it would have been prudent to do so) we do not accept that there is any reason to doubt his evidence that he was confident that he accurately recorded Mr Chaudhary's statements.

[69] As is recorded in Mr Gooch's file note, Mr Chaudhary in fact made three admissions: he agreed to reduce commission by 50 percent, he had not honoured that agreement due to financial and personal commitments, and he had agreed to pay Mr Rajan \$4,000 in the mediation agreement. The fact that those three admissions are expressly recorded indicates that Mr Gooch was clear in his mind as to what Mr Chaudhary told him.

[70] We turn now to the mediation agreement. Mr Purusman correctly stated that in the first appeal decision, the Tribunal found that Mr Chaudhary's failure to honour the agreement is not conduct within the definition of "real estate agency work". But that finding does not mean that evidence that Mr Chaudhary entered into an agreement to make a payment to the vendors cannot be considered when determining whether he entered into the commission agreement.

[71] In relation to the Committee's reference to the mediation agreement, the Tribunal said in the first appeal decision:¹¹

[33] Section 87(1) of the Act gives a Complaints Assessment Committee the power to direct that parties to a complaint explore the possibility of resolving the complaint by negotiation, conciliation, or mediation. Section 87(4) provides that:

No evidence is admissible ... before the Committee or before the Disciplinary Tribunal of any information, statement, or admission disclosed or made to any person in the course of any negotiation, conciliation, or mediation conducted in accordance of a direction....

[34] Ms Mok referred the Tribunal to s 57 of the Evidence Act 2006, as to privilege of settlement negotiations, mediation, or plea discussions. This provides that parties to a settlement or mediation have a privilege in respect of such discussions if the communication was intended to be confidential, and made in connection with an attempt to settle or mediate the dispute. However, s 57(3)(a) of the Evidence Act provides that the privilege does not apply to the terms of an agreement settling the dispute.

[35] We accept Ms Mok's submission that the purpose of s 87(4) is analogous to that underlying s 57 of the Evidence Act 2006, that is, to encourage the parties to a mediation to discuss the issues between them freely and frankly without concern that anything said in the context of the mediation will be used in later

¹¹ First appeal decision, fn 6, above, at [33]–[35].

proceedings. We also accept her submission that s 87(4) of the Act is not directed at concealing the fact of a mediation, or the terms of that agreement, as opposed to discussions and negotiations in the course of reaching that agreement.

[72] Mr Rajan's complaint to the Authority was that Mr Chaudhary had agreed to reduce the commission payable on the sale of his property by 50 percent, and that Mr Chaudhary failed to honour that agreement. The mediation agreement stated that upon payment, Mr Rajan would withdraw his "complaint", and provided that it was a full and final settlement for the "complaint".

[73] We do not accept that the mediation agreement has no relevance to the issue whether Mr Chaudhary agreed to the commission reduction. There can be no doubt that the mediation agreement was tied to the commission agreement. The fact that Mr Chaudhary agreed to pay the vendors "\$4,000", rather than the exact 50 percent of the commission, does not detract from this conclusion. We are entitled to take the mediation agreement into account as part of the evidence as to the commission agreement.

[74] Accordingly, we are not persuaded that the Committee was wrong to find that Mr Chaudhary agreed to reduce the commission payable on the sale of the property to Mr Rajan's colleague by 50 percent. Having reconsidered the evidence before the Committee, and having considered the oral evidence given to the Tribunal, we have reached the same conclusion.

Did Mr Chaudhary fail to honour the commission agreement?

[75] This issue does not require analysis. It was not disputed that Mr Chaudhary did not honour the agreement to reduce the commission payable on the sale of the property. The fact that he did make a payment to Mr Rajan some months after the mediation agreement does not alter the fact that he did not, at the time the sale was settled, take only 50 percent of the commission on the sale.

Are (a) reaching an agreement as to the commission to be paid in respect of the sale (or other disposition), and (b) failing to honour such an agreement, within the definition of “real estate agency work” in s 4 of the Act?

The statutory definition

[76] As relevant to this appeal, “real estate agency work” is defined in s 4 of the Act as:

... any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; ...

[77] “Transaction” (as relevant to this appeal) is defined in s 4 as:

the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land: ...

Submissions

[78] Mr Purusram submitted that an agreement to reduce commission is outside the scope of “real estate agency work”, as defined in the Act. He submitted that it was not within the ambit of “work done or services rendered ... for the purpose of bringing about a transaction”.

[79] He further submitted that the findings against Mr Chaudhary regarding the commission agreement were interconnected with the issue of breach of the mediation agreement. He referred to the Tribunal’s first decision, in which it found that compliance, or non-compliance, with a mediation agreement was not within the definition of real estate agency work. He submitted that similarly, compliance or non-compliance with the commission agreement (which was the basis of the mediation agreement), was not within the definition.

[80] Ms Mok submitted that both making an agreement as to the commission payable, and failing to honour such an agreement, are within the definition of “real estate agency work”. She submitted that in the light of the consumer-protection focus of the Act, it is inappropriate to take too narrow and literal an approach to the interpretation of real estate agency work, and that an expansive, purposive approach is justified.

[81] Ms Mok submitted that Mr Chaudhary's conduct in failing to honour the commission agreement was closely connected to the transaction for the sale of Mr Rajan's property to his colleague, as the agreement was an important part of Mr Chaudhary's involvement in the transaction. Further, the failure to honour the agreement occurred at the time of the transaction, and if Mr Chaudhary had chosen to honour the agreement, the reduced commission would have been charged as part of the overall transaction. She submitted that it would be wholly artificial to sever off Mr Chaudhary's failure to honour the agreement from the agreement itself.

Discussion

[82] Ms Mok referred the Tribunal to two High Court judgments in which the definition of "real estate agency work" was discussed.

[83] In *Home Buyers Limited v Real Estate Agents Authority*,¹² her Honour Justice Mallon considered the interpretation of "real estate agency work" in the context of a person charged with carrying out real estate agency work without a licence issued under the Act. Her Honour stated that the definition of "real estate agency work" is the "cornerstone of the Act", because it determines whether the consumer protection provisions set up by the Act apply.¹³

[84] In *House v Real Estate Agents Authority (CAC 20003)*,¹⁴ his Honour Justice Cooper considered the interpretation of "real estate agency work" in the context of a complaint by a vendor that a salesperson had disclosed information to a prospective purchaser, without seeking his permission or advising him. As a result of receiving this information, the prospective purchaser initially indicated an intention to cancel the agreement for sale and purchase, although ultimately settled. The vendor complained in respect of the salesperson, the relevant agency (in respect of an alleged failure to provide assistance to ensure that the transaction did not founder), and the customer relations manager of the Agency (in respect of the manner in which the complaint against the agency was handled).

¹² *Home Buyers Limited v Real Estate Agents Authority* [2011] NZHC 1814.

¹³ At paragraph [19].

¹⁴ *House v Real Estate Agents Authority (CAC 20003)* [2013] NZHC 1619.

[85] We set out the following statements from his Honour’s judgment:

[33] Plainly, the term “real estate agency work” is one of the key provisions of the Act ...

...

[45] It is plain from the statement of statutory purpose in s 3 of the Act that the main object of the legislation is the promotion and protection of the interests of consumers in respect of real estate transactions, and the promotion of public confidence in the performance of real estate agency work. I accept that given the statutory purpose and the regulatory apparatus contained in the Act, a narrow and literal approach to the definition of “real estate agency work” would be inappropriate.

[46] One example of why that is so is immediately apparent. The definition refers to “work done or services provided”. Nowhere is there an express reference to an omission or failure to do something which ought to have been done to secure a successful resolution to a transaction. Unless the definition is construed so as to extend to such failures to act, the achievement of the legislative process would in many cases be frustrated.

...

[50] ... the definition [applies] to the overall task the agency is required to perform: once the relationship of principal and agent has been established anything (be it an act or omission) that is related directly or indirectly to that work is liable to be within the definition. This accords with the pivotal nature of the definition in the scheme of the Act and its importance for the achievement of the statutory purposes.

[86] His Honour found that the agency’s alleged failure to provide assistance for the purpose of bringing about the transaction came within the definition of “real estate agency work”, but the manner in which the complaint was dealt with by the customer relations manager did not.

[87] In the present case, Mr Rajan introduced the buyer to Mr Chaudhary in order for the sale and purchase agreement to be completed. This was an essential part of the transaction. While the transaction clearly could have been completed without Mr Chaudhary’s involvement, it was completed by way of Mr Chaudhary’s providing services (albeit limited in their extent) for which he was to receive payment by way of a half share of the commission. The commission agreement was therefore part of the overall process of bringing about the sale to the buyer. We are satisfied that making the commission agreement is within the definition of “real estate agency work”.

[88] We turn to the issue as to whether Mr Chaudhary’s failure to honour the commission agreement is within the definition of “real estate agency work”. Mr

Chaudhary's failure was an omission to do something (that is, to charge Mr Rajan only 50 percent of the commission) that was directly related to the transaction. We are satisfied that Mr Chaudhary's failure to honour the commission agreement comes within the definition of "real estate agency work". It was open to the Committee to consider whether that failure constituted unsatisfactory conduct.

Was the Committee wrong to find (at paragraph 3.7 of its second substantive decision) that Mr Chaudhary lied to his supervisor about the existence of a commission agreement?

Evidence

[89] Mr Chaudhary's evidence was that he did not lie to his supervisor about the existence of a commission agreement. His evidence was that there was no commission agreement, so he did not lie to Mr Sega when he told him that.

[90] In an email sent to counsel for the Authority and the Tribunal on 15 April 2019, Mr Sega said:

... I understand that the charges against Akhil Chaudhary are being considered in an appeal to the Tribunal ... I just want to clarify and add that I ... never said that Akhil Chaudhary (Licensee) had lied to me ...

[91] We note Ms Mok's submission for the Authority that we should not give leave for this email to be adduced as evidence, as it was not provided to the Committee. Plainly, the email was not before the Committee. However, it is not necessary for us to make a ruling on the point. Mr Sega's email does not assist the Tribunal to determine the issue before us, which is whether Mr Chaudhary lied to Mr Sega about the existence of the commission agreement, not whether Mr Sega said that Mr Chaudhary lied to him.

Discussion

[92] Our finding on this issue follows necessarily from our finding that there was an agreement between Mr Chaudhary and Mr Rajan that Mr Rajan would be charged only 50 percent of the commission payable on the sale to the buyer. The evidence of both Mr Chaudhary and Mr Sega was that Mr Chaudhary told Mr Sega that there was no

such commission agreement. In the light of the Tribunal's finding that there was a commission agreement, Mr Chaudhary's statement to Mr Sega was not true. There is no basis on which we could find that Mr Chaudhary's statements were accidental, or unintended. Put plainly, by making an untrue statement, Mr Chaudhary lied to Mr Sega.

[93] There is no evidence that Mr Sega had any independent knowledge of any dealings between Mr Chaudhary and Mr Rajan. He knew only what he was told by Mr Chaudhary. His evidence is therefore of no assistance in determining this issue.

[94] We are not persuaded that the Committee was wrong to find that Mr Chaudhary lied to Mr Sega when he said that there was no commission agreement.

Is making a statement to a licensee's supervisor as to the existence of a commission agreement within the definition of "real estate agency work" in s 4 of the Act?

[95] It was accepted by the Authority at the hearing of Mr Chaudhary's first appeal that his conduct in misleading, or lying to, the Authority about the existence of the commission did not constitute "real estate agency work". It was also accepted that his failure to comply with the mediation agreement did not constitute "real estate agency work".

[96] Ms Mok submitted that Mr Chaudhary's conduct in lying to Mr Sega as to the existence of the commission agreement was inseparable from his conduct in failing to honour the agreement, and therefore part of the overall real estate transaction. Mr Purusram submitted that there was no commission agreement, and therefore no lie to Mr Sega, and no need to consider whether a lie to a supervisor was within the definition of real estate agency work.

[97] The pro forma invoice for the commission was prepared by Mr Sega, on the basis of information provided to him by Mr Chaudhary. Mr Chaudhary's conduct in making untrue statements to Mr Sega had the effect that Mr Rajan was incorrectly charged the entire commission on the sale. Mr Chaudhary told Mr Sega that the normal commission was to be charged, and Mr Sega deducted the full commission from funds

forwarded to Mr Rajan's solicitor. The charging of commission was part of the overall transaction. We cannot therefore separate Mr Chaudhary's untrue statements to Mr Sega from his failure to honour the commission agreement. Both are within the definition of "real estate agency work".

In the light of the answers to the above questions, did Mr Chaudhary engage in unsatisfactory conduct under s 72 of the Act in failing to honour the commission agreement

[98] We have found that:

- [a] Mr Chaudhary made an agreement with Mr Rajan that Mr Rajan would be charged only 50 percent of the commission otherwise payable on the sale of the property.
- [b] Mr Chaudhary failed to honour this agreement, with the result that the full commission was deducted.
- [c] Mr Chaudhary made an untrue statement to Mr Sega, that there was no commission agreement.

[99] The effect of deducting the full commission was that Mr Rajan was overcharged commission on the transaction, by 50 percent. Mr Rajan was charged more than Mr Chaudhary and the Agency were entitled to charge, pursuant to the commission agreement.

[100] Such conduct constitutes a breach of rr 6.2 of the Act pursuant to which Mr Chaudhary was required to "act in good faith and deal fairly with all parties engaged in a transaction". Mr Chaudhary's conduct in denying the existence of an agreement reached with Mr Rajan as to the commission payable on the sale of the property, and failing to honour the agreement, was clearly a failure to act in good faith and a failure to deal fairly with Mr Rajan.

[101] Mr Chaudhary's conduct was also conduct that was likely to bring the real estate industry into disrepute, and thus a breach of r 6.3. We accept Ms Mok's submission that Mr Chaudhary's failure to honour the commission agreement, and his

maintaining that the agreement did not exist, was conduct that would lead members of the public to think that licensees should not condone it or find it to be acceptable, and conduct that would tend to lower the standing and reputation of the industry.¹⁵

[102] We are satisfied that Mr Chaudhary's conduct constituted unsatisfactory conduct under s 72 of the Act. We have, therefore, reached the same conclusion as did the Committee.

The Committee's second penalty decision

[103] The Committee ordered censure of Mr Chaudhary, imposed a fine of \$1,000, and ordered him to undertake further training by completing Unit Standard 26152 ("Explain the principles of ethics applying to real estate practice").

[104] We have considered the issue of penalty afresh, in the light of our finding that Mr Chaudhary is guilty of unsatisfactory conduct, by failing to honour the commission agreement he had entered into, and by making an untrue statement to Mr Sega, that there was no commission agreement.

[105] Mr Purusman submitted that the Committee had completely disregarded Mr Chaudhary's good character: he submitted that Mr Chaudhary had served the community in his position for years, and had an unblemished record. He submitted that this needed to be balanced against the factors of the complaint having involved a minimum amount, the payment made by Mr Chaudhary, and Mr Rajan's having withdrawn the complaint.

[106] We have concluded that the orders for censure and further training imposed by the Committee were well within the Committee's discretion as to penalty. However, the Committee does not appear to have considered whether it was appropriate to order Mr Chaudhary to pay a fine, in light of the facts that Mr Chaudhary paid Mr Rajan \$4,400 (approximately 50 percent of the commission), and Mr Rajan withdrew the

¹⁵ See *Complaints Assessment Committee 414 v Goundar* [2017] NZREADT 52, at [83]–[84]; *Jackman v Complaints Assessment Committee 10100* [2011] NZREADT 31, at [65], and *Re Raos* Complaint No CA4315602, 9 June 2011, at paragraph 4.39.

complaint. We have concluded that in the particular facts of this case, it is not necessary to order Mr Chaudhary to pay a fine.

Orders

[107] For the reasons set out above, we are not persuaded that the Committee was wrong to find Mr Chaudhary guilty of unsatisfactory conduct under s 72 of the Act. Mr Chaudhary's appeal against that finding is dismissed.

[108] Mr Chaudhary's appeal against the penalty orders made by the Committee is allowed to the extent that the order that he pay a fine of \$1,000 is quashed. However, as ordered by the Committee, we order that Mr Chaudhary is censured and that he undertake further training by completing Unit Standard 26152: "Explain the principles of ethics applying to real estate practice".

[109] 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.

Hon P J Andrews
Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member