

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 34

READT 001/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MICHELLE BAKER and RODNEY BAKER Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First Respondent
AND	HAMISH DRUMM Second Respondent
Hearing:	30 July 2019, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr and Mrs Baker Mr M Mortimer, on behalf of the Authority No appearance by or on behalf of Mr Drumm
Date of Decision:	12 August 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mrs Michelle Baker and Mr Rodney Baker have appealed under s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 416, dated 19 December 2018, in which the Committee decided to take no further action on their complaint against Mr Drumm. Mr Drumm is a licensed salesperson, engaged at Tommy’s Real Estate Lower Hutt (“the Agency”).

[2] We record that Mr Drumm did not appear at the hearing of the appeal, and did not file any submissions.

[3] We also record that Ms and Mr Baker left the hearing shortly after Mr Mortimer began making oral submissions on behalf of the Authority. After the hearing, Mr Baker sent an email to the Tribunal’s case manager. In part, Mr Baker’s message contained further submissions relating to the appeal, and evidence. Mr Baker also expressed criticism of the Tribunal and the hearing. We have not had regard to any of Mr Baker’s statements in this email in considering the appeal. We have had regard to the material that was put before the Committee, the Committee’s decision, and the submissions that were made to us by Mrs Baker (for herself and Mr Baker) and by Mr Mortimer on behalf of the Authority.

Background to the complaint

[4] Mr and Mrs Baker’s complaint against Mr Drumm was (in very general terms) that he did not act in their best interests and in accordance with their instructions, that his marketing of the property was designed at achieving a quick sale by presenting the property as being available for a price that was well below their expectation, and that following the sale, they were charged commission and marketing charges that were not what they had agreed to. They also contended that the Agency failed to honour an offer of complimentary membership at a local golf club for one year.

[5] Mr and Mrs Baker were the owners of a residential property at Gracefield, Lower Hutt. They decided to sell it, and buy a “live aboard” launch. They wanted to raise as much money as possible from the sale of the property, and were attracted by an offer

from an agency, “Tall Poppies”, of a flat commission fee of \$10,000 plus GST, regardless of the price the property sold for.

[6] Mr and Mrs Baker did not list the property with Tall Poppies, as they had an introduction to a salesperson at Ray White, Mr Rodwell, who offered them a “friends and family” commission rate. They listed the property with Mr Rodwell for a “deadline sale” in November 2017. The property did not sell, although one prospective purchaser was at the stage of seeking mortgage finance, prior to making an offer.

[7] Mr and Mrs Baker decided to terminate the Ray White agency, and sell the property privately. They purchased a TradeMe listing, for \$630. The listing had a “start date” of 29 November 2017, and referred to an “expected sale price” of \$600,000.

[8] Mr Drumm left messages on the Bakers’ answerphone, then visited them at the property on 4 December 2017 (a Monday). He gave them a Comparative Market Appraisal which he had already prepared, noting an appraisal value of \$540,000 to \$620,000. He was aware of the existing Ray White agency.

[9] Mr and Mrs Baker say they told Mr Drumm:

[a] they had listed the property on TradeMe at a start price of \$600,000 and that was the price they wanted to achieve;

[b] Mr Drumm had to match the Tall Poppy flat fee for commission, of \$10,000 plus GST, and they were non-committal as to Mr Drumm’s proposal that he could charge a commission of \$10,080 if the property sold for \$560,000, but wanted a bonus if the property sold for more; and

[c] if Mr Drumm took over the listing, he was to use their TradeMe advertisement, as they did not want to spend more money on marketing.

[10] Mr and Mrs Baker say that Mr Drumm had a listing agreement with him, which he went through. Before leaving the property, he asked them to sign the agreement, but they refused, as they were still waiting to receive an offer through Mr Rodwell.

[11] Mr Drumm sent Mrs Baker a message later that evening, in which he said he would:

... honour that other agency on 30% off the top of the \$10k plus gst (for that buyer only) or other buyer through that agency. ...

[12] In a message sent the following morning (Tuesday 5 December), Mr Drumm said:

That \$10k plus gst fee I will even match this time .. but if we sell next year it's 3 percent of the sale price. ...

[13] That evening, Mr Drumm sent Mrs Baker a message asking if their then agent had presented them with "a good unconditional offer". He asked to be advised by the end of the day if nothing had materialised, or if they had sold.

[14] In the morning of Wednesday 6 December 2017, Mrs Baker sent Mr Drumm a message "Go go go do what you have to". Mr Drumm advised that he would be at the property with his photographer that afternoon, and that there would be open homes at the property the following (Thursday) evening and on Sunday 10 December.

[15] After the photographer's visit, Mr Drumm gave Mr and Mrs Baker a listing agreement to sign. Their evidence was that Mr Drumm was in a rush, and they didn't get a chance to read it, and Mr Drumm did not highlight any changes from what he had offered them the previous day. There was no discussion of the agreement, and they assumed that it would be in accordance with their discussion with Mr Drumm. They signed the agreement. They said that Mr Drumm took the signed agreement away with him, and did not leave them a copy.

[16] Mr and Mrs Baker said that during a discussion after an open home on 17 December, they told Mr Drumm that he had not given them a copy of the listing agreement. They said that Mr Drumm then left the property, but returned shortly thereafter, carrying mail from their mailbox. This included a copy of the listing agreement, apparently posted to them.

[17] The listing agreement provided for a commission of "1.8% of the sale price + \$600 + GST" (estimated at \$10,080 if the property sold for \$560,000) rather than a flat

fee of \$10,000 plus GST, regardless of price. The copy Mr Drumm gave Mr and Mrs Baker had “TBA” inserted in a handwritten addition relating to the bonus proposal made by Mr Drumm (and rejected by them).

[18] Mr Drumm prepared printed flyers for the property. He did not provide these to Mr and Mrs Baker for checking before they were printed. The flyers contained errors, as they referred to the wrong address for the property, and the rateable value of the property was stated as \$435,000, when it was in fact \$445,000. Mr Drumm gave copies of the flyers to the Bakers to distribute around the neighbourhood. The Bakers’ evidence was that while the on-line advertising was subsequently corrected, they were never given any reprinted flyers.

[19] Mr Drumm also insisted on Mr and Mrs Baker deleting their TradeMe listing, and placing his own listing, which he said would be at no cost to them. Mr and Mrs Baker expressed their particular concern at the following wording inserted by Mr Drumm:

Opportunity knocks today, with our vendors having bought elsewhere and committed to bringing down the auction hammer on the 16th December 2pm. Their instructions are “we are on the market with no plan B”.

With a GV of just \$445k OMG! get your skates on ladies and gentlemen & forget any previous price expectations. Make no mistake come the 16th December there will be a proud new owner of [the property].

[20] The Bakers said that this wording, focusing on the rateable value (“RV”), was written specifically to target those looking for a bargain or a quick sale, and attracted property investors looking to re-sell and make a quick profit. They said that it painted a very clear picture that they had no alternative but to sell, which misrepresented their situation, and made them sound desperate. They said they did not instruct Mr Drumm that they were “on the market with no plan B”, but had in fact instructed him that if they did not achieve their expected price, they would not sell. They also said they instructed Mr Drumm not to refer to the RV, as it dated from before significant modifications had been done to the property. They said that Mr Drumm’s response was that he was the professional, and they should trust him.

[21] One of Mr and Mrs Bakers’ neighbours (“Mr P”) was recorded by Mr Drumm as having attended an open home on 7 December. The Bakers’ evidence was that Mr

P later told them that Mr Drumm (having asked what price Mr P saw the property at) said to him: “What if I told you, you could have it for \$520k”, and Mr P felt this was unfair to them. The investigator referred to Mr and Mrs Bakers’ evidence in his investigation report, but said that they had failed to provide contact details for the neighbour, as promised.

[22] After reading the investigator’s report, Mr and Mrs Baker met with the investigations team leader. He confirmed that they had provided Mr P’s contact details to an Early Resolution Team member, who had saved them in the file management system for the complaint. However, they were not brought to the investigator’s attention. The investigations team leader spoke to Mr P, on 16 November 2018. Mr P said he knew Mr and Mrs Baker wanted “\$600,000 plus” for the house. Mr P is recorded as saying:

[Mr Drumm] was lowballing what the Bakers wanted. He was offering a lower price. I can’t remember what words he said as it was near the beginning of the year. I can’t remember the figures he mentioned. It may have been around \$450,000 to \$500,000 but it was so long ago I’m not sure if this is right or not.

I told [Mr Baker] about this but this was after the house was sold. He told me he wasn’t happy with the other agents as well.

I hope the agent doesn’t get into trouble because he was a nice guy. I just felt what he was saying about the price wasn’t right as I knew the Bakers wanted more and he shouldn’t have offered a lower price.

[23] Mr Drumm arranged for a property staging company to submit a quote for staging. Mr and Mrs Baker said in their complaint that they did not need, and could not afford, staging, but Mr Drumm insisted that it was the right thing to do, and they felt railroaded into it. The staging installation involved moving the Bakers’ heavy marble and glass table. Mr and Mrs Baker said in their complaint that during the installation, the wooden laminate floor was scratched and the table was damaged. They said that dealing with the home staging company was very difficult.

[24] Mr and Mrs Bakers’ complaint was that Mr Drumm was present and involved in the process when the floor was damaged, but later denied it, and that he suggested putting a rug over the damaged floor to conceal the scratch from potential buyers.

[25] The auction sale of the property was scheduled for Saturday 16 December. On 15 December, Mr Drumm provided Mr and Mrs Baker with a marketing report giving

feedback from the marketing period. He had not previously provided any feedback, despite requests. Most of the reported price indications were less than \$500,000 (averaging \$485,385), well below their expectation of \$600,000. Price indications from prospective purchasers introduced by Ray White were not included in the report. Mr and Mrs Baker say that they were all well above \$500,000 (averaging (\$560,000)). They considered that the marketing report confirmed their view that Mr Drumm was not acting in their best interests.

[26] Mr Baker signed a Reserve Price form, stating a reserve of \$590,000. However, as there were no registered bidders, the auction was re-scheduled for 21 December. One bid was received at the re-scheduled auction on 21 December 2017. The bid was for \$500,000, increased to \$501,000 on the basis that certain chattels would be included. Mr and Mrs Baker rejected this offer. There then followed a number of heated exchanges between Mr and Mrs Baker and Mr Drumm and his manager, Mr Coffey.

[27] Mr and Mrs Baker then determined to take control of the marketing themselves. They declined offers by the Agency to terminate the listing agreement, as they considered that a change of agency would send a negative message to prospective purchasers, and hinder their efforts to sell their home for the best price. They also saw benefit in using the Agency to co-ordinate open homes, while they undertook the viewings. They prepared a revised TradeMe advertisement, which did not highlight the RV, and stated a “BEO” (Buyer Enquiry Over) figure of \$579,000. Mr and Mrs Baker say that Mr Drumm insisted this figure being used, rather than a BEO of \$590,000, which was their preference.

[28] An open home was held on 7 January 2018. In an email to Mr Drumm dated 12 January 2018, Mr and Mrs Baker confirmed their acceptance of an offer of \$602,750.

[29] On 16 January 2018, Mr and Mrs Baker received a statement from the Agency, recording a “real estate fee”, comprising commission charged at 1.8% of \$602,750 (\$10,849.50) and a further charge of \$600, GST of \$1,717.42, and “marketing” charged at \$393.00. In a covering email, the Agency’s office administrator noted that

“the full advertising spend was \$1,430 – as discussed we have only charged \$393 as per the marketing schedule initialled by Michelle”.

[30] In an email to the Agency the same day, Mr Baker complained that he had not agreed to pay any more than \$10,000 commission. In an email to the Agency on 18 January 2018, Mrs Baker stated that she did not “have a copy of the initialled marketing schedule you are referring to in support of your claim, please can you send me a copy”. In response, the Agency sent Mr and Mrs Baker copies of a document headed “The Advertising campaign for Drumm, Tommy’s Real Estate”, which has Mrs Baker’s initial on it, and a copy of a document headed “Marketing schedule for [the property]”.

[31] Mr and Mrs Baker said in their complaint that the Agency’s commission invoice was fabricated, and that they were charged \$1430 for marketing, which they had not agreed to. They further said that while the marketing charge was reduced to \$393 after they challenged it, they were in fact charged for TradeMe advertising, which they had expressly rejected, having paid for a TradeMe advertisement two days before Mr Drumm approached them.

[32] Mrs Baker said at the hearing that she accepts that her initial is on the “advertising campaign” document, but she does not know when she initialled it, or when the entries were made on it. She reiterated that she would never have agreed to pay anything for a TradeMe advertisement, and made it clear that the advertisement they had paid for was to be used. She further said that she saw this document for the first time when it was sent to her by the Agency, after the property was sold.

[33] Mr and Mrs Baker said in their complaint that around Christmas 2017, Mr Baker was playing golf at the Shandon Golf Club and noticed a billboard offering a year’s complimentary membership for anyone who listed and sold their property through the Agency. The billboard included the wording “List and sell your property with Tommy’s Hutt Valley and we will pay your club membership to Shandon for one year.” The billboard further stated “Contact Mike Coffey for details”.

[34] Following the sale, Mr Baker went to claim the free membership from Mr Coffey, but was told that he did not meet the criteria. Mr and Mrs Baker complained that the Agency should have been more upfront about the criteria (if they existed at the time they listed and sold their property) and the Agency should honour their promise.

Mr Drumm's response

[35] Mr Drumm was requested to respond to the complaint both generally, and to specific issues.

[36] Mr Drumm said that at the time of listing, Mr and Mrs Baker had been on the market for some time with another agent and had not received any offers, and explained that they wanted to buy their dream boat to live on and must pay a deposit to secure it. He said they were extremely anxious about missing out on the boat if a sale didn't happen very soon, and asked him to call the boat seller to explain the marketing plan and assure him that a sale was imminent.

[37] Mr Drumm denied that he did not give Mr and Mrs Baker a copy of the listing agreement and marketing schedule. He said that during a lengthy discussion with them when they first spoke, Mr and Mrs Baker said their previous agent had failed to give them a copy of their listing agreement. He said his response was that this was an obligation for agents, and assured them they would get a copy of everything if they listed the property with him. He said he made a point of giving the Bakers a copy of the listing agreement at the time of listing.

[38] Mr Drumm agreed that Mr and Mrs Baker indicated they only wanted to pay \$10,000 for commission. He said they discussed some options around his fee at that level based on their price expectations of mid \$500,000s. He said they eventually agreed on a percentage of 1.8% plus an administration fee of \$600, plus GST, which worked out to approximately \$10,080 at an estimated sale price of \$560,000.

[39] Mr Drumm agreed that the RV and the address for the property were incorrect in the first print of flyers. He said that this occurred due to the rapid 24-hour turn-around from the supplier used in order to have them ready for the first open home, and

he failed to notice the error. He said this was rectified with a reprint as soon as he became aware of the error, at no cost to the Bakers, and he notified all those who attended the first open home of the error.

[40] He said that Mr and Mrs Baker were able to review the advertising any time they wished, and he and Mrs Baker worked together on this while the Agency had the listing. He said the RV was simply included as a matter of fact, and was readily available online. He said he discussed with Mr and Mrs Baker that a low RV would draw more interest, and that the Agency typically did not put a price guide with auctions.

[41] Mr Drumm said that he discussed with Mr and Mrs Baker that an auction close to Christmas was going to need a serious call to action, given the time pressure of Christmas looming, and he and the Bakers agreed that a campaign stating “highly motivated vendors” was the best way to make things happen in the very short time frame available. He said it was only after he started giving buyer feedback from some buyers who did not see the value at their expectation that Mr and Mrs Baker started to question the “highly motivated” advertising. However, he said that after a discussion, they decided to continue with it.

[42] Regarding the complaint concerning the scratched floor and damage to Mr and Mrs Baker’s table, Mr Drumm said that “the vendor, staging company, and myself” moved a table outside with towels under the legs, in order to measure for a smaller table, which was later installed. He said that when he next returned to the property, the larger table was back in place. He said he had no way of knowing if the floor had been scratched when the table was first moved, and suggested Mr and Mrs Baker or the homes stager could have scratched the floor when swapping the table back.

[43] However, in specific questions put to him by the investigator in an email dated 15 August 2018, Mr Drumm was asked “when the floor was scratched, were you present?” Mr Drumm answered “yes”.

[44] Mr Drumm said he did not know who Mr and Mrs Baker were referring to as the neighbour who attended the open home. He said he always asks prospective

purchasers where they see the value of the property to be, and that if an attendee had in this case responded \$520,000, he would have encouraged the attendee to go to the auction, as that was within 7 percent of Mr and Mrs Baker's expectation. He said he would never make a statement that someone would be able to own the property for any amount, as that is the vendors' decision and not under the control of the agent.

[45] Mr Drumm said that the eventual purchaser initially offered \$560,000 but he negotiated this up to the final agreed price.

[46] Mr Drumm said that the commission charged was in accordance with the signed listing agreement, and any suggestion that he altered the agreement was offensive. Regarding marketing costs, he said that Mr and Mrs Baker were initially charged for what was discussed and "verbally" agreed at the time of listing. He said that the auction fee of \$600 was put into advertising, and that he paid everything other than \$393, which had been signed for by Mrs Baker.

[47] He said that the marketing plan was signed at the same time as the listing agreement, but he did not pick up that Mr Baker had not signed it until they challenged the initial invoice.

[48] Mr Drumm said he did not personally know anything about the Shandon Golf Club membership offer, and it was not discussed with him before or during marketing of the property. He said that when Mr Baker contacted Mr Coffey, he was told that he needed to have done that prior to listing the property, and that the offer was not available on an already discounted commission. He noted that the 1.8% commission charged to Mr and Mrs Baker was less than 40% of the Agency's standard commission of 3.95%.

[49] Mr Drumm further said that the offer was also advertised on the Shandon Golf Club website, which stated that conditions applied. He said that Mr Coffey had since gone back and added "conditions apply" to the billboard, to clarify terms and conditions on the offer.

[50] The investigator also asked for a response to the complaint from Mr Coffey. Mr Coffey said that he had attended a meeting with Mr and Mrs Baker, at which they expressed concern as to the price feedback from potential buyers given to them by Mr Drumm. He said they discussed the “high motivation” marketing and Mr and Mrs Baker decided to continue with it. Mr Coffey also said he attended the auction at which the property was passed in. He did not refer to the golf club membership offer.

Issues raised after the investigator’s report

[51] We have recorded earlier that Mr and Mrs Baker met with the investigations team leader after receiving the investigator’s report. As a result of that meeting, the team leader spoke with the Bakers’ neighbour, Mr P. Mr and Mrs Baker also provided a schedule pointing out a number of errors in the report.

[52] Mr and Mrs Baker complained that Mr Drumm manipulated the investigation of their complaint, by contacting salespeople they had dealt with previously, and several people they had dealt with in the course of purchasing their boat. They said that this resulted in the investigator receiving information that was irrelevant to the investigation against Mr Drumm. One example they gave was Mr Drumm’s giving the investigator information regarding the person who brought their launch from Havelock to Wellington, more than two months after the sale of their property was completed. They complained that this was completely irrelevant, and a breach of their privacy. Further, they were not given any opportunity to comment on the material gathered by the investigator until after the report was completed.

[53] Mr and Mrs Baker also complained that the investigation was one-sided, in favour of Mr Drumm, and following Mr Drumm’s response to the complaint, the investigator changed the focus of the investigation away from Mr Drumm, into an investigation of them. They complained that instead of assessing the facts provided by them, he went about gathering information that had no relevance to the complaint, but was prejudicial to them.

[54] At the hearing, Mrs Baker submitted that they were prevented from providing further material to the Committee, on the grounds that there was already too much

documentation before it. She submitted that the material she wished to provide, but was prevented from doing so, included material which was important to respond to the investigator's report.

The Committee's decision

[55] The Committee dealt with the complaint as being solely against Mr Drumm, notwithstanding that Mr and Mrs Baker named Mr Drumm and Mr Coffey as the licensees they were complaining about, and notwithstanding that their complaint concerning the golf club membership was addressed to the Agency. We summarise the Committee's findings, using the headings as in the Committee's decision.

Commission rate charged and whether the listing agreement was amended

[56] The Committee characterised this aspect of the complaint as being that Mr Drumm "misled [Mr and Mrs Baker] about the commission rate and failed to honour the agreed rate. There is an allegation that [Mr Drumm] amended the listing agreement after it was signed ...".¹ The Committee found:²

The commission rate signed for in the listing agreement was charged by the Agency when the property was sold. The issue of the bonus that was raised by [Mr and Mrs Baker] was never agreed between the parties and, accordingly, there was no charge relating to this. The Committee agreed that it was up to [Mr Drumm] to negotiate this if he chose to, however no pressure was applied to [Mr and Mrs Baker] when they chose not to engage in negotiations around this.

[57] The Committee went on to find that Mr Drumm left a carbon copy of the listing agreement with Mr and Mrs Baker, and dismissed Mr and Mrs Baker's complaint that he did not give them a copy when they signed it, and that when they received it, Mr Drumm had amended it. It said:³

The Committee considered the allegation that [Mr Drumm] did not supply a copy of the Listing agreement to [Mr and Mrs Baker] until some weeks later and that [Mr Drumm] put it into an envelope and into their letter box and then emptied their letter box when he arrived, handing them the listing agreement and their other mail. [Mr Drumm] says he left a carbon copy of the listing

¹ Committee's decision, at paragraph 1.4.

² At paragraph 3.1. The "issue of the bonus" appears to be a reference to Mr and Mrs Baker's complaint that Mr Drumm added "TBA" to a handwritten entry on the listing agreement, after they signed the agreement.

³ At paragraph 3.2.

agreement with [Mr and Mrs Baker] immediately after signing the document. No evidence was provided to the Committee that substantiated the complaint. Because of the serious nature of the allegation, effectively amounting to an allegation of fraudulent behaviour, the Committee considers that it needed strong evidence available to it to be able to find in [Mr and Mrs Baker's] favour in this regard. In the absence of such strong evidence the Committee agreed, on the balance of probabilities and without any further available evidence corroborating [Mr and Mrs Baker's] position, we consider it more likely than not that a carbon copy had been left with [Mr and Mrs Baker] as that is consistent with standard practice. ...

Prospective purchasers misled over price [Mr and Mrs Baker] would accept

[58] The Committee referred to Mr and Mrs Baker's evidence as to Mr P's statement to them as to Mr Drumm's statement that the property could be bought for an amount much lower than their expectations. It said that it:⁴

... viewed a letter from the neighbour which stated in essence that [Mr Drumm] had mentioned a figure but the neighbour could not actually be sure now much time had passed and what the figure was. The Committee did not consider this to be satisfactory evidence that [Mr Drumm] had in fact named a much lower purchase price and the property sold for more than [Mr and Mrs Baker's] stated reserve a short time later. No evidence was provided in support of the complaint and, in any event, the outcome of the sale was not affected.

Urgency and "need to lie"

[59] The Committee said that Mr and Mrs Baker had stated "many times" that they had no urgency to sell and that they would not sell unless they received a suitable sales figure. The Committee also referred to their complaint that Mr Drumm was leading prospective purchasers to believe that they had to sell.

[60] The Committee dismissed this aspect of the complaint. It noted that Mr and Mrs Baker had requested that Mr Drumm make contact with the boat broker, so that he was aware where they were in the sale process and they could hold the boat purchase. The Committee also referred to a text message to Mr Rodwell, advising that they could not wait any longer for Ray White to produce an offer. The Committee continued:⁵

[Mr and Mrs Baker] go on to say "it isn't a rush for you but it is for us". The Committee agreed that the documentary evidence shows [Mr and Mrs Baker] had been driving this sale forward as they had other plans they wished to pursue and it was likely this situation was also the one imparted to [Mr Drumm].

⁴ At paragraph 3.3.

⁵ At paragraph 3.4

[61] The Committee went on to consider “the claim that [Mr Drumm] said ‘I need to lie to prospective purchasers to feed the greed’”. It said this was:⁶

... a case of “he said she said”. There was no evidence provided that substantiated this claim and so the Committee was left unable to find this allegation to be made out. ...

Incorrect RV and incorrect address in the marketing brochure

[62] The Committee noted that Mr Drumm accepted that the RV and address for the property were incorrect in the original brochures. The Committee said:⁷

[Mr Drumm] showed that, as soon as the errors were pointed out, reprints of the documents were done and the information corrected to those who had already received it. [Mr and Mrs Baker] say this was ignored and left incorrect. The evidence showed that [Mr Drumm] immediately corrected this problem so the Committee finds the conduct does not reach the threshold for unsatisfactory conduct. Due to the quick response by [Mr Drumm] to make the changes required to the marketing material overall the Committee considered no harm had come from the error.

Ignored instructions about marketing and incurred and charged for advertising and misled [Mr and Mrs Baker] over the staging costs

[63] The Committee said that:⁸

[Mr and Mrs Baker] say they requested [the RV] not be included in the advertising and [Mr Drumm] ignored this request. No evidence was provided that specific instructions were ignored, and it seemed to the Committee that the parties had differing views on this. The Committee did not receive any evidence that [Mr Drumm] wilfully ignored [Mr and Mrs Baker] on this matter and, as this information is publicly available, it could not be said that any harm was sustained by [Mr and Mrs Baker] because of it. The property sold at a value substantially above the RV.

[64] With respect to the charge for advertising costs, the Committee said:⁹

The agreed and signed for advertising invoice was issued incorrectly by the Agency administration staff. This invoice was corrected and charged to [Mr and Mrs Baker] as soon as they raised the issue of the incorrect charges and [Mr Drumm] personally met the cost of the balance of the advertising costs. This situation had also arisen with the previous Agency [Mr and Mrs Baker] had used and based on the available information, it seemed unlikely to the Committee that the Agency had set out to charge them for unauthorised advertising. The

⁶ At paragraph 3.5.

⁷ At paragraph 3.6.

⁸ At paragraph 3.7.

⁹ At paragraph 3.8.

situation was remedied immediately so [Mr and Mrs Baker] were not left out of pocket.

[65] The Committee considered the “staging issue” to be in a similar vein. It found that Mr and Mrs Baker had accepted the staging company’s quote. It recorded that Mr and Mrs Baker had become involved in a dispute with the staging company over damage to their table and the floor, which had not been resolved. The Committee found that Mr Drumm could not be held accountable for this damage, as he was not a party to the agreement with the staging company. The Committee said:¹⁰

The damage to the table and floor and when it happened could not be ascertained and it was not appropriate to hold [Mr Drumm] responsible for this. This part of the complaint is dismissed accordingly.

Golf Club membership

[66] The Committee said:¹¹

[Mr Baker] said he would provide the investigation with a photo of this advertisement showing there were no terms and conditions attached to this offer. This has not happened. However, [Mr Drumm] provided a copy of the billboard which clearly shows in large letters “Conditions Apply”. There appeared to be no basis for the allegations that the Agency did not comply with this advertising hoarding and this part of the complaint is dismissed accordingly.

Overall conclusion

[67] The Committee concluded:¹²

... the allegations made against [Mr Drumm] had not been able to be supported with satisfactory evidence and there had been no breach of the Rules, or the Act, by [Mr Drumm] which meant a finding of No Further Action was appropriate after considering the allegations.

Appeal submissions

[68] Mrs Baker submitted that the Committee failed to give proper (or any) consideration of the material they provided in support of their complaint, and reached the wrong decision. She submitted that she and Mr Baker were very clear as to the

¹⁰ At paragraph 3.9.

¹¹ At paragraph 3.10.

¹² At paragraph 3.11.

commission they would agree to, and assumed that Mr Drumm would honour the agreement reached in their discussions with him, and confirmed by Mr Drumm in his emails.

[69] In relation to their complaint that Mr Drumm altered the listing agreement, Mrs Baker pointed to the fact that the entry “[TBA]” appears only on the version of the listing agreement that Mr Drumm removed from their letter box, which is the only version of it they were given. The entry is in a different coloured ink from all other entries on the document. However, the version of the listing agreement provided by Mr Drumm to the investigator does not have the “[TBA]” on it. Mrs Baker submitted that this establishes that they were not given a carbon copy of the listing agreement at the time they signed it, and that it was altered by Mr Drumm.

[70] On the issue of the use of the RV, Mrs Baker submitted that they were very clear when speaking to Mr Drumm, that the RV was old, dating from before renovations. She and Mr Baker did not want it highlighted in the marketing, as it would indicate that they would accept an offer at or near the RV, when that was not the case. Mrs Baker submitted that she and Mr Baker made it clear to Mr Drumm that their price expectation was \$600,000, and that if they could not achieve that price, they would not sell. She said that Mr Drumm ignored them, in order to achieve his own purpose of a quick sale before Christmas.

[71] Mrs Baker also referred to the investigator’s failure to speak to their neighbour. She submitted that Mr P’s evidence was honest, and made it clear that Mr Drumm was “lowballing” the value of the property.

[72] Mrs Baker submitted that the Committee wrongly assumed that she and Mr Baker had complained that Mr Drumm had said he was “feeding the greed”. She submitted that at that point in the complaint, they were simply recording Mr Drumm’s response to their having raised their serious concerns as to his approach to marketing their property, in particular, his focus on the RV, specifically targeting those looking for a bargain or a quick sale.

[73] Mrs Baker referred to the Committee's findings in relation to the errors in the printed flyers. She submitted that Mr Drumm corrected the on-line flyers, but not the hard copy. She submitted that he never gave them any reprinted flyers. She also submitted that the copy of a small flyer produced to the Committee shows only one side of the flyer, so provides no evidence of any correction. She further submitted that a copy of an A4-size flyer put before the Committee was created by Mr Drumm for the purposes of the investigation.

[74] Mrs Baker submitted that the Committee also misunderstood their complaint regarding the damage to the floor and their table during staging. Their complaint was that Mr Drumm was present when the damage to the floor occurred (as he stated in a response to the investigator), but later claimed it could not be determined when it had occurred.

[75] In relation to the marketing charges, Mrs Baker submitted that it is clear that she and Mr Baker were charged \$1430 for marketing, notwithstanding that they had not agreed to it, and it was only when they challenged the charges that they were reduced. She submitted that the subsequent reduction does not alter the fact that they were charged for costs they did not agree to. She further submitted that the charge of \$393 was itself wrong, as it was for TradeMe advertising, which they did not agree to, and never would have agreed to, having purchased a listing just before Mr Drumm approached them.

[76] In relation to the golf club membership offer, Mrs Baker submitted that the Committee wrongly stated that there was no evidence supporting their allegation. She referred to a photograph of the billboard, which does not include a statement that "conditions apply".

[77] Mrs Baker submitted that the Committee misunderstood their complaint, and wrongly focussed on matters of detail (such as the printing errors) rather than their complaint that Mr Drumm failed to act in their best interests, by misrepresenting their home, and the perception given to prospective purchasers. She submitted that the Committee failed to give due consideration to the material they provided, but rather based its decision on unsubstantiated claims made in Mr Drumm's response.

[78] Mrs Baker submitted that the Committee's focus was diverted away from Mr Drumm and towards herself and Mr Baker by virtue of Mr Drumm's providing information that had no relevance to the investigation. She submitted that Mr Drumm's conduct was fraudulent, and he should be found guilty of fraud.

[79] Mr Mortimer spoke to written submissions previously filed, in which the Authority submitted that it was open to the Committee to make the findings it did, on the material that was before it. It was also submitted that where the evidence of Mr and Mrs Baker and Mr Drumm differed, the Committee did not err in accepting Mr Drumm's evidence.

[80] Mr Mortimer submitted at the hearing that the signed listing agreement and initialled marketing schedule are the "best evidence" of what was agreed Mr and Mrs Baker, and Mr Drumm, regarding commission and marketing costs. He submitted that it was open to the Committee to accept that evidence.

[81] Regarding the allegation that Mr Drumm altered the listing agreement, Mr Mortimer acknowledged that the fact that "[TBA]" (in relation to a bonus) is written in a different coloured ink on the copy of the agreement Mr Drumm uplifted from the letter box supports the allegation. However, he submitted, that should not necessarily lead to a different result, as there never was any agreement at to a bonus. Mr Mortimer further submitted that Mr Drumm's statement to the investigator that he made sure he gave Mr and Mrs Baker a carbon copy of the listing agreement after it was signed had "a ring of common sense".

[82] In relation to advertising costs, Mr Mortimer accepted that Mrs Baker's statement in an email to the Agency on 18 January 2018 (in relation to the Agency's invoice) that "I don't have a copy of the initialled marketing schedule" may support her position that she was not given a copy of the schedule before that time.

[83] Mr Mortimer submitted that, in the circumstances, while the Committee may not have been correct in making a positive finding in favour of Mr Drumm, it was open to it to find that the allegations regarding the listing agreement and marketing schedule were not proved.

[84] In relation to the issue of whether Mr Drumm acted in Mr and Mrs Baker's best interests in his marketing, Mr Mortimer acknowledged that the TradeMe listing purchased by the Bakers (which states an "expected sale price" of \$600,00) lends support to their position, that they made it clear to Mr Drumm that their price expectation was \$600,000, rather than the much lower figure indicated by him to the investigator.

[85] Mr Mortimer also acknowledged that the Committee may not have appreciated that it had a photograph of the billboard, in which there was no reference to conditions on the offer. However, he submitted that even if the Committee had seen that photograph, the decision to take no further action was still correct. This was because the golf club membership offer was made by the Agency and in particular, Mr Coffey. Mr Mortimer also submitted that it was not clear on the evidence when the billboard was first seen by Mr Baker.

Discussion

[86] The Tribunal's powers on appeal are set out in s 111(4) and (5) of the Act:

...

- (4) After considering the appeal the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

[87] The Tribunal's powers in this appeal are therefore restricted. In particular (in the light of Mrs Baker's submission that Mr Drumm engaged in fraudulent conduct) if the Tribunal concludes that the Committee's decision was wrong, it is limited as to what action it can take, in that it can only exercise a "power that the Committee could have exercised". The Tribunal could make a finding of unsatisfactory conduct, but it could not make the more serious finding of misconduct, because a Complaints Assessment Committee has no power to make a finding of misconduct. If a Committee considers that the evidence before it provides grounds to do so, it may determine that a complaint be considered by the Tribunal, and lay a charge of misconduct.¹³

¹³ Section 89(2)(a) of the Act.

[88] We have concluded that the Committee in this case focused on particular examples of Mr Drumm's conduct rather than making an overall assessment of whether Mr Drumm acted in Mr and Mrs Baker's best interests and, in particular, acted contrary to their instructions. We address particular findings by the Committee below, and note that we have not found it necessary to address every finding.

Commission rate and amendment of listing agreement

[89] We accept that Mr and Mrs Baker were charged 1.8 percent of the sale price, plus \$600, plus GST when the property was sold, and that this is set out at paragraph 5.4 of the listing agreement, which was signed by Mr and Mrs Baker. We also accept that a signed agreement will normally be the "best evidence" of what was agreed. However, that begs the question of whether Mr and Mrs Baker were given time to consider the agreement before signing it, and whether they were alerted to the fact that it did not provide for a flat commission fee of \$10,000 plus GST, already agreed to by Mr Drumm. If, as they said in their complaint, Mr Drumm did not leave a carbon copy of the agreement with Mr and Mrs Baker after they signed it, then they would have had no opportunity to review it until later.

[90] The Committee found on the balance of probabilities that Mr Drumm left Mr and Mrs Baker a carbon copy of the listing agreement after it was signed. It said it had no evidence substantiating their complaint that Mr Drumm did not leave them a copy, and in fact did not give them a copy until some days later, when he removed an envelope, containing the agreement, from their letter box.

[91] The Committee does not appear to have taken into account the difference between the versions of the listing agreement provided by Mr Drumm to the investigator (as being the original of a copy he left with them), and the version Mr Drumm gave Mr and Mrs Baker (from their letter box). The former does not contain the addition of "[TBA]" in the wording relating to a bonus; the version given to Mr and Mrs Baker does, and the entry is in a different coloured ink from the balance of the document. While the addition itself may not be significant, given that there is no suggestion that a bonus was ever agreed or charged, the difference between the two versions indicates that the copy given to the Bakers was not a carbon copy of the

agreement they signed. That tends to support Mr and Mrs Baker's complaint that they were not given a carbon copy of the listing agreement after they signed it, and their complaint that Mr Drumm altered the agreement after it was signed.

Misleading prospective purchasers as to the price Mr and Mrs Baker would accept

[92] The Investigator wrongly said in his investigation report that Mr and Mrs Baker had promised to give contact details of their neighbour, Mr P, but failed to do so. They had provided it to an Early Resolution Team member, who had saved it in the file management system for the complaint. The error was picked up by Mr and Mrs Baker when they saw the report, and the neighbour was then contacted. However, that was not until November 2018, 12 months after Mr Drumm conducted the open home at which he was said to have suggested the property could be bought for \$520,000. By the time he was spoken to, Mr P could not remember Mr Drumm's exact words. However, he was recorded as saying that Mr Drumm was "lowballing what the Bakers wanted. He was offering a lower price".

[93] In paragraph 3.3 of its decision, the Committee said that it "viewed a letter from" the neighbour (in fact, a report from the investigations team leader of a telephone call to Mr P), but did not cite the words used by Mr P. In the context of the delay in contacting Mr P (not of either the Baker's or Mr P's doing), his evidence of Mr Drumm "lowballing", and "offering a lower price" was evidence that supported the Baker's complaint that Mr Drumm was not acting in their best interests, with the aim of achieving the best price possible for their house. That evidence should have been considered by the Committee, not dismissed as unsatisfactory.

[94] The Committee went on to say that "in any event, the outcome of the sale was not affected". In that statement, the Committee conflated the separate issues of whether what was said was in breach of Mr Drumm's obligations, and what disciplinary consequences should follow the breach (if there was one). The eventual outcome of the sale process is not relevant to consideration of whether Mr Drumm was in breach of his obligations and duties to his clients, Mr and Mrs Baker.

Incorrect RV and incorrect address

[95] The Committee found at paragraph 3.5 of its decision that the marketing flyers had been corrected. We have recorded Mrs Baker's submission that only the online flyers were corrected, and they were never given any reprinted hard copy flyers. It appears that the Committee did not have hard copies of reprinted flyers before it. Page 397 of the Committee's bundle of documents shows only one side of a small flyer, and while it gives the correct address for the property, it does not indicate any information as to the RV, correct or incorrect. Page 398 of the Committee's bundle appears to be an A4-size flyer for the property, but that could not be a corrected and reprinted flyer used during the auction campaign, because it refers to a sale "by negotiation".

[96] It is, therefore, not clear to the Tribunal what evidence the Committee's conclusion that the flyers were reprinted was based on.

Ignored instructions about marketing and incurred and charged for advertising and misled Mr and Mrs Baker over the staging costs

[97] At para 3.7 of its decision, in referring to the fact that the property sold at a value substantially above the RV, the Committee conflated the separate issues of whether Mr Drumm ignored instructions given by Mr and Mrs Baker, and whether any harm was caused by his doing so. They were obliged to consider whether Mr Drumm was in breach of any of his obligations and duties to Mr and Mrs Baker independently of any consideration of what impact such any breach may have had.

[98] The material before the Committee contained many statements by Mr and Mrs Baker to Mr Drumm that they did not want the RV highlighted in marketing the property, and the reason why. It is evident from the material they produced that they raised the issue with Mr Drumm immediately on becoming aware of the impact of the feedback from the marketing campaign, first given to them on 15 December 2017, the day before the scheduled auction (deferred as there were no registered bidders). Their complaint included Mr Baker's response to their concern, that he was the professional, and they should trust him.

[99] We have concluded that there was evidence before the Committee on which it could have determined that Mr Drumm ignored Mr and Mrs Baker's wishes regarding references to the RV. The fact that a property's RV is publicly available is irrelevant. The issue for Mr and Mrs Baker was that highlighting the (low) RV was a marketing strategy they did not want, as it encouraged low offers.

Gold Club membership

[100] The Committee said at paragraph 3.10 of its decision that "[Mr Baker] said that he would provide the investigation with a photo of this advertisement showing that there were no terms and conditions attached to this offer. This has not happened." Page 219 of the Committee's Bundle of Documents is a photograph of the billboard, advertising the offer of free club membership, and it does not contain any references to terms and conditions". Page 220 of the Bundle is a photograph of the billboard with the statement "CONDITIONS APPLY". Both of these photographs appear to have been provided by Mr Drumm, as part of his response to the complaint. There was no need for Mr Baker to supply a photograph of the billboard without conditions, as Mr Drumm had already done so.

[101] The Committee also had evidence from Mr Drumm's response to the complaint, in which he said that the billboard was altered to include reference to conditions:

"Conditions apply" is stated on the golf club web site under the same offer. In discussions with [Mr Coffey] the advertising company suggested that directing enquiry to [Mr Coffey] was more than enough to cover the conditions as a first port of call. [Mr Coffey] has since gone back and added "conditions apply" to the sign to further clarify terms and conditions of any golf offer (Photo attached).

[102] In a communication following the investigator's report, Mrs Baker said:

[Mr Baker] is a regular player at Shandon and had been playing at Christmas 2017 when he noticed the billboard. [Mr Baker] had no knowledge of the online website advertisement or the golf club website, and the sign didn't mention or direct him to either site to check. There was no "conditions apply" written on the billboard as per evidence supplied...".

[103] This aspect of the complaint was against the Agency, in that Mr and Mrs Baker wanted the Agency to honour the offer of free golf membership. It was not a complaint against Mr Drumm. We conclude that the Committee was wrong to dismiss this aspect

of the complaint, on the grounds that it had not been supported by satisfactory evidence. On the evidence, the reference to conditions was added after Mr Baker claimed the free membership.

The Committee's approach to the complaint

[104] In focussing on particular conduct alleged against Mr Drumm, the Committee has not focussed on the fact that the complaint was against Mr Coffey and the Agency, as well.

[105] Further, the Committee does not appear to have picked up on the issue of the difference between Mr and Mrs Baker's price expectations and Mr Drumm's. Mr and Mrs Baker's expectation (\$600,000) is supported by their original TradeMe advertisement (which Mr Drumm told them to cancel, and then replaced with his own advertisement), in which that is stated as their "expected sale price". Nor does the Committee appear to have appreciated that there was no evidence of Mr Drumm providing Mr and Mrs Baker with any feedback from prospective purchasers until the day before the first scheduled auction (15 December 2017). This lends support to Mr and Mrs Baker's complaint that Mr Drumm did not in fact provide any feedback until that time. Both matters were relevant to Mr and Mrs Baker's complaint that Mr Drumm failed to act in their best interests.

[106] We are concerned that Mr and Mrs Baker were prevented from submitting material in response to the investigator's report, on the grounds that there was already too much material. This is especially so when they had not had the opportunity to respond to particular enquiries during the investigation.

[107] We are also concerned that material was put before the Committee that was not relevant to the investigation, such as comments from the broker who dealt with the Bakers' boat purchase, and references to debts alleged to be owed by Mr and Mrs Baker. It is of particular concern that the investigator's queries regarding the boat purchase were put to Mr Drumm. If the investigator considered that information relevant to the complaint was available from the boat broker, the initial approach

should have been through Mr and Mrs Baker, and they should have been given the opportunity to comment on any information provided.

Conclusion

[108] We have considered the options available to us under s 111 of the Act. We are satisfied that the Committee was wrong to decide to take no further action on the complaint. We have concluded that the appropriate course is to refer the complaint back to the Committee for fresh consideration of the evidence (including the evidence Mr and Mrs Baker were prevented from providing), in the light of the Tribunal's comments in this decision.

[109] Accordingly, the appeal is allowed. The complaint is referred back to the Committee for fresh consideration.

[110] 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

Mr G Denley
Member

Ms N Dangen
Member