

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 36

READT 009/19

IN THE MATTER OF

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

BETWEEN

LANCE ROBERT BARKER and
GEORGINA BARKER
Appellants

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 518)
First Respondent

AND

JOHN QUIAMBAO and HOI (STEPHEN)
WAN
Second Respondents

Hearing:

8 August 2019, at Auckland

Tribunal:

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

Appearances:

Ms M Cherrington, on behalf of Mr and
Mrs Barker
Ms E Mok, on behalf of the Authority
Ms K Harkess, on behalf of Mr Quiambao
and Mr Wan

Date of Decision:

15 August 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Barker have appealed under s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 518, dated 2 April 2019, in which the Committee decided to take no further action on their complaint against Mr Quiambao and Mr Wan.

[2] Mr and Mrs Barker were the owners of a property at Stonefields, Auckland. We will refer to this property as “Briody Terrace”). They sold that and bought another property in Stonefields, which we will refer to as “Vialou Lane”. Mr Quiambao and Mr Wan are licensed salespersons engaged at Megan Jaffe Real Estate Limited, trading as Ray White Remuera (“the Agency”). Mr Quiambao is the leader of “Team John Q” at the Agency, and Mr Wan is a member (Senior Associate) of the team. Mr Quiambao was the listing agent for both Briody Terrace and Vialou Lane. Mr Wan was involved in marketing Vialou Lane.

[3] Mr and Mrs Barker made their complaint after they purchased Vialou Lane, then sold Briody Terrace for less than the value as appraised by Mr Quiambao and Mr Wan. They complained that, in breach of their obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”):

- [a] Mr Quiambao made misleading misrepresentations about the ease with which Briody Terrace would be sold, for the desired price;
- [b] Mr Quiambao and Mr Wan provided an inaccurate current market appraisal of Briody Terrace, based on out of date sales figures;
- [c] Mr Quiambao and Mr Wan told them that another prospective purchaser had made an offer on Vialou Lane, when in fact that offer was rejected; and
- [d] Mr Quiambao and Mr Wan failed in their duties to Mr and Mrs Barker, by encouraging them to submit an unconditional offer on Vialou Lane when they had not sold Briody Terrace.

Background

[4] Mr and Mrs Barker were acquainted with Mr Quiambao because he lived a few doors away from them. They met with him on 23 May 2018, to discuss their proposed sale and purchase. He was known to have a significant share of, and particular insight into, the Stonefields market. At this meeting, Mr Quiambao gave them a “Phase 1” Booklet, comprising 39 pages, which included an introduction to team John Q and the Agency, and an outline of alternative selling options. It also set out a sample marketing programme. This booklet had been prepared by Mr Wan.

[5] On 30 May 2018, Mr Quiambao met again with Mr and Mrs Barker. He provided them with a Comparative Market Analysis for Briody Terrace, dated 28 May 2018. This had been prepared by Mr Wan, and reviewed by Mr Quiambao. It included an appraisal of the current market value for Briody Terrace at \$1,450,000 (“buyer value”) to \$1,550,000 (“optimum value”) (“the appraisal”). Mr Wan arrived at the appraisal range by reference to the sales of three properties in Stonefields, which he considered to be similar in being four bedroom/two bathroom terraced houses with a similar outlook, with similar layout, size, sun, and aspect:

[a] A property that sold for \$1,360,000 in July 2017, described as:

Similar layout and sun aspect. The front of the property also faces a park. The interior is in a tidy condition. Quiet location.

[b] A property that sold for \$1,365,000 in August 2017, described as:

Similar layout and age home. Quiet location on the same street as your home. No park views to the front of your property. The backyard faces west.

[c] A property that sold for \$1,425,000 in June 2017, described as:

Similar layout, newer home, located on [an] elevated location in Stonefields with a park view at the front.

Backyard faces northwest with open views and developed surroundings.

This property is superior because of the sub aspect and has a more presentable outlook at the back.

[6] Mr and Mrs Barker did not enter into a listing agreement at this stage.

[7] There is a dispute as to what information was given by Mr and Mrs Barker to Mr Quiambao, and by him to Mr and Mrs Barker.

[8] Mr and Mrs Barker said that they told Mr Quiambao that they wanted to sell Briody Terrace to enable them to pay off their mortgage and have a nest egg for a comfortable retirement, and provided him with their financial details, including the mortgage amount. They say that Mr Quiambao told them that he could easily obtain a price for Briody Terrace within the appraised range, that it was one of the nicest homes in Stonefields, with an open view over a park to Mt Wellington, it was in excellent condition, and he had cash buyers waiting to buy.

[9] Mrs Barker also said that after this meeting she walked outside with Mr Quiambao and told him that a further reason for selling was Mr Barker's illness, and that she wanted to take financial pressure off him.

[10] Mr Quiambao said that he told Mr and Mrs Barker that he could not control whether there were buyers ready and willing to purchase their property, and/or the price they were prepared to pay. He said he also explained to Mr and Mrs Barker that most auctions in Stonefields in the previous 12 months only had one or no bidders. He agreed that Mr and Mrs Barker told them they wanted to downsize to free up capital, but said they did not give him any other information or detail about their financial and personal circumstances or their reasons for selling. He further said that it was not until the Barkers sold Briody Terrace that he learned of Mr Barker's illness.

[11] Mr Quiambao said he "would have told them that I had a database of potential buyers looking in the Stonefields market", but did not assure Mr and Mrs Barker that they would get a particular price for Briody Terrace, or that he had buyers ready to buy their property straight away.

[12] Mr Quiambao and Mr Wan identified property listings which might be of interest to Mr and Mrs Barker. Mr and Mrs Barker attended auctions and open homes for other properties listed by Mr Quiambao.

[13] On 9 June 2018, Mr Quiambao entered into a listing agreement for Vialou Lane.

Mr and Mrs Barker inspected Vialou Lane. After their first inspection, on 26 June 2018, they expressed interest in making a pre-auction offer, Mr Wan sent them a property information pack (which included a recommendation to seek independent legal or technical advice), a pre-auction offer form, and comparable sales information.

[14] Mr Quiambao and Mr Wan had other interest in Vialou Lane, in the mid to high \$900,000s. Mr Wan said that at the same time as he sent Mr and Mrs Barker information regarding a pre-auction offer, they sent the same information to another potential purchaser, “the H trust”. The H trust made a pre-auction offer on 27 June 2018. This was rejected by the vendor.

[15] There is a dispute as to whether Mr and Mrs Barker were told that the H trust’s offer had been rejected. Mr and Mrs Barker say they were not told this before they submitted their offer. Mr Wan’s response to the complaint was inconsistent. He first said he “would have told Mr and Mrs Barker of this”. Later, he said “I informed Mr and Mrs Barker about this”.

[16] Mr and Mrs Barker said they had to approach their bank for bridging finance. They were put on a waiting list for a bank loan, but in the end sourced the necessary funds privately. They submitted a pre-auction offer on 6 July 2018. It appears from their offer document that they initially offered \$975,000, but this was subsequently increased to \$980,000, before the offer was presented by Mr Quiambao and/or Mr Wan to the vendor. They paid the required deposit of \$90,000.

[17] Mr and Mrs Barker’s offer of \$980,000 was accepted by the vendor, and the auction was brought forward from its scheduled date of 19 July 2019 to 11 July 2019. There were no other bidders at the auction, so Vialou Lane was sold to Mr and Mrs Barker in accordance with their pre-auction offer.

[18] Mr and Mrs Barker entered into a listing agreement for Briody Terrace with Mr Quiambao on 12 July 2019. The sale method was specified as sale by auction, scheduled for 16 August 2018.

[19] Mr and Mrs Barker were provided with marketing reports, dated 8 and 15 August 2019. These included references to prospective purchasers with budgets of up to \$1,500,000, viewers having previously made offers on properties, and to the possibility of some viewers being in a position to make unconditional offers.

[20] There were three registered bidders for the auction. The reserve was set at \$1,460,000. A prospective purchaser who had given price feedback at \$1,400,000 told Mr Quiambao five minutes before the auction that she had decided not to bid. Bidding went up to \$1,270,000, but that bidder was not prepared to go any higher. Briody Terrace was therefore passed in on a vendor bid of \$1,350,000.

[21] Briody Terrace was then marketed for sale for a set price of \$1,460,000. A conditional offer was received at \$1,300,000, but Mr and Mrs Barker accepted an unconditional offer of \$1,270,000 from the person who had bid to that amount at the auction.

[22] As a result, Mr and Mrs Barker considered that rather than downsizing and achieving a nest egg for their retirement, they had realised \$180,000 less than the lower figure in the appraisal range, and \$280,000 less than the higher figure in the range.

The Committee's decision

[23] The Committee set out three “fundamental reasons” for its decision to take no further action:

- [a] Unsatisfactory conduct is required to be proved on the balance of probabilities: that is, the Committee was required to be satisfied that it was more likely than not that the conduct Mr and Mrs Barker alleged had occurred. In this case there was a direct contradiction between Mr and Mrs Barker's statements, and the statements made by Mr Quiambao and Mr Wan. The Committee was unable to resolve those conflicts, so was unable to make findings against Mr Quiambao and Mr Wan.¹

¹ Committee's decision, at paragraph 3.2.

[b] Licensees' "special duties" (fiduciary duties, duties to act in clients' best interests, and duties of communication) applied only where there was a "vendor client" relationship. The Committee considered that Mr Quiambao and Mr Wan owed "vendor client" duties to Mr and Mrs Barker as from May 2018, when they first approached them about selling Briody Terrace. Those duties did not apply in respect of Vialou Lane, although Mr Quiambao and Mr Wan owed "customer duties" as from about 26 June 2018.²

[c] Mr and Mrs Barker had to take ultimate responsibility for their decisions. The Committee considered that Mr Quiambao and Mr Wan had not unduly pressured them to sell Briody Terrace, or to buy Vialou Lane. The Committee noted that Mr and Mrs Barker had bought Vialou Lane before Briody Terrace was even listed for sale, and sales could never be guaranteed until they actually occurred, and Mr and Mrs Barker should have realised that there was always the possibility that they would not achieve the sale price they were expecting. The Committee considered that Mr Quiambao and Mr Wan were required to provide requisite advice about the sale and purchase, separately, but not to give "broad prudential advice" as to how Mr and Mrs Barker should plan and provide for their retirement.³

[24] The Committee concluded:⁴

3.5 The Committee ... acknowledges the distress and worry that [Mr and Mrs Barker] have experienced resulting from the two transactions. It is clearly a most unhappy outcome for them. The Committee must focus, however, on whether [Mr Quiambao and Mr Wan] breached their obligations under either the Act or the Rules. The Committee does not consider that it is proven that they did, having regard to the standard or proof earlier mentioned. There is no doubt that the price achieved for [Briody Terrace] was deeply disappointing to [Mr and Mrs Barker], but markets can be perverse and fickle, and there is no suggestion that [Mr Quiambao and Mr Wan] did not do other than their best to achieve the best price in the circumstances.

3.6 In particular, it is not proved that [Mr Quiambao and Mr Wan] misled [Mr and Mrs Barker] about price expectations, provided an inaccurate

² At paragraph 3.3.

³ At paragraph 3.4.

⁴ At paragraphs 3.5 and 3.6.

[appraisal], encouraged them to make an unconditional offer, or misled them about another prospective purchaser.

Appeal submissions

[25] Ms Cherrington submitted for Mr and Mrs Barker that the Committee was wrong to find that their allegation that Mr Quiambao misleadingly misrepresented to them that Briody Terrace would sell easily, for a price that would leave them a retirement nest egg, after they had bought a smaller property, was not proved.

[26] She submitted that their evidence is supported by evidence given to the investigator by one of their neighbours. That neighbour, “Mr S”, had said that the Barkers had been assured by Mr Quiambao that there were buyers lined up, and were a “shoe in” to get \$1.5m or thereabouts for Briody Terrace. Ms Cherrington submitted that with that evidence, the Committee ought to have accepted Mr and Mrs Barker’s evidence as credible.

[27] Ms Cherrington also submitted that the Committee was wrong to find that the appraisal was not inaccurate. She submitted that it was based on sales that had occurred at least 12 months earlier than Briody Terrace, and that Mr Quiambao and Mr Wan said nothing to Mr and Mrs Barker as to the property market dropping since those sales. She submitted that the fact that Briody Terrace sold for \$1,270,000 suggested that the appraisal of \$1,450,000 to \$1,550,000 did not reflect current market value.

[28] In relation to the purchase of Vialou Lane, Ms Cherrington submitted that the Committee was wrong to find that Mr and Mrs Barker’s allegation that they were encouraged to buy the property, and not told that the offer by the H trust had been rejected, was not proved. She submitted that Mr Quiambao and Mr Wan did not tell them that the offer had been rejected, and therefore allowed Mr and Mrs Barker to continue to believe that there was competition for Vialou Lane.

[29] She submitted that Mr Quiambao and Mr Wan put Mr and Mrs Barker under undue or unfair pressure to buy Vialou Lane, in breach of r 9.2 of the Rules. She submitted that Mr Quiambao’s representations as to the ease with which Briody

Terrace could be sold, at a price at or near the appraisal range, encouraged Mr and Mrs Barker into making a pre-auction offer for Vialou Lane before Briody Terrace was listed, and that Mr Wan (having told them that another offer had been made for Vialou Lane), did not tell them that the offer had been rejected. She submitted that if they had been told that the H trust's offer had been rejected, they would not have made the unconditional pre-auction offer.

[30] Ms Harkess submitted for Mr Quiambao and Mr Wan that the Committee was wrong to find that Mr Quiambao owed fiduciary duties to Mr and Mrs Barker as from May 2018. She submitted that Mr and Mrs Barker were not clients (as defined in s 4 of the Act) until they signed the listing agreement on 12 July 2019. She accepted that before that, they were "prospective clients" in relation to the sale of Briody Terrace, and "customers" in relation to the purchase of Vialou Lane.

[31] Ms Harkess submitted that the Committee was correct to find that Mr and Mrs Barker's allegations that Mr Quiambao made misrepresentations as to the sale of Briody Terrace were not proved. She submitted that Mr S's evidence did not support the allegations, as he was not present at any discussions between Mr Quiambao and the Barkers. She submitted that marketing reports provided to Mr and Mrs Barker corroborated Mr Quiambao's statements that he had a database of buyers, whom he knew to be unconditional and/or in the \$1,400,000 to \$1,500,000 range.

[32] Ms Harkess also submitted that the Committee was not wrong to find that the appraisal of Briody Terrace was not inaccurate. She submitted that the choice of comparative sales had been properly explained, and that the appraisal met the requirements for appraisals, under the applicable Rules. She submitted that the fact that the sale price of Briody Terrace was not within the appraised range did not make the appraisal wrong. She further submitted that neither buyer feedback during the marketing of Briody Terrace, nor sales data produced by Mr and Mrs Barker during the investigation of their complaint, suggested that the appraisal range was wrong.

[33] Ms Harkess accepted that Mr Quiambao and Mr Wan owed Mr and Mrs Barker duties as customers, in relation to their purchase of Vialou Lane. She submitted that they treated the Barkers fairly, and there was no breach of the Rules. She submitted

that Mr and Mrs Barker were not “vulnerable”, and were able to (and did) exercise their own judgment. She submitted that Mr Quiambao and Mr Wan were not aware of Mr and Mrs Barker’s financial position, or Mr Barker’s illness.

[34] Ms Harkess further submitted that Mr and Mrs Barker were not pressured into making an offer for Vialou Lane. She submitted that they attended an open home at the property on 26 June, and again on 27 June, and subsequently indicated that they were interested in making a pre-auction offer. She submitted that Mr Wan correctly told them that there had been a pre-auction offer made, in the “mid to high \$900,000s”. She referred to Mr Wan’s evidence as to having told the Barkers that the offer was rejected. She further noted that Mr Wan gave the Barkers the bank account details for payment of the required deposit on 30 June. She submitted that the fact that the Barkers’ pre-auction offer was not made until 6 July indicated that there was no rush, and no pressure on them to make the offer.

[35] Ms Mok submitted for the Authority that the Committee was wrong to find that Mr Quiambao and Mr Wan owed “client” duties to Mr and Mrs Barker as from late May 2018. She submitted that up until the time they signed the listing agreement, on 12 July, they were “prospective clients”. She submitted that Mr Quiambao and Mr Wan owed them duties as prospective clients, and customers, but not the duties owed solely to clients; for example the duty to comply with fiduciary duties (under r 6.1) or the duty to act in Mr and Mrs Barker’s best interests (under r 9.1).

[36] Ms Mok submitted that it is clear on the evidence that Mr Quiambao and Mr Wan worked together, as a team. Except in relation to the alleged misrepresentations made by Mr Quiambao to Mr and Mrs Barker, Mr Quiambao and Mr Wan were both involved in each of the issues raised by Mr and Mrs Barker, and could be found culpable in respect of an alleged breach of licensees’ obligations.

[37] Ms Mok made similar submissions as Ms Harkess in respect of the allegations made by Mr and Mrs Barker: that on the evidence before it, it was open to the Committee to find the allegations not proved.

What duties were owed by Mr Quiambao and Mr Wan?

[38] We accept the submissions made by Ms Harkess and Ms Mok, that the Committee erred in finding that Mr Quiambao owed Mr and Mrs Baker duties under rr 6.1 and 9.1 as from the May 2018. These Rules provide:

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

[39] "Client" is defined in s 4 of the Act:

client means the person on whose behalf an agent carries out real estate agency work.

[40] The terms "prospective client" and "customer" are not defined in the Act, but are defined in r 4.1 of the Rules:

customer means a person who is a party or potential party to a transaction and excludes a prospective client and a client

prospective client means a person who is considering or intending to enter into an agency agreement with an agent to carry out real estate agency work.

[41] The Act and Rules clearly distinguish between clients, prospective clients, and customers. The fact that a "client" relationship does not arise until such time as there is a listing (or agency) agreement in place between the licensee and the person on whose behalf real estate agency work is carried out is shown by r 9.6:

- 9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

[42] We observe that the fact that fiduciary duties, and the duty to act in a client's best interest, are restricted to a licensee's clients, should not be seen as in any way lessening the importance of the duties owed to prospective clients and customers.

Was the Committee wrong to find that the allegation that Mr Quiambao made misleading misrepresentations as to selling Briody Terrace was not proved?

[43] Ms Harkess and Ms Mok rightly submitted that Mr and Mrs Barker's neighbour, Mr S, was not present at any meetings with Mr Quiambao. Mr S could not give direct

evidence of any statement made by Mr Quiambao to the Barkers. His evidence was as to what Mr and Mrs Barker told him that Mr Quiambao had said to them. As such it is hearsay evidence, and subject to the rules as to the admissibility of hearsay evidence set out in Part 2 (ss 16-18) of the Evidence Act 2006.

[44] However, both the Committee (under s 89 of the Act) and the Tribunal (under s 109), have the power to:

... receive in evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not the statement, document, information, or other matter would be admissible in a court of law.

[45] It is not surprising that neither Mr and Mrs Barker, nor Mr Quiambao, could provide independent corroborating evidence as to what was said in a meeting that only they attended. However, if the absence of independent corroborating evidence must always lead to a finding that a complaint is found to be not proved, it is hard to see how the complaints process can achieve the purposes of the Act, as set out in s 3 of the Act:

3 Purpose of Act

- (1) The purpose of the Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
- (2) The Act achieves its purposes by—
 - (a) regulating agents, branch managers, and salespersons:
 - (b) raising industry standards:
 - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[46] In this case, Mr S's evidence is as to a statement made to him at the time Mr and Mrs Barker were considering making a pre-auction offer on Vialou Lane. Mr S told the investigator:

Prior to the auction, [Mr and Mrs Barker] had purchased [Vialou Lane]. Before that purchase [Mr S] had expressed concern to [them] about their intention to make an unconditional offer having not yet sold [Briody Terrace].

[Mr and Mrs Barker] had been assured by [Mr Quiambao] there were buyers lined up and were a shoe in to get \$1.5m or thereabouts.

[47] In the light of the fact that Mr S said that this statement was made to him before Mr and Mrs Barker made their pre-auction offer on Vialou Lane, we consider that the Committee, and this Tribunal, can properly take his evidence into account when considering the allegation that Mr Quiambao made misleading misrepresentations as to the sale of Briody Terrace. Mr S's evidence supports Mr and Mrs Barker's evidence.

[48] However, that does not establish that Mr Quiambao made misleading misrepresentations as to selling Briody Terrace. Mr Quiambao's marketing reports from the sale of Briody Terrace show that he did in fact have a database of potential buyers (whom he invited and encouraged to attend open homes at the property), and that some of these were in a position to make an unconditional offer of up to \$1,400,000, if they were interested in buying. That suggests that Mr Quiambao had a reasonable basis for saying that there were potential purchasers for Briody Terrace, at or near the price Mr and Mrs Barker wanted.

[49] Accordingly, we are not persuaded that the Committee was wrong to find that this allegation was not proved.

Was the Committee wrong to find that Mr Quiambao and Mr Wan were not in breach of their obligations in relation to the appraisal of Briody Terrace?

[50] Rules 10.2 and 10.3 provide:

- 10.2 An appraisal of land or a business must–
 - (a) be provided in writing to a client by a licensee; and
 - (b) realistically reflect current market conditions; and
 - (c) be supported by comparable information on sales of similar land in similar locations or businesses.
- 10.3 Where no directly comparable or semi-comparable sales data exists, a licensee must explain this, in writing, to a client.

[51] In its decision in *McCay-Woods v Real Estate Agents Authority (CAC 20008)*, the Tribunal said in relation to the equivalent provisions to rr 10.2 and 10.3 under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the predecessor of the current Rules):⁵

⁵ *McCay-Woods v Real Estate Agents Authority (CAC 20008)* [2014] NZREADT 103, at [57]–[58].

[57] We agree with [counsel for the Authority] that the purpose of the above rule is to ensure transparency and that any appraisal provided by a licensee is realistic so as to avoid the risk of an overinflated (and therefore misleading) appraisal used simply to obtain a property listing; or an unrealistic low appraisal to ensure a quick sale and commission for the licensee, but which may lead to vendors achieving a significantly lower than market value for their property.

[58] It does not follow that an appraisal will always match the purchase price. A different purchase price may, of course, be realised, whether that be under or over the appraised value. What is important is that the licensee has exercised the required care and skill in reaching his or her market appraisal and that it is supported with comparable sales data. This enables a vendor client to make an educated decision when they are presented with purchase offers.

[52] In its decision in *Rodgers v Real Estate Agents Authority*, the Tribunal agreed with a submission made on behalf of the Authority that:⁶

... an appraisal needs to do more than simply show a prospective client comparable properties and sales figures and must inform the prospective client why the properties have been selected and how that information translates in to the appraised price that the licensee has arrived at for the property.

[53] In the present case, the appraisal prepared by Mr Wan and reviewed by Mr Quiambao was in writing, and it referred to the sales of three properties. The reasons why these properties were selected as being comparable were set out: they related to the location, layout, size, and condition of the property, whether there was a view, and its aspect for sun. In these respects, the appraisal complied with the requirements of rr 10.2 and 10.3. Further, the fact that the sale price for Briody Terrace did not match the appraisal range does not, in itself, establish that the appraisal did not comply with the Rules.

[54] However, the appraisal was dated 28 May 2018. The three properties referred to had sold in June, July, and August 2017. The most recent sale was, therefore, at least nine months, and the oldest sale eleven months, before the appraisal. While there is no “bright line” for determining how far back a sale may be before it ceases to be relevant to “current” market value, we accept Ms Cherrington’s submission that sales nine to eleven months before an appraisal may not still be “current” at the time of the appraisal.

⁶ *Rodgers v Real Estate Agents Authority* [2016] NZREADT 7, at [50].

[55] If Mr Quiambao and Mr Wan considered the sales to be comparable, notwithstanding that they had occurred nine to eleven months previously, then that should have been pointed out and explained in the appraisal. If there were no more recent sales of comparable properties then, in accordance with r 10.3, that should have been pointed out and explained.

[56] For this reason, we are satisfied that the Committee was wrong to find that Mr Quiambao and Mr Wan complied with rr 10.2 and 10.3 when preparing and presenting the appraisal.

Was the Committee wrong to find that Mr Quiambao and Mr Wan were not in breach of their obligations in relation to Mr and Mrs Barker's purchase of Vialou Lane?

[57] Mr and Mrs Barker's complaint was that they were put under pressure to make a pre-auction offer on Vialou Lane by being told that another prospective purchaser (the H trust) had put in an offer. We accept that if Mr and Mrs Barker knew that they were the only prospective purchasers, they could not be said to be under pressure to make an offer. If they were told that the other offer had been rejected, then any existing pressure would have been eased. However, for as long as Mr and Mrs Barker believed there to be another "live" offer, they could be said to be under pressure as to whether to make an offer themselves, and at what level.

[58] We have concluded that the Committee was wrong to find that it could not determine the conflict between the evidence given between Mr and Mrs Barker (that they were not told that the H trust's offer had been rejected) and that given by Mr Wan (that he "would have told" them that the offer was rejected, or that he "informed" them).

[59] Mr and Mrs Barker's evidence, that they were not told, is supported by their later conduct. They continued to seek the necessary funding from the bank (and later, privately) during the period between being sent the pre-auction offer form and submitting the offer, and their offer was increased. They were required to confirm funding, if they had any intention of bidding at the auction. However, we consider it to be more likely than not that if they had been told that the H trust's offer was no

longer “live”, they would not have submitted their pre-auction offer. The fact that it took several days before Mr and Mrs Barker were in a position to submit their pre-auction offer does not change the position. They should have been told that the H trust’s offer had been rejected. On the balance of probabilities, we find that if Mr and Mrs Barker had been told that the H trust’s offer had been rejected, before they submitted their pre-auction offer, they would have waited until the auction.

[60] We find that in failing to advise Mr and Mrs Barker that the H trust’s offer had been rejected, both Mr Quiambao (as listing agent for the property) and Mr Wan (as salesperson), put Mr and Mrs Barker under undue or unfair pressure. The fact that their offer was increased before it was submitted to the vendor also indicates pressure from Mr Quiambao and Mr Wan, in breach of their obligations under r 9.2:

9.2 A licensee must not engage in any conduct that would put a client, prospective client, or customer under any undue or unfair pressure.

[61] It was also a breach of Mr Quiambao’s and Mr Wan’s obligations under rr 6.2 and 6.4:

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

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

Conclusion

[62] We have concluded that the Committee was wrong to decide to take no further action on Mr and Mrs Barker’s complaint. On our own assessment of the facts, we have concluded that in two respects (the appraisal and the failure to tell them that the H trust’s offer had been rejected) Mr Quiambao and Mr Wan breached their obligations to Mr and Mrs Barker. It is appropriate to make findings of unsatisfactory conduct against them. We assess the unsatisfactory conduct to be at the low end of the range of unsatisfactory conduct.

Penalty

[63] Mr and Mrs Barker cannot claim financial compensation in respect of the difference between the sale price of Briody Terrace and the appraisal range, or in respect of their purchase of Vialou Lane as a result of having made an unconditional pre-auction offer.⁷

[64] We have concluded that it is not necessary to receive penalty submissions. In respect of both Mr Quiambao and Mr Wan, the findings of unsatisfactory conduct are appropriately addressed by way of the findings themselves, and orders for censure.

Orders

[65] We find Mr Quiambao and Mr Wan guilty of unsatisfactory conduct under s 72 of the Act. We order that each of Mr Quiambao and Mr Wan is censured.

[66] 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

⁷ See *Quin v Real Estate Agents Authority* [2012] NZHC 3557.