

Introduction

[1] Mr Ian Molloy and Ms Lisa Molloy (“the appellants”)¹ have appealed against the decision of Complaints Assessment Committee 521 (“the Committee”), dated 7 November 2019, in which it found the appellants guilty of unsatisfactory conduct (“the substantive decision”). They have also appealed against the Committee’s decision, dated 25 February 2020, in which the Committee made orders as to penalty (“the penalty decision”).

Background

[2] The Committee’s finding was in relation to the appellants’ conduct in the course of the marketing and sale of a property in Milford, Auckland (“the property”) to Mr Albert Pallatt, between October 2017 and January 2018.

[3] Mr Molloy is a licensed agent, and Ms Molloy is a licensed salesperson, engaged at Barfoot & Thompson’s Glenfield branch (“the Agency”). On 8 October 2017, the property was listed by Mr Molloy for sale at an auction scheduled for 2 December. The registered value of the property (capital value plus land value), dated 1 July 2014, was \$2.65 million. In an appraisal dated 3 October 2017, Mr Molloy appraised the value of the property at \$3 million, with a market range of \$2.85 to \$3.1 million.

[4] Prior to the auction, the property came to Mr Pallatt’s attention. At the time, he was 87 years old. He had been in a defacto relationship with Ms Susanna Perez for some five years. Ms Perez is a licensed salesperson engaged at Barfoot & Thompson, but at a different branch from the appellants. Ms Perez was not involved in marketing the property.

[5] Mr Pallatt owned the property he lived in at Long Bay, Auckland. He also owned a commercial block of land at Silverdale. He and Ms Perez intended to sell their respective homes and buy a property in which they would live together. They became engaged in December 2017. Mr Pallatt and Ms Perez looked at the property together,

¹ Except where it is necessary to refer to them individually, Mr Molloy and Ms Molloy will be referred to as “the appellants”.

and Mr Pallatt looked at it on his own and with friends. Prior to the auction, Mr Pallatt was provided with copies of the title to the property, the LIM, an information pack, particulars of auction, and a rental appraisal.

[6] The property did not sell at auction. On 6 December, Mr Pallatt made an offer to buy it, at \$2.275 million. The offer was conditional on a satisfactory building report. It was declined immediately on presentation to the vendors, with no counter-offer being made. In an email from Ms Molloy to Ms Perez that day, Ms Molloy noted that she was “disappointed with the low offer”, and found it “very frustrating that your buyer is being dictated to by a lawyer ...”. Ms Molloy further said that the property would be listed for sale at \$2.88 million, with room for some negotiation.

[7] Mr Pallatt made further visits to the property after the auction. On one occasion he was accompanied by a long-time friend, Mr Farmer, who was a retired builder. Mr Farmer undertook an informal building inspection of the property. On another visit, he was accompanied by another friend who had experience in the building industry. In total, he visited the property, either alone or with Ms Perez or others, eight or nine times.

[8] On 14 December, Ms Molloy forwarded to Ms Perez information provided to her by the vendors regarding the plaster cladding on the property. On 16 January 2018, Mr Molloy sent Ms Perez an email thanking him for advising that Mr Pallatt was seeking finance approval.

[9] On 23 January, Mr Pallatt made an unconditional offer to buy the property, for \$2.7 million, with settlement to occur on 27 July (“the unconditional offer”). The unconditional offer was drawn up at a meeting between themselves and Mr Pallatt and Ms Perez. The appellants advised the Committee through their solicitors that Ms Molloy took Mr Pallatt through the agreement and explained its provisions to them, and that Mr Pallatt showed them an offer he had received for his Silverdale property, at approximately \$7 million. The appellants understood that Mr Pallatt had not accepted this offer, as he wanted \$10 million for the Silverdale property.

[10] Mr Pallatt's unconditional offer was accepted by the vendors, who signed the agreement for sale and purchase. Mr Pallatt sent the agreement to his solicitor, Ms Wilson, the day after it was signed. Ms Wilson asked the vendors' solicitors for an amendment to the agreement to make it conditional on a LIM report and building inspection. This was refused by the vendors.

[11] The appellants also prepared a "Form 2" consent form, pursuant to s 134 of the Act. Pursuant to s 135 of the Act, they also obtained an independent market valuation of the property, prepared by Lyons & Co, Valuers, dated 31 January 2018. This assessed the market value of the property as \$2.76 million.

[12] Mr Pallatt died on 22 May 2018, aged 88. The property was subsequently appraised by Ms Claire Curlewis, a licensed salesperson at Harcourts Cooper & Co on behalf of Mr Pallatt's estate, at \$2.35 to \$2.54 million. It was sold on 29 October 2018 for \$2.56 million.

Complaint

[13] A complaint was made to the Authority on 24 September 2018 by Mr Kearney (solicitor) on behalf of Mr Pallatt's sons Roger and Philip, who were the executors of his estate. The complaint was against Ms Perez and Mr Molloy, and alleged that they:

- [a] pressured Mr Pallatt into signing the unconditional offer for the property;
- [b] failed to give Mr Pallatt the opportunity to take independent legal advice before signing the unconditional offer;
- [c] failed to insert clauses into the unconditional offer to protect Mr Pallatt's interests; and
- [d] failed to follow the Agency's policies and procedures in relation to the transaction.

[14] On 15 March 2019, the Committee decided to inquire into the complaint. Pursuant to s 78(b) of the Act, the Committee also decided to conduct an “own motion” inquiry into Ms Molloy’s conduct.

Evidence before the Committee

[15] At the conclusion of its investigation, the Committee had before it the following:

- [a] The letter of complaint from Mr Kearney, dated 12 July 2018.
- [b] Letters in response, from the appellants’ solicitors, dated 23 August 2018 (to Mr Kearney) and 12 April 2019 (to the Authority’s investigator). The Tribunal notes that the appellants’ solicitors stated that the appellants were available to make statements to the Authority, or provide affidavits. However, there is no indication that statements or affidavits were requested.
- [c] Copies of relevant documents: the appraisal prepared by Mr Molloy, the Agency listing agreement, the unconditional offer signed by Mr Pallatt, the s 134 consent form, the Lyons & Co valuation, the appraisal prepared by Ms Curlewis, and the agreement for sale and purchase entered into on 29 October 2018.
- [d] Copies of correspondence, comprising Ms Molloy’s emails to Ms Perez of 6 December and 12 December 2017, Mr Molloy’s email to Mr Perez of 16 January 2018, and a letter dated 16 January 2018 from a barrister acting on behalf of Ms Perez to Mr Kearney, concerning a claim for division of relationship property.
- [e] Records of interviews conducted by the investigator, as set out below.

[16] Mr Farmer is recorded as having told the investigator that he had known Mr Pallatt for 45 years, and was aware of his engagement to Ms Perez, and their plan to sell their own houses and buy one together. He said that Mr Pallatt asked him to view the property, and that Mr Pallatt said he was going to see his lawyer “Wilson”, as “the

wheels were in motion”. He also said that Mr Pallatt owned the Silverdale property, which Mr Farmer believed was valued at \$7 million. Mr Farmer said he encouraged Mr Pallatt to get it re-valued, but Mr Pallatt said he would be happy to get \$7 million for it. Mr Palmer also said that he was at Mr Pallatt’s house after the funeral. Mr Pallatt’s sons were there, but did not recognise a car Mr Pallatt had owned for two and a half years.

[17] Ms Wilson advised the investigator by email that she first became aware of Mr Pallatt’s interest in the property when she received the unconditional agreement for sale and purchase. She said she has no diary record of meeting with Mr Pallatt in December 2017, and had not recorded any time for reviewing a LIM and building report at that time. She said she would have wanted to view the LIM and building report to ensure that there were no building issues with the property. Further, she had no record of having discussed the purchase with Mr Pallatt on 28 January 2018.

[18] Mr Chris Barker is a licensed salesperson at a Harcourts agency, which held a general agency for Mr Pallatt’s Silverdale property as from December 2015. He said Mr Pallatt had asked him what he thought the property was worth. This was after Mr Pallatt had entered into the unconditional agreement to buy it. Mr Barker said that Mr Pallatt said he thought he had bought it on conditions. Mr Barker also said that he saw Mr Pallatt and Ms Perez at a private viewing of another property well before Mr Pallatt entered into that agreement. The Tribunal notes that Mr Barker also said that he saw Mr Pallatt at this viewing in March/April 2018 (that is, after he had bought the property), but this discrepancy does not appear to have been clarified by the investigator.

[19] Mr Barker, with his then manager, Mr Andrew Bruce, met with Mr Pallatt in May 2018. Mr Bruce said that Mr Pallatt said Ms Perez had convinced him to buy the property and he believed there were conditions on the purchase then learned it was unconditional. Mr Bruce said Mr Pallatt also believed that Ms Perez was getting a commission on the sale and said he had been hoodwinked by her. Mr Bruce said it was very unlike Mr Pallatt to sign anything without the approval of his sons or his solicitor. He said Mr Pallatt was difficult to deal with and had strong views.

[20] Ms Curlewis said she had had business conversations with Mr Pallatt over the years. She said Mr Pallatt had contacted her “out of the blue”, saying he was confused that he may have bought a house, and as to whether he had signed a conditional or unconditional contract for it. She said she believed that this call was directly after Mr Pallatt had entered into the agreement to buy the property. The Tribunal notes that Ms Curlewis also said that she recalled the conversation with Mr Pallatt as being close to the time of his death, which was on 22 May 2018. This discrepancy does not appear to have been clarified by the investigator.

[21] Ms Curlewis described Mr Pallatt as being very confused and panicky, and said she was aware that he was “in a negative relationship with his lawyer”. Ms Curlewis said she did not appraise the property for Mr Pallatt, or give him any indication of her opinion as to its value.

[22] As noted earlier, the investigator does not appear to have sought statements from, or asked any questions of, the appellants. Nor does it appear that the statements of Mr Farmer, Mr Barker, Mr Bruce, and Ms Curlewis were provided to them for response.

The Committee’s substantive decision

[23] The Committee decided to take no further action against Ms Perez. The Committee recorded Ms Perez’s statement that she did not receive any commission on the transaction. The Committee found that she was not engaged in real estate agency work, as defined in the Act. Accordingly, the disciplinary provisions of s 72 of the Act (which apply to the conduct of real estate agency work) could not apply. Further, the Committee found that it was unlikely that a finding could be made of misconduct under any of the provisions of s 73 of the Act (which may be applied outside of real estate agency work). There is no appeal against this finding.

[24] The Committee found that there was no unsatisfactory conduct by either of the appellants on the complaint that they exerted undue or unfair pressure on Mr Pallatt to enter into the agreement to buy the property. There is no appeal against this finding.

[25] The Committee also found that there was no unsatisfactory conduct by either of the appellants on the complaint that they failed to give Mr Pallatt the opportunity to take independent legal advice before he entered into the agreement. In making that finding, the Committee noted that Mr Pallatt was interested in, and visited, the property several times over several weeks before submitting the unconditional offer. The Committee could not find on the balance of probabilities that the appellants denied him the opportunity to seek legal advice. There is no appeal against this finding.

[26] Further, the Committee found that there was no unsatisfactory conduct on the complaint that the appellants failed to follow the Agency's policies and procedures in respect of the transaction. There is no appeal against this finding.

[27] The Committee upheld the complaint that the appellants engaged in unsatisfactory conduct by failing to protect Mr Pallatt's interests, by failing to insert "appropriate clauses" in the unconditional offer.

[28] The Committee recorded the complainants' claim that Mr Pallatt had no liquid funds available to settle the purchase, had limited income, and no ability to obtain finance, that the appellants made no effort to establish the ability of Mr Pallatt to fund settlement of the property, and that the complainants questioned Mr Pallatt's mental capacity.

[29] The Committee's reasoning in upholding this element of the complaint was as follows:²

3.14 While there is no expert evidence of the mental state of [Mr Pallatt] evidence from three other real estate agents suggests that [he] was a cautious man and that he was confused about his unconditional purchase of the property. His solicitor's contemporaneous correspondence suggests the same.

3.15 [Mr Pallatt] was 88 years old. It is not in dispute that he made an unconditional offer on the property. [The appellants] claimed there was no need for a building inspection clause because [he] had had the property inspected prior to making his offer and had done his due diligence in respect of the LIM. [The appellants] submitted that it was perfectly natural that unnecessary terms were not included in the ASP. The six month settlement period was presumably designed to permit [Mr Pallatt] to sell another property to fund settlement of the property.

² Committee's substantive decision, at paragraphs 3.14 to 3.18.

3.16 We acknowledge that [the appellants] were in an awkward position with [Mr Pallatt]. He was 88 years old, but that did not mean that he did not wish to proceed with the purchase of the property. It was not inherently irrational for him to offer. However, any unconditional offer to buy is inherently dangerous. Once signed the purchaser is legally bound to purchase the property on the agreed date at the agreed price, no matter what. The Property Law Section of the New Zealand Law Society state “You should *never* enter into such an agreement without taking legal advice”. Yet this is what [Mr Pallatt] did, at least to any meaningful degree. Any earlier discussion [he] may have had with his solicitor was clearly inadequate as evidenced by the surprise shown by the solicitor at receiving the unconditional ASP.

3.17 By not sending [Mr Pallatt’s] offer to his solicitor before [Mr Pallatt] signed, the solicitor was denied the opportunity to advise [him] of the wisdom of the transaction into which he was about to enter and to point out the seriousness of the risks involved. The solicitor’s advice would have included inquiring into and advising on [Mr Pallatt’s] financial position and other assets and checking that he wished to proceed. There is nothing before the Committee that suggests [the appellants] contemplated having [Mr Pallatt’s] solicitor peruse the ASP before [he] signed the unconditional offer. Because of this, [Mr Pallatt] did not receive the independent advice that might otherwise have been relevant to whether he was exercising his own independent will.

3.18 More worryingly, [the appellants] were also under the impression that it was “perfectly natural that unnecessary terms were not included in the ASP”. In our view given the circumstances [the appellants] should have inserted some conditions to protect the interests of [Mr Pallatt]. These conditions may have related to securing finance, search and approval of title, receipt of a satisfactory builder’s report, or the unconditional sale of [Mr Pallatt’s] property.

[30] The Committee found that the appellants were in breach of their obligation under r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) to exercise skill, care, competence, and diligence when carrying out real estate agency work, in breach of their obligation under r 6.2 to act in good faith and deal fairly with all parties in a transaction, and found that their conduct was such that, if known by the public generally, would likely bring the industry into disrepute (a breach of r 6.3).

The Committee’s penalty decision

[31] The Committee concluded that the appellants’ conduct was in the “lower quartile of the scale of seriousness” of unsatisfactory conduct. The Committee also noted that both Mr Molloy and Ms Molloy had clean disciplinary records. It concluded that the unsatisfactory conduct was not sufficiently serious to warrant censure or reprimand, and that it was not necessary to impose a fine. However, each appellant was ordered

to make a payment to Mr Kearney in respect of his attendances in submitting the complaint.

Submissions as to the Committee’s substantive decision.

[32] Mr Hargreaves submitted for the appellants that the Committee’s finding put them into a conflict with their fiduciary duties to their vendor clients. He submitted that the appellants owed the vendors duties as agents under their agency agreement, and fiduciary duties pursuant to r 6.1 of the Rules, and were compelled to act single-mindedly in their principals’ best interests.³ He submitted that the Committee’s decision wrongly put a purchaser’s interests above those of the appellants’ client vendors.

[33] Mr Hargreaves submitted that in the circumstances in which Mr Pallatt’s second offer was made – he had by that time had Mr Palmer’s building inspection, and done due diligence on the LIM – the Committee’s decision was, in effect, that the appellants should have refused to follow Mr Pallatt’s instructions to them, and to say “this is too advantageous to our clients, you must make it less so”.

[34] Mr Hargreaves further submitted that licensees’ duty under r 6.2 to be “fair” does not erode their fiduciary duty under r 6.1. He submitted that an unconditional offer was the most advantageous offer for the vendors, and that in this case, when faced with a motivated purchaser, who had done his due diligence, visited the property eight times, had evidence of assets, and had negotiated a longer settlement period than usual to allow him to sell his own house, the appellants would have been breaching their fiduciary duties to the vendors if they had unilaterally “inserted some conditions to protect Mr Pallatt”⁴ into the offer he wanted them to make. He submitted that the appellants could not choose to act in their own interests (to avoid an unsatisfactory conduct finding) by refusing to allow Mr Pallatt to make an unconditional offer.

³ Citing the Tribunal’s decision in *Adams v Real Estate Agents Authority (CAC 10070)* [2012] NZREADT 5, at [22].

⁴ Citing the Committee’s substantive decision at paragraph 3.16.

[35] Mr Hargreaves also submitted that the Committee was wrong to find that the appellants had failed to deal fairly with Mr Pallatt. He submitted that there was no sign that Mr Pallatt was incapacitated, and in the absence of any expert evidence before the Committee as to mental incapacity, there is a presumption of mental competence.⁵ He submitted that Mr Pallatt wanted to make an unconditional offer. He had put conditions on his earlier offer, then had an inspection, and done due diligence. He had negotiated for a longer settlement period, and had been to the bank for finance.

[36] He submitted that the Committee's finding of a breach of r 6.2 was based on an idea that the appellants should have ignored Mr Pallatt's wish to make an unconditional offer, sent the offer to his solicitor, then added conditions he had not asked for. He submitted that this amounted to paternalism which is not a requirement of "fairness". He submitted that the Committee's findings directly contradicted previous Committee and Tribunal findings, in which it has been said that it is not the role of an agent to prevent a purchaser from making an offer.

[37] Mr Hargreaves further submitted that the Committee's decision is discriminatory, in breach of s 19(1) of the New Zealand Bill of Rights Act 1990, and s 21(1)(i) of the Human Rights Act 1993, which prohibit discrimination on the grounds of (among other things) age. He submitted that Mr Pallatt was fully competent, and there was no evidence that he was not competent, or even vulnerable. He submitted that Mr Pallatt was entitled to make an unconditional offer, without it being reviewed by his lawyer, yet the Committee decided that he should have been treated differently from other prospective purchasers because of his age.

[38] On behalf of the Authority, Ms Bishop submitted that the core issue for determination is whether licensees acting for a vendor have a duty to protect the interests of a potentially vulnerable purchaser, or an unbridled obligation to advance their own clients' interests. She submitted that the starting point for determining licensees' obligations must be the consumer-protection purposes of the Act, and in the present case, the Committee was correct to find that the appellants were required to use extra caution when dealing with potentially vulnerable prospective purchasers.

⁵ Referring to the Protection of Personal and Property Rights Act 1988, s 5.

[39] She submitted that the appellants' submission is that the appellants' fiduciary obligations to their client vendors required them to pursue their clients' interests where they know they are acting in breach of the Rules. She submitted that this cannot be correct, and that to accept that licensees' fiduciary obligations are absolute would be inconsistent with the purposes of the Act.

[40] Ms Bishop submitted that there are limits to licensees' fiduciary duties of loyalty: clients must accept that licensees will be offering competing properties for sale, and that they have obligations under the Act and Rules, and legislation such as the Fair Trading Act 1986. She submitted that the touchstone must be rr 5.1 and 6.2, and if licensees have reasonable grounds for concern about a prospective purchaser's understanding of a transaction, they are compelled to take care. She accepted that this is necessarily a fact-specific enquiry, but submitted that if licensees are on notice about a customer's vulnerability, they cannot turn a blind eye and proceed without first making diligent and good faith enquiries to ensure that the prospective purchaser is being independently advised, or otherwise adjusting to the prospective purchaser's position.

[41] Ms Bishop further submitted that in the present case, the Committee was correct to find that Mr Pallatt was potentially vulnerable. She accepted that his age, of itself, was not a sufficient warning sign, given his experience in property investment. However, she submitted that the Tribunal could safely infer that Mr Pallatt was in a vulnerable mental position when he signed the unconditional offer, and the appellants ought reasonably to have noticed this and, if acting diligently, fairly, and in good faith, should have taken steps to protect him. She referred to the following:

[a] When Mr Pallatt spoke to his solicitor two days after signing the unconditional offer, he told her that he did not make an unconditional offer, or initial amendments deleting conditions.

[b] Mr Pallatt contacted Mr Barker, Mr Bruce, and Ms Curlewis, and was described as expressing confusion and distress as to the terms of sale, the prospect that Ms Perez had received a commission on the sale, and anxiety at the price he was paying. He was said to have acted out of character.

- [c] Mr Pallatt was buying the property with Ms Perez, an agent in the same company as the appellants, so that the lines between licensee and purchaser were blurred. Ms Bishop noted that that the appellants were sufficiently conscious of the “unorthodox” nature of the situation to require a Form 2 consent.
- [d] Mr Pallatt died within four months of signing the unconditional offer.
- [e] Appraisals of the property fluctuated significantly over the period, and it was sold in October 2018 for \$140,000 less that Mr Pallatt had bought it for in January.

[42] Ms Bishop submitted that even if Mr Pallatt’s mental state had deteriorated after his first visit to the property in November 2017, the appellants should have noticed a deterioration and acted accordingly.

[43] Mr Hargreaves filed submissions in reply. He stressed that the appellants were not submitting that licensees’ fiduciary duties are unfettered, but submitted that they exist independently of the Rules, and r 6.1 should not be interpreted so as to conflict with r 6.2. He further submitted that given that the appellants owed a fiduciary duty to pass on an unconditional offer made by a competent prospective purchaser, doing so could not be held to be “unfair”.

[44] Mr Hargreaves submitted that the difference between the parties’ positions revolved around the factual question of whether Mr Pallatt was so obviously vulnerable that the appellants could not fairly have allowed him to make an unconditional offer. He repeated his submission that the Committee had no evidence that at the time he signed the unconditional offer, Mr Pallatt was exhibiting warning signs or acting in a way which cause the appellants to think he was vulnerable, or potentially vulnerable. He submitted that the appellants saw no evidence of vulnerability or disquiet when he made the offer, and he did not present in any meeting as being vulnerable.

[45] Mr Hargreaves further submitted that Mr Pallatt was an experienced real estate investor, with proof of available assets, and wanted to make an unconditional offer. There was no sign of any vulnerability until several days after the offer was made and accepted. He submitted that the appellants had, in line with the Authority's submissions, made diligent and good faith enquiries, and had ascertained from Mr Pallatt that he:

- [a] had seen a lawyer (if not Ms Wilson, it must have been another one);
- [b] had had two builders advise on the property, and had done due diligence on the LIM;
- [c] had funds, or the ability to get funds, over the long settlement period through accepting the offer he had on the Silverdale property, the sale of his and Ms Perez's houses, or bridging finance;
- [d] was an experienced investor in real estate.

[46] Mr Hargreaves submitted that the only "warning sign" present in this case (from a list suggested by the Authority) was Mr Pallatt's age. He was fit, active, not infirm in mind or body, not ill, not poverty-stricken, not illiterate, and not unsophisticated. He submitted that the only other possible indicator of potential vulnerability was Ms Perez's involvement, and the Committee had not raised any concern in that respect, finding that she and Mr Pallatt were looking for a family home together.

[47] We record that no submissions were made by or on behalf of the second respondents (the original complainants).

Discussion

[48] The Committee found the appellants to have been in breach of the following Rules:

Rule 5.1

A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

Rule 6.2

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

Rule 6.3

A licensee must not engage in any conduct likely to bring the industry into disrepute.

[49] We have also referred to a licensee's fiduciary duty:

Rule 6.1

A licensee must comply with fiduciary obligations to the licensee's client

[50] There was no real dispute that licensees must comply with all of the applicable Rules and statutory provisions. As Mr Hargreaves made clear in his reply submissions, he did not submit that the fiduciary obligation is unfettered.

[51] A licensee must be conscious of, and comply with, obligations and duties owed to all parties in a transaction. No one duty is predominant over all others. Reasonably competent licensees will be aware of, and comply with, their duties, whether they be to consumers in the form of vendor clients, or consumers in the form of prospective purchasers.

[52] Further, there was no dispute that licensees' obligations are considered against the purpose of the Act, as expressed 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 purpose 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.

[53] We refer briefly to the previous Tribunal and Committee decisions referred to in the parties' submissions.

[54] In *Piper & Ebert v Real Estate Agents Authority (CAC 408)*, the licensees' appeals against a Complaints Assessment Committee's findings were allowed in part, but not to the extent of disturbing the overall findings of unsatisfactory conduct.⁶ As relevant to the present appeal, the Committee had upheld complaints by the vendors of a property that the licensees added a clause to the sale agreement and changed the settlement date without their knowledge or approval. The Tribunal was not persuaded that the Committee was wrong to conclude that the licensees were guilty of unsatisfactory conduct in doing so.

[55] Ms Bishop submitted that this case is distinguishable from the present case, as the licensees had gone against the express wishes of their clients, and there was no suggestion of a vulnerable prospective purchaser. Mr Hargreaves submitted that it is relevant to the present case, as an example of licensees being punished for acting on their own initiative to insert a condition which was of benefit to the prospective purchaser but against the interests of their clients.

[56] In *Henderson v Real Estate Agents Authority (CAC 20008)*, the appellant was the purchaser of a property.⁷ She complained to the Authority that she had felt bullied and unfairly pressured by a licensee, and that the licensee had failed to insert a building report condition into her offer to buy the property, leading to her having made an unconditional offer. The Complaints Assessment Committee dismissed her complaint and she appealed to the Tribunal.

[57] The Tribunal received evidence that the appellant suffered from depression and chronic alcoholism. The Tribunal dismissed the appeal, finding that the appellant had not proved that she had asked for a building report condition to be included in her offer. The Tribunal said:⁸

When Mrs Henderson was giving evidence at the hearing it was clear that she was under stress. Had the agents been dealing with her in such a state it would have been most unfair and improper of them to have had her sign an agreement. However there does not seem to be any independent evidence to suggest that Mrs Henderson was in this state when she signed the agreement in January 2013. ...

⁶ *Piper & Ebert v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 32.

⁷ *Henderson v Real Estate Agents Authority (CAC 20008)* [2014] NZREADT 73.

⁸ *Henderson*, at [20](ii).

[58] Ms Bishop referred to the Tribunal’s comment, and submitted that the decision is consistent with licensees owing obligations to a vulnerable prospective purchaser, and that they cannot take advantage of vulnerability even if that is in their client vendor’s interest. Mr Hargreaves submitted that in contrast to that case, in the present case Mr Pallatt was not visibly in distress at the time he signed the unconditional offer.

[59] In *Lloyd v Real Estate Agents Authority (CAC 10056)*, the Tribunal considered a licensee’s appeal against a finding of unsatisfactory conduct, in relation to his marketing of a property.⁹ The Tribunal upheld the Complaints Assessment Committee’s finding in respect of one aspect of the complaint made against him: that the licensee had failed to make it clear to the complainant that, where there were other parties interested in purchasing the property, she should put her best offer forward. As relevant to the present case, the Tribunal found as a fact (after hearing evidence that was not before the Committee) that the licensee had not inserted conditions into the complainant’s offer without her consent.

[60] Ms Bishop submitted that in this decision, the Tribunal confirmed that licensees owe duties to prospective purchasers even when acting for vendors. Mr Hargreaves submitted that the decision supports the appellants’ argument, that a licensee should not let a prospective purchaser make an offer which is not their “best offer”. He submitted that in the present case, it was “natural” that Mr Pallatt would have wanted to put his “best offer” forward (that is, an unconditional offer), as he had already obtained building reports and done due diligence. He submitted that in not preventing him from doing so, the appellants treated Mr Pallatt fairly.

[61] We do not consider that any of the decisions referred to are of particular assistance in determining this appeal. In any particular case, determination of whether (in order to comply with the duties under rr 5.1 and 6.1–6.3) a licensee had a duty to a “protect” a vulnerable, or potentially vulnerable, prospective purchaser will be fact-specific. The enquiry for a Committee considering a complaint is whether, on the evidence before it, the Committee can be satisfied that the complainants have proved the complaint.

⁹ *Lloyd v Real Estate Agents Authority (CAC 10056)* [2012] NZREADT 27.

[62] In the decision under appeal, the Committee was required to be satisfied that at the time Mr Pallatt entered into an unconditional agreement to buy the property he was exhibiting vulnerability or potential vulnerability to the extent that would have led a reasonably competent licensee to be concerned as to whether he was in need of protection with regard to submitting the unconditional offer.

[63] In her submissions, Ms Bishop acknowledged that age, alone, is not a sufficient ground for “protection”. She cited a commentator’s summary of “warning signs”, as follows:¹⁰

The modern approach is to ask more generally whether one party is at a serious disadvantage vis-à-vis the other. An exhaustive list of circumstances amounting to such a special disadvantage cannot be produced, but such a list would include “poverty or need of any kind, sickness, age, ... infirmity of body or mind, drunkenness, illiteracy or lack of education, [and] lack of assistance or explanation”. Examples from other cases which may be added to this list include stress or anxiety coupled with ignorance of the value of the subject-matter of the contract. The key factor is that the disadvantaged party must be, for whatever reason, unable to make proper judgments as to what is in his or her own best interests.

[64] If Mr Pallatt had, at the time he signed the unconditional offer, presented as showing signs of incompetence, poverty, sickness, infirmity of body or mind, drunkenness, illiteracy or lack of education, and the inability to make proper judgments as to what was in his best interests, then the Committee would have been correct to find that the appellants had a duty to take steps to “protect” him.

[65] The Committee referred to the statements of Mr Barker, Mr Bruce, Ms Curlewis, and Ms Wilson. However Mr Barker and Mr Bruce did not meet with Mr Pallatt until May 2018, and Ms Curlewis was ambiguous as to whether she spoke with Mr Pallatt shortly after he signed the unconditional offer, or shortly before his death. We do not consider their evidence to be of significant weight when determining Mr Pallatt’s presentation to the appellants when he signed the unconditional agreement.

[66] Ms Wilson stated that she spoke with Mr Pallatt on 26 January, and that she would have liked to advise him to include LIM and building report conditions “as he was elderly and not in good health”. However, it appears from her statement that she

¹⁰ James Every-Palmer “Unconscionable Bargains” in Andrew Butler (gen ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, 2009 717 at [23.2.1.] (citations omitted).

had not had contact with Mr Pallatt for some time, as she denies having met with him in December 2017, when he made the first offer on the property. Accordingly, her evidence does not assist in determining whether Mr Pallatt exhibited signs of vulnerability, or potential vulnerability, when he signed the unconditional offer.

[67] We do not accept Ms Bishop's submission that we can infer from the evidence referred to by her that Mr Pallatt was showing signs of vulnerability when he signed the unconditional offer, to the extent that the appellants ought reasonably to have noticed this and, if acting diligently, fairly, and in good faith, would have taken steps to protect him.

[68] Having rejected the complaint based on Ms Perez's involvement, and having found that Mr Pallatt had had the opportunity, over a period of several weeks, to take legal advice, and that the appellants did not prevent him from doing so, the only reliable evidence before the Committee that Mr Pallatt was vulnerable, or potentially vulnerable, when he signed the unconditional agreement, was his age.

[69] We accept Mr Hargreaves' submission (with which Ms Bishop agreed) that Mr Pallatt's age was not in itself sufficient to require a reasonably competent licensee to take steps, such as refusing to submit his offer until it had been reviewed by a solicitor, or inserting clauses which he had not requested.

[70] With respect to the time at which he signed the unconditional agreement, the Committee had before it unchallenged evidence that Mr Pallatt had previously made an offer to buy the property conditional on a builders report and satisfactory LIM. Although that offer was rejected, the Committee had before it evidence that Mr Pallatt had had two builders inspect the property and that he had done due diligence as to the LIM. It also had evidence that Ms Molloy had taken Mr Pallatt through the provisions of the offer before he signed it.

[71] The Committee also had evidence of the registered value of the property at \$2.65 million (which Mr Pallatt's offer exceeded by \$50,000), and the Lyons & Co independent market valuation at \$2.76 million, which was \$60,000 more than Mr Pallatt's offer for the property.

[72] As to Mr Pallatt's ability to complete settlement, the Committee accepted that the long settlement period was intended to give Mr Pallatt time to sell his own home. There was evidence before it that Mr Pallatt had shown the appellants an offer he had on his Silverdale property, which was well above the amount of his unconditional offer. Further, it had evidence that Mr Pallatt had taken steps to obtain finance.

[73] The Committee also had Mr Farmer's statement that Mr Pallatt said he had seen a lawyer as "the wheels were in motion", and that Mr Pallatt was happy to accept an offer on the Silverdale property. Further, the Committee had evidence that Mr Pallatt had been viewing the property over a lengthy period, and had negotiated a lengthy settlement period, and that he was experienced in real estate transactions.

[74] On the evidence that was before the Committee, we have concluded that the Committee erred in finding that it was, or should have been, obvious to the appellants that Mr Pallatt was vulnerable, or potentially vulnerable, to the extent that they should have sent Mr Pallatt's offer to this solicitor before he signed it, and that they should have "inserted some conditions to protect Mr Pallatt's interests".

[75] We find that the Committee was wrong to find that the appellants breached rr 5.1, 6.2, and 6.3 by presenting his unconditional offer to the vendors.

[76] We therefore conclude that the appellants' appeal must be allowed, and the Committee's finding of unsatisfactory conduct quashed. In the light of that conclusion, the appellants' appeal against the Committee's penalty decision must also be allowed, and the Committee's penalty orders quashed.

Outcome

[77] The appellants' appeals are allowed. The Committee's substantive decision finding the appellants guilty of unsatisfactory conduct is quashed, and the Committee's penalty orders are also quashed.

[78] 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.