

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 28

Reference No: READT 010/2023

IN THE MATTER OF

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

BETWEEN

**WHALAN AND PARTNERS LIMITED t/a
BAYLEYS CHRISTCHURCH**
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2107)**
First Respondent

AND

SL
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
P N O'Connor (Member)

Representation:

Counsel for the appellant:	T M Pasley
Counsel for the first respondent:	N Sirisamphan
The second respondent:	No appearance

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 06 October 2023

INTRODUCTION

[1] The vendors of a residential property sold by the licensees complained about being charged GST on the commission by the agency. They pointed to contradictory provisions in the agency contract and to an email from one of the licensees confirming the estimated commission cited in the contract was GST inclusive. The Committee dismissed the complaint against the licensees, but found the conduct of the agency to be unsatisfactory.

[2] The agency appeals. It says this is a contractual dispute and it was entitled to GST under the contract. It further says the Committee was unfair to find the agency guilty, yet it decided to take no action against the licensees who were primarily involved in the impugned conduct.

BACKGROUND

[3] LQ and NQ are licensed salespersons under the Real Estate Agents Act 2008 (the Act). They will be known as LQ and NQ respectively, and collectively as the licensees. They were engaged by Whalan and Partners Ltd t/a Bayleys Christchurch (the agency). The agency is a licensed agent under the Act.

[4] On 24 May 2021, the vendors (who will be known as OW and PW, and collectively as the vendors) and the agency signed the latter's agency contract concerning the sale of the vendors' residential property in South Canterbury. They signed in black ink (the relevance of this detail will shortly become apparent). It was signed on behalf of the licensees by NQ in blue ink.

[5] In the "Commission" section of the contract, the printed text of cl 7.3 read:¹

The estimated amount of Commission payable by the Owner under this contract (Estimated Commission) is \$ _____ (plus GST) and is based on the highest price in the price range set out in the annexed CMA. The Owner acknowledges that the Commission actually payable under this contract will be based on the actual Consideration paid for the Property ... and may differ from the commission based on the appraised price set out in the CMA ...

[6] There are two versions of cl 7.3 as it was amended two days later. The original version provided to the vendors on 24 May 2021 has not been sent to the Tribunal, but its form is apparent from the revised version sent to the Tribunal read in conjunction with the subsequent communications. The handwritten figure of "29,350.00" was inserted after the "\$" symbol in the original version. It was in blue ink. Following the figure, the

¹ Agency contract (24 May 2021), cl 7.3; bundle at 92.

printed phrase “(plus GST)” has been crossed out, probably in blue ink. It has been replaced in blue ink by the handwritten phrase “Inc of GST” added immediately above.

[7] In the next section of the contract, “Marketing Budget” (at cl 8.1), the figure of “2,307.99” has been handwritten after the “\$” symbol in what appears to be blue ink. It was followed in the printed script by “(plus/incl GST)” with a cross through “plus” probably in blue ink.

[8] The “All transactions” part of the “Bayleys Schedule of Fees” section of the contract stated in bold at item 2 (p 6 of the contract):²

All charges are exclusive of GST. GST is payable in addition to all charges.

[9] The annexed comparative market analysis (CMA) referred to in cl 7.3 gave a range of \$850,000 to \$950,000. The “Marketing investment” section of the CMA listed various marketing costs amounting to a total of \$2,002.99, made up of costs of \$1,741.73 plus GST of \$261.26. The “Professional fees” section repeated the message that all charges were exclusive of GST, then set out how to calculate the total fee, being:

- administration charge of \$600
- 4% on first \$500,000
- 2.5% on balance

[10] The vendors sent an email to the licensees on 25 May 2021 concerning the agency contract. In relation to the statement “All charges are exclusive of GST” (item 2 on p 6), the vendors said this was not correct as the contract elsewhere showed the marketing, fees and commission to be GST inclusive. The vendors specifically referred to cl 7.3 where “Inc of GST” was written. They further added they were not GST registered and pointed out that “IS” in “IS/IS NOT GST registered” (at cl 10.1(k) of the contract) had not been deleted.

[11] LQ replied the following day, 26 May 2021. She acknowledged the vendors were not GST registered and stated the property would be sold inclusive of GST. She added (*verbatim*):

...we have amended the Listing documents to your changes below and attached an updated copy...

With regards to the marketing/commission fee amount quoted to you on your property, I have quoted these amounts incl GST, but the GTS component is already included in these totals. As discussed, the commission amount won't be known until we have secured a sale on your property with the price you have

² Bundle at 95.

agreed to sell for. We will then let you know the commission amount you will be charged.

[12] An updated agency contract was sent to the vendors by LQ with her email of 26 May 2021 and by NQ on 27 May 2021.³ This is the version of the contract sent to the Tribunal.

[13] It appears to the Tribunal that the following changes were made to the contract:

1. The handwritten figure of “29,350.00” in blue ink has a dash in black ink through it.
2. Above the figure (crossed out in black ink) and the printed GST phrase (crossed out in blue ink) is “\$31,850 —,” handwritten in black ink.
3. The “IS” in cl 10.1(k) was blacked out.

[14] There appears in the Authority’s bundle sent to the Tribunal an invoice (21 June 2021) from the agency addressed to the vendors. It showed the marketing costs to be \$2,120, to which GST of \$318 was added, giving a total to pay of \$2,438. It is not known whether it was sent to them or paid.

[15] The property was sold conditionally to the purchaser on 26 July 2021 for \$932,000.

[16] The agency’s Deal Transaction Report (undated, but presumably completed by the licensees on about 26 July 2021) showed commission of \$31,400, to which GST of \$4,710 was added, giving a total commission of \$36,110. The “Yes” box was ticked in relation to “GST Discussion”, with the comment, “Being sold inclusive of GST”.

[17] The sale and purchase agreement became unconditional on 6 September 2021.

[18] The agency sent an invoice (dated 7 September 2021) to the vendors. It recorded the sale price as \$932,000, with the total fee being \$36,110 (\$31,400 + GST of \$4,710). The total fee was deducted from the deposit of \$93,200, leaving a balance of \$57,090 which had been banked into the vendors’ account.

[19] The vendors sent an email to the licensees on 11 September 2021 concerning the “Overcharge of commission”. According to the vendors, they had pointed out several times the discrepancy in the contract wording regarding the GST payable. They were assured the commission would be as per cl 7.3, which stated the estimated commission

³ See the Committee’s decision, Complaint No: 44427 (28 February 2023) at [3.38]–[3.39].

was \$31,850 (with “plus GST” struck out and “Inc of GST” handwritten). The licensees had also originally written \$29,350, but after their query had changed it to \$31,850. The vendors observed that \$31,850 was based on \$950,000 (the highest price in the estimated range) calculated in accordance with the “Bayleys Schedule of Fees” and “Professional fees” sections of the contract and CMA respectively. Hence, state the vendors, the total commission charged should be \$31,400, based on the actual price of \$932,000. They had been overcharged \$4,710.

[20] The agency’s general counsel replied to the vendors by email on 17 September 2021. The issue raised was said to be about the estimate of commission. The initial estimate written in blue pen was \$29,350, with “plus GST” deleted and “Inc of GST” added. Counsel stated this was not an accurate estimate for the top of the CMA range. The fee for a sale at \$950,000 was added in black pen, but arguably it did not include GST because “Inc of GST” was not written in black. The agency did not retain the GST component of the fee, so it was always excluded from the calculation of fees in cl 7.3. The vendors’ argument appeared to be that the estimate was a binding commitment, based on discussions with the staff. The licensees did not dispute that GST was discussed but both are adamant there was never a discussion about reducing the fee. The documentary evidence supported the view that the correct fee was charged.

[21] The vendors responded to the general counsel by email on 18 September 2021. They agreed there was never a discussion about a reduction in the fee. One of the licensees had made the handwritten change to the contract and when the GST issue was raised, the licensees brushed aside the concern with the assurance that the fee would be as per the example in cl 7.3. Nor was the argument about an estimate being a binding commitment. Their position was that they should be able to trust the accuracy of the contract, which showed that the fee on \$950,000 would be \$31,850 inclusive of GST.

[22] In an internal email from LQ to the general counsel on 18 September 2021, the author said it was clear the vendors did not want to pay GST. An estimate was clearly that. They were fully aware that GST had to be added to all fees (as set out in the “All Transactions” box of the contract). The vendors had signed this box.

[23] In an email to the vendors on 20 September 2021, the general counsel confirmed her conclusion. They had initialled the “All Transactions” section of the “Bayleys Schedule of Fees” stating (in bold) that the charges were exclusive of GST fees. The estimate (at cl 7.3) could only be relied on as a guide and was less likely to be accurate if amended by “persons unknown” to be inclusive of GST.

Complaint to Authority

[24] On 21 September 2021, the vendors sent an email to the Authority recording the history of their dispute with the licensees and the agency over the commission. They noted in their statement that the only change to the contract after they raised the issue on 25 May 2021 was to the commission amount, which went from \$29,350 to \$31,850 but was “still ‘Inc of GST’”. The suggestion by the general counsel of an amendment by “persons unknown” was ridiculous. The vendors requested an investigation and that the agency be required to refund the overcharged \$4,710.

[25] In an email to the Authority on 23 September 2021, the vendors stated they do not believe any reasonable person could claim the contract was clear and accurate when clauses disagreed with each other. They brought this to the attention of the licensees at the very start of the process and received a reply from LQ that GST was included.

[26] A formal complaint form was filed by the vendors with the Authority on about 6 October 2021 (form and covering letter dated 27 September 2021). The vendors stated that despite raising the issue at the start that cl 7.3 included GST and LQ giving written and verbal confirmation this was correct, they had been wrongly charged GST.

[27] The Authority wrote to the licensees on 28 February 2022 noting that the vendors had been charged more commission than they expected. It was recommended that the licensees review their practices to ensure they met their obligations. When making changes to an agency contract, it was recommended they seek input from a manager so the changes were consistent with other clauses. In this case, while the commission was calculated correctly according to the contract, the incorrect amount had been given as an estimate giving the vendors the wrong idea.

[28] The Authority referred the complaint to the Committee which issued a Decision to Inquire on 22 March 2022.⁴ It noted that the complaint had been made against the licensees and the agency. In respect of the agency, it identified the issues as:

1. Whether the agency wrongly charged an additional \$4,710 in commission.
2. Whether the agency ensured the licensees were properly supervised and managed.

[29] An explanation was provided on 5 May 2022 to the Authority by general counsel (counter signed by both licensees). The following points were made:

⁴ Complaint No: C44427 Decision to Inquire (22 March 2022); bundle at 189–191.

1. The heart of the dispute was whether an estimate was a binding commission agreement with the client. That was a contractual determination and should be properly tested in a civil forum, not by the Committee. If the Committee elected to make a finding, it was submitted the estimate was not binding as it was not initialled by the vendors and it was never agreed by the agency.
2. It was clear from the documents and emails that the vendors were aware of the commission to be charged and never queried the amount. They were arguing that a genuine mistake in an estimate of fees entitled them to compensation from the agency, even if they knew about the mistake from the outset. They recognised the inconsistency between the estimate and the schedule of fees at the time the listing was executed. They should not be able to seek a remedy based on that mistake.
3. There was a regrettable miscommunication surrounding the estimate. The service fee was clear, as was the vendors' ability to calculate it. They were aware the estimate and the schedule of fees were at odds at the time of listing, but elected to wait until the agency had completed its service before seeking to enforce the lower commission claim.
4. The first figure in the estimate was not based on the highest appraised value. When this was queried, the commission on the highest value was correctly calculated, but GST was not included in either calculation. The licensees have apologised to the vendors for this. It was caused by a confusing discussion between the vendors and the licensees about the requirement to pay GST on a commission. It was accepted that if GST was intended to be included in the estimate, there was a miscalculation. It does not, however, reach the standard required for unsatisfactory conduct.
5. The GST component was excluded under the standard wording of the agency contract. The change to that standard wording, to make the calculation inclusive of GST, had effectively caused the confusion.
6. During the "submission" (presumably the author means "listing") meeting between the vendors and the licensees, the GST issue was covered. The vendors laboured the point about GST not being applicable. The licensees were confused by these comments and the changes to the standard wording at cl 7.3. Neither recalled writing "Inc of GST" in cl 7.3. It was likely

that it was written by OW, as it was in the same coloured ink as his signature. The question to be determined was who added “Inc of GST”.

7. The vendors were not misled. It had not been clearly established that the licensees intended to calculate the fee inclusive of GST despite the handwritten alteration to that effect. Even if the alteration was made by the licensees and should have included GST, it was still an estimate only. The vendors were aware this was not the maximum fee they might have to pay.

[30] In an email to the Authority (16 August 2022), the vendors state that the suggestion OW changed the contract was pure nonsense and insulting. He would not have raised the GST anomaly if he had changed the contract.

[31] The vendors sent another email to the Authority on 17 August 2022. They said it was the licensees who originally wrote by hand the wrong commission in cl 7.3. The handwritten “Inc of GST” was on the contract when they were given it to sign. The only change made was to increase the commission to \$31,850 to reflect the highest price in the range set out in the CMA, but it was still “Inc of GST”. They had never queried the calculation, nor asked for a reduction. What they had queried was “Inc of GST”, which was at odds with a later clause. The fact they raised this the next day and LQ confirmed by email that the commission example included GST made the claim that they remained silent doubly odd and upsetting.

Decisions of the Committee

[32] The Committee relied on rr 5.1 and 10.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules):

5 Standards of professional competence

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

...

[33] The Committee issued its liability decision on 28 February 2023.⁵ In respect of the licensees, it considered that they initially gave an incorrect commission estimate, as the contract required it to be based on the highest price.⁶ However, this was corrected when it was pointed out. The initial error was a minor breach of r 5.1. There was nothing to suggest the licensees misled the vendors as to the commission. It appeared they

⁵ Complaint No: C44427 (28 February 2023).

⁶ Rule 10.6(a) requires a licensee to provide and explain an estimate of the commission based on the appraised value of the property.

were a tad sloppy in completing the agency contract. No further action would be taken against the licensees.

[34] Turning to the agency, the Committee noted that the invoice (7 September 2021) showed a total fee of \$36,110, being \$31,400 plus GST. The vendors said they should have been charged \$31,400. The agency's schedule of fees stated that all charges were exclusive of GST. However, when the amount in cl 7.3 was corrected by the licensees, "(plus GST)" was deleted and "Inc of GST" was added. This amendment was not initialled by the parties.

[35] The Committee noted that "29,350" and "Inc of GST" were written in blue pen, and "(plus)" was deleted in blue pen. The figure was corrected to \$31,850, reflecting the highest price, in black pen. The figure of \$2,307.99 in cl 8.1 was written in blue pen, as was the deletion of the "plus" for GST, thereby making the marketing fee inclusive of GST. NQ signed the contract in blue pen. The initials and signatures of the vendors were in black pen. It was therefore possible that one of the licensees had completed the agency contract with a blue pen. When the commission figure in cl 7.3 was corrected to reflect the highest price, it was possible the words "Inc of GST" were written in. It appeared to the Committee that the licensees quoted the commission and the marketing fees as being GST inclusive.

[36] The Committee found that the vendors did not labour the point about GST not being applicable to the transaction, as contended. They were saying the recorded commission was inclusive of GST. The agency contract contained conflicting provisions, since the schedule did not align with cl 7.3.

[37] The agency had alleged the vendors were aware of the miscalculation and chose to stay silent, but the Committee found the vendors did not remain silent. They had raised the GST issue the next day, on 25 May 2021.

[38] The Committee did not accept the agency's contention that, if GST was intended to be included, there was a miscalculation or a mathematical error. LQ's email was clear that the amounts were inclusive of GST.

[39] According to the Committee, the agency said it checked every agency contract. Had it checked this contract, it would have noted the GST position. It did not raise any concerns.

[40] It was the agency which charged the commission (plus GST) relying on a contract with contradictory provisions. The Committee concluded that the agency charged GST in circumstances where it ought not to have, because the contract was unclear as to the

GST position. This created uncertainty and confusion. The agency breached r 5.1 and was guilty of unsatisfactory conduct.

[41] As to whether the licensees required supervision, the Committee noted they were both experienced and did not need day-to-day supervision. No further action would be taken in relation to the issue as to the adequacy of the agency's supervision of the licensees.

[42] The Committee sought submissions on the penalty orders. In their submissions (undated), the agency submitted that the breach was at the lower end of the scale of unsatisfactory conduct. It did not act deliberately in breach of the Act or the Rules. The agency had learned from the complaint and would ensure it remained alert to potential issues in the future. The Committee should not make an order, but if it was minded to do so, an apology would be appropriate and it would make a donation to charity on behalf of the vendors.

[43] In the penalty decision on 24 May 2023,⁷ the Committee listed the mitigating factors:

1. The agency tried to resolve the issue by offering to make a donation to charity of the vendors' choice.
2. The breach was not deliberate.
3. The agency responded to the vendors' communications on the process they believed had been followed in calculating the commission.

[44] It regarded as an aggravating factor that the agency checked every agency contract to ensure the estimated commission was correctly completed. Had it done so, it would have noted the contradictory provisions.

[45] The Committee concluded that the agency's conduct was at the low to mid range of the scale of unsatisfactory conduct. It was a one-off breach and there was an absence of deliberate or deceptive conduct. However, while the agency accepted there may have been a miscalculation in the estimated commission, rather than acknowledging an error, it persisted in contending the commission charged was correct.

[46] The Committee did not consider a reprimand was appropriate, given the low to mid classification and the agency's offer to make a donation to charity. A fine was not appropriate as the only issue was the refund of GST.

⁷ Complaint No: C44427 Decision on Orders (24 May 2023).

[47] The Committee ordered the agency to apologise to OW and to rectify the vendors' loss by refunding \$4,710 to them.

APPEAL

[48] On about 22 June 2023, the agency appealed against the Committee's decisions.

Submissions of the agency

[49] In submissions (1 August and 12 September 2023), the agency contends it was incorrect of the Committee to take no action against the licensees, the parties primarily involved in the impugned conduct, yet find the agency guilty of unsatisfactory conduct.

[50] The Committee found it to be unsatisfactory that the agency failed to notice the licensees' error in the agency contract, an error the Committee found to be minor ("a tad sloppy"). These findings are contradictory. The communications about the estimated commission were all between the vendors and the licensees. The agency was unaware of them until after settlement. It was the licensees or vendors who altered the agency contract to state that the estimated commission included GST. The standard wording makes it clear the estimated commission excludes GST. The responsibility for clarifying this variation lay with the licensees.

[51] The Committee's joinder of the agency raises concerns that it did so to ensure that a refund could be ordered against the agency rather than the licensees. At the time of joinder, it said it was concerned about whether there had been adequate supervision of the licensees. However, they were very experienced. The Committee confirmed they did not need day-to-day supervision, so the basis on which they were joined was flawed. The Committee has employed an 'end justifies the means' artifice to find the agency liable and order a refund.

[52] The Committee's conclusion was based on the premise the agency had been negligent. The Committee said that as a general policy the agency checked that agency contracts satisfied s 126 of the Act and here it had failed to notice the GST discrepancy.⁸ The agency's checklist (sent to the Tribunal) is designed to ensure an enforceable agency contract. The calculations of the estimated commission were not checked for accuracy because the agency was not aware of the significance of the issue, since the contract provides an estimate and a formula for calculating the actual commission. The checking of the precise figure is a high standard to impose on the agency.

⁸ Section 126 of the Act states that an agent is not entitled to commission unless the real estate agency work is performed under a written agreement.

[53] The Committee has failed to give sufficient weight to the key issue of “estimate” versus “agreed commission” from a contractual perspective. It was mistaken to inquire on the assumption that the vendors were misled, given there was a contractual dispute between the parties. The Committee subsequently found there was nothing to suggest the vendors were misled. The estimated commission was merely an estimate or indication as to the actual commission to be charged when the property was sold. This was clear to the vendors from LQ’s email of 26 May 2021 referring to the commission amount being unknown until the sale. The estimated commission is not an enforceable agreement to pay that estimated amount, since the actual price was not then known. Once the price was known, the actual commission would be calculated in accordance with the formula in the schedule of fees. Clause 7.3 is not the contractual mechanism on which the agency bases its future actual commission.

[54] The agency does not allow a variation of commission at listing without amending the schedule of fees. Any reduction would be noted in the deal transaction report. The report clearly indicated that the commission had not been changed. It is fair and reasonable that the vendors pay the actual commission. The Committee’s decisions have provided the vendors with a windfall.

[55] The difference of 15 per cent representing GST was a matter between the licensees and the vendors and cannot reasonably be said to be professional negligence by the agency. That would require a level of perfection, rather than the actual standard of reasonable competence.

[56] As a service provider, the agency adds GST to commission, whereas with marketing costs, it is a conduit between the client and a third party, so GST is included. The email of 26 May 2021 did not correctly explain this point.

[57] The vendors did not raise the issue of an error in the estimate with the agency until it had completed its service. The agency considers this may have been a conscious choice by the vendors rather than an unexpected discovery of the discrepancy.

[58] The agency confirms that every agency contract is now checked to ensure the estimated commission is accurate.

[59] It is submitted that the agency had no control over the conduct leading to the error and was not negligent. There are reasonable grounds to overturn the finding of unsatisfactory conduct.

[60] The Committee’s order to pay \$4,710 to the vendors is inequitable. The vendors were not misled, as the Committee found. They received the full value and benefit of the

professional services, without having to pay the fair, reasonable and agreed price for them.

[61] Further, the penalty decision is inconsistent with previous Committee decisions on similar complaints where findings of a breach of r 5.1 by a supervising agent have been made.⁹ If the Tribunal upholds the finding of unsatisfactory conduct, it ought to apply a penalty commensurate with those for similar conduct, keeping in mind that the finding of unsatisfactory conduct is a significant penalty itself through commercial stigmatisation. The comparable penalties have not included any type of payment, let alone to clients who were not misled and received the benefit of the licensees' professional services.

Submissions of the Authority

[62] In its submissions (1 September 2023), the Authority (on behalf of the Committee) submits that the findings against the agency were within the Committee's jurisdiction and were made on a fair and proper basis.

[63] It is submitted that the key document at the heart of the complaint is the agency contract. It is between the agency and the vendors. The responsibility for the contract lies with the agency. It is fundamental to any real estate transaction.¹⁰ It is vital for consumers that such contracts are accurate, internally consistent and not confusing.

[64] The agency's standard contract is *pro-forma* and prepared by the agency. Any amendments should have been picked up by the agency. The specific clause is a key part of the contract and the agency ought to have exercised skill and care when it checked the document. The agency says it was unaware of the GST issue until after settlement, despite its policy to check all such contracts. In these circumstances, the Committee found a breach of r 5.1. It is the agency which prepares the standard contract, distributes it to the licensees and checks every completed contract. The extent of control and responsibility that the agency had meant that it could not be blameless for errors in the contract.

[65] The Authority rejects the accusation that there was any predetermination or cynical approach by the Committee to joinder of the agency. It was clear there were issues relevant to the agency, as the decision to inquire identified.

⁹ C40928 (12 May 2023), C43490 (13 March 2023), C48662 (23 February 2023), C33058 (10 November 2020) and C45362 (27 March 2023),

¹⁰ Real Estate Agents Act 2008, s 126; and *Soft Technology JR Ltd v Jones Lang Lasalle Ltd* [2022] NZCA 353 at [70].

[66] In respect of the agency's submission that checking precise figures is a high standard to impose, the Authority says that responsibility for any miscalculation was not part of the finding. Rather, it was the agency's role in allowing the inconsistent terms of the contract to be agreed and to proceed that was the basis of the breach.

[67] While the agency suggests the issue is a contractual dispute, it is submitted that any such dispute exists in parallel with the inquiry into professional conduct. The Committee has jurisdiction over a licensee's conduct, whether or not the parties have a separate civil dispute.

[68] It is further submitted that the Committee's assessment of the agency's conduct was not dependent on its findings concerning the licensees. The conclusions regarding the agency and the licensees are not contradictory. It is not uncommon for investigations to involve multiple licensees with each of them owing distinct professional obligations. It was not unfair to find the actions of the licensees were not sufficiently serious for a finding of unsatisfactory conduct while the agency's role and responsibility meant it was. The Committee has a wide discretion to take no further action.

[69] Having found the agency was guilty of unsatisfactory conduct, the Committee could make an order to rectify the agency's error. The order to pay \$4,710 was made on a proper basis. The earlier penalty decisions of the Committee relied on by the agency founded on supervision or s 126 of the Act, are not analogous.

JURISDICTION AND PRINCIPLES

[70] This is an appeal pursuant to s 111 of the Act.

[71] The appeal is by way of a rehearing.¹¹ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.¹² After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.¹³ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁴

[72] A hearing may be in person or on the papers.¹⁵ A hearing in person may be conducted by telephone or audiovisual link.

¹¹ Real Estate Agents Act, s 111(3).

¹² *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

¹³ Real Estate Agents Act, s 111(4).

¹⁴ Section 111(5).

¹⁵ Sections 107 and 107A.

[73] This appeal is against the determination of the Committee under s 89(2)(b) that unsatisfactory conduct was proven. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.¹⁶ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.¹⁷

[74] The appeal in relation to the penalty is an appeal against the Committee’s exercise of a discretion. This requires an appellant to establish that the Committee made an error of law or principle, took into account irrelevant matters or failed to take into account relevant matters, or that the Committee’s decision on penalty is plainly wrong.¹⁸

[75] The Tribunal issued a procedural Minute on 6 July 2023 as to the conduct of the appeal. The Authority filed in the Tribunal on 18 July 2023 a bundle of the documents that were before the Committee.

DISCUSSION

[76] In their submissions (1 August 2023), the agency sets out four issues,¹⁹ though it is our view that the agency’s third and fourth issues are the only substantive ones. Nonetheless, we will deal with the first and second issues.

1. *Was the Committee correct to join the agency to the investigation?*

[77] It is submitted the Committee incorrectly joined the agency to a complaint which primarily concerned the licensees’ conduct.

[78] The agency wrongly attributes joinder to the Committee. It was the vendors who made the complaint against the agency, as well as the licensees.²⁰

[79] Even if the vendors had not complained directly against the agency, the Committee had the power to investigate its conduct connected with the individual licensees.²¹ As the Authority submits, investigations commonly involve multiple licensees each with their own distinct obligations. There is a good reason for giving the Committee the discretion to add licensees to an investigation. Those complaining to the

¹⁶ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16]; and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹⁷ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 16, at [4]–[5]; and *Scandrett*, above n 16, at [112].

¹⁸ *WM v Real Estate Agents Authority (CAC 1906)* [2022] NZREADT 7 at [56].

¹⁹ Submissions of the agency (1 August 2023) at [9].

²⁰ Complaint (27 September 2021); bundle at 13.

²¹ Real Estate Agents Act, s 78(b). An agency may also be an agent under s 36(3) of the Act and therefore a licensee. The agency here is an agent and licensee.

Authority will not necessarily know the full scope of the wrongdoing or the wrongdoers, so it is appropriate for the relevant investigating bodies such as the Committee to make such decisions.

[80] It is further submitted that the Committee's joinder of the agency to the complaint raises concerns that it did so to ensure a refund could be ordered against the agency. According to the agency, at the time of joinder the Committee said it was concerned as to whether there had been adequate supervision of the licensees. However, in this case the licensees were very experienced and the Committee ultimately found no failure to supervise. The agency therefore contends that the Committee's basis for joining the agency was flawed.

[81] The Authority in its submissions rejects the accusation that any predetermination or cynical approach was taken. It says it was clear that there were issues relevant to the agency.

[82] The agency's questioning of the Committee's motive in investigating the agency is of no merit. Putting to one side that it was not the Committee which joined the agency, the contention that supervision was the only or even primary concern of the Committee is wrong. The first issue identified by the Committee in the decision to inquire, before it even deals with the licensees, is whether the agency wrongly charged the vendors with \$4,710. It seems to us self-evident, as will become apparent later in our assessment, that the Committee correctly decided to inquire into the agency's conduct in invoicing the vendors an extra \$4,710. There is not an iota of evidence supporting the agency's attack on the Committee's motive.

2. Was the Committee correct to inquire into the agency's conduct?

[83] This is put two ways:

1. The Committee ought to have dealt with the matter by way of a compliance letter.
2. This was a contractual dispute.

[84] Taking the first point, the agency says the error was an accidental, incorrect calculation, rather than a breach of the Act or the Rules. Instead of deciding to inquire pursuant to s 79(2)(e) of the Act, the Committee could have dismissed the complaint as inconsequential or frivolous pursuant to s 79(2)(a) to (c).

[85] We note that the Authority did send such a compliance letter to the licensees, but it also referred the complaint to the Committee. It seems to us that the justification for the inquiry is apparent from the subsequent liability decision of the Committee, with which it will be seen shortly we agree. In doing so, we do not accept that the agency's wrongful conduct is merely a miscalculation or accidental failure to identify a miscalculation by the licensees.

[86] This brings us to the agency's contention that this is a contractual dispute. This is a 'red herring'. The inconsistency in the contractual provisions as to whether GST is to be added to the commission undoubtedly has contractual consequences between the vendors and the agency, but it was not the role of the Committee and nor is it our role to determine those consequences. That is for a civil court. As the Authority submits, the contractual dispute exists in parallel with the professional standards and disciplinary regime. Our role, like that of the Committee, is to assess the conduct of the agency and the licensees in terms of the professional standards set by the Act and the Rules.

[87] The agency says it is clear the estimated commission was only intended to be an approximate and non-binding indication as to the fee ultimately payable. The actual sale price and hence commission (calculated in accordance with the contractual mechanism in the schedule of fees) would not be known at the time the agency contract is signed.

[88] That may be correct in terms of contract law. But it is not the point in a disciplinary context and it was not the basis of the vendors' complaint. The focus here is on the agency's conduct on two occasions, being when it reviewed the draft agency contract and later when it invoiced the vendors for commission post-settlement. There will be cases where the contractual obligations of the parties are critical to assessing professional conduct, but that is not the position here. For the reasons given later, the agency's conduct in the circumstances here is unsatisfactory irrespective of any contractual right to charge GST.

3. *Was the Committee correct to determine that no action be taken against the licensees, but to determine the agency was guilty of unsatisfactory conduct?*

[89] It is necessary to first decide a critical factual issue raised initially by the agency's general counsel and now by the agency's counsel on appeal, namely who wrote "Inc of GST" in cl 7.3. The general counsel says it was likely written by OW. The Committee found that it was possible that one of the licensees added the phrase when correcting the estimated commission in cl 7.3 to that of the highest price in the estimated range. The agency's current counsel alleges the alteration was made by either the licensees or the vendors.

[90] It is unfortunate that the agency has made this unjustified attack on the *bona fides* of OW. The evidence supports the Committee's position that one of the licensees made the alteration, though we find it was likely made on a different occasion to that identified by the Committee.

[91] The precise anatomy of the completion of cl 7.3 and its revision is set out earlier. NQ signed the contract in blue ink on behalf of both licensees. The vendors both signed in black ink. The figure "29,350.00" and the phrase "Inc of GST" are in blue ink, as is the crossing out of "(plus GST)". The corrected commission figure of "31,850" and the dash connecting that figure to "Inc of GST" are in black ink, as is the crossing out of "29,350.00".

[92] It is not disputed that the licensees wrote both figures. The most likely scenario is that NQ wrote "Inc of GST" when he crossed out "(plus GST)" and added the figure of \$29,350.00, at the same time signing the contract. He did all of this in blue ink. The Committee correctly found that it was one of the licensees who wrote "Inc of GST", but we find that occurred when the contract was originally completed and not when the estimated commission was later revised. The contract was then sent or perhaps left with the vendors to sign on 24 May 2021. The next day the vendors raised the issue in an email.

[93] LQ responded on the following day, 26 May. In her email, she said the quoted commission fee included GST. She returned the contract to the vendors which had been amended. One of the licensees, presumably LQ, had crossed out "29,350.00" and written above it "\$31,850" with a long dash beside it, all in black ink. The dash connected the new figure with "Inc of GST" in blue ink. The handwritten amendments in black, coupled with the email, were plainly a message to the vendors that the estimated commission and later the actual commission were inclusive of GST.

[94] We find that both the licensees knew and intended that the commission example in cl 7.3 was inclusive of GST and so would the actual commission charged later when the property was sold.

[95] We do not know why the licensees effectively waived payment by the vendors of GST. They are experienced licensees and are unlikely to have been confused as to whether GST should be added. We do not know why they did not apparently follow internal agency rules about a reduction in commission. We decline to speculate as to their motivation, as it is not material.

[96] The agency's attack on the vendors is wider than wrongly attributing to them the alteration in the contract about GST. The agency continues to accuse the vendors of consciously remaining silent, knowing of the inconsistency in the contract, until the agency had completed its professional service. That is patently incorrect. Again, the Committee is right. The vendors raised the inconsistency on the day after they were provided with the contract. They then received the emailed assurance that the commission was inclusive of GST, complying with the example in cl 7.3 (both the old example and the revised example).

[97] Turning now to the agency's principal contention on appeal – the allegedly contradictory treatment of the agency and the licensees – counsel for the Authority makes the point that investigations can involve multiple licensees (which might include an agency) each of which owe distinct obligations. The Committee's assessment of the agency's conduct was not dependent on adverse findings against the individual licensees.

[98] We agree that there is a need to identify precisely the conduct of the licensees and the agency which is said to be unprofessional, which might not even be at the same time.

[99] The Committee found the licensees made an error in the initial calculation of the estimated commission based on the highest price in the estimated range (for the purpose of cl 7.3). They corrected this when the vendors pointed out the GST inconsistency, inserting the correct figure in cl 7.3 based on the price of \$950,000. The original erroneous example in cl 7.3 was found to be a breach of r 5.1 but minor, so the Committee decided no further action was necessary. It also found there was nothing to suggest the licensees intended to mislead the vendors. They were a tad sloppy in completing the contract in respect of not just this error but others as well.

[100] We accept the Committee has a discretion as to whether a breach of the Rules warrants a formal disciplinary finding or can be dismissed as minor and below the threshold for such a finding. Further, we agree with the Committee's decision in this case to take no further action against the licensees in respect of the wrong estimate.

[101] The Committee then went on to assess the agency's conduct, notwithstanding having effectively dismissed the complaint against the licensees. It found the agency had breached r 5.1 and was guilty of unsatisfactory conduct.

[102] The agency on appeal misrepresents the basis of the Committee's finding of a breach of the rule. The agency says the licensees were the parties primarily involved in

the impugned conduct, that the communications about GST were between the licensees and the vendors and that it was the licensees who were responsible for clarifying the variation in the contract concerning GST. The agency goes on to contend that, despite the primary conduct being that of the licensees, it was found to be negligent because of its general policy to check agency contracts but in this case it failed to notice the GST discrepancy with the estimated commission.

[103] The negligent checking of the agency contract at the time of listing was certainly one factor which influenced the Committee.²² However, the faulty checking of the contract was not the entire or real basis for finding unsatisfactory conduct on the part of the agency. It was the later post-sale charging of commission (with GST added) which was the agency's impugned conduct. The Committee concluded that the agency charged GST in circumstances where it ought not to have.²³

[104] The Committee said this was because the contract was unclear as to the GST position. The agency was relying on a contract, which on its face appeared to contain contradictory provisions as to the GST position. At the very least, according to the Committee, that created uncertainty and confusion. This was in the context of the Committee's finding that the licensees had been "clear" in informing the vendors in the email of 26 May 2021 that the estimated amount in cl 7.3 was inclusive of GST.²⁴

[105] We agree with the Committee that it is the agency's post-sale invoicing that is the impugned conduct, not the checking of the draft agency contract at the time of listing. We do not therefore agree with the Authority's submission that the breach found by the Committee was based on the agency's role in allowing the inconsistent terms of the contract to be agreed and to proceed. Unlike the Committee though, it is our view that any negligent checking of the draft contract by the agency is not important. The focus is the agency's conduct at the time of the invoice (7 September 2021) and then continuing to insist on the addition of GST when it was immediately challenged by the vendors. It follows that the Committee's dismissal of the complaint against the licensees (which is entirely about what they did at the time of listing) is not material to whether the different conduct of the agency at a different time breaches r 5.1. It was the agency which invoiced GST, not the licensees, and then insisted in communications with the vendors that it was correct to do so.

[106] We agree with the Committee that charging GST on the commission in the circumstances here was a breach of r 5.1 and unsatisfactory conduct. Faced with a

²² Complaint No: C44427 (28 February 2023) at [3.31] and [3.54].

²³ At [3.31]–[3.32].

²⁴ At [3.30].

contradictory contract and an email (26 May 2021) which clarified the contradiction (stating that the amount was GST inclusive), the agency added GST. While we accept that the agency believed it was contractually entitled to do so, it knew that the licensees had told the vendors the estimated amount included GST. This was a conscious decision to add GST and did not result from any miscalculation or accident on the part of the agency. No party contends the agency did not act in good faith or sought to mislead the vendors, but the Committee correctly found it lacked skill and care in issuing the invoice in these circumstances with GST added.

4. Was the Committee correct to order the agency to refund the GST?

[107] Having found unsatisfactory conduct by the agency, the Committee has the power to order rectification of any error or, where that is not practical, to provide relief, at the agency's expense.²⁵ It accordingly ordered the agency to pay the GST component of the commission (\$4,710) to the vendors.²⁶

[108] We have already rejected the argument that the contractual consequences of the contradictory GST provisions in the contract trump the professional disciplinary obligations. Neither the Committee nor the Tribunal is required to determine the contractual obligations of the parties. It is not material in this case to the assessment – of whether an order for payment should be made – whether the vendors were contractually obliged to pay GST.

[109] The agency does not contend that the Committee had no power to order such a payment. The argument is that the order was inequitable. It is said the vendors received the full benefit of the professional service without paying a fair, reasonable and agreed price for it. The order has resulted in a windfall for the vendors.

[110] We do not accept the order is inequitable. We doubt the agency's interpretation of the contract (having regard to the email of 26 May 2021), though we have not determined the contractual position. What the Committee found to be unsatisfactory is that the agency, faced with a confusing and contradictory contract, charged GST. It did so after the contradiction had been clarified in the vendors' favour. LQ had told the vendors in the email of 26 May 2021 that the commission estimate was GST inclusive, inferring the actual commission charged later on the actual price would be as well. It was not inequitable to require the repayment of the GST amount in circumstances where the vendors had been told they would not have to pay it.

²⁵ Real Estate Agents Act, s 93(1)(f).

²⁶ Complaint No: C44427 Decision on Orders (24 May 2023) at [2.1(a)] and [6.19].

[111] It is further submitted by the agency that the Tribunal, in assessing whether the order for payment is appropriate, should keep in mind that the finding of unsatisfactory conduct on its own is a significant penalty through commercial stigmatisation. We accept that the publication of the Committee's decisions and that of the Tribunal give rise to some reputational damage. Nonetheless, the order was appropriate as an additional penalty.

[112] According to the agency, previous decisions of the Committee did not make a monetary order. We find none of the previous decisions cited by the agency to be analogous. The circumstances comprising the wrongdoing and the mitigating/aggravating factors are different in each case. The cases cited do not assist us.

[113] The decision particularly singled out as analogous (C40928) is not at all similar. It was not about the commission charged being too high, but about the wrong information given in advertising materials. The supervising agent was found guilty of inadequate supervision of the licensee. The case before the Tribunal has nothing to do with inadequate supervision.

[114] In fact, in one of the decisions (C33058), a refund of commission was ordered though it is not a relevant precedent as the agency's responsibility was based on the duty to supervise.

[115] The Committee appears to have considered the agency's failure to note the contradictory contractual provisions to be an aggravating factor.²⁷ Even if it is a relevant background factor, we would not regard it as aggravating. However, we do regard the agency's unwarranted attack on the vendors as aggravating. Neither of these factors justifies revisiting the penalty.

[116] We agree with the Committee that the agency's conduct was at the low to mid range of the scale of unsatisfactory conduct, that this was a one-off breach and that there was no deception by the agency. We find the penalty orders, both as to repayment of the GST and the apology, to be reasonable and proportionate, if not somewhat light.

OUTCOME

[117] The appeal is dismissed. The Committee's liability and penalty decisions are confirmed.

²⁷ At [6.2].

[118] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[119] The Committee directed publication of its decision without the names of the vendors and licensees, but stating the name of the agency.

[120] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, as well as the privacy of the people involved, it is appropriate to order publication without identifying the vendors and the licensees, but naming the agency.

D J Plunkett
Chair

G J Denley
Member

P N O'Connor
Member