

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2024] NZREADT 14

Reference No: READT 029/2023

**IN THE MATTER OF**

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

**BETWEEN**

**EH and E LTD**  
Appellants

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2204)**  
First Respondent

**AND**

**C LTD**  
Second Respondent

Hearing on the papers

Tribunal:

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

Representation:

The appellants:	Self-represented
Counsel for the first respondent:	G Maslin, T Bain
Counsel for the second respondent:	R B Hern

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION**  
**Dated 6 May 2024**

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## INTRODUCTION

[1] One of the appellants was the director (the director) of a company (the purchaser) which entered into conditional agreements to purchase two properties. The properties will be known as property 100 and property 106, reflecting their addresses on the same street. The other appellant is the purchaser itself. Substantial deposits were paid to the real estate agency engaged in the transaction (the agency) to hold them in trust.

[2] The purchaser's solicitor signed forms confirming satisfaction of the conditions attached to the purchase agreements for both properties. The deposits were therefore released to the vendor. Settlement did not, however, occur and the vendor retained the deposits.

[3] The director and the purchaser complained to the Real Estate Agents Authority (the Authority) against the agency, essentially on the ground that their solicitor did not expressly consent to the release of the deposits. The complaint was referred to Complaints Assessment Committee 2204 (the Committee) which decided to take no further action. It is from this decision that the director and the purchaser appeal.

## BACKGROUND

[4] The two adjoining residential properties are in Auckland. The putative purchaser was E Ltd. Its sole director was EH. The agency was C Ltd.

[5] On 28 June 2021, the purchaser entered into conditional sale and purchase agreements (the purchase agreements) to buy the properties for \$2,088,888 (property 100) and \$2,000,000 (property 106). The purchase agreements provided for five per cent of the purchase prices to be paid into the agency's trust account when the agreements became unconditional. Settlement was expected on 28 March 2022.

[6] There are relevant (and identical) conditions of both purchase agreements (*verbatim*):

2.4 The person to whom the deposit is paid shall hold it as a stakeholder until:

- (1) the requisition procedure under clause 6.0 is completed without either party cancelling this agreement; and
- (2) where this agreement is entered into subject to any condition(s) expressed in this agreement, each such condition has been fulfilled or waived; and

...

2.5 Where the person to whom the deposit is paid is a real estate agent, the period for which the agent must hold the deposit as a stakeholder pursuant

to subclause 2.4 shall run concurrently with the period for which the agent must hold the deposit under section 123 of the Real Estate Agents Act 2008, but the agent must hold the deposit for the longer of those two periods, or such lesser period as is agreed between the parties in writing as required by section 123 of the Real Estate Agents Act 2008, but in no event shall the deposit be released prior to the expiry of the requisition period under clause 6.0, unless the requisition period is expressly waived in writing after the effect of the same is explained to the purchaser by the agent or by the purchaser's lawyer or conveyancer.

...

24.0 The vendor will get the resource consent approved for 18 townhouses as per the scheme plan provided, and EPA [engineering plan approval] approved prior to settlement.

25.0 Vendor has Unconditionally Purchased the Property.<sup>1</sup>

...

(e) The deposit paid by the Purchaser shall continue to be held by the agent as stakeholder until the register proprietor has advised the Vendor that the register proprietor (as vendor under the first agreement) is in a position to settle under that agreement and the pre-settlement solicitor undertakings have been given.

[7] On 7 July 2021, the agency sent an "Unconditional Notice" and another unknown document for property 100 to the purchaser's solicitor.<sup>2</sup>

[8] On 12 July 2021, the purchaser's solicitor advised the vendor's solicitor that the due diligence conditions were satisfied and the purchase agreements for both properties were accordingly unconditional.<sup>3</sup>

[9] Between 14 and 16 July 2021, the purchaser paid total deposits of \$204,444.40 for the two properties into the trust account of the agency.

[10] On 30 July 2021, the vendor's solicitor requested the agency to release the deposits for both properties.<sup>4</sup>

[11] The vendor's solicitor provided to the agency a signed form (the confirmation form) on the agency's letterhead (dated 30 July 2021) concerning property 100:<sup>5</sup>

CONFIRMATION OF SATISFACTION OF CONDITIONS/REQUISITION OF  
TITLE SALE

<sup>1</sup> The vendor was not the registered owner but had unconditionally purchased the properties, with settlement to occur contemporaneously with settlement under the purchase agreements at issue in this appeal.

<sup>2</sup> Email (7 July 2021) from the agency to the purchaser's solicitor; agency's additional bundle of documents.

<sup>3</sup> Email (12 July 2021) from the purchaser's solicitor to the vendor's solicitor; agency's additional bundle.

<sup>4</sup> Email (30 July 2021) from the vendor's solicitor to the agency; agency's additional bundle.

<sup>5</sup> Confirmation form (30 July 2021); Authority's bundle of documents at 126.

## VENDOR SOLICITOR

...

To enable us to comply with our audit requirements can you please confirm that:

All conditions for the sale and purchase of the subject property have been satisfied or waived;

and

Any objection or requisitions of title have been satisfied or waived in accordance with the agreement and/or the requisition period is expired.

[12] According to the agency, on 2 August 2021 the vendor's solicitor provided a written confirmation of the satisfaction of conditions for property 106.<sup>6</sup> At the same time, the vendor's solicitor signed another form on the agency's letterhead (the early release form) for property 106 (dated 2 August 2021):<sup>7</sup>

## EARLY RELEASE / UNCONDITIONAL SALE

...

The party undersigned authorise and instruct you to disburse the monies to the credit of [the vendor] held in your Trust Account, notwithstanding the fact that you have not held it for 10 working days.

The Parties record that this Agreement is unconditional in all respects.

[13] On the same day, 2 August 2021, the agency sent an "Unconditional Notice" for property 100 to the purchaser's solicitor.<sup>8</sup>

[14] The purchaser's solicitor signed the confirmation form for property 100 on 3 August 2021 and provided it to the agency by email on the same day (text in full):<sup>9</sup>

I enclose the unconditional notice.

[15] The form was in the same terms as the confirmation form signed by the vendor's solicitor, except that "PURCHASER SOLICITOR" replaced "VENDOR SOLICITOR" in the title.

[16] The agency therefore released the balance of the deposit for property 100 to the vendor's solicitor that day (the agency retained its commission).

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<sup>6</sup> Letter (28 June 2023, mistakenly dated 2021) from the agency's manager to the Authority; Authority's bundle at 66. This confirmation has not been sent to the Tribunal.

<sup>7</sup> Early Release form (2 August 2021); Authority's bundle at 127.

<sup>8</sup> Email (2 August 2021) from the agency to the purchaser's solicitor; agency's additional bundle.

<sup>9</sup> Email (3 August 2021) at 9:28 am from the purchaser's solicitor to the agency; agency's additional bundle. Confirmation form in the Authority's bundle at 129.

[17] On the same day, 3 August 2021, the agency asked the purchaser's solicitor to sign "the early release form" for property 106.<sup>10</sup> The solicitor was advised that:

...once I have this I will disburse both.

[18] This request prompted the purchaser's solicitor to immediately ask for the "Unconditional Notice" for property 106.<sup>11</sup>

[19] Also on the same day, 3 August 2021, the agency informed the purchaser's solicitor that property 106 had been settled by the previous owners.<sup>12</sup>

[20] On 4 August 2021, the agency said to the purchaser's solicitor it was still waiting for "... your signed ER/Unconditional notice" for an unidentified property.<sup>13</sup>

[21] Presumably later that day, 4 August 2021, the purchaser's solicitor signed the confirmation form for property 106 and provided it to the agency.<sup>14</sup> The latter then released the balance of the deposit for that property to the vendor's solicitor on the same day (the agency retaining its commission).

[22] Settlement did not occur on 28 March 2022 as scheduled.

[23] On 1 April 2022, the purchaser's solicitor sent an email to the vendor's solicitor stating that the vendor had failed to provide resource consent and EPA prior to settlement (as per cl 24 of the agreement). Settlement had been delayed. The purchaser had suffered a loss and would charge penalty interest of 15 per cent per annum commencing on 28 March 2022 until settlement.

[24] On 9 May 2022, the vendor issued a settlement notice demanding settlement.

[25] On 10 May 2022, the purchaser's solicitor sent an email to the agency stating that a dispute had arisen between the vendor and the purchaser, so the agency was not authorised to release the deposit without his written authority.

[26] The purchaser served a settlement notice on the vendor on 20 May 2022.

[27] On 26 May 2022, the vendor cancelled the agreements.

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<sup>10</sup> Email (3 August 2021) at 10:20 am from the agency to the purchaser's solicitor; agency's additional bundle.

<sup>11</sup> Email (3 August 2021) at 10:22 am from the purchaser's solicitor to the agency; agency's additional bundle.

<sup>12</sup> Email (3 August 2021) from the agency to the purchaser's solicitor; agency's additional bundle.

<sup>13</sup> Email (4 August 2021) at 2:33 pm from the agency to the purchaser's solicitor; agency's additional bundle.

<sup>14</sup> The email sending it to the agency has not been produced to the Tribunal. The confirmation form is in the Authority's bundle at 130.

[28] The purchaser's second solicitor wrote to the vendor's solicitor on 7 June 2022 stating that, at the time the settlement notice was issued by the vendor, there was no resource consent and no EPA. The vendor was therefore in breach of the agreements and could not issue a valid settlement notice on 9 May 2022. The vendor's cancellation was unlawful. Accordingly, the purchaser was cancelling the agreements and demanding immediate repayment of the deposits.

[29] The purchaser's second solicitor wrote to the agency on 14 June 2022 stating that the vendor's cancellation was unlawful. The purchaser had cancelled the purchase agreements. It demanded repayment of the deposits. The letter recorded that the purchaser's first solicitor had been asked to consent to the early release of the deposit on 2 August 2021, but he did not do so. The first solicitor had now received confirmation from the agency that the funds had been disbursed. It appeared the agency was in breach of its obligations. The timing of the disbursement was especially concerning as it was done very shortly after the agency had sought but not received the purchaser's consent to early release.

[30] The agency replied on 27 June 2022 to the solicitor's letter of 14 June 2022. As the issue was between the vendor and the purchaser, the agency would not be involved.

#### *Complaint to Authority*

[31] On 19 July 2022, the director and the purchaser made a complaint to the Authority against the agency. They said that no permission had been given by their solicitor to release the deposits. Neither the agency nor the vendor would repay them. The agency had acted in a most careless, unethical and unprofessional way.

[32] In a telephone discussion with an officer of the Authority on 23 November 2022, the director said the agency had released the deposits despite his solicitor telling it not to release them.

#### *Explanation from the agency*

[33] The agency wrote to the Authority on 30 June 2023 enclosing a letter to the Authority (28 June 2023, misdated 2021) from the agency's manager at the relevant branch. The manager stated that on 30 July 2021, the vendor's solicitor requested release of the deposits for both properties and provided a confirmation of satisfaction of conditions for one of them. The confirmation for the other property was provided on 2 August 2021. Such confirmations were then provided by the purchaser's solicitor on 3 and 4 August 2021, so the deposits were released in accordance with the provisions

of the purchase agreements. The agency had understood it was authorised to release the deposits.

#### *Decision of the Committee*

[34] In its decision (6 November 2023), the Committee found that the purchaser's solicitor had confirmed the satisfaction of conditions for both properties. The agency therefore acted appropriately when it released the deposits to the vendor. It would take no further action.

#### **APPEAL**

[35] On about 2 December 2023, the purchaser and its director appealed to the Tribunal against the Committee's decision of 6 November 2023.

#### *Submissions of the purchaser*

[36] In submissions (undated) attached to the notice of appeal, the director says the confirmation forms did not give express authority to the agency to release the deposits. Furthermore, the agency failed to take reasonable steps to determine who should be entitled to the deposits.

[37] The purchaser provided no further submissions in support of the appeal or in reply to those of the Authority, despite the invitation to do so. He advised on 7 February 2024 he was content to rely on those filed with the notice of appeal.

#### *Submissions of the Authority*

[38] In his submissions (20 March 2024, corrected on 22 April), Mr Bain submits that the Committee did not err in determining that the agency acted appropriately in releasing the deposits. The confirmation forms stated clearly that under the purchase agreements all conditions had been satisfied or waived. This provided authority for the agency to release the deposits. The agency acted in accordance with s 122 of the Real Estate Agents Act 2008 (the Act).

[39] Counsel notes that the director appears to accept his solicitor confirmed the sales were unconditional and those confirmations were not a mistake.<sup>15</sup> The director argues that the confirmations did not amount to explicit confirmation the agency could release

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<sup>15</sup> Submissions (corrected, 22 April 2024) at [40].

the deposits. The Authority submits that the confirmation forms did constitute sufficient written authorisation to release the deposits (under cl 2.4 of the agreements).

[40] The submissions acknowledge the vendor's solicitor signed an early release form, which explicitly gave permission for release of the deposits. There is no evidence an early release form for either property was provided to the purchaser's solicitor or that the agency had discussed early release with him. It is not known what information was in the covering emails to the purchaser's solicitor when he was sent the confirmation forms.<sup>16</sup>

[41] However, a minimum of 13 working days had passed between the last instalment of the deposits being paid to the agency on 16 July 2021 and the first release to the vendor's solicitor on 3 August 2021. As the statutory period of 10 working days from receipt of the deposits (specified in s 123 of the Act) had passed, it is submitted the confirmation forms were sufficient authority to transfer the deposits to the vendor. In signing these forms, the solicitors for both parties confirmed that all conditions had been satisfied or waived.

#### *Submissions of the agency*

[42] Counsel for the agency notified the Tribunal on 25 March 2024 that the agency would not be filing submissions, given the Authority's comprehensive submissions.

[43] The Tribunal issued a procedural Minute on 19 December 2023 concerning the conduct of the appeal. The Authority filed a bundle of the documents that were before the Committee on 12 January 2024. At the request of the Tribunal, the agency produced additional documents on 23 April 2024.

## **JURISDICTION AND PRINCIPLES**

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

[45] The appeal is by way of a rehearing.<sup>17</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>18</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination

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<sup>16</sup> These submissions were made prior to the agency producing the additional bundle of documents.

<sup>17</sup> Real Estate Agents Act 2008, s 111(3).

<sup>18</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].



of the Committee.<sup>19</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>20</sup>

[46] A hearing may be in person or on the papers.<sup>21</sup> A hearing in person may be conducted by telephone or audiovisual link.

[47] This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. 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.<sup>22</sup> 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.<sup>23</sup>

## DISCUSSION

[48] In his submissions to the Tribunal, one of the allegations made by the director is that the agency failed to take reasonable steps to determine who was entitled to the deposits, as required by s 122 of the Act. He does not elaborate on this contention. It is not clear what this is a reference to. There had been a change of vendor on about 29 June 2021, but the solicitor for the vendor had remained the same.<sup>24</sup> The agency released the deposits to the vendor’s solicitor. There is no breach of s 122.

[49] The only issue for the Tribunal to address is the primary dispute as to whether the agency was entitled to release the deposits on 3 and 4 August 2021, before satisfaction of cl 24 of the purchase agreements (requiring the vendor to provide resource consent and an approved EPA prior to settlement). Settlement had been due to occur on 28 March 2022, but the resource consent was not issued until 16 May 2022 and a partial EPA was approved by 20 May 2022.<sup>25</sup>

[50] The contractual obligations concerning the deposits relevant here are cls 2.4 and 25(e) of the purchase agreements.

[51] Starting with cl 2.4, the Tribunal is not aware of any requisition problem (and in any event, the purchaser’s solicitor confirmed all the conditions and requisitions in each

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<sup>19</sup> Real Estate Agents Act, s 111(4).

<sup>20</sup> Section 111(5).

<sup>21</sup> Sections 107 and 107A.

<sup>22</sup> *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].

<sup>23</sup> *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 22, at [4]–[5]; and *Scandrett*, above n 22, at [112].

<sup>24</sup> See Variation to Terms and Conditions of Sale (29 June 2021); Authority’s bundle at 46. Manager’s letter to Authority (28 June 2023); Authority’s bundle at 67.

<sup>25</sup> Letter (7 June 2022) from purchaser’s solicitor to the vendor’s solicitor; Authority’s bundle at 54.

purchase agreement had been satisfied or waived), so the issue here is whether subclause (2) of cl 2.4 was met. Pursuant to that subclause, the agency was entitled to pay itself the commission and release the balance to the vendor's solicitor if every condition in each agreement was fulfilled or waived.

[52] Plainly cl 24 was not fulfilled. In early August 2021 when the deposits were released, there was no resource consent or approved EPA. Presumably, the agency knew this.

[53] The agency relies on the two confirmation forms signed by the purchaser's solicitor, as authority for the release of the deposits. In signing those forms, he confirmed that all the conditions in each purchase agreement had been satisfied or waived.

[54] Turning then to cl 25 of the purchase agreements, subclause (e) required the agency to hold the deposits until the vendor had advised it was in a position to settle. This condition had also not been fulfilled when the deposits were paid out, presumably to the agency's knowledge. No doubt because of the non-fulfilment of cl 24, the vendor had not advised it was in a position to settle under the agreements. However, as was the case with cl 24, the non-fulfilment of cl 25(e) was waived by the purchaser's solicitor when he provided the signed confirmation forms.

[55] In light of the waiver of the fulfilment of cls 24 and 25 by the purchaser's solicitor, the agency appears to have been entitled to release the deposits under cl 2.4.

[56] The purchaser raises an obstacle. He contends his solicitor had not given express permission to release the deposits. According to the director's evidence to the Authority on 23 November 2022, his solicitor told the agency not to release the deposits.

[57] It is true that the purchaser's solicitor did not give express permission to release the deposits, but it is not correct that he told the agency not to release them (until well after they were released). What the solicitor did was to sign the confirmation forms for both properties, which permitted the agency under cl 2.4 to release the deposits.

[58] In his email of 3 August 2021 to the agency providing the signed confirmation form for property 100, the solicitor did not reserve the purchaser's position on releasing the deposit, let alone prohibit it. The purchaser has provided no evidence that in respect of property 106, his solicitor expressly declined consent to release the deposit or told the agency not to release it. Given cl 2.4 of both agreements, it was incumbent on the solicitor to expressly prohibit the early release, or even to refuse to sign the confirmation forms.

[59] We acknowledge that the purchaser’s solicitor had been asked on 3 August 2021 to sign “the early release form” for property 106 and on 4 August was reminded that the agency was waiting for the “ER/Unconditional notice” form, and that he never provided such signed forms for either property.

[60] However, the evidence does not show that the solicitor was deliberately withholding permission to release the deposits. Indeed, there is no evidence he was actually sent the early release forms. He appears to have signed the only forms he was sent, the confirmation forms. He was aware that the agency was intending to disburse the deposits (see the agency’s email of 3 August 2021 at 10:20 am). Given the solicitor’s signature on the confirmation forms, the agency was entitled to view those signatures and his silence on the deposits, as authority to disburse the deposits.

## **OUTCOME**

[61] The Tribunal confirms the decision of the Committee to take no further action. The appeal is dismissed.

[62] 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**

[63] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any party or the agency.

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D J Plunkett  
Chair

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G J Denley  
Member

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P N O’Connor  
Member