

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 67

READT 064/15

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN RUSSELL MARTIN
Appellant

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 407)
First respondent

AND NATHAN TAMIHANA
Second Respondent

AND GOLD REAL ESTATE GROUP LIMITED
Third Respondent

Hearing: 3 and 4 August 2016 (at Christchurch)
25 August 2016 (at Auckland)

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances: Ms M J Borcoski, on behalf of the Appellant
Ms K Lawson-Bradshaw, on behalf of the First
Respondent
Ms S B Mitchell, on behalf of the Second and Third
Respondents

Date of Decision: 4 October 2016

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant has appealed against the decision of Complaints Assessment Committee 407 (“the Committee”) issued on 27 August 2015. The Committee decided to take no further action in respect of the appellant’s complaint against the second respondent (“the licensee”), and the third respondent, Gold Real Estate Ltd, which trades as Harcourts Gold (“the Agency”).

[2] The appellant contends that a disciplinary charge should be laid in respect of the licensee’s and the Agency’s conduct in relation to his purchase of a property in Christchurch. He contends that both the licensee (a salesperson at the Agency) and the Agency have acted contrary to the Real Estate Agents Act 2008 (“the Act”) and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”).

Factual background

[3] The following is a brief summary only, by way of background to the issues. All of the events referred to in this decision were between March and November 2014.

[4] In March, the appellant won a substantial Lotto prize. This put him in the position of being able to buy a house – something that, as a sickness beneficiary, he had never before contemplated being able to do. He was not familiar with any part of the process of buying a house, or the prices paid for houses in Christchurch. The appellant knew the licensee, having met him through a mutual friend. The three of them had met reasonably regularly. The appellant asked the licensee for his help to buy a house.

[5] The licensee showed the appellant a number of houses (estimated to be between 12 and 24). Two other real estate salespersons (also friends) showed the appellant houses as well. He made an offer through the licensee on one house, but withdrew the offer very shortly afterwards.

[6] Another salesperson at the Agency (“Ms M”) was the listing salesperson for a property in Idris Rd, Christchurch (“the property”). She had completed an appraisal of the property in which she assessed the market price range as being \$840,000 to \$910,000. The house was to be sold at auction on 23 May. By the time the appellant first viewed the property, Ms M had conducted 12 Open Homes, which were attended by 30 groups. Two of those had registered an interest in the property.

[7] Over the course of 19 May, the following occurred:¹

- [a] At about 12.15 pm, the licensee showed the house to the appellant, and the appellant expressed interest in buying it;
- [b] At about 12.30 pm, Ms M advised a potential purchaser of the property (“the X’s”) that the vendor’s expectations “have certainly come down in their thinking”. She also told them that there was not much interest in the property.
- [c] The appellant and the licensee had lunch together;
- [d] The licensee made arrangements for the appellant to consult a solicitor, and accompanied him to the appointment, which was at 2.30 pm and lasted for about one hour;
- [e] At about 4.15 pm, the licensee took the appellant to the property for a second viewing with a friend;
- [f] At about 5.15 pm, the appellant and the licensee returned to the licensee’s office, and filled in an Agreement for Sale and Purchase and a pre-auction offer form;
- [g] The appellant returned home. The licensee realised that the appellant had not signed the pre-auction offer, and took it to the appellant’s home to be signed;

¹ This is a “bare bones” account, and is expanded on later in this decision.

- [h] The appellant's pre-auction offer to purchase the property for \$890,00 was presented to the vendor at 5.45 pm;
- [i] The pre-auction offer was accepted by the vendor at 6.00 pm; and
- [j] The auction was brought forward to 21 May.

[8] On 20 and 21 May, the appellant and then a (different) solicitor acting for him sought, without success, to withdraw his offer and to cancel the Agreement for Sale and Purchase. The auction began at 2.30 pm on 21 May. The appellant's pre-auction offer was announced as the opening bid. There were no other bids, so the house was sold to the appellant.

[9] Settlement of the purchase occurred on 4 June. The appellant sold the house on 7 November, for \$765,000.

The appellant's complaint

[10] The appellant's complaint against the licensee and the Agency may be summarised as follows:

- [a] The licensee suggested the pre-auction offer of \$890,000, which was an inappropriate price, and in so doing, he did not act in the appellant's best interests;
- [b] The licensee misled him as to the level of interest on the property;
- [c] The licensee pressured him into making an offer at too high a price, did not ensure that he understood the process of a pre-auction offer, and did not advise him that the offer would become the opening bid and could not be withdrawn;
- [d] The appellant was not provided with a copy of the pre-auction offer form, or with the booklet that should be provided to all purchasers; and

[e] The people named on the pre-auction offer form as being required to be involved in the process were not involved.²

[11] We record at this point that it was common ground that the appellant did not enter into a buyer's agency agreement with the licensee, to be his purchasing agent.

The Committee's decision

[12] Complaints Assessment Committee 303 considered the complaint and decided to inquire into it on 16 September 2014. However, that Committee was disbanded on 3 December 2014, and the complaint was referred to the Committee (Committee 407). Having considered the complaint on the papers, the Committee concluded that neither the licensee nor the Agency had breached the Act or the Rules, and decided to take no further action.

[13] In particular, the matters considered by the Committee as supporting its conclusion that there had been no breach of the Act or the Rules were:

- [a] In its opinion, the appellant had experienced the ordinary pressure experienced by many if not all prospective purchasers;
- [b] The appellant had a friend assisting him, he could draw on the advice of other licensees, and had received legal advice, so he was not as dependent on the licensee as he suggested he was;
- [c] The appellant had discussed price with the licensee but was keen to purchase and had generous funds to do so;
- [d] The price was not unrealistic;

² The Agency's "Pre Auction Sale – Buyer's Form" states, at paragraph 1: "All pre-auction offers must be unconditional. A Business Owner / Branch Manager / Sales Manager / Auctioneer must be involved."

[e] While the issue as to whether pre-auction offers may be withdrawn was legally complex, it was not unreasonable for the licensee to tell the appellant he could not withdraw his offer; and

[f] The persons named on the pre-auction offer form had been consulted when the appellant made his pre-auction offer.

[14] Finally, the Committee expressed its opinion that it was “not the Committee’s role to assess whether [the licensee] or the Agency failed to apply the very best practice which could possibly have been applied in the circumstances.”

Appeal hearing

[15] The appeal was heard over two days, as a de novo hearing. Briefs of evidence were filed in advance, and the Tribunal heard oral evidence from the appellant, the licensee, members of the Agency, and other evidence called by the appellant and the second and third respondents. Witnesses were available for cross-examination and re-examination. The hearing was re-convened in Auckland to hear closing submissions.

[16] Having heard the evidence and received submissions for all parties, the Tribunal must determine whether the appellant has established that the Committee was wrong to conclude that the licensee and the Agency were not in breach of the Act or the Rules, and to decide to take no further action. If the Tribunal is not persuaded that the Committee was wrong, the appeal will be dismissed. If the Tribunal is persuaded that the Committee was wrong, it may make a finding of unsatisfactory conduct, or remit the matter back to the Committee to lay a charge of misconduct.

Appeal issues

[17] Broadly stated, it was contended for the appellant that the Committee’s decision was wrong in fact and law, and that the Committee failed to comply with the rules of natural justice. The latter ground relied on the Committee’s failure to

provide counsel for the appellant with a copy of a legal opinion obtained by the Agency and submitted to the Committee, and on the fact that one of the Committee members had an association with Harcourts.

[18] First, we consider the particular issues raised in the context of the overall submission that the Committee was wrong in fact and law. Those issues may be summarised as follows:

- [a] Was the licensee's role (and in particular, his obligations as a salesperson on behalf of the vendor) properly explained to the appellant?
- [b] Was the appellant given an adequate and fair explanation of the nature and implications of the pre-auction offer form?
- [c] Was the appellant misled as to the price he should offer for the property?
- [d] Was the appellant misled as to the level of interest in the property?
- [e] Was undue pressure placed on the appellant to make a pre-auction offer?

First issue: was the licensee's role (and in particular, his obligations as a salesperson on behalf of the vendor) properly explained to the appellant?

Evidence

[19] The appellant's evidence was that he told the licensee (as a friend) that he was looking for a property. He had known the licensee socially for three to four years, including having had lunches together. He thought the licensee was working for him, in his interests, and the licensee never said he was working for the vendor, rather than him. The appellant did not ask the licensee who he was acting for because, he said, the subject never came up. This was notwithstanding that he had viewed one to two dozen properties with the licensee and had made an offer on one of them. The appellant presumed that the licensee would get a commission of some sort, which would come out of what he paid for the property.

[20] The licensee agreed that he had known the appellant for some three years. He agreed that the appellant told him he was looking to purchase a property. He said he thought the appellant was discussing this with him because he knew the licensee would be able to advise him as to what suitable properties were on the market. He said it was not his general practice to say to a prospective purchaser that he was acting for the vendor. In answer to questions in cross-examination, the licensee acknowledged that he was working with the appellant to assist him to buy a house, he was aware that the appellant did not have a lot of experience, and he was aware that the appellant was putting his trust in him.

Submissions

[21] Ms Borcoski submitted for the appellant that he believed the licensee was acting in his interests, and was not aware that the licensee was acting for the vendor. She submitted that the licensee should have made it clear to the appellant that his duty was to the vendor, and he had to act in the vendor's interests, not the appellant's interests. In support of this submission, Ms Borcoski referred to the evidence that the licensee knew the appellant personally, he knew that the appellant had never purchased a property before and had little knowledge of the process, he had been helping the appellant with his search for a property, he knew that the appellant was relying on his representations as to price, and he knew that the appellant trusted him.

[22] Ms Borcoski acknowledged that it might be onerous to require a licensee to advise every visitor to an Open Home that he or she is acting for the vendor, but she submitted that in a case where a person goes into a real estate agency and says "I am looking to buy a house, can you help me?" the agent should disclose that he or she is acting for the vendor, and has obligations to the vendor. She submitted this is even more so in the present case, given the licensee's knowledge of the appellant's position. Ms Borcoski submitted that in this case, it was not acceptable for the licensee to say "it is not my general practice to say I am acting for the vendor".

[23] Ms Borcoski submitted that the licensee's failure to make it clear to the appellant that he was acting for the vendor, not the appellant, was a breach of rr 5.1 (requirement to exercise skill, care, competence, and diligence at all times when

carrying out real estate agency work), 6.2 (requirement to act in good faith and deal with all parties to a transaction) and 6.4 (requirement to not mislead a customer or client, or withhold information that should in fairness be provided).

[24] Ms Mitchell submitted for the licensee and the Agency that it often occurs that a licensee is approached to assist a prospective purchaser to locate a suitable property. However, the licensee's fiduciary duties are owed to the vendor, not the prospective purchaser. She further submitted that it is not common practice for a licensee to advise a purchaser that he or she is acting for the vendor. She referred to a "common understanding", and submitted that "the average person understands", that a real estate agent acts for the vendor, not the purchaser.

[25] Ms Mitchell accepted that there may be cases where, if a licensee is alerted to a particular issue (such as a particular vulnerability), the licensee needs to consider whether any particular information or additional information should be provided. However, she submitted that identifying such a case is dependent on the specific facts of the case, and this was not such a case.

[26] Ms Mitchell submitted that the appellant had asked other friends who were licensees to assist him, he had found some properties on TradeMe, and he did not enter into an agreement with the licensee to be his purchasing agent. She further submitted that while the appellant expected the licensee to be paid a commission, that commission was to be paid by vendor.

[27] On behalf of the Authority, Ms Lawson-Bradshaw accepted that when an agency agreement has been entered into with a vendor, a licensee owes fiduciary duties to the vendor. However, she submitted, the licensee also owes a duty of fairness and care to customers. The relevant considerations for determining whether the licensee complied with those duties will include what kind of purchaser the appellant was, how the appellant presented to the licensee, and whether the appellant was confused or lacked understanding.

[28] Ms Lawson-Bradshaw submitted that if the Tribunal finds the appellant was a person needing to have have matters explained to him, or to be given further

information, and that the licensee was on notice that the appellant was such a person, then it is open to Tribunal to find that in this situation the licensee should have done more to clarify his role in the transaction.

Assessment

[29] No evidence was adduced as to any “common understanding” that a real estate agent acts for the vendor, or that “the average person understands” that real estate agents act for the vendor. While it may be accepted in the industry that it is general real estate practice that, in the absence of a specific buyer’s agency agreement, licensees act for, and have fiduciary duties to, the vendor, the Tribunal doubts that any such “common understanding” is as widespread amongst prospective purchasers as was suggested. On the evidence in this case, we are not satisfied that the appellant “understood” that the licensee was acting for the vendor, not him.

[30] It does not assist the second and third respondents’ argument that the appellant may have asked other friends who were real estate salespersons to assist him. On the evidence before the Tribunal, the appellant may equally have regarded them as acting for him, in his interests.

[31] Nor does the fact that commission is taken out of the payment of the proceeds of sale to the vendor support the second and third respondents’ argument. The Tribunal accepts that, as a matter of practice, commission is paid by the vendor out of the proceeds of sale, but there is no evidence that the appellant knew or understood that this meant that the licensee’s fiduciary obligations were to the vendor, and he was not acting in the appellant’s interest. The appellant’s evidence was only that he knew that the licensee would be paid a commission.

[32] On the evidence before the Tribunal, in the particular circumstances of this case, the appellant should have been given a clear explanation of the licensee’s role. The appellant had no experience in buying or selling property, at all. He was suddenly able to do something he had never contemplated being able to do. He had no experience in dealing with real estate salespersons in the context of property dealings, and regarded the appellant as a friend. For those reasons it was incumbent

on the licensee to take particular care to ensure that the appellant understood that he acted for vendor, and had a fiduciary duty (and the implications of that duty) to act in the best interests of the vendor, not the appellant.

[33] The evidence before the Tribunal supports a finding that in not having made it clear to the appellant that he was acting for the vendor, and as the appellant believed that the licensee was acting for him, the licensee failed to give the appellant a proper explanation as to his role in the transaction. He allowed there to be confusion. There are grounds for a finding that the licensee was in breach of r 6.4 by misleading the appellant in this respect. Further, the licensee put himself in the position of being unable to deal fairly with all parties. In this respect there are also grounds for a finding that he was in breach of r. 6.2.

Second issue: was the appellant given an adequate and fair explanation of the nature and implications of the pre-auction offer form?

Evidence

[34] This issue was the prime focus of the appeal hearing. It was not disputed that in a case where the possibility of a pre-auction offer arises, a licensee must give a prospective purchaser an adequate and fair explanation of the nature and implications of the process of making a pre-auction offer, and the pre-auction offer form. In determining this issue in the present case, it is necessary to traverse what advice was given to the appellant on 19 May 2014.

(a) When the appellant and the licensee had lunch together

[35] The appellant said he and the licensee did not talk about making any offer during the hour they spent having lunch; they talked only about general matters. However, he was not “100% sure” what they discussed. The licensee said the whole reason for the lunch was to discuss the property. However, in his interview with the Authority’s investigator, the licensee said he did not discuss “the form”, as the appellant had “left the form in his car”. It is not clear what “form” it was that the appellant left in his car.

(b) At the solicitor's office

[36] The appointment with the solicitor was at 2.30 pm, and it lasted for about one hour. The appellant said the meeting was predominantly about the Land Information Memorandum ("LIM") and insurance, and he presumed that the solicitor went through the Agreement for Sale and Purchase. He said the discussion with the solicitor was not about a pre-auction offer, it was "anything but". He did not recall seeing a pre-auction offer form at the solicitor's office. He also said that the licensee was with him, and he presumed that the licensee spoke to the solicitor. He said he did not ask any questions, as he did not know what to ask.

[37] The licensee said that the time at the solicitor's office was largely spent going through the LIM, insurance, and auction pack, with the solicitor going through the auction pack "page by page", discussing and clarifying its contents. He did not recall the solicitor advising the appellant in relation to a pre-auction offer. We note that in his interview with the Authority's investigator, the licensee said that the solicitor "didn't discuss the pre-auction buyer form".

[38] In a statement dated 21 October 2014, the solicitor set out the matters he discussed at the meeting. His statement confirms that he advised the appellant on the documents contained in the auction pack. He said that there was "no doubt that the nature of the contract and all the contents of the auction pack presented to [the appellant] were discussed fully with [the appellant] and he was provided with a copy of the real estate agents guide as required." The solicitor's narration of the matters on which he advised the appellant is comprehensive, and it makes no reference to a pre-auction offer, or a pre-auction offer form. The auction pack included in the Bundle of Documents provided for the hearing does not include a pre-auction offer form.

(c) When the appellant viewed the property a second time

[39] At about 4.15 pm, the appellant had a second viewing of the house, at which he was accompanied by a friend from his wine group. He said the viewing lasted for about 15 minutes, and there was little opportunity to discuss matters such as a pre-

auction offer. He said there was “some discussion” as the licensee drove him back to his office. The licensee’s evidence was that when driving back from this viewing, the appellant said he was keen to buy the house and said “let’s write up an offer”.

(d) At the licensee’s office after the second viewing

[40] From the evidence as to the events of 19 May, it would appear that the appellant and the licensee returned to the licensee’s office at around 5.15pm. It was common ground that they were together for 15 to 20 minutes.

[41] The appellant said he could recall “bits and pieces” of his discussion with the licensee at his office. He said the licensee told him there was a lot of interest in the property, and that if he made an offer and it was accepted, he would own it. He signed an Agreement for Sale and Purchase, and he said the licensee suggested he make a pre-auction offer. He said this was the first time he had come across a pre-auction offer. His previous offer had been a “straight” offer, and he had withdrawn it simply by ringing the licensee and saying he wanted to withdraw it.

[42] The appellant said he presumed that because he had signed the Agreement for Sale and Purchase, the property would not go to auction. He said that after speaking with Ms M, the licensee mentioned the auction, and said the auction was being brought forward, and it was “a done deal”. His evidence was that he then asked why he could not go to the auction and bid for the property, and was told only that he could not do so. Further, he said he was not told anything about withdrawing his offer, and he thought he could withdraw it as he had the previous time. He said he was told the offer was on the table until 4.00 pm on the day of the auction.

[43] The licensee said that when he and the appellant returned to his office, he contacted Ms M and discussed recent property sales, and the parameters of an offer. He then assembled the relevant documents, and went through them with the appellant, explaining them in detail. He said they discussed price, and he explained the significance of a pre-auction offer, and the pre-auction offer form, and the appellant read the form. The licensee’s evidence was that it was “all pretty easy” to go through the documents, as they had discussed the process in detail at lunch and

the appellant understood what he was signing. The licensee said he “double checked” with the appellant that this was the property he wanted, he prepared a side agreement as to possession date, a fence, and the deposit, the appellant signed the documents, he gave copies to the appellant, and the appellant left.

(e) At the appellant’s home, when he signed the pre-auction offer form

[44] The licensee’s evidence was that after the appellant had left his office, he spoke to Ms M about putting the pre-auction offer to the vendor. At this point, he realised that the appellant had not signed the pre-auction offer form, so he rang and arranged to go to the appellant’s house to get the form signed. He accepted he had panicked, and “raced round” to the appellant’s home, and may not have spent as much time discussing the process with the appellant as he could have, but said they had discussed it already.

[45] The appellant could not recall any discussion, or being taken through the pre-auction offer process and the pre-auction offer form “paragraph by paragraph”. He said the licensee told him that the form was a formality, so he trusted him. He said there was some rush, but as he was a friend, he did not think the licensee was doing anything wrong.

(f) After the appellant signed the pre-auction offer form

[46] Ms M’s evidence was that the licensee gave her the appellant’s signed offer at 5.45 pm, she then presented it to the vendor, and it was accepted at 6.00 pm. She informed the Agency’s manager that a pre-auction offer had come through, then called the auctioneer and arranged for the auction to be brought forward to 21 May. The manager’s evidence was that the licensee telephoned him about the appellant’s offer, and told him the appellant had taken independent legal advice. He also said the licensee confirmed that he had “done the explanation” of the pre-auction offer. He accepted that the logistics of bringing the auction forward forms a big part of the Agency’s involvement on the pre-auction offer process (and in this case, he said, the auctioneer was taking care of the logistics).

(g) Subsequent events

[47] In the morning of 20 May, the appellant rang the licensee, saying he wanted to withdraw the offer and was told he could not do so. At 5.46 pm, the appellant sent an email to Ms M, saying he was withdrawing his offer, and would deliver a notice of cancellation to the licensee. He also sent an email to the licensee, confirming his intention to withdraw the offer. In the morning of 21 May, the appellant delivered a notice of cancellation to the Agency. He met with a (different) solicitor at 12.00 noon, and at 2.15 pm that solicitor sent written confirmation of the withdrawal of the offer to the Agency. He attached a notice of cancellation of the Agreement for Sale and Purchase.

[48] The auction commenced at 2.30 pm on 21 May. The appellant was not present. One potential buyer, the X's, attended. The appellant's pre-auction offer was announced as the opening bid. No other bids were made, so the property was declared sold to the appellant.

Submissions

[49] Ms Borcoski submitted that the Tribunal should accept the appellant's evidence that there was no discussion of the property, or possible pre-auction offer, when he and the licensee had lunch after the first viewing.

[50] Regarding the meeting with the solicitor, Ms Borcoski submitted that as the pre-auction offer form was not included in the material on which the solicitor gave advice, it could not be inferred that the appellant had received legal advice about the pre-auction offer process or the pre-auction offer form: the advice was about conveyancing only. She submitted that there was no explanation of the meaning and consequences of the offer or the form, nor was it explained to the appellant that he could not withdraw his offer before or at the auction. She submitted that this led to breaches of r 9.7 (as to obtaining legal advice), and 9.8 (which provides that a licensee must not take advantage of a customer's inability to understand relevant legal documents).

[51] Ms Borcoski further submitted that although the licensee said he had followed a detailed process of explaining the pre-auction offer process and the form, it was evident from the chronology of events that there was insufficient time for this to have been done. Having gone through the timeline as to the time taken at each stage, Ms Borcoski submitted that any explanation was given over a period of only 15 minutes, at the licensee's office. She submitted that the Tribunal should accept the appellant's evidence that he did not understand the process or the documents he was being asked to sign and the fact that he tried to withdraw the offer the very next day shows that he did not understand the pre-auction offer process and the pre-auction offer form. She submitted that such explanation as the appellant was given as to the meaning and consequences of making a pre-auction offer was inadequate.

[52] Ms Mitchell submitted that the licensee took all reasonable steps to ensure that the appellant was sufficiently informed as to all aspects of the pre-auction offer process. She submitted that in the light of the licensee's evidence that he had explained the process to the appellant during the day, little weight should be given to the time spent at the licensee's office, and at the appellant's home.

[53] Ms Mitchell also submitted that the appellant had received independent legal advice from the solicitor, and it could not be argued that he did not give such advice. She submitted that it is more than reasonable to assume that the solicitor's advice would be proficient, such that the licensee could reasonably be confident that the legalities had been explained to the appellant. She further submitted that it was the appellant's choice whether he asked the solicitor questions, or asked him whether he should ask questions.

[54] Ms Mitchell further submitted that, in any event, the licensee and the Agency had been correct to tell the appellant that he could not withdraw the pre-auction offer after it had been accepted by the vendor. On this point, she referred to a legal opinion provided by the Agency's solicitors during the course of the Authority's investigation.

[55] On the issue of credibility, and their respective recall of events, Ms Mitchell submitted that the licensee's evidence was more reliable, and should be preferred

over the appellant's. She submitted that the appellant's responses to questions that he "could not recall", or was "not 100% sure" indicated that his evidence was not reliable, particularly in light of the fact that this was the appellant's first house purchase and, as such, his recall of relevant events should have been clear.

[56] Ms Mitchell accepted that the licensee's evidence was at times as to his "usual practice", but submitted that his responses to questions in cross-examination and to questions from the Tribunal showed that he had good recall of this particular transaction. She submitted that there were only a few occasions when the licensee expressed uncertainty. Finally, she submitted that the licensee's demeanour indicated that he had good recall.

[57] Ms Lawson-Bradshaw submitted that the key issue in the appeal is whether the form was clearly and adequately explained to the appellant, and this came down to whether the Tribunal accepted the appellant's or the licensee's evidence. In the context of the appellant's relationship with the licensee, and the appellant's lack of experience in property, the question to be asked was whether the licensee took sufficient steps. Ms Lawson-Bradshaw submitted that in relation to the pre-auction offer form, it is not enough to simply read out each paragraph of the form; a careful explanation of each paragraph is required. She submitted that if the Tribunal were to find that the explanation was insufficient, it is open to the Tribunal to find unsatisfactory conduct. *Assessment*

[58] Counsel made submissions as to the Agency's pre-auction offer form, and as to whether the form could, legally, preclude the appellant from withdrawing the offer. Counsel referred to the Agency's "Pre Auction Sale – Buyer's Form" signed by the appellant, which provided at paragraphs 2 and 7:

2. The pre auction bid is prepared on the Particulars and Conditions of Sale of Real Estate by Auction 4th Edition (2) with the following time clause added as a special condition.

This offer shall remain open until it is accepted, rejected, or withdrawn, but the Buyer shall not be free to withdraw it before 4 pm 21st May 2014.

...

7. If there is an auction conducted with the interested parties, the opening bid announced will be the bid already made.

[59] Counsel also referred to s 36ZA of the Fair Trading Act 1986 and, s 42 of the Property Law Act 2007,³ concerning sales by auction. Section 36ZA of the Fair Trading Act provides:

S 36ZA Start and end of auction

- (1) An auction starts when the auctioneer invites the first bid from potential participants.
- (2) An auction ends when the auctioneer makes it clear that bidding is closed.
- ...

[60] Counsel's submissions related to whether, in the light of the provision in the Agency's form that the pre-auction offer is announced as the opening bid, it must (pursuant to s 36ZA of the Fair Trading Act) remain open until such time as the auctioneer makes it clear that bidding has closed. If that is the correct interpretation, then it would have been wrong in law for the Agency to refuse to allow the appellant to attend the auction, and to withdraw his bid before the auctioneer made it clear that bidding was closed.

[61] We accept Ms Lawson-Bradshaw's submission that it is not necessary, in this decision, for the Tribunal to determine whether the Agency and the licensee were, as a matter of law, correct in telling the appellant that once the pre-auction offer was signed by the buyer, it could not be withdrawn. The Committee said in its decision that there is a "general understanding in the industry" that pre-auction offers cannot be withdrawn at auction. However, from a review of the pre-auction offer form it appears to be at least arguable that if a pre-auction offer has been announced as the "opening bid" at the auction, it may be withdrawn at any time before completion of the auction.

[62] At the very least, the position is uncertain. In this respect, we note that in response to a question from the Tribunal, the auctioneer involved said that if (a) a person who had had a pre-auction offer accepted turned up at the auction, (b) the offer price was announced as the opening bid, and (c) the offeree then wanted to

³ Section 42 of the Property Law Act 2007 was repealed on 18 December 2013.

withdraw the offer, he might allow the offeree to withdraw. Further, an auctioneer called as an expert witness said that in his experience an auctioneer will allow a pre-auction offer announced as the opening bid to be retracted before the auction was complete. This uncertainty heightens the need for the pre-auction offer process, and the pre-auction offer form, to be explained carefully, in detail, with the explanation tailored to the particular customer.

[63] As Ms Lawson-Bradshaw submitted, the pre-auction offer process and the pre-auction offer form are complex and not easily understood. That is likely to be so where a person is dealing with the process and form for the first time. The process has serious consequences for the purchaser, not the least of which is the risk that, at auction, the offeror may be required to make a higher offer to secure the property, or lose the opportunity to buy the property for less than the pre-auction offer. This gives even more reason for a careful and thorough explanation.

[64] In the particular circumstances of this case, the complexity of the process and its serious consequences must be considered in the context of the appellant's being a person with absolutely no experience in buying property, who had never contemplated the prospect of buying a house, and who had no familiarity with any part of the process beyond looking at other houses and making an offer (later withdrawn) on one. In the circumstances, the explanation had to be done very carefully, not in hurried circumstances, and highlighting the meaning and all possible consequences of making a pre-auction offer.

[65] We consider it is more likely than not that the appellant and the licensee discussed the appellant's possible purchase of the house during their lunch. However, as noted above, the licensee told the investigator that he did not discuss "the form" at lunch, as the appellant had "left the form in his car". Even if the "form" was the pre-auction offer form, there cannot have been any detailed discussion or explanation of it, as it was not in front of them. We cannot, therefore, conclude that a careful and thorough explanation of the pre-auction offer process was given during the lunch.

[66] With respect to the appointment with the solicitor, the Tribunal does not doubt that the solicitor gave proper professional legal advice on the material that was before him. However, on the evidence before the Tribunal, there is no basis on which the Committee could have considered that the appellant was given legal advice as to making a pre-auction offer and/or the nature and implications of the pre-auction offer form. The solicitor cannot have done so, as the relevant material was not provided to him for this purpose.

[67] Nor does the Tribunal consider that the appellant's second viewing with a friend could give the Committee any comfort as to the appellant's knowledge and understanding of the pre-auction offer process. The statement by the appellant's friend (taken as read at the hearing, without any requirement for cross-examination) makes it clear that her discussion with the appellant was confined to matters such as the size of the rooms, and the possibility of building an additional garage.

[68] There was no evidence that the appellant's friend was a licensed salesperson, or that she had particular expertise in buying and selling houses in general, and the process of making a pre-auction offer and the nature and implications of the pre-auction offer form in particular. The second viewing with a friend could not give the Committee any confidence that the appellant's understanding of the process and the form was enhanced.

[69] Furthermore, there was no evidence on which the Committee could consider that the appellant was able to take advice from other licensees. It is evident from the timeline set out earlier that between the time of his first viewing and his signing the pre-auction offer form there was no opportunity for the appellant to take such advice.

[70] In the light of the above, there remains only the time the appellant spent at the licensee's office, which appears to be some 15 minutes. We accept that the licensee would have given the appellant some information regarding the pre-auction offer form. However, we also accept Ms Borcoski's submission that there was not enough time for the licensee to give the appellant an explanation that addressed the complexity and consequences of the process, was tailored to his particular circumstances, and was the kind of explanation he needed to be given before he

made a pre-auction offer. The explanation given by the licensee may well have been sufficient for a more experienced purchaser, but the evidence before us does not support the Committee's finding that it was appropriate and sufficient for the appellant.

[71] Accordingly, we conclude that, given the appellant's particular circumstances, the evidence does not support the Committee's finding that he was given a proper explanation of the meaning and implications of the pre-auction offer process, and the form he was required to sign. There are grounds for a finding that the second and third respondents were in breach of rr 9.7 and 9.8.

Third issue: was the appellant misled as to the price he should offer for the property?

Evidence

[72] The appellant's evidence was that he asked the licensee how much he would have to pay for the property, and the licensee first mentioned \$865,000, then later told him the offer should be \$890,000. The licensee told the investigator that he had not seen Ms M's appraisal, but he told the Tribunal that when he returned from the second viewing, Ms M told him about a nearby property which had sold for \$865,000. He then told the appellant that the property he was interested in was better than \$850,000 but not in the range of \$900,000 or more. He said the appellant suggested an offer of \$890,000.

[73] Ms M's evidence was that she had appraised the property at \$840,000 to \$910,000. She told the licensee that the vendor was expecting that the sale price would not be below \$900,000. However, the Open Home records indicate that interested parties had given indications of offers "not at \$800,000", "\$650,000", and "not worth \$800,000". Further, as noted in the timeline set out earlier in this decision, Ms M advised the X's at about 12.30 pm on 19 May that the "vendor's expectations have certainly come down in their thinking". She did not pass on to the licensee either the Open Home comments, or her knowledge that the vendor's expectations had lowered. In answer to questions from the Tribunal, Ms M said that (regarding listings for which she is the listing salesperson) she does not pass on

information from Open Homes, or tell her colleagues what a vendor's price expectations are. She said that such information is confidential to the purchaser.

[74] The X's said Ms M told them that there was not much interest in property, and that the vendor's expectations were lowered. On the basis of that information, they would offer \$690,000, and up to \$725,000 at auction, but not more.

Submissions

[75] Ms Borcoski submitted that the licensee's suggested price range of \$850,000 to \$900,000, and his suggested offer of \$890,000, did not accurately reflect the vendor's price expectations. She submitted that the licensee had simply adopted Ms M's indication of lowest price the vendor would accept as a pre-auction offer. As a result, she submitted, the licensee had misled the appellant as to the appropriate offer price.

[76] Ms Mitchell submitted that Ms M's appraisal was not unrealistic, as sale prices in post-earthquake Christchurch had been difficult to predict, and new-built houses which met earthquake code requirements were at a premium. She further submitted that Ms M had not been able to pass on the vendor's expectation as to the sale price, because general practice in the Agency is that vendors' expectations are confidential to the vendor.

Assessment

[77] We note, first, the contradiction apparent in Ms M's evidence as to her not informing her fellow salesperson, the licensee, that the vendor's price expectation had been lowered (because it was confidential), while passing the same confidential information on to the X's.

[78] The licensee advised the appellant as to the appropriate price to offer for the property in accordance with the information he had, that is Ms M's advice as to the selling price of the nearby property (\$865,000), and her advice that the vendor would not accept an offer below \$900,000. Further, the appellant's offer was within the

parameters of Ms M's appraisal. While the property may have sold for less (or more) at auction, that does not alter the position. The licensee's dealing with the appellant's pre-auction offer was in accordance with the advice given to him and his fiduciary duty to the vendor. In so saying, this highlights the conflicting position the licensee was in, having not made his role clear to the appellant.

[79] We are not persuaded that the licensee misled the appellant as to the parameters within which an offer might be made, although the licensee himself appears to have been misled by the Agency, such that his ability to deal fairly with the appellant as a customer was compromised.

Fourth issue: was the appellant misled as to the level of interest in the property?

Evidence

[80] The appellant's evidence was that the licensee told him there was a lot of interest in the property, and this was why he should make a pre-auction offer. The licensee said he was not told that only two people had registered interest at the Open Homes; he was told there was "other interest" in the property. He passed on such information as he had to the appellant. Ms M accepted that she told the licensee that there was "other interest", but did not say that only two people had registered interest. As with the vendor's expectation as to price, Ms M said information regarding the Open Homes was confidential to the vendor.

Submissions

[81] Ms Borcoski submitted that, as was the case in relation to the appropriate offer price, in being told there was "a lot of interest in the property" the appellant was misled. Ms Mitchell submitted that the licensee's understanding as to the level of interest in the property throughout the marketing period was accurately communicated to the appellant, so was not overstated. She further submitted that the observable level of interest prior to the auction is not representative of actual interest at the auction.

Assessment

[82] As was the case in respect of the offer price, we are not persuaded that the licensee misled the appellant as to the level of interest in the property. He gave the appellant such information as he had himself been given. His actions were consistent with his obligations to the vendor. However, his ability to comply with his obligation to deal fairly with the appellant may have been compromised by a lack of information.

Fifth issue: was undue pressure placed on the appellant to make a pre-auction offer?

Evidence

[83] The evidence of the appellant and the licensee on this issue was, in essence, based on the timeline set out at the beginning of this decision, and the evidence set out in relation to the third and fourth issues. The appellant's purchase of the property was completed in less than six hours, from his first viewing at 12.30 pm to the vendor's acceptance of the offer at 6.00 pm. The appellant said he felt pressured to make the offer, because of the level of interest and the possibility of it selling for a higher price at auction. The licensee's evidence was that the appellant was given appropriate advice regarding the process, and he gave the appellant the information he had. He also said he confirmed with the appellant that this was the property he wanted to buy.

Submissions

[84] Ms Borcoski submitted that there was no urgency to put in a pre-auction offer on 19 May, as the auction was scheduled for 23 May, and there was in fact no other significant interest. She submitted that the licensee knew the appellant trusted him, and unfairly pressured the appellant into making the offer. Ms Mitchell accepted that apart from the property he had earlier offered on, this was first property the appellant had expressed real interest in buying. She submitted that the licensee had spent the day with the appellant working towards his making the pre-auction offer, without taking shortcuts. She further submitted that the Committee was correct in finding

that any pressure experienced by the appellant was of the type normally associated by people buying and selling properties.

Assessment

[85] We accept, as was implicitly acknowledged in Ms Mitchell's submission, that the process of buying and selling is inherently stressful, particularly for those who have limited experience with the process.

[86] In the context of the circumstances set out above, that is: the confusion as to the licensee's role, the complexity of the pre-auction offer process, and the appellant's personal circumstances, this was a case where particular care needed to be taken. The appellant needed to be given sufficient time to absorb the advice he was given, to think carefully about what he was doing and, if he wanted to, to consult other people as to the particular process he was getting into. At the least, the evidence suggests that this was a case where the appellant could well have been given time to consider the advantages and disadvantages of a pre-auction offer, rather than completing the "first viewing to accepted offer" process within such a short time.

Overall assessment as to the first to fifth issues

[87] The manager's response to a question from the Tribunal that he was "not happy with the way this [transaction] was done" is revealing. In a number of respects, the appellant was not dealt with in a manner that met the licensee's and the Agency's obligations to deal fairly with him, and not to mislead him: the licensee's role should have been explained clearly, the appellant should have been given a clear and adequate explanation of the pre-auction offer process and the pre-auction offer form, and the licensee should have been given information that would have enabled him to deal more fairly with the appellant.

[88] In its decision, the Committee said that

It is not the Committee's role to assess whether the Licensee or the Agency failed to apply the very best practice which could possibly have been applied in the circumstances.

[89] The Act and the Rules, between them, set out the “very best practice” which must be applied. Thus, in considering whether there has been a breach of the Act or the Rules, the Committee was required to assess whether in the case before it best practice had been applied. In the present case, the evidence provides an evidential basis for a finding that “best practice” was not applied by the licensee or the Agency and that there were, therefore, breaches of the Act and Rules by the licensee and the Agency. Accordingly, we accept the appellant’s submission that the Committee was wrong to decide not to enquire further.

Sixth issue: was there a breach of natural justice?

[90] This issue related to two matters. The first was that the solicitors’ opinion on the issue as to whether the pre-auction offer could be withdrawn, provided to the Committee by the Agency, was not provided to counsel for the appellant. The Authority accepted that, by oversight, a copy of the opinion was not provided to counsel. However, we accept Ms Lawson-Bradshaw’s submission that the opinion was not decisive for the Committee – the Committee relied on a “common practice in the industry” as to withdrawal of offers.

[91] In any event, any disadvantage experienced by the appellant and his counsel as a result of not having the opinion is cured by this appeal hearing.

[92] The second matter argued related to the membership of the Committee, which included Mr R Hadley, who was a sales consultant for a Harcourts agency at the time. While making it clear there was no allegation of actual bias on Mr Hadley’s part, Ms Borcoski submitted that the Committee’s decision as to the Agency’s use of the pre-auction offer form may have an impact on all Harcourts agencies, not just the Agency involved in this case. She submitted that this raised the issue of an apparent bias.⁴ Ms Mitchell’s response was that the Agency is a separate entity from that with which Mr Hadley is associated. Thus, she submitted, there was no possibility that Mr Hadley had a conflict of interest.

⁴ See *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA), at [62].

[93] In any case, whether before the Committee or the Tribunal, the relevant panel should not include any person who has, or may have, a conflict of interest. Notwithstanding that Mr Hadley's agency and the Agency are different entities, there is a possibility that a "fair minded lay observer" may "apprehend that the decision maker may not bring an impartial mind to the resolution of the instant case".⁵ In the present case, Mr Hadley should have recused himself from being a member of the Committee.

[94] However, it is relevant that Mr Hadley did not consider the appellant's complaint on his own. He was one of the three members of the Committee. Any perceived conflict or apparent bias on his part was ameliorated by the composition of the Committee, and in any event is cured by the hearing before the Tribunal.

[95] Neither of the two issues raised under this ground of appeal leads us to the conclusion that the Committee failed to act in accordance with the principles of natural justice.

Outcome

[96] In light of our findings in respect of the first to the fifth issues on appeal, we have concluded that the Committee was wrong to decide not to enquire further into the appellant's complaint. His appeal is allowed.

[97] Having undertaken that inquiry, we find that the licensee and the Agency have engaged in unsatisfactory conduct, under s 72(a) of the Act. A telephone conference with the parties is to be arranged to set a timetable for filing submissions and, if a hearing is sought, to set a date for a penalty hearing.

[98] Finally, the Tribunal expresses concern at the evidence given for the Agency that a listing salesperson does not pass on to other salespersons information that is relevant to the listing. In order for licensees to comply with their obligation to act in good faith and deal fairly with all parties (r 6.2), an agency should put in place systems to enable the agency's licensees to work together for the common good of

⁵ Ibid.

all parties to the transaction. This would appear to be inconsistent with one salesperson withholding from other salespersons information that is relevant to a listing.

[99] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member