BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 68

READT 050/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	EWAN JOHNSON AND ALLEN JOHNSON Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 20003) First respondent
AND	MICHAEL HARVEY Second Respondent

READT 051/15

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	MICHAEL HARVEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 20003) First Respondent
AND	EWAN JOHNSON AND ALLEN JOHNSON Second Respondents
Hearing:	15 and 16 August 2016, at Nelson
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen (Member) Ms C Sandelin (Member)
Appearances:	Mr Allen Johnson, in person and on behalf of Mr Ewan Johnson Mr P McMenamin, on behalf of Mr Harvey Mr M Hodge, on behalf of the Authority
Date of Decision:	5 October 2016

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Ewan Johnson and Mr Allen Johnson ("collectively, the Johnsons")[1] have appealed against a decision of Complaints Assessment Committee 20003 ("the Committee") issued on 21 May 2015. In that decision, the Committee found Mr Michael Harvey guilty of unsatisfactory conduct under s 72(d) of the Real Estate Agents Act 2008 ("the Act") because of breaches of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules") in the course of a transaction in late 2011/early 2012.[2] The Johnsons contend that the Committee should have made a finding of misconduct against Mr Harvey.

[2] Mr Harvey has cross-appealed against the Committee's decision. He contends that the Committee should not have made any disciplinary finding against him.

[3] The appeal and cross-appeal were heard in Nelson on 15 and 16 August 2016, as a de novo hearing. Both the Johnsons and Mr Harvey gave and called evidence on their behalf, and witnesses were cross-examined. Submissions were filed following the hearing: for the Johnsons on 22 August 2016, for Mr Harvey on 30 August 2016, and for the Authority on 5 September 2016.

[4] The Tribunal records that when Mr Harvey filed his appeal, he applied for interim and permanent orders under s 108 of the Act, that his name and identifying details not be published. In a decision issued on 5 November 2015, the Tribunal refused his application.[3] Mr Harvey appealed to the High Court against the Tribunal's decision. The Tribunal understands that this appeal has not yet been heard.

Background

[5] The dispute between the parties relates to a transaction in which Mr Johnson entered into an Agreement for Sale and Purchase to purchase two sections in a new

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1 Unless otherwise stated, references in this decision to "Mr Johnson" are to Ewan Johnson.

2 The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 were revoked as from 8 April 2013 and replaced by the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. All references in this decision to "the Rules" are to the 2009 Rules.

3 *Harvey v Real Estate Agents Authority* [2015] NZREADT 77.

subdivision at Mapua. The parties' accounts of their dealings are in stark conflict with each other. The following paragraphs set out a chronology of events, and notes disputed areas.

[6] Mr Harvey is a licensed agent and was at the time, the owner of Aranui Realty Ltd; trading as Ray White Mapua ("the Agency").[4] Mr Harvey is also the sole director of Split Atom Marketing Ltd ("Split Atom"). Split Atom acquired land at Mapua which it developed into a 12 lot subdivision ("the subdivision"). Each lot in the subdivision was listed for sale through the Agency.

[7] Mr Johnson has operated a mobile coffee cart business based in Nelson for several years. In 2002, he bought a lifestyle property outside Nelson. Mr Harvey was the listing agent for that property. Mr Johnson and Mr Harvey maintained some contact in the years after the purchase (including Mr Harvey buying coffee at the coffee cart). Mr Johnson sold the lifestyle property in 2009. Mr Harvey was not involved in that sale. As at 2012, Mr Johnson had funds remaining from the sale.

[8] In early September 2011, Mr Johnson and Mr Harvey had a conversation at Mr Johnson's coffee cart about the possibility of Mr Johnson buying two lots in the subdivision. Split Atom had priced the lots at $165,000 each. At that time, titles had not been issued for any of the lots.

[9] While Mr Harvey and Mr Johnson agree that they discussed a purchase price of $150,000 for each section, and that Mr Harvey said that they would readily be able to achieve $160,000 each if on-sold, they differ in their accounts of the conversation. It was common ground that selling both sections for $150,000 each was of benefit to Mr Harvey as it assisted him financially, and there were economies of scale in selling two sections at once.

[10] Mr Johnson said he would run the proposal past his father; Allen Johnson. Mr Harvey and Allen Johnson had a discussion in which Mr Harvey again talked of a purchase price of $150,000 and an on-sale price of $160,000. While there is some

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[4] Mr Harvey's franchise agreement with Ray White was terminated some months after the transaction with which this appeal is concerned.

dispute as who instigated this discussion, it is immaterial for the purposes of this decision.

[11] Mr Johnson and Mr Harvey viewed the sections. Again, there is some dispute as to who took whom to the viewing, but it is immaterial for the purposes of this decision.

[12] Mr Johnson signed an Agreement for Sale and Purchase, dated 5 September 2011 ("the Agreement") in respect of lots 5 (620 m^2) and 8 (655 m^2) of the subdivision ("the sections") within a few days of viewing the sections.

[13] The following terms of the Agreement are relevant to the appeal:

[a] Mr Harvey disclosed his relationship with Split Atom and the Agency.

[b] The Agreement was conditional on Split Atom obtaining certificates of title (cl 30(b)). This clause was amended by Mr Johnson's solicitor to provide that titles were to be obtained within six months, after which he had the right to cancel the Agreement. The settlement date was five working days after Split Atom's solicitors gave notice that titles to the sections were available for searching (cl 22). Split Atom was required to proceed with the subdivision and obtaining titles with due diligence (cl 23).

[c] The penalty rate for late settlement was 18 per cent per annum.

[d] Mr Johnson was to pay a deposit of 10 per cent of the purchase price for each section ($30,000 in total) (cl 28(a)).

[e] The Agreement was conditional on approval by both parties' solicitors (cl 30(a)).

[f] Mr Harvey was required to allow access to Mr Johnson and persons working on his behalf prior to settlement, for the purposes of on-sale.

[g] Mr Johnson acknowledged that he had in no way relied on any statements, opinions, or representations made by Mr Harvey, Split Atom, or the Agency (cl 18).

[14] Solicitors' approval was given on 7 September 2011. The same day, Mr Harvey gave an undertaking not to charge commission if the Agency sold the sections on behalf of Mr Johnson. This undertaking was limited to two years after the Agreement became unconditional.

[15] There is a dispute as what agreement (if any) there was as to how, and when, the sections were to be marketed, and as to how, and when, they were in fact marketed.

[16] In February 2012, Mr Johnson made an unconditional offer to purchase a property in Stafford Avenue, Nelson, for $350,000. His offer was accepted. There is a dispute between him and Mr Harvey as to what discussion there was between them concerning Mr Johnson's purchase. Settlement of the Stafford Avenue purchase was due in early or mid-May 2012.

[17] On 3, 10, and 17 February 2012, and on 23 March 2012 and 13 April 2012, sections in the subdivision were advertised for sale by the Agency, with Mr Harvey as listing agent. The advertisements did not identify individual lots in the subdivision, but stated that the areas of the sections "range from 650–1016 m^2". The sections were priced "from $195,000".

[18] As at 8 March 2012, title had not been issued for the sections. Mr Johnson therefore had the right to cancel the Agreement. He did not exercise this right. Titles were issued on 30 May 2012, which made the Agreement unconditional. Split Atom's solicitors issued settlement notices. Over the next month the parties' solicitors corresponded regarding Mr Johnson's inability to settle. The settlement date was extended. On 20 June 2012, Mr Johnson's solicitors advised that he could not complete settlement. Forfeiture of the deposit was accepted in full and final settlement.

[19] As at 7 May 2012, the sections were recorded on Ray White internal systems as being "for sale", at $215,500. On 8 June 2012, a further advertisement stated, without giving any indication of area, that "there will only ever be two sites at this price"; priced at "from $175,000 or just make your offer".

[20] On 9 July 2012, Mr Johnson wrote to Mr Harvey alleging that he had not marketed the sections appropriately, with the result that they had not sold before settlement. He sought an undertaking that Mr Harvey would return the deposit when the first section eventually sold.

[21] The sections were sold on 18 July 2012 and 31 July, respectively, each for $165.000.

The Committee's decision

[22] Mr Johnson and his father Allen Johnson each made a complaint to the Authority on 14 November 2012. They alleged that Mr Harvey approached Mr Johnson about the sections and promised that he would market them, and they could be resold at a substantial profit before Mr Johnson was required to settle the purchase. They alleged that Mr Harvey did not on-sell the sections before settlement, or make any genuine effort to do so, then enforced settlement in the knowledge that Mr Johnson could not afford to settle and would forfeit the deposit. They then alleged that Mr Harvey had sold the land shortly after the Agreement was cancelled, at a price that would have been accepted by Mr Johnson.

[23] The Committee's investigation of the complaint included interviews completed in June 2013 by the Authority's investigator ("the investigator") with Mr Johnson and his father, and with Mr Harvey. The investigator also obtained information from the two subsequent purchasers of the sections, Mr Johnson's solicitor, and a person who was present at coffee cart at the time of the conversation between Mr Johnson and Mr Harvey.

[24] In its decision issued on 21 May 2015, the Committee found that:

[a] At the time of the conversation at Mr Johnson's coffee cart, Mr Harvey led Mr Johnson to believe that his purchase of the sections was a short term one, on the understanding that Mr Harvey would on-sell the properties on Mr Johnson's behalf, at no commission. This would achieve a significant profit, and induced Mr Johnson to enter into the agreement to buy the sections. Selling the sections to Mr Johnson helped Mr Harvey to obtain funds to complete the subdivision.

[b] Mr Harvey did not provide Mr Johnson with a market appraisal, or an agency agreement. These were required because once the Agreement became unconditional, Mr Johnson became the owner in equity. As such, Mr Johnson was then a client of Mr Harvey and the Agency for the on-sale.

[c] Mr Harvey made no genuine attempt to achieve on-sale, when he knew or ought to have known that Mr Johnson was reliant on the sections being on-sold.

[d] Mr Harvey was in breach of rr 6.1 (failure to comply with an agent's fiduciary duty to his client by there being no genuine attempt to achieve on-sale), 6.2 (failure to act in good faith and deal fairly with the parties, in relation to penalty interest rate), 6.4 (misleading Mr Johnson as to the likely return), 9.1 (failure to act in Mr Johnson's best interests), 9.5 (failure to provide a written appraisal) and 9.15 (marketing the sections without a written agency agreement in place).

[e] Accordingly, Mr Harvey had engaged in unsatisfactory conduct.

[25] In a penalty decision issued on 20 July 2015, the Committee censured Mr Harvey and imposed a fine of $7,500.

The appeals

[26] The grounds of appeal set out in the Johnsons' Notice of Appeal reflect the matters raised in their complaint. In general terms, they challenge the Committee's finding of unsatisfactory conduct. They allege that:

[a] Mr Harvey represented to Mr Johnson that he would never have to settle his purchase of the sections, then reneged on that;

[b] Mr Harvey promised to on-sell the sections then made no effort to do so; and

[c] Mr Harvey re-sold the sections and obtained a windfall gain after Mr Johnson had forfeited his deposit.

[27] They contended that the Committee should have found Mr Harvey guilty of misconduct. They also sought compensation for loss suffered.

[28] Likewise, Mr Harvey challenges the Committee's finding of unsatisfactory conduct, but submits that the Committee should not have made any finding against him. In particular, in his Notice of Appeal, Mr Harvey alleged that:

[a] The Committee failed in a number of respects to perform its duties and functions in accordance with natural justice;

[b] It failed to properly consider and apply the evidence; and

[c] It erred in fact and in law, such that its decision was contrary to the weight of the evidence.

[29] Mr Harvey's focus at the hearing of the appeals, and in his submissions, was on the Committee's findings of fact. As the appeals were heard de novo, it is appropriate to focus on substantive issues, rather than procedural issues.

[30] The issue of whether Mr Harvey was carrying on real estate agency work for Mr Johnson is an essential element in determining the appeals. If he was not, he could not be found guilty of unsatisfactory conduct under s 72 of the Act, and he

could not be found guilty of misconduct except pursuant to s 73(a) of the Act. It has not been suggested that s 73(a) applies in this case.

[31] The Committee's findings will be considered as set out below:

[a] The discussions between Mr Johnson and Mr Harvey, and the terms of the Agreement;

[b] Whether Mr Harvey was carrying on real estate agency work for Mr Johnson. If the Tribunal finds that he was, the Tribunal must consider:

[i] The lack of a written appraisal or written agency agreement;

[ii] Mr Harvey's efforts to on-sell the sections;

[iii] The relevance of Mr Johnson's purchase of the Stafford Avenue property; and

[iv] The eventual sale of the sections.

[32] We note that the Committee also found that the penalty interest rate provided for in the Agreement for Sale and Purchase was unreasonably high. As penalty interest was not in fact charged, it is not necessary to consider the Committee's finding.

The parties' discussions and the Agreement

[33] We accept Mr Hodge's submission, in his opening submissions on behalf of the Authority, that the pre-contractual discussions between Mr Johnson and Mr Harvey are crucial to their understanding of subsequent events.

The Committee's finding

[34] In its decision the Committee identified the conversation at the coffee cart as being the cornerstone to reaching a decision on the complaint. The Committee had

before it statements from the Johnsons and Mr Harvey, transcripts of the investigator's interviews, and other material related to the transaction. The Committee recorded that "the parties agree that [Mr Harvey] told [Mr Johnson] that he needed to sell two sections quickly to raise the final loan from the bank so that the development could be completed". This was not in dispute on appeal.

[35] In relation to the issue of whether Mr Harvey told Mr Johnson that he would on-sell the sections, and that Mr Johnson would not have to complete settlement, the Committee referred to a statement from an independent witness, Mr Gately, who was present at the coffee cart at the time. Mr Gately's brief statement was that he "was present when Mike Harvey approached Ewan about purchasing properties in Mapua". He remembered the conversation as he and Mr Johnson talked about the properties after Mr Harvey left. While he did not remember the exact date and context of the conversation, he "clearly" remembered Mr Harvey coming up to Mr Johnson and having a discussion about the sale of property in Mapua.

[36] The Committee also referred to Mr Johnson's solicitor having told the investigator that Mr Johnson told her, when he first approached her, that Mr Harvey said he needed to sell the two sections in order to finalise roading works, and that he could sell the sections again quickly. She referred to calls from Mr Harvey to the effect that "if things got tight he would buy one section back himself and wouldn't force settlement through".

[37] The Committee was "satisfied on the balance of probabilities that [Mr Harvey] led [Mr Johnson] to believe that his 'investment' of $30,000 was a short term one designed to help [Mr Harvey] complete the development and make [Mr Johnson] a good return".

Evidence

[38] Mr Johnson's evidence was that Mr Harvey approached him at the coffee cart and said he was doing the subdivision and needed additional funds to finish it. He said Mr Harvey told him he could buy the sections for $150,000 each ($300,000 in total), and pay a deposit of $30,000. Mr Harvey would then complete the

subdivision and sell the sections for $165,000 each. Mr Johnson said Mr Harvey led him to believe, in discussions on several occasions, that he would not have to complete the purchase, as Mr Harvey would on-sell the sections before settlement. He said that after he viewed the sections with Mr Harvey, he discussed the proposal with his father, Allen Johnson. Allen Johnson said Mr Harvey phoned him and explained the transaction, and assured him that the sections would sell readily at around $160,000 each.

[39] Regarding the Agreement, Mr Johnson said he signed it "within a few days" of viewing the sections, He found it "comprehensive and there were areas of it that I didn't fully understand and left it with my solicitor." He said he had "little to do" with the terms of the Agreement and, while acknowledging that he had initialled each of its pages, he said he did not look at it in detail as "there was a hell of a lot of paper".

[40] Mr Harvey's evidence was that he told Mr Johnson about the subdivision after Mr Johnson approached him at the coffee cart, looking for an investment property. He said Mr Johnson asked if Mr Harvey could make him a deal for two of the sections in the subdivision. Mr Harvey was prepared to consider this, as the deposit would assist with obtaining finance (he had to have six sale contracts in place at that time) and there was an economy in scale in selling two sections together. He said he met Mr Johnson at the subdivision later the same day and explained the subdivision process to him in detail, and that he and Mr Johnson together developed the idea that Mr Johnson would buy the two sections.

[41] Mr Harvey accepted that there may have been a discussion about on-selling the sections after title was issued, but was adamant that he never said that the sections would be on-sold before Mr Johnson was required to settle his purchase. He acknowledged that he had said that if he came across anyone who wanted to buy a section the area of Mr Johnson's sections, he would refer them to him.

Submissions

[42] The Johnsons' submissions were founded on the Committee's acceptance of

Ewan Johnson's evidence that Mr Harvey told him that he would on-sell the sections before he was required to settle his purchase.

[43] Mr McMenamin submitted on behalf of Mr Harvey that Mr Johnson's account of the initial discussions was inconsistent, and not credible. He referred to Mr Johnson's statement in his complaint that Mr Harvey had "convinced me that the sections were worth up to $200,000 each" then later in the complaint "the initial purchase price was $150,000 each and Harvey convinced me that they would sell for upwards of $170,000 each". Mr McMenamin also referred to Mr Johnson's interview with the investigator when, in answer to the question "so he could on sell them at a better price?" Mr Johnson said "yeah he was talking big numbers $195,000 and I said look I'd be happy with $160,000, $10,000 profit on each better than the bank interest…'

[44] Mr McMenamin also made submissions regarding the solicitor's statement, founded on Mr Johnson's refusal to waive legal professional privilege. The solicitor had been summoned by Mr Harvey for cross-examination as to her instructions from Mr Johnson on a number of matters. For that to occur, it was necessary for Mr Johnson to waive privilege, and he did not do so.

[45] Mr McMenamin submitted that while Mr Johnson was within his rights to take this course, there were implications the Tribunal could consider. He submitted it was "obvious" that if Mr Johnson's evidence were true, the solicitor's evidence (assumed to be true) could only corroborate and add strength to his case. However, his refusal to allow the solicitor to give evidence meant that he could not be given the benefit of a doubt which was of his own creation. He submitted that no evidence emanating from the solicitor could be treated as supportive of Mr Johnson's case.

[46] Mr McMenamin further submitted that documents relating to the Agreement provided objective evidence which "flatly contradicted" Mr Johnson's evidence. He referred to cl 18 of the Agreement, which recorded Mr Johnson's acknowledgement that he "in no way relied upon any statement, opinions or representations" made by

Split Atom, Mr Harvey, or the Agency and that "they have[5] been provided with as much time as they feel they need prior to the signing of this agreement."

[47] Mr McMenamin also referred to Mr Johnson's solicitor's file notes, correspondence as to amendments to particular terms of the Agreement and giving approval to the Agreement. He submitted that the "clear inferences which must almost inevitably be drawn from the documents", were that Mr Johnson was contemplating building on one section, he was willing and able to settle and might resell soon after the subdivision was completed, and was being assiduously advised by his solicitor who was totally in charge of framing the final terms of the contract, and would have explained all the terms of the Agreement to Mr Johnson.

[48] Mr Hodge submitted that the evidence given by Mr Johnson and Mr Harvey suggested that on-sale of the sections was in both their minds at the time of the initial discussions, and when the Agreement was entered into. He submitted that there was an evidential basis on which the Tribunal could conclude that Mr Harvey had made representations as to re-selling the sections at a profit.

[49] In this regard, Mr Hodge referred to cl 31 of the Agreement, which allowed access to the sections prior to settlement for the purposes of on-sale, the solicitor's record of discussions as to on-sale prior to the subdivision being completed or soon after, Mr Harvey's undertaking as to not charging commission on a re-sale, and correspondence from Mr Johnson and his solicitor after the Agreement became unconditional recording his understanding that Mr Harvey would on-sell the sections. He also referred to Mr Johnson's consistent statements in his complaint, his statements to the investigator and the Committee, and his evidence to the Tribunal, that Mr Harvey would on-sell the properties before settlement.

[50] Mr Hodge also referred to cl 18 of the Agreement. He submitted that while such a clause may absolve Mr Harvey from civil liability, it is not determinative in the wider context where the Tribunal must undertake a wider assessment of Mr Harvey's conduct, against the applicable professional standards.

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5 "They have" is clearly intended to be a reference to Mr Johnson.

Assessment

[51] We note Mr McMenamin's submission regarding Mr Johnson's solicitor. We acknowledge that the solicitor was not present for cross-examination, and we have taken that into account in considering what weight, if any, should be given to her statement to the investigator. However, we do not accept that we should ignore her statement that Mr Johnson told her that Mr Harvey said that he could "sell the sections again quickly", and that Mr Harvey "wouldn't force settlement through".

[52] We also note Mr McMenamin's submission regarding inconsistencies in Mr Johnson's evidence. We accept there is some inconsistency as to the price at which the sections could be on-sold. However, Mr Johnson was as adamant throughout that Mr Harvey would on-sell the sections for him before settlement as Mr Harvey was to the contrary.

[53] There is a conflict in the evidence of Mr Johnson and Mr Harvey. We do not accept that in the course of the discussions Mr Harvey promised, in so many words, to on-sell the sections before Mr Johnson was required to settle. What is clear, however, is that Mr Johnson believed that to be the case, as did Mr Allen Johnson, and as Mr Johnson reported to his solicitor. There was, at least, confusion between Mr Johnson and Mr Harvey as to what was being agreed. Mr Harvey must bear some responsibility for this confusion, as an experienced agent and in the light of his assessment of Mr Johnson (in his interview with the investigator) as "not the sharpest", and as "an idealist who hears what he wants to hear".

[54] We find that Mr Harvey did not take any, or sufficient, steps to make it clear to Mr Johnson what they were agreeing to and, in particular, that he was not agreeing to on-sell the sections before title was issued.

Issues raised as to Mr Harvey's interview with the investigator

[55] We have referred earlier to the parties' interviews with the investigator. One of Mr Harvey's grounds of appeal related to "the attitude" of the investigator. He alleged that the investigator had failed to carry out his functions impartially, had

made up his mind that Mr Harvey had "committed wrongdoing", and was acting on behalf of Mr Johnson. Mr Harvey said the investigator "talked me through the process on the pretence that he was doing everything empathetically".

[56] At the appeal hearing, Mr Harvey said that during the interview, the investigator was "relentless" in his questioning. He further said that he was "not in a good state" when he was interviewed, as a result of trauma following the dissolution of his marriage, and did not know what he was saying.

[57] Dr Galvin; a senior clinical psychologist, gave evidence. Her opinion was that at the time he was interviewed, Mr Harvey was at the height of an illness which would have caused him to be unable to sustain attention, to have a tendency to forget or confuse complex matters, and to react in an abrupt manner to make a problem go away. However, in answer to questions in cross-examination on behalf of the Authority, Dr Galvin accepted that she had not read Mr Harvey's formal statement, or the transcript of his interview. She also accepted that Mr Harvey would present as lucid, and could give sensible answers to questions put to him. She could not comment on Mr Harvey's answers to particular questions.

[58] We accept Mr Hodge's submission that there is nothing in the interview that appears unfair or oppressive. Mr Harvey was given the opportunity to answer questions in full, and did so. The transcript contains nothing to suggest that Mr Harvey did not understand, or was confused by, any of the questions put to him. He answered in detail questions concerning his dealings with Mr Johnson, and he gave detailed information concerning his dealings concerning his Ray White franchise, and concerning the dissolution of his marriage.

[59] We accept that Mr Harvey has received treatment for an illness. However, as noted above, Dr Galvin accepted that he would present as lucid, and could give sensible answers. We do not accept that we should ignore Mr Harvey's statements as recorded in his interview with the investigator.

Was Mr Harvey carrying on real estate agency work for Mr Johnson?

The Committee's decision

[60] The Committee found that Mr Johnson became the owner in equity once the Agreement went unconditional, and that Mr Harvey had undertaken to perform real estate agency work for Mr Johnson and to sell the sections.

Evidence

[61] As noted earlier, Mr Johnson's evidence was that Mr Harvey had said he would sell the sections for him.

[62] In his formal statement of evidence Mr Harvey said there was no suggestion of a listing or formal instruction to sell the the sections and Mr Johnson was "simply unwilling to allow me to list the properties". He said he remained under the impression that if Mr Johnson was going to list either of the sections for sale, it would be with another agent.

[63] In his interview with the investigator, Mr Harvey said he had "extensively marketed the sections", and had done so "without a listing because [the sections] were still in my name". He said he was in a bit of a quandary because "at the end of the day [the sections] were under contract to [Mr Johnson]". Later in the interview the transcript records:

[Investigator]	You know how you marketed the sections that he had purchased to on sell did you market any of the other ones as well?
[Mr Harvey]	No.
[Investigator]	So it was just those for him?
[Mr Harvey]	Just those two.
…	
[Investigator]	So you marketed these to try and achieve that on sell he was wanting?

[Mr Harvey]	He never told me he wouldn't be able to settle though you see, he never said to me I won't be able to settle and I always said to him you will really get your real premium, he wanted $195 so I was marketing them $195.
[Investigator]	Was that marketing after he couldn't settle?
[Mr Harvey]	No, but this was before, there was never any indication that he wouldn't be able to settle, there was never any indication.
[Investigator]	But he had come to you and said I want to on sell these and make some money?
[Mr Harvey]	He was like I want to on sell these and I want to make some money I don't want to have to come up with the money on the day under 3.16.

[64] At the hearing, Mr Harvey acknowledged his having said that it was "awkward" that he did not have a listing authority and he agreed that "it would appear I was" marketing. He said that the passages set out above were wrong, and he could not actually say why he answered any of the questions as he did. He later said that his position would have been that whatever Mr Johnson did regarding selling the sections was fine, and he would have passed on anyone he encountered, that he could have got a listing, but did not want to because there would be a conflict. He accepted that the answers he gave at the hearing were exactly the same as those recorded in the interview.

Submissions

[65] Mr McMenamin challenged the Committee's finding that Mr Johnson was the owner in equity on the basis that the Committee had provided no authority for its finding, and had ignored the fact that the Agreement did not become unconditional until 30 May 2012, when titles became available.

[66] He submitted that Mr Harvey was not carrying on real estate agency work. To find that, he submitted, would require the Tribunal to find that in telling Mr Johnson he would pass on Mr Johnson's details if he encountered anyone who was interested in sections, Mr Harvey was carrying on real estate agency work. He submitted this would require such an artificial and strained interpretation of the definition of "real estate agency work" in s 4 of the Act as to be untenable.

[67] Mr McMenamin further submitted that the advertisements for the sections (referred to at [17] and [19], above) could not be advertisements for Mr Johnson's sections, because the references to 650 – 1016 m2 were not to the exact areas of Mr Johnson's sections.

[68] Mr Hodge submitted that it was not necessary for the Committee to find that Mr Johnson was an owner in equity before it could find that Mr Harvey carried on real estate agency work. He submitted that the primary enquiry is whether Mr Harvey's conduct constituted "real estate agency work", as defined in the Act, and that the definition is sufficiently wide to capture actions taken in anticipation of equitable ownership, and advertising which is part of "generic" advertising such as that for a subdivision.

[69] Mr Hodge also submitted that Mr Harvey's undertaking not to charge commission in the event that the Agency sold the sections within two years from the date the Agreement became unconditional supported the submission that Mr Harvey was carrying on real estate agency work for Mr Johnson. He submitted there was further support in cl 31 of the Agreement, (allowing access to the sections prior to settlement for the purposes of on-sale), the solicitor's record of discussions as to on-sale prior to the subdivision being completed or soon after, and correspondence from Mr Johnson and his solicitor after the Agreement became unconditional recording his understanding that Mr Harvey would on-sell the sections.

[70] Mr Hodge submitted that the Tribunal could have concluded that Mr Harvey was carrying on real estate agency work for Mr Johnson, and it follows that Mr Johnson was Mr Harvey's "client" for the purposes of the Act and the Rules. Mr Harvey was therefore obliged to comply with the applicable provision of the Act and Rules when marketing the sections for on-sale.

Assessment

[71] "Real estate agency work" is defined in s 4 of the Act as:

> **Real estate agency work or agency work–**
>
> (a) Means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction

[72] The matters referred to by Mr Hodge, set out at paragraph [68] above, support a conclusion that Mr Harvey at least intended to carry on real estate agency work for Mr Johnson. We also accept Mr Hodge's submission that the Committee's finding that Mr Johnson was the owner in equity was not essential to its finding that Mr Harvey was carrying on real estate agency work. The definition in s 4 is not limited in such a way. It requires only that the "work done" is "on behalf of another person". Nor does the definition require that the "work done" was (as relevant to the present case) in relation to a particular section.

[73] The subdivision was advertised generically, with no reference to any particular sections. While the minimum area mentioned, "650 m^2", is not precisely the same as the actual area of Mr Johnson's sections (655 and 620 m^2), it is clear from the Site Plan for the subdivision that Mr Johnson's sections are the only ones under 700 m^2 (the smallest of the other sections). It is reasonable to infer that the reference to 650 m^2 was intended to be to Mr Johnson's sections. Further, as recorded earlier, Mr Harvey said in his interview that he marketed Mr Johnson's sections.

[74] Advertising is "work done", there can be no doubt that, as a real estate agent, Mr Harvey was in trade, and the advertisement was clearly designed to effect a sale. No artificial or strained interpretation of the definition is required. We find that Mr Harvey advertised Mr Johnson's sections for sale and thereby carried on real estate agency work.

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

> **client** means the person in whose behalf an agent carries out real estate agency work

[76] We find that Mr Harvey carried on real estate agency work on behalf of Mr Johnson, albeit pursuant to an informal and undocumented arrangement. Mr Johnson was Mr Harvey's client, as the sections advertised included his.

[77] It follows that we conclude that the Committee correctly found that Mr Harvey was obliged to comply with the applicable provisions of the Act and the Rules. We turn therefore to the issues arising as a consequence of that finding.

No written appraisal or agency agreement

[78] The Committee found that as Mr Harvey was carrying on real estate agency work for Mr Johnson, he was required to comply with rr 9.5 (which required him to provide a written appraisal), and 9.15 (which required there to be an agency agreement in place). It found that Mr Harvey had failed to comply with these Rules.

[79] McMenamin submitted that the Committee's conclusion that Mr Harvey had breached rr 9.5 and 9.15 was wrong in fact and in law. It was not disputed that Mr Harvey did not provide a written appraisal, or that there was no agency agreement in place.

[80] Mr McMenamin's submission was founded on his contention that Mr Harvey was not carrying on real estate agency work on behalf of Mr Johnson. We have rejected that submission. We conclude that the Committee correctly found that Mr Harvey breached rr 9.5 and 9.15.

Mr Harvey's efforts to on-sell the sections

[81] In his formal statement of evidence, Mr Harvey said that up until the end of 2011 he did not actively promote the subdivision, although there were Ray White signs on the two sections up until February 2012 (marked "under contract"). In his interview with the investigator, he said (as noted at paragraph [62], above) he had "extensively marketed" Mr Johnson's sections. However, his evidence at the hearing was that he had only agreed to direct anyone expressing interest to Mr Johnson, and Mr Johnson had never instructed him to market the sections.

[82] The Johnsons submitted that Mr Harvey advertised the sections at a price ($195,000) that was significantly higher than the initially agreed on-sale price

($165,000) and despite requests from Mr Johnson, did not advertise a lower price until shortly before settlement date for the Agreement.

[83] The presence of Ray White signs on the sections up until February 2012, and the advertisements after February 2012 are objective evidence of Mr Johnson's sections being marketed, albeit generically. There is no evidence of any marketing before then, or of any potential purchasers having been directed to Mr Johnson. The Ray White signs cannot be counted as inviting offers for Mr Johnson's sections, as they were marked "under contract"). In those circumstances, we conclude that the Committee correctly found that Mr Harvey breached r 6.1, by failing to comply with his fiduciary obligations to Mr Johnson.

Mr Johnson's purchase of the Stafford Avenue property

[84] Mr Hodge submitted that Mr Johnson's purchase of the Stafford Avenue property is significant because:

[a] If Mr Johnson had not entered into an agreement to buy that property, he would have had sufficient funds to complete settlement of the Agreement, when the titles were issued; and

[b] It supports the proposition that Mr Johnson was under the impression that the sections would be on-sold before he was required to settle.

[85] Mr Johnson told the investigator that when he found the Stafford Avenue house he rang Mr Harvey and expressed concern that the sections had not been sold. He said Mr Harvey told him he was "fine to go ahead and buy your house". He said that having made an unconditional offer, he had to complete the purchase. As the sections had not sold, he had to obtain second tier finance, and Allen Johnson arranged further finance on the security of his own house.

[86] Mr Harvey stated in his Notice of Appeal that this conversation was raised for the first time in the interview, and as it had not been mentioned in Mr Johnson's complaint, he had not had any opportunity to comment on it. He agreed at the

hearing that Mr Johnson had rung him about the purchase of the Stafford Avenue property, but said it was an "afterthought", after Mr Johnson had made an unconditional offer. He said Mr Johnson's only concern was as to when he would be required to complete settlement of the Agreement.

[87] We are unable to determine this conflict in the evidence one way or the other. Accordingly, we have disregarded Mr Johnson's purchase of the Stafford Avenue property in respect of both appeals.

The subsequent sale of the sections

[88] The Committee found that Mr Harvey had received enquiries concerning the sections from the eventual purchasers before the Agreement was cancelled. The Agreement was cancelled on 20 June 2012. The investigator made file notes from telephone interviews for each of the purchasers, dated 25 June 2013. One, who purchased a section on or about 18 July 2012, said she had discussions with Mr Harvey "about three weeks" before the sale. She had seen an advertising board at the section, showing a price of $190,000, but paid $165,000. The other, who purchased a section on or about 31 July 2012, also saw the advertising board and talked with Mr Harvey about it "a couple of months before the sale, which "happened quite quickly".

[89] The purchasers were not required to give evidence at the hearing, which would suggest that their evidence is accepted. However, while the evidence suggests that their discussions were (at least) close to cancellation of the Agreement, both purchasers are imprecise as to when they occurred. In the circumstances, we do not have a sufficient evidential basis on which to uphold the Committee's finding.

Overall assessment

[90] We have found that:

[a] Mr Harvey did not take any, or sufficient, steps to make it clear to Mr Johnson what they were agreeing to and, in particular, that he was not

agreeing to on-sell the sections before title was issued.

[b] Mr Harvey carried on real estate agency work on behalf of Mr Johnson, and Mr Johnson was Mr Harvey's client.

[c] The Committee correctly found that Mr Harvey was obliged to comply with the applicable provisions of the Act and the Rules.

[d] The Committee correctly found that Mr Harvey breached rr 9.5 and 9.15. by failing to provide a written appraisal and by not having an agency agreement in place.

[e] The Committee correctly found that Mr Harvey breached r 6.1, by failing to comply with his fiduciary obligations to Mr Johnson.

[91] Having considered all of the matters referred to in this decision, we find that the Committee correctly found Mr Harvey guilty of unsatisfactory conduct. We are not persuaded that his conduct justified a finding of misconduct, nor are we persuaded that it did not justify a finding of either unsatisfactory conduct or misconduct.

[92] Accordingly, both appeals are dismissed, and the Committee's decisions stand.

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

_____
Hon P J Andrews
Chairperson

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member