**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2012] NZREADT 13

READT 108/11

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| **IN THE MATTER OF** | appeals laid under s.111 of the Real Estate Agents Act 2008 |
| **BETWEEN** | **ANDREA QUIN** |
| | Appellant |
| **AND** | **THE REAL ESTATE AGENTS AUTHORITY** (CAC 10036) |
| | First respondent |
| **AND** | **PHILIP ANDREW BARRAS** and **SANDRA KNAPTON** |
| | Second Respondents |

READT 100/11

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| **BETWEEN** | **PHILIP ANDREW BARRAS** |
| | Appellant |
| **AND** | **THE REAL ESTATE AGENTS AUTHORITY** |
| | First respondent |
| **AND** | **ANDREA QUIN** |
| | Second respondent |

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

**HEARD** at TAURANGA on 31 January 2012

**DATE OF DECISION:** 2 April 2012

**REPRESENTATION**

Mr P A Barras and Ms S Knapton on their own behalf
Mr M Hodge, counsel for the first respondent
Mr P Napier, counsel for Ms A Quin

## DECISION OF THE TRIBUNAL

### *The Issue*

[1] There are two appeals before us, namely:

[a] Andrea Quin (licensee) appeals against the finding of unsatisfactory conduct made on 11 May 2011 by Complaints Assessment Committee 10036 ("CAC") and its 9 September 2011 decision making orders (READT 108/11; and 100/11) and;

[b] Philip Barras and Sandra Knapton (together complainants) appeal against the CAC's 9 September 2011 decision as to orders (READT 100/11).

### *The Factual Background*

[2] In its decision of 11 May 2011, the Committee set out the factual background as follows:

> *"On 9 November 2009, Philip Barras and Sandra Knapton (the complainants) visited a property in Tauranga that was for sale by auction. The property was advertised as being just over 1ha, a character block complete with stream, with a relocated kauri villa.*
>
> *The complainants were accompanied by Ian Grindle, a salesperson licensed under the Real Estate Agents Act 1976 (the 1976 Act).*
>
> *The property was being marketed by Land Agents (2007) Ltd, trading as RE/MAX Property ("the agency"). The agency was also licensed under the 1976 Act.*
>
> *The listing agent who the complainants dealt with was Andrea Quin ("the licensee"). She was a salesperson licensed under the 1976 Act. Following the passing of the Real Estate Agents Act 2008 (the 2008 Act), which came into effect on 17 November 2009, she has been licensed as a salesperson. ...*
>
> *The complainants lodged a written complaint against the licensee in March 2010. They state that on arrival at the property they asked the licensee where the boundaries were. They assert that the licensee pointed out boundaries "by way of waving her arms in the general direction" of the boundaries; and that she pointed out the boundaries around the perimeter of the property.*
>
> *They also state that the licensee pointed out the access to the property (by way of a gate that leads on to a metal driveway), and that she told them that she just had to point out that that was the accessway, a statement they say they found strange at the time, given that it was obvious that that was the accessway to the property.*
>
> *Of particular concern to the complainants was their future ability to build a workshop from which Mr Barras could operate a business. Their main concern with properties they looked at was where they could locate a large shed, with heavy vehicle access to it. Mr Barras is a marine and industrial engineer.*

*After viewing the property, the complainants checked out the property file at Western Bay District Council, to ensure all was in order with it.*

*The complainants bought the property at auction on 25 November 2009.*

*The complainants took possession of the property on 9 December 2009. They carried out some earthworks on the eastern side of the property (in the area of the accessway). While a family member was there, mowing lawns, a neighbour passed and mentioned that the earthworks they had carried out were not on land that belonged to the complainants.*

*In due course, the complainants met with the owners of the adjoining property. The complainants marked out the boundary in spray paint, delineating the approximate boundary they had been told about by the neighbours. They say that it was clear that heavy vehicle access was not going to be a possibility.*

*Correspondence followed with the agency. The complainants argued that the actual boundary was some 8 m inside a nine wire fence that appeared to mark the actual boundary. They claimed that the licensee should have known about this, and that they should have been told about this before the auction.*

## *Committee's Decision*

*Decision Finding Unsatisfactory Conduct*

[3] On 11 May 2011 the Committee issued its finding of unsatisfactory conduct. The events relate to a rural property in Tauranga which the complainants bought by auction on 25 November 2009. The Committee's inquiries focused on the extent of the licensee's knowledge of an issue regarding an accessway and eastern boundary; what representations (if any) she made in relation to the eastern boundary; and whether or not her conduct was capable of constituting unsatisfactory conduct in terms of the Real Estate Agents Act 2008.

[4] The Committee found that the licensee made misrepresentations in relation to an eastern boundary and failed to provide the complainants with proper information about an accessway. More specifically, the Committee found the following aspects of the licensee's behaviour contributed towards its finding of unsatisfactory conduct:

[a] The licensee's response to the complainants' specific question about the location of the boundaries meant that it was reasonable for the complainants to understand from her gestures that the nine wire fence marked the eastern boundary;

[b] The licensee told the complainant that there was an issue with the accessway but said no more than that. This, combined with telling them to do due diligence, was inadequate advice;

[c] The licensee did not tag her reference to the gateway issue with a warning to do due diligence in such a way as to put the complainants on alert about the real underlying issues with the land, to indicate that they needed to instruct a surveyor, or to make enquiries of the neighbour to determine

where the accessway ought to be. The licensee did not properly explain the problems with the accessway;

[d] The licensee failed to mention any issue with the accessway in an email dated 16 November 2009 which described various characteristics of the property;

[e] The licensee knew that there was a problem with the property but did not understand its extent. The information given to her about the accessway ought to have put her on enquiry, and she ought to have taken steps to find out. It was not for the complainants to ask for more information;

[f] The licensee ought to have realised there would also be a boundary issue given the vendor's advice that the gateway was not where it should be.

[5] Broadly, the Committee found that the licensee failed to determine the real issue with the accessway and compounded the error by failing to alert the complainants in the clearest possible terms to the fact that there was a real problem with the only access to the property. She should not have indicated the boundaries to the property and should have told the complainants in the *"clearest terms"* that she had been told by the owners that the gate was not where it was meant to be. She should have said that she was not able to state the boundaries to the property and advised the complainants to make their own professional enquiries.

[6] The Committee found that representations and omissions relating to the eastern boundary and accessway *"continued, uncorrected"* up to the time of the 25 November 2009 auction. The fact that the auctioneer signalled that agents were not bound to point out boundaries or that the property was sold on an *"as is where is"* basis neither relieved the licensee from the representations she made to the complainant, nor meant that the complaint must be considered under the 1976 Act.

***Decision of Committee on Orders***

*Relief sought by Complainants*

[7] The complainants were permitted to file submissions on what, if any, order should be made and, if they sought relief under s.93(1)(f) of the 2008 Act, were required to specify the amount sought with reference to quotations and invoices. It needed to be established that the relief related to matters consequential on the licensee's conduct identified by the Committee.

[8] Before the Committee, the complainants sought relief as follows:

[a] $15,874: for additional rent paid on a workshop in Mt Maunganui which would not have been necessary had they been able to build the shed on their property;

[b] $9,250.60: cost of building retaining and pedestrian stairs to the new entrance gate to the dwelling;

[c] $27,472.27: expenses in relocating to the same standard a driveway of compacted and loose gravel.

[9] The complainants sought total relief of $101,871.30 but did not itemise the remaining $49,274.43. Alternatively, they sought what they considered to be the *"maximum penalty"* of $100,000 *"to compensate for both expenses and compensation"*.

[10] There are additional invoices which include:

[a] $15,629.88: cost of electrical installation for a new engineering workshop (GST exclusive);

[b] 12.5 days annual leave taken by complainants;

[c] $460: loss of earnings of complainants;

[d] $238: doctors fees; and

[e] $16.66: medications incurred by Ms Knapton.

*Orders made by the Committee*

[11] The Committee made orders open to it under the 2008 Act. It ordered the licensee to:

[a] Pay a fine of $7,000 to the Authority pursuant to s.93(1)(g) within 21 days;

[b] Undergo training or education by completing unit standards 23136 and 26149 within six months under s.93(1)(d); and

[c] Pay relief of $25,000 plus GST to the complainants on proof of completion of the quoted work. The licensee was ordered to pay the $25,000 plus GST within seven days of the complainants providing a copy of particular invoices for a sum exceeding $25,000 plus GST and showing that the work described in the quotations had been carried out.

[12] The Committee rejected the complainants' claims for:

[a] Financial relief for rental of an alternate workshop;

[b] Costs relating to the erection of a workshop on the land;

[c] Annual leave;

[d] Loss of earnings;

[e] Doctor's fees;

[f] Medication;

[g] Site excavation for the shed floor; and

[h] Stripping of original accessway.

***Complainants' Grounds of Appeal for READT 100/11***

[13] The complainants seek *"relief in whole for the expenses incurred by the conduct of Ms Quin"*. The complainants seek further compensation as follows:

[a] Supplied invoices:

[i] Retaining work and pedestrian stairs to gain access to the house from the new driveway;

[ii] Invoices and quotes to complete new driveway to Council standard;

[iii] Additional expenses required to supply power to the new shed site;

[iv] Annual leave taken to meet with contractors, solicitors, Council, and to collate information relating to this dispute;

[v] Loss of earnings for Mr Barras to attend original hearing and two day hearing set for 2012;

[vi] Work completed on property belonging to neighbour completed in December 2010 prior to accessway issue being established;

[vii] Legal costs from February 2010 to address the accessway issue directly with Remax;

[b] Expected Council fees to lodge new works on Council file and obtain a new driveway number;

[c] Stripping defunct driveway and conversion to grazing land;

[d] Additional legal costs to finalise matter;

[e] Civil compensation; and

[f] It was also noted that there may be additional costs to have the matter finalised.

[14] The complainants' submissions accepted the Committee's decision in relation to the fine, further training, and publication.

***Licensee's Grounds of Appeal for READT 100/11 and in Response to READT 108/11***

*READT 108/11 – Licensee's grounds of appeal*

[15] The licensee contends that the Committee's decision is wrong in the following ways:

[a] It found the 2008 Act applied when the conduct complained of took place before that Act was in force;

[b] It found that the licensee's conduct fell in the upper end of the spectrum of unsatisfactory conduct notwithstanding that there was no dishonesty or personal enrichment and there was some disclosure made; and

[c] The Committee did not have the power to award $25,000 plus GST for the provision of a new accessway because this would not be a payment arising from the consequences of the licensee's error or omission.

*READT 100/11 – Licensee's submissions in response*

[16] In response to the complainants' appeal against penalty the licensee submits:

[a] The complainants have not provided any basis upon which the Tribunal could or should find that the Committee's reasoning was wrong;

[b] There was no adequate evidence of additional rental being paid;

[c] There could have been advantages in having a separate workshop in Mt Maunganui;

[d] The rental was paid by Profab M & I Engineering Ltd which is a different entity to the complainants and loss suffered by a third party is not properly claimable;

[e] There is no explanation why retaining work and pedestrian stairs are necessary, and the driveway could be graded to the existing contour;

[f] There is no explanation why any expenses relating to the supply of power to the new shed site, lost earnings, medical, or legal expenses should be met and no proper legal basis upon which they would be claimable; and

[g] None of the additional claims sought in the appeal were foreseeable losses arising from the licensee's unsatisfactory conduct.

***Discussion***

[17] We agree with Mr Hodge's submission that the licensee's unsatisfactory conduct occurred after 2008 Act came into force. The misrepresentation identified by the Committee occurred on 9 November 2009 (when the licensee was present at the property with the complainants). This was before the 2008 Act came into force on 17 November 2009. Notwithstanding that, it was open to the Committee to find that the unsatisfactory conduct continued after the 2008 Act came into force. This is because the licensee ought to have corrected the misrepresentation made on 9 November 2009 prior to the auction on 25 November 2009, as there was opportunity to do so. In this sense, the licensee's conduct is caught by the 2008 Act, albeit the latter stages of her conduct.

[18] The fact that it was within the licensee's power to correct her misrepresentation distinguishes the position in this case from the Tribunal's decision in *Wetzell v CAC and Mac Vicar* [2011] NZREADT 8. The relevant facts in *Wetzell* involved an increase in commission rates in a new listing agreement for a sole agency which was signed on 4 October 2009. The CAC held that the licensee failed to draw the increase to the complainant's attention before obtaining his signature. On 6 February

2010 the property was sold and on 9 February 2010 the commission was determined by the licensee's agency in accordance with the new listing agreement. The CAC found that the licensee's unsatisfactory conduct extended to the time that the commission was deducted on 9 February 2010. The Tribunal had *"no doubt"* that the licensee's alleged unsatisfactory conduct was *"limited solely"* to the period up to and including the signing of the new listing agreement on 4 October 2009, which period was before the 2008 Act came into force. It was *"untenable"* for the CAC to have found that the alleged unsatisfactory conduct was connected to the time that the commission was actually deducted on 9 February 2010. This finding flowed from the fact that once the licensee obtained the complainant's signature, reliance on and enforcement of the listing agreement was not a matter for the licensee, but for her agency. The Tribunal concluded that the order made by the CAC under s.93(1)(f) was therefore *"made entirely without jurisdiction"*.

[19] However, the present case is distinguishable, because the licensee was well able to correct her misrepresentation prior to the auction.

[20] Irrespective of any misrepresentation, it was unsatisfactory for the licensee not to provide proper information about the problems with the accessway and boundaries prior to the auction. On the facts, it was open for the Committee to find that the licensee was aware of problems with the accessway and boundary and that she made no attempt to ascertain what precisely the problems were, even after *"alarm bells rang"* and she became worried. The licensee had the opportunity to ameliorate the situation before the auction. It was too late to do so in her email to the vendor of 18 December 2009 enquiring about the boundary as that was after the auction and after the complainants were bound by their purchase.

[21] We find that the licensee's unsatisfactory conduct was ongoing after 17 November 2009 and that Orders can be made under the 2008 Act.

*Open to find conduct fell at upper end of unsatisfactory conduct*

[22] The licensee submits that the Committee erred in finding that the conduct fell at the upper end of unsatisfactory conduct on the basis that there was no dishonesty or personal enrichment and there was some disclosure made regarding the accessway and boundaries. The licensee goes on to submit that the upper end of unsatisfactory conduct must be reserved for those cases involving dishonesty or personal enrichment rather than a failure to do all that was required. It is submitted for the licensee that the Committee therefore erred because the licensee's failures were not in the same league as cases involving dishonesty or personal enrichment.

[23] We find that it was open to the Committee to find that the conduct fell at the upper end of unsatisfactory conduct. In making a finding of unsatisfactory conduct rather than laying a charge of misconduct to be determined by this Tribunal, the Committee was, in effect, finding that the conduct fell within the lower disciplinary level of unsatisfactory conduct, albeit at the upper end of this lower level.

[24] In *CAC v Downtown Apartments Ltd and Anor* [2010] NZREADT 06, this Tribunal remarked on the *"two disciplinary levels"* under the 2008 Act. Importantly, and of relevance to the licensee's argument regarding personal gain or dishonesty, in *Downtown Apartments* we found that even for the more serious disciplinary level of misconduct, it was not necessary to prove a wrongful intention. We stated:

*"[49] There are now two disciplinary levels under the 2008 Act;*

*(a) Unsatisfactory conduct - Complaints Assessment Committees and the Disciplinary Tribunal;*

*(b) Misconduct – Disciplinary Tribunal only.*

*Leaving s.73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s.72 to misconduct under s.73 of the 2008 Act:*

*(a) Unacceptable conduct (as regarded by agents of good standing) s.72(d) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s.73(a));*

*(b) Negligence/incompetence (s.72(a) and (c)) → serious negligence/incompetence (s.73(b));*

*(c) Contravention of the Act/Regulations/Rules (s.72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s.73(c)).*

*[50] At a high level of generality, therefore, it may be said that s.72 requires proof of a departure from acceptable standards and s.73 requires something more – a marked or serious departure from acceptable standards.*

*[51] The requirement to prove something more than a departure from acceptable standards does not mean it is necessary to prove a wrongful intention in order to prove misconduct. That would be inconsistent with the express language of s.73(a)."*

[25] In the present case, the licensee was dealing with a property worth a significant amount to the parties involved. In any event, irrespective of the value, the licensee was required to be diligent in finding out the correct position about the boundaries and advising the purchaser accordingly or, at least, being very clear to the purchasers that the position in relation to the boundaries was not settled and they needed to check them, or have them checked, thoroughly. This is all the more so in the present context where the licensee admits that *"alarm bells"* rang about the accessway/boundary issues. The licensee did not properly explain the problems about the accessway. It was too late for the licensee to address these matters after the auction.

[26] The Committee did not find that the licensee's conduct fell at the upper end of the spectrum of all conduct in breach of the 2008 Act. Rather, it found it to sit at the upper end of the lower level of unsatisfactory conduct. We consider that this finding was open to it.

*Open to order relief*

[27] The licensee's third substantive ground of appeal is, essentially, that the complainants have not shown any claimable loss flowing from the unsatisfactory conduct.

[28] The licensee does not now submit that there is no jurisdiction to order monetary relief under s.93(1)(f)(ii). That such jurisdiction exists has been confirmed by this Tribunal in *Baker v REAA & [An Agency]* [2012] NZREADT 1.

[29] Rather, the licensee submits that *"at best"* the complainants' case is that they would not have bought the property had they known of the problems with the eastern boundary and accessway. Indeed, the licensee submits the complainants made a gain as they (it is put) bought it at $25,000 under value according to the valuation evidence of Mr Harris (a valuer) that the value of the property at the time of purchase, factoring in the problems that had come to light, was $315,000.

[30] The licensee relies on the principles in *Harvey Corporation v Barker* ([2002] 2 NZLR 213. The issue dealt with in *Harvey Corporation v Barker*, in relation to assessment of loss, did not arise in the *Baker* case but it needs to be dealt with in this case. In that case, the agent had misrepresented that the property included land upon which the entrance and part of the driveway to the property were constructed when the land was on an unformed paper road owned by the local Council. The Barkers sought the cost of relocating the entranceway and driveway. The Court of Appeal found that the Barkers were not entitled to compensation and stated at page 217:

> *"[14] ... the proper question in a claim against Harveys under s43 is whether the Barkers are worse off as a result of the making of the representation – by changing their position in reliance on it – not whether they have been unable to realise a benefit because of the failure of the vendors to convey a property without the defect complained of. The Barkers accordingly had to prove that the misrepresentation of the property had caused them to act in a way which resulted in a loss. Normal measures of such a loss are whether what has been acquired is worth less than what was paid and/or whether there has been wasted expenditure. For example, say the Barkers had expended additional money developing an area within the entrance gates, only to find that, contrary to the representation, the development was on the Council's land. Such an expenditure, to the extent that it was wasted – that the Barkers did not get value for it – would be claimable under the Act. Another example would be proven over-expenditure in purchasing the land in reliance upon the gates and driveway being within the title. To the extent that the Barkers might by reason of the misrepresentation have paid too much for the land – and so did not get full value for their expenditure – the 'lost' additional money would be recoverable under s43. But, in order to sustain such a claim, it was necessary for them to show that they paid more than the market value of the property as it actually was, i.e. with the title defect. In fact, however, the evidence was that they bought slightly below market value. Their failure to obtain title to the gates and the driveway disappointed their expectation, but it did not produce a loss of the requisite character to sustain a s43 claim."*

[31] And at 219:

> *"[20] ... The purchasers' claim under s43 is limited to the consequences of the making of the representation, and does not extend to the consequences of the failure to perform it.*

> *[21] it has not been shown that the Barkers were, by reason of the agent's misleading and deceptive conduct, caused to make an avoidable expenditure or denied an opportunity, which they could and would have taken, of obtaining the property at a lesser price."*

[32] We consider that *Harvey Corporation v Barker* is distinguishable from the current case for several reasons. The Barkers suffered no loss as their property was not devalued because of the true status of the gates and land on a paper road owned by the council. It appears that the Barkers could still have used the existing gates and did not need to move them. In effect, the gates and start of the driveway were on the property for practical purposes. By comparison, in relation to the accessway in the current case, the complainants were required to put in a new accessway in order to gain the access required to their property. Their loss in bearing this cost arose due to the licensee's error and/or omissions as they paid for a property with an accessway which it in fact did not have. They then needed to incur costs to attain what they paid for i.e. a property with the accessway they thought they were buying.

[33] In *Harvey Corporation v Barker* there is the additional difference that the agent was unaware of the true position. In the current case, the licensee was clearly aware of issues with the accessway and boundary and put it as high as saying that *"alarm bells"* rang. Another material difference is that the Barkers would still have bought the property, albeit at a lesser price. The complainants, in the current case, gave evidence that they would not have.

[34] Also, *Harvey Corporation v Barker* was a case involving s.43 of the Fair Trading Act 1986 (FTA) which regime expressly requires loss to be shown. The FTA is important consumer protection legislation, and cases decided under it will often provide useful guidance in this Tribunal. However, it is always necessary to apply the wording of the particular statutory provisions in issue. The FTA has a general status but the Real Estate Agents Act 2008 is intended specifically to respond to the regulatory needs of New Zealand's real estate industry and market. The Act's purpose is expressly to *"promote and protect and interests of consumers in respect of transactions that real estate agency work"* is shown in its s.3, namely:

> *"**3 Purpose of Act***
> *(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*
> *(2) The Act achieves its purpose by –*
> *(a) regulating agents, branch managers, and salespersons:*
> *(b) raising industry standards:*
> *(c) providing accountability through a disciplinary process that is independent, transparent, and effective."*

[35] The FTA's purpose is:

> *"... to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety and also to repeal the Consumer Information Act 1969 and certain other enactments."*

[36] Turning to the particular sections of the Real Estate Agents Act 2008 in question before us, the content of s.43 of the FTA is not identical to that of s.93 of the 2008 Act. Section 43 of the FTA relevantly begins (emphasis added):

> *"**43 Other orders***
> *(1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that **a person,** whether or not that person is a party to the proceedings, **has suffered, or is likely to suffer, loss or damage by conduct of any other person** ... (emphasis added)."*

[37] Section 43(1) goes on to provide various orders against the person who engaged in the conduct. Each of the permissible orders refers to the *"loss or damage"* suffered. As the Committee noted, there is no clear corresponding section to s.93(1)(f)(ii) which moves beyond relief in the form of rectifying any error or omission (s.93(1)(f)(i)) to providing relief from the consequence of the error or omission. Section 93 of the 2008 Act confers on committees and this Tribunal a broad discretionary power to grant relief on both a plain reading of the section and when the purpose of the Act is considered (*Baker*). The section provides (relevantly):

> *"**93 Power of Committee to make orders***
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
> *...*
> *(f) order the licensee-*
> *(i) to rectify, at his or her or its own expense, any error or omission; or*
> *(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the **consequences of the error or omission**:*
> *... (emphasis added)"*

[38] The complainants have suffered particular loss in the necessity to construct an appropriate accessway. Section 93(1)(f)(ii) concerns *"relief, in whole or in part, from the consequences of the error or omission"*. A broad approach can be taken to identifying the consequences of an error or omission, as opposed to focussing narrowly on loss or damage in terms of diminution of market value.

[39] We consider that the fact that a person has purchased a property which, he or she thought, had a particular feature, based on a representation by an agent, when in fact it does not have that feature, is a consequence for which relief can be provided in appropriate cases. This is so despite the fact the market value of the property may not be diminished because of the absence of the feature concerned.

***Our Conclusions***

[40] We consider that it was open to the Committee to find that the licensee engaged in unsatisfactory conduct in relation to misleading the complainants and withholding information which should have been provided.

[41] It was open to the Committee to find that the unsatisfactory conduct was ongoing until the time of the auction and, hence, it is captured by the 2008 Act.

[42] Accordingly, it was open to the Committee to grant relief under s.93(1)(f)(ii). The case of *Harvey Corporation Ltd v Barker* is distinguishable as explained above. Any relief to the complainants must flow directly from the consequences of the licensee's error or omission, and it is for the complainants to demonstrate this on balance of probabilities.

[43] We emphasise that licensees must take every care to ascertain and understand the precise boundaries of the property they are marketing. It is fundamental that prospective purchasers are told precisely what the property comprises. If there is uncertainty about boundaries, that must be spelt out to prospective purchasers with full candour. Any advice which proves to be inaccurate must be corrected immediately the error is known.

[44] We feel that the parties to this case became a little confused. Apart from our reasoning and views set out above, we do not think it has been proved that the complainants bought the property at any undervalue; it was purchased by them at an open-market auction; nor is that aspect relevant to assessment of their loss from the licensee's unsatisfactory conduct.

[45] The $7,000 fine imposed by the Authority is not in issue.

[46] We consider that more evidence about the complainants' loss has been adduced to us than was available to the Authority. It now seems to us that, in particular, the complainants suffered the following items of loss (GST inclusive), namely:

| | $ |
|---|---|
| Cost of retaining wall and pedestrian stairs for new entrance gate | 9,250.60 |
| New driveway formation | 11,122.00 |
| Council-standard required formation from road verge to correct boundary | 18,359.75 |
| Increase in electrical costs to new shed site | 4,035.21 |
| Wasted works on wrong land | 1,816.88 |
| Contribution to legal fees | 2,000.90 |
| Total | 46,585.34 |

[47] Presumably, the complainants will obtain GST inputs for the above items. To date, the complainants have been allowed $25,000 by the Committee, plus GST, as compensation towards their claimed basic restoration work costs of $65,946.60. Some claimed items have insufficient nexus to be a loss attributed to the unsatisfactory conduct. Also, there are certain elements of betterment in some items of claim; e.g. such as that the new driveway is of superior standard to the former driveway because the local Council now sets stricter standards for its approval.

[48] In terms of the items of loss suffered by the complainants and listed above, we realise that, at the hearing before us, the complainants put their basic losses at $65,946.60 comprising the items listed above plus items such as $13,889.75 (plus GST) for workshop rental, and items of $560 for Ms Knapton and $1,200 for Mr Barras claimed for use of their annual leave to attend hearings of this case before the Committee and us. The complainants have also emphasised that they have not incorporated what they refer to as *"any civil compensation claim relating to stress nor additional time off work to bring this matter to the appeal stage"*

[49] The stance for the licensee is that the above listed losses have not been proved but, in any case, various items are queried as follows.

[50] Mr Napier (for the licensee) submits that there was no necessity for the complainants to build a retaining wall or stairway because there was plenty of space to form an easy slope from the higher level to the lower level incorporating a simple path between the two levels, and also there is just one quote for this work and competitive tendering would likely have brought the price down. We are satisfied with the evidence of cost provided and that the work done was reasonably necessary; although we have discounted all these items.

[51] Mr Napier puts it that a new drive formation would have been required wherever the shed was sited, and that there were only a couple of metres of formed driveway in the first place; so this item cannot be a loss flowing from any misrepresentation; and there was just the one quote for it. We have taken that submission into account.

[52] Mr Napier submits that the only work which would need to be done to form a new road access was to clear top solid, excavate a shallow drain, lay concrete piping for the width of the drive and back fill with metal and compact. Accordingly, he puts it that the price of $15,965 (excluding GST) is far too high for this work; and there was only one quote for it. We take that into account and consider that Council requirements caused much of that price.

[53] Mr Napier submits that it has not been explained why there are increased electrical costs to a different shed site, that the new shed site is possibly closer to the power supply than the original site, and there is only the one quote for that work. We accept that the terrain required extra costs but we take that point into account.

[54] Mr Napier submits that there is no evidence of monies having been expended on land which does not belong to the complainants and the invoice for $1,816.88 appears to be for work done close to the complainants' house. We are satisfied that sum was spent on unnecessary work due to the licensee's misrepresentation.

[55] With regard to the legal expenses item, Mr Napier submitted that there is evidence only of one account for $1,111.75 and that, given the complainants' right to pursue this claim under the Act which (he puts it) they have done for the most part without legal assistance, the licensee asserts that no such loss flows from her misrepresentation. In fact, since that submission was made we note that the legal fees claimed were $2,000.90 and not $3,000 as we had understood. We take into account the comments for the licensee on this expense item.

[56] We agree with the Committee's reasoning that the other items, sought by the complainants for compensation, lack sufficient nexus with the licensee's unsatisfactory conduct.

[57] Also, we have broadly taken into account the concept that the complainants have lost most of a grazeable paddock which was needed for the new driveway; but that the driveway needed to be strengthened for trucks.

[58] Accordingly, when we stand back and consider the claimants' losses in terms of our discretion under s.93, we increase the Committee's $25,000 (plus GST) *"relief"* award to $40,000 (GST inclusive); otherwise, its penalty package is confirmed. It also follows from our findings that the licensee's appeal, against the finding of unsatisfactory conduct by her, is dismissed.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member