BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 74

READT 099/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**ANNA MOLENAAR**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10066)**
	First respondent
AND	**CATHERINE MacDONALD** and **RICHARD NEWMAN**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

ALL EVIDENCE HEARD at QUEENSTOWN on 16 and 17 August 2012 (but with a series of subsequent typewritten submissions)

DATE OF DECISION 14 December 2012

APPEARANCES

Appellant on her own behalf
Mr S Wimsett for Authority
Mr M E Parker and Mrs M Cowan for second respondents

DECISION OF THE TRIBUNAL

Introduction

[1] Anna Molenaar (the appellant) appeals the against two decisions of Complaints Assessment Committee 10066 (CAC, namely):

[a] Decision dated 30 August 2011 to take no further action in respect of her complaint against licensed salesperson Catherine MacDonald; and

[b] Decision dated 14 September 2011 to take no further action in respect of her complaint against licensed agent Richard Newman.

[2] The two appeals have been heard together and the licensed salesperson and licensed agent are together the second respondents.

Factual Background

[3] At the relevant time, Ms MacDonald worked for Newman Real Estate Ltd, trading as Ray White Arrowtown. Mr Newman is the principal of Ray White Arrowtown.

[4] The appellant bought a property at 15 Cornwall Street, Arrowtown which settled on 22 September 2010. Ms MacDonald dealt with the appellant purchaser and the vendor was Betty Frizzell.

[5] The appellant made a pre-settlement inspection on the morning of 22 September 2011. She did not raise issues of cleanliness or the state of the property at this time.

[6] The appellant did not obtain a building inspection.

[7] On 4 November 2010 the appellant complained to Ray White Arrowtown about several issues with the property which can be summarised as:

[a] The property was in a dirty state when she went to move in on 5 October 2010;

[b] Rubbish was left under the house and in the basement;

[c] There were live wires hanging loose in the basement;

[d] The roof was leaking in two places; and

[e] The schist fireplace surround was too heavy and the lounge floor near it was collapsing.

[8] The appellant required communication by email, although Mr Newman attempted to engage with her by telephone and to meet her.

[9] On 24 November 2010 the appellant lodged a complaint by telephone with the Real Estate Agents Authority. She also filed a complaint with the Disputes Tribunal at the local District Court. Counsel for the second respondents understand this is *"on hold"* pending the outcome of this appeal.

[10] The appellant's complaints before the CAC were broadly two-fold:

[a] In relation to Mr Newman, the licensed agent: that he lacked professionalism, did not provide a fair and reasonable response to serious issues, and was *"evasive, arrogant"* and said that it *"wasn't their problem"*; and

[b] In relation to the Ms MacDonald, the licensed salesperson: broadly, that she misrepresented the condition of the property prior to purchase, particularly the condition of the roof, issues concerning the fireplace, and the state of wiring under the house.

[11] In summary, the licensed agent maintains that neither he, the licensed salesperson, nor the vendor knew of the leaking roof. The vendor had signed a sole agency agreement dated 2 August 2010 which stated that the property had no defects to her knowledge and relevantly reads *"client acknowledges that the land/property in question is not subject to any underlying defects"*. The vendor emailed the licensed agent on 6 December 2011 that she was unaware of any roof leaks during her own occupancy of the property and nor had the issue been raised by two tenants who were in occupancy from about September 2008 to August 2010, but other maintenance issues had been raised and attended to.

[12] The licensed agent stated that he did not deal with the appellant in the manner alleged i.e. that he was unprofessional, *"evasive"*, and *"arrogant"*. The licensed salesperson denies making any misrepresentations.

Our Jurisdiction on Appeal

[13] The CAC determined to take no further action in relation to both second respondents pursuant to s.89(2)(c) of the Real Estate Agents Act 2008 (Act). Section 111 provides a right of appeal to us for any person affected by a determination of a Complaints Assessment Committee, including any determination under s.89. The appeal is by way of rehearing.

[14] It is settled law that this appeal is subject to the wider *Austin, Nichols and Co Inc v Stichting* Lodestar [2008] 2 NZLR 141 (SC) principles whereby we consider matters afresh and may substitute our judgment for that of the CAC. (See for example *O v CAC 10028 and T* [2011] NZ READT 15.

[15] Section 111(4) of the Act empowers us to confirm, reverse, or modify a determination. If we do, we may exercise any of the powers that the CAC could have exercised (s.111(5)). In this instance, we can therefore: uphold the CAC's decisions to take no further action; or grant the appeal in relation to one or both decisions and make a finding(s) of unsatisfactory conduct followed by any penalty orders deemed appropriate; or determine that the complaint(s) discloses a prima facie case(s) of misconduct, which should be considered by us at a further hearing.

The Reasoning of the Committee

[16] We also set out the following paragraphs from the decision of the Committee issued on 30 August 2011.

> *"2.6 The Complainant's issues with the Property are: She alleges leakage from the roof which is in a deteriorated condition. She states she had asked the Licensee why the vendor had replaced only iron on the veranda and was told in front of her witness Les Cross "That's all that needed replacing the rest is fine". The Complainant also alleges that she had asked the Licensee about the condition of the floor and was told in front of her witness, Les Cross "It's fine. It's just all old Arrowtown places". The Complainant sates she has had to have a builder install support beams on the fireplace surround and states in her complaint that this was necessary to stabilise the floor with sufficient support to comply with installation of the permitted fireplace. The Complainant further alleges that she had asked the Licensee about wires hanging under the house and the Licensee*

assured her that the wires were safe. However, an electrician had told the Complainant that two of the bare wires were live. The final point relates to the rubbish that was left in the basement of the house.

...

2.9 *The Licensee is adamant that the Complainant never asked her about the condition of the roof and she, the Licensee, denies making the statement about the roof being in "good condition or you'll have no problems here". That the allegation made that she was asked about "why the vendor only replaced a few sheets of iron on the veranda" and she had stated "that's all that needed replaced, the rest is fine" is simply untrue. The only discussion was that the front iron looked newer. She agreed with the Complainant that these sheets look newer but she made no statement on the condition of the roof. Neither had the vendor told her when she listed the Property that she had replaced that part of the roof.*

2.10 *The Licensee states that it was only after the Complainant made a formal complaint that the vendor had told her that she replaced sheets of iron on the roof. The Licensee states that she did tell the Complainant that during open homes it had snowed or rained heavily and that she had not seen leaks or any water damages however, this discussion was over the phone on 12 November 2010 in response to the Complainant's claim the roof had leaked. This was not discussed during any of the Complainant's viewing of the Property.*

2.11 *The Licensee also denies the allegation she made the following statement: "When we were under the house/basement I asked (the Licensee) about the damp. She thought the water was coming from a blocked spouting". The only mention of a drain to the Complainant was the drain that had just been fixed by the kitchen. There was a discussion about dampness but only in regard to the garage not having a door. She did tell the Complainant that the vendor had installed insulation under the house. She did not state that it was a "warm house". She did tell the Complainant that she would need to install a fireplace as it would not be warm enough in the winter with just a heat pump. There was no discussion at all regarding the wiring under the house.*

2.12 *The Licensee denies the Complainant asked her about the fireplace and surround. She did tell her and other potential buyers that the fireplace had been removed as the vendor had obtained a grant to install a heat pump. She could not get the grant unless the fireplace had been removed. She did not say the chimney was fine. She did state that the Complainant would be able to put a fireplace in but it would need to meet the Arrowtown clean air compliance. The Complainant never mentioned a sloping floor at any time to her. This is the first time she has heard there is a sloping floor by the fire. She would never say to any buyer "it's fine, it's all old Arrowtown places ... it's not a worry". She does not talk like this and does not make any claims like this as a real estate salesperson. Her house was not brought up as there is no relevance.*

2.13 *The Licensee denies making the following statement: "Don't worry I know all the rubbish under the house/basement will be removed". She advised*

that she never made such a statement or said she or anyone else would remove the rubbish. At the pre-settlement inspection the Complainant inspected the garage and did not bring up any issues of rubbish. She did not state that her mother was organising the cleaning or that she had mentioned to the Complainant that she will have a very clean oven as her mother had offered to clean it for the vendor as she, the vendor, had had a stroke and her mother did not want her having another. Further, the Licensee denies that she promised to have the rubbish removed."

[17] Under the heading of *"discussion"* the Committee stated as follows:

"4.1 The Committee in considering the complaint and submissions from both parties and all the evidence before it make the following findings:

4.1.1 The basis of the complaint is the allegation that the Licensee made misrepresentations about the structural condition of the Property, specifically relating to the roof and the fireplace, assuring they were fine and nothing more needs to be done to them.

4.1.2 According to the Complainant she relied on these misrepresentations which turn out to be untrue, resulting in losses sustained to her as she had to incur the expense of fixing the roof and stabilising the fireplace structure.

4.1.3 The other issues are the assurances by the Licensee the rubbish on the Property will be removed and the electrical wires hanging under the house were safe.

4.2 The Licensee denies making any statements of misrepresentations as alleged by the Complainant. The Committee in this regard are faced with conflicting statements by the parties. In such a situation the onus is on the party alleging the misrepresentations to provide evidence to support these misrepresentations.

4.3 On the balance of probabilities we find that there is insufficient evidence to support a finding that the Licensee has made such statements misrepresenting the structural condition of the roof and fireplace, the rubbish and live wires to the Complainant. We made this finding in light of the evidence that follows.

4.4 We note that the Complainant did not obtain a building report prior to purchasing the Property. Although she has stated the reason why she did not obtain a building report was because she trusted the Licensee's assurances, we do note she had viewed the Property several times and in our view would have had the awareness of such issues, such as the roof and the fireplace, to obtain her own building report which she states she has done so for every other property she had been interested in as she has been looking for a property for 10 months prior to this purchase."

[18] The Committee then found, on the balance of probabilities, that there was no compelling evidence that Ms MacDonald made statements to the appellant that there were no problems with the roof. Nor was the Committee persuaded that the licensee had made statements promising that rubbish would be cleared and taken away, nor

that the hanging wires in the basement were safe. The Committee felt that many of the issues were matters between the appellant and the vendor rather than with Ms MacDonald the licensee. It also noted that Mr Cross was not an independent witness as he is a close friend of the appellant's and they did not find some of his evidence credible. On the balance of probabilities, the CAC found that there was insufficient evidence that the licensed salesperson had made the alleged misrepresentations.

[19] The Committee concluded that there is insufficient evidence to support any wrongdoing on the part of the licensee to warrant unsatisfactory conduct within the meaning of s.72 of the Act. It determined to take no further action with regard to the complaint or any of the issues raised.

[20] In its second decision, the CAC found that the licensed agent did address the issues raised by the appellant and there was no evidence that he had been arrogant or evasive.

Issues on Appeal

[21] The appellant advances the following grounds for her appeal:

[a] The CAC did not review all of the facts fairly;

[b] The licensed agent's involvement and local friendships were not mentioned or reviewed;

[c] There was no appropriate investigation or review of the facts supplied to the Authority regarding the fireplace permit;

[d] The relationship between the licensed salesperson, the vendor, and parties was not investigated;

[e] The appellant's photos were never reviewed or mentioned;

[f] Everyone seemed determined to believe the licensed salesperson when the evidence clearly showed otherwise; and

[g] The appellant has sought documentation *"presented to 1st appeal"* which has not been supplied.

[22] Inter alia, the appellant seeks to rely on s.6 of the Contractual Remedies Act 1979 regarding the alleged misrepresentations. That section reads:

> *"**6. Damages for misrepresentation** – (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract –*
>
> *(a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and*
>
> *(b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.*

> *(2) Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, but subject to section 5 of this Act, subsection (1) of this section shall apply to contracts for the sale of goods."*

[23] In summary, the appellant submits that *"statements were made resulting in me entering into this contract and the statements were found out later to be untrue. I as a result have suffered loss."* However, s.6 cannot apply because the second respondents are not parties to the said sale and purchase transaction.

[24] Also, the appellant attacks the *"closed door hearing"* of the CAC and contends that its members were not lawyers.

[25] The appellant claims a total of *"up to $40,000,"* which includes *"punitive damages"* and invoices for remedial work completed totalling $13,325.34.

[26] Counsel for the second respondent submits that:

[a] The appellant's reformulation of her original complaint into an action under s.6 of the Contractual Remedies Act 1979 is misguided and that an action under s.6 cannot lie against the second respondents as they are not parties to the agreement for sale and purchase; (we agree)

[b] Should we find that an action lies against an agent under s.6 of that Act, we have no jurisdiction to hear it or to grant the relief sought;

[c] Rather, our functions relate to discipline, which regime is separate to the civil disputes system by virtue of s.155 of the Act (we agree); and

[d] The remedies sought are not as a result of, or related to, any action or inaction by the second respondents; the property was an older home in Arrowtown and the appellant chose not to seek a building inspection; the appellant reduced her offer by $5,000 to take account of the fact that the property did not have a fireplace or garage door; the appellant was satisfied as to the property's condition on the day of the settlement; and what happened inside the property between settlement and the date of complaint is not an issue for the second respondents as they had completed all duties expected of reasonable and competent agents in the circumstances.

The Stance of the Appellant

[27] Before us the appellant covered similar ground to that which she put to the Committee. She emphasised that she was told by Ms MacDonald that the roof was in good condition and there would be no problems from it and that the removal of the fireplace had not created any building problems.

[28] The appellant sought compensation for some of her renovation work on the property and for hotel accommodation she had incurred when she felt unable to move into the property after settlement due to its alleged unclean state.

[29] The appellant was firmly and extensively cross-examined by Mr Parker with emphasis on the failure of the appellant to obtain a prepurchase builder's report. The

appellant emphasised that she did not do so because Ms MacDonald had emphasised it was unnecessary as the vendor was such an honest person. It was put that Ms MacDonald offered to obtain a builder's report but that the appellant had firmly refused that offer. There was analysis of the appellant obtaining a reduction in price due to work being needed on the property as an old property needing upgrading work or some renovation.

[30] There was much cross-examination of the appellant on the theme that she had been very appreciative of the service to her of Ms MacDonald as a real estate licensee and the appellant had assured the licensee that she had not done anything wrong from the point of view of the appellant. Nevertheless, before us the appellant asserted, inter alia, that she did not get a builder's report because of all the assurances she had from Ms MacDonald and that her failure was that she trusted Ms MacDonald.

[31] Some of the evidence from the appellant is that when she viewed the property with Ms MacDonald she, the appellant, had a close friend with her, namely, Mr Les Cross who gave evidence by telephone. She said she asked the licensee about the condition of the roof and was told it was in good condition. She then asked the licensee why the vendor had replaced a few sheets of iron on the veranda side of the property and she was told that was all that had needed replacing and the rest of the roof was fine.

[32] The appellant also alleges that the licensee told by Ms MacDonald her that, during open homes, there was rain and snow but the house was warm without any leaks or problems.

[33] The appellant says that when they went into the basement she asked the licensee about dampness there and was told that water seemed to be coming from a blocked spouting. The appellant then stated that it must be very cold and draughty without a garage door and was told that the floor as insulated and it was a warm home. The appellant said she also mentioned some loose wiring in the basement and asked the licensee if that was safe and was told *"of course, the vendor is a very honest person, it would be done right and the previous tenants had stored all their stuff down here"* i.e. in the basement.

[34] The appellant says that she was told by Ms MacDonald that the licensee knew the vendor and *"you could not meet a more honest and open lady*".

[35] Mr Cross's evidence was consistent with that of the appellant and there is no question that they are very close friends. He knew that the appellant had checked with the local Council about the state of the fireplace but could not recall whether it was presettlement or post settlement. He understood that the sloping floor in the lounge area although near the fireplace might not be connected to the fireplace removal. He felt that the elderly house needed quite some work as at settlement including painting inside and out and some rot around windows and a sloping floor in the lounge. It was put that a prepurchase building report would have been prudent but Mr Cross said that the appellant relied on the assurances of Ms MacDonald as agent. He had carefully looked over the house for her including in the basement and said he trusted the assurances of Ms MacDonald. Mr Cross is an IT specialist.

The Stance of the Licensee Salesperson

[36] The second respondent licensee, Ms MacDonald, detailed all her dealings with the appellant about properties including 15 Cornwall Street, Arrowtown. Ms MacDonald had asked the appellant on 4 August 2010 if she would like to view it and they did that at about 5.00 pm on 12 August 2010 but only for about ten minutes partly because the licensee was on her way home with the flu.

[37] The property had been on the market since 3 August 2010 being marketed by way of a deadline sale up to 4.00 pm 3 September 2010. On the day the appellant viewed the property she told the licensee that she, the appellant, wanted to put in a cash offer of $410,000 and that she did not want to put any conditions such as a builder's report into the offer. This is denied by the appellant. The transaction and representation report of Newman Real Estate Ltd records that a builder's inspection was offered to the appellant but declined.

[38] Ms MacDonald said that during the viewing of the property she and the appellant noted that the front iron on the roof looked newer than the rest of the roof but she, the licensee, had no knowledge about the condition of the roof and made no representations about it other to agree that it did look newer.

[39] Ms MacDonald said that she told the appellant that the vendor had recently had a drain by the kitchen fixed. They discussed the dampness of the house in the context of there being no garage door. The property was one where a person could drive into a carport under the house but there was no door to that. Ms MacDonald also pointed out to the appellant that the rear of the house needed painting and the appellant said that she would do that herself.

[40] Ms MacDonald expressed the opinion that for adequate winter warmth the appellant would need a fireplace in addition to the heat pump already installed in the house. Ms MacDonald told the appellant, as she had told other viewers of the property, that the existing fireplace had been removed because the vendor had received a grant for a heat pump conditional upon that removal. Apparently, the previous fireplace had not met Arrowtown's clean air compliance regulations.

[41] The appellant asked Ms MacDonald to send a cash offer form to her lawyer in Invercargill on the basis that the appellant would sign it in ten days time when she was next there. Ms MacDonald said she asked the appellant if she was sure she did not want any other conditions such as a LIM report or builder's inspection, and she said that she did not. However, a few days later before mailing the contract form to the Invercargill lawyer, Ms MacDonald telephoned the appellant and advised her that she should get the LIM report because the real estate firm were obtaining one in any case and there would be no cost to the appellant. The latter agreed to that and, on 18 August 2010, the lawyer was sent not only the form of sale and purchase agreement but a copy of the LIM. On 2 September 2010 the lawyer confirmed with Ms MacDonald that the LIM had been checked and was in order.

[42] On 2 September 2010 Ms MacDonald spoke with the appellant who then wanted to reduce her offer to $405,000 because she now considered she would need to spend money on installing a garage door and fireplace. At that stage the appellant had viewed the property three times.

[43] The licensee said that she met the vendors on 3 September 2010 to review the appellant's offer and that she, the licensee, agreed to discount her commission to make up for the reduced price offer as the vendors would only come down to $410,000 and not to $405,000. Nevertheless, as no agreement had been signed up with the appellant, the property continued to be marketed and was advertised at a price of $430,000 and more open homes took place on that basis.

[44] Ms MacDonald telephoned the appellant on 6 September 2010 *"and let her know that if she could go to $408,000 I think the vendors would agree to that"*. The appellant said she would agree if the outdoor furniture was included as chattels. On 7 September 2010 the property went under contract with the appellant at $408,000.

[45] Ms MacDonald arranged a presettlement inspection by the appellant on 22 September 2010 and the appellant looked through the entire house and garage with Ms MacDonald and raised no concerns; so that settlement occurred that afternoon.

[46] However, on 4 November 2010 the appellant raised her various complaints about the property. She asserted that the property was so dirty she could not take possession. Ms MacDonald says that it was clean on the day of the presettlement inspection and there was discussion whether others had occupied the property since then. It seems that Ms MacDonald's mother cleaned the oven for the vendor, and was a friend of the vendor, and she had noted that the property was in a clean and tidy state as at the settlement date. The appellant had also complained about rubbish in the garage, skid marks in the toilet, dog bones in the freezer and, later, about dust.

[47] Among various concerns of the appellant about that time was that there had been torrential rain the night the appellant eventually took possession which led to leaks where the previous chimney had been blocked and by windows in the living room. It was ascertained that the vendor had not known of any previous leaks. That issue was referred to the tenants of the vendor, who had been in possession until the marketing period commenced, but they said they had no problems with leaks or even with condensation.

[48] There was a later complaint by the appellant that iron sheets in the roof had been turned over and there were 38 nail holes in them and there was water pooling underneath, and the appellant was worried that when the roof was taken off the timber underneath it might be rotting.

[49] The licensee is adamant that she did not make any representations to the appellant about the property and that, as at the settlement date, the appellant had no issues about the property not even about its cleanliness. She has found this matter most distressing.

[50] In cross examination, Ms MacDonald was adamant that the only discussion between her and the appellant about the roof was that part of it looked newer. She insists she did not state that the roof was in good order or do more than agree that part of the roof looked newer. Inter alia, she emphasised that she and the appellant had not discussed the fireplace except that, with a grant, the vendor had installed a heat pump and had the fireplace removed.

[51] The licensee emphasised, inter alia, that the appellant would not allow a builder's report to be obtained because she wished to submit a clean offer to the vendor *"for maximum bargaining power"*.

[52] The licensee said that, at the presettlement inspection on settlement day, the property was in a clean state and there were no signs of any leaks. Ms MacDonald was not shaken in any way under extensive cross-examination from Mr Wimsett and the appellant.

Evidence from Mr Newman

[53] There was evidence from Mr R M Newman as the principal of Newman Real Estate Ltd trading as Ray White Arrowtown. He did not become involved with the property until the appellant raised some issues on 4 November 2010 through the company receptionist. He immediately telephoned the appellant and was in communication with her from then. On 9 November 2010, he sent her an email advising that the former owner was still overseas but that Mr Newman would talk to her on her return about the fireplace, the roof, and the cleanliness of the property. Inter alia, on 22 November 2010 he spoke with the appellant again and advised that the vendor had no knowledge of any leaking roof and had not herself lived in the property for the past two years during which time it had been tenanted, but there had been no complaints of leaks. The appellant did not accept the truth of that. Mr Newman advised her that his company had no knowledge of any leaky roof or faulty floorboards and held a signed authority form from the vendor that the property had no defects. He arranged for the vendor to confer with the appellant.

[54] Mr Newman emphasised that it took the appellant about 61 days after settlement of the purchase to raise any issues, and that she had not obtained a building inspection report prior to purchase despite being offered that by Ms MacDonald. Mr Newman had no idea why the property would be unclean 61 days after settlement and could only assume that someone entered the property after settlement.

[55] On 26 April 2011 the appellant came to his office and dropped in samples of roofing iron and spouting in a rather rough manner. He felt he had done his best to resolve issues for and with the appellant.

Discussion

[56] The first respondent notes that there are clear conflicts of evidence regarding the licensed salesperson's alleged misrepresentations and that this will be a matter of fact for us to determine having heard from the parties in person. However, the allegations against the licensed agent might, by contrast, turn more on documentary evidence. This is because the conduct complained of relates to an exchange of emails produced in evidence before the Committee.

[57] The first respondent submits that, as a general principle, a licensee should not make statements confirming the suitability or integrity of a property unless he or she has independently verified the situation given such assertions will generally be beyond their knowledge. It is submitted that a preferable course is for a licensee to advise the purchaser to make further enquiries (unless defects are known, in which case they must be disclosed). We agree.

[58] It is also submitted that even an innocent misrepresentation is unsatisfactory conduct unless the licensee can show that he or she took all reasonable steps to verify the accuracy of the information or was a *"mere conduit"* of information from the vendor. Being a *"mere conduit"* would require proof that the licensed salesperson made it clear that he or she was doing no more than passing on information conveyed to them and was not vouching for its accuracy. Again, we agree.

[59] The Act and Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 aim to guard against conduct which might undermine the integrity of the industry such as misrepresentations by salespersons. For example:

[a] Rule 6.4 provides:

> *"A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client."*

[b] Rule 6.5 provides:

> *"A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects, the licensee must either –*
> *(a) obtain confirmation from the client that the land in question is not subject to defect; or*
> *(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.*

[60] These rules are important substantive provisions aimed at promoting and protecting the interests of consumers in relation to real estate transactions in accordance with the purpose of the Act.

[61] The first respondent submits that, notwithstanding matters before us are disciplinary in nature, issues of compensation are clearly envisaged by our Act as is seen, for example, in s.93 and in our penalty decision in the *Barras/Quin* proceedings reported at [2012] NZREADT 13. It was noted that the *Barras/Quin* decision is subject to appeal to the High Court.

[62] The first respondent agrees with counsel for the second respondents that we do not have jurisdiction to determine a claim under the Contractual Remedies Act 1979. That Act provides a separate and discrete type of civil remedy as anticipated by s.155 of our Act. As already indicated, that is our view also.

[63] An analysis of misrepresentation by analogy to the Contractual Remedies Act 1979 could only be engaged if we find that the licensed salesperson made the misrepresentations alleged. In such event, we would not need to address arguments relating to interpretation and application of the Contractual Remedies Act 1979. Rather, the law for us to apply is governed by provisions in our Act as applied by us in the *Barras/Quin* matter reported at *Decision of Complaints Assessment Committee (CAC 10036)* 11 May 2011 (decision finding unsatisfactory conduct) and at [2012] NZREADT 13 (penalty decision).

[64] *"Closed door" hearing by non-lawyers*: The first respondent submits there is no merit in these allegations and the Act presumes hearings on the papers. We agree.

Complaint against licensed agent relating to lack of professionalism, arrogance, and evasiveness: The first respondent submits that it was open to the CAC not to take further action in respect of this aspect of the complaint on the documentary evidence before it; but that, of course, this is a matter for us to determine on appeal.

[65] The essential background of this case is that the appellant purchased a property at 15 Cornwall Street, Arrowtown on 22 September 2010. The agent who dealt with Ms Molenaar on this purchase was Ms Catherine MacDonald. The appellant and vendor agreed on a price, a prepurchase inspection was undertaken with Ms MacDonald on the day of settlement (with which Ms Molenaar raised no concerns), and nothing further occurred until some 61 days after settlement.

[66] Then, the appellant first laid a raft of complaints in respect of the property as outlined above. It seems to us that both named second respondents attempted to deal as swiftly as possible with these complaints by engaging in numerous telephone and email communications with both the appellant and the vendor. This communication was semi-frustrated as the appellant would not engage in telephone communication with the second respondents and insisted everything be done by email.

[67] As we have already indicated, only a party to a contract can be liable for misrepresentation under s.6 of the Contractual Remedies Act 1976. This is the case even if it is established that the misrepresentation occurred via the party's agents. This principle is exemplified by *Wakelin v RH and EA Jackson Ltd* (1984) 2 NZCPR19 where the vendor of a lunch bar was held liable for damages under s.6 as a result of misstatements made by the land agent it had employed to sell the property. At page three of the judgment, His Honour Henry J stated at page four of the judgment:

> *"I am accordingly satisfied that the answer given was, in the circumstances, a misrepresentation as to the true position ... I am further satisfied that on the evidence this representation was a cause at least in part, of the plaintiff's decision to purchase."*

[68] Notwithstanding this, the Court found that the agent was not liable under s.6 and in this regard stated at page four of the judgment that s.6 *"(1)(a) gives an entitlement to relief to a party to a contract only as against another contracting party. It does not purport to confer any rights against other persons"*.

[69] It is trite law that a party's liability for statements of that party's agent is confined to statements made within the real or apparent authority of the agent. If an agent makes a statement which is beyond his or her authority, the party will not have the representation attributed to him or her and will not be liable. However, if an agent makes misrepresentations, whether within the terms of his or her or authority or not, no action lies against the agent personally under s.6 as the section renders only the parties liable. Accordingly, even if a misrepresentation is established, which is denied by the second respondents, the appellant cannot succeed against the second respondents under s.6 of the Contractual Remedies Act 1979.

[70] We consider that this is the incorrect forum in which to bring a claim under s.6 and that we have no jurisdiction to determine a claim brought under s.6 or grant relief under that Act as sought by the appellant.

[71] The second respondents say that it was illogical for the appellant to spend $408,000 and not be prepared to spend up to $800 on a building inspection, but this was a decision entirely for the appellant to make. She elected not to obtain the report, and the suggestion that this was because of some alleged representation by Ms MacDonald is not credible.

[72] This is a credibility dispute and it is for us to assess the credibility of the parties. We found the presentation of the respondents in giving their evidence to be convincing as are their contemporaneous records by way of diary notes, and emails. We assess both second respondents as honest and careful witnesses. In contrast, there is paucity of contemporaneous, objective evidence to support the appellant's allegations.

[73] If the appellant is to be believed, Ms MacDonald often responded to queries with a bland statement about the vendor's honesty and that everything would be all right. Ms MacDonald does not present as the sort of person who would make such statements in response to specific enquiries. For every prudent step, such as obtaining a prepurchase inspection report, the appellant provides as a rationalisation that such was not necessary because of the assurances given by Ms MacDonald. There is objective contemporaneous evidence in the form filled out by Ms MacDonald at the time that this was offered but refused.

[74] We are satisfied that Ms MacDonald's relationship with the vendor is that the vendor knew Ms MacDonald's mother well; but that has little bearing on this matter.

[75] Whatever the factual position about rubbish, it was not the responsibility of Ms MacDonald; it was ultimately the responsibility of the vendor.

[76] As far as the roof is concerned, it was the vendor's position that there was no problem with it. There are communications from the two tenants in the property prior to its sale; both of those tenants and the vendor had no problems with the roof.

Our Conclusions

[77] As already indicated, we prefer the evidence of Ms MacDonald. Also, we feel that the appellant took far too much from one or more rather vague and bland assurances about the integrity of the vendor. The appellant decided not to obtain a builder's report as Ms MacDonald had suggested. Had she done so, she might not have her current regrets other than the alleged uncleanliness of the property.

[78] We note that the appellant is fairly experienced on the property market having purchased at least five properties previously in her lifetime. It must have been obvious to the appellant that the property needed renovation and it seems more than she had expected was needed. We note that the main items of expenditure were $7,624.50 for roofing work, $1,000 to a builder for a support wall, and $3,830.65 for plumbing work. Also there was $153.19 for electrical work, $375 for cleaning, $285 accommodation, and a $39 rubbish fee.

[79] It was not prudent for the appellant to rely on vague statements of a real estate agent, if she did. We accept that real estate agents will often apply subtle pressures to some extent but there does not seem to have been any undue pressure applied to the appellant in this case.

[80] Simply put, it has not been proved, on the balance of probabilities, that the second respondents had any responsibility for the unclean state of the property on 5 October 2010 nor for any rubbish there. There were no representations from either of the second respondents about the safey of the wires in the basement, the state of the roof, nor the condition of the lounge floor and weight of the schist fireplace surround. There is no proof that any conduct of either respondent could amount to unsatisfactory conduct and we have no reason to criticise their respective conduct in any way. It seems that, to a relatively modest degree, the appellant has misjudged the precise state of the property and seeks to unreasonably blame the real estate sales person and her employer.

[81] Accordingly, we agree with the views and findings of the Committee; so that this appeal is dismissed.

[82] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____
Judge P F Barber
Chairperson

_____
Ms J Robson
Member

_____
Mr G Denley
Member