BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 105

READT 38/11

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10017)**
	Prosecutor
AND	**IVAN SHERBURN** Licensed Salesperson, of Hamilton
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at HAMILTON on 25 September 2013 (prior hearing of a witness at Auckland on 3 September 2013) (with subsequent typewritten submissions)

DATE OF THIS DECISION 26 November 2013

COUNSEL

Mr L J Clancy for the prosecution
Mr E J Hudson, barrister, for the defendant

DECISION OF THE TRIBUNAL

Background

[1] Mr Ivan Sherburn ("the defendant") faces one charge of misconduct laid by Complaints Assessment Committee 10017.

[2] The charge arises from a complaint made to the Real Estate Agents Authority by Roy and Nancy Harlow and relates to the registration by the defendant of three restrictive covenants on the title of a subdivided farm property on Raynes Road, Hamilton, when the property was subject to an agreement for sale and purchase between Sherman Ltd (as trustee of the Sherburn Family Trust) and the Harlows.

[3] The prosecution alleges that the defendant deliberately failed to disclose the registration of the three covenants to the Harlows and that his conduct was disgraceful under s.73(a) of the Real Estate Agents Act 2008. It needs to be understood that there were already some restrictive covenants over the land which, inter alia, prohibited the use of the property for *"any purpose which unreasonably interferes with the quiet enjoyment of any owner of any other lot or which creates or may create a nuisance"*.

Our Previous Threshold Decision

[4] In our decision of 15 June 2012 [2012] NZREADT 33 between the parties, we dealt with a number of jurisdictional issues regarding the said charge and (inter alia) we stated:

> *"**The Issue***
>
> [1] The appellant licensee, Ivan Sherburn, has appealed the decision of Complaints Assessment Committee 10017 to charge him with misconduct under s.73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. This appeal is confined to the threshold issue of whether a prima facie case has been established to support the charge.
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> [2] That charges reads:
>
> > *"1. Following a complaint made by Roy and Nancy Harlow (complainants), Complaints Assessment Committee 10017 (Committee) charges Ivan Sherburn, licensee, with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*
> >
> > ***Particulars***
> >
> > *The defendant's deliberate non-disclosure of the registration of three covenants on the title to the property at 31 Raynes Road, Hamilton (property), after the complainants had entered into an agreement to purchase the property."*
>
> [3] We understood the three covenants to read that the landowner:
>
> > *"... will not:*
> >
> > *(a) Shoot any wildlife other than for the eradication of pests such as rabbits, possums and suchlike;*
> >
> > *(b) Permit or allow motorcycling or go-cart recreation or other noisome activity on the land, but this covenant shall not extend to the use of motor bikes, mowers, weed eaters or suchlike for the use in farming or gardening operations;*
> >
> > *(c) Keep or permit to be kept on the land more than two dogs of a great greater age than 3 months but this does not preclude the ownership of additional dogs for working purposes."*
>
> *...*
>
> ***Factual Background***
>
> *[5] The complaint was made by the second respondents, Mr and Mrs Harlow, on the basis of the following background.*

[6] The Sherburn Family Trust, of which the Appellant and his wife were the principal beneficiaries, owned 31 Raynes Road, Hamilton. On 3 August 2007, that trust obtained consent from Waipa District Council to subdivide into three lots some land it owned on Raynes Road. The consent was subject to various easements on the property and that aspect is pivotal to this case.

[7] On 6 November 2007, the second respondents as purchasers, entered into an agreement for sale and purchase of one of the subdivided blocks of land. The agreement was entered into by Sherman Ltd, as trustee of the Sherburn Family Trust and vendor. The Appellant was both a director and shareholder of Sherman Ltd and acted as the salesperson for the sale on behalf of the vendor's agent (Ray White Real Estate).

[8] On 7 November 2007, the Appellant executed an easement certificate creating the easements required by the Council's subdivision consent, but also creating three covenants. This was lodged with LINZ on 6 December 2007 and was registered on 7 December 2007. The sale and purchase agreement made no mention of, or provision for, these covenants and the second respondents allege that they were not made aware of them at that time.

[9] On 26 March 2008, the second respondents discovered the three covenants and that led to a protracted legal dispute (in the civil jurisdiction) between the parties.

[10] The transaction leading to the Harlows' complaint concerned that 6 November 2007 agreement entered into by them (as purchasers) with Sherman Ltd (as vendor). That agreement was preceded by an earlier agreement incorrectly dated 1 October 2007 but, in reality, occurring on 1 November 2007 which provided for a $595,000 purchase price with settlement on 14 December 2007. That agreement was replaced by the 6 November 2007 agreement because the Harlows wanted to defer settlement until February 2008. To compensate the vendor, the purchase price was increased to $622,300.

[11] Pending settlement, the Harlows were granted a right of occupation free of rental.

[12] However, prior to settlement, issues arose between the parties. The Harlows alleged misrepresentation and the imposition of restrictive covenants without their consent. Rather than settle the purchase of the land and claim damages (if available), they sought to renegotiate the purchase price. The vendor (Sherman Ltd) declined such overtures, issued a settlement notice and, ultimately, cancelled the agreement and issued proceedings in the High Court at Hamilton seeking possession and damages. The Harlows resisted the claim and counterclaimed, alleging that the cancellation was invalid. In addition, they sought to have the contract reopened pursuant to the provisions of the Credit Contracts Act 2003 by reason of the vendor's (alleged) oppressive conduct.

[13] There was hearing in the High Court at Hamilton in August 2009 and Hansen J, in a reserved decision (Sherman Ltd v Roy Harlow & Anors, HC Hamilton CIV 2008-419-877, 19 November 2009), determined that cancellation was lawful as the vendor was ready, able, and willing to settle. It was in this context that Hansen J considered the issue of the restrictive covenants. He did not determine if there was agreement to them by the Harlows as he found that, on the issue of the title, the Harlows had the right of requisition which they did not pursue. He also found that the agreement was not a credit contract and, therefore, could not be reopened. In any event, he found

that the vendor's conduct was not oppressive; and he considered and dismissed the Harlows' six allegations of misrepresentation.

[14] The Harlows successfully appealed to the Court of Appeal where the issue was relatively narrow, namely, whether there was a collateral agreement to permit the imposition of the covenants. That Court found there was not, so that there was no right to register the covenants and the vendor's cancellation was therefore unlawful (Roy Harlow & Anors v Sherman Ltd [2010] NZCA 627).

...

[38] Mr Hudson then submitted that, when considering s.94(1) which deals with notice to the licensee of a Committee's determination under s.89, the Committee was precluded from reaching such a determination because the misconduct complained of must be "in the course of Mr Sherburn's business as a real estate agent". Mr Hudson submitted that it was in the course of the appellant's business to advertise the property for sale through the agency of Ray White and to show the property to the second respondents as prospective purchasers, but that it was the appellant as vendor of the property who was responsible for instigating the creation and registration of the restrictive covenants. Mr Hudson submitted that the steps taken by the appellant were those of a vendor and could not be regarded as being conduct in the course of his business as a real estate agent.

[39] We think otherwise and that the appellant as real estate agent had a clear duty to be open and forthright about the nature of the restrictive covenants and the procedures involved in their registration. In that respect Mr Hudson referred to the purpose of the Act as the protection of the public and the need to maintain appropriate standards within the industry. He submitted that the conduct of the vendor, in imposing restrictive covenants and how that was achieved, has no relevance to the purposes behind the Act and that it was only coincidental that the appellant happened to be both a trustee on the title of the property and also the real estate agent marketing the property. We think that the conduct of the vendor with regard to the restrictive covenants is very relevant to the purposes of the Act.

...

[72] As we have also covered above, in this case, there is an obvious nexus between the appellant's conduct and his fitness or propriety to carry out real estate work. This was an act involving real estate where, allegedly, there was a misrepresentation by the appellant directly relating to the real estate and involving legal documents. A real estate agent must be able to be trusted to deal with the sale of real estate honestly and with the utmost integrity. Prima facie, there could be misconduct by the appellant on the basis of a subterfuge.

Outcome

[75] Simply put, we consider that the Committee properly carried out its inquiry or screening role prior to laying the said charge. Its reasoning is obvious enough and sufficient to establish a prima facie case. Credibility findings about other issues in civil litigation are not binding on us but we shall take them into account. Neither the process under s.172 of the Act, nor the doctrine of res judicata prevent us considering the said substantive charge against the appellant.

[76] All in all, we consider that the charge has been properly laid and that we have jurisdiction to proceed and must diligently move on to a timetable and fixture to deal with the substance of the charge."

Chronology

[5] The following factual chronology is not in issue

[a] Early November (probably 1 November) 2007: The parties sign a first agreement for sale and purchase of the property. Correspondence between the parties' solicitors ensues.

[b] 5 or 6 November 2007: The Sherburns and the Harlows meet at the Sherburns' home and a new agreement – the agreement – is signed. The new agreement overtakes the solicitors' correspondence regarding the first.

At the meeting, Mr Sherburn shows the Harlows a document recording a number of restrictive covenants (the historic covenants) affecting the property, dating from 1991. The Historic Covenants restrict any use of the property which would unreasonably interfere with the quiet enjoyment of neighbouring owners or which would cause a nuisance. Mr Harlow initials or signs the document he is shown.

The agreement makes no mention of new restrictive covenants.

[c] 7 November 2007: The date entered on an easement instrument by a legal executive in the office of Mr Cochrane, the solicitor acting for the defendant. The easement instrument includes the three new restrictive covenants in issue and is signed by Mr and Mrs Sherburn. No copy of the easement instrument is then given to the Harlows or their solicitors.

[d] 7 November 2007: On the same day, the Harlows and the Sherburns enter into an occupation agreement, under which the Harlows are permitted to enter into occupation of the property.

[e] 8 November 2007: The terms of the agreement are the subject of an exchange of correspondence between the parties' solicitors.

[f] 6 December 2007: The easement instrument is registered. No copy is then provided to the Harlows or their solicitors.

[g] 20 December 2007: Mr Cochrane gives notice to the Harlows' solicitor that title has issued. The correspondence makes no mention of the covenants nor is a copy of the easement instrument provided.

[h] April / May 2008: The new covenants are raised in correspondence between the parties' solicitors:

[i] 22 April 2008: Lawyers for the Harlows state their client *"totally rejects that the latest covenants were discussed prior to the contract being signed ... this is simply not true"*.

[ii] 12 May 2008: Mr Sherburn's lawyer states that the covenants *"were discussed ... They were not mentioned in the agreement but Mr Sherburn*

did not think that anyone could object to them and considered that they were as much for your clients' benefit as anyone else's".

[i] 19 November 2009: Decision of Rodney Hansen J in the High Court on Sherman Ltd's claim for an order for vacant possession of the property, a declaration that the Agreement was cancelled with effect from 22 May 2008 and damages.

[j] 20 December 2010: Court of Appeal decision holding that Sherman Ltd was not entitled to register the three covenants (there being insufficient evidence of an oral collateral agreement to this effect between the parties), that the Harlows' failure to requisition for the removal of the covenants did not mean they were deemed to have accepted them, and that Sherman Ltd had not been entitled to cancel the agreement. The Court of Appeal orders Sherman Ltd to refund the Harlows' deposit of $45,000 and pay the Harlows' costs.

Evidential Matters

[6] When the defendant briefed his solicitor, Mr Cochrane, he advised Mr Cochrane that he (the defendant) had discussed the content and effect of the new covenants with Mr and Mrs Harlow and they were in agreement. His solicitor had no reason to query that and there were other issues thought to be far more important between the parties at that time.

[7] It is rather unusual for a vendor to register restrictive covenants against a title subsequent to signing an agreement for sale and purchase of the relevant land. We accept that there was no suggestion whatsoever to Mr Cochrane that he not be open about proceeding to register the covenants; and he would have rejected any such suggestion. He simply registered the new covenants in the usual way, advised the Harlows' solicitor, and did not expect that solicitor to demur, and nor did he. Mr Cochrane remarked that there is a requisition procedure under the agreement for sale and purchase which the Harlows' solicitor could have applied.

[8] Mr Harlow is adamant that he had no inkling of the likelihood of restrictive covenants until he found in March 2008 that they had been registered against his title. He said that he and his wife were told of the existing or historic covenants on 5 November 2007 by the Sherburns, but there was no discussion with them of there being any new restrictive covenants whether additional or as clarification of the historic covenants. He did not think that there was any vagueness in the historical covenant and he felt the new restrictive covenants were not necessary for their clarification but related to different matters. He said the only discussion he had about covenants was with Mr Sherburn on 5 November 2007 when they discussed the historic covenants and he was given a copy of them. He paid particular attention to that situation because he and Mrs Harlow wished to bring their aviaries onto the property and also to use a type of 4 wheeler motorbike and trailer for farm work and did not want to find either of those activities restricted by the historic covenant.

[9] We observe that both Mr and Mrs Harlow and Mr and Mrs Sherburn seem very credible witnesses. They were very carefully and firmly cross-examined. Despite the conflict in the evidence between the Harlows and the Sherburns, we could not regard any such witness as untruthful and we can only conclude that confusion somehow developed in their discussions with each other at material times. Simply put, the evidence of the Harlows is that the formation and proposed registration of the three restrictive covenants was never discussed with them at any material time by the Sherburns but that there were some discussions about covenants in particular to do with regulating shooting in the area.

Also the existing historic covenants were explained to the Harlows by the Sherburns and the Harlows accepted them. The Harlows had made it clear to the defendant that they did not want any shooting in the area, particularly the shooting of wild life.

[10] Mr Sherburn's evidence is quite firm that he discussed with Mr and Mrs Harlow his intention to register the three further covenants in issue and that he explained to them that such covenants were in the Harlows' interest as well as his, and would reassure peace and quiet in the area for them all. The defendant did note that, at material times, the Harlows were focused on completing the purchase and taking possession of the farm ahead of any other thought. He said he had explained the effect of the historic covenants to Mr Harlow in particular to ensure he understood the appropriate use of the land. He said that in fact the issue of restrictions on use of the land was raised by Mr Harlow who wanted to be satisfied that he (and Mrs Harlow) could bring their aviaries to the property.

[11] The defendant said that although he covered his intentions about restrictive covenants and the effect of the existing covenants, he did not think it a very important topic at the time in terms of the overall transaction between the parties but it was significant enough for him to bring the historic form of covenant to a meeting of the Harlows and Sherburns at his home on 5 November 2007. However, he said that he had never given the Harlows *"anything in writing regarding the new covenants"* and he had drafted out what he thought to be appropriate wording for his solicitor to implement. The solicitor does not seem to have changed that wording very much.

[12] The defendant said that the Harlows showed no concern whatsoever over the defendant's views on existing and restrictive covenants other than to cover their aviaries and the use of the four wheeled motorbike, and the defendant thought that all understood that the proposed three new covenants were merely a clarification of the existing historic covenants.

[13] It does seem that when those conversations took place the Harlows were still prospective purchasers and had then yet to sign the agreement for sale and purchase but there seemed to be some dispute about that. Certainly, the defendant felt that the content of the new restrictive covenants was innocuous in terms of the effect of the historic covenant and put it that *"it just never occurred to me"* that the Harlows could be concerned. Also he had assumed that his solicitor would have advised the Harlows' solicitor of the content of the new covenants and the registration procedure. Having said all that, the defendant asserted that the Harlows clearly knew about and agreed to his registering the three new restrictive covenants and understood what was happening.

[14] However, he then went on to admit that *"maybe I was casual about it but there was nothing sinister on my part"*. He opined that this complaint against him had arisen as part of the Harlows' efforts to have him reduce the sale price of the farm they had been acquiring. Again at the end of his evidence to us, Mr Sherburn said *"I used the word "covenants" but maybe I was casual as I felt that Mr and Mrs Harlow were not concerned about the restrictions"*. However he maintained that, on at least two occasions, he told them that he intended to register the three covenants against the title to the property they were acquiring and noted that they seemed quite unconcerned about that.

[15] The import of that evidence of Mr Sherburn was clearly confirmed by Mrs Sherburn in her evidence to us. She asserted that Mr and Mrs Harlow were aware of what Mr Sherburn was doing regarding the three new restrictive covenants and understood that he was merely clarifying and spelling out the effect of the historic covenants designed to give quiet enjoyment in the area. She was also adamant that she had heard Mr Sherburn (her husband) using the word *"covenant"* when covering the issue with Mr and Mrs Harlow.

Discussion

[16] As indicated above, before us there was a clear conflict of evidence between the Harlows and the Sherburns as to whether or not the defendant's intention to register the three covenants was discussed with, and agreed to, by the Harlows prior to the sale and purchase agreement being signed.

[17] The Harlows were firm that there was only general discussion as to the content of what became two of the covenants. In particular, there was a discussion that neither family would like shooting on a lake at the property and there was mention that Mr Harlow had a four-wheel motorbike which he used for farming and gardening purposes with a trailer. Both Mr and Mrs Harlow stated that these discussions were only of a general nature and that there had been no discussion, much less an agreement, about further restrictive covenants being registered on the title. Both were clear that the issue of keeping dogs was never discussed.

[18] By contrast, the Sherburns' evidence was that the defendant specifically raised with the Harlows the question of registering new covenants, both at an initial meeting with the Harlows when they walked over the property and, subsequently, at the Sherburns' home when the agreement was signed on 5 November 2007. The Sherburns stated that the Harlows agreed to the defendant's proposal of the three new covenants.

[19] For the prosecution, Mr Clancy submits that the evidence of the Harlows should be preferred and points to the following matters in particular:

[a] The Harlows' claim that the covenants were not discussed and agreed to is consistent with their response to this issue when it first came to light in April 2008, as expressed in their solicitor's correspondence.

[b] While the defendant's response when the issue was first raised does contend that the covenants were discussed, the thrust of the response is that the covenants were *"as much for [the Harlows'] benefit as anyone else's"* and that *"it never occurred to [Mr Sherburn] that anyone might object to them"*. As noted by the Court of Appeal, this response is consistent with the defendant's evidence under cross-examination by Mr Harlow in the High Court, *"the thing is you don't have an issue with the covenants themselves anyway"*.

[c] If the defendant's claim that the covenants were discussed and agreed is correct, Mr Clancy puts it as surprising that:

[i] Provision for the covenants was not made in the agreement.

[ii] The defendant never asked Mr Harlow to review / sign the text for the new covenants (as he had for the Historic Covenants). The defendant accepted in cross-examination that he had likely drafted the text for the three covenants some time in early November 2007, prior to the agreement being signed.

[d] The defendant never asked his solicitor to send a copy of the covenants to the Harlows, or confirm the Harlows' acceptance of them in correspondence, despite the various other legal steps taken between 6 November and 20 December 2007; and Mr Clancy puts it that: *"This sequence left the Court of Appeal with "an uneasy impression of subterfuge and deliberate non-disclosure of the three covenants by Sherman"*.

[20] Mr Clancy submits that the evidence as a whole is consistent with the defendant having made a unilateral decision to register the three further covenants, without agreement from the Harlows, to protect his own interests, perhaps believing that the covenants were *"as much for the Harlows" benefit as anyone else's"*.

[21] Mr Clancy submits that if we accept that the defendant deliberately failed to disclose the covenants to the Harlows, then a finding of misconduct should follow. In principle we agree.

[22] Mr Clancy also submits that, as the licensed salesperson acting on the sale, the defendant had a clear duty to disclose matters affecting the property to the Harlows as purchasers, and that a deliberate failure to disclose such a matter would be regarded by agents of good standing or reasonable members of the public as disgraceful. Again we agree in principle. We also agree that it is no answer for Mr Sherburn, as a licensed salesperson, acting in that capacity on the transaction, to rely on caveat emptor and the Harlows' solicitor's responsibility to search the title once issued. The defendant had an active duty of disclosure as salesperson which, if deliberately avoided, is properly categorised as disgraceful.

[23] Mr Clancy also puts it that if we are not persuaded that the defendant's failure to disclose the covenants was deliberate and/or disgraceful, a finding of unsatisfactory conduct may nevertheless be appropriate in terms of our powers under s.110(4) of the Act.

[24] Real estate agency work that falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee is unsatisfactory conduct under s.72(a) of the Act.

[25] We also agree that the defendant was conducting real estate agency work, as defined by s.4 of the Act, on the sale to the Harlows. The property was marketed by Ray White and the Ray White brand and branch details appear on the agreement. The defendant acted *"on behalf of another"*, namely Sherman Ltd and the Sherburn Family Trust, distinct legal entities from himself as salesperson. He may have written out the covenants and arranged their registration as a private person, but we are concerned with whether he advised the Harlows of the covenants or of their contemplation.

[26] We may conclude that, even if the defendant did not act deliberately, more was required from him, as a reasonably competent licensee, regarding disclosure of the covenants than occurred here. Had the defendant ensured that the Harlows were given a copy of the covenants and an opportunity to register any objection, the subsequent dispute would never have arisen. We set out further views on that issue below.

[27] The defendant's own expert witness, Mr A Griffith (a retired and distinguished real estate salesperson), stated that a licensed salesperson would be obliged to disclose covenants to a purchaser that were not disclosed on the title but which the salesperson was aware the vendor intended to register. We agree that a reasonably competent licensee would ensure that such disclosure was clear and recorded to avoid any later dispute, particularly, where that licensee was closely connected to the vendor entity intending to register the covenants.

[28] Mr Hudson submits that the evidence establishes that the registration of the covenants was disclosed to the Harlows and to their solicitor. He notes that Mr Cochrane's unchallenged evidence is that he forwarded a copy of the title to the Harlows' solicitor of 20 December 2007 and no requisition of the title was received. Mr Hudson puts it that pursuant to the doctrine of indefeasibility of title as enshrined in the

Land Transfer Act 1952, registration is notice to all the world and, except in the case of fraud, there is immunity against claims to the title so that it follows that, on 7 December 2007 when the covenant was registered, notice was given to all the world including the Harlows of the registration of the covenants. He puts it that, in any case, particular notice was given on behalf of the defendant when on 20 December 2007 his solicitor forwarded a copy of the title to the Harlows' solicitor and, because the covenant clearly appears on the face of that title, that step must have been a disclosure of the registration of the covenants to the Harlows. We take that aspect into account.

[29] Mr Hudson then made submissions along the lines that the defendant's conduct complained of was not in the course of his business as a real estate agent. Mr Hudson submitted that the defendant was acting as an agent for the vendor of the trust and not as an agent for the Harlows and put it:

> *"5.5 He was acting as an agent in showing the property to the Harlows and in drawing up the contract and having the contract executed. It is conceded that in his role as agent in negotiation the contract he would, in accordance with the abovementioned decisions, have an obligation to bring to the Harlows' attention the land covenants which existed and those which it was intended to register.*
>
> *5.6 In my submission the evidence establishes that he did this. Hanson J in the High Court found this to be so.*
>
> *5.7 Therefore in my submission the instructions to Mr Cochrane and subsequent steps taken fall outside the role of estate agent. They were tasks which Woodhouse J identified in the earlier decision [Property Promotions Ltd v The Police [1968] NZLR 945 (SC)] as "an activity which happened to run parallel with the actions of a real estate agent"."*

[30] However, our contrary views on that issue are set out above.

[31] Mr Hudson raised again the issue of res judicata which we dealt with in our said jurisdictional decision regarding this charge. He seemed to be putting it that we had misunderstood his submission and stated:

> *6.5 Whether or not there was disclosure of his intentions to create the three additional covenants was an issue which was squarely before the High Court. Hansen J in his judgment said as follows:*
>
> > *[17] "The Harlows accept that the proposal to register a covenant prohibiting shooting was discussed before they signed the agreement. They also acknowledge that in the course of the discussion the issue of noisy vehicles and dogs on the land was mentioned. They are adamant that there was no proposal to control noise by covenant."*
> >
> > *[18] I am satisfied the proposal to create the three new covenants was raised by Mr Sherburn, although I acknowledge the possibility that the Harlows may not have fully understood the implications of what was being proposed."*

[32] Mr Hudson's submission seemed to be that we are bound by that finding of Hanson J. As it happens we do not disagree with that finding of Hanson J so there seems little point in reopening the issue of res judicata.

[33] Mr Hudson then made submissions along the lines that our credibility findings should relate to those made before Hanson J in the High Court. We do not have issues with our own assessment of credibility as we explain further below. However, it is interesting that whereas, before us, Mr and Mrs Harlow denied awareness of the defendant's intention to create the covenants, it was established in the High Court that there were discussions between the parties at least in respect of shooting, noisy vehicles, and dogs and there was evidence before us about their discussion of shooting and motorbikes.

[34] Mr Hudson wanted us to take particular notice of the findings of Hanson J in the High Court which he put as follows:

> *"6.9.1 At [42] of his judgment he found Mr Sherburn had acted in good faith and without any intention to mislead (HC: 17).*
>
> *6.9.2 At [15] he found Mr Sherburn's disclosure of the roading was appropriate and that there was nothing oppressive in his conduct (HC: 19).*
>
> *6.9.3 At [53] His Honour determined in respect of the airport flyover that Mr Sherburn answered questions "honestly and accurately" (HC: 19)."*

[35] Mr Hudson then submitted that gives further support for us to find that the defendant's conduct in respect of the covenants was not deliberate. As it happens, we accept that the defendant acted in good faith and without any intention to mislead at material times; nor have we any reason to doubt his credibility.

[36] Mr Hudson then completed his submissions as follows:

> *"6.10 In my submission the evidence falls short of establishing deliberate conduct or conduct undertaken with wrongful intention on the part of Mr Sherburn.*
>
> *One must indeed question in asking whether or not the conduct was deliberate, what indeed Mr Sherburn had to gain from any deliberate non-disclosure. One struggles to find an answer when that question is considered in light of the fact that there was already an existing covenant registered against the title which excluded "unreasonable interference with quiet enjoyment or which creates or might create a nuisance."*
>
> *The covenant Mr Sherburn was proposing did no more than to give better definition to the above. He had nothing to gain from any deliberate non-disclosure of what he was intending to do."*

[37] Having stood back and absorbed the evidence on behalf of the prosecution and the defence, we have no particular reason to disbelieve any witness. We accept that there were discussions between the Harlows and the Sherburns in respect of regulating the use of the land being purchased by the Harlows from the defendant's family. This would be done by the creation of restrictive covenants in favour of adjoining land at that stage retained by the vendors. There seems to be some haziness on the part of Mr and Mrs Harlow as to what was explained to them together with confusion at material times between them and the Sherburns as to the precise extent of the registered restrictions and as to when the defendant's ideas would be converted into registered restrictive covenants. Mr and Mrs Harlow expected to be consulted further but the defendant thought that his intentions, as he implemented them with the three restrictive covenants, were fully supported by Mr and Mrs Harlow.

[38] At that stage Mr and Mrs Sherburn were friendly with Mr and Mrs Harlow and sought to assist them in any reasonable way. Subsequently, the Sherburns felt that the Harlows had not been straight with them and the parties became, and probably still are, hostile to each other and the said civil litigation in the High Court and Court of Appeal eventuated.

[39] Simply put, at material times there was confusion between those parties about clarifying the existing restrictive covenants by the three further covenants for the general peace and harmony of the area; and those three covenants have caused this prosecution.

[40] We accept that Mr and Mrs Harlow did not realise until about March 2008 that the defendant had organised registration of the three restrictive covenants in issue. However, we cannot be satisfied that the defendant deliberately failed to disclose that registration to them. That is our finding on the balance of probabilities.

[41] It follows that we cannot find the charge of misconduct to have been proved.

[42] However, we consider that, at all material times, the defendant was acting as a real estate agent rather than as a vendor and neighbour to the Harlows. We consider that a reasonably competent real estate agent, in the circumstances described above, would not have allowed the confusion over the covenants to develop in the minds of Mr and Mrs Harlow, as it did. The defendant, as a real estate agent, needed to be clear and forthright about the nature of the new restrictive covenants and the procedure involved in their registration.

[43] We can understand that the defendant thought the covenants were beneficial rather than restrictive to the Harlows. We can understand that the Harlows were more concerned about other aspects of the overall farm purchase from the defendant's family and various consequences of that; and did not seem to absorb that the three clear and precise restrictive covenants were being registered against the title they were acquiring. Frankly, one would have expected the defendant's solicitor to have carefully covered the proposed registration process of the restrictive covenants with the solicitor for Mr and Mrs Harlow prior to actual registration of the new covenants and the solicitor for Mr and Mrs Harlow to have fully searched the new title on its issue.

[44] We are also conscious that, in good faith, the defendant thought Mr and Mrs Harlow were fully supportive of the new covenants and understood how beneficial they would be for their peace and harmony in the area.

[45] For all that he failed, at least technically, to maintain the standard of conduct which a reasonable member of the public is entitled to expect from a reasonably competent licensee. That means that he is guilty of unsatisfactory conduct in terms of s.72(a) of the Act and his conduct would breach other parts of the definition of *"unsatisfactory conduct"* in that section and is generally unacceptable.

[46] In terms of penalty, because the material events to our finding of unsatisfactory conduct happened under the jurisdiction of the Real Estate Agents Act 1976 rather than the 2008 Act, we seem to have very limited powers. Accordingly, we ask the Registrar to arrange a telephone conference of counsel with our chairperson to discuss this penalty aspect further in the reasonably near future.

[47] 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.

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Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Ms N Dangen
Member