BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 69

READT 028/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**SIMON AND JADE ORSBORN**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	First respondent
AND	**WARWICK COLLIER and J.V.L. PRESTIGE REALTY LTD**
	Second respondents

MEMBERS OF TRIBUNAL

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

INTERIM ON THE PAPERS DECISION ISSUED 7 December 2012 ([2012] NZREADT 73)

DATE OF THIS FINAL DECISION 13 August 2013

HEARING DATE FOR THIS DECISION 30 May 2013 at Palmerston North

REPRESENTATION

Mr B A Stewart, counsel for the appellants
Ms J MacGibbon, counsel for first respondent
Mr A Darroch, counsel for second respondents

FINAL DECISION OF THE TRIBUNAL

Background

[1] On 24 February 2012, Complaints Assessment Committee (CAC) 20006 made a finding of unsatisfactory conduct against the second respondents, and neither party appeals that. In its penalty decision of 23 April 2012, that CAC imposed a censure against both the respondents; and publication of its decision; but the complainants appeal that penalty and seek, in particular, compensation of $50,385, an apology, and costs.

[2] At first, we were asked to deal with this matter *"on the papers"* and that led to our decision of 7 December 2012 ([2012] NZREADT 73).

[3] By way of background, we set out the following paragraphs of our decision of 7 December 2013 herein, namely:

> *"**The Issues***
>
> *[1] Simon and Jade Orsborn ("the appellants) appeal against the 23 April 2012 decision of Complaints Assessment Committee 20006 imposing a penalty on the second respondents for unsatisfactory conduct. That penalty decision related to the way the second respondents acted as estate agents on the sale to the appellants of a property at 139 Kawakawa Road, Feilding.*
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> *[2] The Committee found that advertising in respect of the property included misleading material and, for that reason, made findings of unsatisfactory conduct against the licensee, Warwick Collier, and against the agency JVL Prestige Limited (the second respondents). The Committee considered what, if any, orders should be made under s.93 of the Real Estate Agents Act 2008 consequent to those findings. It held that the second respondents' conduct was at the lower end of the scale of unsatisfactory conduct and made orders for censure against them both; and no further penalty was imposed.*
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> *[3] The appellants appeal the penalty decision and seek:*
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> *[a] An apology from both the licensee and the agency;*
> *[b] Payment of $49,385.00 made up of:*
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> *[i] $25,000 as compensation for misrepresentation as to the current rateable value of the property;*
> *[ii] $24,385.00 as compensation for misrepresentation as to the area of the property.*
>
> [c] *An order that the licensee and the agency pay the appellants' costs in respect of the investigation and prosecution of the complaint both before the Committee and us."*

[4] In terms of our finding, inter alia, in our said decision of 7 December 2012 that evidence needed to be adduced to us viva voce at a hearing, this matter resumed on 30 May 2013. In our said decision of 7 December 2012 we had set out the basic facts as follows:

> *"**The Basic Facts***
>
> *[5] On 13 May 2011, the vendors of the property signed a sole agency agreement with the agency for the sale of the property.*
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> *[6] The licensee prepared advertising material for the sale of the property. Before the Committee, the licensee stated that he had sourced some information from RPNZ, which showed that the property had a rateable value of $435,000. However, the vendors insisted that the rateable was $460,000 and produced a 1 April 2011 rates invoice from Manawatu District Council to confirm the higher capital value and a land area of 3.8512 hectares.*
>
> *[7] A brochure and newspaper advertising was prepared describing the land size of the property as 9.5 acres (3.8512 hectares) with a rateable valuation of $460,000.*

[8] At the time of listing the property, the vendors also advised the licensee that there was to be a "boundary adjustment" to include the front paddock of the property in the land belonging to 147 Kawakawa Road, which the vendors also owned. The application to the local Council for this boundary adjustment was made on 26 May 2011, but not approved until 16 June 2011.

[9] The appellants accept that, at all relevant times prior to their purchasing the property, they knew that a boundary adjustment was taking place. The licensee had informed all prospective purchasers of this.

[10] On 20 June 2011, a copy of the Conditions of Sale of Real Estate by Auction was provided to the appellants and all interested parties. Importantly, it described the land area as being 3.471 hectares (more or less), noted that it was "subject to survey being Lot 2 of the proposed subdivision plan annexed", and noted that a new certificate of title was to be issued.

[11] On 27 June 2011, the licensee and the sales manager of the agency met with the appellants to go over the Conditions of Sale of Real Estate by Auction and suggested that they seek legal advice on the documents. They understood that the appellants did, in fact, seek legal advice.

[12] On 29 June 2011, the appellants purchased the property at auction for $420,000, after the auctioneer had pointed out the reference in the Terms and Conditions of Sale to the boundary adjustment.

[13] The appellants say that when they made their purchase, they relied on the advertising material, which stated the land area as being 9.5 acres (3.8512 hectares) and the rateable valuation as $460,000. They say that after the auction, but immediately prior to settlement, they realised that the land area they had purchased was actually 8.54 acres (3.471 hectares) and that the rateable value of the property was $435,000."

The Simple Facts

[5] The second respondent, JVL Realty Ltd, was engaged as a real estate agent to sell the property at 139 Kawakawa Road, Feilding, and was represented by its independent contractor, Warwick Collier, at the time of the listing. The Listing Agreement was dated 13 May 2010. Although it refers to the land area as 9.513 acres, our photostat copy of that agreement seems to refer to there being a boundary adjustment taking place. The original Certificate of Title is C/T WN 47A/691 issued as at 18 December 1997 for a land area of 3.8512 hectares being Part Lot 17 Deposited Plan 2994.

[6] A flyer was prepared by JVL Realty Ltd which showed Warwick Collier as an agent and 9.5 acres of land being sold and having a rateable value of $460,000.00. The flyer was given unamended to the appellants who say they relied upon it. The flyer contained an error as to the area of land which was actually sold and as to the rateable value of the property at that time. The area sold was about 8.5 acres and the correct rateable or roll value of the 9.5 acres had recently been reduced to $435,000.

[7] Both parties knew that there was a title adjustment being completed. The appellants' position is that the flyer as prepared represented the property for sale.

[8] The appellants attended at the auction on 29 June 2011 and were the successful bidders following, seemingly, spirited bidding; although it turns out there were no other bidders.

[9] An hour or so after the auction, the appellants discovered that the area in the new adjusted title was significantly less than 9.5 acres (metric equivalent 3.8512 hectares); and the actual area purchased was 3.4782 hectares. This is equivalent to about one acre less than the area shown on the advertising brochure.

[10] Also following the auction, it was determined that the correct rateable value of the property prior to the subdivision, being the 9.5 acres or 3.8512 hectares, was $435,000.00.

Further Background

[11] The concluding paragraphs of our said 7 December 2012 interim decision read:

> *"[43] It is for us to assess whether the Committee erred, in terms of the test in K v B, in deciding not to make an order for financial relief. Counsel for the Authority noted that, in its initial decision, the Committee found that the appellants had been advised about the subdivision from the outset, had sought legal advice, and that the auction documentation had clearly set out that the property was subject to a proposed subdivision plan. Accordingly, it is put, there was ample opportunity for the misrepresentations contained in the advertising to have been corrected.*
>
> *[44] It is also put that, in those circumstances, we may conclude that it was reasonably open to the Committee to find that no orders beyond censure were required in this particular case. ...*
>
> *[46] It is a rather delicate situation for vendors to auction a property on the basis that it is the remainder after a subdivision yet to take place. It is a situation where, with the best will in the world and exercising integrity, real estate agents can be criticised for not clarifying the situation. In many ways, the real issue seems one of credibility of the appellants. Did they realise what they were buying or should they have? The second respondents seem to have conceded that their auction advertising was deficient, but evidence from and for them could be explanatory to some degree. ...*
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> *[48] Having said all that, we repeat that it may be difficult for the appellants to obtain more redress than that granted by the Committee. On the face of it the second respondents have acted in a way which could have caused confusion on the part of the purchasers but it is puzzling that the purchasers did not realise they were bidding for the balance of the land after the cutting off of the paddock retained by the vendors. However, unless we assess the witnesses involved for credibility, we could only find that we have no reason to disagree with the CAC. Although this is not an appropriate appeal to hear on the papers, a full hearing may not lead to a different outcome."*

Evidence

[12] The evidence before us was quite extensive but does not abrogate from the above summary of facts.

Evidence from Mr and Mrs Orsborn

[13] We noted that the purchasers seemed inexperienced at purchasing by auction.

[14] Mrs Orsborn covered how she and her husband went to an open home of the property at which Mr Collier told them that there was a subdivision taking place and that *"the pond paddock"* was not included in the sale; and the land area being sold did not amount to the 9.5 acres referred to on the flyer. Mrs Osborn said that for some time Mr Collier advised them not to take the auction terms of sale to their lawyer but a day before the sale he was anxious that they did, and seemed to have thought that they would have done that sooner.

[15] It seems to have been shortly after the auction sale when an officer of their bank advised them that the rating valuation of the farm which they had bought was not $460,000 as they had thought, but was $435,000 *"and that was for the unsubdivided area of land/property of 9.5 acres"* she said. They were then required to obtain a registered valuation for their bank and Mrs Orsborn stated that *"came back at $400,000"*.

[16] The purchasers say they were never told more than that the pond paddock was not part of the sale. In re-examination, Mrs Orsborn said *"I knew where the house and paddocks and where the boundaries were on the property but we did not know the actual land size"*.

[17] The purchasers seem to have been unhappy with their legal advice until they instructed their current counsel Mr Bruce Stewart not long after the purchase. They instructed him *"to get compensation for the loss of equity (difference in actual GV and the valuation that was stated on the flyer), and for the loss of value for the land that was purchased v what was stated on the flyer or what we thought we were purchasing. We did not realise until we met with Bruce that the subdivided piece of land was one acre. We never thought it would be anything near that"*.

[18] In Mr Orsborn's typed brief of evidence he recalled being given a flyer to the property by Mr Collier at the open home and now emphasises that it was incorrect as showing the wrong government valuation and in not disclosing that an acre would be deducted from the land described on they flyer as being as for sale.

[19] The Orsborns did not visit their lawyer until the morning of the auction day. They had used that lawyer before when they had purchased their first property.

[20] Mr Orsborn said that they were not told that they had been bidding against the auctioneer throughout the auction until just after the hammer went down for them at a $420,000 price. They had no idea during the auction that they were the only bidder. Mr Orsborn said they made about five bids until the bidding reached $415,000, in their favour and that was $5,000 *"off the limit they set themselves, and $35,000 off approved amount from BNZ Bank"*. When they held the bid at $415,000 the auctioneer had a word with the vendors, and then resumed with a vendor's bid *"pushing them up to 417,000"*. When the auctioneer again conferred with the vendors he told the purchasers they needed to come up *"a little bit more"* and suggested $420,000 to which they agreed; so that the hammer went down at that price.

[21] Under cross-examination, Mr Orsborn was clear that Mr Collier had told him that land was to be subdivided off the 9.5 acres amount of land referred to in the auction

flyer and that the *"pond paddock"* was excluded; so that he thought the area being purchased was about 9.5 acres less the pond paddock.

[22] It was put to Mr Orsborn that Mr Collier had made it clear to him that there would be vendor bids but Mr Orsborn said *"Well I missed it. I didn't hear that said – on the Bible"*.

[23] One of the questions asked of Mr Orsborn by Ms MacGibbon was whether, before the auction, he had been given a copy of the *"particulars and conditions of sale of real estate by auction"* which he signed after the sale. Those show the land area as 3.471 hectares *"subject to survey being lot 2 of the proposed subdivision plan annexed"* and, under the heading of *"conduct of auction"* near the foot of the first page, state that *"the vendor reserves the right to bid personally, by a representative, or through the auctioneer and to withdraw the property at any time before it has been sold and without declaring the reserve price."* Mr Orsborn did not think he had been given a copy of that document prior to the auction but was not sure because it was two years ago.

Evidence from Mr Collier

[24] In his evidence-in-chief Mr Collier stated as follows:

> *"3. In May 2011 I was contacted by Christine Goulding and John Henare to list their property at 139 Kawakawa Road, Feilding.*
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> *4. At that time Christine and John were considering a boundary adjustment on the property. They told me the details had not been finalised but they were keen to go ahead and list the property anyway. I appraised the property for them. I thought a reasonable sale price would be around $450,000.*
>
> *5. I listed the property on 13 May 2011. Initially I recorded the rateable value of the property as $435,000 based on the information I had found on the RPNZ website. However when we went thought the listing agreement together Christine informed me that the rateable value was $460,000. She showed me a rates notice to support this. I knew the RPNZ website was not always reliable and up to date. The rates notice Christine showed me was current so I accepted that as confirmation of the true rateable value.*
>
> *6. I prepared the advertising for the property shortly after the listing agreement was signed. This recorded the rateable value as $460,000 and the land area as 9.5 acres – being 3.8512 hectares as stated on the title search.*
>
> *7. On 20 May 2011 Christine Goulding contacted me again to confirm the front paddock of the property was going to be subdivided off and would not be part of the sale. They wanted this to be part of the adjoining property, which they also owned. She told me they had filed an application for subdivision with the Council that day.*
>
> *8. On 25 May 2011 I met with Christine again to sign an auction authority form. She filled in the preferred possession date as 22 July 2011 subject to the new title being issued.*

Meeting the Orsborns

9. I first met Simon and Jade Orsborn at the open home on 12 June 2011. I told them that the paddock at the front of the house was not part of the sale, but that the paddock on the right hand side of the driveway was included. I said that the boundary would change when the vendor's subdivision application was approved by the Council. I told all attendees at the open home this.

...

The terms of sale

11. The first draft of the terms of sale was sent to the vendor's lawyer, John Key for his approval before being released to any prospective purchasers. On 14 June 2011 I received a response from John Key requesting that some of the terms be amended. He also recommended that the terms should not be released to any prospective purchaser until the subdivision went through. We made the amendments and sent them back to John Key the following day.

12. We received a reply from Mr Key on 16 June 2011 seeking a further amendment. A few hours later I also received confirmation that the subdivision consent had been granted.

13. I provided the Orsborns with the approved terms of sale on 20 June 2011. This had the post-subdivision land size of the property recorded in the property particulars on the front page (3.471 hectares)."

[25] Before us Mr Collier stated, inter alia, that when the property came on the market the vendors did not have available the actual area of the land to be auctioned: *"so I produced a flyer and was extra careful to say that the entire front paddock was not included and we showed that to everyone and we said this is the total area of land but this paddock won't be included*".

Re Compensation: The Quin Case

[26] There was reference from all counsel to *Quin v Real Estate Agents Authority* [2013] NZAR 38 (per Brewer J). On the question of damages Mr Stewart submitted that the appellants do not seek *"expectation damages"* but seek compensatory damages to compensate them for the wrongdoings of Mr Collier and/or of JVL Prestige Limited. He submits that the appellants are seeking an order for recovery of the actual loss suffered by the *"misconduct"* (as he puts it) of the second respondents and that the appellants are not seeking, as in the *Quin* case, compensation for a loss of opportunity or *"expectation damages"*.

[27] Mr Darroch (counsel for the second respondents) refers to the appellants seeking compensation for the difference between the advertised government valuation of the land ($460,000) and its actual government valuation, ($435,000) namely, a difference of $25,000. They also seek compensation for the so-called misrepresentation of land area and claim $24,385 in respect of that. As Mr Darroch put it, there was no valuation evidence available to the Committee which considered the 2010 capital value,$435,000, noted this was $15,000 greater than the final

purchase price, and concluded there was no evidence to support the appellants' contention of loss.

[28] Mr Darroch then referred to the valuation from Mr P J Loveridge (referred to further below and obtained for the appellant in March this year) which suggests that the current market value of the property as at 6 March 2013 was $420,000. Mr Darroch notes that there has been no cross-examination of Mr Loveridge who was not even called to adduce that valuation. Mr Darroch submits that, in any event, Mr Loveridge's valuation does not support that the appellants incurred a loss by purchasing the property as it states that the current market value of the property is $420,000 which is the precise amount paid for the property by the appellants on 29 June 2011, and there is no evidence to support any inference that the value was lower at the time of purchase.

[29] Accordingly, Mr Darroch submits that the Committee was entitled to conclude that, in all the circumstances, no compensation should be awarded to the appellants; and that the evidence before us does not take the valuation position any further.

[30] With regard to the *Quin* case, Mr Darroch regards it as suggesting that the wording of ss.93 and 110 of the Act make it clear that only a *"limited jurisdiction"* is conferred on the Committee and it had no power under s.93 to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. He also submits that there is no power for us to award compensation under s.110 unless misconduct by the licensee has been proven and loss has been suffered as a result of that misconduct.

[31] We agree that our power to award compensation under s.110(2)(g) is only available where we have found a licensee guilty of misconduct. Otherwise, in terms of s.110(4), if we find unsatisfactory conduct by a licensee we are confined to making any of the orders which a Complaints Assessment Committee may make under s.93 of the Act. For present purposes, counsel refer to s.93(1)(f) which reads:

> *"(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 consequence of the error or omission."*

[32] In *Quin*, the High Court held that committees cannot order licensees to pay complainants money as compensation for errors or omission for pure market or economic loss (compensatory damages). Instead, licensees can only be ordered to do something or take action to rectify or *"put right"* an error or omission. If the licensee can no longer *"put right"* the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission. That may involve monetary payment and any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee.

[33] However, an order under s.93(1)(f) cannot be made in respect of a straight monetary loss, i.e. compensation for an alleged loss in market value, which is the case here. The present appellants are seeking compensation of that kind in the sum of $49,385. In terms of *Quin*, this cannot be awarded. This is not to say that

monetary orders cannot be made under s.93(1)(f) in certain circumstances. However, when there is no possible way of rectifying the error other than paying damages for the difference in value, then the *Quin* decision precludes payment of monetary compensation.

[34] In *Quin*, Brewer J pointed out that the primary focus of the Act is not on the provision of a forum in which complainants can seek monetary compensation, but on the regulation of the real estate industry so as to promote and protect the interests of consumers. He added *"This includes conferring on regulators powers to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them"* – para [44]. A little later, at his para [51], Brewer J notes that the only provision in the Act which provides specifically for the payment of monetary compensation is s.110(2)(g) which relates to where a person has suffered loss by reason of a licensee's misconduct.

[35] The offending in the present case is of *"unsatisfactory conduct"* rather than misconduct, so that our powers to make orders under s.110 do not apply and we are confined to the powers which the Committee had under s.93 of the Act. In that respect Brewer J stated:

> *"[58] In my view, the wording of ss 93 and 110 makes it clear that a limited jurisdiction is conferred. Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s.110, but to a limit of $100,000.*
>
> *[59] Section 93(1)(f)(i) empowers a Committee to make orders directed at the taking of actions. So, a Committee may order a licensee "to rectify, at his or her or its own expense, any error or omission". Rectify means to put right or to correct. That is the focus of the provision. It is, in my view, a power to order a licensee to do something to put right or correct an error or omission by the licensee, at the licensee's expense.*
>
> *[60] Similarly, s 93(1)(f)(ii) is focused on the taking of action to provide relief from the consequences of an error or omission where rectification is not practicable. This is clear from the framing of the power to order a licensee "to take steps to provide" relief "in whole or in part". The inclusion in the power of the ability to order that this be done at the licensee's expense is a necessary incident of the power to direct the taking of steps."*

[36] In his paragraphs [65] and [66] Brewer J concluded:

> *"[65] I conclude that the 2008 Act gives a Committee the power to order a licensee to rectify an error or omission, or to take steps to provide relief from its consequences, where the error or omission resulted from the licensee's unsatisfactory conduct. Whatever is ordered would be at the licensee's expense. In situations where a complainant has already done what was necessary to rectify the error or omission, or to provide relief from its consequences, the power would extend to requiring a licensee to reimburse the complainant.*
>
> *[66] However, the 2008 Act does not give a Committee the power to order a licensee to pay compensatory damages, either by way of indemnity or for loss of expectation. The 2008 Act does give the Tribunal the power to award*

compensation for loss where there is a finding of misconduct against a licensee ..."

[37] At para [75] of his decision Brewer J stated:

"[75] If I am wrong in my view that s 93(1)(f) does not empower a Committee to order compensatory damages, I would nevertheless accept the appellant's submission that the power does not extend to expectation damages ...".

Discussion

[38] Section of the Act defines *"unsatisfactory conduct"* and reads:

*"**72 Unsatisfactory conduct***
For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

(c) is incompetent or negligent; or

(d) would reasonably be regarded by agents of good standing as being unacceptable."

[39] Frankly, after hearing the evidence of Mr Collier, and of his then colleague Mr Nielson, we felt that the second respondents had approached the marketing of this land by auction in a rather sloppy and careless manner. They were rather casual about being accurate as to the land area being sold at auction, as to finding out available information on that, and in simply relying on a rates notice provided by the vendors as to the current rating value of the land rather than checking out its valuation for themselves. We consider that it was the job of the licensees from the outset to know the size of the paddock (and its precise boundaries) being lopped off and retained by the vendors from the 9.5 acre farm and, if not, it was premature to market the land. We realise that the flyer was prepared before the vendors confirmed to Mr Collier that the area of the pond paddock was excluded, but he should have then issued a replacement and accurate flyer.

[40] Mr Stewart (counsel for the appellants) submitted that, while the respondents accept that there has been unsatisfactory conduct on the part of the two respondents, there was in fact misconduct; but we are concerned with an appeal about penalty based on a finding of unsatisfactory conduct by the Committee.

[41] Nevertheless, we emphasise that the conduct concerning the appellants, as put by Mr Stewart for them, is:

"(a) JVL conducting an auction with the bids being plucked out of the air, representing to the Appellants that there were other bidders when in fact there were no other bidders, thus inducing the Applicant to raise their bid in their knowledge that they would otherwise miss out on the property. That was not true. That conduct, it is respectfully submitted, is fraudulent.

(b) JVL produced a brochure in which it is openly acknowledged by Mr Collier that he checked the RPNZ website and found the correct rateable value at $435,000.00 and yet he then caused to produce for JVL a brochure showing a rateable value of $460,000.00 is, at the very least negligent.

(c) Producing a brochure which shows a land area for sale of 9.5 acres where in fact that land area was not the correct land area is at the very least negligence. There was no effort whatsoever from either JVL or Warwick Collier to correct the incorrect brochure. As the brochure was given to prospective purchasers, including the Appellants, it was given to them for the purpose of inducing them to enter into a contract (or in this case, an auction). JVL and Warwick Collier both have a duty to represent the correct facts."

[42] Accordingly, it is submitted for the appellants that, as a result of fraudulent bidding at the auction, they paid much more for the property than they might have had correct information been given to them i.e. that they over-paid for the property. They break this down as $25,000 for the second respondents misrepresenting the rateable value of the property, and a further $24,385 for their misrepresenting the area of the property. It is put that this loss has led to most unfortunate financial and domestic consequences for the appellants. However, as we have explained above, the *Quin* decision limits our compensatory powers.

[43] Mr Stewart submits that, in the present case, Mr Collier represented that the rateable value of the property was $460,000 when the evidence available to the second respondents showed it was $435,000; that Mr Collier's colleague, Mr Nielson, knew there were no other bids at the auction yet, allegedly, represented to the appellants that there were bids; and that Mr Collier knew that the property was to be subdivided but, nevertheless, published a brochure showing its area as 9.5 acres which was the area prior to subdivision. It is put that the second respondents collectively, either wilfully or negligently, misrepresented such vital facts which caused the appellants to make a bid at an incorrect and too high level. There was certainly negligence by the second respondents in those respects.

[44] The licensees thought that the roll value of the 9.5 acres was $460,000 but should have realised it had been reduced to $435,000. The Terms of Sale permitted vendor bidding. The licensees did explain to the appellants that a substantial section was being subdivided off the 9.5 acres and retained by the vendors.

[45] Inter alia, Mr Stewart submits that to suggest that the appellants were the author of their own misfortune is a nonsense. We would not accept such a suggestion.

[46] Finally, he put it that the penalty package against the second respondents should be a censure; an order that they apologise to the appellants; and order that they undertake appropriate training or education to ensure they do not again misrepresent the nature of a property nor advance false bids at an auction; that they should be significantly fined to reflect the seriousness of misrepresenting the nature of a property in brochures and that there are bids at auctions which allegedly did not exist; that they pay costs of the appellants on a solicitor client basis; that there be compensation orders for the said total sum of $49,385; and that there be full publication of the decisions of the Committee and this Tribunal relating to the complaints of the second and third respondents.

[47] The second respondents have accepted the Committee's finding of unsatisfactory conduct and seek that its decision on penalty be upheld on the basis that, although the initial brochure described the land as 9.5 acres (which is 3.8512 hectares) those respondents ensured that the appellants and other interested purchasers were informed about the subdivision and its nature; that the rateable value of $460,000 was incorrect but had been provided to those respondents by the vendors and supported by a current rates demand; that the appellants purchased the property at the auction for less than the $435,000 actual rateable value at the time so there can be no evidence that they have suffered any loss through the actions of the second and third respondents.

[48] On 10 May 2013 we had adduced to us a valuation report from a Mr P J Loveridge dated 20 March 2013 which assessed the market value of the property as at 6 March 2013 at $420,000 and noted the land area at 3.4782 hectares on which the value is put at $240,000. Value of improvements (house and buildings) was assessed at $175,000 plus a further $5,000 for chattels and pump. It notes that the rateable valuation of the property at 1 September 2010 was $420,000 (improvements $160,000 and land value $260,000). The valuation also seems to say that the 3,730 square metres section, which the appellants feel they should have also acquired. has a value of $10,000 including GST if any. This evidence was not available to the CAC; nor his the valuer been cross-examined.

[49] Mr Darroch submits for the second respondents that the CAC found that while there was no intent of the second respondents to mislead purchasers, the second respondents failed to sufficiently highlight particulars of the transaction as they were likely to change as a result of the subdivision. Nevertheless, the Committee considered that the appellants must take some responsibility for the confusion because they had sought legal advice prior to the auction; were told about the subdivision from the outset; were given a copy of the auction documentation well in advance of the auction which clearly states that the possession date is dependent on the release of a new title and that the land area would be *"part"* of lot 17 and subject to the proposed subdivision; and they were told of the boundary adjustment by way of subdivision with reduction in area at the commencement of the auction by the auctioneer. The Committee noted that the final purchase price which they paid at auction was $15,000 less than the 2010 capital valuation.

[50] As indicated above, the valuation produced by the appellants in May 2013 puts it that the current market value of the property as at 6 March 2013 was $420,000 but the valuer was not available at the hearing for cross-examination and his evidence does not support that the appellants incurred a loss by purchasing the property. The valuation simply states that the current market value of the property in March 2013 is $420,000 which is the same price as paid by the appellants on 29 June 2011. There is no evidence to support an inference that the value of the land was lower at the time of the purchase.

[51] Although this appeal is confined to the penalty imposed by the Committee, the appellants have raised a new allegation of fraud and seem to be suggesting that a finding of misconduct should be made. That is not a matter within our jurisdiction. If the Committee decides to lay a charge of fraud against the licensees, we would then have jurisdiction to deal with that.

[52] It concerns us that the flyer prepared for the auction failed to point out that the property was subject to a subdivision and, therefore, the land being auctioned was

for a lesser area than advertised. We appreciate that the second respondents apparently told all interested parties that the land being auctioned was less a paddock of about one acre in size. However, the precise information was then available from the surveyor, the vendors' lawyer, the Land Transfer Office, and from the local Authority. It should have been obtained and appropriately explained to all interested parties together with an accurate plan and proper legal description of the balance of the land which was being sold at auction. If that information had not been available, it would have been premature of the second respondents to have arranged and conducted the auction sale.

[53] The auction took place on 29 June 2011 and the subdivision had been approved on 16 June 2011. Any brochure for an auction sale should have been up-to-date and accurate. It was most unsatisfactory conduct on the part of the second respondents to have produced a flyer which was quite inadequate, and possibly confusing, as to what land was being auctioned. Any reasonable effort on their part could have produced clarity and the correct government (or rating valuation) of the property.

[54] In terms of the complaint that, when bidding stopped at $415,000 and there were no other bidders, the auctioneer pushed the appellants up to $420,000, we observe that the auctioneer and vendors were entitled to do that under the terms of auction sale. However, the appellant purchasers may not have responded had they had the correct information about the role value of the property at that particular date.

[55] In her final oral submissions, Ms MacGibbon referred to Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:

> *"6.4 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."*

[56] She noted that the purchasers knew the boundary (and land area) was being changed/reduced, but still assert that they should have been able to rely on the flyer, and that they had legal advice; so that all in all, she submitted, the level of unsatisfactory conduct from the respondents was low.

[57] Having said all that which is, in effect, that the second respondents were cavalier in their presentation of information for the auction, it does seem that the appellants did not rely on the flyer in relation to the land area. It is concerning that they may have been influenced by having incorrect information of the current rates valuation. We conclude that the appellants well knew that the appropriate area of the front paddock was being deducted from the land referred to in the flyer, although there seems to have been some confusion between the use of acres and on some documents and hectares on others. We accept that the Orsborns did not realise that quite as much as one acre was to be excluded from their purchase; but that seemed to be because they did not understand metric measurements.

[58] Having stood back and absorbed all the above, and we have had far more evidence adduced to us than to the Committee, we endorse the view of the Committee that the conduct of the respondents was unsatisfactory conduct in terms of every ingredient of the definition of that term in s.72 of the Act. We consider that it is at the high end of the scale rather than the low end of the scale as the Committee seemed to have thought in terms of the evidence then available to it.

[59] Accordingly we Order as follows:

[a] Each respondent is censured;

[b] Each respondent is to apologise in writing to each appellant;

[c] Each respondent is fined $4,000 payable to the Registrar of the Authority at Wellington within three weeks from the date of this decision;

[d] Each respondent is to pay $2,500 towards the legal costs of the appellants arising from their said complaints payable to their counsel (Mr B A Stewart) within the said period of three weeks.

[e] Each respondent is to pay $2,000 as a contribution to our costs payable within the said period of three weeks to the Tribunals Unit, Ministry of Justice, 86 Customhouse Quay, Wellington.

[60] We are not currently attracted to granting name suppression to either of the second respondents but they are entitled to so apply under s.108 of the Act.

[61] If we had power to do so, we would likely order that the commission obtained by the respondents on the sale be paid to the appellant purchasers.

[62] 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 N Dangen
Member

_____
Mr J Gaukrodger
Member