

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 79

READT 086/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **XIANGRONG (SUNNY) WU** of Auckland, Complainant Purchaser.

Appellant

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**

First respondent

AND **YUDING (VICTOR) LI** of Auckland, Real Estate Agent.

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 10 June 2013 but with subsequent series of written submissions

DATE OF DECISION 20 September 2013

APPEARANCES

The appellant on her own behalf (but with a Mr L Chung as a support person and interpreter). A professional independent interpreter (Mr Albert Deng) was also available in the usual way.

Ms S G J Locke, counsel for the Authority

Mr T D Rea and Ms C R Eric, counsel for second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] This is an appeal against a 16 October 2012 decision of Complaints Assessment Committee 20005 to take no further action against Yuding “Victor” Li (the licensee) on the complaint of Ms Xiangrong “Sunny” Wu (the complainant/appellant) described below.

Factual Background

[2] The licensee placed advertisements to sell a property at 485 East Road, Murrays Bay (the property), in a number of circulars, including Barfoot and Thompson's own circular as well as "*The Chinese Property Weekly*" of 21 September 2011. The advertisements all contained words to the effect that the property was a brand new executive home sitting on existing foundations. We note that the advertising referred to "*with sea views*".

[3] The complainant met with the licensee to view the property. She says that he repeated several times during their meetings that the property was totally new. The property was being sold by tender and the tender closing day was 10 October 2011.

[4] The complainant says that she made an offer by tender on the basis that the property was brand new. She also states that before the tender closed, the licensee pressured her into increasing her offer on the property by saying there would be other competitive offers on it. As a result, she increased her offer from the \$580,000 which she thought the property was worth to that which the licensee told her to offer, namely, to \$620,000, and she also made her offer unconditional, which the licensee told her was necessary in order to favourably compete. She was ultimately successful in purchasing the property for \$620,000.

[5] After moving into the property, the complainant found that the stove was inoperable and that telephone cables were not connected to the house. She contacted the local Council and found (as she puts it) that the property was not in fact brand new, but an addition to an existing single-storey residential building to which the Council had given consent to build an extra bedroom and add a garage.

[6] The complainant started a complaint procedure with the Authority in early January 2012 and put it that she would have obtained a builder's report if she had known that (as she puts it) the property was not brand new. She is aggrieved that if she wishes to sell her home, she will have to sell it as a renovated home and therefore (she believes) at a lesser value.

[7] She also complained that the erection of a new building on the section next to her own property (subdivided off her property) has meant that she has lost her sea view and has affected her private life. That section is number 485A East Coast Rd, is lower than her property, and was also marketed for the same developer vendor by the licensee.

The Complaints Assessment Committee's Decision

[8] The Committee made enquiries with a Mr Hamish Clark as the developer of the property. He and neighbours from both sides of the property had combined to undertake a subdivision and build properties behind existing houses. He advised the Committee that the complainant's property had been all but demolished and rebuilt on the existing floor slab.

[9] He also told the Committee that when he instructed the licensee to sell the properties, he provided him with detailed plans for the new properties. He also told the Committee that he ensured that it was a condition of the purchase of the No 485 house property that any purchaser signed an acceptance of those plans because the properties to be built in front of Ms Wu's property would be blocking most of her view.

[10] Mr Clark also told the Committee that he went to great lengths to ensure that any purchaser was fully informed because, he said, there would have been problems with his resource consent if this condition had not been included.

[11] The licensee told the Committee that the complainant visited the property on three or four different occasions prior to purchasing it. He said he provided her with all relevant documentation, and that she studied that with friends who told her that the property had retained an existing foundation and a small existing plastered brick wall.

[12] The Committee viewed the plans for the alterations to the property and felt that they clearly showed the retained elements of the existing dwelling.

[13] The Committee was of the view that most purchasers would regard the property as a new home, and that the flyer from Barfoot and Thompson, supplied to all purchasers, made it clear that the home was being built on existing foundations.

[14] In relation to the complaint about unfair pressure, loss of value, and loss of view, the Committee believed that the complainant had all the information she needed to make a fully informed decision and that the licensee had ensured that she had all relevant information to understand exactly what the situation was with the neighbouring property in terms of her views. The Committee thought that a prudent purchaser would have been on warning to make the proper enquiries.

[15] After considering all the information, the Committee decided it did not have sufficient evidence to make a finding of unsatisfactory conduct against the licensee and decided to take no further action.

A Summary of Further Relevant Evidence to Us

[16] As covered below, there is a conflict of evidence between the licensee and the appellant/complainant.

Evidence from Ms Wu

[17] The complainant stated that the licensee's advertisement in the Chinese Property Weekly led her to the open home of what had been advertised as a brand new house at 485 East Coast Rd, Murrays Bay. Over 24 September to 9 October 2011 she attended three open homes of the property with some friends. She asked the licensee for relevant documents and, she said, was provided by him with part of the plan of the house on 7 October 2011 but not all the pages were given to her. She discussed these with friends who confirmed that the house was constructed of bricks and weatherboard. They attended the last open home with her on 9 October 2011. She continued her evidence-in-chief as follows:

- “5. On each occasion the house at 485 East Coast Rd was represented by Victor Li as being a brand new house with wide sweeping ocean views. Victor Li also assured us there were no concerns about the sea view through the large left side window of the lounge of this house being impeded.*
- 6. These friends (who had attended the open home) were also assured about the views. We relied upon this statement especially as he was the*

listing agent for both 485 and 485A (the subdivided land). Please refer to the statements submitted to REAA by my friends in year 2012.

7. *I was relaxed discussing all these matters with the agent Victor as he spoke to us in Chinese (my first language) thus avoiding any misunderstanding. I relied upon his translation during the signing of the Tender documents too and genuinely believed what he had said about the other proposed new house (485A) to be built in that it would not affect this house's view (at 485) because he knew what was going on in both sides.*
8. *I didn't know Victor was intentionally covering up the truth of the house to gain the offer from me. I attach those pages that Victor provided me on 7 October 2011 (These I took to my friends May and Dennis Hyde that night).*
9. *Please refer to page 20 of the bundle of documents served by the first respondent dated on 2 May 2013. I saw some small flyers like "guide to Tender" at open home in tiny unclear English so I asked Victor for Chinese meaning and he explained in Chinese (without mentioning or provide any Tender documents). Victor had not mentioned or given me the item 3 (original listing – listed 5/2/2010) at any occasions. Victor had not provided me with the information from page 27 to page 33 nor from page 119 to page 121.*
10. *According to Victor's respond on the 6th of March 2012, Victor stated that he gave me full Plan of the house at 485 and 485A East Coast Rd, and we (including May and Dennis) studied those documents together on site at the last open home (on 9 October 2011). This is not true. I attach a statement from May and Dennis to confirm these facts. This completely contradicts the agents' statement.*
11. *Soon after I moved into this so called "brand new home", I discovered this was actually a renovated old house. It is described in City Council's house records as "Alterations to existing single storey dwelling".*
12. *REAA and Victor never explained why he said and advertised this as a brand new house at 485 East Coast Rd (both in English and Chinese). OR why he provided false information to his clients using his language advantage to mislead his clients in his professional job (REAA says he was not misleading). I genuinely believe this is misleading conduct!"*

[18] The complainant/appellant, Ms Wu, was carefully and fully cross-examined by counsel through the use of the interpreter (of Mandarin), although we feel that she and her adviser, Mr Chung, seemed to have an excellent understanding of English.

[19] It was put to her by Mr Rea that the property was new, apart from foundations and a small brick wall. She insisted she was never told that by the licensee. She was pressed that the licensee had told her the small brick wall, which had been plastered over, was part of the original foundations of the previous house on the site. She firmly denied being told that. However, a little later in her cross-examination, the appellant seemed to accept that at an open home she was told that the house was built on previous foundations and had passed an inspection by the local Council as if it were a new house. She then seemed to admit she knew that prior to her purchasing the property. She then seemed to accept that, prior to purchase, she

knew that she was purchasing a house which had just been built on previous foundations and incorporating a small brick wall from the previous property on the site. However, she said that she received that information just one day before she signed the purchase agreement. She may have been referring to the date of signing the tender offer.

[20] The complainant stated that, since purchasing the property, she has found out from the local Council that what she purchased was not a brand new house but she agreed with Mr Rea that, but for the foundations and the small brick wall, everything else about the house was brand new. She then seemed to accept also that issues over vents and telephone cables related to incomplete building work only.

[21] It was put to her that the licensee's flyer about the house clearly stated that the house had been built on previous existing foundations.

[22] The complainant seemed to be saying that she had understood in the Chinese language (Mandarin) that the whole house was brand new and she put it that she had been intentionally misled by the licensee and told that even the foundations and the small brick wall were new so that the total house was brand new.

[23] At about that point, we remarked that Mr Chang appeared to us to be advising the appellant how to answer Mr Rea's cross-examining questions.

[24] Mr Rea then referred to the issue over sea views. He put it to the appellant that, at all the open homes, there was full documentation available in the kitchen of the home with tender documents and building plans for the house proposed to be built next door to the property. At first, the appellant said she did not recall that and that the licensee did not give her a copy of those documents. She was reminded that she had previously said that he had. She responded that the licensee had told her some things but not given her the tender documents. She then seemed to say that she saw some drawings at the time when she signed the agreement to purchase. She added that she only asked the licensee whether the proposed development next door would affect her should she purchase.

[25] It was put to her that the licensee had showed her all the relevant plans and advised her to make her own independent enquiries. She seemed to also say that the licensee had told her that her view would be fairly unaffected as the adjoining house would be built on the right hand side of its section and below her property. She maintains that she did not, and does not, understand the relevant drawings, which were adduced to us, and that she had not been advised of them. It was put to her that she had initialled those plans and that they clearly showed that the adjoining new house would take up the complete width of its section. Inter alia, it was put to her that the plans show the position explained to her. She maintained that she understands all that now, but did not at material times. We noted that she seems to speak fluent English even though Mandarin is her first language.

[26] Also in cross-examination, the complainant/appellant insisted that the licensee had pressured her to sign the purchase contract because she had first offered \$580,000 but he insisted to her that the property was worth \$620,000 at least and that there were three other prospective purchasers prepared to offer more than \$620,000. She says that he advised her to put her best offer forward for the tender.

[27] Inter alia, in re-examination, the appellant seemed to be saying that she had not been told about the likely height of the house to be built next door and its affecting of her view.

[28] The appellant seemed to admit to Ms Locke that all relevant plans were on display at the open homes and that the effect of the proposed adjoining property on her sea view was clearly explained.

Evidence from Mr Kerr (for the appellant)

[29] A comprehensive valuation (dated 16 May 2013) of the property as at 10 October 2011 (GST inclusive) was adduced for us. It was authored by a Registered Valuer, Mr W W Kerr and, inter alia, stated that the market value of the property as a totally new home retaining most of the view should be \$590,000 but as provided to the complainant with the view affected by neighbouring homes at a lower level would value at about \$550,000. He recommended compensation of a minimum of \$40,000 for the complainant.

[30] Mr Kerr gave evidence to us of revisiting the property since his said report of 16 May 2013 and stated that there was inadequate venting in the main bathroom of the property which did not seem to be a code of compliance problem, and that the fan in the roof was simply inadequate. He also stated that the range-hood in the kitchen “goes nowhere”. He thought these matters substantiated that the property was not brand new and as well that it was on old piles and, as he put it, not having a vented kitchen or bathroom. However, under cross-examination he admitted that little expense was involved in remedying those aspects.

Evidence from Mr Li, the Licensee

[31] The licensee is a sales person for Barfoot & Thompson Ltd at its Northcote branch, Auckland. He explained how back in 2010 he was the selling agent of a property at 485 East Coast Rd, Murrays Bay which then included the substantial section now known as 485A. That purchaser was a developer who subdivided the land into two sections being the vacant section at 485A and the house property (described above) purchased by the appellant as 485 East Coast Rd, Murrays Bay. The developer had almost completely demolished the existing house and built a new house using the existing foundations and parts of one small existing wall.

[32] Plans and photographs were supplied to us. The licensee first produced a full copy of building plans and specifications for the house purchased by the appellant. He said they had been kept on site for inspection by the local authority and were available for viewing by prospective purchasers together with specifications. The licensee then stated:

“7. The sale of the Property was to be conditional on the purchaser agreeing to the building plans for a proposed house at 485A (and, if necessary, building works at 487 East Coast Road). This was because these building works would infringe the local authority’s rules regarding site and height to boundary distances. Therefore, the vendor provided me with a copy of the building plans and specifications for a proposed house at 485A. These were to be made available to prospective purchasers also. I produce a copy of these building plans.”

Marketing of Property

8. *The Property was advertised in various publications, including the Chinese Property Weekly. The advertisements stated "brand new and modern designed home with big sea view: or similar wording and stated that the section at 485A was also for sale. The reference to sea views related to both properties. [BOD, p 39-40 & 129-130] All advertisements included a reference to Barfoot & Thompson's website, which contained further information on the Property (and section at 485A). The website recorded the house on the Property as being a "brand new executive home sitting on existing foundations". [BOD, p 85-86]*
9. *I gave careful consideration as to how to describe the house on the Property at the time and believe that given the works carried out it would have been extremely difficult to describe the house as anything other than brand new. Otherwise, I would have been misinforming prospective purchasers and failing in my duty to the vendor. I note that the building plans for this house are titled "Proposed New Residence at 485 East Coast Road".*
10. *The marketing of the Property also included three weekend open homes held during the period late September to early October 2011.*
11. *At these open homes, marketing flyers were made available to all interested parties. These flyers stated that the Property was a "One level brand new weatherboard executive home sitting on existing foundation". Printed on the reverse of this flyer was a guide to buyer at tender I produce a copy of these marketing flyers.*
12. *The building plans and specifications for the house at the Property and the proposed house at 485A, together with the subdivision site plan, were on permanent display at the Property during the open homes. Copies of the Particulars and Conditions of Sale by tender, attaching extracts of the building plans for the proposed house at 485A, were available for all interested parties. [BOD, p 60-84]*

...

"New" House at 485 East Coast Road

16. *When Ms Wu first visited the Property, the marketing flyers and building plans for both the house at the Property and the proposed house at 485A were on display and I recall referring Ms Wu to these.*
17. *With regards to the house at the Property, I explained to Ms Wu that the house was brand new but that the existing foundation was retained as well as a brick wall that was plastered over by the builder and pointed these existing features out to her on the plans. The plans clearly show the existing foundation and original brick wall.*
18. *Ms Wu studied these plans and appeared happy with the quality and design of the house.*
19. *At Ms Wu's request, I made a full copy of the building plans for the house at the Property and provided these to her. The plans contained in Ms Wu's bundle of documents do not represent the full set of plans which I*

provided to her. Ms Wu came back to the Property with Dennis and May a few days later and studied these plans on site and we discussed where the original wall was.

20. *It was clear from Ms Wu's attendance at the first open home that she had a keen interest in the Property. I advised her of the tender date and said that she should carry out any due diligence that she felt was necessary prior to this date. Ms Wu had over two weeks to arrange this and subsequently brought a number of people to view the Property with her.*

Proposed house at 485A East Coast Road/Sea Views

21. *On no occasion did I represent the Property to Ms Wu as having "wide sweeping ocean views". This is an exaggeration. Nor did I tell Ms Wu that the proposed house to be built at 485A would not impair the sea view.*
22. *A full set of the building plans for the proposed house at 485A were available at the open homes and I recall referring Ms Wu to these. Extracts from these plans were also attached to the Particulars and Conditions of Sale by Tender, copies of which were available at the open homes.*
23. *It was my standard practice to refer all interested parties to the building plans for the proposed house at 485A and advise that the purchaser of the Property would need to agree to these building plans as a condition of the purchase because these building works would infringe the local authority's site and height to boundary rules. I recall discussing the impact of the proposed house to be built on 485A on the Property with Ms Wu. I told Ms Wu that the sea view from the Property would be affected but exactly how I could not say. However, given that the Property would be built several metres away and on a lower sloped section, a good (but distant) sea view would be retained in part. I have not visited the Property since the house at 485A was built, however, a wide sea view appears to have retained from the left hand side of the Property. [BOD, p 50]*

...

25. *I made it clear to Ms Wu that she would need to satisfy herself by way of her own due diligence investigations regarding the building plans for the house at 485A and the effect of such on the Property.*
26. *I am fluent in Mandarin and English. Ms Wu and I spoke primarily in Mandarin but also used English at times, in particular when Ms Wu attended the open homes with non-Mandarin speakers. I understand that Ms Wu can read and write in English. I did not translate any documents into Mandarin for her, nor did she ever ask me to do so.*

Tender

27. *A copy of the guide to buying at tender was printed on the reverse of the marketing flyer. Ms Wu received a copy of this flyer and I also explained the tender procedure to her.*

28. *In accordance with the guide to tender, I explained to Ms Wu that she needed to present her best offer on tender, and an unconditional offer would be the most attractive offer for the vendor. However, a conditional offer could be made and she may want to consult her solicitor before presenting an offer. Ms Wu confirmed to me that she had a solicitor.*
29. *I told Ms Wu that the market feedback for the Property was in the low \$600,000s, but this was an indication only and everyone would have their own opinion as to its value*

...

Complaint by Appellant

39. *In January 2012, Ms Wu filed a complaint with the Real Estate Agents Authority alleging that I told her that the Property was a new house when in fact it was renovated. Ms Wu asserted that she had lost "considerable value" and sought compensation of \$60,000. However, no valuation was provided.*
40. *Ms Wu subsequently filed a further complaint asserting that I misrepresented the Property as having wide sea views and had incorrectly advised her that the proposed house at 485A would not impair these views. Ms Wu sought that the Property be 'returned' to Barfoot & Thompson.*
41. *I refute these allegations and do not believe that Ms Wu has suffered any loss. The Government Valuation for the Property was \$580,000 and at the time of the tender, October 2011, many properties were selling well above Government Valuation. [BOD, p 24]"*

[33] The licensee was carefully cross-examined by Ms Locke. He admitted that the fact that a small wall from the previous residence on the property was being retained and incorporated into the new house was not noted in the advertisements. He remarked that the particular wall was a very small part of the new property and the major retention from the previous residence was the use of its foundations and that, otherwise, the property was "brand new". He stated that he had explained to the appellant that the small wall and the foundations had been kept from the demolition of the previous house on the site and re-used.

[34] It was put to the licensee that the appellant says she was never shown plans when she signed the tender document. The licensee strongly asserted that she had been provided with detailed plans and advised by him to study them and confer with her legal adviser or with the local Council. He said he spent much time explaining to her the overall position and the contents of the documents especially of the tender for purchase. He also firmly stated that the plans showed quite clearly the effect on her property of the property proposed to be built next to her. In that respect, he told her that some of her view would be kept but that she needed to study the plans and take advice on that aspect.

[35] The licensee was also cross-examined by Mr Chung on behalf of the appellant.

[36] In the course of that, by consent, the appellant was recalled. It was put to her by Mr Rea that she had been a director of a company called Primeloc Properties

2006 Ltd and apparently still was. She maintained that position was only her being a manager for Mr Chung when he was out of New Zealand and that the business of that company was Mr Chung's business. It was put to her that she was not at all naive about business or property matters but indeed was very astute and experienced. She responded that Primeloc Properties 2006 Ltd merely owned one substantial property in Henderson but required quite some management of lessees of both the business and residential type. Her trade is that of an acupuncturist.

[37] Mr Chung then put it to the licensee that the house now in issue is a renovated house and is not brand new. There was also reference to the licensee having used the expression "*wide sea views*" in his advertising which attracted the appellant. The licensee stated, inter alia, that a renovated home would not have needed to meet the compliance requirements from the local Council as had the home purchased by the appellant and that building inspectors constantly checked building progress. He again made it clear that he had said to the appellant that the home was a "*new house except for the small wall and the foundations*". He said that he himself believed the house to be a new house built on existing foundations.

[38] Also under cross-examination from Mr Chung, the licensee seemed to admit saying to the complainant that the proposed home next door would not entirely block out her sea view as it was on lower ground but she should take advice and have that aspect checked out in full. Mr Chung finally put it to the licensee that the appellant had purchased the house based on the licensee's flyer and not on the other documents supplied or available. The licensee responded that he told the appellant that the view would be partially blocked and he was not sure how much of it would remain.

Issues on Appeal

[39] The complainant alleges that:

- [a] She relied on the advertisement which stated that this was a new house and that she would most likely not have bought the house had she known "*the truth*";
- [b] The licensee deliberately and fraudulently represented to her that the house to be built at 485A East Coast Rd would only obscure a small part of the sea views;
- [c] She was given no opportunity to check the contract with a lawyer, was pressured into making a tender, and was never given full plans of the two houses.

[40] It is put by counsel that the appeal will be determined by our assessment of the credibility of the witnesses. In that respect we prefer the evidence of the licensee.

[41] The appellant asserts that it was misleading to advertise the house as "*brand new*" when it is renovated (as she puts it). She also asserts that she did not receive full plans of the proposed neighbouring house at 485A East Coast Rd and was promised by the licensee that the building would not impede her sea views. She further asserts that she was pressured into making an unconditional offer by the licensee.

[42] The licensee asserts that the property was appropriately advertised as a brand new home on existing foundations and that this was explained to the complainant. He also asserts that the complainant had access to full house plans for the proposed neighbouring property at 485A East Coast Rd which were laid out at the open homes (which she attended on more than one occasion). Further, he asserts that the complainant was also provided with a full set of building plans for the property at 485 East Coast Rd. While he was unable to indicate the extent to which the house at 485A would impede the sea views at 485, the licensee did indicate to the complainant that the building would affect the sea views. He denies any suggestion that he pressured the complainant into making an unconditional offer (or any aspect of the offer made by the complainant).

[43] It is put by Ms Locke that, subject to our factual findings, the issues are:

- [a] Whether it was misleading to advertise the property as brand new on existing foundations;
- [b] Whether the CAC was correct to find that the licensee did enough to make sure the complainant understood the proposed building next door;
- [c] Whether the CAC was correct in its decision to take no further action.

Statutory Context

[44] Sections 72 and 73 are key provisions in the complaints and disciplinary regime created by the Real Estate Agents Act 2008. Section 72 sets out what constitutes unsatisfactory conduct by a licensee and s.73 sets out what constitutes misconduct by a licensee. Those sections read:

“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.*

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*

- (c) *consists of a wilful or reckless contravention of—*
- (i) *this Act; or*
 - (ii) *other Acts that apply to the conduct of licensees; or*
 - (iii) *regulations or rules made under this Act; or*
- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.”*

[45] Among other things, a wilful or reckless breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 constitutes misconduct (s.73(c)(iii)), a breach of the Rules constitutes unsatisfactory conduct (s.72(b)). Those Rules “... *set minimum standards that licensees must observe and are a reference point for discipline*” – rule 3.3. Relevant rules include:

- [a] Rule 6.2: A licensee must act in good faith and deal fairly with all parties engaged in a transaction;
- [b] Rule 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.

[46] These rules clearly set out obligations owed to all parties to a transaction, vendor or purchaser.

Discussion

[47] In final submissions for the appellant, it was put by Mr Chung that the advertisements and verbal presentations to her from the licensee describe the house she was purchasing as “*brand new*” and as “*a new house built to an exacting modern standard*”. It is submitted for the appellant that constituted a misrepresentation. We disagree as we explain below. It seemed to be also put that the fact that there were the so called non-compliant aspects about vents and telephone cables showed that the standards being observed was that of refurbishing an old house rather than erecting a brand new house. That does not follow.

[48] The following was also stated on behalf of the appellant:

“12 Views

It is our understanding that pictures used by real estate agents that do not truly represent or that can be misleading in an advertisement cannot be used for promotional purposes – as was the case with the subject where the wide views of the sea were clearly depicted in all the advertising promoting the subject property.

The term “assured view” and “borrowed view” is highly relevant in this instance. The property was promoted and sold on the view the prospective purchaser must know how much on the view was substantially different in reality to what was told and the legal rights that would normally be available to property owners were also being removed.

13.1 Affected View *The “wide sea views” was clearly shown in the advertisements and verbally portrayed to Ms Wu by Mr Li (and again represented to her friends).*

13.3-14-15 Plans *The few pages of the house plans (of 485A) attached to the back of the Tender Documents were only shown to Ms Wu when she was signing the Sale and Purchase Agreement.*

It was clear at the hearing that Ms Wu had no understanding or ability to interpret any plans.

Had any buyer approached the Auckland City Council at the time of purchase, it would have been clear that the subdivision of the rear lot was approved on the basis that the house site for 485A was located towards the middle of the site at least 4-5 metres below the level of the subject house and therefore, it would have been reasonable to expect next to no loss of view would have prevailed.

17 To be built house at 485A:

Mr Li repeatedly stated that the house was being built quite a few metres away from the left boundary on the downward slope, which means that house at 485A would “NOT” materially impede the view through the lounge window.”

[49] Simply put the key issues raised for the appellant are that the house purchased through the agency of the licensee was not “brand new” and that she was told that the wide sweeping sea view would remain from the left window of the lounge; so that she had been misled both in the licensee’s advertising and by him in person. She maintains that the licensee intentionally misled her and as a result she has suffered financial loss. She asserts that she was only provided with a few pages from the building plans for the house at the property even after requesting a full copy and that the licensee told her she only needed those pages. She asserts that had she not been so misled, she would not have made any offer to buy the property.

[50] The licensee denies that he misled the appellant in any way intentionally or otherwise. We prefer the licensee’s evidence.

[51] Ms Locke submits for the Authority that if we accept the licensee’s evidence, then we may find that the licensee did enough to satisfy the requirements under Rules 6.2 and 6.4 (set out above), and that, in particular, if we accept the licensee’s evidence, we will have found that the licensee provided the complainant with all information that should fairly and lawfully be provided. We stated above that we prefer the evidence of the licensee and we accept matters as he has stated them.

[52] The Authority also submits that, given the complete remodelling and building of the property at 485 East Coast Rd, it is open to us to find that the description of the house as “brand new” on “existing foundations” is an accurate description of the property on the particular facts of this case. We do so find.

[53] Ms Locke also put it that, alternatively, we may accept any of the complainant’s assertions, namely:

[a] That the licensee pressured her into making an unconditional offer without time to take independent legal advice;

- [b] That he reassured her that her wide sea views would not be affected by the building at 485A East Coast Rd even though he knew otherwise;
- [c] That the licensee deliberately misled the complainant by describing the house as “*brand new*”.

[54] We reject those assertions of the complainant/appellant.

[55] Mr Rea submitted that, after careful consideration, the licensee decided to advertise the house as brand new and that it is very difficult and possibly misleading to describe it as anything other than that because the existing house had been almost completely demolished and rebuilt with only the foundation and parts of one small brick wall retained. Also there was detailed information available to the appellant regarding the property at all times.

[56] Mr Rea emphasised that the market flyers available at all the open homes, the advertising on Barfoot & Thompson’s website, and all print advertising stated that the house was sitting on an existing foundation and that the appellant admits reading those flyers. Mr Rea referred to the licensee’s evidence that he specifically explained to the appellant that the house was brand new but that the existing foundations were retained as well as a brick wall which had been plastered over, and he had pointed out these features on the building plans to her. Also the building plans for the house were on display at the open homes and the appellant was provided with a full copy of them. These clearly show the existing foundations and the parts of a brick wall which had been retained.

[57] Mr Rea referred to the appellant’s assertion that the licensee intentionally misled her by representing that, after construction of the proposed house at number 485A, her sea view would remain from the left window of her lounge. She further asserts that she did not receive a copy of the plans for the proposed house at 485A or the particulars and conditions of sale by tender, prior to the tender date, despite requesting them.

[58] Again, the licensee denies so misleading the appellant intentionally or otherwise. He says that a full copy of the building plans for the proposed house at 485A was on display at all the open homes, and that he referred all interested parties to them and advised that any purchaser of the property at number 485 would need to agree to these as a condition of the purchase because the building works would infringe the local authority’s site and height to boundary rules. He recalls covering these matters fully with the appellant. He told her that her sea view would be affected but he could not exactly define to what extent. He believed that because the adjoining house would be built several metres away from her property and on a lower sloped section, she would retain part of a good sea view, but he advised her to investigate that aspect with her advisers.

Our Conclusions

[59] When we stand back and absorb all the evidence adduced to us, we cannot find that the conduct of the licensee has been unsatisfactory in terms of s.72 of the Act. It certainly could not be misconduct. The nature of the construction of the house which the appellant was purchasing was accurately explained to her and for any interested party. She was given proper advice about the effect on her sea view of the property to be built on the adjoining lower section. It seems to us that the appellant had all documents and, particularly, the particulars and conditions of sale with regard to her

tender, carefully explained to her both in English and in Mandarin. We are satisfied that the appellant is very fluent in both English and Mandarin. She was given every opportunity by the licensee to take her own advice from her lawyers and other advisers.

[60] We consider that a description of the property purchased by the appellant as “*brand new*” was accurate enough but, in any case, we are satisfied that she was carefully told that it was built on existing foundations and also on a small brick wall retained from the previous property.

[61] We are satisfied that the appellant was never placed under any inappropriate pressure by the licensee.

[62] Simply put, the property purchased by the appellant was correctly described as having a “*new house*” and she has accepted that she was informed of the existing building elements prior to her making her tender offer. Also she has accepted that she was made aware of the proposed building works on the adjoining section and that her sea view would be affected but not the extent of that because that was a matter outside the knowledge and expertise of the licensee. She was merely advised by him to make her best tender offer and we cannot interpret that as inappropriate pressure.

[63] In terms of all the plans and photographs adduced to us, we think it reasonable for the licensee to have believed that a sea view would be retained for the appellant, given that the new house to be built on the section at 485A would need to be built several metres away from her property and taking into account the slope of the section and also the position of the sea view. In fact, a sea view has been retained from the left side of the appellants property but we understand that the new house built at 485A was built closer to the common boundary and, therefore, a little higher on the slope than anticipated by the licensee. We accept that he is not a qualified surveyor with the necessary training to interpret such building plans. No doubt, it was precisely for that reason that he took the precaution of advising the appellant to carry out due diligence investigations by taking her own professional advice. There is no dispute that the appellant had at least two weeks to make such further inquiries or take advice, as suggested by the licensee, but she failed to do that.

[64] Having said all that, while we do not think that the appellant was misled in any way, we can understand how distressing it must be for her that much of her fine sea view has been blocked by the neighbouring house.

[65] We are of the view that no failure has been proven against the licensee. In fact, we feel he provided the appellant with thoroughly good real estate agency service. He properly and wisely advised her with candour, but she seems to have failed to heed much of that advice.

[66] We agree with the decision of the Committee that no further action should be taken against the licensee in respect of any of the appellant’s allegations.

[67] Accordingly, this appeal is dismissed.

[68] 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

Mr G Denley
Member

Ms N Dangen
Member