BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 25

READT 037/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PETER AND PATRICIA BURN** of Auckland, Retired Chartered Accountant, and his wife
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20002)**
	First respondent
AND	**WILLI BARDOHL** of Auckland, Real Estate Agent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 11 February 2014

DATE OF THIS DECISION 8 April 2014

APPEARANCES

The appellants on their own behalf
Ms J M Pridgeon, counsel for the Authority
Ms J M Keating, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Peter and Patricia Burn (the complainants and appellants) appeal against a 17 June 2013 decision of a Committee of the Authority to take no further action on their complaint against the licensee, Mr Bardohl, who works for Stanaway Real Estate Agency.

[2] The essence of the complainants' case is that, before they purchased a property at 7 Hobson Heights Road, Albany (the property), the licensee failed to inform them that a large deck attached to the house had not received appropriate Council consent for its construction. The licensee states that he did inform the complainants of this and they, being eager to purchase the property, nevertheless signed the sale and purchase agreement dated 11 October 2010.

Background Facts

[3] On 19 September 2010, the property was listed for sale with the licensee. On 11 October 2010, the complainants signed a conditional contract to purchase it for $980,000, with settlement to occur on 19 November 2010.

[4] That contract was conditional on the complainants confirming, within five working days of the date of the contract, their satisfaction with a building inspection report being obtained on the property. The complainants also obtained a LIM report which reported no issues with the property and were satisfied with a builder's report so that the contract became unconditional. However, because of their own financing issues, the complainants were forced to delay settlement and incur penalty interest to the vendor.

[5] The complainants say that on about 21 March 2011 they learned through the local Council that a large deck attached to the house had not received relevant Council consent before being built. They say that the licensee had not informed them about the deck issue before that date and, when they queried this with the licensee, he told them that he knew about the deck issue at the date they signed the purchase contract, but did not pass the information on because he thought the vendor was going to fix it.

[6] Before the Committee, the licensee's evidence was that the vendor told him the deck was non-compliant on 10 October 2010 (the day before the sale and purchase agreement was signed), but that the vendor said he would ensure, at his own cost, that it was compliant by settlement date. The vendor confirmed he had then told that to the licensee. The licensee says that the vendor had then also told him that the compliance of the deck would be *"signed-off"* by the Council soon and it was only days away. The licensee says that he passed the information on to the complainants the same day at a meeting at their house. He says that the complainants were then, nevertheless, extremely eager to purchase the property.

[7] On 12 October 2010, the day after the contract for the sale of the property was signed, the licensee completed a standard transaction report for his agency on the property's sale. That noted the deck issue, that it had not been signed off, and that the vendor said it would be done before settlement.

[8] The licensee says that after signing the sale and purchase agreement and the contract becoming unconditional, the vendor found out that his builder had not obtained the requisite permit for the deck. Rather than there being a simple *"sign off"*, the builder had to get plans drawn and go through the process of obtaining a resource consent after more work was carried out.

[9] The licensee also says that on 3 August 2011, the complainants entrusted him with the sole agency listing for re-sale of the property. The agreed sale price was $948,000, which was $32,000 below the price the complainants had paid for the property. The licensee says that, until then, there was no complaint about the sign-off on the deck.

[10] At the time when the complainants on-sold the property (apparently at a loss of $32,000), the deck permit had still not been issued. The complainants say that they had to inform potential purchasers of this fact and that the purchase price they were able to obtain was affected because of it. However, they acknowledge that they sold-

the property at a time when the market was low and that this also affected their sale price.

[11] The complainants say that had they known about the deck consent issue at the time of purchase, they would have been able to use it as leverage to either delay settlement or avoid paying penalty interest until the matter was rectified.

The CAC's Decision

[12] On the information before it, the Committee found (on 17 June 2013) no evidence to establish with any certainty that the licensee was aware of the issues surrounding compliance of the new deck prior to 10 October 2010. Furthermore, it could not be established whether the licensee advised the complainants of the issue at that time or not, and the complainants themselves seemed less than certain about this.

[13] On balance, the Committee thought that there was insufficient clear evidence to conclude that the licensee was guilty of misconduct or unsatisfactory conduct; and it determined to take no further action. Extracts from the thoughtful reasoning of the Committee are:

> *"4.5 There are some aspects of the sale of the property which the Committee questions:*
>
> *4.1.1 The Agreement for Sale and Purchase at clause 6.1(1)(a) states: 'the vendor warrants and ... has no knowledge of any outstanding requirement ... from any local authority". If the Licensee knew about the non-compliant deck why did he not get the vendor to amend this clause until such time as the deck was compliant or why was there no additional clause inserted by the purchasers to the agreement to reflect the non-compliant deck?*
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> *4.1.2 The complainants obtained a builder's inspection and presumably were happy with the report they received. The Committee questions why the complainants and their builder did not raise the issue with the Licensee or their lawyer particularly as there was a recently constructed substantial deck and the LIM report that they obtained pre purchase "shows that the Council wasn't aware of it at that stage either"*
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> *...*
>
> *4.7 It seems to the committee that whilst the complainants obviously found the episode distressing the vendor at his own cost did honour a commitment to obtain sign off from the Council for the deck.*
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> *4.8 In relation to the loss incurred by the complainants from the resale of the property it is not clear to the Committee whether that was a result of the issues surrounding the deck or, as the complainants acknowledge, market conditions at the time "The market was down when we sold which affected our sale price".*
>
> *4.9 The Committee noted that the complainants engaged the Licensee with the Sole Agency Listing for the re-sale of the property which was*

surprising in that they have complained about the conduct of the Licensee during the purchase of the property.

...

5.2 The Committee could not find evidence from the information provided that could establish with any certainty that the Licensee was aware of the issues around compliance of the new deck prior to 10 October 2010 nor can it be established with any certainty whether the Licensee advised the Complainants of the issue at that time or not. The Licensee is adamant that he did, whilst the Complainants have a different view although there may be some uncertainty as illustrated by Mr Burn in an interview with Derek Milne from the Authority on 30 April 2013. He stated 'I have spoken with my wife about the meeting we had that night and we are sure that it was never mentioned'.

5.3 Accordingly the Committee has concluded that there is insufficient clear evidence for it to conclude that the Licensee could be considered guilty of unsatisfactory conduct in terms of s72 or misconduct in terms of s73. Accordingly the Committee has determined under section 89(2)(c) of the Act to take no further action with regard to the complaint or any issue involved in the complaint."

A Summary of the Evidence Adduced to Us

The Evidence of Mr Burn

[14] Mr Burn is a retired chartered accountant/senior commercial manager. In October 2010 he and Mrs Burn made an offer to purchase the property but, at that particular time, needed to obtain suitable finance. Mr Burn says that he and Mrs Burn have no recollection of the licensee advising them that the deck at the property did not comply with building regulations and that a permit for it had not been obtained. He felt that, if the licensee was aware of that, he should have covered it as a vendor warranty in the sale and purchase agreement; although in clause 6.2(5) of that contract the vendor warranted that at the giving and taking of possession, where the vendor has caused any works, any permit, resource consent, or building consent required by law had been obtained and any works completed in compliance with them and that a code of compliance certificate had been issued. That is a standard clause in the REINZ/Law Society 8th Edition Agreement for Sale and Purchase.

[15] Mr Burn states that the LIM report arranged by the licensee on 7 October 2010 made no mention of the building of the deck and puts it that, if the licensee knew that a deck was in the course of being built, that should have been referred to in the agreement for sale and purchase by a prudent real estate agent. Mr Burn said, had that been done, he would have required all matters to be in order regarding the new deck being built at the property before he settled the purchase.

[16] Mr Burn says that it was not until 21 March 2011 that he was aware that there was no permit for the deck. He asserts that there should have been a condition in the agreement for sale and purchase prepared by the licensee to protect Mr and Mrs Burn over the deck. Accordingly, he maintains the licensee has been guilty of misconduct or at least unsatisfactory conduct.

[17] His stance is that the vendor and the licensee *"were fully aware that the substantial deck was unpermitted and they chose to ignore giving any advice to us until after settlement"*. He adds that the deck has since been completely restructured at a substantial cost, including bearing posts, the strengthening of supporting cross-beams, and reinforcing of the rails. When Mr and Mrs Burn, fairly soon (in late 2011), resold the property, they had the following clause inserted in that sale and purchase agreement namely:

> *"The purchasers acknowledge that they have been made aware that the building consent application, resource consent application, and certificate of acceptance have been lodged with the Auckland City Council by the previous owners Grant and Sara Smith in respect of the deck and all work required has been carried out by the previous owners"*.

[18] Before us Mr Burn insists that, until 21 March 2011, the licensee had not mentioned to him any problems about approvals needed for the deck.

[19] Under cross-examination he said that he found the licensee a nice person who worked very hard on behalf of Mr and Mrs Burn. However, he has brought this complaint against the licensee because he considers that the outstanding issue over the deck should have been made a vendor warranty under the contract whereby Mr and Mrs Burn purchased the property from Mr and Mrs G Smith.

[20] In his cross-examination by Ms Keating, it was firmly put to Mr Burn that the licensee says he did discuss the deck issue with Mr Burn before he and Mrs Burn purchased the property. Mr Burns responded that, had that happened, Mr Burn would have had the position covered in the contract. It is difficult to believe that Mr Burn would not have been concerned to cover the deck situation by a condition in his offer.

[21] We note that the vendors, Mr and Mrs Smith, have since covered all the costs of compliance but Mr Burn simply feels *"so they should have"*. Mr Burn seemed to be saying that from the outset he had understood that the building of the deck would be subject to regular inspections by the Council and did not realise that it needed a permit. Mr Burn said he had thought on 15 March 2011 that the Council simply required to make a routine inspection of the deck but when on 21 March 2011 he read the Council letter dated 15 March 2011 to the vendors (copied by Council to Mr Burn's company), he saw reason to become concerned. He is adamant that prior to 21 March 2011 the licensee had not mentioned to Mr and Mrs Burn any issue about the building of the deck.

The Evidence of Mr G Smith

[22] Mr G Smith (as vendor to Mr and Mrs Burn) gave evidence in support of the licensee.

[23] He stated that, in October 2009, he and Mrs Smith had decided to build a deck at the rear of the property. They consulted a builder who advised that they would need a building consent, but that would be routine and they should let him build the deck as a straightforward job and he, the builder, would make the necessary application to Council to obtain the necessary certificate of acceptance. They decided on that approach and in June 2010 the builder made the application for a certificate of acceptance to the then North Shore City Council.

[24] However, at the time Mr and Mrs Smith decided to sell their property in October 2011 the consent had still not been granted, but they knew it was being processed. They had no reason to believe there were any issues with their application for consent, which they expected to be granted very soon. Accordingly, at the time of listing the property for sale they did not advise Bayleys (the licensee's employer) that the deck did not have a code of compliance certificate. Mr Smith says that he did, however, advise the licensee of this issue upon receiving the offer from Mr and Mrs Burn to purchase the property on 11 October 2010. He had then put the matter to the licensee as that sign-off of approval of the deck was almost complete and was expected to occur before settlement of the sale to Mr and Mrs Burn. Mr Smith continued in his typed evidence-in-chief.

> *"2.10 I am not aware of whether Mr Bardohl advised the Burns of the status of the deck compliance, but I have no reason to doubt that he would have. It simply was not an issue at that time."*

[25] As it happened, at material times Mr and Mrs Burn were having difficulties selling their home at Castor Bay, in Auckland, so that settlement did not take place as planned. They requested an extension of settlement from 19 November 2010 until 20 January 2011. That was agreed to on the basis that Mr and Mrs Burn pay penalty interest to Mr and Mrs Smith. In fact, settlement did not occur until 22 February 2011.

[26] Mr Smith concluded his typed evidence-in-chief as follows:

> *"2.18 On 1 March 2011 I emailed Mr Burn saying that an outstanding inspection needed to be completed by the Council for the deck compliance. Mr Burn questioned whether it was a regular inspection or whether there was a reason for it being outstanding. I confirmed that the inspection was the final part of the process and that we were covering all costs to get anything sorted. Mr Burn said he understood "the business regarding the deck" and trusted that all would be ok. ...*
>
> *2.19 Following this inspection, I understand the Council sent Heather Rodgers, the architect who designed the deck, a letter on 15 March 2011 saying that resource consent would be necessary for the deck. Mr Burn sent it to me and in an email, in which I also mentioned other things, I reassured Mr Burn that we were committed to getting everything sorted so he didn't need to be concerned. He replied "also pleased re your info re deck thanks".*
>
> *2.20 The deck was never raised as a major issue because we were dealing with it. Obviously, no one expected it to be as drawn-out as it was. But we bore the cost of all necessary procedures to achieve compliance.*
>
> *2.21 When the Burns had to re-sell Hobson Heights because they could not sell their property, we did provide an undertaking in writing that we would complete all issues relating to achieving final sign-off. Again, this was not a big issue, it was just to satisfy prospective purchasers that it was being dealt with – as we were not the vendor (and therefore automatically responsible)."*

[27] In cross-examination by Mr Burn, Mr Smith mentioned that the actual construction work on the deck had started in October 2009. It comprises about 600 square feet in area and is 6 to 8 feet above ground level.

The Evidence of Mr Bardohl

[28] Mr Bardohl, the licensee, is a very experienced and successful real estate agent. He says that, at the time of listing the property for Mr and Mrs Smith in September 2010, he was unaware of any consent issues relating to the property and, in particular, he was unaware that the deck did not have a code compliance certificate. He stated that, typically, a real estate agent will only discover such consent issues either from disclosure by the vendor or upon receiving a LIM report; although, in this case, the LIM report did not make any disclosure, presumably, (as the licensee put it) because the application for consent was in process.

[29] Inter alia, the licensee stated that for the benefit of Mr and Mrs Burn a building inspection clause was inserted in their contract to purchase the property because the property was a monolithic plaster clad house and Mr and Mrs Burn wanted to be sure it was weathertight. That became clause 16 of the contract and made the purchase conditional on Mr and Mrs Burn being satisfied within five days by a building inspection report from their nominee inspector; and that condition was fulfilled. The licensee also stated:

> *"On 11 October 2010, Mr Smith informed me that code compliance sign off for the new deck at the rear of Hobson Heights was almost completed and that his builder was working with Council to get the sign off and expected this would happen well before settlement."*

[30] He then says that he explained that to Mr and Mrs Burn on the evening of 11 October 2010 and specifically told them there was an issue with the deck, that it was not signed off by the Council, but that Mr Smith had confirmed that the application for consent was in process and should be sorted out before settlement. The licensee says that he clearly recalls Mr and Mrs Burn telling him they had no problem with that because Mr Smith had undertaken to ensure compliance and to incur any associated costs. At the time Mr and Mrs Burn were extremely eager to purchase the property.

[31] As indicated above, it transpired that Mr and Mrs Burn were happy with the building inspector's report and paid the deposit on 11 October 2010 and the agreement became unconditional. It is to the credit of the licensee that, on 12 October 2010, he completed a transaction report for his agency noting, inter alia, *"New back deck not yet signed off but owner says he's in the process and will be done before settlement"*.

[32] The licensee also mentioned that because Mr and Mrs Burn had been unable to sell their property in Castor Bay by August 2011, they contracted him to sell the Hobson Heights property to purchasers who were made aware of the compliance status of the deck and, as he put it: *"As the Smiths had undertaken in writing to achieve compliance, it was acceptable. Mr Smith did effect compliance and it was not raised by the Polands [the purchasers from Mr and Mrs Burn] as an issue at any time"*.

[33] The licensee opined that the fact that the Polands' price was $32,000 less than the Burns had paid for the property had nothing to do with the deck but was because

Mr and Mrs Burn needed a quick sale. He added that the type of cladding of the property might also have been a market stigma at that particular time. Certainly, the licensee does not accept that *"the deck was a point of leverage for the sale"* from Mr and Mrs Burn to Mr and Mrs Poland, as Mr Burn had put it.

[34] The licensee concluded his evidence as follows:

> *"2.23 It is true that obtaining compliance for the deck turned out to be much more complicated, time consuming and costly than anyone had anticipated. But Mr Smith continued to attend to the compliance works, obtaining the necessary experts to meet the Council conditions and paying all fees and costs himself. Once the Burns knew that Mr Smith would deal with any issues arising until compliance was achieved, they did not raise any concerns at any stage until this complaint was received, two years after their purchase of Hobson Heights.*
>
> *2.24 I am surprised and upset that I am now facing a complaint over this issue. I worked very hard for the Burns to facilitate the purchase and subsequent sale of the Hobson Heights property, as did Mr Smith, and the Burns were grateful at the time. I also worked very hard on the sale of the Castor Bay property (after the on-sale of the Hobson Heights property) but was unable to sell at the price expected by the owner."*

[35] The licensee was extensively cross-examined. Under cross-examination from Ms Pridgeon, he asserted that he first found out about the deck not being complying and requiring Council consent when he presented the Burns' offer to the Smiths on 11 October 2010. He said that Mr Smith then assured him that all was in hand and the consent would be very soon available and there was no discussion as to what the licensee should tell Mr and Mrs Burn about that.

[36] The licensee said that, at that stage, there was another party interested in purchasing the property and an auction programme was under way. The vendors (Mr and Mrs Smith) were requiring any pre-auction offer to be unconditional so that he, the licensee, felt he could not add a clause to make the Burns' offer conditional from the point of view of a purchaser in any substantial way. Yet we note that clause 16 was added for Mr and Mrs Burn as covered above to include a condition about a satisfactory building inspection being obtained.

[37] The licensee says that he therefore told Mr Burn that to make his offer subject to a condition about the deck was unacceptable to the vendors but the matter was being remedied at the expense of the vendors. The licensee says there was then no discussion with Mr Burn about the deck and discussion was confined to price and that Mr and Mrs Burn were emotionally attached to purchasing the property.

[38] Also under cross-examination, the licensee said that when he told Mr and Mrs Burn of the compliance issue regarding the deck, but that it was being remedied, they were unconcerned about the point and only interested in the price they were to pay and did not ask him any questions about the deck.

[39] Again, the licensee emphasised that he did not cover the deck situation in the offer to purchase from Mr and Mrs Burn, as he normally would have done, because they could not purchase pre-auction on a conditional basis regarding such a matter with the particular vendors. The licensee put it that they therefore needed a warranty clause from the vendors and that was already in the standard form of agreement

being used (as explained above regarding the standard clause 6.2(5)), but the vendor would not have accepted a clause to protect specifically Mr and Mrs Burn regarding the deck. It was pointed out to the licensee that the purchase contract covered a condition about weathertightness; and the licensee seemed to respond that the vendor would not accept conditions which might delay settlement.

[40] It was firmly put to the licensee by Mr Burn that the licensee did not tell Mr Burn about issues regarding the deck before March 2011; to which the licensee firmly replied *"Not so, I told you on 11 October 2010"*.

[41] In re-examination of the licensee, it was emphasised that he did not receive the LIM report until 11 October 2010 and, although the vendors told him about the deck needing compliance approval on that day, he did not know until March 2011 that a resource consent was needed regarding the construction of the deck. The licensee said he also felt comforted about there being no condition in the offer to cover the deck situation for Mr and Mrs Burn, because there was the vendor's warranty in clause 6.2(5) as referred to above. He added that, in any case, he needed to beat other parties in order to have the vendors sell to Mr and Mrs Burn before auction and, generally speaking, the vendors required an unconditional offer.

[42] Also, the licensee asserted that, at material times, he thought there was no issue over the deck and that it was being processed by the Auckland City Council in the usual way at the expense of Mr and Mrs Smith as vendors to Mr and Mrs Burn.

Discussion

[43] There has been reference to the definition of *"unsatisfactory conduct"* set out in s.72 of the Act and to various rules respectively reading:

> *"**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.*
>
> ***Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009***
>
> *Rule 6 Standards of professional conduct*
>
> *6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.*
>
> *6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*

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

9.1 A licensee must act in the best interests of a client and act in accordance with client instructions."

[44] There seems to be no dispute that the licensee knew about the deck issue at least before the complainants signed the sale and purchase agreement for the property. Did the licensee inform the complainants about the deck issue before they signed that agreement?

[45] If we accept that the licensee did so inform Mr and Mrs Burn, the Authority submits that the appeal should be dismissed. However, if we accept that the licensee failed to inform the complainants of the issue before they signed the sale and purchase agreement, despite he knowing about it, the Authority submits that an unsatisfactory conduct finding would be available.

[46] Ms Pridgeon notes for the Authority that the complainants have referred to the vendors' warranty clause, clause 6 of the sale and purchase agreement. She submits that the licensee should have noted the deck's non-compliance under this clause. That seems to us to be a matter for reference to the complainant purchasers' solicitor

[47] Ms Pridgeon puts it that licensees are expected to be familiar with the standard terms of approved forms of agreements for sale and purchase of real estate, and should ensure that such agreements are modified, where appropriate, to reflect the parties' intentions and the particular facts of the transaction. We agree, although a party may need to be referred by the licensee to legal advice.

[48] Ms Pridgeon notes that the vendors' warranty clause is inserted primarily to protect the purchasers' position, and that no issue was raised by the vendors about the inclusion of this clause in the sale and purchase agreement, nor the failure to refer to the deck's non-compliance. It is submitted for the Authority that, on the particular facts of the present appeal, unless we find as a matter of fact that the licensee failed to advise the complainants of the issues with the deck, the Committee's decision to take no further action should stand. There is a clear conflict of evidence on that factual issue.

[49] The simple stance of Mr Burn is that he has no recollection of the licensee on 11 October 2010 telling him anything about issues regarding the deck. He feels that he should have been protected by an appropriate clause, drafted and inserted in his offer by the real estate agent, making his offer subject to Auckland City Council approval to the construction of the deck and that he was disadvantaged by the licensee's failure to do that. Mr Burn considers that the financial losses he has experienced by the delay in settlement, and then needing to resell the property at a loss, flow from this alleged failure of the licensee. In fact, the standard clause 6 of the agreement seems to provide sufficient protection for Mr and Mrs Burn. We have not been told whether they are seeking recourse from Mr and Mrs Smith pursuant to clause 6.

[50] Ms Keating, as counsel for the licensee, accepted that there are two issues, namely, did the licensee tell Mr Burn about the deck on 11 October 2010 as he says and as is recorded in his notes made the following day? Also, should he have

covered compliance issues for the deck by inserting (or arranging for a solicitor to deal with) a suitable conditional clause in the offer from Mr and Mrs Burn.

[51] Ms Keating submits that, in October 2010, no one expected that a resource consent was needed for the deck to meet compliance issues; that was not ascertained until March 2011; and there is insufficient evidence that the conduct of the licensee has been unsatisfactory in any way.

[52] Ms Pridgeon emphasises that it has come out of this hearing that the licensee knew of issues about the deck by 11 October 2010 and that was not put to the Committee; that we need to decide whether the licensee failed to inform Mr and Mrs Burn of the issue about the deck before they made their offer; and that could amount to unsatisfactory conduct. She accepts that not every failure by a licensee is a breach of a rule so as to be unsatisfactory conduct. She puts it that we need to decide whether we believe the licensee that he did not find out about issues over the deck until 11 October 2010 and that he then passed on to Mr and Mrs Burn that the vendors would take responsibility for them.

[53] Mr and Mrs Burn say that were not told about any compliance issue over the deck until March 2011; but we have no reason to disbelieve the licensee that he referred the issue of the deck to them on 11 October 2010. At this stage, there is confusion between the licensee and Mr Burn as to who said what to whom at material times.

[54] In our view, certainly with the benefit of hindsight, there needed to be a specific clause inserted into the offer from Mr and Mrs Burn to Mr and Mrs Smith to cover that the purchase was conditional upon completion of the deck and the obtaining of all compliance requirements regarding it from Auckland City Council before settlement. However, there already was a warranty in the standard terms of contract which seemed sufficient to cover and protect Mr and Mrs Burn. Nevertheless, the agent needed to either ascertain the situation clearly and explain it to both vendors and purchasers or to have the matter referred to the solicitor for Mr and Mrs Burn.

[55] We recommend that all real estate agents keep a daily diary recording such matters. At least in this case, on the following day 12 October 2010, the licensee had made a note in his transaction report which supports his evidence that he raised the matter with Mr and Mrs Burn on 11 October 2010. This means they would not have first learned of problems over compliance and certification of the deck in March 2011. We are also conscious that, at material times, all parties seemed to regard the issue over the deck as minor, routine, and being remedied, and that Mr and Mrs Burn were eager purchasers.

[56] For all that, it would have been good practice to insert an appropriate condition in the offer of Mr and Mrs Burn tailored to cover completion and certification of the deck prior to settlement. The licensee should have referred that concept to the purchasers' solicitor.

[57] In all the circumstances, we take the view that the licensee has been guilty of unsatisfactory conduct at a relatively low level. We consider that the licensee should have obtained more information from the vendors about the legal status of the deck and also (despite the standard clause 6 warranties in the agreement) should have addressed it separately in the agreement with a suitably tailored condition, or referred that to the solicitor for the purchasers.

[58] Accordingly, we quash the decision of the Committee to take no further action but note that far more evidence has been adduced to us at a hearing than was available to it for its statutory investigation on the papers.

[59] We expect that submissions to us on penalty can be provided succinctly and in writing. Currently, our inclination is to simply fine him the licensee $2,000 payable to the Registrar of the Authority at Wellington within one calendar month of any such order. However, the parties are entitled to a penalty hearing if any of them so require. We direct our Registrar to arrange a timetabling conference of counsel and parties with our Chairperson to progress the matter of penalty in terms of our above findings.

[60] 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 J Gaukrodger
Member

_____
Ms C Sandelin
Member