BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 37

READT 050/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**STEVEN OLDE-OLTHOF AND SHARON THOMAS**, of Invercargill, the Complainant Purchasers
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20005)**
	First respondent
AND	**BRENDAN MASON**, of Invercargill, Real Estate Salesperson
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 21 May 2014

REPRESENTATION

The appellants on their own behalf
Ms J MacGibbon and Ms N Copeland, counsel for the Authority
Mr J Waymouth, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL ON APPEAL AGAINST PENALTY

Introduction

[1] Mr Olde-Olthof and Mrs Thomas ("the appellants"), as trustees of the Roslyn Lawrence Family Trust, appeal against the 26 August 2013 penalty determination of Complaints Assessment Committee 20005 to censure and fine (at $2,000) Brendan Mason ("the licensee") and order that he enrol in national unit standard course US26149. The complainant appellants consider those penalties to be inadequate in relation to their property purchase detailed below. Those penalties related to the Complaints Assessment Committee having found unsatisfactory conduct by the licensee as we cover below.

Background

[2] The licensee was the listing agent for a residential property at 28 McIvor Road, Invercargill. In March 2012 the appellants attended three open homes at the property. They state that the licensee provided advice about the operation of the under-floor heating system during this time and, in particular, during the second open home discussed the operating costs of the system.

[3] The licensee states he was advised by the vendor as to the quantity of heating circuits used at the property and that the vendor relied on an open fire as the main source of heating. He says that he then relayed this information to the appellants. They claim they were not made aware of this information.

[4] On 27 March 2012 the appellants signed a sale and purchase agreement to make an offer to purchase the property. While the offer was being drawn up, the appellants questioned the licensee as to whether or not a Land Information Memorandum (LIM) or a builder's report should be obtained regarding the property. The licensee says he advised the appellants that a code of compliance certificate was due from the Invercargill City Council which would be more important and informative to them, but that he could obtain either report if they wished. After some discussion, the appellants decided not to make the contract subject to a builder's report or receipt of a LIM.

[5] The licensee is also said to have had the appellants initial clause 6.2(5) of the offer document to highlight that it is the vendor's responsibility to provide a code of compliance certificate. Certainly, there is such initialling on that part of the contract document. That cl.6.2(5) has the vendor warrant:

> *"(5) Where the vendor has done or caused or permitted to be done on the property any works:*
> *(a) any permit, resource consent or building consent required by law was obtained; and*
> *(b) the works were completed in compliance with those permits or consents; and*
> *(c) where appropriate, a code compliance certificate was issued for those works."*

[6] Settlement of the purchase of that property by the appellants for $800,000 occurred on 11 May 2012. No code of compliance certificate was provided.

[7] On moving into the property, the appellants found defects, including leaking, problems with the under-floor heating, and field drains not working. They complained to the Authority that the licensee had misrepresented the state of the underfloor heating and the overall condition of the building.

The Committee's Decision

[8] In its decision of 4 July 2013, the Committee found the licensee guilty of unsatisfactory conduct regarding his advice in relation to the appellant purchasers obtaining a LIM and building report and his failures in highlighting the possibility of weather-tightness issues. It considered that the type of property, namely, a six-year-old architecturally designed home made in part of fibrolite and plaster, should have alerted a competent licensee to the potential for weather-tightness issues. The Committee also noted that, during an open home, there had been advice from a builder of moisture on the

walls in the garage of the property. The Committee held that the licensee had a positive duty to advise the appellants to obtain a LIM and builders report but, instead, he had discouraged them from getting these reports.

[9] The Committee also had serious concerns in relation to the licensee's advice to the appellants about the functions of a code of compliance certificate, a LIM report, and a builder's report. It considered that his erroneously suggesting that the information contained in a LIM report was unnecessary showed a serious lack of knowledge as to what the reports are for and that this had the effect of persuading the appellants to not obtain a LIM or building report.

[10] The Committee dismissed that part of the complaint which dealt with the underfloor heating after finding the evidence on the matter inconclusive.

[11] As further background, we set out the following extract from the Committee's substantive decision of 4 July 2013 finding unsatisfactory conduct on the part of the licensee as follows:

> *"3.20 In this case we have evidence from a builder who inspected the Property on an open home day that he advised the licensee there appeared to be moisture on the walls in the garage. We find this evidence credible and believe it should have put the Licensee on notice that there could be a problem. On the evidence before us it seems that the Licensee's conduct at the time of drawing up the offer for the Property had the effect of persuading the Complainants not to obtain a building report and not to obtain a LIM report.*
>
> *3.21 As a result we believe that the Licensee failed in his duty under Rules 6.4 and 6.5 in relation to this advice. We believe that this was the type of building which should have alerted a competent licensee to the potential for weather tightness issues. The Licensee had had advice from the builder that there was moisture on the walls in the garage, and with this knowledge we find he discouraged the Complainants from getting further reports when we believe he had a positive duty to advise them to obtain these reports.*
>
> *3.22 We also have serious concerns about the Licensee's conduct in relation to his advice around the code of compliance certificate. A LIM report covers such matters as the zoning for the property, details of any potential erosion subsidence or flooding problems the location of private and public storm water drains, details of any consents or notices affecting the land or any building on the land, all certificates issued by building certifier pursuant to the Building Act 191, and numerous other important information about the land and what is happening in the general area. For the Licensee to suggest that this information was not necessary shows a serious lack of knowledge of what these reports are for. We find the Licensee is in breach of Rules 5.1 and 6.4 in relation to this conduct.*
>
> *3.23 In relation to the problems with the under-floor heating we find that the evidence before us is inconclusive and therefore dismiss this part of the complaint against the Licensee.*
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> *3.24 After full consideration of this matter we find that Licensee's conduct in relation to this matter fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and is conduct that*

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

The Rules Referred to By the Committee

[12] Rules 5.1, 6.4 and 6.5 of Real Estate Agents Act (Professional and Client Care) Rules 2009 read:

"5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

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.

6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate market', that land may be subject to hidden or underlying defects, the licensee must either-

(a) obtain confirmation from the client that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses."

General Principles

[13] We agree with counsel for the Authority that decisions of industry disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public (through both specific and general deterrence). While this may mean that orders made in disciplinary proceedings have a punitive effect, this is not their purpose – *Z v CAC* [2009] 1 NZLR 1 at [97]. As McGrath J said for the majority of the Supreme Court in that case (Blanchard, Tipping and McGrath JJ) at para [97]:

"... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."

[14] Turning to the particular statutory scheme under the Act, we summarised the position in *CAC v Walker* [2011] NZREADT 4 as follows:

"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).

[18] This function has been recognised in professional disciplinary proceedings involving other professions [and] ... is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.

> *[19] In Patel v Dentists Disciplinary Tribunal High Court, Auckland, CIV 2007-404-1818, 13 August 2007, Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future."*

[15] Accordingly, the purpose of disciplinary proceedings is not to punish, but to emphasise the maintenance of high standards and public protection through both specific and general deterrence.

Issues on Appeal

[16] It is submitted for the Authority that the primary question is: what penalty is appropriate and available under s.93 following the Committee's findings of unsatisfactory conduct against the licensee?

[17] Penalty decisions are discretionary in nature. In *K v B* [2010] NZSC 112, [2012] 2 NZLR 1, our Supreme Court confirmed that appellate courts will adopt a different approach on appeals from discretionary decisions to that taken on general appeals and stated:

> *"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary."*

[18] The narrower approach described in *K v B* (supra) is appropriate in respect of appeals against the exercise of the discretion granted to Complaints Assessments Committees in determining penalties following unsatisfactory conduct findings (see, by analogy, the decision of Woolford J in relation to s.110 of the Act in *Kumandan v Real Estate Agents Authority* CIV-2013-404-2433). Accordingly, in order for us to allow the appeal, the appellant must demonstrate that the Committee's penalty decisions either made an error of law or principle; or failed to take into account a relevant consideration; or took into account irrelevant considerations; or were plainly wrong.

[19] Put another way, it is not sufficient to allow the appeal that we might come to a different view as to the appropriate orders.

The Stance of the Appellants

[20] The appellants seek orders under s.93(1)(f)(i) and/or (ii) of the Act which read:

> *"**93 Power of Committee to make orders***
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
> *...*

(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 consequences of the error or omission:"

[21] The appellants agree in principle with the Committee's decision of 4 July 2013 and put it that its finding of unsatisfactory conduct against the licensee seems to be based on his having, while knowing that there were water egress issues, promoted the quality of the property and actively discouraged the appellants from seeking independent advice concerning the quality of the property. The appellants believe there is evidence that, on the balance of probabilities, the licensee knew of the water egress issues and yet attested to the good quality of the cladding on the property. They assert that his conduct seems to have been wilful rather than a lack of judgment. However, we observe that the CAC did not seem to conclude that the licensee knew of water problems and there is no clear evidence of wilful deception or misrepresentation by the licensee.

[22] The appellants submit that the licensee's conduct is at the top end of the range of unsatisfactory conduct as defined in the Act. They stress their view that the licensee knowingly misrepresented to them, both in writing and orally, the quality of the property and compounded that by telling them that a builder's or an engineer's report would be *"superfluous"*.

[23] The appellants made detailed submissions about the effect of the reasoning of Brewer J in *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 and we refer below to the reasoning of His Honour in that case.

[24] In terms of penalty options, the appellants put it that the licensee has gained *"some $30,000 plus of commissions"* from inducing them to sign the contract to purchase the property *"by misrepresentation"*. They make references not only to the Act and its Rules, but also to the Fair Trading Act 1986 and the Contractual Remedies Act 1979. They conclude their submissions as follows:

"55. The appellants say that in terms of Public Policy and equity it is manifestly unfair that:

- *the 2nd respondent should benefit through commissions from knowingly misrepresenting the condition of the property to induce the appellants to enter into the contract for sale for $800,000 without making good on his misrepresentations,*
- *the 1st respondent has not, in making its determination in the Decision on Orders, recognised the multiple breaches of legislation committed by the 2nd respondent,*
- *the 1st respondent did not apply the provisions of s 93(1)(f)(ii) and make an order for the 2nd respondent to make good on his misrepresentations when the 2nd respondent compounded his misrepresentation by saying the appellants did not need to seek independent advice on the quality of the building.*

56. The appellants urge the Tribunal, in equity and good conscience, to instruct the 1st respondent to make an order under s 93 that the 2nd respondent put the property in the state represented by the 2nd respondent.

The injury

> *57. The appellants re submit for considerations of the Tribunal their Submission on orders dated 10 July 2013. The appellants say that their submission provides full details of the costs to effect repairs, or for repairs still to be effected to bring the property up to the condition represented by the 2nd respondent"*.

[25] In a subsequent further short submission, the appellants advise that they have engaged contractors to effect repairs to the garage walls at the property, after a delay in the contractors becoming available and then with further weather delays. They state that the contractor has confirmed that there has been cracking of plaster and, very likely, water egress into the fibrolite which requires the recladding of the front and the east and west aspects of the central portion of the property; and that the faults in the coatings on the fibrolite are reasonably obvious and are not new. They state that the repair costs are estimated to be in excess of $15,000, plus painting, and are likely overall to exceed $20,000.

[26] The appellants conclude their submissions on penalty as follows: *"The latest faults are, in the view of our contractors, the type of fault that would be reasonably obvious to a person undertaking a building inspection. Bearing in mind that the second respondent has admitted to discouraging the appellants from seeking a building report, while knowing there were faults, we ask ...".* We cover below the remedies sought by the appellants.

The Stance of the Licensee

[27] Mr Waymouth was much in accord with the approach of the Authority. However, he firmly rejects any suggestion that the licensee intentionally or deliberately acted in the manner determined by the Committee.

[28] In particular, Mr Waymouth emphasised that the Committee found the licensee guilty of unsatisfactory conduct relating to his advice about obtaining a LIM and building report, and not with respect to any liability for purported defects or failures in the property; and that the licensee's failure was of a positive duty to advise the appellants to obtain a LIM and/or building report; but the licensee firmly denies that he actively discouraged the appellants from getting such reports.

[29] Inter alia, Mr Waymouth referred to the Committee having stated in its para 4.1:

> *"Although our legislation does provide provisions for rectification and compensation in some limited situations, we believe in this case the complainant's primary remedy, if any, regarding the operation of chattels should be a claim against the vendors and not the licensee ... we are therefore not offering anything in the way of compensation to the complainants in this instance."* Mr Waymouth points out that the Committee's decision was thorough and comprehensive and shows that the Committee was well aware of the extent and nature of powers provided to it under s.93 of the Act, but was reasoned in its refusal to make any order under s.93(f) by way of compensation for the appellants. Mr Waymouth also submits: *"The fact that there were issues with the house itself, are not issues caused by the appellant with respect to the error or omission under s.93(1)(f)"*.

[30] Mr Waymouth also, helpfully, analysed Brewer J's reasoning in *Quin* (supra).

[31] Finally, Mr Waymouth observed that the appellants may well have remedies of a civil liability type in terms, perhaps, of breach of contract, negligence, or under the Fair Trading Act 1986, but that it has not been proved that we should interfere with the decision of the Committee.

Submissions for the Authority

[32] Ms MacGibbon submits for the Authority that the Committee was entitled to come to the decision it did, that there was no discernible error in its approach, and that its decision cannot be stigmatised as plainly wrong.

[33] She notes that the appellants state that they are not seeking compensation and state that:

[a] they seek an order for the licensee to recompense expenditures they have incurred, or are still to incur, to attempt to repair the defects to the property, and that:

[b] the sole motivation for the complainant is to seek recompense of costs incurred to restore the property to its condition as represented by the licensee.

[34] Ms MacGibbon noted that in *Quin v The Real Estate Agents Authority* (supra), the High Court held that Committees of the Authority cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under s.93(1)(f) of the Act; so that (she submits) the present appellants cannot seek compensatory damages from the licensee.

[35] Ms MacGibbon, very helpfully, made the following submissions on general principles arising out of *Quin* should we contemplate an order under s.93(1)(f).

[36] Following a finding of unsatisfactory conduct, Committees can, pursuant to s.93(1)(f) of the Act, order a licensee to:

"(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 on 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."

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

[38] Alternatively, if the complainant has already taken action to *"put right"* the error or omission, or taken action to *"provide relief from the consequences"* of the error or omission, then orders can be made for licensees to reimburse the complainant. It is put that this seems to be the only way in which an order for monetary payment from the licensee directly to the complainant can be achieved. Otherwise, wherever appropriate,

the licensee must be ordered to do something, even if it is paying for a third party to do that thing. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. An order under s.93(1)(f) cannot be made in respect of a straight monetary loss, e.g. compensation for a loss in market value on a resale.

[39] An example given by Brewer J, at para [62] in *Quin*, involved a misrepresentation that a chattel is included in the sale of a property and, in that case, an order may be made for a licensee to: negotiate the inclusion of the chattel in the sale at the licensee's expense; supply a similar chattel at the licensee's expense; or reimburse the complainant if the complainant has purchased a similar chattel in the meantime. What cannot be done is to order the licensee to pay compensation to the complainant for the difference in the market value of the property with the chattel and without (assuming there is such a difference).

[40] At his para [68] in *Quin*, Brewer J refers to factors which may apply in the Committee's exercise of discretion under s.93(1)(f), including the costliness of rectification or the taking of steps to provide relief; culpability of the licensee to other parties; complexity of issues of causation; and remedies available to a complainant under the general law.

Our Conclusions on Penalty

[41] The purpose of disciplinary proceedings is not to punish, but to emphasise the maintenance of high standards and public protection through both specific and general deterrence.

[42] Appeals against penalty decisions are appeals against a discretionary decision and as such, are limited. We accept that the Committee's discretionary decisions in this case should not be interfered with lightly.

[43] The findings and views of the CAC seem fair and just to us and we have covered them in some detail above.

[44] At the request of the parties, we have heard this appeal against penalty *"on the papers"*; so that we cannot be sure whether the unsatisfactory conduct of the licensee was deliberate or careless, but it seems to have been rather careless. In terms of our focus on penalty, as the issue now put to us, we are prevented by the principles outlined in *Quin* (supra) from awarding compensatory damages to the appellants against the licensee. It is relevant to note that in *Tong v REAA and Others* [2014] NZREADT 3 we observed:

> *"[18] In any case, the amount sought by the appellants is compensation for straight market loss. This kind of monetary award was discussed in the decision of Quin v The Real Estate Agents Authority [2012] NZHC 3557 where the High Court (per Brewer J) held that committees (or the Tribunal on appeal) cannot order licensees to pay complainants money as compensation for errors or omission (compensatory damages) under s 93(1)(f) of the Act. Licensees can only be ordered to do something or take actions to rectify or "put right" an error or omission s 93(1)(f)(i). If the licensee can no longer "put right" the error or omission, that licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission, s 93(1)(f)(ii). Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. An*

order under s 93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value. ...

[20] In Orsborn v REAA & Collier & Anor [2013] NZREADT 69, we dealt more fully with the Quin concepts and part of what we said there reads:

*"**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*". …
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> *[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.*
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> *[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 …*
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> *[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).* …
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> *[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.*
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> *[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 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 its her 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'. This 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. …"

[45] We stress that the penalty issue now before us relates to unsatisfactory conduct, not misconduct; so that our compensatory power in s.110(2)(g) is not relevant.

[46] At the very least, the licensee did not facilitate the appellants receiving proper advice as to the state of repair or maintenance of the property at times material to their purchase. In the circumstances, a LIM report and a builder's report should have been obtained for

the appellant purchasers. Indeed, as Mr Waymouth put it for the licensee, the Committee has found the licensee guilty of unsatisfactory conduct in terms of his advice to the appellants in those respects and that his failure was of a positive duty to advise the appellants to obtain a LIM and/or a building report, despite the licensee's denials that he actively discouraged the appellants from getting such reports.

[47] As Mr Waymouth also said, the appellants may have remedies in our civil courts. However our focus is on the licensee's conduct in the circumstances covered above and, at this stage, only with regard to a fair and just penalty.

[48] We consider that the Committee has properly dealt with penalty and all relevant issues. Accordingly we confirm the decisions of the Committee and this appeal is dismissed.

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

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Judge P F Barber
Chairperson

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Ms N Dangen
Member

_____
Ms C Sandelin
Member