BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 78

READT 80/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL KING**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**WARREN DAVID FINDLAY**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at CHRISTCHURCH on 31 July 2014

DATE OF THIS DECISION 3 October 2014

COUNSEL

Mr R W Maze for appellant
Ms J MacGibbon for the Authority
Mr M E Parker and Ms A J Nash for the respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Paul King ("the appellant") appeals against the 22 November 2013 determination of Complaints Assessment Committee 20004 to take no further action on his complaints against Mr David Findlay (the licensee).

[2] The issue on appeal to us is whether the advertising of a property at 4 Kidson Terrace, Christchurch, was misleading in that it stated the property had three or four bedrooms when, the appellant contends, it was a seven bedroom property (with five car parking spaces).

[3] There is also the question whether the following issues are within the scope of this appeal, namely:

[a] whether the second respondent failed to act competently in not returning telephone calls nor supplying tender documents to interested parties;

[b] whether the advertising of a double garage was misleading when there is other parking space available.

Basic Factual Background

[4] Norfolk Finance Ltd (the mortgagee) held a mortgage over the property and, on 24 April 2013, engaged the licensee to sell it by tender closing 4.00 pm on 27 May 2013.

[5] In late April 2013 advertisements were placed on Trade Me and realestate.co.nz showing a property icon of 3 bedrooms and two parking spaces.

[6] Tony McPherson, as director of the agency which employed the licensee (Ray White Metro), stated that *"the original advertising for 4 Kidson Terrace, Christchurch was three bedrooms and study plus flat, with 3 bedroom icon on the advert. The house was being used this way, but the separation between house and flat was an internal door and a small sunroom, with a server through one wall to a kitchenette, was used as a second bedroom"*.

[7] During the period 1 May to 22 May 2013, the advertising was changed to show four bedrooms. These were the three bedrooms included from the original advertising plus the bedroom in the flat downstairs. Otherwise, the text of the advertising did not change. In terms of that amendment, Mr McPherson stated: *"The dwelling was originally intended to be a single residence. Then the decision to market it as four bedrooms with four bedroom icon amended, the text still indicated three bedroom and study upstairs, downstairs could be a separate flat and supply a floor plan to all interested parties."*

[8] A file note of a conversation between the sales manager at Ray White Metro, Vanessa Golightly, and the Real Estate Agents Authority's investigator notes that the property had upstairs two living areas, a study, and three bedrooms; and downstairs a bedroom, living area, and kitchen. She was very clear that the two living areas upstairs are not bedrooms and one of these has a large open entrance with no closing door. She also stated that the study is barely large enough to fit a single bed and is in the corner of a sunroom and clearly not a bedroom.

[9] During the tender process, the insurance for the property was withdrawn so that the property was to be sold on an *"as is where is"* basis with no insurance cover. There were over 55 inspections by interested parties, 15 requests for tender packs; and 5 tenders were received.

The Committee's Decision of 22 November 2013

[10] The Committee accepted the licensee's evidence and noted that he had supplied a floor plan to assist purchasers viewing the property. Further, it confirmed the licensee's view that advertising the property as having six bedrooms could cause some confusion for potential purchasers given the size, position, and status of some of the rooms.

[11] The Committee accepted the licensee's approach of marketing as bedrooms those rooms that were clearly defined as bedrooms. It stated that, in such situations, a conservative approach should be taken, rather than running the risk of providing purchasers with misleading information.

[12] The Committee could not find any breach by the licensee of the Fair Trading Act 1986 nor of the Credit Contracts and Consumer Finance Act 2003. It found that the licensee *"has advertised the property appropriately"*. It dismissed the complaints and also determined to take no further action.

Scope of Appeal

[13] We accept that it is not necessary for complainants to particularise complaints so as to point to specific provisions of the Act and/or Rules allegedly breached. That would be wholly unrealistic and contrary to the purposes of the Act.

[14] Ms MacGibbon referred to *Wyatt v REAA and Barfoot & Thompson Ltd* [2012] NZHC 2550 (per Woodhouse J), in which the High Court held:

> *"[62] I am satisfied that the Tribunal should not have proceeded to make a determination on the conflict of interest question. There are two main reasons for this.*
>
> *[63] The first is that, in my judgment, the Tribunal did not have jurisdiction. The Tribunal's jurisdiction is prescribed by s.111 which, so far as material, is as follows:*
>
> ***111 Appeal to Tribunal against determination by Committee***
>
> *(1) A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the date of the notice given under section 81 or 94.*
>
> *…*
>
> *(4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.*
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> *[64] There was no determination of a Committee, which means a Complaints Assessment Committee, in respect of which the Tribunal could entertain an appeal. For Barfoot & Thompson, Mr Hern referred to s.105(1) of the Act which provides that the Tribunal may regulate its procedure as it thinks fit. However, this is not a provision enabling the Tribunal to give itself a jurisdiction it does not have.*
>
> *[65] There is no doubt that the parties engaged with the issue in the hearing before the Tribunal. However, having regard to the carefully prescribed statutory procedures for the bringing of a complaint, with investigation and determination by a Complaints Assessment Committee, and the wording of s.111 in respect of appeals, I am not persuaded that jurisdiction could effectively be granted by agreement. But if I am wrong in that regard there is a second consideration which satisfies me that the Tribunal's determination should be set aside. This is the clear statement by Mr Wyatt, in his written submissions following the hearing, that he did not seek a determination of this*

issue. Even if his raising of the matter with the Tribunal could be regarded as a complaint, which I doubt, as the complainant he was entitled to withdraw it. This may have a bearing on costs. But it does not have a bearing on the substance."

[15] In *Garlick v REAA* [2014] NZREADT 40, we recently held:

"[50] The Tribunal treats appeals as hearing de novo …

[51] However, it would be a breach of natural justice for the respondent to have to deal with completely new matters not raised in the complaint. However issues can and do become refined or more or less important during the appeal process. In this case the issues which are dealt with in the appeal are factually similar to those in the complaint and the decision of the Complaints Assessment Committee. We consider therefore that it is appropriate for the Tribunal to consider these issues as well."

[16] While we consider it is in the best interests of the parties for all matters to be dealt with at the appeal hearing, we note that the decision in *Wyatt* provides a limitation on the extent to which *"new"* issues raised after the Committee stage may be dealt with on appeal. We cannot give ourselves jurisdiction which we do not have under the Act.

A Summary of the Evidence

The Evidence of Mr King the Appellant

[17] In his 9 December 2013 notice of appeal, the appellant sets out his reasons for the appeal as follows:

"4.1 Agency's right to sell the property – the licensee states the property was removed from the market (in his evidence) therefore an honest market sale process was not achieved. People who wish to make a bid were not allowed to and not interviewed by "investigator" Ross Governeur when asked how he would like the evidence presented or whether he would collect it. Process took six months. Here was plenty of time. I was told he was instructed by "a lawyer" not to collect this evidence. The Fair Trading Act was breached (in trade as well) when these potential buyers were told the house was "off the market". It was sold two months later quietly out the back to Findlay's friend.

4.2 Misleading advertising – see Ford Baker Valuation supplied to the Committee. The house has six bedrooms plus an office. Ford Baker are registered property valuers. Findlay is not …"

[18] In what seems to be a brief of evidence prepared by the appellant himself in February 2014, he (Mr King) raises a number of jurisdictional matters. He alleges that the Committee failed to conduct a fair and balanced hearing; that the Chairman of the Committee had a conflict of interest; and that Mr R Gouveneur of the Authority did not satisfactorily investigate Mr King's complaint and that the investigation took too long. Mr King also stated as follows:

"[6] Misleading advertising is a live issue on Appeal and advertising a seven bedroom house for three bedrooms is misconduct and also in breach of

the Fair Trading Act. It is noticeable that the house was quickly torn apart while in the possession of Norfolk Financial Management Limited and that investigators who went to count rooms were unable to figure out what was going on. Mr King has full engineering reports and building reports, however, which show the number of bedrooms to be seven and three lounges and two bathrooms and this is also confirmed in a registered valuation prepared by Ford Baker and paid for by Jack Porus's company in June 2013.

[7] The authority to sell is, I believe, a red herring in that the appellant obtained an interim injunction to stop the sale of the house and then this was overturned when the High Court was told that $380,000 was owed in legal fees. This gross overcharging has since been dismissed as a "typing error" by Jack Porus and his company in his submissions to the Law Society. The High Court has not been approached by Jack Porus's company to correct their "error" in testimony to the High Court. Therefore the Principal Jack Porus may claim he has authority, however this was obtained by deception as was the mortgage placed on my home and this is confirmed by the Court of Appeal COA 546/2011."

[19] We record that for all the above, Mr Maze (counsel for Mr King) helpfully made it clear that the appellant's case is that the property should never have been advertised as having three or four bedrooms, when (it is put) it has six bedrooms, and it was a breach of duty by Mr Findlay (the licensee) to have done that.

[20] Mr King was carefully cross-examined by Ms Nash and Ms MacGibbon respectively, particularly with regard to a 16 May 2013 Structex report on the property assessing its earthquake damage and about a number of the documentary exhibits. Mr King's evidence can be referred to adequately below when we deal with the submissions. Essentially, he maintains that the licensee advertised the property for sale in an inept manner which caused Mr King, as mortgagor, to lose much money over its sale by his mortgagee.

[21] The appellant was meticulously cross-examined by Ms MacGibbon and Ms Nash about the nature and character of the various rooms in the property. Those concepts were also carefully dealt with by Mr Maze in re-examination. There was much reference to the Structex report.

[22] In Mr King's view, the property had a market value of about $1 million prior to the Christchurch earthquakes. It was put to him by Ms Nash that the property would never have been worth half that, which is why he considered the tenders as quite low. Mr King said that he had been able to rent the house or take in boarders on a profitable basis.

[23] It seems that, after the Christchurch earthquakes, the appellant's insurance company cancelled the insurance cover on the property and that, apparently, is a matter of separate litigation. It was put to Mr King by Ms Nash that, after the earthquakes, the property was *"bulldozer material"*. Mr King does not accept that and points out that people now live there and that, prior to the sale by the mortgagee, his fiance and two children lived there with him. He felt that tenderers were simply trying to buy the property cheap. He said that it suited the insurer to regard the property as comprising two dwellings, but it suited the EQC to treat it as one building.

[24] Mr King genuinely feels that what he regards as *"inept advertising"* with regard to the number and character of rooms in the house, and with regard to available carparking, cost him about one million dollars; so that one can understand his distress. Also, at one time in his life, he was a real estate agent himself and, accordingly, has views as to the methods and effects of advertising of property as for sale. Inter alia, Mr King covered that in the late 1950s the property comprised three apartments but was later turned into a home upstairs and a flat downstairs, which seems to be why the insurer regarded it as comprising two homes. The downstairs flat comprised two bedrooms. Mr King also mentioned that, some years ago, he had let the property as a motel for about 18 months.

Other Evidence for the Appellant

[25] By consent briefs of evidence were adduced by the following witnesses.

[26] A Mr T G Buxton, who seems to be an expert in real estate appraisal, had noted that the property was, as he put it, misdescribed as three bedrooms when it comprises seven bedrooms and over 300 square metres. He said that he made this clear to the licensee well before the tender date but that he received no response from the licensee, although the latter had had a discussion with him. Mr Buxton noted that the property was subsequently withdrawn from sale by the mortgagee and said *"I was quite shocked to hear that it had later sold for an undisclosed sum"*.

[27] A Mr G Turner provided a letter recording that he tried to make contact with the licensee in early May 2013 to show an interest in the property but that the licensee did not call him back. He said he was disappointed to learn about the eventual sale price and his offer would have been higher. He had been thinking of offering $550,000 for the property.

[28] Mr D P Keir, a motellier in Christchurch and a former real estate agent, stated that he tried to obtain tender documents for the property from the licensee but, despite the licensee's office assuring Mr Keir that the tender documents would be provided, that did not happen. Mr Keir also added in his brief:

> *"9. It was my suggestion that caused Paul to set up his downstairs apartment as a short term rental because there was a shortage in Christchurch and I told him he could get $100 per night for it. Paul set the apartment up in the same style as a motel suite and was getting good income from it.*
>
> *10. If I was the real estate agent listing the property I would have listed it as "home and income" or "home with attached granny flat or apartment" because this was more truthful than Dave Findlay's advertisement and would have achieved a higher price for the property."*

[29] Then there is a brief from a Mr R Booth as a Christchurch businessman experienced in realty. He said that his efforts to obtain tender documents from the licensee were unsuccessful.

A Summary of the Evidence from Mr D Findlay (as the Licensee Second Respondent Licensee)

[30] The licensee has been a successful real estate agent in Christchurch since August 1996. He was first instructed to sell the property as a mortgagee's sale in

late 2008 by a Mr J Porus representing the mortgagee. He said the property was in a poor state of repair and required extensive remedial work. He added that the sale of the property became thwarted by litigation instituted by the appellant as mortgagor.

[31] In early 2013 the licensee was instructed to recommence a formal sales procedure and he then drew up a sole agency agreement which was executed by the mortgagee on 24 April 2013. His instructions were to arrange a mortgagee's sale on an *"as is where is"* basis. In terms of the licensee's usual practice, he completed in April 2013 a listing agency transaction report and an agency/appraisal checklist for the mortgagee as vendor. He said that he and Mr Porus favoured a tender process *"as this excluded the possibility of any disruption by Mr King at an auction, given our previous experience in dealing with him"*.

[32] Mr Findlay then dealt in some detail with how he had advertised the property for sale by tender.

[33] Initially, Mr Porus approved a *"Press"* advertisement showing the property to have three bedrooms but with a study, two additional living areas, and a separate flat. About a week later, the licensee decided to amend the advertising description to indicate four bedrooms plus additional rooms. The licensee put his reasoning for that to us as *"the reason for the change was to try and convey the size of the property, although I was conscious that the number of rooms which could be expected to be utilised as bedrooms was limited. The text of the advert did not change, only the "bedrooms" icon."* He then added *"I was also conscious in marketing the property as having a separate flat in circumstances where there was only a glass door separating the main residence on the first floor from the ground floor entrance area"*.

[34] The licensee also gave his views as to whether certain rooms in the residence could properly be termed as *"bedrooms"* e.g. because one was clearly a covered-in porch, or veranda, and was rather small. He referred to another room as a sunroom and felt it would be misleading to call it a bedroom and, in particular, it had a servery access from the kitchen next door to it.

[35] In any event, all his marketing material was approved by Mr Porus on behalf of the mortgagee vendor.

[36] The licensee then referred to the particular tender process which he undertook and to the evidence of the various witnesses for the appellant. In general, he maintained that those persons cannot have made much of an effort to communicate with him at material times.

[37] The licensee said that the tender closed on 27 May 2013 but, due to a Court injunction obtained by the appellant, the tenders were not opened until 3.00 pm the next day, Tuesday, 28 May 2013. Although five tenders were received, none of them were at a high enough level for the mortgagee. The licensee felt that a reason for the low offers at tender was that the mortgagee vendor had been unable to insure the property.

[38] The licensee understood that, at that point, the mortgagee vendor undertook to repair the property and rent it rather than sell it. That meant the end of the licensee's dealings with the marketing of the property. However, about a month later the licensee was told by a member of the mortgagee's staff that the property was under offer and, he assumes, it was eventually sold to that offeror.

[39] In terms of the allegation that the property was sold to a friend of his, the licensee noted that the purchasers were Odette and Richard Humphreys and are not known to him.

[40] The licensee also confirmed to us that he received payment for the work he had undertaken in relation to the tender process for the property.

[41] Of course, the licensee was carefully cross-examined by Mr Maze and Ms MacGibbon, mainly with regard to various detailed plans and descriptions of the house and its rooms, with a view to clarifying the sensible character of the various rooms in the property.

[42] Ms Nash referred the licensee to the detail of the Structex report.

[43] Under careful cross-examination from Mr Maze, it was put to the licensee that the advertising showed three bedrooms upstairs and one downstairs when there were really seven bedrooms; but that advertising referred to there being a separate flat as well. Initially, the advertised reference organised by the licensee for late April 2013 was to only three bedrooms. The licensee accepted that the number of bedrooms was very important when advertising real estate and emphasised that, inter alia, he had taken account of the Structex report with its floor plan.

[44] The licensee did not accept that there had been a mistake in first advertising the property as comprising three bedrooms but remarked, without prompting, that he had, less than a week later, thought it better to take account of a bedroom downstairs in what he regarded as a separate flat. Under pressing from Mr Maze, the licensee would not accept that his advertising was mistaken about the number of bedrooms; although he put it *"I don't entirely agree"*, seemingly, because he regarded the situation over the number of bedrooms and the available separate flat as rather flexible from an advertising point of view. He seemed to accept that the downstairs sunroom could, just, have a bed fitted into it; and, similarly, the sunroom upstairs, although he regarded that as a porch which had been fully enclosed.

The Stance of the Appellant

[45] Mr Maze (counsel for the appellant) helpfully clarified that, although the appellant had in his initial complaint to the Authority challenged the authority of the licensee to sell the property, as well as alleging misleading advertising by the licensee, he now accepts that the licensee's authority to sell the property *"derived from the contractual arrangements between Norfolk Mortgage Trust and Mr Findlay".* He added: *"Mr King's complaint principally relates to the actions of the mortgagee which cannot be sheeted home to Mr Findlay. Further, on the evidence it does not appear that Mr Findlay in fact sold Mr King's property"*.

[46] Mr Maze put it that the appellant (Mr King) seeks that we find that the licensee has engaged in unsatisfactory conduct due to the misleading and inadequate advertising alleged above.

[47] Mr Maze appropriately covered the effect of s.72 of the Real Estate Agents Act 2008, which defines *"unsatisfactory conduct"*, and referred to rules 5.1 and 6.2 of the Real Estate Agents Act (Professional Conduct and Client Care Rules 2009) which respectively read:

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

…

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

…

[48] There was also reference in the course of the hearing to rules 6.1, 6.4, and 9.1 which respectively read:

"6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.

…

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.

…

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law."

[49] Mr Maze noted the following definitions in rule 4, namely:

*"**Customer** means a person who is a buyer or potential buyer of land or a business, and who is not a client as defined under section 4 of the Act*

***Prospective client** means a person who is considering or intending to enter into an agency agreement with an agent to carry out real estate agency work."*

[50] Mr Maze then dealt with the substance of the appellant's case as follows:

"a. That Mr Findlay breached the duty to deal with customers fairly by failing to provide tender documents to customers (Mr Buxton, Mr Booth, Mr Keir and Mr Kipping) when requested to do so;

b. That Mr Findlay breached the duty to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work, by failing to return telephone calls made by customers, namely, Mr Buxton, Mr Booth, and Mr Keir;

c. That Mr Findlay breached the duty to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work by incorrectly describing the property. The particulars of the complaint are:

i. describing the house as a three bedroom house;

ii. describing the house as a four bedroom house; and

iii. describing the house as having two parking spaces when it had two "outside" parking spaces as well as a large double garage."

[51] Then Mr Maze very helpfully dealt with those categories of complaint in some detail.

[52] Essentially, Mr Maze submits that the conduct of the licensee at material times fell short of the standard required by the licensee in terms of s.72. We now set out the submissions contained in Mr Maze's typed brief concerning the number of bedrooms in the house, namely:

"47. The evidence of Mr King that the property had seven bedrooms is supported by the report of the quantity surveyor at Arrow International.

48. Mr King also relies on the report by "Ford Baker" at REAA Bundle page 17.

49. The evidence of Mr King is that the property had three "outside" parking spaces as well as a large double garage.

50. The number of bedrooms which the property could reasonably be described as having is a question of fact. In my submission, more probably than not, the answer to that question is seven. Likewise the question of the number of parking spaces ought to be resolved in Mr King's favour.

51. If that is accepted then the advertisements stating that the property had three or four bedrooms were incorrect and had a misleading effect, likewise for the parking spaces. In my submission a reasonably diligent and competent real estate agent would have correctly identified the number of bedrooms in, and parking spaces at, a house before advertising it. Accordingly I submit that Mr Findlay has breached the duty to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work."

The Stance of the Licensee

[53] Ms Nash submits that this appeal is of no merit and appears to be motivated by the appellant's dissatisfaction with the actions taken by the mortgagee. She also submits that the licensee was carrying out duties to his client the mortgagee who had a right to sell the property, as covered in *Norfolk Nominees Ltd v King* [2013] NZHC 398.

[54] With regard to the allegation that the licensee misdescribed the property as a three/four bedroomed home rather than a six/seven bedroomed home as maintained by the appellant, Ms Nash puts it that a licensee must be able to justify his representations and, if there is any uncertainty, must take a conservative approach.

[55] Ms Nash points out that, in so far as the appellant seemed to be making a new complaint at this point that an honest market sale process was not achieved because individuals were prevented from bidding and that the Fair Trading Act 1986 was breached because buyers were told the property was *"off the market"*, that does not come within our jurisdiction as it was not an issue considered by the Committee. We agree. In any event, the appellant did not seem to pursue before us the issue of a

breach of the Fair Trading Act 1986; and the issue or evidence of individuals being prevented from *"bidding"*, no doubt *"tendering"* is meant, is rather flimsy and unconvincing.

[56] As counsel for the licensee put it, the issue is whether or not the license breached his duty to exercise skill, care, competence and diligence at all times when carrying out real estate agency work by, allegedly, incorrectly describing the property. In support of that submission and the evidence before us about the number of bedrooms in the property, counsel for the licensee submitted:

> *"Bedrooms*
>
> *[35] Just as the complaint itself has gone through a number of iterations, so has the number of bedrooms according to the appellant. The appellant's latest contention is that the property has seven bedrooms; however, in the past, he has vacillated between six and seven bedrooms in the context of this complaint. To the CAC, his final position appeared to be that there were six bedrooms; indeed, that is the basis upon which the CAC evaluated his complaint. His position in this regard continued, with him again stating that the property was a six-bedroom property in his Notice of Appeal, dated 22 November 2013, apparently supported by an extract from a Report by Ford Baker Registered Property Valuers.*
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> *[36] However, by memorandum to the Tribunal, dated 12 February 2014, the appellant had reverted to the contention that the property boasted a seven-bedroom dwelling and details this proposition therein.*
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> *[37] The appellant relies on a report from Arrow International in support of his current claim that the dwelling contains seven bedrooms. The report is unsigned and undated but notes a "visitation date" of 27 October 2011 and an "issue date" of 28 October 2011, some two and a half years prior to the sale of the property. The report appears to have been commissioned by AMI insurance and produced for the purposes of determining the feasibility of reinstating the dwelling to its pre-earthquake condition as per AMI policy. It is a methodical report with barely any commentary, focussing instead on a quantitative assessment of the damage attributable to the earthquakes. It was not produced for the purposes of valuation, nor for the marketing and sale of the property.*
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> *[38] The report concluded that: "the house will need to be demolished including the foundations due to the level of differential settlement being over acceptable tolerances for repair."*
>
> *[39] The report does not support the appellant's contention that the property had seven bedrooms; it only provides for six, four of them in the main house and two bedrooms in the downstairs flat. The report provides no description of the rooms and no criteria for their definition as "bedrooms".*
>
> *[40] The respondent has outlined his approach to the marketing of the property in his brief of evidence, dated 17 June 2014, at paragraphs [12]-[21]. Essentially his approach was to market the property with those rooms that could clearly be defined as bedrooms, the remaining rooms being left for potential purchasers to make their own assessment as to usage.*

> *[41] The respondent's position (and that adopted by the CAC at first instance) is that if he were to market the property in question as a six or seven bedroom house, he could potentially open himself up to complaints from potential purchasers in relation to a breach of rule 6.4 of the Code, …"*

[57] The appellant contends that this issue involves an examination of rule 5.1 (set out above) whereas counsel for the licensee puts it that the CAC was correct in determining the issue in relation to rules 6.2 and 6.4 (set out above). The view put for the licensee is that, even if we did consider the matter with regard to rule 5.1, we should not differ with the CAC as the facts do not disclose any failure by the licensee to act competently and diligently in his marketing of the property. We agree. It is also put for the licensee that we should take account of rules 6.1 (set out above) and rule 10.9 which stipulates that: *"A licensee must not advertise any land or business on terms that are different from those authorised by the client"*. We agree that if the licensee had advertised the property in the manner contended for by the appellant, then he would have been in breach of most of the rules referred to and would have exposed himself to a potential complaint from his client.

[58] Mr Parker notes that the appellant relies on a report from Arrow International in support of his claim that the dwelling contains seven bedrooms. That report is unsigned and undated but notes a *"visitation date"* of 27 October 2011 and an *"issue date"* of 28 October 2011, some two and a half years prior to the sale of the property. It is a methodical report with barely any commentary. It was produced to provide the appellant's then insurer with the results of a quantitative assessment of the earthquake damage for valuation purposes, not for the marketing and sale of the property. The report concluded that: *"the house will need to be demolished including the foundations due to the level of differential settlement being over acceptable tolerances for repair."* The report also estimated that the total rebuild budget for the property would be $802,506.52, comprising $664,885.76 of works within EQC scope and the remainder outside of it.

[59] Mr Parker adds that, despite the content of that report the appellant, in his lay opinion, disputes that the property sustained significant earthquake damage and was in need of demolition. Further, he refused to accept that such factors could have had any impact on the pricing structure of the property and the offers received.

[60] We note that the Arrow report does not support the appellant's contention that the property had seven bedrooms; it provides for six bedrooms, four of them in the main house and two bedrooms in the downstairs flat. The report provides no description of the rooms and no criteria for their definition as *"bedrooms"*. During cross-examination it was put to the appellant that the report listed six bedrooms rather than seven. He indicated the presence of another room on the upstairs level; however, the Arrow report termed that room as an *"office/study"* rather than a bedroom. The appellant had no explanation for this apparent 'misnomer' other than *"it was wrong"*. Mr Parker put it that it seems that the appellant seeks to rely on some of what the report says but is not prepared to accept its conclusion on the damage nor its definition of one of the contentious rooms as an 'office/study'.

[61] Mr Parker also suggests that it is likely that the only reason two of the three contentious rooms were listed as *"bedrooms"* by Arrow in its report was because there were beds in those rooms when the surveyors visited the property to assess the damage. He opines that the beds would have operated as a reference for the

surveyors whose brief would not have required any independent evaluation of whether or not those rooms were in fact bedrooms.

[62] Conversely, the licensee's evidence is that the house was devoid of furniture when he visited the property so that he had to apply his own judgement and come to his own determination as to the manner in which he should represent the rooms. Mr Parker submits that he did so on a reasonable and reasoned basis.

[63] Mr Parker noted that it was submitted for the appellant that the licensee, when trying to ascertain how to market the property, should have approached the appellant to ascertain his views on the property and the usage of the rooms on the basis that the appellant had lived in the property and *"knew all of its quirks."* However, we accept that it would have been delicate and, perhaps, inappropriate for the licensee to approach the appellant for comment where the property was being sold by mortgagee sale. During cross-examination, the licensee explained that, in mortgagee sale situations he would often, as in this case, receive his instructions from the solicitor for the mortgagee. He went on to say that, in such circumstances, he feels it would be inappropriate to then go and seek assistance or comments about any aspect of the sale process or the property from the former owner, as the licensee's client is the mortgagee.

[64] It is put that the licensee's approach was to market the property with reference to those rooms that could clearly be defined as bedrooms and let potential purchasers make their own assessment as to usage of the remaining rooms. He considered that, if he were to market the property as a six or seven bedroom house, he could potentially open himself up to complaints from potential purchasers in relation to a breach of rule 6.4 set out above.

[65] It is submitted for the licensee that, whatever rule is applied, the complainant has failed to establish that, by advertising the property in the manner that he did, the licensee failed to exercise skill, care, competence and diligence at all times.

Re Final Oral Submissions

[66] There was much reference to plans and photographs regarding the rooms in the property.

[67] Understandably, Mr Maze spent some time dealing with our jurisdiction in terms of the findings of the Committee and also about just what information or evidence was before the Committee compared with what is now before us. However, he accepts that the hearing before us is de novo.

[68] The focus of the case for Mr King is that the property comprised at least six bedrooms but the licensee had advertised first at three and then four bedrooms. His case is simply that the property was advertised deficiently because the number of bedrooms was (in his view) grossly understated and that led to a lack of properly priced tenders and, ultimately, (in the view of Mr King) to a significant monetary loss by him due to the failings of the licensee. It is asserted that the licensee was wrong to advertise the property as three bedrooms when he himself very soon realised there were four bedrooms but that, in any case, there were at least six and, arguably, seven bedrooms and the property should have been advertised on the basis of six or seven bedrooms. We infer that it is being put for Mr King that, rather than there

being reference to a separate flat, the advertising focus should have been on the maximum number of bedrooms.

[69] Mr Maze submits for Mr King that, accordingly, the licensee is guilty of unsatisfactory conduct and it is for us to fix an appropriate penalty.

[70] In her final oral submissions Ms MacGibbon emphasised that if issues have not been put before the Committee, we are barred from dealing with them in terms of *Wyatt* and *Garlick.* However, she also put it that if matters raised before us were in contemplation before the Committee, then we do have jurisdiction and that it is up to us to decide precisely what was put before the Committee. She accepted our remark that Mr King may not be barred from laying a fresh complaint should there be further evidence or argument available. Our discussion and reasoning below incorporates Ms MacGibbon's very helpful submissions.

[71] Further to her submissions referred to above, Ms Nash emphasised that Mr King is well able to formulate his complaints, is not a stranger to the Courts, and that more than adequate evidence is before us to deal with all issues.

DISCUSSION

[72] All counsel referred to the High Court decision of *Wyatt v REAA and Barfoot & Thompson Ltd* to which we referred above. For present purposes, we note that Woodhouse J found in *Wyatt* that an issue which was not the subject of a determination of a Committee could not be entertained by us and jurisdiction could not be granted by agreement between the parties.

[73] Ms MacGibbon particularly referred to rule 6.4 set out above.

[74] Ms MacGibbon noted that in *Wright v CAC & Woods* [2011] NZREADT 21 at [41]-[43] we said:

> *"The emphasis in r 6.4 and 6.5 is on the conduct of [the] licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent. We also agree with submissions made by counsel that, for example, suggesting a building report should be obtained cannot avoid liability under r 6.4 or 6.5 however each case depends on its factual circumstances …*
>
> *A licensee must comply with r 6.4 and 6.5 and cannot turn a blind eye to problems with the property."*

[75] In *Donkin v REAA and Morton-Jones* [2012] NZREADT 44 at [9] we considered the limits of an agent's obligation to obtain information (in that case a LIM and rating information) before making positive representations in relation to a property. We stated:

> *"The point is that an agent should make sure before a positive representation is made that they have at least taken some precautions to check the veracity of the representation. … We do not expect that land agents will have the ability of a solicitor to determine the acceptable risks and problems with titles and/or*

> *covenants and/or LIM reports but clearly purchasers rely upon an agent when making representations as to the state of the property. The agents job is to ensure that the purchaser is not mislead. In this particular case if the agent had bothered to obtain a LIM or had called the Council to ask, or even obtained a rates report then there would have been no misrepresentation. The difficulty here was that without checking further the agent accepted the vendor's words and made no effort to alert anyone of any potential risk in accepting this statement."*

[76] We note that the allegation that the licensee failed to deal fairly with customers is rather vague in terms of the evidence provided to us; as is the allegation that he failed to return telephone calls made by customers. The essence of the case before us seemed to be that the appellant, as former owner of the home, is incensed that in seeking to sell the property by tender for the mortgagee, the licensee had described it only as a three bedroomed house, and then a four bedroomed house, and that it had two parking spaces when, in terms of the evidence from the appellant, it had two outside parking spaces plus a large double garage.

[77] Ms MacGibbon submits for the Authority that it is clear that the text of the advertising remained the same and, simply, the number of bedrooms changed between three and four. An explanation was provided by the licensee as to the reason for the change in bedroom numbers, namely, to represent the main area of the house with the three bedrooms upstairs; and then, later, the room downstairs was included as a bedroom in the house.

[78] Ms MacGibbon also puts it that the floor plan clearly describes the number of bedrooms as being four in total, rather than the seven referred to by the appellant. The Committee found that to have described the property as seven bedrooms would have been a misrepresentation. She submits that, on the evidence before us, there is nothing to show that the Committee decision was incorrect.

[79] She emphases that, essentially, the question for us is whether or not the second respondent misled potential purchasers by marketing the property as having three, then four bedrooms, rather than the seven bedrooms contended for by the appellant.

[80] Broadly, we agree with the submissions of counsel for the licensee and the Authority as we have covered them above.

[81] For all that has been adduced and argued before us, the essence of the concern of Mr King has not changed nor has the correctness of the CAC's reasoning.

[82] Essentially for present purposes, the CAC considered whether the property should have been advertised as being 6 bedrooms as maintained by Mr King without misleading interested persons. It noted that the licensee had marketed the property at 3 bedrooms plus a study upstairs and then 4 bedrooms but together with a separate flat downstairs which clearly contained a bedroom. The CAC noted the licensee's view that *"if the Property was advertised as having 6 bedrooms than potential purchasers would likely challenge this due to the size, position and status of some of the rooms"*. It also noted that it was questionable whether some rooms could be called bedrooms. It also stated: *"The agent's job is to ensure that the purchaser is not misled"*. As we have noted above, it found that the licensee had advertised the property appropriately.

[83] We have been referred to a May 2013 Ford Baker registered valuation prepared for the mortgagee. That valuation treated the house as having six bedrooms.

[84] The copies of 8 May 2013 advertisements adduced to us show, inter alia, 3 upstairs bedrooms and study and that downstairs *"living could be separate flat"*; and of 15 May 2013, 3 bedrooms and study upstairs and a bedroom downstairs and *"living could be separate flat"*.

[85] The Structex Metro Ltd 16 May 2013 engineer's report to the mortgagee *"to provide an assessment of earthquake damage and repairs required*" seems to consider the property to have 4 bedrooms as such but 2 sunrooms.

[86] A 28 October 2011 Arrow International report for the insurer of the property about remedial work from earthquake damage, seems to treat the property as having 6 bedrooms on the basis of 4 upstairs plus a study, and 2 downstairs but without regard to a separate flat or to the 2 sunrooms.

[87] In *King v Norfolk Nominees Ltd* (supra), Justice Fogarty assessed the licensee's advertising as, in effect, within the bounds of common sense. That is our view also.

[88] One of the sad features of this case is that the appellant is, understandably, gripped by losing his home to a mortgage lender, in the context of the horror of earthquakes, and cannot see that the licensee contracted a listing from the mortgagee and, in our view, commenced a sale by tender process in an expected manner. That involved, inter alia, formulating newspaper advertisements which, in turn, led to deciding the number of bedrooms in the property. In all the circumstances, we think that the licensee went about that real estate agency work in a prudent and sensible manner.

[89] Generally speaking, we agree with one of the final submissions from Mr Maze that we must look at the overall situation in terms of fairness and natural justice.

[90] We do not think it necessary to be over-technical about the scope of our jurisdiction and we have taken into account all submissions put to us. Frankly, we think that the fair approach in terms of Mr King's complaints is that we consider all issues he has raised as being within our jurisdiction. We consider that the Committee applied all proper procedures in terms of its investigation and decision on the papers.

[91] It has not been proved (on the balance of probabilities) that the licensee failed to provide tender documents or return telephone calls.

[92] Having said that, the scope of our jurisdiction is somewhat academic in this case because we feel that a mountain has been made out of a rather simple issue, namely, whether there was any conduct failure by the licensee in his assessment of what rooms in the property were bedrooms so that there could be accurate advertising about that. We think that there is some scope for argument as to the number of bedrooms in the property at material times but, if there is reference to bedrooms and a self-contained flat or apartment as there was, the licensee cannot be criticised for understating bedrooms. It may have been preferable to have ignored the self-contained flat possibility and to have focused on the number of bedrooms; although in practical terms some of the rooms are more sun-porches than bedrooms.

[93] The licensee seems to us to have applied all appropriate skill, care, and competence regarding his marketing of the property.

[94] We observe that the focus before us was on the character of rooms in the property and whether or not they should be described as bedrooms. The advertising of available parking at the property was mentioned as being inadequate but we consider such an allegation as rather pedantic and beside the point on the facts of this case. It is most unlikely that any prospective purchaser was misled about available parking at the property.

OUR CONCLUSION

[95] We feel that the licensee has not been deficient in any way whether in terms of formulating the advertising which took place or in handling the marketing of the property for the mortgagee, as he had been instructed so to do. In any case we think that, in the context we have covered above, no further action should be taken against the licensee.

[96] Accordingly, we agree with the findings of the Committee and this appeal is hereby dismissed.

[97] 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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Mr G Denley
Member

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Mr J Gaukrodger
Member