BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 27

READT 049/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL AND CLARE DOLHEGUY**
	Appelants/Complainants
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC 303)**
	First respondent
AND	**SONIA STOTT**
	Second respondent (licensee)

MEMBERS OF TRIBUNAL

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

HEARD at CHRISTCHURCH on 27 March 2015

DATE OF THIS DECISION 20 April 2015

COUNSEL

The appellants on their own behalf
Ms J MacGibbon, counsel for the Authority
Mr P Napier, counsel for the licensee second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] This case arises out of confusion by complainant property purchasers about the concept of a right-of-way.

[2] Paul and Clare Dolheguy ("the appellants") appeal against the decision of the Complaints Assessment Committee which determined, under s.89(2)(c) of the Real Estate Agents Act 2008, to take no further action with regard to their complaint against Ms Sonia Stott ("the licensee"), a real estate salesperson.

Background facts

[3] On 2 March 2011, the property at 26A Brockham Street, Christchurch was listed with Vision Real Estate Ltd, trading as "Harcourts Vision".

[4] The property is on a rear section and a driveway, which forms part of the fee simple title of that property, provides a right of way easement for the neighbouring property at 26 Brockham Street.

[5] The appellants viewed the property with the licensee in April 2011 and made a conditional offer to purchase it on 12 May 2011. That offer was conditional upon finance, obtaining a LIM report, insurance matters, solicitor's approval, and a structural engineer's report. The agreement became unconditional and the appellants settled the purchase and took possession of the property on 17 June 2011.

[6] In February 2013, the appellants came home to discover that their neighbour, Layzell Ltd, had removed part of the driveway fence. The appellants believed that Layzell had no right to remove the fence or use their driveway to access No. 26. However, on 18 April 2013, a Disputes Tribunal found that the fence was erected on Layzell Ltd's land, and not on the boundary of the properties of Layzell Ltd and the appellants.

[7] The appellants complained to the Authority that the licensee failed to disclose the existence of the right of way and represented to them that the driveway was part of the property (their property at No. 26A) and, therefore, under total control of the appellants. The evidence adduced to us does not support non disclosure of the right of way for No. 26. Also, they acknowledge that they discovered the easement as part of their own due diligence on the property.

[8] The appellants also complained that the licensee assured them that the driveway fences were on the boundary. Again, the evidence is not to that effect.

[9] The appellants say they would not have purchased the property if they had known about the access and boundary issues, as privacy was of the utmost importance to them.

[10] Prior to the hearing before us, the licensee stated that she told the appellants that they owned the driveway but that the neighbouring property had a right of way over it. She said that she provided them with a copy of the title for the property on 18 April 2011 when she emailed a copy of this to the appellants, which is evidenced by her diary note to that effect. It is noted that there is no current email copy which, she states, is because data was lost in the subsequent process of her changing computers. Her computer technician has confirmed that there are no sent email items on her computer for the relevant period. The appellants dispute that this email was ever received by them. They further note in their submissions that the "*Claire*" referred to in the diary entry is not the spelling of *"Clare"* Dolheguy but rather of *"Claire"* Reid, a work colleague of the licensee and the listing agent of the property.

[11] The licensee states that she did not point out the boundary to the appellants as she had no reason to think that the fence was the boundary, and she is aware that is not always the case.

[12] Broadly, the evidence to us from the licensee remained consistent with what was put before the Committee.

The Committee's 7 April 2014 Decision

The easement

[13] The Committee considered that the issue relating to the easement is whether the right of way was explained to the appellants; and it found:

[a] That the licensee correctly told the appellants that they owned the driveway, and that ownership of the driveway was not shared and that it was not partly owned by another party;

[b] The licensee disclosed the easement to the appellants;

[c] That the licensee genuinely believed that the appellants would also take advice from their solicitor about the easement before the contract was declared unconditional;

[d] That the licensee exercised reasonable care and skill in making the agreement subject to the appellants' solicitor's approval but that the appellants did not discuss the title or easements with their solicitor. They did not turn their mind to the issue of the easement or believed that it would not be exercised.

The fences being on the boundary

[14] The Committee observed that it is not a requirement for a licensee to establish or point out boundaries for a property in every case. The Committee accepted the evidence of the licensee and found it unlikely that the alleged representation (that the existing driveway fencing was on the boundary) would have been made given the licensee did not know where the boundary was.

Conclusion of Committee

[15] Accordingly, the Committee determined to take no further action against the licensee on the complaint. The Committee's reasoning is clear and detailed and it provided the following summary:

> *"4.4* ***Summary***
> *4.4.1 It is not a requirement for a licensee to establish or point out boundaries for a property. The Committee is satisfied that the licensee is unlikely to have done this.*
>
> *4.4.2 It is debateable whether or not an easement on a title forms part of the duty of disclosure to a potential customer. The title check is most often completed by a solicitor, as this forms part of the general terms of sale. The complainants accept that their solicitor provided them with copies of the title and easement document prior to the expiration of the conditional period. The easement document clearly contains the words "right of way" and the title itself has a memorial referring to the right of way. It appears that the opportunity to discuss the title with their solicitor was not exercised by the complainants.*

4.4.3 The licensee and Ms Reid have presented evidence that supports the licensees position that disclosure of the easement was made. The complainants state that they thought the easement related to drainage, which leads the Committee to believe that the easement was known to the complainants, albeit they misunderstood its application.

4.4.4 The key factor to the Committee is that the complainants had time and opportunity to look into the property and obtain expert advice on legal matters before committing to an offer and again once the offer was accepted during the conditional period.

4.4.5 The Committee believes that the complainants may have misinterpreted the licensee when she discussed the ownership of the driveway. It is not unreasonable that the complainants would assume ownership meant total control, but as there is conflicting evidence about what was said on the matter, there is insufficient evidence to meet the threshold for unsatisfactory conduct.

4.4.6 The Committee will therefore take no further action against the licensee on this complaint."

A summary of the evidence adduced to us

The evidence of Mr Dolheguy

[16] Mr Dolheguy broadly confirmed the above facts and expressed his concern that he purchased the property with the advice of the licensee in May 2011 but that, in February 2013, the neighbour at No. 26 Brockham Street tore down the said boundary fence to enable that neighbour access the rear of his section by vehicle. That led to an unsuccessful action by the appellants before a Disputes Tribunal.

[17] Mr Dolheguy puts it that he was not in any way advised by the licensee as to the terms of an easement in favour of that neighbour over the driveway to the property of Mr and Mrs Dolheguy at No. 26A (apparently owned in a Family Trust); nor was he advised that the relevant fence was not erected on a boundary but within the land of the neighbour; and that a previous owner of No. 26A had consented to that; and as the driveway was formed with concrete up to that fence as Mr Dolheguy said, it looked like the boundary fence. His grievance is that at no stage did the licensee advise that, at law, the fence could be removed at any stage by the neighbour, as he put it, "*under the terms of the driveway access easement*".

[18] Mr Dolheguy maintains that the licensee should have known the terms of the easement and, more so (as he puts it), the definition of the boundaries. He considers that *"the definition of easement, land use and such issues are part of the land and house parcel that the agent is selling*" and that all such matters should be disclosed to prospective purchasers. Much of Mr Dolheguy's evidence is argument or submissions, rather than evidence about facts.

[19] Insofar as the licensee had advised the Committee, and gave such evidence to us, that she sent an email to Mrs Dolheguy with the easement terms; that is denied by the appellants. The latter admit that they had their Family Trust purchaser take legal advice at the stage of making an offer to purchase the property but they are firmly of the view that their lawyer did not fail them and that the licensee did.

[20] Mr Dolheguy referred to earlier visits of the complainants to the site with the licensee when, he asserts, the licensee told the complainants many times "*that the land includes full ownership of the driveway. You cannot be locked out and that is not shared with neighbours as occurs in many situations with rear section owners owning part of driveways and they are shared*. *This was clearly a point made to us as a key feature and benefit of the driveway ownership structure, never did agent allude to the arrangement for access off the driveway especially from the fenced portion of the driveway as it existed then."*

[21] In further evidence-in-chief, Mr Dolheguy expanded on what the appellants had sought as a property to provide privacy. He felt the house had only been constructed within the previous two years and the driveway, as one walked down it towards the house, was fully fenced on the left side and partially fenced on the right side; but so that the boundaries of the house at 26A were fully fenced and the fence in question was 1.8 metres high of standard timber palings. He insisted that the licensee had advised the appellants that they (the appellants) would own the driveway, it was all theirs, no one could block or prevent them from accessing the house, and that was a good thing as the drive was not shared ownership as is often found on rear sections. Mr Dolheguy had noticed that there were no boundary pegs to be seen but puts it that the licensee said what you see fenced here is yours, or he got that impression.

The Cross-examination of Mr Dolheguy

[22] Of course, Mr Dolheguy was carefully cross-examined by Ms MacGibbon and then by Mr Napier. He admitted to Ms MacGibbon that he had his lawyer vet all relevant documents, including the title to the property and the easement document, and emphasised that the state of the driveway was very important to him and his wife and, in particular, they required a private and peaceful section.

[23] He again referred to the licensee having stood with them on the driveway, extending her arms and saying: "*all this is yours and no one can stop you using it*". She also told them, Mr Dolheguy asserts, that the driveway was private to their property and no one else could block them, apparently, in terms of an outlook. He had emphasised from the outset that he and his wife required to enjoy retirement at the property "*in peace and harmony*".

[24] He seemed to then say that he did not recall discussing boundary matters with the licensee even though he and his wife made many visits to the property prior to purchasing it in order, as he put it, to tick all the boxes.

[25] Later in his cross-examination by Ms MacGibbon, Mr Dolheguy said he referred to the "*nice new boundary fences*" when talking at the site with the licensee, and that he understood that the property had been subdivided off an older home nearby; and he said he asked the agent if the boundary was okay because he had noticed an old fence behind the new fence and queried with the agent as to how those fences tied into the boundary. He asserts that she responded that the fences are there are they are new and what you see is what you get; and there was also reference by the licensee to the neighbouring property in question (No. 26) having a vehicle entrance onto its front lawn rather than by way of the driveway.

[26] Inter alia, it was put to Mr Dolheguy by Ms MacGibbon that the licensee says she did not indicate any boundary to the appellants as she did not know where the relevant boundary stood and she had simply said to them "*this is the boundary*

fence". Apparently, the vendor was then present and he went to great lengths to add that this property could not be built out. The response and stance of Mr Dolheguy is that he and his wife "*wanted a nice private back section and she, the agent, in general terms pointed out the boundary fence*".

[27] It was put to him also that the licensee had said that the Dolheguys would have total ownership of the property but that the relevant neighbour had a right of way over the drive. Mr Dolheguy responded to that question from Ms MacGibbon: "*No, she convinced us it was all ours*".

[28] To Mr Napier, Mr Dolheguy asserted, *inter alia*, that the licensee never suggested that the driveway was to be shared with the neighbour. He admitted that she may have used the expression that there was a right of way but Mr Dolheguy firmly states that, if she did, he took it as meaning a right of way for the appellants to their property. He added that if the licensee had used the word "*shared*", with the people at No. 26 having access on the drive up to the front door, the appellants would not have purchased the property because it would have taken away the privacy they insisted upon.

[29] Mr Napier put it to Mr Dolheguy that the appellants had been advised by their lawyer who must have explained the effect of the right of way to them. However, Mr Dolheguy was and is firmly of the view that it was the task of the licensee, and not of his solicitor, to explain in simple words the effect of the right of way easement and that was not done.

[30] Mr Dolheguy insists that, until well after the event and at the time of the litigation in the Disputes Tribunal, he did not know what the word "*easement*" meant and he did not know that the driveway over the property No. 26A, which the appellants purchased through their Family Trust, had an easement over it for the benefit of the neighbours at No. 26.

[31] It was put by Mr Napier to Mr Dolheguy that, surely, his solicitor had explained the meaning and effect of the easement to him. Mr Dolheguy responded that his lawyer simply said "*it is a standard easement*" so that he did not know that it gave a right of way over his driveway to the owner of No. 26 and he had thought that the words "*standard easement*" meant normal full access exclusively to the appellants as owners of No. 26A.

[32] Mr Napier also put it to Mr Dolheguy that the licensee will give evidence that she did not refer to the fence in issue being on a boundary. Mr Dolheguy then accepted that she did not refer to the fence as a boundary fence but he had got the impression that it was. He said that his real issue with the licensee is that the said fence was able to be removed by the neighbour and she did not advise him of that.

The evidence of Mrs Dolheguy

[33] Mrs Dolheguy said that the garage of the neighbour at the rear of the neighbour's property was not clearly visible at the time the appellants purchased the property and was probably obscured behind a very large tree at that time. The appellants had assumed that the garage was a garden shed and it did not occur to them that anyone would have built a garage but then allowed it to be blocked off from access by a fence with no gate.

[34] The appellants made it clear they have been so upset by the stress from the above issues that they can no longer live at the property, which they had regarded as a lovely modern home, and they are selling up and building another property elsewhere. Mrs Dolheguy's attitude is that No. 26A is not now the property they bought and she asks "*why did our real estate agent, Ms Stott, tell us that it would be our own private driveway when, in fact, she knew that the front neighbour had the rights to spoil our lifestyle at any time that he so wished. …?*"

[35] Under cross-examination by Ms MacGibbon, Mrs Dolheguy referred to the licensee saying to the appellants that "*this (the driveway) is all yours and you do not have to share it with anybody",* holding out her hands as she said that. She also told Ms MacGibbon that she did not discuss the fence with the licensee and nor was there any reference between them about the boundary of the driveway.

[36] Again to Mr Napier, Mrs Dolheguy referred to the licensee telling the appellants that they did not have to *"share*" the driveway.

[37] Mr Napier put it to Mrs Dolheguy that the licensee told the appellants that, although they would own the driveway as purchasers of No. 26A, the neighbours at No. 26 had a right of way over that driveway. Mrs Dolheguy responded that there had been no mention of the neighbours having such a right but that the appellants were told there was a right of way over the driveway and she understood that as meaning to her "*yes but to our property*", i.e. the right of way was for the benefit of the appellants; and that they (the appellants) did not know what "*right of way*", or *"easement*", actually meant.

[38] Accordingly, Mr Napier put it to Mrs Dolheguy that the licensee had told her there was a right of way over their driveway for the benefit of No. 26, but Mrs Dolheguy responded "*she did not say that*".

[39] It was also emphasised that the appellants were keen to purchase the property because they thought it comprised "*a lovely house*".

The Evidence of the Defendant

[40] Ms Stott noted that the property had been listed by her colleague, Claire Reid, also from Vision Real Estate Ltd in Christchurch. Ms Reid had made Ms Stott aware of the right of way over the driveway and, subsequently, provided her with a copy of the title which showed that. At the time of the viewing by the appellants, the right of way was not being used by the neighbour at No. 26 even though there was a garage at the back of No. 26 which could only be accessed by the driveway to No. 26A Brockham Street. Ms Stott added: "*the landowner of 26 Brockham Street had, I understand, acted on a request from his tenant to secure the back of the property with a fence, thereby blocking vehicle access to the garage*".

[41] Ms Stott stated that she explained to the appellants at the property that the home at No. 26A (which they were to purchase) owned the driveway but that the neighbouring No. 26 had a right of way over that driveway.

[42] With regard to the fencing, Ms Stott stated in her evidence-in-chief "*the fence between the two properties acted as a physical boundary, but I did not make any representations about it being on the boundary. It appears that the fence is in fact inside the boundary of 26 Brockham Street which gives [the appellants] a wider driveway at 26A Brockham Street. I did not know this at the time".*

[43] Ms Stott is sure that, early on in negotiations, she sent a copy of the title to the appellants by email and has a diary note of 18 April 2011 that she did that. However, that email cannot now be found on her computer because, in the meantime, she has transferred her records from one computer to another.

[44] She asserts that, in all her discussions with the appellants, she repeated that although they would own the driveway to No. 26A if they purchased it, there was a right of way over it in favour of No. 26. In any case, because she had their agreement for purchase drawn up on a conditional basis, she fully expected that their lawyer would discuss with them all issues as to title.

[45] She is distressed that, seemingly, the appellants did not fully comprehend at material times the potential consequences of the right of way easement over their driveway and that the fence did not form the boundary to their property. She asserts that she made no representation as to the location of the boundary or its relationship to the fence and that she had no reason to think that the fence was not on the boundary.

The Cross-Examination of Ms Stott, the Licensee

[46] Ms Stott was carefully cross-examined by Mr Dolheguy. He put it to her that she was aware of the effect of the easement and she responded in the affirmative and that she knew the fence could be pulled down by the neighbour. The licensee responded to the latter point about the fence that she did not make any representations to the appellants about the fence or the boundary; and that she genuinely thought that the fence would not be pulled down, even though she realised it had been erected partly on the driveway over which the neighbour would need to come to obtain vehicular access to his garage and would need to remove part of a fence to be able to do that.

[47] She asserts that she clearly told the appellants a number of times that they owned the driveway but there was a right of way over it; and she genuinely thought they understood the effect of that.

[48] Mr Dolheguy put it to the licensee that she knew that the appellants wanted a fenced and very private property and she had failed to tell them that, because of the right of way, the fence could be removed. The licensee responded that she supposed it was always a possibility that fences could come down but she had no reason to think that in this case.

[49] The licensee responded to Mr Dolheguy that she genuinely believed he and his wife understood the effect of the easement and that they were receiving careful legal advice.

[50] Again to Ms MacGibbon, the licensee said that she took every effort to provide all information about the title and easement to the appellants; and that, with regard to the boundary, she made no representations whatsoever.

The Stance of the Authority

[51] The Authority agrees with a submission for the licensee that this is a factual appeal which will turn on our findings about what was said by the licensee to the appellants regarding the extent of access (at No. 26) to the driveway. It is submitted that if the licensee's evidence is accepted as that she informed the appellants that

the neighbouring property had a right of way over the driveway, then the Committee's decision should be upheld; but if we determine that the appellants were only informed that they had ownership of the driveway, and not that the neighbours had a right of access, that this is a misrepresentation by the licensee.

[52] It is submitted for the Authority that, in terms of driveway access and use, disclosure of such information is material to the purchase of a property of this kind and, particularly in this case, where land had been divided into three separate titles, and, access to the property in question was down a long driveway between the two other sections.

[53] If the appellants were told by the licensee that they had total ownership of the driveway, this information is correct but not the complete picture, and can be characterised as misleading. There was an existing fence which blocked any access by the neighbouring property to the driveway. Therefore, from the physical appearance of the property there was nothing to put the appellants on notice that the neighbouring property had a right of access over the driveway. If this was not properly explained to them, then to characterise the property at No. 26A as having total ownership would be misleading.

[54] While the Committee noted that the licensee included a solicitor's clause in the sale and purchase agreement, it is submitted for the Authority that this does not abdicate the responsibility of the licensee to provide accurate information to potential purchasers. We agree.

[55] The issue with regard to the fence is not that the licensee incorrectly identified the boundaries of the property but, rather, her alleged failure to point out that the fence was not on the boundary line and could therefore be removed to allow access. *Fitzgerald v REAA* [2014] NZREADT 43 (at [20]) is cited as authority for the proposition that, without being on notice that it was an issue for the appellants, the licensee was not required to inquire into the correct location of the boundaries.

[56] However, it is also put for the Authority that this would be a non-issue if the appellants were aware of the neighbours' right of access over the driveway. The positioning of a fence cannot operate to exclude an owner's lawful right of access. It is therefore submitted for the Authority that the primary consideration for us in this appeal is the factual determination as to what information was conveyed by the licensee to the appellants concerning the driveway.

The Stance of the Appellants

[57] The concerns and complaints of the appellants have been covered above but we appreciated their quite extensive typed submissions which also take issue with a number of findings of the Committee. Simply put, they submit that the licensee did not correctly or reasonably accurately explain to them the terms of the easement over the driveway; led them to believe that the fence represented the boundary; did not provide them by email with details of the certificate of title of the property as she promised and maintains that she did; and generally failed in her duties to them.

[58] In his final oral submissions, Mr Dolheguy lucidly repeated the complaints of the appellants and put it that, while they were told there was a right of way over their driveway, they were not told that they were sharing the driveway *"right up to our front door*" (as he put it) and that they (the appellants) did not understand that the licensee

was telling them that the easement over the driveway gave the neighbour a right of way over it and she knew that but did not explain it to them.

[59] He repeated their complaint that they had no idea that that neighbour could tear down the boundary fence because it was not on the boundary but on the neighbour's property. They assert that the licensee knew that was possible but thought it unlikely and never made that point to them.

[60] The appellants also maintain that at no time did the licensee ever show them the easement document and that she did not send it to them by email as she maintains.

[61] They also assert that the licensee is wrong to say that the neighbour's garage off the right of way was visible, because at material times it was blocked by a huge tree and looked like an old tin shed. They say that they had no idea that their neighbour would want, let alone is entitled, to access it off the right of way. They observed that the concrete forming the driveway was identical on both sides of the right of way for its entire length so that there was nothing to suggest that the fence could be of a temporary nature or that the driveway was not what it seemed to be.

The Submissions for the Licensee

[62] The stance of the licensee is that she clearly informed the appellants about the fact of there being a right of way over the driveway to the property they were to purchase and also that she made no representation as to the location of the boundary or its relationship to the fencing. We appreciated the detailed typed submissions along those lines from Mr Napier referring to relevant evidence and analysing the reasoning of the Committee.

[63] In his final oral submissions to us, Mr Napier put it that he was fairly much accepting of the submissions from Ms MacGibbon on behalf of the Authority. He submitted it to be clear from the *Fitzgerald* case that, unless an agent has a suspicion that a fence was not on the boundary, the agent is not required to refer to fencing and that there is evidence in this case that the licensee clearly made no representation about the boundary fencing.

[64] Mr Napier submitted that the evidence is that the licensee clearly stated there was a right of way easement over the driveway in favour of a neighbour at No. 26 and that the complainant appellants accept that but say they did not understand the effect of that to be that they were sharing their driveway. Mr Napier put it that Mr Dolheguy presents as a sensible business person so that the licensee had every reason to believe he understood the effect of a right of way and that, if he did not, that cannot be visited on the licensee especially when the appellants were being advised by a solicitor in the usual way.

[65] Mr Napier submits that we should accept the evidence of the licensee that she sent the promised email to the appellants providing them with a copy of the title and the easement but, in any event, she had explained the existence of the right of way in favour of the neighbour to the complainants and they had also received legal advice from their solicitor about that.

[66] Mr Napier also put it that the licensee thought the fence was permanent as it was presented that way and she had no reason to think it was not placed on the boundary.

[67] He submitted that the licensee acted reasonably and competently throughout this transaction.

Discussion

[68] In *LB v The Real Estate Agents Authority*, [2011] NZREADT 39 we said:

> *"[18] We consider that a licensee, upon taking instructions for a sale of property, should search its title, or have some competent person search its title, or have some competent person search it for the licensee, and be familiar with the information gained from such a search. In this case it would have also been necessary to search the content of a transfer shown as containing a restrictive covenant. Such a search is not a difficult task to carry out or arrange. Similarly, the licensee should ascertain such matters as zoning and compliance with town planning regulations or Council requirements. We do not accept that a licensee can simply regard such matters as within the realm of a vendor or purchaser's legal adviser. Licensees should be familiar with and able to explain clearly and simply the effect of any covenants or restrictions which might affect the rights of a purchaser. This is so whether that purchaser is bidding at auction or negotiating a private treaty."*

[69] In *L v Real Estate Agents Authority* (CAC 20004), [2013] NZREADT 63 an agent advertised a property that was subject to a covenant restricting the age of those able to live there and we said:

> *"[13] … [T]he obligation of an agent is to go further than simply recognising that there are issues with the title and drawing it to the purchasers and their solicitors' attention. … Issues such as those raised in this covenant need to be known prior to the property being marketed because the terms of the covenant could significantly affect the way that the property can be sold and subsequently used. In this case clearly a covenant which appeared to restrict sale to persons over the age of 55 is a significant restriction/barrier which ought to be drawn to the purchasers' attention before they decide to purchase.*
>
> *[14] The Tribunal reiterates that real estate agents are not expected to be lawyers. However this title contains extremely useful information which needs to be understood by the agent prior to the property being sold. If the agent cannot understand the implications or meaning of encumbrances, caveats, covenants or other restrictions on the title then they should ask their vendor to provide the legal advice which will clarify these things for any potential purchaser. Alternatively if appropriate they can obtain that legal interpretation themselves. However since an agent acts as an agent for the vendor the most appropriate source of information must be the vendor themselves or their solicitor. …*

[70] We said also that the Act places a positive obligation on agents to be "*open, honest, accountable and to ensure that nobody is misled or deceived at the time the property is being sold"* and that the Act purports to "*protect members of the public when they are making what can often be the biggest purchase of their lives*".

[71] The case of *McCarthy v REAA and Matutinovich* [2014] NZREADT 94 involved non-disclosure of proposed mining activity in Waihi. In finding unsatisfactory conduct we addressed the issue of misstatement by the agent being an innocent one.

> *"[27] We have found that [the agent] did make the statement [the purchaser] complained of. We make this finding despite the fact that the misstatement was innocent. The Rule is clear, any incorrect information is a breach of the Rule. We therefore conclude that there was a breach of R6.4.*

[72] That Rule 6.4 read:

> *"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."*

[73] Rather candidly and generously, Mr Dolheguy in final brief additional oral submissions asserted that his business knowledge did not extend to knowing about the effect of the word *"easement";* and that he is not calling the licensee a liar and admits that she told the appellants of the existence of the right of way but they thought it was a benefit for them and not for their neighbour; and their concern is that the licensee assumed they understood and, as a result of that assumption, they consider they have been prejudiced.

[74] There was a suggestion that, should we find in favour of the appellants, they will seek quite substantial compensation for their loss or likely loss on resale of the property. We record that it is settled law from the High Court case of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 (per Brewer J) that neither the Committee nor us have power to award monetary compensation against a real estate agent should he or she have been guilty of unsatisfactory conduct. This Tribunal has a power to award compensation in the event of a real estate agent being found guilty of misconduct.

[75] We record that, in terms of credibility, we prefer the evidence of the licensee. We accept that she told the complainants that No. 26 (the neighbouring property) had a right of way over their driveway.

The right of way issue

[76] The licensee referred to the existence of a right of way over the driveway to the property being acquired by the appellant complainants but they did not understand that was an encumbrance. Somehow, the appellant/complainants thought it gave them total control of the driveway rather than, as was the position, giving a right of access to the neighbour on a sharing basis with them.

[77] It would have been a good practice if the licensee had linked the dots for the appellant complainants and explained to them that the right of way meant that they could be required to share the driveway with the neighbour; and that might happen because the neighbour had a garage at the rear of his property which could only be accessed along the right of way to the appellant's property. She should not have assumed that was unlikely to happen due to the existing fencing appearing relatively permanent. However, she did not answer any questions from the appellants in an inadequate or misleading way.

[78] One might have expected that the appellants would have observed that to be the situation and, in any case, would have understood that the registered driveway was an encumbrance on their title and gave rights to the neighbour to share the use of what they regarded as their driveway. Had they understood that, they might have realised that the neighbour might, one day, wish to remove part of the fence in order

to access his garage at the rear of his section. Of course, linked with that misunderstanding is that there appeared to be a permanent type of fence all along their driveway.

[79] Having said all that, one would have expected the lawyer for the appellants to have spelt out to them the effect of the registered right of way easement; and it seems he did refer to it with them.

[80] It is difficult to believe that the appellants did not understand the meaning of *"right of way"* or *"easement"*. In any case, it cannot be deficient of the licensee to have assumed that the appellants understood what she was telling them on this case.

The fencing along the driveway

[81] As we have covered, it was not apparent that the paling fencing was within the land of the neighbour at No. 26 which meant that it was not a boundary fence at law and could be removed by the neighbour. Linked with that issue is that the appellants did not understand that the boundary fence stood over a part of the right of way and was blocking the neighbour from using the right of way for access to his rear garage should he wish to undertake that right in terms of a registered easement in his favour over the driveway and over the title to the appellant's property. It would have been good practice for the agent/licensee to have pointed out that the fencing cut across the neighbour's right of way. Again, one would have expected the appellants' lawyer to discuss that with them, and it seems that he did.

[82] We observe that it transpired that the fence was able to be removed because it was not on a boundary but that, in any event, a portion of it could have been removed to give access to the neighbour in terms of his right of way to the rear of his section.

Outcome

[83] A lack of good practice could amount to unsatisfactory conduct by a licensee. However, in the context of the facts of this case, the licensee did not make any misrepresentation nor fail any clear duty. True, she did not link up the dots for the appellants and she assumed that they had a normal understanding of the meaning of "*easement*" or of "*right of way*", and that they would understand what their lawyer might put to them about the state of the title and, in particular, about its right of way encumbrance.

[84] We do not regard a person as having full ownership of a driveway when it is subject to a right of way in favour of a neighbour. True the owner holds the title, but it is subject to an encumbrance which requires a sharing of the driveway in reality. However, in terms of the fencing we can understand the licensee saying words to the effect that no one could stop the appellants from using the driveway. The licensee did not represent that the fencing stood on a boundary but only how it seemed to be suitable.

[85] A real estate agent is engaged by a vendor to market property and that must be done in an ethical and fair manner in accordance with the law. However, such an agent is not expected to give legal or technical advice to prospective purchasers; nor

is that agent required to analyse the property from a purchaser's viewpoint except to honestly, sensibly, and fairly answer questions.

[86] When we stand back and absorb the evidence in this case and the issues overall, we consider that the licensee was entitled to assume that the appellants understood what she was saying and the effect of the right of way. Accordingly, we confirm the general finding of the Authority to take no further action against Ms Stott with regard to the complaints against her from Mr and Mrs Dolheguy.

[87] 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

_____
Mr G Denley
Member