BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 30

READT 079/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**LEIGH MASEFIELD**
	Appellant/Licensee
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC 301)**
	First respondent
AND	**JOHN McHUGO and JENNIFER DONALD**
	Second respondent/purchasers

MEMBERS OF TRIBUNAL

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

HEARD at KAIKOHE on 6 March 2015

DATE OF THIS DECISION 24 April 2015

APPEARANCES

Mr T D Rea, counsel for the appellant licensee
Mr L J Clancy, counsel for the Authority
The second respondent complainants on their own behalf

DECISION OF THE TRIBUNAL

[1] This case is about purchasers of a residential property having their view encroached by a house built below them when they believe they were assured by the appellant licensee that could not happen.

Introduction

[2] Ms Leigh Masefield ("the licensee") appeals against a 19 March 2014 decision of Complaints Assessment Committee 301 finding that she had engaged in unsatisfactory conduct in respect of a complaint made by John Hugo and Jennifer Donald ("the complainants") in respect of their purchase of 234 Wharau Road, Kerikeri ("the property").

[3] By a further decision, dated 5 August 2014, the Committee fined the licensee $2,500, censured her, and ordered that she undertake further education.

Background

[4] On 29 January 2013, the complainants viewed the property after being attracted by advertising which emphasised its 'stunning view'. They purchased it by agreement dated 22 February 2013 for settlement on 10 April 2013.

[5] The complainants allege that, prior to purchasing the property, the licensee told them that the views from the property were protected. Specifically, the complainants allege that the licensee:

[a] Gave them a general assurance that to the effect that *"no one can build out your view in New Zealand"*; and

[b] Gave them a specific assurance that any future building on the section below the property, i.e. 248 Wharau Road, would have no effect on the views from their property at 234 Wharau Road.

[6] The licensee denies giving either assurance.

[7] The licensee states that she obtained and reviewed a copy of the property's certificate of title and noted that there appeared to be building restrictions (via land covenants as she puts it) on the land below the property which provided for a 20 metre viewing corridor and building height limits. She states that she spoke with the vendor (to the complainants) and also to the owner of the property below, Mrs de Boer, about the covenants.

[8] The licensee also states that, following her review of the title documentation and discussions with the vendor and neighbouring owner:

[a] She gave the complainants copies of the certificates of title for both the property and 248 Wharau Road and copies of the land covenants;

[b] She referred the complainants to the building restrictions set out in the covenants;

[c] She told the complainants that the purpose of the restrictions was to protect views from the property at No. 234 Wharau Road;

[d] She may have also told the complainants that any building on 248 Wharau Road would have to be *"stepped down the section"*; and she says she believes that she made it clear this was simply information from the owner of that property.

[9] The purchase of the property by the complainants settled on 10 April 2013. They later discovered that a house was being built on the section below them at 248 Wharau Road. When that house was completed, it partially obstructed the views from the property.

The Committee's Decision of 19 March 2014

[10] The Committee decided that the licensee had engaged in unsatisfactory conduct and fell short of her duty of care when dealing with the complainants, stating:

> *"She did this by accepting and passing on as fact the explanation from the owner of the nearby section about how the covenants were affecting the property. By choosing this explanation without verifying the correct interpretation of complicated covenant documentation, the licensee has not exercised sufficient care or diligence in respect of her duty to the complainants."*

[11] In its penalty decision of 5 August 2014 the Committee stated, inter alia:

> *"3.1 The Committee in its determination of 19 March 2014 has determined under section 89(2)(b) of the Act that it has been proved, on the balance of probabilities, that the Licensee Leigh Masefield has engaged in unsatisfactory conduct in that she knew that the views from the property were of paramount importance to the complainants and they were a focus of the licensee's marketing of the property. It found that it was inadequate for the licensee to provide assurances about such an important and complicated feature of the property on the basis of a third party explanation, i.e. that of the owner of a nearby property."*

Issues on Appeal

[12] The Authority submits that this appeal will turn on our findings as to exactly what was said by the licensee to the complainants about the extent to which the views from the property were protected. There is a clear conflict of evidence on this issue between the parties.

[13] If we find, as alleged by the complainants, that the licensee gave broad assurances that no future building on 248 Wharau Road would impact the views from the property, then it is submitted that a finding of unsatisfactory conduct must follow as the covenants, clearly, did not provide that level of protection. If the licensee assured the complainants that they did, either directly or indirectly, it is put that was, as a matter of fact, misleading.

[14] However, it is also put for the Authority that if we find that the licensee did no more than pass on to the complainants that the purpose (rather than the effect) of the covenants was to protect the views, we may conclude that such a statement would not, in itself, be misleading. It is submitted that clearly was the purpose of the covenants, even if that purpose does not appear to have been fully achieved in reality.

[15] If we find that the licensee went further than simply referring the complainants to the covenants and explaining their purpose, for example in saying that any building on 248 Wharau Road would need to be *"stepped down the section"* and that any such information passed on was incorrect, then the question will be whether the licensee verified that information before passing it on or, at least, made clear that she was passing on unverified information from a third party, which had not been checked or verified in any way by her or by Barfoot & Thompson Ltd her employer.

General Background Evidence

[16] The licensee stated in her evidence that she:

[a] Reviewed the certificate of title and land covenants applicable to the property and to 248 Wharau Road;

[b] Understood that restrictions had been placed on both the property and 248 Wharau Road, providing for a 20m viewing corridor across the latter section and a height restriction of *"57 metres above mean sea level in terms of One Tree Point Datum"*;

[c] Made enquiries with the owner of 248 Wharau Road (Mrs de Boer), who told her the covenants were to protect the views from the property;

[d] Made enquiries about the land covenants with the vendor Mr M A Christiansen whose evidence is referred to below. He was not actually aware of the covenants but understood the background to them;

[e] Made further enquiries in December 2012 with Mrs de Boer, who confirmed the covenants were to protect views and that, while a two-storey house could be built on the section at No 248 below the property, it would have to be stepped down on the section.

[17] The licensee has stated that she provided the complainants with a copy of the certificate of title and relevant land covenants (for the property and 248 Wharau Road); and passed on to them what Mrs de Boer and the vendor had told her about the purpose of the covenants.

[18] The licensee denies ever telling the complainants that *"no one can build out your views in New Zealand"* or giving a specific assurance that any building done at 248 Wharau Road would definitely not affect the views from the property.

[19] Mrs de Boer also states that, in allowing her to subdivide a previous larger property, the Council had imposed various conditions. One was that a building height restriction and other restrictions (such as to the height of vegetation) be recorded in covenants and registered against the title to her property. These covenants were put in place to provide greater protection of the views from the section above (i.e. the property) than was originally in place.

[20] Mrs de Boer also states that she recalls discussing her understanding of the covenants with the licensee Ms Masefield. Mrs de Boer notes that, when the new property was built on 248 Wharau Road, it was higher than she expected given the restrictions.

[21] The licensee has also given evidence about a further conversation between herself, the vendor, and the complainants during a building inspection on 21 March 2013. That was after the agreement for sale and purchase had been signed by the complainants, and by Mr Christiansen as the vendor to them.

[22] The licensee states that the complainants asked if the views could be guaranteed and that the vendor had replied they could not be. When the complainants asked the licensee where any potential house could be built at 248 Wharau Road, she said that she did not have that information and referred them

instead to the covenants. The licensee relies on her diary notes to support her recollection of this conversation.

[23] The complainants state that the issue of views was discussed with the licensee due to a bad experience Ms Donald's father had gone through in Spain, when he had bought a property only to have his view impeded by subsequent building work. As a result of that experience, Ms Donald raised the issue of the view from the property with the licensee who, she alleges, told her that *"this could never happen in New Zealand"*.

[24] The complainants state that the licensee *"definitely told us that our view would be protected and not affected by any property built at 248"*.

[25] In respect of the said conversation involving the vendor after the contract had been signed, the complainants state that the conversation was about the possibility of a beach front resort being developed a kilometre away, about which the vendor said he couldn't guarantee would not happen; and that the possibility of building at 248 Wharau Road was not discussed on that occasion.

A Summary of Salient Evidence Adduced to Us

The Evidence of Mr M A Christiansen

[26] Mr Christiansen is a building consultant at Kerikeri and a previous owner, but vendor to the complainants, of the property at 234 Wharau Road, Kerikeri, the subject of these proceedings. He is also the owner of a neighbouring property at 240 Wharau Road, Kerikeri where he and his wife reside.

[27] In 1999 they had purchased the property which then incorporated both those properties and they subdivided it into two lots in about 2001. As part of that subdivision they registered covenants over No. 234 for the benefit of 240 to place various restrictions on the height of any buildings and vegetation on No. 234 for the benefit of 240. However, in 2002, covenants were registered by Mrs de Boer against some neighbouring sections, which included No. 248 Wharau Road, the property on which the house at issue in terms of blocking views at No. 234, has been built. Those latter covenants were registered as part of a subdivision process for the benefit of both numbers 234 and 240 Wharau Road and imposed restrictions on the height of any buildings and vegetation on the said neighbouring sections which included No. 248.

[28] In 2002 Mr and Mrs Christiansen sold No. 234 and it was subsequently on-sold to a Mr and Mrs Tisdall.

[29] In about 2008 there was a further subdivision application relating to the said neighbouring sections which included No. 248. Mr and Mrs Tisdall and Mr and Mrs Christiansen objected to that for various reasons. Mr and Mrs Tisdall were concerned that any future buildings on the proposed further sections would affect their views. It appears that eventually Mrs de Boer registered covenants on the sections comprising that further subdivision imposing restrictions on buildings and vegetation which, effectively, are the covenants in issue in these proceedings. Those covenants were designed to give some protection to views from No. 234, the subject property of the present complaint, with regard to No. 248 the property on which the house at issue has been built.

[30] As it happens, because Mr and Mrs Tisdall considered that No. 234 suffered from leaky building syndrome, Mr Christiansen repurchased it in 2011 and had it repaired. He then realised that the building and vegetation height restrictions in the covenants designed for its view protection were inadequate as, he put it, *"the height envelopes as calculated by my surveyors, Thompsons Surveyors, were too high. These were the same surveyors who did the surveying on 240 and 248 Wharau Road. Therefore, I varied the 234 covenants to adjust the height envelopes."*

[31] In May 2012 Mr Christiansen listed No. 234 Wharau Road for sale with the appellant licensee of Barfoot & Thompson. The licensee enquired of him about the covenants for the benefit of 234. He told her that their purchase was to restrict building and planting to protect the views from his property at 240 Wharau Road as he was not then aware of the covenants subsequently imposed relating to neighbouring sections including No. 248. He states that he cannot now recall when those covenants relating to No. 248 were first discussed with the licensee. However, he was made aware of their content prior to the complainants inspecting No. 234 in March 2013; although Mr Christiansen was not aware of the specific details in the covenants until he obtained a copy of them after the complainants had raised their concerns about the height of the building at No. 248. He had entered into an agreement for the sale of 234 to the complainants in February 2013.

[32] He noted that in 2013 a house was built on No. 248 which partially obstructs the views from 234. He says that he is not a surveyor and did not ascertain the restriction on height of any future building on No. 248 at material times but is surprised at its permitted height. He presumes that the purpose of what he refers to as the No. 248 Wharau Road covenants was to protect the views from No. 234. He questions the adequacy of the calculations by the surveyor at material times for the purposes of that covenant.

[33] Mr Christiansen then goes on to record that the complainants visited No. 234 with the licensee in March 2013 to check the alignment of the driveway and he was present. He noted that Ms Donald (one of the complainants) was using an electronic navigation system to chart the boundaries to 234 and then asked him about the boundaries and the covenants for the benefit of No. 234 and whether *"it could be guaranteed that the views would not be built out"*. Mr Christiansen records *"I said that this could not be guaranteed and Ms Masefield agreed with me by nodding her head. I also said that I did not know the building height envelopes in the 248 covenants. I also believe that I may have provided, in response to queries from Ms Donald, guestimates as to likely building sites on the sections in front of the property at 234 Wharau Road, taking into account the requirement under the District Plan that there be no buildings within 10 metres of a property boundary, but do not recall the details. I did not have any information concerning future buildings on 248 Wharau Road."*

[34] Before us, it was put to Mr Christiansen by Ms Donald that the complainants deny any such conversation about views with Mr Christiansen except that there seemed to be reference to possible interference with views by a likely resort to be built some miles away on the beach. Mr Christiansen asserts there was such a conversation about views while the complainants were ascertaining boundary pegs and that Ms Donald asked him to guarantee they could not lose their view (as they had already purchased the property then). He said that, because he did not know the content of the various easements, he could not guarantee that and he said they discussed the effect of the likely building of a house on the section in front at No. 234

(i.e. at No. 248) and he remarked that a resort could be built on the beach front which would affect the view from No. 234. Mr Christiansen said that the complainants then asked him what the height restrictions on No. 248 might be and he said he did not know. There seems to have also been some discussion as to how high some olive trees planted in land in front of No. 234 could grow in a particular valley.

[35] Ms Donald particularly put it to Mr Christiansen that as they were meeting over the boundaries of the driveway, she asked Mr Christiansen if he would guarantee the complainants could not lose their view, and says that he responded they could not lose it. He denies having said that. As already indicated, that was at a point of time when the complainants were committed to the purchase of No. 234.

The Evidence of the Licensee

[36] The licensee covered the above facts. She said that, upon receiving the listing of the property on 2 May 2012, she obtained a copy of its Certificate of Title and of the land covenants registered against it and that she understood from reviewing these land covenants that:

> *"7. …*
>
> *(a) various restrictions had been placed on buildings and/or vegetation at certain parts of the properties situated in front of the property, being 248 Whanau Road and a neighbouring section (which may now be possibly known as 232 Wharau Road), for the benefit of the property; and*
>
> *(b) these restrictions provided a 20 metre viewing corridor across the section at 248 and the neighbouring section (being 10 metres either side of the boundary between these properties) and a height restriction of "57 metres above mean sea level in terms of One Tree Point Datum" for buildings and vegetation on the remainder of that part of 248 Wharau Road which is situated in front of the property. I produce a copy of the easement instrument which recorded these land covenants, together with the corresponding plan. [First respondent's BOD at 78-84 & 100-101]*
>
> *(c) various restrictions on the height of buildings and vegetation had also been placed on the property for the benefit of 240 Wharau Road (being the land contained in CT NZ137A/1187), which is situated behind the property. I produce a copy of the transfer and easement variation instrument which recorded these land covenants. [First respondent's BOD at 90-92 & 86-89]."*

[37] She continued later in her evidence-in-chief as follows:

> *"14 I believe that the information that I passed on from Ien de Boer was correct albeit that it was very general information, i.e. that there were covenants in place to protect the views from the property. This information was provided in good faith. I was unable to provide any further information or assurances and, therefore, did not do so.*
>
> *15 At no time, did I tell Mr McHugo and Ms Donald that "no one can build out your views in New Zealand". There is clearly no general protection for views in New Zealand, otherwise covenants of the sort in this case would*

not be required. Nor did I provide any assurances that any future building on 248 Wharau Road would have no effect on their views. I simply did not have the information or expertise to provide such assurances. Furthermore, at the final inspection it was made clear by the vendor, and agreed by myself, that no guarantees could be provided. I do, however, recall a discussion with Mr McHugo and Ms Donald regarding the potential for shrubbery on neighbouring properties to obscure their views and I said that I believed that they could ask the Council to intervene if an owner refused a request to trim the shrubbery.

16 *Furthermore, at no time did I state or lead Mr McHugo and Ms Donald to believe that the practical effect of the covenants had been verified by Barfoot & Thompson. The only way to verify this would have been to engage a surveyor to calculate the potential height of any future buildings at various points on the section. We did not engage a surveyor to verify building height boundaries on the section and, to my knowledge, this is not a step generally taken by real estate agents. Therefore, there were no discussions regarding the height of any future buildings on 248 Wharau Road in reference to the home at the property or the exact extent to which the views would be protected. I merely passed on information received from the owner of 248 Wharau Road, who was also the party who registered the covenants, regarding the purpose and intended effect of the covenants and identified this information as having come from this party.*

17 *I understand that Mr McHugo and Ms Donald previously made an offer to purchase the section at 248 Wharau Road but am unaware as to what enquiries were made in relation to this. This section was also listed for sale with Barfoot & Thompson at the time and, at one point, the listing was transferred into my name, due to the relevant salesperson having left the company, however, I did not market it and it was sold either privately or by another agency.*

Sale and Purchase Agreement

18 *After a period of negotiation, Mr McHugo and Ms Donald entered into an agreement for sale and purchase of the property dated 22 February 2013 for the amount of $456,000. This agreement was subject to various conditions, including a LIM report, building inspection and solicitor's approval of title. The unconditional date was 22 March 2013 with settlement on 10 April 2013. I produce a copy of this agreement.*

19 *Ms Donald says in her signed statement that, prior to the unconditional date on the property, her conveyancing company advised them of the covenants and took her to "Thomsons Surveyors, on 248" (being the surveyors who calculated the building and vegetation restrictions) but I am unaware of what advice was provided and/or enquiries made.*

Subsequent discussion between vendor and purchasers

20 *On 21 March 2013, Mr McHugo and Ms Donald had an opportunity to speak to the vendor, Mr Christiansen, on site during a building inspection to check the alignment of the driveway. I was also present at this inspection. During this inspection they discussed with Mr Christiansen the covenants on 234 Wharau Road. They also enquired regarding the*

> *possibility of building on the land in front of the property, namely 248 Wharau Road, and asked if the views could be guaranteed, to which Mr Christiansen replied that they could not and I agreed with this. Ms Donald asked where any potential house could be built on the section at 248 Wharau Road (i.e. was there a designated building site). I said that I did not have this information and referred to the restrictions in the covenants, as this was the only information I had. Mr Christiansen gave very general indications as to where building could take place but pointed out that these were only guestimates as to what future purchasers might do. I produce my brief notes of this date."*

[38] The licensee also said that, at the time of listing, she enquired with Mr Christiansen, the vendor who was also a building inspector for the Far North Council, regarding the effect of those land covenants on No. 234. She also spoke with Mrs de Boer the owner (through a company CDB Ltd)of the section at No. 248. The licensee said that Mrs de Boer told her that the purpose of those covenants was to protect the views from No. 234. The licensee obtained copies of the title and covenants relating to No. 248 and reviewed them also. She believes that she also later discussed those covenants on 248 with Mr Christiansen but he was not aware of them, although he had knowledge as to the likely background for them.

[39] The licensee states that, in about December 2012, she had a further conversation with Mrs de Boer when she, the licensee, was showing some prospective purchasers around No. 234. Then, Mrs de Boer repeated that the covenant was to protect the views and that a two storey house could potentially be built on the section at 248 but, due to the height restriction, it would need to be stepped down the section. That seems to have been a reference to the house likely to be built on No. 248 which has caused this issue.

[40] The licensee states that she provided a copy of the title and land covenants relating to No. 234 to all prospective purchasers including the complainants together with similar information relating to No. 248.

[41] She adds: *"I specifically referred Mr McHugo and Ms Donald to the height restrictions and 20 metre viewing corridor in the covenants, the latter of which was measured by Ms Donald. The purpose of providing this information was so that they could make all relevant enquiries".* Her diary notes and the transaction report for the sale record that she did that.

[42] The licensee also adds: *"In addition, I passed on the information I had received from the owner of the section at 248 Wharau Road, Ien de Boer, that the purpose of the covenants on 248 was to restrict building and vegetation in order to protect the views from the property. I believe that I also passed on the information from Ien de Boer that due to the height restriction any buildings would need to be stepped down the section. I do not recall my exact words but believe that I made it clear that this information came from the owner of 248 Wharau Road who had registered the covenants".*

[43] Ms Masefield (the licensee) was then thoroughly cross-examined which had the effect of retraversing much of the above evidence.

[44] Ms Masefield insisted to Mr Clancy that she had simply said to the complainants that the reason for the existence of the covenants was to protect the view from

No. 234, but she did not say that the covenants protected that view nor could she have been taken to imply that.

[45] She emphasised that, at that point, she believed that the complainants had already consulted a surveyor about the issue of their views and the effect of the covenants.

[46] The licensee was pressed by Mr Clancy that she had told the purchasers that the view from 234 was protected and not merely that the covenants were imposed to protect the view. The licensee responded firmly that she merely said that the reason for the covenants was to protect the view from 234 and she is *"pretty sure of saying that"*.

[47] She also asserts that she made it clear that her knowledge about the covenants came from the owner of No. 248, the section upon which the house of concern to the complainants has been built.

[48] It emerges that an effect of the covenants on 234 is to provide a view corridor on the right hand side of its outlook and we note that the *"offending"* house at No. 248 has been built to the left of that view or outlook.

[49] The licensee was pressed by Ms Donald that she (the licensee) had guaranteed that the view from the section was protected and there was reference to an experience about views which Ms Donald's father had had in Spain. However, the licensee asserts that she simply did not remember any such reference to Spain.

[50] Nor did the licensee recall that the complainants had earlier considered buying the section in front of 234, namely No. 248, and had the licensee make a verbal and rather low offer for it; but then dropped the idea due to the price sought by the vendor and the likely costs of drainage work.

The Evidence for the Complainants

[51] Both the complainants filed a joint statement of their concerns the salient portions of which read as follows:

> *"(1) Documentary evidence existed and was in the possession of Barfoot and Thompson prior to the marketing and sale of 234 Wharau Road that subsequent building on the adjoining site at 248 Wharau Road was likely to affect the view from No 234. The appellant's bundle of documents p11 shows the 55m contour line as being within the boundary of No 234. It is clear from this that building to 57m would affect the view. The licensee either knew about this or should have known about it. It would not have been necessary to erect poles on the site or employ a surveyor as described in the Interview transcript. …*
>
> *(2) …*
>
> *(ii) Although we were advised by a professional valuer no valuation has been obtained. This is because we have considered that the cost of a valuation is unlikely to be justified by the prospect of obtaining compensation.*

(3) *There is some confusion between the terms "Surveyor" and "House inspector". We need to make it clear that at no time did we employ a surveyor although references are made to our doing so in the "Record of interview" and the "Agency response"*

(4) *The letter from Barfoot and Thompson dated 21 October 2013 implies that Leigh facilitated a meeting between ourselves and the vendor to discuss the implications of the covenants on the site at 238. She did not. It is stated that we worked with Mark Christiansen. We did not. Leigh effectively prevented our meeting him by telling us that it was not protocol to meet the vendor until after a price had been agreed. It was only after this point that our conversation with MC took place about the possibility of the view being built out and this referred to the possible development of a resort at Onewhero Bay. It was later in the same conversation that he told us he had no knowledge of the height restricting covenants on No 248.*

(5) *In marketing No 234 to us LM stated that although a two storey house could be built at No 248 it would have to be stepped down the slope in order to comply with the height restrictions. It did not and has not been so stepped down.*

(6) *Effect on Us*

(i) *The property was advertised and marketed by reference to its splendid views. We agree with the decision that "It was inadequate for the licensee to provide assurances … on the basis of a third party explanation".*

(ii) *We bought a house that was not as it was described by LM.*

(iii) *We do not want LM or the agency she works for to profit from this transaction or for either to do the same kind of thing again.*

(iv) *We would like to obtain compensation but will pursue this only if the chance of success appears realistic."*

[52] Under cross-examination from Mr Rea, Ms Donald said that the licensee never told her that the information given to Ms Donald by the licensee simply came from Mrs de Boer.

[53] Ms Donald said that the complainants never realised that the covenants on the land were inadequate from a purchaser's (of No 234) point of view and they eventually went to the surveyors because they could not understand what protection they had from an olive grove in front of them. She emphasised that the view was critical to the complainants but they understood from the licensee that the view at 234 was protected so they felt they need not get a surveyor to explain matters to them about that, but they were worried about the possible height of olive trees nearby.

[54] The complainants had assumed that the licensee had checked out the effect of the registered covenants and it did not occur to them that the licensee's comments came from Mrs de Boer, the vendor of the front section who they understood to be a friend of the licensee.

[55] The complainants say that, if the licensee had made it clear to them that her comments to them about the protection of their view simply came from Mrs de Boer, they would not have accepted that advice; and also they had understood that, in New Zealand, prospective purchasers could rely on the word of a real estate agent.

[56] It appears that the offending section (at No. 248) in front of No. 234 had been listed with another agency but Ms de Boer (as its vendor) was prepared to treat with the appellant licensee because, according to Ms Donald, the licensee and Mrs de Boer were friends.

[57] Inter alia, it was put to Ms Donald by Mr Rea that the licensee had never said to Ms Donald that the licensee, or Barfoot and Thompson Ltd, had had a surveyor verify what Ms de Boer had told them about the affect of the covenants as preserving the view from No. 234. However, in response, Ms Donald asserted that had been said and that the reference was to *"protecting"* the view rather than *"preserving"* it. Ms Donald also asserted that the licensee had said that in New Zealand a view was protected and could not be overridden and that covenants to protect the view were easy to enforce.

[58] Ms Donald did not recollect Mr Christiansen having told her that the view could not be guaranteed and only recalled discussing with him the position of boundary pegs.

Relevant Principles

[59] In *Fitzgerald v REAA* [2014] NZREADT 43, at paragraph [20] we affirmed that:

> *"An agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his/her ability."*

[60] *Fitzgerald* concerned alleged representations made to a complainant purchaser about the dimensions and boundaries of a property. We considered that if the licensee in that case had been asked whether the fence constituted the correct legal boundary, then she would have been obligated to make proper enquiries and confirm where the boundaries were or to advise the complainants that she did not know and that they should obtain advice from a surveyor.

[61] *Fitzgerald* follows a line of cases in this Tribunal which have established that where a licensee makes a representation about a property to a potential purchaser, the licensee is obliged either to independently verify the information passed on, or to make very clear to the potential purchaser that the licensee is passing on unverified information and advise that the purchaser check the position with an independent professional if the issue is important to that purchaser.

[62] In *LB and QB 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 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."

[63] We also held that a licensee could not rely on having acted merely as a conduit from seller to purchaser in order to exonerate himself or herself from responsibility for a misrepresentation. A licensee should not *"place sole reliance and credence on advice or assurances from a vendor"*, even if these are given in good faith.

[64] In *Donkin v REAA and Morton-Jones* [2012] NZREADT 44, 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 said that:

"[8] … when advertising includes a positive representation such as in this case, that the property is a legal home and income, then the agent must ensure that either:

(a) they have made proper enquiries to ensure the property is a legal home and income; or

(b) they make it clear to any purchaser that this is a statement from the vendor and will need to be independently verified by the purchaser; or

(c) they clearly inform a purchaser that there may be issues regarding this and they need to obtain independent legal advice."

[65] We clarified that by saying:

"[9] 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 agent's job is to ensure that the purchaser is not misled. 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."

[66] Any restrictions on a property or anything else unusual discovered by a licensee should be drawn to the attention of, and explained to, prospective purchasers, together with a recommendation that they seek their own advice.

[67] 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 at paragraph [15] we said:

"[15] … [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 the 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 solicitors."*

[68] We also said 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"*. The Act purports to *"protect members of the public when they are making what can often be the biggest purchase of their lives"*.

[69] In *Grindle v REAA and Bracey* [2014] NZREADT 85, the complainants were the purchasers of a dairy farm property. They were provided with incorrect information on the farm's milk solids production for the previous three years, which the agent had failed to verify. In upholding a finding of unsatisfactory conduct we commented:

> *"[42] Mr Grindle was aware of the importance of the production figures and knew that the figures he had been given by the vendor were unverified. He did not advise that to the complainants or to any other prospective purchaser. It was incumbent on him to do so: refer Red Eagle Corporation Ltd v Ellis [2010] NZSC 20. He should have made proper enquiries himself …"*

The Submissions for the Authority

[70] It is accepted that this appeal will turn on our findings as to exactly what was said by the licensee to the complainants about the extent to which the views from the property were protected by the covenants. It is submitted for the Authority that the principles developed in cases like *Donkin* and *L* should be applied but that this case will turn on those factual findings.

[71] If we find that the licensee gave broad assurances – either directly or indirectly – that no future building on 248 Wharau Road would impact on the views from the property, then a finding of unsatisfactory conduct should follow. Such an assurance would have been misleading as, while he purpose of the covenants may have been to protect the views of the property to some significant extent, the covenants clearly did not provide absolute protection.

[72] On the other hand, if we find that the licensee did no more than pass on to the complainants that the purpose of the covenants was to protect the views from the property, and gave no assurance as to their actual legal effect, then that in itself may have been unobjectionable as long as the limits of that information were made clear.

[73] However (Mr Clancy puts it), it appears that the licensee accepts that she went somewhat further than simply referring to the purpose of the covenants and that she may also have said that any building on 248 Wharau Road would need to be *"stepped down the section"*. If we find that the licensee made positive representations of that sort, then the licensee must show that any such representation had been properly verified, or that she at least made very clear, when passing on such information, that it was merely information from a third party that she had not verified. She may also have been obliged to suggest that the complainants check the information themselves if it was an important issue for them.

The Submissions for the Appellant/Licensee

[74] Mr Rea noted that the Committee considered that Ms Masefield engaged in conduct which satisfied the requirements of s.72 of the Real Estate Agents Act 2008 ("the Act"), in that she breached rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules") which provides: *"A licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work."*

[75] He observed that the background to the determination involved findings by the Committee that:

[a] The licensee failed to exercise sufficient care or diligence by accepting and passing on as fact the explanation from the owner of the nearby section (Mrs de Boer) about how the covenants affected the property without verifying the correct interpretation of this complicated covenant documentation which related to an issue of paramount importance to the complainants;

[b] The licensee was on notice that the covenants required interpretation, hence her visit to Mrs de Boer who had created the restrictions; and

[c] The licensee was aware that the complainants were unfamiliar with the New Zealand property market and this was a further indicator to exercise caution and diligence due to the reliance they would likely have on any explanations provided by the licensee in connection with the purchase of property in this country.

Issues on Appeal

[76] As Mr Rea put it, the broad issue on appeal is whether the appellant ought to be found guilty of unsatisfactory conduct. The narrower issues are:

[a] Whether it is established on the evidence that the licensee's actions, in relation to the marketing of the property, breached Rule 5.1.

[b] If there was unsatisfactory conduct in some respect (which is denied) whether it would, nevertheless, be appropriate to exercise the discretion to take no further action in all of the circumstances of the case.

[77] Mr Rea's primary submissions for Ms Masefield (the licensee) are that the Committee erred by failing to find that she was a mere conduit of information; and, in

reaching its conclusions, the Committee failed to take into account and/or give sufficient weight to various relevant factors.

[78] The secondary submission for the licensee (pursued in the alternative) is that even if we consider it established to the relevant standard that her conduct could constitute a breach of any of the Rules (which is denied), we should nevertheless determine that no further action would be warranted on the grounds that further action is unnecessary or inappropriate in the circumstances.

[79] In the course of his typed opening submissions Mr Rea put it:

> *"14 Mr McHugo and Ms Donald allege that Ms Masefield told them "no one can build out your views in New Zealand" and that she provided assurances that any future building on 248 Wharau Road would have no effect on the views. Ms Masefield denies this and says that she did not have the expertise to provide any such assurances. Barfoot & Thompson had not engaged a surveyor to calculate the building height envelope and, therefore, Ms Masefield was unable to advise as to the extent to which the views could be impacted.*
>
> *15 Ms Masefield further states that she not tell or lead Mr McHugo and Ms Donald to believe that the practical effect of the covenants had been verified by Barfoot & Thompson.*
>
> *Sale and Purchase Agreement*
>
> *16 Mr McHugo and Ms Donald entered into a conditional agreement for sale and purchase of the property dated 22 February 2013 for the amount of $456,000. This agreement was conditional on a LIM report, building inspection and solicitor's approval of title. …*
>
> *Second respondents offer to purchase the section at 248 Wharau Road*
>
> *18 Mr McHugo and Ms Donald previously made an offer to purchase the section at 248 Wharau Road, however, it is unknown what enquiries were made in relation to the covenants at this stage.*
>
> *Discussion between vendor and purchasers*
>
> *19 On 21 March 2013, Mr McHugo and Ms Donald met with Ms Masefield and Mr Christiansen on site to check the alignment of the driveway. They discussed the covenants on the property (being the restrictions for the benefit of Mr Christiansen's property at 240 Wharau Road).*
>
> *20 According to Ms Masefield and Mr Christiansen, they also discussed the possibility of building on 248 Wharau Road, being the land in front of the property. Mr McHugo and Ms Donald asked if the views could be guaranteed, to which Mr Christiansen replied that they could not and Ms Masefield agreed with this. Ms Donald also asked where any potential house could be built on the section at 248 Wharau Road and Ms Masefield responded that she did not have this information and referred to the covenant. Mr Christiansen provided a "guestimate" as to likely building sites."*

The Conduit Concept Relevant to this Case

[80] Mr Rea puts it that the Committee acknowledged that Ms Masefield *"passed on"* information received from Mrs de Boer to Mr McHugo and Ms Donald but concluded that she had *"accepted"* this information and passed it on *"as fact"*. Mr Rea submits that the Committee erred in reaching this conclusion and in failing to find that the licensee was a mere conduit of this information.

[81] It is the evidence of the licensee that, after reviewing the relevant titles and land covenants she spoke with Ms de Boer, the owner of the section to which these covenants related, who advised that the purpose of these covenants was to protect the views from the property. She was also advised by Mrs de Boer that a two storey house could potentially be built on the section but due to the height restriction it would need to be stepped down the section. This evidence is supported by an email statement from Mrs de Boer and a copy of the resource consent application.

[82] Mr Rea submits that Ms Masefield passed on this information from Mrs de Boer to Mr McHugo and Ms Donald and, in doing so, identified that it was information received from Mrs de Boer and that Ms Masefield did not embellish or endorse this information. Mr Rea observes that no further information or assurances were provided, nor could they have been as Barfoot & Thompson had not engaged a surveyor to ascertain the height boundaries and there was no information regarding any future building on the site.

[83] Mr Rea submits that Mr McHugo and Ms Donald's assertions that Ms Masefield told them that *"no one can build out your views in New Zealand"* and provided assurances that any future building on 248 Wharau Road would have no effect on the views are not credible. Mr Rea puts it that the former statement is patently incorrect and contradicted by the very fact that covenants were in place to protect the views; and the latter is a definitive statement allegedly made in circumstances where Barfoot & Thompson had not engaged surveyors to ascertain the height boundaries and held no information as to any future building on the site. He submits that, on the balance of probabilities, it is much more likely that Ms Masefield merely passed on the information received from Mrs de Boer as she states in her evidence.

[84] Mr Rea continued that, as previously recognised by us, the general law authorities relating to s.9 of the Fair Trading Act 1986 are relevant and applicable to disciplinary cases relating to allegedly misleading conduct by a licensee in breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[85] The Court of Appeal in *Goldsbro v Walker* [11992] 5 TCLR 46 (CA) stated the general principle that *"… that an innocent agent who acts merely as a conduit and purports to do no more than pass on instructions from his principal does not thereby become responsible for anything misleading in the information so passed on"*.

[86] In the leading decision of *Red Eagle Corporation Ltd v Ellis* [2010] 12 TCLR 526 the Supreme Court expanded upon this principle stating that *"to be seen to be a mere conduit, the conveyor of misleading or deceptive information must have made it plain to the recipient that he or she is merely passing on information received from another, without giving it his or her own imprimatur – that is, making it appear to be information of which the conveyor had first-hand knowledge"*.

[87] Mr Rea submits that, based on these authorities, Ms Masefield was clearly a mere conduit of the information provided.

[88] He also submits that detailed information regarding the covenants was provided to Mr McHugo and Ms Donald and they were, therefore, able to make further enquiries to ascertain the effect of these covenants. Ms Masefield provided copies of the certificates of title for both the property and 248 Wharau Road and the land covenants to Mr McHugo and Ms Donald prior to them making an offer on the property and pointed out the restrictions contained in the covenants. Those covenants detailed the restrictions imposed and the areas affected and these areas were marked on the plan attached to the certificate of title for 248 Wharau Road.

[89] Mr Rea submits that Ms Masefield made reasonable enquiries regarding the covenants from reliable sources; and that Mrs de Boer of CDB Ltd, as the owner of the section at 248 Wharau Road at the time at which the covenants were registered, and also Mr Christiansen, were aware of the purpose and intent of the covenants. It is put that had enquiries been made with the local Council, the same information would likely have been received; but without engaging a surveyor, Ms Masefield was unable to obtain any further detailed information as to the practical effect of the covenants.

[90] Mr Rea submits that Mr McHugo and Ms Donald were provided with significant information regarding the covenants as they had engaged conveyancers and also met with Thompson surveyors who had calculated the height restrictions in the covenants; so that (he submits) it cannot be asserted that they were reasonably misled by the information passed on by Ms Masefield.

[91] Mr Rea adds that Mr McHugo and Ms Donald assert that they purchased the property primarily due to the views, but they failed to carry out any due diligence regarding the effect of the covenants which were in place to protect the views, despite having been provided with copies of the relevant titles and covenants, having previously made an offer to purchase 248 Wharau Road, and having had the opportunity to discuss the covenants with Thompson Surveyors who had calculated the height restrictions and with their lawyers.

[92] Mr Rea also emphasises that after being advised by the vendor, Mr Christiansen, that the views could not be guaranteed, Mr McHugo and Ms Donald still failed to carry out any due diligence and took no steps to attempt to cancel or re-negotiate the agreement, such avenues arguably being available to them as the agreement had not then been declared unconditional.

Re: Our Discretion under Section 80(2)

[93] It is put for the appellant that, even if we find that she has engaged in unsatisfactory conduct, we should exercise our discretion under s.80(2) to take no further action.

[94] The Authority submits that such an approach is misconceived and submits that the exercise of the discretion under s.80(2) is only appropriate before, not after, we have found a breach of the Rules or other instance of unsatisfactory conduct. Counsel for the Authority also submits that if we consider the issues and evidence in full and find that a disciplinary breach has occurred, then a finding of unsatisfactory conduct must follow, for the reasons discussed below.

[95] Complaints Assessment Committees, and this Tribunal in turn (exercising its powers under s.111 of the Act), have a broad discretion to take no further action

under s.80(2) of the Act. This has been recognised in a number of Tribunal decisions and has recently been affirmed by the High Court in *Barfoot & Thompson v Real Estate Agents Authority and Anor* [2014] NZHC 2817.

[96] However, it is submitted for the Authority that this is not to say that, where a Committee or Tribunal has found a disciplinary breach, the discretion can then be exercised to take no further action but rather, in appropriate circumstances, Committees or the Tribunal may exercise the discretion at a preliminary stage, thereby obviating the need for a finding on the question of whether or not a disciplinary breach has occurred.

[97] It is put that once a Committee (or this Tribunal) has considered the evidence and concluded that a licensee's conduct amounts to a breach of the Rules or any other form of unsatisfactory conduct, then it must make a finding accordingly; and that s.80(2) does not permit a Committee or this Tribunal to decide that no further action should be taken after the stage has been reached that an inquiry and a hearing has taken place and it has been concluded that a licensee's conduct falls within one or more of the four tests for unsatisfactory conduct set out in s.72.

[98] In other words: it is submitted for the Authority that, if after full consideration of the issues and the evidence, a Committee (or this Tribunal) is satisfied that a licensee has engaged in unsatisfactory conduct then there is no discretion to find otherwise. We were also referred to *S v New Zealand Law Society (Auckland Standards Committee No 2)* (High Court), Auckland, 1 June 2012, CIV-2011-404-3044 Winkelmann J), in which the High Court held that a *"two stage test"* of this kind is not applicable to disciplinary proceedings under the Lawyers and Conveyancers Act 2006.

[99] The Authority submits that this is not the type of case where the s.80(2) discretion should be used to obviate the need for a finding on the question of whether the licensee breached her duties and we agree with that. The issue at stake is an important one, and a determination should be made on the facts after a full consideration of the issues and the evidence.

[100] Counsel for the Authority accepts that if, on the facts as we find them, there was no breach of the Rules or unsatisfactory conduct of any other kind in this case, then, clearly, we can reverse the decision of the Committee and determine to take no further action; but that if we find that a disciplinary breach has occurred, then the Committee's unsatisfactory conduct finding must stand.

[101] Counsel for the licensee submits that the Committee, having regard to all of the circumstances of the case, ought to have exercised its discretion, pursuant to s.80(2) of the Real Estate Agents Act 2008 ("the Act"), to take no further action on the grounds that further action was unnecessary or inappropriate.

[102] Mr Rea puts it that the conduct falls at the lower end of the scale of unsatisfactory conduct, if it is unsatisfactory conduct at all (which is denied); and emphasises that Ms Masefield has worked in the real estate industry for over seven years and has never been the subject of any disciplinary finding at any level, either under the Real Estate Agents Act 1976 or the current Act prior to this determination.

[103] In this case we do not consider it appropriate to rely on s.80(2), but we consider that we have the discretion available to uphold the appeal and reverse the unsatisfactory conduct finding even if we were to form the view that there could

potentially be a finding of unsatisfactory conduct by the appellant. Mr Rea submits that this would be the appropriate course in this case even if we considered that there was potentially some non-compliance by the appellant (which is denied).

[104] We consider that s.80 must be considered in the context of the determinations available under s.89 of the Act. That enables a Committee, or us, to take no further action as a discretionary option to the laying of a charge of misconduct or to a finding of unsatisfactory conduct. Section 89(3) makes it clear that it does not abrogate from the discretion set out in s.80. Those sections do not require that we apply the discretion to take no further action before we have found unsatisfactory conduct rather than after so finding, nor at any particular time in the judging process. We consider that we may decide to take no action against a licensee even if we find there has been unsatisfactory conduct if we consider that to be the just outcome but, of course, we must provide reasons for such an outcome.

Discussion

[105] It was accepted that the height restrictions contained in the covenants do not appear to be adequate for their intended purpose of providing protection of the views from the property, although it still retains fine views. That inadequacy could not reasonably have been identified without engaging a surveyor.

[106] In final oral submissions, Mr Rea based the case for the licensee on what he calls *"the conduit defence"* that a licensee is exonerated with regard to any information passed to a prospective purchaser by that licensee if the licensee has made it clear that the licensee is simply passing on information from the vendor (or from whoever). The agent must make it clear that the agent is not the source of the information and it comes from the vendor. In particular, Mr Rea submits that the agent is not required to advise that the agent has not verified the information which the agent is passing on. Of course, it is accepted that the agent may not embellish or appear to endorse the information and cannot imply that the information has been verified.

[107] Good practice would be for the agent to not only make it clear to the prospective purchaser that the information is merely being passed on but also that it is not a representation and has not been verified nor imply that. Depending on the precise context, there is probably no requirement for a positive statement from the agent that he or she has not verified the information. However, this case does not necessarily need to be related to the conduit issue.

[108] Mr Rea submits that, in the present case, nothing the licensee said to the complainant second respondent purchasers suggested that the agent, or Barfoot & Thompson Ltd, had verified the effect of the easements designed to protect the view. Mr Rea particularly points to the statement from Mr Christiansen to the purchasers that the views were not guaranteed (and the licensee seems to have nodded agreement to that), although there was then a conditional purchase contract in existence.

[109] Mr Rea emphasised that information passed on to the purchasers by the licensee had been given to the licensee by the vendor who had caused the covenants to be created. Mr Rea accepts that best practice would have been for the licensee to firmly tell the purchasers to obtain the advice of a surveyor as to the meaning and effect of the view covenants. However, he submits that this case is not

about best practice but about what happened and he relies on the conduit defence. We agree this case is about what happened.

[110] He also submits that should we feel the conduit defence has not been made out, we should exercise our discretion to take no further action in terms of the overall facts of this case. He submits (correctly, in our view) that we have a wide unfettered discretion to decide to take no further action at any time and we are not compelled to find misconduct even if that technically exists.

[111] Mr Rea emphasises that the covenants designed to protect views have proved to be inadequate because the surveyors had not set a height line bar high enough for owners of the property purchased by the complainants; and that it seems that the surveyors may not have provided the necessary data for the lawyers to create easements in the manner Mrs de Boer had contemplated.

[112] Mr Clancy submitted that this case turns on its own precise facts in terms of settled law.

[113] He put it that the licensee may have done no more than tell the complainants that there are restrictive covenants existing over relevant properties designed to protect the view of the property in question but the licensee is not sure whether the covenants do that, or to what extent, and her information simply comes from her talking to the vendor. As Mr Clancy also says, the licensee could have gone to the extent of assuring the complainants that their views were protected; but that does not seem to have happened in terms of the evidence. He surmises that the representations of the licensee about view could have fallen somewhere between those two approaches. Indeed, Mr Clancy put it that if we consider that the witnesses for the licensee are being truthful, then the case falls in that middle zone so that not enough was done to use the information passed on by the vendor.

[114] Mr Clancy also puts it that there is the licensee's own evidence that she is unsure whether that she made clear to the complainants that she was merely passing on the views of the vendor; and that the licensee did not make it clear that neither she, nor Barfoot & Thompson Ltd, had verified what the vendor maintained about protection of the view.

[115] It seems to us that the licensee simply told the complainants that there were covenants designed to protect the view; and that is fair comment. She did not say or imply that had been verified nor spell out the extent of any protection. There are still good views from the property. It is not clear whether she said that her information came from the vendor and Mrs de Boer, but that seems likely. We assess the licensee as a credible witness.

[116] Mr Clancy submits that the evidence goes further than just creating a conduit issue and observed that much of the information about protecting the view has come after the agreement for sale and purchase had been signed and it is for us to decide who said what to whom at what point.

[117] Mr Clancy noted the complainants' evidence that they would not have purchased the property unless they had been satisfied that the view was substantially protected and put it as an issue for us is whether there was any misrepresentation made to them about the view whether innocent or not. Mr Clancy also submits that there is an issue as to whether the licensee did enough in the circumstances to fulfil her duty to the complainant purchasers. If she fulfilled her duties in that respect then,

as Mr Clancy puts it, she has not offended against s.72 of the Act. He submits that we must make a determination on the evidence and we should not be relying on s.80(2) to simply decide to take no further action.

[118] We do not find any misrepresentation by the licensee about the view. We do not think she failed in her duty; but it would have been a better practice to firmly advise the complainants to seek professional advice about the effect and extent of the covenants. It is curious that the complainants did not do that of their own accord.

[119] We feel that there has been no unsatisfactory conduct by the licensee in the context put to us and that, insofar as there are conflicts of evidence, we simply do not know who to believe as all witnesses seem credible and it is clear that the witnesses have become a little hazy over the passage of time. We regard the appellant as an honest witness.

[120] We are conscious that if the licensee had made a better effort to either translate the rather technical wording of the covenants into understandable advice, or had firmly recommended to the complainant purchasers that they consult a surveyor (or perhaps a lawyer) for that purpose, then that would have been a much better practice in the circumstances of this case where protection or preservation of the view was paramount for the purchasers. The licensee could have been more helpful to assist the complainants have properly explained to them just what protection came from the covenant registered on the various titles overall.

[121] Having said that we consider that it is not proven that the licensee has misled the complainants in any way and, although it is possible, but in our view not probable, that she may not have made it clear to the complainants that her advices about protection of the view came from the vendor or Ms de Boer on a conduit basis nor that those advices are unverified, there does not seem to have been anything misleading in the particular words used by the licensee.

[122] We observe that even if the house at No. 248 had been required to be stepped down, it could still have encroached upon the view from No. 234.

[123] What went wrong in this case is that the complainant purchasers needed to be told (i.e. to find out) precisely what the covenants regarding protection of the views from No. 234 actually meant in terms of the siting and height of the house which could be built at No. 248 and was very likely to be soon built (i.e. on the section in front of them), and as to how high, in terms of the restrictions in the various covenants, any building could be erected or olive trees, or any other foliage would be allowed to grow. That this did not happen cannot be sheeted home to the licensee. She does not seem to have misled anyone, nor failed in her basic duty as a real estate agent.

[124] The complainants should have taken the precaution of getting a translation of the meaning of the covenants as prudent purchasers. It may well be they should have received more prodding from their lawyer to do that which would only have needed them (or their lawyer/conveyancer) to consult the said surveyors.

[125] Accordingly, we find that on the balance of probabilities it has not been proved that the licensee is guilty of unsatisfactory conduct. We consider that Rule 5.1 has not been breached by the licensee. We take into account that the onus of proof is on the appellant licensee. We have been favoured with much more evidence than was

adduced to the Committee whose careful decision we need to quash in terms of our findings.

[126] For the above reasons, this appeal is granted.

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

_____
Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Ms N Dangen
Member