

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 79

READT 073/14

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **STEPHANIE McMEEKEN and LAKE WAKATIPU REALTY LTD**

Appellants

AND **REAL ESTATE AGENTS AUTHORITY (CAC 306)**

First respondent

AND **ROD AND DONNA HALE**

Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD at QUEENSTOWN on 3 August 2015 (with subsequent type-written submissions)

DATE OF THIS DECISION 9 November 2015

COUNSEL

Ms A J Nash for appellants
Ms K Lawson-Bradshaw for the Authority
No appearance for the second respondent complainants

DECISION OF THE TRIBUNAL

The Issue

[1] Two hours before a mortgagee's auction sale, the domestic partner of the registered proprietor of the property (i.e. the mortgagor) called at the office of the real estate agency marketing the property for the mortgagee (the appellant Lake Wakatipu Realty Ltd) and issued the agents there with a trespass notice regarding the property. That incident was immediately referred by the appellant licensees to the mortgagee (a bank) which quickly obtained legal advice that the trespass notice was ineffective and that the auction sale should proceed as planned. That auction sale so proceeded and resulted in a sale of the property to the complainant second respondents. The latter were not told of that incident until a few days after they had

been the successful bidders at the auction. That was before they had actually signed to purchase the property. They have not participated in this appeal.

[2] The issue before us is whether that incident about the purported trespass notice should have been disclosed to prospective purchasers prior to the auction. The Committee found that it should have been and we refer further to the Committee's decision below.

[3] Accordingly, we have before us an appeal by Ms S McMeeken ("the licensee"), but not by her employer Lake Wakatipu Realty Ltd against the decision of CAC 306 finding that she has engaged in unsatisfactory conduct in respect of that complaint by the second respondent purchasers.

Factual Background

[4] On 26 February 2013, ASB Bank Ltd instructed Bayleys on the mortgagee sale of 1 Skye Lane, Queenstown.

[5] Mrs D Hale (one of the complainants) and a friend viewed the property on 5 April 2013. Ms McMeeken indicated she could possibly help Mrs Hale find tenants to rent the property until Mrs Hale and her husband moved to Queenstown from Tauranga.

[6] Some time prior to the auction, Ms Amanda Wardell, the registered proprietor of the property, advised Ms McMeeken and the agency of the existence of a lease on the property, but no actual lease documentation was ever produced.

[7] On 8 April 2013, Ms McMeeken emailed the Auction Particulars and Conditions Agreement to the Hales, and suggested that they take legal advice on the documents before bidding. Ms McMeeken made it clear to the Hales that she was acting on behalf of the bank and that vacant possession was not guaranteed.

Auction Day

[8] At approximately 12.40pm on 11 April 2013, a Mr Brendan Thow came to the agency's office. Mr Thow asked Bayleys to stop the auction and said it was illegal. It seemed to be then known that he was the domestic partner of Ms Wardell.

[9] Ms McMeeken met with Mr Thow and the auctioneer. As Mr Thow left, he handed Ms McMeeken a piece of paper that turned out to be a form of trespass notice which purported to forbid the agency, or any of its agents or managers, from entering on to the property. The trespass notice disclosed Amanda Wardell as the occupier, together with Sims Aviation Ltd as a lessee of the property. In fact, the property had been tenanted to a Mr P Bjorck, his wife, and their four children for over a year apparently on a weekly or monthly tenancy.

[10] The agency and Ms McMeeken promptly took advice from ASB's solicitors prior to the auction and say they were advised that the "*lease was not worth the paper it was written on*" and the trespass notice had no validity. They were advised that they should continue with the auction. They had delayed the auction pending that advice.

[11] The auction proceeded on 11 April 2013 and Mr and Mrs Hale were the unsuccessful bidders. They have not participated in this appeal to us. Since the

hearing before us on 3 August 2015, there has been a series of further written submissions from counsel by consent.

Events following the Auction

[12] Following the auction, Ms McMeeken advised the Hales about the purported lease and trespass notice. The Hales took legal advice as to their effect.

[13] Ms McMeeken also obtained further advice from ASB that the trespass notice and the lease were not legally binding.

[14] In the meantime, Mr and Mrs Hale's solicitor received emails from Ms Wardell suggesting that the sale was invalid and that Mr and Mrs Hale had no legal claim to the property. Mr and Mrs Hale obtained legal advice and did, at one stage, investigate whether they could avoid the contract. Ultimately, they continued with the purchase and settlement took place on 8 May 2013.

[15] Between 5 and 25 July 2013, Mr and Mrs Hale met with Ms McMeeken and the agency to endeavour to resolve issues surrounding the auction process and the additional costs they had incurred.

[16] It is understood that Mr and Mrs Hale are currently residing in the property.

The Committee's Decisions

[17] In its substantive decision of 8 April 2014, the Committee found that Ms McMeeken and the agency had an obligation to inform all prospective purchasers, including Mr and Mrs Hale, about the purported lease and trespass notice prior to the auction. It found that, in failing to do so, Ms McMeeken and the agency had engaged in unsatisfactory conduct. It noted that the primary failing of the agency was failing to supervise Ms McMeeken.

[18] This appeal to us is by Ms McMeeken who (in the Committee's penalty decision of 29 July 2014) was censured and ordered to pay a fine of \$1,500.

[19] The Committee dismissed Mr and Mrs Hale's complaints in respect of Ms McMeeken's and the agency's failure to advise them of the reason for pauses in the auction process and the steps taken to address Mr and Mrs Hale's concerns post auction. In reaching this finding, the Committee recorded that Ms McMeeken did not mislead Mr and Mrs Hale in respect of the pauses during the auction and that (due to the auctioneer seeking final instructions from the mortgagee) she could only make a calculated assumption, which she did in this case. The Committee went on to say that Ms McMeeken and members of the agency met with Mr and Mrs Hale, and that the failure to come to an agreement with them did not mean they failed in any way to honour their obligations under the Act.

Relevant Further Evidence Adduced to Us

Evidence of Ms McMeeken

[20] In her brief of evidence Ms McMeeken provided further detail about her knowledge at the time of receiving the trespass notice and her subsequent actions. She also covered the above facts in detail.

[21] Ms McMeeken says that, after receiving the notice, she immediately contacted David Rugen at ASB Bank who said he would take legal advice on the matter. Just ten minutes later he telephoned Ms McMeeken back to say that his legal advice had been that the notice was “*not worth the paper it is written on*”. At that stage, Ms McMeeken considered she had done all that she was required to do.

[22] Ms McMeeken states that she was on the telephone with the complainant Mr Hale during the auction and was not privy to what was happening when the auctioneer stopped the auction to take advice from the bank by telephone. Ms McMeeken further states that she did not see any evidence of the registered proprietor (the previous owner) attempting to stop the auction and that she only had met Mr Thow before, but never Ms Wardell. It was only after the auction had finished that she noticed Mr Thow outside the office door. She states that he did not try and talk to her.

[23] In her evidence Ms McMeeken sets out the various reasons why the trespass notice was not considered relevant and, presumably therefore, why it was not disclosed prior to the commencement of the auction. Her reasons include:

- [a] The notice incorrectly stated the details of the purported tenancy;
- [b] There was no such tenancy agreement as stated in the notice;
- [c] Whether or the agency could enter the property was not material to purchasers; and
- [d] Given it was a mortgagee sale, the property was no longer “*owned*” by Ms Wardell (the registered proprietor).

[24] Ultimately, Ms McMeeken states that she only told Mr and Mrs Hale about the trespass notice after the auction out of an “*abundance of caution*” and that she did not consider there would have been any issues if she had not disclosed it at all.

[25] Inter alia, it was put to Ms McMeeken that she did not clarify whether she should disclose the service of a trespass notice to interested parties and did she seek to obtain advice on its validity for the matter of disclosure. She responded that she is not now sure but had not expected instructions from a bank about the disclosure aspect and the bank’s legal advice was simply to proceed with the auction.

The Evidence of Mr D Murray the Auctioneer

[26] Mr D C Murray is the principal of the agency and its auctioneer. He has been involved in real estate since 1974 and has been an auctioneer for about 25 years before recently retiring.

[27] He said, at about 15 minutes before the auction, the licensee informed him that the partner of the property’s registered proprietor was present and seeking to stop the auction. He met that person who stated that the auction was illegal and he was going to stop it. Mr Murray responded that “*we*” were proceeding in full accordance with the vendor bank’s instructions. That conversation seemed to have been cordial.

[28] The licensee then came back to Mr Murray and said that as Mr Thow had left he handed her a document which purported to be a trespass notice and which also stated that the property had been leased to a company called Sim Aviation Ltd. That

material was immediately faxed to the ASB as mortgagee. It very soon responded that its legal advice was that the documents delivered by Mr Thow were not valid and to proceed with the auction. The ASB also then informed Mr Murray that Mr Thow had served a similar notice on it in Queenstown.

[29] Mr Murray then made standard statements about the particulars and conditions of the auction which then proceeded. In due course, the mortgagee bank authorised that the property was on the market at the particular level of bids and the property was sold to the second respondents at \$768,000 with the licensee as their agent. The licensee then emailed (to the second respondent purchasers) the particulars and conditions contract for signing and it was returned that day signed by Mr Hale. The deposit was paid several days after the auction rather than immediately on the fall of the hammer on the auction day of 11 April 2013.

[30] On 19 July 2013 Mr Murray ascertained that Mr Hale was unhappy with the way the auction had been run and felt he (Mr Hale) should have been told that (it was put) the mortgagor had attended the auction and tried to disrupt it and stop it. Mr Murray immediately met Mr Hale and the events of the auction day were discussed in terms of the visit then of Mr Thow. Mr Hale said that he had been unaware that the agency had received papers from Mr Thow prior to the commencement of the auction and this concerned him even more. There were detailed discussions in which Mr Murray was very candid with Mr Hale as to relevant events and information but the outcome was that Mr Hale felt that the licensee and Wakatipu Realty Ltd should have notified him of the trespass notice and of *"the mortgagor"* trying to stop the auction *"as he would not have bid on the property"*. Inter alia, Mr Hale said he loved the house and he and Mrs Hale were very happy living there and he had met and had conversations with Mr Thow *"and all was good now"*.

[31] Mr Murray said that, eventually, Mr Hale told him he was seeking compensation from, presumably, Wakatipu Realty Ltd for his legal fees, travel to Queenstown and accommodation, which he estimated to cost about \$15,000 or he would go to the REAA. He later said to Mr Murray that he was not satisfied with the outcome of meeting with Mr Murray and, if he could not get satisfaction, he would go to the REAA. Mr Hale said to Mr Murray that he would give the matter until Monday. Mr Murray did not hear from him again until he was notified of Mr Hale's complaint.

[32] Mr Murray stated to us that he had no contact with Amanda Wardell, the registered proprietor of the property, before the auction and nor did his company (the agency).

The Evidence of Ms A A Rattray

[33] At material times, Ms Rattray was sales manager and joint owner of Lake Wakatipu Realty Ltd. She covered that, on 4 March 2013, that company was instructed by ASB to market and undertake a mortgage auction of the said property and she had the licensee engaged as a salesperson to do that.

[34] She (Ms Rattray) recalled being at the licensee's desk a week or so before the auction and overhead the licensee having a conversation with Mr Hale who appeared to be voicing concerns about access, possession, and security if he bought the property. She said that she then said to the licensee words along the lines of *"this is a mortgagee sale and you must seek legal advice regarding the implications of this. If you have any concerns you should not bid"*.

[35] She said that on auction day of 11 April 2013 she was welcoming people arriving for the auction and, not long before the auction was due to begin, Mr Thow who was later revealed to be the partner of the owner of the property, approached her and asked to speak to the licensee. She arranged that and Mr Thow indicated that he wanted to stop the auction as he considered it to be illegal and that it should not go ahead.

[36] That led to Mr Thow having a discussion with her husband (Mr David Murray, the said auctioneer) and, a little later, she saw Mr Thow hand a purported trespass notice to the licensee. She confirmed that the matter was immediately referred to the mortgagee/vendor (ASB) which forthwith obtained legal advice that the trespass notice was invalid and that Mr Thow had served a similar notice on the Queenstown branch of ASB that morning. She considered that ASB had ascertained that the auction was legitimate and appropriate and ASB instructed her company to continue. Otherwise she confirmed that above evidence.

[37] Inter alia, she referred to the fact that Mr Hale had been late paying his deposit. She said that his reason for that was he had become concerned regarding possession and tried to resist payment, and his lawyer had advised him that, as he had bought the property against her initial legal advice, she could not help him any further. That led him to seek a second opinion from a barrister who seems to have confirmed the solicitor's view.

[38] Ms Rattray also confirmed that Mr Hale eventually stated he was not satisfied with the outcome of his discussions with Wakatipu Realty Ltd and he was seeking compensation for, among other things, his legal fees, travel to Queenstown, security and accommodation which he assessed at approximately \$15,000. She said he told Mr Murray to provide those funds to him within two days or he would complain to the REAA. Apparently, Mr Murray responded by asking Mr Hale if he was threatening him. Also, Mr Murray suggested to Mr Hale that the events of concern to him were not unusual in a mortgagee sale situation and that he felt that he and his staff had behaved appropriately at all times and he could not understand how any action from them could have caused any of the losses claimed by Mr Hale. The latter replied that he would give it a few days but they did not hear from Mr Hale again until he complained about the company and Ms McMeeken. Ms Rattray added that she had had no contact prior to the auction with Ms Wardell.

Issue on Appeal

[39] The key issue is whether or not Ms McMeeken and the agency should have disclosed the existence of the purported trespass notice to potential purchasers, before the auction took place.

[40] The appellants also raised the following issues in their submissions to us:

- [a] Whether the Committee struck an inappropriate balance between the rules 5.1, 6.2 and 6.4 ;
- [b] Whether the Committee failed to consider rules 6.1 and 9.1 which contain what the appellants say are duties that supercede the duties in rules 5.1, 6.2 and 6.4. Those rules are set out below;

- [c] Whether it is important to consider the “*far-reaching and detrimental impact*” of the Committee’s decision on licensees seeking to act upon professional advice;
- [d] Whether consideration is needed of the professional and financial implications on the licensee through the unsatisfactory conduct finding, and whether the Committee’s response was disproportionate to the conduct in question; and
- [e] Whether the Committee’s decisions further the purposes of the Act.

The Law on Disclosure

[41] There is a clear and express disclosure obligation in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 for the benefit of both vendor clients (described in the Rules as ‘clients’) and purchasers (described in the Rules as ‘customers’). This is found at Rule 6.4 which states:

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

[42] Other rules of relevance in this appeal are:

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

6.1 A licensee must comply with fiduciary obligations to the licensee’s client.

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

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

[43] The above rules are general and must be balanced against one other. The Real Estate Agents Act 2008 and the Rules are designed to provide consumer protection. Fair disclosure to assist consumers in making informed decisions is an important part of that protection.

[44] 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 is intended to “*protect members of the public when they are making what can often be the biggest purchase of their lives*”; refer *L v Real Estate Agents Authority* (CAC 20004) [2013] NZREADT 63.

[45] We have emphasised the importance of fair disclosure by real estate agents to purchasers (customers) in a number of our decisions. One such decision, *Complaints Assessment Committee v Miller* [2013] NZREADT 31, was recently cited by the High Court with approval in *Complaints Assessment Committee v Jhagroo* [2014] NZHC 2077 at [66] to [68]. *Complaints Assessment Committee v Miller* involved the non-disclosure by an agent to a purchaser of plans for additional building work at a neighbouring school. The Court in *Jhagroo* also noted a submission made by counsel for Mr Jhagroo that “*the bar had been lifted on the*

enactment of the [2008] Act, imposing high expectations on licensees to carry our pre-contract enquiries". We accept that fair disclosure to purchasers is another area where high expectations are now imposed on licensees.

[46] In "*Obligations and consumer protection*", Professor McMorland noted:

"... the purchase of real estate [is] one of the most serious and expensive transactions an ordinary person ever enters into [and] the prospective buyers should have available a range of relevant information regarding the property before making the decision whether to buy it or not. In this age of consumer protection, the traditional view of the law that the vendor has no duty of disclosure, that the only primary duties owed by the agent are in contract to the vendor/principal, is no longer satisfactory."

[47] This is not to ignore a licensee's duties owed to vendor clients. For example, where a client directs that information, which should be disclosed to a purchaser, be withheld, the licensee must not disclose the information but, rather, must not continue to act for that client.

[48] In *Henton v Real Estate Agents Authority & Barfoot & Thompson Limited & Wallace* [2014] NZREADT 2, a case involving a salesperson passing on an email to a purchaser without the authority of the vendor, we found:

"Despite the overall conclusions we come to as set out below, we feel that, at least with hindsight, Ms Wallace as the vendor's agent could have been expected to have first contacted Mr Henton [the vendor] before passing the email on to the purchaser. However, we find that, in all the circumstances, her failure to do so does not meet the threshold of unsatisfactory conduct as defined in s.72 of the Act; nor does it breach any rule in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. It would have been a breach of R 6.4 if she had not passed on to the purchaser the content of the 19 December 2011 email because that comprised information urgently needed by the purchaser. Nevertheless, she would have been wise to at least have told Mr Henton of the content of the email before she passed it on to the purchaser and, preferably, to have conferred with Mr Henton before doing so."

[49] This further demonstrates that vendor clients have, of course, a direct interest in what is disclosed. However, citing the best interest of the client does not itself justify non-disclosure.

The Stance of the Authority

Balancing the Interests of a Vendor Client and a Purchaser Consumer

[50] Ms Lawson-Bradshaw submits that, given the position that licensees are often placed in, it is not unusual for them to have to balance the interests of their vendor client with those of a prospective purchaser; but how that balance should be struck in any given situation depends on the particular facts involved.

[51] She puts it that such is the case when Rules 9.1 and 6.4 both come into play as neither rule is absolute. She submits that, in a consumer protection regime with the obvious desirability of the free flow of information allowing consumers to make informed choices, there is a heavy emphasis on the need for fair disclosure.

[52] It is accepted by the Authority that mortgagee situations are often fraught with risk, including mortgagors being disgruntled. However while, pursuant to the Terms and Conditions of Sale, a vendor may not have a contractual duty to provide any details as to rights claimed on the property, it is submitted for the Authority that those Terms and Conditions do not curtail a licensee's ethical obligations under the Act and Rules or any other fair trading considerations. We agree.

[53] It is put that in this particular case, the licensee was aware of a specific trespass notice, and knew that it may cause concern to potential purchasers. It is submitted that the general and ever-present risk of an unhappy mortgagor is not the same as the actual, and specific, risk posed by a known unhappy mortgagor who is already causing problems.

[54] Ms Lawson-Bradshaw submits that, regardless of the legal standing of the trespass notice, its very existence could (and in this case did) cause issues going forward for the future purchaser. She observed that the appellants have argued that the risk of discouraging potential purchasers through disclosure is a good reason to withhold information but submits that disclosure is required because purchasers may consider such information material.

[55] It is put that to help protect the vendor client's interests, it was open to Ms McMeeken to disclose the trespass notice, and also state that the vendor had received legal advice that the notice was not legitimate.

Far Reaching and Detrimental Impact

[56] The Authority disputes the appellants' claim that the Committee's decision will have a "*far reaching detrimental impact*". It puts it that just because the Committee found that Ms McMeeken should have disclosed the trespass notice does not mean that she was not entitled to rely on the legal advice and it was available to her to disclose the notice and the advice to the potential purchasers.

[57] Ms Lawson-Bradshaw submits that there is nothing in the Committee's decision that overrides the ordinary property law on how a Bank may contract out of encumbrances but, rather, the Committee's decision means that purchasers have a right to know if previous occupiers of the property for sale are causing problems and may impact their future peaceful enjoyment of the property.

Professional and Financial Implications on the Appellant

[58] Ms Lawson-Bradshaw noted that the appellants have argued that the potential effect of the unsatisfactory conduct finding, and subsequent censure order, on Ms McMeeken's future employment is a relevant factor for to be taken into account by us when considering whether to overturn the substantive decision. She submits that this is not the case but likely future effects (not speculative effects) may be relevant to penalty as a mitigating factor.

[59] Ms Lawson-Bradshaw emphasises her submission that consumers are aware of important information so that they can enter into what may be the most important agreement they ever made fully informed. She submits that the finding of the Committee that the existence of the trespass notice should have been disclosed is consistent with that purpose. She puts it the Committee's decision stands for nothing more than the proposition that purchasers should be fully and fairly informed of

known facts which may reasonably be considered relevant to their purchasing decision.

A Summary of the Appellant's Case

[60] Ms Nash submitted that the Committee struck an inappropriate balance between the said rules considered in its substantive decision.

[61] Ms Nash submitted that Ms McMeeken conducted herself in a manner which did not breach these rules. She puts it that, in terms of exercising skill, care, competence and diligence in accordance with Rule 5.1, Ms McMeeken was careful to ensure that Mr Thow's presence was immediately brought to the attention of Mr Murray, her supervising principal, so that he could discuss the matter with Mr Thow and attempt to mollify the situation. After Mr Thow produced the Trespass Notice, Ms McMeeken again brought the situation to the immediate attention of Mr Murray and together they telephoned the ASB Bank to explain what had happened and seek instructions as to how to proceed. It is put that the legal advice that the Trespass Notice was "*not worth the paper it's written on*" removed the fact of the Trespass Notice from something that could be considered as material to a decision to purchase the property to an immaterial fact which could have no bearing on a potential purchaser's rights over the property.

[62] In Ms Nash's submission, Ms McMeeken acted entirely appropriately in following the instructions of her vendor client and her supervising principal; she also exercised skill and competence in her assessment that the information in question was immaterial in light of the deficiencies in the document and the legal advice confirming its invalidity; the risks to her client associated with disclosure were greater than those facing any potential purchaser; and on that basis, it cannot be reasonably contended that Ms McMeeken acted in breach of Rule 5.1.

[63] Ms Nash noted that, in its decision, the Committee opted to focus on Rule 6.4 and the requirement not to withhold information which should in fairness be disclosed.

[64] Ms Nash put it that the Committee's substantive finding against Ms McMeeken omits any reference to the fact that she was also subject to competing duties imposed on her by Rules 6.1 and 9.1 of the Rules (set out above).

[65] She submits that while licensees owe general duties of fairness to purchasers pursuant to Rules 6.1 and 6.4, such duties are subsidiary to the overriding duties owed to a client by virtue of the fiduciary relationship between vendor and agent; and this is particularly so in relation to the central fiduciary duty of loyalty.

[66] Ms Nash also submits that Ms McMeeken's overarching duty of loyalty to her vendor client precluded disclosure in the current circumstances for the following reasons:

- [a] The information was not material to a decision to purchase the property;
- [b] The information had no material outcome or detrimental impact on the complainant's attempt to settle and take possession of the property;
- [c] Disclosure could have had disproportionately severe consequences for Ms McMeeken's vendor client.

[67] Ms Nash submitted that parties facilitating and entering into commercial transactions in the course of their employment should be entitled to obtain professional legal advice before embarking on a course of action confirmed by that advice and feel assured that they are adopting the correct course of action. She adds that, in instances where the person seeking legal advice has provided the advisor with complete and accurate information and the advisor is sufficiently experienced and qualified to provide such advice, case law seems to suggest that the person seeking advice should be entitled to rely on that advice without fear of legal or disciplinary repercussions.

[68] She puts it that her position in this regard is clearly supported by our decision in *Harcourts Group Limited v REAA & Graves* [2015] NZREADT 7 where the issue was whether the listing agreement used by Harcourts Group Limited contravened Rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care Rules) 2012, (a requirement that a licensee in the best interests of, and the lawful instructions from, the vendor) and Harcourts had obtained legal advice prior to drafting the listing agreement. Ms Nash noted that, unusually, in *Harcourts* Mr Hodge for the Authority approached the matter by arguing that the appeal should be allowed. At paragraph [11] of our decision, we record Mr Hodge's submission as follows:

"... the Authority now accepted that Harcourts had reasonably and properly taken legal advice from their legal advisor as to how the clause should be drafted and that it should not be regarded as unsatisfactory conduct for them to have reasonably relied upon the accuracy of that advice."

[69] Our Tribunal allowed the appeal and substituted its finding that no further action be taken in relation to the complaint as the licensee's reasonable reliance on legal advice can provide a defence to the charge, but reliance on such advice must be reasonable.

[70] Ms Nash also puts it that, in the present appeal, the Committee's decision may have made sense in a situation where the legal advice obtained was plainly wrong on its face and would have appeared so to any reasonable person, but that was not the case here. She adds that the advice was correct and obviously so with the result that any reliance on that advice was reasonable and therefore militates against a finding of unsatisfactory conduct.

Discussion

[71] There is no material dispute of fact. The central question is whether or not the licensee should have disclosed to the complainants, prior to the commencement of the auction, the fact of Mr Thow's presence and his service of an invalid and misleading or confused trespass notice confirmed by legal advice to be "*not worth the paper it is written on*". As Ms Nash put it, we must consider what kind of information should in law or fairness be provided to customers or clients pursuant to Rule 6.1 (set out above) and, clearly, if the relevant information had been material to the purchasers, then good faith and fairness would have mandated disclosure.

[72] In her final submissions Ms Nash emphasised her submission that the invalid and "*fraudulent*" (as she put it) trespass notice and the presence of Mr Thow prior to the auction was immaterial to the complainants' decision to purchase the property due to the cumulative impact of the following factors. That Mr Thow was not legally

the owner of the property and he had no rights, and in fact settlement of the sale and purchase took place without issue. That under the terms of the mortgage contract to ASB neither Mr Thow nor his partner could have prevented the sale of the property without either repaying the mortgage or coming to an agreement with ASB, and as neither of those events occurred they had no right to issue a valid trespass notice. The invalidity of the trespass notice would have been logically apparent to a reasonable person from the outset and in itself it was full of errors.

[73] Ms Nash referred to mortgagee sale situations being often fraught with aggrieved and distressed mortgagors. She noted that there is a standard term in the Conditions of Sale which was included in this case reading:

“The Vendor shall not be under any obligation to provide at any time details of any lease, tenancy, licence or other occupation arrangement for the property. The vendor gives no warranty as to any lease, tenancy, licence or other occupation arrangement for the property, nor that vacant possession will be available at settlement date. The vendor is not under any obligation to provide vacant possession at settlement date.”

[74] It was also emphasised for the licensee that there was legal advice from a very reputable firm of lawyers that the trespass notice was not worth the paper it was written on.

[75] Inter alia, Ms Nash noted the evidence that it seems unlikely that knowledge of the trespass notice would have deterred the purchasers because they bid against the advice of their lawyer, completed the purchase, and are now happy residents in the property. Also, the relevant information was disclosed to Mr Hale immediately after the auction but did not deter him in any way. However, our focus is on the relevant conduct of the licensee in terms of the complainant.

[76] Ms Nash submitted that there is an overarching fiduciary duty by the agent to the vendor and a requirement to follow the vendor’s lawful instruction; and she particularly referred to Rule 6.1. She also referred to the content of Rule 9.1 (set out above). Generally speaking, it is best not to regard any rule as absolute but to apply in the context of any other relevant rule and in accordance with common sense and the facts of the case.

[77] In her final submissions, Ms Lawson-Bradshaw repeated the submission for the Authority that if a licensee’s duty to his or her clients is in direct conflict with the licensee’s duty to disclose information to a customer, and if there is no way to reconcile those two duties, the licensee must cease to act.

[78] She submits for the Authority that the trespass notice should have been disclosed and that its legal status, or lack of it, does not change this position. She put it that an invalid trespass notice, and the wider dispute it relates to, can still cause problems for a purchaser. She submitted that a potential purchaser has the right to be aware of such a trespass notice so that he or she can decide whether or not to enter into a sale and purchase agreement and that non-disclosure deprives a potential purchaser of that choice. She added that the fact that the complainants completed the sale after learning about the trespass notice does not mean it was not material information.

[79] We take the view that the conduct of the licensee in the context we have detailed above cannot be faulted. Mr Thow had no standing although he might have

if he had had some proof of being the agent or messenger for Ms Wardell, the registered proprietor. In any case, the ASB seems to have been a mortgagee in possession with greater rights of control and sale than did the defaulting mortgagor. It seems clear that, at material times, Ms Wardell was no longer living in the property and people named Bjorks were tenating it and that the lessee company referred to by Mr Thow had no rights in relation to the property.

[80] It seems to us that Mr Thow was treated respectfully not only by the licensee but by Whakatipu Realty Ltd. It also seems to us that the complainants must have thought they saw a chance to exploit a particular situation caused by Mr Thow with a view to seeking compensation from the licensee and/or Whakatipu Realty Ltd by threatening to complain to the Real Estate Agents Authority. We are not impressed by such a stance but, nevertheless, we must analyse the conduct of Ms S McMeeken, the licensee, as we have done.

[81] Having said all that, we generally agree with the Authority, and its counsel, that particularly at mortgagee sales, agents must be careful to disclose any material fact or issue to all prospective purchasers. However, we find that on the particular facts of this case it was not necessary for the events relating to Mr Thow and his purported trespass notice to be disclosed.

[82] Accordingly this appeal is allowed, and the finding of unsatisfactory conduct decision and penalties against Ms McMeeken of the Committee are hereby quashed, and we find that no further action is to be taken on the relevant complaints.

[83] 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 C Sandelin
Member