BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 8

READT 044/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**WARREN WILSON**
	First appellant
AND	**ROBERT WYNN-PARKE**
	Second appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20008)**
	First respondent
AND	**DANIEL HEWES and TERENCE GOODFELLOW**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 10 and 11 November 2014

DATE OF THIS DECISION 22 January 2015

APPEARANCES

The respective appellants/complainants on their own behalf
Mr L J Clancy, counsel for the Authority
Mr P J McDonald, counsel for the licensees

DECISION OF THE TRIBUNAL

Introduction

[1] This appeal relates to the marketing by real estate agents of a city property which could be regarded as land-locked, or not having appropriate access.

[2] Warren Wilson and Robert Wynn-Parke ("the appellants") appeal against the following decisions of Complaints Assessment Committee 20008, namely:

[a] a 21 March 2014 decision to take no further action (pursuant to s.89(2)(c) of the Real Estate Agents Act 2008 ("the Act")) in respect of a complaint by Mr Wilson; and

[b] a 1 April 2014 decision not to inquire (pursuant to s.79(c) of the Act), in respect of a complaint by Mr Wynn-Parke.

[3] Both complaints related to the conduct of the second respondent licensees, Daniel Hewes and Terence Goodfellow, regarding the sale of a property at 40 Karaka Street, Newton, Auckland, by mortgagee sale. Specifically, the appellants allege that the licensees failed to disclose certain defects about the property (detailed below) to prospective purchasers.

Factual Background

[4] Mr Wilson was the owner and mortgagor of the property and Mr Wynn-Parke was its purchaser (using a company) from the mortgagee about two months subsequent to a mortgagee auction sale relating to it.

[5] In October 2011, a real estate agency BCRE Limited (a member of the Harcourts Group) was instructed by ANZ Bank, via its solicitors Bell Gully, to sell the property. Mr Hewes was the branch manager of BCRE Limited and was also the auctioneer engaged to auction the property. Mr Goodfellow was the real estate agent responsible within BCRE Ltd for managing the listing of the property, its marketing, arranging the auction, liaising with the mortgagee vendor through its solicitors, and dealing with prospective purchasers.

[6] The auction for the property was initially scheduled for 22 November 2012. Mr Wilson alleged to the Authority that a survey of the property indicated issues that were not being disclosed to prospective purchasers. His initial complaint to the Authority was dealt with by the issue of a *"compliance letter"* from the Authority dated 14 December 2012; and the initial auction date was postponed.

[7] Disclosure letters dated 21 March 2013 and 10 April 2013 were prepared by the legal firm Bell Gully on behalf of the ANZ Bank vendor. These letters refer to various issues relating to the property, including the possible taking of some of its land for roading, the need to lease an adjacent road reserve for suitable access, that the mortgagee had not undertaken an accurate survey of the boundaries of the property, the existence of a land covenant (restriction on height of any building), and a Council order for removal of a building on the property.

[8] In particular, the said disclosure letters refer to the existence of a lease from the Auckland City Council to the mortgagor of the adjacent road reserve (72 Upper Queen Street, Auckland) which had been taken for a legal road but was not a formed legal road. In the 21 March 2013 letter, it is stated:

> *"The mortgagee understands from the mortgagor and Auckland Council that there is a lease between the Auckland Council and the mortgagor in respect of areas A, B and C [on a particular plan]. Purchasers are advised to seek independent advice in respect of the potential impact the existence of any such lease may have on site development."*

[9] In the 10 April 2013 letter, it is stated:

> *"At present there is a lease between the Auckland City Council and the mortgagor in respect of the areas A and C (the **Lease Land**). The mortgagee has received advice from Auckland City Council that the landlord under the lease is now Auckland Transport, and that Auckland Transport intends to cancel the lease with the mortgagor, and is prepared to negotiate entry into a new lease of the Lease Land with the new owner of the property. We refer you to clause 28 of the terms and particulars of sale. We **attach** Auckland Transport's Road Surface, Airspace and Subsoil Encroachment Policy and Guidelines documents (which govern the private use of structures on or over or under a legal road and are intended to regulate the management of the use of legal roads for private purposes). Purchasers are advised to seek independent advice in respect of the existing lease and any new lease."*

[10] The lease (and various issues relating to it) is the particular aspect of disclosure that Mr Wilson is primarily concerned about. His stance is that the property is land-locked as a result of the existence of the lease of that adjoining land so that any purchaser of 40 Karaka Street would need to negotiate with the lessee (or, perhaps, the lessor) to secure road access. The real estate company's position was that it was instructed by Bell Gully that the property was not land-locked.

[11] On 17 April 2013, Mr Wilson wrote to Bell Gully and to the licensees claiming that the matters referred to in the 10 April 2013 letter were incorrect and misleading. He claimed that the letter misrepresented that the mortgagor is the lessee of the adjoining property and that Auckland Transport intended to cancel the lease. He referred to a letter from the Director of RMAPlanning Ltd stating that RMAPlanning Ltd was the lessee by virtue of a Deed of Assignment of lease dated 12 March 2012. He stated that discussions with Auckland Transport confirmed that it denied saying to any party that it intended to cancel the lease.

[12] The licensees' position is that they were unsure whether the assignment of lease was "genuine and valid or the whole picture" as it was put for them. Mr Hewes states that he spoke with the solicitor at Bell Gully who confirmed that Auckland Transport was intending to terminate the lease and was willing to negotiate a new lease with the purchaser of 40 Karaka Street.

[13] All that led to the auction which had been re-scheduled for 18 April 2013 being again postponed.

[14] A further disclosure letter dated 2 May 2013 was prepared.

[15] On 15 May 2013, an email was sent from Bell Gully to the licensees recording that Auckland Transport had confirmed that its intention was to terminate the lease. That email also noted that the contemplated sale (by auction) was to be on the condition that the new owner of 40 Karaka Street had the option to enter into a new lease (of the adjoining road reserve land) with Auckland Transport and that, if Auckland Transport was unable to offer a new lease to the ultimate purchaser, then that purchaser would have the option of either waiving the condition or cancelling the sale and purchase agreement.

[16] An auction was held on 16 May 2013 but no confirmed sale resulted. The property was ultimately sold on 28 August 2013 to a family company established by Mr Wynn-Parke following a private negotiation.

[17] Mr Wynn-Parke's complaint also focused on the issue of the lease. He states that he had made the licensees aware of the issues with the property which he knew about, and that he expected them to research those issues and, if found to be correct, to advise and fully inform all other prospective purchasers.

The Decisions of the Complaints Assessment Committee

[18] In respect of the decision to take no further action (i.e. on Mr Wilson's complaint), the Committee found that the licensees took all reasonable steps to disclose to potential buyers the information that was material. It accepted that, in the initial and earliest stages of the transaction, the disclosures were "*less than ideal or even optimal*". However, the Committee found that, having regard to the unusual features of the property, the fact that disclosure was possibly something of a work-in-progress at the outset was not necessarily surprising; and, by the date of the auction, legally sufficient disclosure of the relevant and material information had occurred.

[19] In respect of the second appellant's complaint, the Committee decided not to inquire pursuant to s.79(2)(c) of the Act. The Committee's decision records that the second appellant sought to join his complaint to that of the first appellant at a very late stage in the process of it being considered. The Committee found the second appellant's complaint to duplicate the first appellant's complaint and that consideration of it would have involved re-litigation of the same issues. The Committee also noted that the second appellant appeared to be seeking the sort of remedy that might be awarded in a general civil jurisdiction. Section 79(2)(c) reads:

> *"(2) The Committee may ….(c) determine that the complaint is frivolous or vexatious and not made in good faith, and for this reason need not be pursued: …".* Part of the Committee's thoughtful reasoning reads:
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> *"4.3 Further to the foregoing, the issues arising from Mr Wynn-Parke's complaint are, in substance, the same as those that we have had to consider with respect to Mr Wilson's complaint. There is, in reality, nothing new in Mr Wynn-Parke's complaint. Mr Wynn-Parke says that, with respect to the process of selling the property he bought, the Licensees failed to disclose certain problems or 'defects' with the building. This is exactly what Mr Wilson contended. Further, the nature of the alleged 'defects' not disclosed are materially the same. The only differences between the two complaints relate to, we would suggest, the kind of language Mr Wynn-Parke uses to articulate his concerns and the repeated assertion that what the licensees allegedly did resulted in increased legal costs for him in relation to which he expects some kind of compensation from the Authority.*
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> *4.4 The Committee is concerned with the kinds of things specified in section 3 of our empowering Act, namely the maintenance of industry standards and the protection of consumers. The role of the Authority and Complaints Assessment Committees is regulatory and disciplinary. It might, in certain limited classes of case, be open to a Complaint Assessment Committee to, if it upholds a complaint, make an order that provides a monetary benefit to a complainant, but that is not really what this legislation and its complaints processes are all about.*

We make these observations with respect to what we believe Mr Wynn-Parke is actually seeking, which is the kind of remedy that might be awarded by a judicial forum having general civil jurisdiction.

4.5 The complaint by Mr Wilson has been dismissed and no further action will be taken in relation to it. Any consideration of Mr Wynn-Parke's complaint would clearly involve a re-litigation' of the issues arising from Mr Wilson's complaint. Such is fundamentally inconsistent with what the processes of the Act are supposed to be about. To this extend, there is, or would be, an abuse of the processes of the legislation with a decision to inquire into a complaint such as this, when the substance of what it is all about has already been considered and determined. Whether he means it to be so or not, Mr Wynn-Parke's complaint is frivolous and vexatious. The Committee will be taking no further action in relation to it."

Salient Evidence Adduced to Us

The Evidence for the Appellants

The Evidence of Mr W Wilson (the first appellant and a complainant)

[20] Mr Wilson emphasised that communications from the licensees after about mid May 2013, and sent on the advice of their lawyers, were particularly misleading on the issue of the availability of a lease of the adjacent road reserve; and that, at all material times, the lessor (which was Auckland City Council on behalf of Auckland Transport) simply accepted the existing lease of that area to Mr Wilson but had the policy that, if it was able to do so, it would grant a similar lease to the purchaser of the freehold property at 40 Karaka Street.

[21] Mr Wilson noted that his stance, and that of his co-appellant Mr Wynn-Parke, is that the licensees refused to provide all necessary background information relating to the freehold property, including in particular information about the adjoining lease of the so-called road reserve area which was the only key to vehicular access to the said freehold property at 40 Karaka Street. The appellants accept that there is what was called "*a milkman's right of way*", which is a small pedestrian access from the street to the said freehold property; although it is currently blocked by a wall. In the past, Mr Wilson has been able to access the property by being the lessee of the adjoining leasehold (road-reserve) land. In reality, we understand that he will provide Mr Wynn-Parke's family company (the purchaser of the freehold at 40 Karaka Street) with vehicular access over that leasehold land into the freehold property.

[22] In any case, Mr Wilson emphasised in evidence before us that, on the various auction dates referred to above and regularly, the appellants raised the said access issues with the licensees and also the question of the legal ownership of the house on the adjacent leasehold property. The licensees insisted that the house was owned by Auckland Transport and was part of the leasehold interest which was likely to be offered to the successful purchaser of the freehold property. The appellants maintain that the house is owned by the lessee and not by Auckland Transport so that, at material times, would have been (they say) owned by Mr Wilson although, seemingly, possession of that property also had been taken by his bank as mortgagee.

[23] Mr Wilson maintains that the licensees deliberately refused to provide a copy of the lease to prospective bidders or purchasers at the planned auction, presumably (he puts it), to emphasise that it would be available as part of the lease arrangement from Auckland Transport with a purchaser from ANZ and that it did not belong to Mr Wilson. The latter states to us that he considers that the conduct of the licensees was: *"Little more than part of a scam to mislead purchasers that the property in question [the freehold property being auctioned] was not land locked and they would also receive the benefit of the lease of an additional property with a house worth a rental income of about $50,000 per annum"*.

[24] The appellants also say that the licensees had initially denied the existence of a survey plan and subsequently refused to make it available; and it would have clarified the nature of the property being auctioned and various problems relating to it as covered above. Mr Wilson alleges also that the licensees refused to release other documents in their possession in order to mislead purchasers. Mr Wilson says that this alleged obstructive conduct from the licensees has caused the appellants significant cost which they would not have incurred had the licensees complied with their professional requirements as real estate agents; and that the appellants seek compensation for their expenses.

[25] Mr Wilson emphasised to us that the freehold property was land-locked except for a walled off milkman's strip. He said that the licensees represented to interested purchasers that the lessor (Auckland City Council for Auckland Transport) would cancel its then current lease to him and that the leased property, with the old villa erected on it, would be available to the new purchaser of 40 Karaka Street and could be let out at about $65,000 per annum. Mr Wilson says that the licensees represented that the whole corner section, being the leasehold area, was available on lease from the Council and they would not resile from saying that despite the existence of the lease to Mr Wilson and his advices that neither ACC or AT had any such policy or intention to cancel his lease. He put it that, otherwise, the lessees misunderstood the situation; although he felt they appeared to take the view that the lease document was, somehow, unreliable.

[26] Accordingly, Mr Wilson insists that the information distributed by the licensees to prospective purchasers was untrue and that they withheld further vital information.

[27] In cross-examination by Mr Clancy, Mr Wilson accepted that his point of complaint is that a number of significant matters were not disclosed to prospective purchasers by the licensees during the auction marketing campaign of the property and that, indeed, matters were wilfully withheld.

[28] Mr Wilson acknowledged that he lived in the leasehold property and still does. It seems that the building on the freehold property has recently been removed.

[29] Mr Wilson added that the licensees should have provided further documents regarding the concept of leasing the road reserve to prospective purchasers and he insisted that AT have always absolutely denied that it intended to cancel his lease. Mr Wilson also insists that, for some reason or other, the licensees misled prospective purchasers that the purchaser of the freehold would receive a lease of the adjoining property owned by ACC for AT. He added that the house on the leasehold property looks old and run down, but has been well renovated inside.

[30] Under cross-examination from Mr McDonald, Mr Wilson explained features of a number of photographs of the property and its adjoining properties. It seems that the

old villa on the freehold property was the subject of a removal order for some time and has recently been removed.

[31] Inter alia, Mr Wilson explained that, although he had been bankrupted by the mortgagee, he was still interested in his former freehold property as lessee of the adjoining road reserve property but considered that he had assigned the lease from ACC of the latter property to RMA Planning Ltd in which he was a shareholder and director. The assignment seemed to have taken place on 14 March 2012 and Mr Wilson's bankruptcy took place on 14 May 2012. That company had been incorporated on 5 March 2012 and is based in the building on the leasehold land, but operates a business in Kaitaia. Mr Wilson also lives in that leased villa which he operates as a home office.

The Evidence of the Appellant Mr Wynn-Parke

[32] Mr Wynn-Parke did not provide a brief of evidence but endorsed all the evidence of Mr Wilson.

[33] Mr Wynn-Parke said he had been a keen buyer of the freehold property and had made that clear to the licensees at all times. Early on, he sought an information pack about the property from them and noted that a number of issues were not dealt with. It seems he caused the first auction to be postponed pending clarification of various issues. He had put it to the licensees that it was their responsibility and duty to investigate his points and he told them that he wanted a level playing field on auction day. He noted they had advertised the property as *"a developer's dream"* which he felt it was not.

[34] Mr Wynn-Parke seemed to be saying that, by the time of the final auction on 16 May 2012, his concerns had been dealt with except the very important one that the freehold property at 40 Karaka Street had no vehicle access to it, and also that the adjoining leasehold property's villa encroached onto the freehold property and, because the encroachment was in concrete, it would be a major work to remedy. There also seemed to be an encroaching shed. Although that was built on concrete blocks, it was readily enough removable but, apparently, its removal would somehow lead to a boundary dispute and that issue is currently before the District Court in Auckland.

[35] Mr Wynn-Parke emphasised that he went to a great deal of time and effort to communicate and visit with the licensees in their office at Manurewa to clarify his concerns. Inter alia, he kept asking them why would they say that the lease from AT was to be cancelled because there was a valid and binding lease from AT to Mr Wilson. Mr Wynn-Parke said that the licensees were vague about that question and simply said they were looking into it.

[36] Mr Wynn-Parke maintains that, up to the day of the auction, the licensees were still telling prospective purchasers that the lease to Mr Wilson would be cancelled and a new lease was available for the purchaser of the freehold property. He emphasised that his point is that the licensees were thereby misleading the market.

[37] It seems that, currently, Mr Wynn-Parke is in the course of negotiations with Mr Wilson to take an assignment of the said lease from AT (into his purchaser company) from Mr Wilson and, indeed, there is apparently an oral agreement about that but not yet a written agreement or a formal deed of assignment.

[38] Mr Wynn-Parke insists that the evidence of Mr Viall (referred to below), as principal of the Harcourt's agency, is completely wrong.

[39] It seems that, at the auction, Mr Wynn-Parke purchased the freehold property for $660,000 but the mortgagee vendor (ANZ Bank) could not fulfil all the conditions of sale so that negotiations followed. He ultimately purchased the freehold property for $440,000.

The Evidence of Mr P Chapman in Support of the Appellants

[40] Mr Chapman (a neighbour to the freehold property) supplied a typed brief of evidence which is focused on the way the licensee, Mr D Hewes, handled the auction of the property, which eventually took place on 16 May 2013.

[41] Mr Chapman said that, in part of his opening presentation, the auctioneer stated that Auckland Transport would be cancelling the current lease of the adjoining road reserve property but provided no evidence about that. Then Mr Wynn-Parke asked some questions of the auctioneer including *"how is it possible for Auckland Transport to cancel the lease"*? It is alleged that Mr Hewes responded *"that's what they have advised they are doing"*. Inter alia, Mr Wynn-Parke then asked whether Harcourts had advised any prospective purchasers that he (Mr Wynn-Parke) was in negotiations with the current lessee (Mr Wilson) to have the lease assigned to Mr Wynn-Parke. Mr Hewes responded *"no"* and there was further interchange on that topic. Allegedly, Mr Hewes, as auctioneer, told those present not to be concerned about the point nor believe it.

[42] Then Mr Wynn-Parke asked who owned the house on the leased land, and said that house apparently encroaches on the property being auctioned. Mr Hewes responded *"Auckland Transport"*. Mr Wynn-Parke then disputed that and put it that the lease showed that the lessee owned that building. We note that the lease infers that the lessee owns a building which is partly on the leased land and partly on the adjoining freehold property.

[43] At that point Mr Hewes and a later witness, Mr Viall, accused Mr Wynn-Parke of trying to disrupt the auction. Mr Wynn-Parke asserted that he was simply endeavouring to ensure that there was a level playing field for all bidders at the auction. Eventually, Mr Viall said he would check out there and then the ownership of the house and left the auction room to do so; but returned a short time later stating that the Crown owns the house, but that was strongly refuted by Mr Wynn-Parke.

[44] The auctioneer then made it clear there was to be no more discussion and the auction proceeded.

[45] Mr Chapman was not a registered bidder for the freehold property but was interested as a neighbour. He referred to condition 28 of the terms of sale which gave the purchaser of 40 Karaka Street the right to withdraw from the purchase if a satisfactory new lease of 72 Upper Queen Street was not available to the purchaser from Auckland Transport at this point.

[46] Under cross-examination he insisted that his version of the conduct of the auction was correct.

The Evidence for the Licensees

The Witness Mr G S Viall

[47] Mr Viall is the principal of the agency, which is a branch of Harcourts, and has overseen a great number of mortgagee sales.

[48] He vouches for the integrity of Messrs Hewes and Goodfellow, the said licensees.

[49] He said that the mortgagee sale of 40 Karaka Street, Central Auckland, had become such of a saga that he personally attended its auction at Harcourts' regional office in Newmarket on 16 May 2013. Also, in accordance with his normal practice, he had Ms N Schuyt, of Bell Gully solicitors, on standby telephone as the solicitor for the mortgagee bank *"in case any issues should arise at the auction"* as he put it.

[50] He then continued evidence-in-chief as follows:

> *"5. Before the bidding got under way, Dan Hewes as the auctioneer gave what I considered to be a very clear and comprehensive explanation of the property and the various issues that had been raised in respect of it. Such issues included boundary encroachments, the precise line of the road taking boundary, and the issue of the area of the land. Then Dan Hewes asked whether there were any questions about any of these issues.*
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> *6. At this point Mr Wynn-Parke, whom I had met previously, told the gathering that he was the lessee of the adjoining property on the corner of Upper Queen Street and Karaka Street and that any purchaser of the property would have to deal with him in connection with any issue to do with the lease of the adjoining land. I asked Mr Wynn-Parke whether he could confirm that he actually was the lessee and had a signed lease. He backed down and said he wasn't actually the lessee but he was negotiating to become the lessee.*
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> *7. Mr Wynn-Parke then asked about the ownership of the building on the corner property which adjoins the subject land. We did not know the answer to that and said so. Mr Wynn-Parke then said that the house was the property of the lessee. This seemed to us to be highly unusual and given that he had previously attempted to mislead the crowd I felt it necessary to find out so as to prevent him from doing so again. I telephoned Nichola Schuyt of Bell Gully and asked her who owned the building on the adjoining leasehold land. She told me that Auckland Transport owned the building. I informed her that Mr Wynn-Parke had informed the auction crowd that the lessee was the owner and Ms Schuyt confirmed that this was untrue. I then went back into the room and said to everybody that Bell Gully's advice was that the building on the adjoining leasehold property belonged to Auckland Transport."*

[51] Mr Viall continued that he believed that he and the licensees did all they could to uncover all useful relevant information about the property and to disclose it to prospective purchasers. He observed that, in his experience, real estate agents who conduct mortgagee sales need to rely heavily on the information they are given by the solicitors for the mortgagee but that, often, they do not possess the information

about the property which an owner would have; and that prospective purchasers normally understand that. He concluded his evidence-in-chief with the following:

> *"9. …. Here neither Mr Hewes nor Mr Goodfellow was in a position to challenge information or assurances explicitly provided to them by Bell Gully. They were in no position to try to conduct their own legal assessment or any surveying or any similar assessment. On the other hand, information provided by those with vested interests such as Messrs Wynn-Parke and Wilson, was correctly approached with caution unless such information could be verified."*

[52] Under cross-examination by Mr Wilson as to the effect of the existing deed of lease from AT to Mr Wilson, Mr Viall simply insists that Bell Gully advised Harcourts that lease was to be cancelled by the lessor and, in any case, a condition of the auction sale was that the successful bidder receive a new lease of that adjoining property from AT. Mr Viall considered that Mr Wynn-Parke was all along *"trying to manipulate the marketing proceedings in his favour"*.

[53] We found the evidence of Mr Viall helpful and assess him as an honest witness.

The Evidence of the Second Respondent Licensee Mr D J Hewes

[54] Mr Hewes has 23 years experience in the real estate agency profession and is a specialist at mortgagee sales. He was the supervisor of the said mortgagee auction of the property because, as he said, it had a range of issues and complexities with which he became involved from time to time. He was also the auctioneer due to call the auction.

[55] He referred to the 10 February 2014 joint response of Mr Goodfellow and himself (set out in pages 23 to 29 of the agreed bundle of documents) to the various issues raised by the appellant complainants. Relevant portions of that response are as follows:

> *"8. We have had difficulty in responding to this complaint, particularly in knowing what the real issues were that Mr Wilson was raising. The paperwork that has been generated by this matter is extremely extensive. The chronology which we submitted with our letter of 21 August 2013 to the investigator makes clear that the auction was rescheduled a number of times and the disclosure letter which we were instructed to distribute to prospective purchasers, went through a number of different editions.*
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> *9. It is only on receipt of Mr Wilson's memorandum of 31 January 2014, that we have understood the issues that Mr Wilson is raising. …..*
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> *….. **The issues now raised by Mr Wilson***
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> *11. As we understand Mr Wilson's memorandum of 31 January 2014 he is in effect saying that the matters numbers 1 to 9 inclusive set out on pages 5 and 6 of his memorandum, are matters which we knew or ought to have known related to the property and which we should have disclosed to prospective purchasers. There is nothing in this complaint. We will deal with the issues in turn as follows:*
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> *1) Land locked by leasehold property. It is clear that the material we gave to prospective purchasers, disclosed the existence of the lease,*

and disclosed the BCL report that provides the foundation to Mr Wilson's contention that the property is landlocked. Mr Wilson's contention is likely not to be true. Certainly we were instructed by Bell Gully that in fact the property was not land locked. On this issue as on other issues as it will emerge, we are being placed by Mr Wilson as the meat in a sandwich between Mr Wilson and the bank represented by its solicitors.

2) *Disclosure of the lease. The Bell Gully letters disclose the existence of the lease. There was a dispute between Mr Wilson on the one hand and Bell Gully on the other as to various matters arising from this lease. We were not able to adjudicate in that dispute and we submit that it would have been entirely inappropriate for us to do so. We were entitled to accept instructions from the solicitors who gave us assurances about the status of the position that they were asking us to make available to purchasers. The statement in Mr Wilson's memorandum at paragraph 2 that we were repeatedly informed by the Council that any purchaser will need to negotiate with the leaseholders for secure road access, is not true. We were not so informed by the Council.*

3) *Encroachment issues on the north boundary. The encroachment issue on the north boundary is disclosed in the BCL document appended to the Bell Gully disclosure letters at every stage.*

4) *Villa on NA517/62 encroaching on the subject property. This encroachment is shown on the BCL document appended to the Bell Gully disclosure letters.*

5) *Concrete brick shed encroaching. This is shown as a possible issue on the BCL survey document appended to Bell Gully's disclosure letters and made available to all prospective purchasers.*

6) *The area of the property. The terms and conditions prepared by Bell Gully show the area as 228 meters. We were instructed by Bell Gully to advertise at 228 meters. Mr Wilson challenged Mr Goodfellow that in fact we should be advertising it as 36 meters less. We went back to Bell Gully but they were clear that we should be advertising it as 228 square meters as per the title. Again we couldn't adjudicate between Mr Wilson and Bell Gully and we submit that we were entitled to accept the instructions of Bell Gully on this point. However Mr Goodfellow was very careful to point out to every prospective purchaser that they should refer to the title and get advice about this because there was an issue about exactly how many square meters were involved.*

7) *Whether villa forms part of the subject property or not. Our job was to disclose the issue and it is clear from the Bell Gully letters that it was disclosed. The building is derelict and we believe it is not connected to any services. We should point out that we have never been allowed to be on the property because the mortgagor (Mr Wilson) would not permit that. However we believe that the villa does not add to the value of the property. The requirement to have it removed is a diminution of the value of the property.*

> 8) *The Bungalow. It is not clear what Mr Wilson's point is here, but the BCL survey information was disclosed to all prospective purchasers and therefore there is nothing that needed to be disclosed that was not disclosed on that subject.*
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> 9) *Auckland Council Court Order. This is included in the Bell Gully disclosure letters and distributed to all prospective purchasers."*

[56] However, Mr Hewes observed that on 17 April 2013 the licensees had received from Mr Wilson documents described as a copy of the lease for 72 Upper Queen Street and a copy of a deed of assignment of that lease; but the licensees were not at all sure that these documents were genuine, valid, or conveyed *"the whole picture"* as the witness put it. He referred the documents to Ms Schuyt of Bell Gully and she shared those concerns.

[57] Mr Hewes concluded his evidence as follows:

> *"6. …. It was Bell Gully's position repeatedly confirmed to us, that Auckland Transport was intending to terminate the lease and was willing to negotiate a new lease with the purchaser of the property we were selling. In those circumstances, the existing lease documents would not have any bearing. By then, Bell Gully had amended the term and conditions of the sale to include clause 28 giving the purchaser a ready exit from the purchase agreement if the purchaser was not able to negotiate a new lease with Auckland Transport. That clause 28 is at page 105 of the bundle. For these reasons Bell Gully told us not to distribute the documents received from Mr Wilson. For the same reasons, we were comfortable with that decision. We would not in any event feel comfortable distributing documents that we cannot reasonably vouch for."*

[58] He said that, as auctioneer, he was asked who owned the bungalow on the leasehold land and he responded that he did not know; but that Mr Viall left the auction room and telephoned Bell Gully and came back to say that that bungalow was owned either by the Crown, Auckland City Council, or Auckland Transport. Mr Hewes said that he did not represent any of those, or anyone else, as actually owning the property.

[59] With regard to clause 28 of the Conditions of Sale, he insisted that he said that *"if"* the existing lease were to be cancelled, he understood that AT would issue a new lease to the successful bidder of the freehold property.

[60] Mr Hewes was carefully cross-examined by all parties or their counsel. Under cross-examination by Mr Wilson he insisted that, at all times, he followed the advice he was given by Bell Gully which, inter alia, was that AT intended to cancel the lease and re-issue it to the successful bidder of the freehold. He was also conscious of the clause in the terms of sale (Cl. 28) enabling the successful bidder to avoid the purchase if that successful bidder did not achieve obtaining a new lease from AT of the leasehold land, including its house.

[61] Inter alia under cross-examination by Mr Wynn-Parke, Mr Hewes insisted that neither he nor Mr Goodfellow made any representation about there being vehicular access available to the freehold property. He pointed out that the plans provided by Harcourts to prospective bidders made it clear that there was no vehicular access to the freehold.

[62] Mr Hewes seemed to us to be an honest and clear witness.

The Evidence of the Licensee Mr T R Goodfellow

[63] Mr Goodfellow has had 18 years experience in the real estate industry and is also a specialist in the conduct of mortgagee sales. He recorded that the agency was instructed on 25 September 2012 by Bell Gully, on behalf of ANZ Bank, to sell 40 Karaka Street, Newton by mortgagee sale. Mr Goodfellow then continued his evidence in chief as follows:

> *"6. There were some complexities with the property, particularly with the title, with the status and ownership of adjoining land, with encroachments on 2 of the boundaries, with access to the property because of the unwillingness of the mortgagor to assist, and by the interest in purchasing the property by an adjoining neighbour Mr Wynn-Parke.*
>
> *7. It has always been difficult to be clear what Mr Wilson and subsequently Mr Wynn-Parke have been alleging against us. We now believe that in essence, they allege that various deficiencies with the property have not been fairly disclosed to prospective purchasers. None of those allegations is true. I have ensured that everything that a purchaser ought to know about this property that was accessible to me, has been disclosed to all prospective purchasers.*
>
> *8. On 17 April 2013 we received an email from Mr Wilson, attaching what he described as a copy of the lease of the adjoining corner site and a copy of the assignment of that lease. We referred to Bell Gully for instructions in respect of this. Bell Gully took the position in respect of the documents that their validity was uncertain and they should therefore not be provided to prospective purchasers. In any event, Bell Gully's position was that the existing lease was to be cancelled and a fresh lease to be negotiated with the purchaser of the land we were selling. The existing lease documentation was therefore not relevant. Bell Gully had already decided to add special provisions to the terms and conditions of the sale, relating to the position with the adjoining corner site and the lease of it. The additional clauses in the terms and conditions of sale are at page 105 of the bundle."*

[64] Mr Goodfellow was carefully cross-examined by all parties or their counsel. He insisted that, throughout the marketing campaign, all prospective bidders were given full information on a continuous basis in terms of advice to Harcourts from Bell Gully. He said that he understood that AT, as lessor of the adjoining road reserve land, intended to cancel the lease and re-issue it to the successful bidder of the freehold. It appears that neither he nor anyone at Harcourts actually contacted AT or Auckland City Council on that point.

[65] Mr Wynn-Parke firmly put it to Mr Goodfellow that the main problem for the appellants is their view that the licensees were not transparent about the lack of vehicular access for the freehold property, which only had a milk-vendor strip as theoretical access. Mr Goodfellow seemed to respond that, because of the milk-vendor strip, the property was not land-locked but simply did not have vehicle access and that was made clear in the licensees' information package for prospective purchasers in terms of advice to Harcourts from Bell Gully.

[66] Mr Goodfellow seemed to us to be a person of integrity.

Relevant Law

[67] The relevant rules of professional conduct relating to disclosure are as follows (Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012):

> *"6.4 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.*
>
> *…*
>
> *10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either –*
>
> *(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or*
>
> *(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.*
>
> *10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld."*

[68] Equivalent provisions were contained at rules 6.4, 6.5 and 6.6 of the 2009 Rules. The effect of the above rules is that licensees must ensure that they are open and honest with prospective purchasers so that purchasers are not misled in their decision to make an offer to purchase a property; *Wright v CAC & Woods* [2011] NZREADT 21 AT [41]-[43].

[69] Licensees must also take reasonable precautions to check the veracity of any representations made. Where the licensee has not made the necessary checks, any positive representation should be qualified as being a statement of the vendor that will need to be independently verified, or, the purchaser must be clearly informed that there may be issues regarding the statement and that the purchaser will need to obtain independent legal advice, *Donkin v Real Estate Agents Authority & Morton-Jones* [2012] NZREADT 44 at [8]-[9]. There we also stated that licensees are not expected to have the ability of a solicitor to determine acceptable risks and problems with issues such as titles and covenants.

The Stance of the Authority

[70] Mr Clancy (as counsel for the Authority) submits that at the heart of this matter was a dispute between Mr Wilson and those instructing the licensees as to whether the lease of the adjoining land (road-reserved 72 Upper Queen Street) was to be cancelled by Auckland Transport, whether that lease had been lawfully assigned, and whether that was material given the said clause 28 of the terms and particulars of sale.

[71] The issue is whether the licensees complied with their duties of disclosure in the circumstances. The evidence focused on the disclosure made in the Bell Gully

letters regarding the lease, the assignment of lease document, and the information available regarding cancellation of that lease by Auckland Transport.

[72] Counsel for the Authority highlighted the Committee's observation, in its decision of 21 March 2014, that it is not open to an agent to attempt to devolve professional obligations to an instructing lawyer, simply because a law firm is the source of instructions; and that if those instructions contradict a licensee's duty to disclose material information to a customer, then the instructions should be returned. We agree.

[73] However, it is also relevant that the issues which arose during the marketing of the property were matters of some complexity and in dispute between the registered proprietor and those acting for the mortgagee. Our focus is not on whether the licensees ought to have attempted to resolve those issues but whether sufficient disclosure was made by the licensees to bring the relevant issues to the attention of prospective purchasers, so that purchasers were able to make their own enquiries and take specialist advice.

[74] At various stages, Mr Wilson has made complaints regarding the REAA investigation of his complaint. That aspect was addressed by the Committee. It noted at paragraph 4.2 of its decision on his complaint that an opportunity was provided for Mr Wilson to make submissions, including any concerns that he believed had not been addressed. The licensees were given a right to respond and Mr Wilson had a right of reply. The decision records that process was followed and the Committee makes reference to Mr Wilson's response at paragraph 4.5 of its decision.

The Stance of the Appellants

[75] Simply put, the appellants complain that the licensees, in the course of marketing the sale by mortgagee auction of the above property, failed to disclose to prospective purchasers the various problems relating to the property which we have covered above.

[76] They put it that the licensees must have known of those problems or, by the exercise of reasonable diligence, should have.

[77] A constant theme before us from the complainant appellants, and especially from Mr Wynn-Parke, is that the effect of the so-called failures by the licensees was that there was not a level playing field at the auction.

The Stance of the Licensees

[78] Counsel for the licensees, Mr P J McDonald, helpfully provided a chronology of salient developments throughout the said saga but we need not set that out for present purposes. He also, quite correctly, noted that our focus is to be on the conduct of the licensees rather than the details provided by the appellants as to their personal involvement in this saga.

[79] Mr McDonald opined that the appellants have not put before us much more evidentiary material than was before the Committee, except that we had evidence from Mr Chapman and (by consent) a brief from Ms Wynn-Parke, the daughter of the second appellant, (but the appellants decided that it was not necessary to call her), and a letter of 17 April 2013 to Bell Gully admitted by consent from Mr P. B.

Friedlander as lawyer for Mr Wynn-Parke. That letter drew to Bell Gully's attention that information in the licensees' disclosure material (and in a letter from Bell Gully of 10 April 2013) may be misleading and explained Mr Wynn-Parke's concerns as a prospective purchaser of 40 Karaka Street.

[80] Mr McDonald put it that the essence of the appellants' case seems to be upon them, and in particular Mr Wilson, having failed to persuade Bell Gully on various points, it became the licensees' responsibility to independently investigate those points and challenge the clear instructions of Bell Gully to Harcourts regarding the said auction process. Mr McDonald submits for the licensees that was not their role and they had no ability to adopt that approach; that a real estate agent's role is not to be an investigating judge in respect of complex matters of law and survey; and, in the circumstances of this case, they were to ensure, so far as they could, that prospective purchasers were aware of the issues with the property so that such prospective purchasers could take their own independent advice. We concur with those views.

[81] Mr McDonald observed, and all parties seemed to agree, that the marketing programme referred to above was a mortgagee sale of a complex property quite different from an ordinary sale of a residential property, and was not a property to interest first home buyers or anyone lacking a sophisticated understanding of property.

[82] Mr McDonald then continued:

> *"9. The appellants point repeatedly to Quin v REAA [2012] NZHC 3557 and to statements by the Tribunal and the High Court, taken from a different context, about the salesperson's obligation to undertake enquiries about an uncertain position relating to the boundaries of the property she was selling.*
>
> *10. The essentials of the findings of the High Court are set out in para [28] of the decision as follows:*
>
> > *"… it was, and in the context of the legislation must have been, open to the Tribunal to find that after an initial misrepresentation where the appellant knew that the position was unclear over the positioning of the boundary, it was unsatisfactory conduct on her part not to make further enquiries and to inform the second respondents of the result of those enquiries (and if it was indeterminate, to pass on the instructions she had received from the vendor and warn the second respondents that they should engage specialist help to establish the boundaries) prior to the auction."*
>
> *11. The crucial point is that the Court allowed that the result of the enquiries may be indeterminate. The nature and extent of the enquiries that the salesperson was required to undertake, were not specified. No doubt that depends on the circumstances. However it is clear that the salesperson is not required in every case to reach their own conclusion on the issue.*
>
> *12. Indeed it is submitted that salespersons will very often not be qualified or resourced to reach a conclusion, and it would be irresponsible to try to do so.*

13. That is the situation that confronted the agents here. The issues raised were of complex matters of law and surveying.

[83] Mr McDonald then dealt with the issue raised by the complainants that the licensees, at material times, had a copy of the lease of the adjoining road reserve property but refused to provide it to prospective purchasers. In that respect Mr McDonald continued:

"15. …. In connection with that it is submitted as follows:

i) The existence of the lease was clearly disclosed by all Bell Gully disclosure letters.

ii) The lease and assignment documents were provided by Mr Wilson at a late stage, one day before the third scheduled date of auction.

iii) The documents came from a source that the agents could not rely upon and against a background which indicated that they were not the full story.

iv) On its face the assignment of the lease was not with the landlord's consent and was therefore invalid as an assignment, and/or provided a further ground for termination.

v) The lease was of the property adjoining the property for sale, and its significance was uncertain.

vi) On the approach taken throughout by Bell Gully, that Auckland Transport were intent on cancelling the lease and that the agreement to purchase was conditional upon the grant of a new lease to the purchaser, the existing lease was beside the point.

vii) Prospective purchasers were referred by the agents to a contact at Auckland Council. A prospective purchaser Mr Fermah's email at page 269 of the bundle to the investigator of the REAA, confirms that he was referred to Auckland Council and was able to make all the due diligence enquiries he thought that any purchaser would want to make.

viii) The agents were right to be cautious about disseminating documents from the source in question. Dissemination of information by the agents was clearly tightly controlled by Bell Gully, for very good reason in this case.

ix) The position with the lease and the termination of it, is just another example of Mr Wilson expecting the real estate agents to be some kind of investigating judge to overrule Bell Gully. See for example, page 241 of the bundle. That is not their role in the circumstances evident here.

x) In respect of the lease and termination of it, the agents in effect followed the prescription of Brewer J in Quin to pass on the vendor's instructions and to advise prospective purchasers to seek independent advice. The latter is included in Bell Gully's letter of 2 May 2013, page 264 of the bundle; see also para vii) above, prospective purchasers referred to Auckland Council.

The Final Oral Summings Up by each Party

[84] Mr Clancy put it to us that it is question of fact and degree whether the licensees have breached their duties in any way and that we should focus on the pre-auction disclosures from them to prospective purchasers.

[85] As set out above, he had submitted that the Real Estate Agents Authority does not accept that licensees can devolve their professional obligations to lawyers i.e. rely on the advice given to them about their obligations from their lawyers. He may have meant that we should take that factor into account and that, generally, the agents could not simply devolve their responsibilities to a lawyer. They cannot merely provide answers from a lawyer saying that was the source and necessarily exonerate themselves; but, if they did that, it is very much a factor in the way their conduct is to be assessed.

[86] Mr Wilson submits that the various letters from Bell Gully to Harcourts show that the licensees were cooking up a scam and had their solicitors trying to circumvent the deficiencies of the property. His essential stance is that the licensees did not disclose all they knew about the property in terms of the concerns raised by him and Mr Wynn-Parke, and relied on advice from Bell Gully. He submits it was wrong for the licensees to accept Bell Gully's advice *"to disclose nothing"*, so he puts it, and to treat the lease as able to be cancelled when it was not. He also puts it that the question of ownership of the house on the leasehold property should not have been left confused until the actual auction took place, but should have been clarified for prospective purchasers months earlier. He submits it was wrong for the licensees to rely on the said clause 28 of the terms and conditions of sale in terms of there being protection for a bidder. He seemed to be saying that his new family company, which acquired the freehold on his behalf (Gowith Holdings Ltd), remains *"him"*.

[87] Mr Wynn-Parke accepts and endorses Mr Wilson's submissions.

[88] Inter alia, Mr McDonald pointed out that the advice from Bell Gully to Harcourts is clearly written and that, in any case, the licensees advised prospective purchasers to obtain their own advice on issues of concern. He emphasised that, insofar as Bell Gully suggested withholding certain information from prospective purchasers on 30 April 2012, that was merely until Bell Gully had been able to clarify the issues and they did that within about a further three days; so that any withholding of information was prudent and very temporary.

[89] Mr McDonald put it that Mr Wynn-Parke's claim for a $10,000 costs order against the licensees to cover his "*extra legal fees*" has no sufficient link to the conduct of either licensee; and that their conduct cannot be regarded as causative in any way of Mr Wynn-Parke incurring such fees.

Discussion

[90] We noted at the outset of the hearing that there was quite some tension between the appellant complainants and the two second respondent licensed real estate agents. However all parties are to be commended for being polite and focused before us.

[91] We accept that the licensees were concerned to professionally carry out their instructions from the ANZ Bank as the mortgagee vendor of the property. That process must have been somewhat painful for the complainant Mr Wilson as he was

the mortgagor of the said freehold property (40 Karaka Street, Newton) and the lessee of the adjoining road reserve property (72 Upper Queen Street), which provided vehicular access to 40 Karaka Street.

[92] The position of Mr Wynn-Parke must have been that his concern was to purchase a desirable freehold site at a fair or good price to him. As a residential neighbour in the area, he had been an acquaintance of Mr Wilson for 17 years but they had not been friends until recent times. It followed that he wanted other prospective purchasers to realise that there were various problems regarding the property e.g. it not having vehicular access, in reality not having satisfactory pedestrian access, there being a dispute as to the ownership of a building on the adjoining leasehold property and, particularly, about its encroachments onto the freehold site and, possibly, vice versa.

[93] It is interesting that this saga seems to have led to the two appellants becoming friends; although Mr Wynn-Parke as current owner of the freehold site seems to be dependent on Mr Wilson for vehicular access to that freehold site which, presumably, he intends to develop.

[94] It can be seen that the parties probably have their respective subjective approaches to the issues.

[95] We agree with the complainants that there seemed to be no reason to be sure that Auckland Transport, as lessor of the adjoining road reserve land, would be able to cancel that lease. There was no convincing evidence that Mr Wilson, as lessee, had assigned his leasehold interest in terms of the draft deed of assignment exhibited to us as the lessor did not seem to have consented to the assignment. It followed that a purchaser of 40 Karaka Street could not be sure of proper access to it and that the licensees were marketing a property which had no vehicular access, dubious pedestrian access, and with encroachment or overhang problems.

[96] Having said that, the licensees simply referred issues, as they were raised, to the solicitors for the mortgagee vendor (Bell Gully and Co) and passed on responses to interested persons, including the complainants, in terms of guidance from those solicitors. We do not think it can be said that any of those responses were misleading and we accept that there was no intention to mislead on the part of either licensee.

[97] In any case, Mr Wilson does not have any convincing proof for his view that the conduct of the licensees was in breach of the Act and its Rules. He considers their conduct to be at least unethical but, in his view, misleading and deceptive.

[98] He has experienced no proven loss as there is no evidence that a higher price should have been obtained for the mortgagee by the licensees which, in turn, would affect the financial relationship between that ANZ Bank mortgagee and its mortgagor Mr Wilson or his company.

[99] Mr Wynn-Parke's concern, apart from agreeing with Mr Wilson about breach of the Act and its Rules, seems to be that he could have purchased the property for a lower price had the licensees been more open about the problems associated with the freehold property and its adjoining leasehold property. He also puts it that, because of the licensees' failures and withholding of information, he incurred at least $10,000 more than he should have in his legal fees in acquiring 40 Karaka Street and its aftermath.

[100] However, it seems to us that Mr Wynn-Parke was extremely well informed on the so-called problems relating to the properties and, indeed, knew more about those than anyone else so that if the playing field was not level that tilt was in his favour.

[101] In fact, we have no reason to find other than that the playing field was generally level. Accordingly, it is puzzling why Mr Wynn-Parke felt the need to incur, apparently, an extra $10,000 in legal fees.

[102] It is somewhat curious that the appellant complainants focus on their not having been a level playing field at the auction because their aim for the auction outcome was achieved i.e. Mr Wynn-Parke was the top bidder for the property. That enabled him to negotiate with the ANZ Bank as vendor (being mortgagee in possession) and obtain a very substantial reduction in price because of the problems associated with the property as covered above.

[103] For all that, Mr Wynn-Parke remains concerned because he has valuation advice that the property was not worth what he paid for it at his settlement of the purchase and that the value has not improved in the meantime. However, Mr Wynn-Parke does not seem to be seeking compensation for any price overpayment he may have made, but is seeking compensation for extra legal fees he has incurred in ultimately acquiring the property due, he puts it, to withholding of information at material times by the licensees; and he asserts that those extra legal fees exceed $10,000. It is possible to interpret his various legal bills relating to the property that way.

Our View

[104] Simply put, the freehold property was marketed for sale together with an appropriate package of information and on the basis of appropriate particulars and conditions of sale in the usual way. There were the usual and appropriate warnings and protections for prospective bidders or purchasers. All issues were referred promptly by the licensees to a highly respected law firm which gave considered responses and advices.

[105] Real estate agents are not expected to act as lawyers. They must meet their obligations in terms of the Act and its Rules. Essentially, their role is to pass on all relevant and appropriate information about the property being marketed and to either obtain answers to issues raised by prospective purchasers, if reasonably possible, and to remind the latter that they should obtain their own independent legal or professional advice.

[106] In this case, there was satisfactory disclosure to prospective purchasers of complications relating to 40 Karaka Street as we have covered them above.

[107] In the present case we find that the licensees have not misled anyone in any way and, indeed, took care to refer all issues to the solicitors for the vendor mortgagee and pass on the responses of those solicitors. The licensees took seriously all concerns raised by the complainants. In our view the position was well summed up and assessed by the Committee of the Authority and we agree with its conclusion that no further action be taken with regard to Mr Wilson's complaint; and that Mr Wynn-Parke's complaint be not inquired into.

[108] For the above reasons this appeal is dismissed.

[109] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member