BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 22

READT 049/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**BARFOOT & THOMPSON LTD**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 302)**
	First respondent
AND	**JANICE GILES and LINDSAY GILES**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 10 December 2015

DATE OF THIS DECISION 1 March 2016

COUNSEL

Mr T D Rea and Mrs C Eric for the appellant
Ms K Lawson-Bradshaw for the Authority
(No appearance by or for the second respondents)

DECISION OF THE TRIBUNAL

Introduction

[1] This is another case concerning the possible methamphetamine tainting of a residential property and the appropriate procedures required by the particular facts.

[2] Barfoot & Thompson Ltd appeals against the decision of Complaints Assessment Committee 302 finding that it engaged in unsatisfactory conduct as explained below. The complainant vendors did not take part in this appeal.

Factual Background

[3] On 15 October 2013 Mr and Mrs Giles (the complainants) listed their property at 45 Davington Way, Burswood, Auckland with the appellant agency and, more particularly, with Robert Liu and James Yang from Barfoot & Thompson Ltd. An auction was

scheduled to take place on 19 November 2013, and nine potential purchasers became registered to bid.

[4] One of the registered potential purchasers arranged for a methamphetamine test which was carried out on the property on 8 November 2013. On 13 November 2013, the test came back positive for methamphetamine. The appellant agency was advised about this test result on 14 November 2013.

Events on 15 November 2013

[5] The appellant entered information about the positive test result into its system at 12.37 pm on 15 November 2013. That system automatically published the information about the test result when it updated at 6.30 pm. The notification stated:

> *"Another party has advised that there may be issues relating to Methamphetamine. The vendor has advised that they have no knowledge of these issues. Recommend to any prospective buyers that they obtain their own expert advice in this regard."*

[6] There is a dispute as to when the complainant vendors were told about the test results by the appellant and whether this was before or after disclosure was made to potential purchasers. The complainants said they were told in the first instance by their lawyer who called them because he had received a draft sale and purchase agreement which included a clause about the positive test result.

[7] The complainants also said that they met with Messrs Liu and Yang to discuss the test result at 4.00 pm on 15 November 2013 and did not have any previous discussions about it. According to the complainants, the licensees put pressure on them to carry out major clean-up work to the house. They also told the complainants that a potential purchaser had already pulled out as a result of the test results.

[8] Mr Yang gave evidence to the Committee that the complainants did not want the information (about the property testing positive for methamphetamine) disclosed and were unhappy when he advised them the information had already been entered into the Barfoot & Thompson internal system. He admitted that the complainants had not consented for the information to be given to prospective buyers and salespersons.

[9] On Mr Yang's version of events he did not disclose the test until the following day (presumably, the 16 November 2013) when salespersons and potential buyers made contact with him. Mr Yang further stated that, when the auction was deferred, potential purchasers were told that was due to personal reasons while sales-persons were provided with the full story.

Events Following Positive Methamphetamine Test

[10] On 17 November 2013, the complainants were told that all registered buyers had withdrawn from the auction.

[11] On 18 November 2013, the complainants arranged for a second test of the property with the NZ Drug Detection Agency and, on that same day, its inspector advised there was no contamination in the house.

[12] On 19 November 2013, the complainants met with members of the appellant Agency and provided them with the new test results. The appellant agreed to take down the false

drug test information from the intranet that day but could not do so then as the information had been entered by the Head Office of the appellant.

[13] On 26 November 2013, the property sold at auction for $670,000.

The Findings of the Committee

[14] On 24 February 2015 the Committee found that the appellant agency had engaged in unsatisfactory conduct by not following its own procedures, or the requirements of Rule 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 relating to discovery of defects. Subsequently, on 22 June 2015 the Committee fined the Agency $2,500 and ordered that it reimburse the complainants for their legal costs of $1,178.75 and $1,322.50.

[15] The Committee found that while the complainants may have been technically informed about the test before the results were entered into the Barfoot & Thompson Ltd system, it preferred the view of the complainants that they should have been given a choice about how to respond to the results before this publication.

[16] The Committee found that disclosure had taken place at 6.30 pm on 15 November 2013 and that, while this was after the meeting with the complainants, it could not have been stopped regardless of the complainant's views because the information entered at 12.37 pm on 15 November 2013 into the Agency's listing system was set to be automatically published. At a meeting with the listing licensees late that afternoon the complainants did not want the information disclosed. The parties then booked another test for 18 November 2013.

[17] The following is an extract from the Committee's decision:

> *"4.4 The dispute here is as to the Agency's application of the process and the crux of the matter centres around the timing of certain events.*
>
> *4.5 The complainants' position is that the policy says that a vendor must be informed of any issue first, so that they can make an informed decision as to how to act. They say that they were not informed until after prospective purchasers and other Agency salespeople had been made aware through the Agency internal system. They say that the policy states that they should have been given the option how to act before the information was placed on the internal system.*
>
> *4.6 The Agency's position is that the Agency did not breach its own policy because the information was not visible in the system until 6.30 pm on 15 November, and by that time, the complainants had been informed. Mr Yang had told the complainants when he met with them however, that the information had been loaded up already, which according to the Agency is correct as they say it was loaded at 12.37 pm.*
>
> *4.7 It may be technically true that the complainants had been informed before any information was disclosed, but the Committee prefers the stance of the complainants' on this point. The policy anticipates the vendors making a choice as to how to act, and having the option of obtaining further expert advice whereas what appears to have happened here is that an immediate decision was made internally to disclose without the steps in the Agency's policy being followed.*

4.8 If the complainants had been given an opportunity to obtain further external advice before any disclosure was made, it is arguable that they would have been able to establish that the defect was not real, and buyer interest may not have waned as much. The Agency's policy and the Tribunal's approach both anticipate that if a vendor chooses not to disclose, and the licensee believes that disclosure should be made, the licensee must cease to act and therefore complies with the rule and avoids exposure to risk.

4.9 The emails between members of the Agency seem to reflect, in theory at least, what should have happened, for example Mr House's email of 18 November talks about cancellation of the agency if the vendors still chose not to disclose. But disclosure had already effectively taken place as at 6.30 pm on 15 November. To say that the policy was followed because there was a meeting which took place before that time is simply incorrect, because the Agency has confirmed that at 12.37 the information was programmed to be published and the time of the actual release was an automated event.

4.10 The Committee accepts that the licensees did not make the information known directly to any of their buyers at that time, but that is not material to the issue.

4.11 Accordingly the Committee finds that the Agency has breached the Rules and engaged in unsatisfactory conduct on this point."

Issue on Appeal

[18] The key issue is what action the appellant should have taken when the positive methamphetamine test came back and whether a proper process was followed when the information was published on the intranet.

[19] We agree with counsel that the issue is not confined to whether the complainants were entitled to further time to undertake a second test.

Further Evidence

[20] We had the benefit of expert evidence from Mr N G Powell, an Auckland scientist, who owns and manages Forensic & Industrial Signs Ltd. He had been asked to review:

[a] A report dated 8 November 2013 by Mr Miles Stratford of MethSolutions Ltd, together with a report from Hill Laboratories dated 12 November 2013;

[b] A report dated 22 November 2013 by Mr Reece Polglase of the New Zealand Drug Detection Agency Ltd.

[21] Mr Powell outlined for us his testing, reporting, and analysis regarding the property with much general advice about the effect of methamphetamine on a residential property. He detailed the results for 45 Davington Way and we need only set out his conclusions as follows:

*"**Conclusions***

44. Methamphetamine, even in small amounts, it is a harmful substance which has toxic effects on the nervous system. Where a property is contaminated with methamphetamine it can be absorbed through the skin or inhaled by those who enter the property. For this reason, the Ministry of Health has issued guidelines

as to the tolerable level of contamination. This is 0.5 micrograms per 100 square centimetres on household surfaces.

45. *The level of contamination at 45 Davington Way, as reported by MethSolutions, was low and below the Ministry of Health guideline. However, this was not likely to have been apparent to anyone without a scientific training due to the way in which the results were reported.*

46. *There are several methods currently used in New Zealand to test for methamphetamine contamination. These tests differ in sophistication and, consequently, their detection limits and sensitivity levels vary. Accordingly, conflicting test results may be received in respect of the same property tested at the same time. This is the reason for the different test results obtained at 45 Davington Way. The results by the Drug Detection Agency did not discredit the earlier results of Meth Solutions but rather the contamination was not detected by the Drug Detection Agency due to the higher detection limits of the testing method used."*

[22] The effect of his evidence is that there is a minor amount of tainting from methamphetamine at the property in terms of that detected on a swab i.e. 0.16 micrograms in the context of the Ministry of Health guidelines of 0.5 micrograms per 100 square centimetres being tolerable.

Rules 10.7 and 10.8 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

[23] There was much reference by counsel to Rules 10.7 and 10.8 which read as follows:

"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[1], 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."

The Case for the Appellant

[24] Mr Rea emphasises that the issue is the timing of disclosure of the potential contamination and the impact of this on the sale of the property. He puts it that the Committee's concern was that, due to the automated timed disclosure, the complainant vendors were not given an opportunity to obtain advice and establish that the defect was not real before disclosure was made and, therefore, limit the potential impact of such information on prospective purchasers.

[25] Mr Rea submitted that the Committee misinterpreted Rule 10.7 which (he puts it) does not require, either expressly or by implication, that disclosure be delayed pending confirmation from the client vendor that there is no such defect. He submits that the rule gives a licensee an election between obtaining confirmation from the client vendor that

there is no such defect or disclosing the potential risk to the customer, and that this election is unfettered, albeit that a licensee should inform the client vendor of any potential defect before disclosing such to others and, if the client does not agree to this disclosure, the licensee is to cease to act pursuant to Rule 10.8.

[26] Mr Rea submits that, furthermore, it would be contrary to the purpose of Rule 10.7, which is the protection of customers, for disclosure of an adverse methamphetamine test to be delayed pending receipt of confirmation of such disclosure from a vendor. He noted that Mr N Powell of Forensic & Industrial Science Ltd gave evidence that methamphetamine contamination poses a significant potential health risk to anyone who enters the property.

[27] Mr Powell also gave evidence that, while the contamination identified by MethSolutions Ltd in this case was at a very low level, this would not have been apparent to someone reading the report, or being informed of its contents, who did not have scientific qualifications. This report was provided to the prospective purchaser's agent but not to the listing agent or vendor clients.

[28] Mr Rea submits that the adverse report was misleading and would likely have caused significant concern to any reasonable person given the significant health risks posed by exposure to methamphetamine; and, in these circumstances, the licensee could not reasonably be expected to delay disclosure pending further testing by the vendor clients.

Misapplication of Rule 10.7

[29] Mr Rea also submits that the Committee misapplied Rule 10.7 and it is not properly applicable in the circumstances as (he submits) an adverse methamphetamine test recording contamination is not a *"hidden or underlying defect";* the property is not defective in any way but rather has been used in a manner which poses an immediate and significant potential health risk; and the situation is not comparable to a defect in title or weather-tightness issues.

[30] Mr Rea noted that Mr Powell gave evidence that methamphetamine contamination cannot be necessarily conclusively disproved by a vendor obtaining subsequent testing. This is due to there being several methods currently used within New Zealand to test for methamphetamine which vary in sophistication and detection limits/sensitivity levels. Therefore, it is possible, as occurred in this case, for a subsequent test to find no trace of contamination due to the method of testing used and the detection limits of such testing.

[31] Mr Rea submits that, consequently, the vendor complainants' assertion that the test results by Meth Solutions were false and that the testing by New Zealand Drug Detection Agency confirmed that the property was not contaminated is not accurate. The report by MethSolutions correctly recorded that the property was contaminated, but this contamination was at a very low level and, due to that, was not detected by the subsequent testing of the New Zealand Drug Detection Agency.

[32] It is further noted that both reports contained disclaimer clauses which record that contamination may not be identified due to various factors including the method of testing.

[33] Mr Rea then submitted that, therefore, a contamination report provided by a suitably qualified expert cannot necessarily be relied on to disprove an earlier report by a similarly qualified expert or to conclusively determine that there is no contamination where such is suspected; and that to conclusively determine (as far as is possible) the contamination status of a property, a level of scientific knowledge is required to determine the method

and results of any prior testing and the appropriate method for thorough testing; so that the disclosure procedures of Rule 10.7 are not appropriately applied to situations of potential methamphetamine contamination and, therefore, disclosure is required. Licensees will not have the expertise to analyse such reports and/or the testing methods used.

[34] Mr Rea submits that furthermore, given the serious potential health risks of methamphetamine, Rule 10.8 can also have no application. He seemed to be putting it that for a licensee to walk away from the issue would be contrary to the fundamental purpose of the Act, which is to promote and protect the interests of consumers in respect of transactions that relate to real estate, and to promote public confidence in the performance of real estate agency work. He observed that the Rules are subordinate to the Act and cannot be interpreted inconsistently with it. Mr Rea submits that a licensee agency cannot simply cease to act knowing that it holds information relating to a serious potential health risk which may then not be disclosed to prospective purchasers.

Rule 6.4 is the Applicable Rule

[35] Rule 6.4 reads:

> *"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."*

[36] Mr Rea submits that, pursuant to Rule 6.4 (and the Fair Trading Act 1986), the immediate disclosure of adverse methamphetamine test results is required as methamphetamine is an issue which should in fairness be disclosed to a customer, and it would be misleading (or even deceptive) to withhold this information or provide the results of only one of two or more tests; so that the results of all tests should be disclosed.

[37] Mr Rea also submitted that the disclosure of all test results would also be required pursuant to Rule 6.2 which reads:

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

[38] Mr Rea also put it that there is an ethical and moral duty on a licensee to disclose the results of all methamphetamine testing. He reasons that, given the potential health risks of methamphetamine exposure, licensees are obliged to provide full and frank disclosure of all information held; which is what occurred in this case. The listing report for the property was updated to record *"CONTRARY TO OTHER INFORMATION, THE VENDOR HAS NOW OBTAINED AND PROVIDED EXPERT ADVICE THAT THERE ARE NO METHAMPHETAMINE ISSUES WITH THIS PROPERTY"* and the licensee informed prospective purchasers of both tests.

[39] Mr Rea submits that Barfoot & Thompson Ltd did not engage in any unsatisfactory conduct, and that the Committee erred in its interpretation and application of Rule 10.7 and should have applied Rule 6.4 which requires immediate disclosure of the adverse methamphetamine test.

[40] In his final oral submissions, Mr Rea summarised his case and submitted that the appellant agency had done its best in the circumstances to act with integrity and that possible methamphetamine contamination is too serious a matter to be withheld.

The Stance of the Real Estate Agents Authority

[41] Ms Lawson-Bradshaw (as counsel for the Authority) noted that the appellant argues that:

[a] Rule 10.7 does not require that disclosure be delayed pending confirmation from the client vendor that there is no defect;

[b] Disclosure should not be delayed given the significant potential health risks to anyone who enters a property affected by methamphetamine;

[c] The second negative test does not necessary prove that there was no methamphetamine contamination; and

[d] Rule 10.7 does not apply because methamphetamine contamination is not a defect for the purposes of Rule 10.7, and rather the applicable rule is Rule 6.4.

Is Methamphetamine a "Defect" under Rule 10.7

[42] Ms Lawson-Bradshaw submits for the Authority that methamphetamine contamination is a defect for the purposes of Rule 10.7. She puts it that, while it is not a structural problem with the property itself, that is not determinative; and Rule 10.7 should not be confined as argued by the appellants, but rather interpreted to include methamphetamine contamination.

[43] Ms Lawson-Bradshaw argues that, while methamphetamine contamination is not a structural issue in the strict sense, it is a physical problem with the property that requires a physical remedy. She notes that Methamphetamine contamination is predominately caused by fumes entering the walls and ceiling of a property which, she submits, is a physical effect on the property which has real and serious consequences for people exposed to the contaminated surfaces.

[44] Due to the physical effects of contamination, extensive cleaning and, in some cases, extensive remodelling is required. Sometimes, rooms require not just removal of the paint from the walls but the removal of walls and ceilings as well, due to the extent of the effect from the fumes.

[45] Ms Lawson-Bradshaw noted that in *Fitzgerald v Real Estate Agent Authority* [2014] NZREADT 43 we accepted that a boundary line on a property could be an underlying defect for the purposes of Rule 6.5 of the 2009 Rules (the predecessor of the current Rule 10.7). She put it that a property's boundary line is not a structural defect that would fit within the interpretation proposed by the appellant and it would be consistent to also include methamphetamine contamination which, like a boundary line, is not a structural issue but does pose a real and legitimate concern to potential purchasers, and has arguably more of an effect than unknown boundary lines. She submits that methamphetamine contamination (when it exists) is a present problem with the property that affects it in a real and physical way.

Consultation with Vendor before Disclosure

[46] Ms Lawson-Bradshaw submits that whether or not Rule 10.7 applies, (and she submits it does) will not affect the basic principles that apply in disclosure situations. She puts it that where a licensee is in possession of material information relating to a property for sale, the licensee must disclose that to potential purchasers but, before disclosure

takes place, basic competence dictates that the licensee needs to talk to the clients (the vendors) and explain that disclosure needs to take place and obtain their views. This is important because the vendor may decide to remove the property from the market to remedy the issue or, as in this case, obtain a second opinion. Of course, if the vendor instructs the licensee not to disclose the information, then the licensee must cease to act. The Authority does not dispute that methamphetamine contamination poses serious health issues and it is important that no potential purchasers are exposed.

[47] Ms Lawson-Bradshaw advises that the Authority would take the same position if the issue were disclosure to potential purchasers who were to attend an upcoming open home where the licensee knew there was potential methamphetamine contamination. She puts it that the open home may need to be cancelled or postponed for safety reasons, but the licensee would still need to discuss disclosure with the vendor and, if the vendor refused to agree to disclosure, then this would place the licensee in a position where they would need to withdraw pursuant to Rule 10.8.

Timing for Disclosure

[48] Here, the results of the test were entered into the Barfoot & Thompson Ltd system before the licensees even met with the complainants to discuss the test results. The licensees had, at best, merely told the complainants about the test results. It does not appear that the complainants were advised of their options, or given an opportunity to explore their options, before disclosure was made. Rather, it was assumed that no discussion about disclosure needed to take place and instead disclosure should occur immediately. Ms Lawson-Bradshaw submits that whether or not the property did in fact suffer from contamination does not change the appellant's duty to the complainants with respect to disclosure.

[49] Ms Lawson-Bradshaw observed that by placing the test results on the intranet for other licensees to see, it appears the information was provided to the potential purchasers as all nine registered purchasers subsequently withdrew from the auction. She submitted for the Authority that, assuming this is correct, at the very least the intranet notification should have been qualified with a note that the complainants had not consented for the information to be discussed with anyone (at that stage).

[50] Accordingly, the Authority submits that the unsatisfactory conduct finding should be upheld.

[51] In final oral submissions, Ms Lawson-Bradshaw emphasised that the Authority's concern is that the agency did not discuss options with the vendors but set a course in motion which could not easily be stopped. For instance, the vendors were not given the opportunity to cancel the sale proceedings. She submits that there is in obligation on the agency to ensure that the vendors are comfortable with any steps to be taken by the agency but there was not even such a conversation with them by staff of the agency in this case. We agree.

[52] Simply put, the Authority submits that the agency should have immediately informed the vendors of the result of the methamphetamine test and discussed proper options with the vendors before the agency itself set out a course in motion; and that, essentially, the vendors should have been told they must disclose the test result if marketing was to continue or that there may be other options such as cancelling the auction and purifying the property; yet the agency's conduct allowed no such choice. Again we agree with those views put for the Authority.

Discussion

[53] We accept that the following licensee duties are relevant in this appeal:

[a] Regarding hidden or underlying defects in terms of rules 10.7 and 10.8 (set out above) of the Rules;

[b] Not to withhold relevant information under Rule 6.4 (set out above) of the Rules;

[c] To act in the best interests of the client and in accordance with the client's instructions under Rule 9.1 of the Rules which reads:

"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."

[54] In accordance with Rules 10.7, 10.8 and 6.4, where a licensee considers information should be disclosed to potential purchasers then disclosure should be made. However, to be consistent with a licensee's fiduciary duty to their client and Rule 9.1, before disclosure to potential purchasers is made the licensee should advise the client of the need for disclosure and discuss the appropriate action to be taken. If a vendor client then instructs that no disclosure should take place, the licensee should cease to act, as set out in *Fagan v REAA & Sinclair* [2013] NZREADT 64, where we commented:

"[26] Where a client instructs that information be withheld from a purchaser, and a licensee considers that the information should be disclosed under the Rules, a licensee should raise and discuss the issue in detail with his vendor client. If the client maintains that information must be withheld and the licensee remains of the view that it should be disclosed, the licensee must then decline to act further on that transaction.

[27] In terms of defects in land, we note that Rule 6.5 [now Rule 10.7] requires disclosure of known defects to purchasers and Rule 6.6 [now Rule 10.8] provides that a licensee must not continue to act for a client who directs that such information be withheld. Those Rules do not, therefore, require disclosure against the instructions of the vendor client, but that where such instructions would involve the licensee breaching the rules, he or she should cease to act.

[28] A licensee must be very clear with a client when a conflict over disclosure arises. If the client maintains that information be withheld that the licensee considers should be disclosed, the licensee's duty is to cease to act; not to disclose the information contrary to the client's instructions."

[55] We consider that the existence of methamphetamine traces at a property is a defect which can be regarded as *"hidden"* or *"underlying"* in terms of Rule 10.7. That means that a licensee must either obtain a clearance that the level is harmless or ensure that a customer is informed of the position so that the customer can seek expert advice of the risk if the customer chooses to do so. Under Rule 10.8 a licensee must not continue to act for a vendor who requires knowledge of a harmful level of methamphetamine to be withheld.

[56] Mr Rea is probably correct that Rule 10.7 does not require that disclosure be delayed pending confirmation from the client vendor that there is no such defect, but we consider that the vendor should be the first to know of the issue. That seemed to be the stance of Ms Lawson-Bradshaw.

[57] We agree with Mr Rea that for a licensee to walk away from the issue, as could be required under Rule 10.8, may have concerning consequences and that licensee would need to be truthful to others about the hidden or underlying defect issue.

[58] While a licensee remains engaged in the transaction, that license must, of course, observe Rules 6.2 and 6.4 as covered by Mr Rea.

[59] We agree with Ms Lawson-Bradshaw that the agency's intranet notification should have at least been qualified with a note that the vendors had not consented for the information to be discussed with anyone at that stage – indeed, because they had yet to be informed of the issue.

[60] In general we agree with the stance of the Authority in requiring high standards; but this is a special case where we have had very detailed and thoughtful submissions focusing on rather unusual facts. That was not available to the Committee.

[61] It is concerning that the vendors were not immediately consulted as to the best procedure to be followed by the agents when the matter of methamphetamine testing arose. As we have often said, the vendors own the property being sold and, generally speaking, should be calling the tune over the marketing process so long as that process is lawful. We appreciate that the Barfoot & Thompson policy is designed to be transparent and honest. In this case that had the effect that for an hour or so some of the agency's licensees knew about the methamphetamine issue, but not necessarily prospective purchasers. Nor did the vendors know as early as they should have and nor were the vendors' views sought at the outset of the problem.

[62] Section 72 of the Real Estate Agents Act 2008 defines *"unsatisfactory conduct"* and reads:

> ***"72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[63] On the facts of the present case we do not consider that Barfoot & Thompson Ltd has been incompetent or negligent. We do not think that agency's said conduct was contrary to any Regulation or Rule made under the Act; nor do we think that its actions would reasonably be regarded by agents of good standing as being unacceptable; nor do we think that such actions have fallen short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.

[64] We agree with Ms Lawson-Bradshaw that the vendors should have been immediately consulted but that, in good faith, Barfoot & Thompson Ltd saw it to be extremely urgent that disclosure be made. While that was not the best course, in our view on the facts of this case it is not conduct which crosses the threshold of unsatisfactory conduct by a licensee as defined in s 72 of the Act. Even if it was, we would take no further action on the particular facts of this case.

[65] Accordingly, this appeal is allowed which means that the thoughtful and helpful decision of the Committee is quashed.

[66] 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