BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 8

READT 018/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN AND NANETTE BOYD-DUNLOP** Appellants (Complainant Purchasers)
AND	**REAL ESTATE AGENTS AUTHORITY (CAC307)** First respondent
AND	**VICKY DICKERSON** Second respondent (Licensee)

MEMBERS OF THE TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at HASTINGS on 5 October 2015 (with subsequent written submissions)

DATE OF THIS DECISION 2 February 2016

COUNSEL

Mr J L Bates for the appellants
Ms C P Paterson for the Authority
Mr N T Gray for the licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Real estate agents must understand the information provided by a Certificate of Title to the property they market, including the effect of any notations, rights, or encumbrances shown on that title document.

[2] John and Nanette Boyd-Dunlop (the purchaser complainants) appeal against the decision of Complaints Assessment Committee 307 to take no further action on their complaint against licensee Vicky Dickerson (the licensee).

Background facts

[3] In August 2010, the complainants viewed a property at 156 Poaiti Road, Napier (called “Sanctury Gardens”), which had been listed for sale with the licensee since May of that year. The property was 3.3672 ha of lawns and gardens but did not include a residence (but there is a marquee area, kitchenette facilities, and an implement shed). The complainants subsequently purchased the property for $830,000 in September 2010 but sold it in 2014 for $445,000 at a significant loss because they could not use it as they had intended.

[4] Prior to the sale in 2010, the previous owner had used the property as a commercial wedding venue. The complainants state that, at material times, they were specifically interested in buying a property that could be used for that purpose.

[5] The property was sold with chattels including a fixed marquee, 50 white chairs and various other items for use in wedding ceremonies. Although marketing advertising for the property did not refer to its use as a wedding venue, the advertising did include the line "options for this unique piece of land are unlimited”.

[6] In an 18 August 2010 email, the licensee told the complainants that there was interest in the property from "people overseas and also locally either wanting it has (sic) a lovely lifestyle block or alternatively to proceed with the low key wedding venue ... " In a further email to the complainants on 22 August, following a viewing of the property, the licensee said "it was interesting to hear you (sic) change of thoughts on where to place the marquee especially as it makes sense to keep all the guests together as opposed to different parts of the property.” On 6 September, in another email to the complainants, the licensee advised that the vendors were “fielding a lot of calls at present for weddings, company xmas parties ... “.

[7] The Licensee also provided the complainants with information from the vendors that they had run five weddings at the Property the previous summer, charging fees of $7,000 in total.

[8] In fact, the property did not have resource consent to be operated as a commercial wedding venue. Further, the title was subject to a restrictive covenant prohibiting commercial activity. In fact there are about 28

restrictive covenants registered against the Title to the property dealing with such matters as trees, subdivision, house building, landscape, architecture and others but one of them reads:

> "5.1 The transferee will not use or permit the use of any lifestyle lot for purposes other than residential purposes, without the prior written consent of the transferor whose decision shall be final and binding upon the transferee."

[9] It is not in dispute that the licensee advised the complainants about the lack of resource consent prior to their purchase. However, the complainants state that when they commented that getting resource consent should be a formality, the licensee made no comment, simply reiterating that any activity should be kept low key".

[10] The lack of resource consent aspect is not an issue in this appeal.

[11] It is not in dispute that the licensee was not aware of, and gave the complainants no advice about, the restrictive covenant.

[12] After purchasing the property and realising that they would not be able to use it as a wedding venue as they had intended, the complainants brought a civil claim against the vendors, the licensee's agency (CD Realty (HB Ltd (Bayleys))) and their own solicitors. The claim was ultimately discontinued, without prejudice to the complainants' ability to complain to the Real Estate Agents Authority which they did.

A summary of evidence adduced to us

Evidence for the Appellants

[13] Ms E Francis gave evidence for the appellants. At material times she worked as a real estate agent at Bayleys in Napier and she had visited the property after Bayleys had first listed it in about May 2010.

[14] She said that it was explained to the Bayleys team by the listing agents, Julie Shand and Vicki Dickerson that the property was being sold as a going concern as a wedding venue, that there were confirmed bookings for the coming year, and that all access was to be via Nilgiri Road and they were advised not to take buyers through the Poraiti Road entrance as some of the neighbours were not happy with extra traffic going through that access.

[15] About three weeks later, Ms Francis herself expressed interest in acquiring the property but was informed by those listing agents that it was no longer being sold as a going concern, that resource consent to run a business from the property was not possible, and that the seller would be blocking access from Nilgiri Road. Ms Francis said that caused her to no longer be interested in the property.

[16] The next witness was Mr Boyd-Dunlop. He said the nub of his complaint was set out by the CAC as follows:

> "2.1 In 2010 the Complainants purchased the property with the express wish to use the property as a wedding venue.
>
> 2.2 The property was already being used as a wedding venue by the vendors, and advertising of the venue was available on a website and in the local press. In addition, the vendors had used photos of a wedding at the property as promotional material for the sale of the property."

[17] Under cross-examination Mr Boyd-Dunlop stated that the licensee had led him to believe he could run weddings from the property. He referred, inter alia, to an advertisement for the property which included the words "options for this unique piece of land are unlimited" and he felt those words, particularly the use of the word "unlimited" meant that the land could be used for any commercial use.

[18] He agreed that the advertisement did not actually refer to commercial uses but said that he had been led to believe that there were all sorts of opportunities for using the land including as a wedding venue. Mr Boyd-Dunlop accepted that he knew the property was not zoned for commercial use but he knew the vendors had been using it commercially (as he put it) for years.

[19] It was put to him by Mr Gray that the licensee made him aware that he would need to get a resource consent to permit a business use of the property but he maintained she had merely said that he may need to do that, to run a wedding business "low key". Mr Gray pressed Mr Boyd-Dunlop that he was told by the licensee he needed to get a resource consent and that was not told that he "may" need to. Mr Boyd-Dunlop responded that he consulted his family lawyer who advised him that because the property had been used for weddings for the past few years, it should be merely a formality to obtain a resource consent and he assumed that to be so and he told that to the licensee who simply said that he should keep any use "low key".

[20] Mr Boyd-Dunlop accepted that for the protection of him and his wife as purchasers, the licensee inserted a due diligence clause in the agreement for sale and purchase and recommended that they obtain legal advice on the transaction.

[21] At that point all counsel accepted that the focus on this case is on the existence of restrictive covenants on the property and that the need for a resource consent is not an issue now under appeal.

[22] Mr Boyd-Dunlop said he did not know about the restrictive covenants on the property and he left all such matters to his lawyers, who advised him that all was in order with the title so that in due course he confirmed to the vendor that the contract had become unconditional. Mr Boyd-Dunlop seemed to accept that his valuer's report had covered the restrictive covenants but said that he, Mr Boyd-Dunlop, did not absorb the valuation as he left all such matters to his lawyers.

The evidence of the Licensee

[23] The licensee, Ms V Dickerson then gave evidence. She emphasised that the flyer and property description in Bayley's advertising of the property made no reference to, or suggestion of, the property being used for a non-residential use.

[24] She said she showed the appellants around the property on about four separate occasions and discussed with them that the vendors and the owners before them, had used the property to host weddings for years without the required resource consent and she understood that the appellants wanted to do that also. Ms Dickerson maintained that she made it very clear to the appellants on a number of occasions that, to host weddings legally at the property, a resource consent to use the property for a non-residential use was necessary. She recalled doing that in a meeting with the appellants in August 2010.

[25] The licensee insisted that she did not tell Mr Boyd-Dunlop that obtaining a resource consent would be a mere formality. She said he had said to her that he assumed that, but she made no comment as she was satisfied that the appellants were aware of the need for such a resource consent and she had told him that the appellants could raise that matter with their lawyer due to her inserting a due diligence clause in the contract which she did. She said that she explained carefully to them the effect and scope of that due diligence clause.

[26] Later in her evidence in chief, she stated as follows:

> "[13] I acknowledge that I was not aware of the restrictive covenant on the title of the property at the relevant time. My understanding and all discussions I had with the Stewarts and the Boyd-Dunlops had been regarding the need for resource consent to use the property for a non-residential use (to host weddings). I did not make any representation at all regarding the restrictive covenant to the Boyd-Dunlops because I did not know about it.
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> [14] At the time I did all that I believed was necessary to ensure that the Boyd-Dunlops were aware of the need for them to obtain resource consent to host weddings at the property even though the Stewarts had been hosting weddings at the property without the required consent. At the time the practice was not for real estate agents to obtain legal advice to understand all encumbrances on the title. It was standard practice to include a due diligence clause to give the purchaser the ability to do all that it considered prudent to check out the property before committing to the purchase. This gave the purchaser the opportunity to obtain legal advice. At no time did I believe that the Boyd-Dunlops were under any misapprehension about the property only being able to be used for residential purposes, and that they would need to obtain resource consent if they wanted to host weddings legally at the property.

> [15] After the Real Estate Agents Disciplinary Tribunal's decision in *LB v The Real Estate Agents Authority* in 2011 was made known to the real estate industry, the practice changed and real estate agents began ensuring that they or the vendor obtained legal advice on any encumbrances on a title relevant to any representations made to the purchaser, or the purchaser was told that they needed to get legal advice and be satisfied themselves in relation to all aspects concerning the property."

[27] Under cross-examination from Mr Bates, the licensee stated that she believed it was always clear and understood by the appellants that there was no permission for weddings to be held on the property and that doing so was illegal. She maintained she made it clear that they needed a resource consent but she advised them in any case to keep their use of the property "low key" meaning that the use of the property for weddings and not be a big income earner and matters like that.

[28] Also, under cross-examination from Mr Bates, the licensee accepted that she should have investigated whether it was clear from the certificate of title to that property that such activities as holding a wedding reception were precluded by covenants registered against the title to the property. The licensee accepted that but not that she had been negligent in so failing to get a grip on the title to the property and its encumbrances because she felt that the due diligence clause and the reference of the property to a valuer and lawyer would deal with that title aspect.

[29] It was put to her that when she started marketing the property, she did not have the valuer's report but she did market the property for the vendors by referring to their having been able to use the property for wedding functions. It was put to her also that she should have studied the effect of the title to the property or have got someone to do that on her behalf. She responded that, in the present case, the title was difficult to comprehend as it had 28 covenants registered against it.

[30] Mr Bates put it to her that, when she marketed the property as being able to be used "low key" for wedding functions, she should have known that was prohibited by a covenant registered on the title. Her response was that she was not advertising the property as having a commercial use.

[31] She was asked that, surely, it was her duty to search the title and advise the appellants as prospective purchasers of the restriction on the use of the property. To that she responded "yes".

[32] In re-examination, Mr Gray sought to play that down by putting it to the licensee that, at that time in 2010, it was not thought to be standard practice for a licensee to have searched and understood the title to the property being marketed. That led the licensee to assert that, at material times in 2010, she thought she did not need to understand the covenants registered against this title and that it was more than adequate for her to have inserted a due diligence clause in the agreement for sale and purchase to enable the appellant purchasers to be protected when their lawyer checked out the title.

[33] By consent briefs of evidence were admitted on behalf of the licensee from two directors of the licensee's agency employer. That evidence related to meetings those directors had with the appellants in about August 2012 when it became clear that a resource consent could not be obtained for the property. It seems that the appellants were seeking compensation from CD Realty (HB) Ltd trading as Bayleys in the area.

The CAC Decision

[34] The Committee was split as to whether the licensee's conduct was unsatisfactory under s 72 of the Real Estate Agents Act 2008.

[35] One view was that the licensee had done all she could reasonably have been expected to do and that it was for the complainants' lawyers to have advised them about the restrictive covenant, particularly given a valuation the complainants had obtained that specifically noted the issue.

[36] The competing view was that, applying current professional standards following our decision in *LB and QB v REAA and Li [*2011] NZREADT 39, the licensee should have examined the title and taken advice on it if necessary, so that she was in a position either to have advised the complainants about the restrictive covenant herself, or at least made clear that the complainants should check the position with their lawyer. The relevant part of *LB & QB v REAA & Li* is as follows:

> "[18] We consider that a licensee, upon taking instructions for a sale of a property, should search its title, or have some competent person search it for the licensee, and be familiar with the information gained from such a search. In this case it would have also been necessary to search the content of a transfer shown as containing a restrictive covenant. Such a search is not a difficult task to carry out or arrange. Similarly, the licensee should ascertain such matters as zoning and compliance with town planning regulations or Council requirements. We do not accept that a licensee can simply regard such matters as within the realm of a vendor or purchaser's legal adviser. Licensees should be familiar with and able to explain clearly and simply the effect of any covenants or restrictions which might affect the rights of a purchaser. This is so whether that purchaser is bidding at auction or negotiating a private treaty.
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> [19] Indeed, it seems to us to be fundamental to effect such a search in order to ensure that the apparent vendor actually has title to the property …
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> [22] We emphasise that our above views about understanding the state of the title of the subject property is an essential role for a licensee, and failure to undertake such a title check could well amount to unsatisfactory conduct under s 72 or even the more serious offence of misconduct under s 73.
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> [23] We consider that our above views relate to Rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:

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

[37] Ultimately, the CAC did not make a finding, of unsatisfactory conduct against Ms Dickerson, largely due to the fact that the licensee's conduct occurred before our decision in *LB,* which the Committee stated was a 'landmark' decision that had raised the bar for standards in the real estate industry.

The case for the appellants

[38] The appellants (through their counsel, Mr J Bates) put it that the relevant rules are Rules 5.1 – "A licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work"; and Rule 6.2 – "A licensee must act in good faith and deal fairly with the parties engaged in a transaction"; – and 6.4 "A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by lawful fairness be provided to a customer or client"; and generally, that the conduct of the licensee is under statutory conduct in terms of s 72 of the Act.

[39] Mr Bates noted that the Committee had found that the licensee was aware that the vendors had been using the property as a commercial wedding venue for many years; that the complainants wished to acquire the property for that same purpose. He correctly submitted also that the focus before us must be the licensee's conduct and not what the appellants or their lawyers should have done in the circumstances.

[40] He put it that the licensee made misleading representations that the premises could be used as a wedding venue business whether deliberately or not. Mr Bates submits for the complaint / appellant purchasers that the licensee should have checked the title and either herself sought advice on the restrictive covenants with a view to ensuring that her purchaser customers were adequately informed about that or should have ensured that they were clearly unambiguously told they could do that themselves. We agree. Mr Bates also seemed to be putting it that the licensee and Bayleys knew the property was no longer being sold as a going concern, that resource consent to run a business from the property was not possible, and that the vendors would be blocking access from Nilgiri Road.

[41] Mr Bates dealt with the effect of *LB and QB v REAA & Li* and submitted that the Committee applied the meaning and effect of that decision. Simply put, he submitted that a licensee was obliged to discharge the same standard of care or fairness as were the real estate agents involved in the *LB and QB* case. He endorsed the submissions from the Authority (referred to herein) with regard to the *LB and QB* case.

[42] Mr Bates also submitted that the licensee was clearly on notice as to the appellants' intentions for the property and she had also passed on specific information to them as to similar previous use by the vendors. He

noted she had admitted saying to them that the wedding business should be run “low key”.

[43] Mr Bates submits that the licensee was obliged to search the title so as to be in a position to know what she was selling before marketing the property in the manner she did and that such failure cannot be saved by insertion of the due diligence clause. We agree. Mr Bates emphasised that the licensee herself conceded that she ought to have searched the title.

The stance of the Authority

[44] Ms Paterson (as counsel for the Authority) submits that the fact that the conduct in this case occurred before the said *LB* decision was released is not, in itself, a bar to a finding of unsatisfactory conduct, as the licensee argues.

[45] She puts it that *LB* did not introduce new rules, but simply clarified the standards that had become appropriate under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Those Rules were in force in August and September 2010, and had been for some time, when the conduct in issue in this case occurred. We agree and add that *LB* reflects basic standards of real estate competence.

[46] The Authority also agrees that the focus in these proceedings must be on the conduct of the licensee and not on what other steps might prudently have been taken by the complainants or their lawyers.

[47] Ms Paterson put it as significant that the licensee was on notice of the complainants' wish to use the property as a wedding venue (as demonstrated by the emails and other evidence adduced to us) and that she provided information to the complainants about the vendors' previous use of the property for that purpose as part of negotiating the sale.

[48] Ms Paterson noted that, in *M v REAA and Lewin* [2013] NZREADT 63, we considered the disciplinary culpability of a licensee who had failed to properly recognise and advise on a significant encumbrance on the title, we stated:

> “[13] However the Tribunal considers that that the obligation of an agent is to go further than simply recognising that there are issues with the title and drawing it to purchasers and their solicitors' attention. As Mr Hodge has submitted issues such as those raised in this covenant need to be known prior to the property being marketed because the terms of the covenant could significantly affect the way that the property can be sold and subsequently used. In this case clearly a covenant which appeared to restrict the sale to persons over the age of 55 is a significant restriction/barrier which ought to be drawn to the purchasers' attention before they decide to purchase.

> [14] The Tribunal reiterates that real estate agents are not expected to be lawyers. However the title contains extremely useful information which needs to be understood by the agent prior to the property being sold. If the agent cannot understand the implications or meaning of encumbrances, caveats, covenants or other restrictions on the title then they should ask their vendor to provide the legal advice which will clarify these things for any potential purchaser. Alternatively if appropriate they can obtain that legal interpretation themselves. However since an agent acts as an agent for the vendor the most appropriate source of information must be the vendor themselves or their solicitor. As Wilde J said in *Altimarloch Joint Venture Limited v Moorhouse & Others* at paragraph 252:
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> > "Bayleys ought to have included accurate and complete information about the water permits in its sales information brochure, carefully checking that information with the Moorhouses and/or G W (the vendor's solicitors) before issuing the brochure. I find Bayleys was negligent in not doing that."
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> [15] This is a statement concerning civil liability of agents but it is helpful to understand that the Tribunal are not imposing upon agents extraordinary requirements. The Real Estate Agents Act 2008 has placed positive obligations on agents to be open, honest, accountable and to ensure that nobody is misled or deceived at the time the property is being sold. As the Tribunal has said on numerous occasions one of the purposes of the Act is to protect the members of the public when they are making what can often be the biggest purchase of their lives.
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> [16] Accordingly the Tribunal thinks that the appropriate steps for any agent to take are as follows:
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> > (i) When a property is listed or appraised the agent should obtain a copy of the title.
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> > (ii) At about the time the agency agreement is signed and before any marketing/sale of the property commences the agent should review the title and to seek clarification from the vendor [or if appropriate their solicitor] about anything unusual on the title. This requires the agent having to read the title and actively ask about issues on the title.
> >
> > (iii) The agent should then discuss the title with the vendor so that any marketing of the property does reflect this information. This Is In keeping with the Real Estate Agents Client Care Rules (Rule 6.4) and with the statements made by this Tribunal in L B and Donkin."

[49] Ms Paterson then put it that the licensee was clearly on notice as to the complainants' intentions for the property. Further, she had passed on specific information to them as to similar previous use by the vendors. In those circumstances, it is submitted for the Authority that the licensee was obliged, in line with the principles discussed in *LB and M*, to have researched the title

so as to be in a position to know what she was selling, including knowing about the restrictive covenant preventing commercial activity.

[50] As Ms Paterson submitted, while the fact that the conduct occurred before publication of our decision in *LB* might go to mitigate any penalty imposed, it should not operate to prevent a finding of unsatisfactory conduct.

[51] Ms Paterson notes that the complainants sought compensation from the licensee before the Committee. She records that in *Quin v REAA and Barras & Knapto* [2012] NZHC 3557 it was established that orders for compensation for financial loss are not available following findings of unsatisfactory conduct under the Act. Instead, licensees can be ordered to do something or take action to rectify or "put right" an error or omission. If the licensee can no longer put right the error or omission, they can be ordered to do something, at their expense, towards providing relief (in whole or in part) from the consequences of the error or omission. Any expense incurred by the licensee as a result of doing what he or she is ordered to do must be borne by the licensee. Ms Paterson submits that, In this case, it is difficult to see what, at this stage, the licensee be ordered to do to rectify or put right her failure to research and understand the restrictive covenant and advise the complainants accordingly.

[52] Ms Paterson also correctly submits that, for the reasons discussed in Quin, direct compensation is not available for any financial loss the complainants' state they suffered in buying the property on the assumption that it could be used as a wedding venue. We agree.

[53] It is also put for the Authority that we may consider that the Committee erred in placing too much weight on the fact that the licensee's conduct in this case occurred before the Tribunal's decision in *LB* in deciding not to make a finding of unsatisfactory conduct.

[54] Ms Paterson adds that, by failing to properly research the title of the property she was selling, the licensee was unaware of a clear restriction on commercial activity, a matter that would clearly be relevant to the complainants, given their expressed intention to use the Property as a wedding venue, and that failure was exacerbated by the fact that the licensee described the options for the Property as "unlimited" in advertising and had passed on information from the vendors regarding their previous use of the Property as a wedding venue.

The stance for the licensee

[55] Essentially Mr Gray submits for the licensee that she acted openly, honestly, in good faith and fairly, did not give false information or withhold any information from the appellants; and she made no misrepresentation to them; and she did not mislead them.

[56] Mr Gray referred to the licensee's evidence that she repeatedly told the appellant complainants, which they acknowledge, that the vendors had been using the property to host weddings without the required resource consent

and that, if the complainants intended to do so lawfully they would need to obtain the required resource consent. Also, Mr Gray referred to the licensee's evidence that she drafted and inserted the due diligence clause as a condition of the sale agreement specifically so that the complainants could obtain legal advice on that very issue.

[57] Essentially, Mr Gray submits that there was no unsatisfactory conduct by the licensee and that the Committee's decision to take no further action was correct and was made in the proper exercise of its discretion under s 89(2)(c) of the Act and was not plainly wrong.

[58] Mr Gray also submitted that to answer the question of whether the appellants were misled, the conduct of both the agent and the complainants must be considered and assessed and it is the exchanges between them in the course of the appellants acquiring the property that are directly relevant to the question whether the agent misled the complainants so that there could be unsatisfactory conduct. He puts it that the complainants allege they were misled by the second respondent's conduct, but then appear to argue that the reasonableness of that position should not to be tested against the extent of their own knowledge overall and based on what they had been told by the second respondent. He also helpfully covered relevant case authorities.

Discussion

[59] The zoning aspect is not put before us as the parties accept the findings of the Committee. Apparently, that is because the complainants knew the property was not zoned for commercial use and had taken legal advice on that issue during the due diligence period.

[60] Before us the issue is whether the licensee's failure to understand and explain to the appellant purchasers the effect of the restrictions on the title on commercial use of a property is unsatisfactory conduct.

[61] We accept that a relevant factor is that the licensee seems to have honestly thought that by including a due diligence clause into the agreement for sale and purchase, there was protection for the complainant purchasers on the assumptions that they would get proper legal advice. While that factor is particularly relevant to penalty it is also a factor about intention in terms of guilt.

[62] One of our sitting members feels that there has been no failure by the licensee who has been failed by the lawyers for the appellants in that the covenants registered against the title were restrictive and complicated and the licensee could not be expected to have training to understand the effect, but the lawyers for the purchasers should have.

[63] Our member feels that the licensee did the best she could by sending all the information to the lawyers for the complainant purchasers and having provided them with time under the due diligence clause to properly advise the complainants. Our member feels that the licensee has not been negligent and did the best job she could in the circumstances and in terms of

what is expected from a real estate agent as distinct from a lawyer; and that the licensee did not market the property as having a commercial use, nor did she mislead anybody, and she made it clear that the property needed but did not have a resource consent.

[64] Overall we accept the view of our colleague that real estate agents are not expected to be lawyers and, inter alia, that might mean that in the case such as the present, the licensee could not be expected to understand the effect of the restrictive covenants. However, we take the view that licensees must know what it is they are selling. That means inter alia, they must either search the title and understand it, or have it searched and explained to them. It seems inadequate for the agent to convey to customers that the agent is unable to advise about the Certificate of Title and the customer must get legal advice about the effect of that.

[65] In this case the licensee simply did not know the extent to which this property could be used legally. She did not know the restrictions on its use. She needed to take advice so that she could properly inform prospective purchasers or she needed to say to each prospective purchaser that she simply did not know to what extent the property could be used at law and they needed to find that out for themselves. In our two previous decisions dealt with above, we have made these views quite clear and we do not resile from them.

[66] We find that the appellants were given to understand from the licensee that they could expect to use the property as a wedding venue on a relatively low key basis in terms of numbers and regularity of weddings.

[67] They were not told that would be a breach of a restrictive covenant. However, they knew that would be a breach of the Resource Management Act 1991.

[68] The licensee admits she was unaware of the restrictive covenant at material times. She included a due diligence condition in the purchase contract so that the appellants could receive good legal advice in terms of their proposed use of the property. That is an inadequate step.

[69] We do not find bad faith on the part of the licensee.

[70] We are conscious that the main concern of the appellants is to obtain compensation. We are not in a position to award compensation in this case due to the effect of *Quin* (supra) and we have explained that restriction on our jurisdiction in a number of cases such as *Tong v REAA & Ors* [2014] NZREADT 3 where we said:

> "[18] In any case, the amount sought by the appellants is compensation for straight market loss. This kind of monetary award was discussed in the decision of *Quin v The Real Estate Agents Authority* [2012] NZHC 3557 where the High Court (per Brewer J) held that committees (or the Tribunal on appeal) cannot order licensees to pay complainants money or compensation for errors or omission (compensatory damages) under s 93(1)(f) of the Act. Licensees can only be ordered to do something or take actions to rectify or *"put right"* an

> error or omission s 93(1)(f)(i). If the licensee can no longer *"put right"* the error or omission, that licensee can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission, s 93(1(f)(ii). Any expenses incurred by the licensee as a result of doing what he/she is ordered to do must be borne by the licensee. Even where reimbursement may be ordered, this must flow out of the complainant having done something to put right the error or omission. An order under s 93(1)(f) cannot be made in respect of a straight monetary loss for a loss in market value …"

[71] Although we consider that the conduct of the licensee was unsatisfactory for the reasons given above, we accept that this was a unique and difficult case and that the licensee did her best to have the lawyers for the complainants protect them in the usual way in the context of a restrictive covenant situation which she did not understand.

[72] Accordingly, although we find unsatisfactory conduct, we agree with the overall view of the Committee that no further action be taken. Nevertheless, we reiterate that a real estate agent must ensure that restrictions on the use of a property are clearly explained to prospective purchasers.

[73] 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.

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Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Ms N Dangen
Member