

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2011] NZREADT 39

READT 013/11

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

**BETWEEN** **LB AND QB**

Appellants

**AND** **THE REAL ESTATE AGENTS AUTHORITY (CAC 10058)**

First respondent

**AND** **LI**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Mr G Denley - Member

**HEARD** at AUCKLAND on 24 November 2011

**DATE OF DECISION:** 7 December 2011

**COUNSEL**

Mr L W Divers for appellants  
Ms N Wilde for first respondent  
Mr S Hamilton for second respondent

**DECISION OF THE TRIBUNAL**

***Settlement***

[1] In the course of the hearing, the parties accepted a steer from the Tribunal and achieved a settlement on the basis, inter alia, that the decision of the Authority be confirmed i.e. that *“The Committee has determined under s.89(2)(c) of the Real Estate Agents Act 2008 to take no further action with regard to the complaint or any issue involved in the complaint”*. We congratulate the parties on achieving that settlement.

[2] Nevertheless, because this case raised an important issue for the Real Estate Agency industry and for its consumers, we record below some observations.

### **The Issue**

[3] The narrow issue, and that focused on by the Authority, is whether the sales person activities of the second respondent licensee constituted unsatisfactory conduct and, in particular, whether she (through her company) had a duty to ensure her marketing of the property was accurate.

[4] A residential property had a separate one bedroom flat and was marketed by the second respondent as a "*Home and Income*". However, a covenant registered against the title to the property prevented it from being used, inter alia, for any commercial purpose or for more than one household unit.

[5] Did the second respondent have a duty, before advertising the property as a home and income, to ascertain that such an activity was permitted?

### **Further Facts**

[6] The overall complaint of the appellants, as purchasers of the property in March 2010, is that the licensee misrepresented it to them as a "*Home and Income*" when the title to the property specifically covenanted against that activity. They also made some minor peripheral complaints about the licensee which can be ignored at this stage and were not concerning.

[7] There is not much need for us to detail further facts other than to note that the property was auctioned on 27 March 2010 and passed in; that the "*single most important requirement*" of the appellants as indicated to the licensee was to find a property for their son to live separately in an income unit while they rent out the main dwelling when they moved overseas. The appellants did not bid at the auction but purchased the property subsequently on 29 March 2010.

[8] On 8 April 2010 the appellants' solicitors sent a notice of objection and requisition of the title to the vendors' solicitors stating that the appellants required removal of the covenant which prevented the property being used (as they then put it) "*for any trading or commercial purpose and prevents any building on the land being used as a flat or flats or as a boarding house, or as a residence for more than one household unit*". The vendors argued, inter alia, that the attached unit in issue had Council permits and was legally rentable.

[9] We note that the title to the property did not spell out the nature of the covenant on its face but, under "*interests*" or encumbrances, referred to a "*land covenant*" in a transfer which also needed to be searched to ascertain the extent of the encumbrance. We deal separately below with the state of the title to the property.

### **The Findings of the Authority**

[10] The Committee of the Authority gave careful consideration to whether the facts disclosed unsatisfactory conduct in terms of s.72 of the Act, or misconduct under s.73. We set out the following portions from the "*Discussion*" of the Committee:

*"The Committee considered the allegations of misrepresentation as being the most significant in the complaint. The property was clearly promoted as a Home and Income and yet the covenant does preclude the activity. The seller*

*client was, and still is adamant that renting the unit is not an illegal activity per se, and that they were not aware of the covenant.*

*The seller says that when the unit was built in 1999 it complied with the District Council rules for a minor household unit as it was designed for extended family members. This is the use that the sellers made of it until the family member passed away in 2009. After that the unit was rented out to unrelated parties. The Bs originally stated that they wanted their son to live in the unit while they occupied the main house. That use would in theory comply with the MCC rules but might still be in breach of the original covenant which the seller considered to be redundant.*

*The Committee considered whether or not the licensee knew or should have known about the covenant. After much discussion, the Committee formed the view that the licensee was not aware of it and that the covenant was not an obvious defect as it was undefined in the Computer Register Copy of Title. The licensee had no cause to doubt the veracity of the sellers position and in the Committee's view acted as a conduit for the information between the seller and the buyer regarding the use of the property.*

*The Committee then had to consider whether acting as a conduit in passing on the information constitutes a breach of section 72 or section 73. It was the Committee's view that the licensee's responsibilities do not extend to interpreting titles to this level. The complainant's solicitor was the correct person to perform this service and has done so ensuring his clients' interests were protected ..."*

### ***The Title to the Subject Property***

[11] A search of the computer freehold register of the relevant property shows that the vendor is the registered proprietor of the freehold of the property and that it is subject to various "interests" i.e. encumbrances. There is a building line restriction which is a fairly standard type of encumbrance. There is a "land covenant" in a particular transfer registered in June 1970 which is highly relevant to the present issue. There is a bank mortgage, and a gazette notice stopping an adjoining service lane as at September 2006.

[12] The covenant of concern to the purchasers, or the encumbrance on the Title, is contained in the transfer noted against the Title. It seems that the subject property was part of a small subdivision in June 1970 which involved registration against the title to the property of a transfer document containing four covenants.

[13] The fourth such covenant reads:

*"Not to use or permit to be used any building or part therefore on the firstly described land [the subject property] as a flat or flats nor as a boarding house nor as a residence for more than one household unit".*

[14] The first covenant prohibits that land from being "used for any trading or commercial purpose including commercial poultry farming".

[15] The second covenant requires any house to be erected on the land to be at least of a particular value and also prohibits the erection of any glass house exceeding 200 square feet in area. The third such covenant prohibited erecting, placing or permitting on the land any caravan, hut or shed to be used as a dwelling or temporary dwelling.

[16] On the face of it the encumbrances were significant but through the lapse of time they had become academic to some degree.

### ***Our Views***

[17] We are conscious that s.3 of the Act sets out its purpose as “... *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.*” We consider that the views we now express below should aid that purpose. Indeed, subs.(3)(2)(b) of the Act refers to that purpose being achieved, inter alia, by “*raising industry standards*”.

[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.

[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.

[20] Also, we observe that acting merely as a conduit from seller to purchaser may not exonerate a licensee from blame. We do not think that a licensee should place sole reliance and credence on advice or assurances from a vendor, even though given in good faith.

[21] It is also our view that office managers, supervising agents, branch managers and the like should ensure that the principles we express above are always applied.

[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.

[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.”*

[24] We expect our above views to be circulated and disseminated throughout the industry.

***Non-Publication of this Licensee's Name or of Her Identifying Details***

[25] With regard to publication of its decision in the present case, the Committee of the Authority stated:

***"Publication***

*One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.*

*Publication gives effect the purpose of the Real Estate Agents Act of ensuring that the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of setting standards and that it is in the public interest that the decision be published.*

*The Committee directs publication of its decision, but omitting the names and identifying details of the complainant (including the address of the property), the licensee and any third parties in the publication of its decision."*

[26] We stated as recently as 22 November 2011 in *Jackman v CAC and M Raos* [2011] NZREADT 34 that it is settled law that open justice is desirable and there must be a presumption that our hearings and our decisions should be public. We also stated that we consider it to be in the public interest that our decisions be available and relate to the particular parties. In that case we did not consider that it is "proper" to grant name suppression to the licensee. We had considered the use of that word in s.108(1) of the Act which, inter alia, gives us power to prohibit publication of any decision or publication of any identifying particulars of the person charged or any other person if we think it "proper to do so". We also noted that this issue of non publication is a matter for the application of our discretion case by case.

[27] In terms of the particular facts and background of this case, including the factor of settlement, we confirm the stance of the Authority and direct publication of this decision but omitting the names and identifying details of the complainant (including the address of the property), the licensee, and any third parties in the publication of this decision; and that order continues with regard to the decision herein of the Complaints Assessment Committee dated 16 December 2010.

[28] Finally, in case there is a need for our further assistance over the detail or the application of the settlement terms reached between the parties, we reserve leave to apply.

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Judge P F Barber  
Chairperson

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Mr J Gaukrodger  
Member

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Mr G Denley  
Member