

Information Sheet:

Checking Titles

This information sheet outlines the Real Estate Authority's (REA) interpretation of licensee obligations arising from a guidance decision made by the Real Estate Disciplinary Tribunal (the Tribunal) in December 2011¹.

Licensees should consider seeking their own advice about the effect of the Tribunal's decision if this is a significant matter for them.

The decision

The case involved the marketing of a residential property, with a separate one bedroom flat, as a "Home and Income". However, a covenant registered against the title to the property prevented it from being used for any commercial purpose or for more than one household unit.

The issue was whether the licensee had a duty before advertising the property as a home and income, to check whether this was allowed.

When the Complaints Assessment Committee (CAC) considered the complaint it decided that there was no such duty and the result was to "take no further action with regard to the complaint or any issue involved in the complaint".

The complainant appealed the CAC decision to the Tribunal. During the appeal hearing, the parties achieved a settlement. However, because the Tribunal considered that the case raised an important issue for the industry, it decided to issue a decision as guidance to the industry and stated that it expected the "views to be circulated and disseminated throughout the industry".

The key part of the decision reads:

"[18] We consider that a licensee, upon taking instructions for the 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

¹ LB and QB v The Real Estate Authority(CAC 10058) and Li (NZREADT 39)

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 auctions 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 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.

[24] We consider that our above views relate to Rule 5.1 of the Real Estate 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 out real estate agency work.

Licensee obligations

In order to comply with the obligations identified in the decision, a licensee must:

- obtain a copy of the certificate of title
- review it to verify that the information about tenure, ownership, legal description and property description in the listing document, matches the information on the title
- establish whether or not there are interests registered on the title such as covenants, caveats, easements etc, that should be brought to the attention of interested parties
- if necessary have a lawyer assist them to interpret what those restrictions mean; and
- ascertain zoning and town planning regulations or Council requirements so they are in a position to point out what restrictions might apply to that property. For example, they should be able to point out how a property is zoned and what zoning restrictions apply.

The licensee is then in a position to explain any restrictions which might affect the rights of a purchaser, and to advise the parties to seek proper legal advice on such matters.

The decision does not create an expectation that licensees will need to personally interpret complex titles or provide an in-depth analysis of the town planning implications in relation to a property. Licensees are not expected to be lawyers or town planners and having pointed out any restrictions, they should continue to refer clients to those with specialist skills.

Commentary

REA considers this decision to be consistent with the following decisions made by a CAC and the High Court, and is consistent with the skills that are now required for entry into the real estate industry.

CAC decision

The Tribunal decision is consistent with an earlier unsatisfactory conduct decision of a CAC (CA4097037 & CA4097109 re Allen & Greenwood). In this case it was held that the licensee:

"...should have checked the identity of the registered proprietor before preparing the agreement. The proper, good and expected practice of an agent ... is to obtain an up to date copy of the certificate of title".

High court decision

The Tribunal decision is also consistent with a decision of the High Court² made in July 2008. That decision related to a situation where false representations were made in relation to the availability of water permits with respect to a vineyard being sold near Blenheim. In finding the real estate agency to be liable, Justice Wild commented:

"Bayleys needed to "get right" important details such as water permits and easements Bayleys needed either to give accurate details in the sales information it provided, or to be able to provide that detail accurately to prospective buyers on request... Bayleys ought to have included accurate and complete information about the water permits in its sales information brochure, carefully checking that information with the [vendors] and/or [vendors lawyers] before issue the brochure."

² Altimarloch Joint Venture Limited v Moorhouse, Marlborough District Council, Vining Realty Group Limited and Gascoigne Wicks HC CIV-2005-406-000091 3

Industry entry qualifications

The entry qualification for the industry is the National Certificate in Real Estate (Salesperson) Level 4. Two of the unit standards that are required to be completed as part of that qualification are;

- 23134 Demonstrate knowledge of land ownership, transfer of ownership, and titles
- 23138 Demonstrate knowledge of council zoning and building law

The obligations identified in the Tribunal decision are consistent with the skills that need to be demonstrated as part of these standards.

Summary

The intention of the Tribunal in releasing this decision is that it will act as guidance to the industry by clearly spelling out that awareness and knowledge of titles is a fundamental obligation of licensees.

Licensees should familiarise themselves with the decision and the associated obligations.

Those responsible for supervising other licensees should ensure that they, and the licensees they supervise, are adequately trained so they can meet these obligations.

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To the best of the Real Estate Authority knowledge, the information in this guide is accurate at the date shown below. However, the requirements on which this information is based can change at any time and the most up-to-date information is available at www.rea.govt.nz

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