

In the Matter of **Part 4 of the Real Estate Agents Act 2008**

And

In the Matter of **Complaint No CA3353754**

In the Matter of **Mr C**
Licence No XXXXXXXXX

Determination of Complaints Assessment Committee

Dated this 6th day of August 2010

Complaints Assessment Committee:

CAC No: 10039

Chairperson: Jo Hughson

Deputy Chairperson: Marina Neylon

Panel Member: Joan Harnett-Kindley

Determination of Complaints Assessment Committee

1 Licensee Background

1.1 The Licensee, Mr C, holds an agent licence and works for ABC Limited trading as XYZ.

2 Complaint

2.1 The complainant and her husband (“the complainant”) stated they first met the Licensee in November 2009 when they were looking for a business to buy. The complainant stated that she assumed the Licensee “must know business” because he told them he was a “business real estate person not a house real estate person”. The Licensee emailed the complainant details of a business he thought might be of interest to them. The information was contained in an Information Memorandum (“the Information Memorandum”) and was for a Wholesale/Distribution business known as LMN. The complainant stated “we believed everything [was] in it” referring to the Information Memorandum. A copy of the Information Memorandum was provided with the complaint.

2.2 There was a detailed and lengthy disclaimer in the first section of the Information Memorandum making it clear it was “provided for preliminary information purposes” and it had been prepared “on the basis of information supplied by the Vendors”. The complainant stated “I have read their disclaimer and yes we needed to do our homework as well, but [the Licensee] knew we had no experience in this field of work, and as I mentioned he said he was a reliable business real estate person who had experience in selling and I thought knowing the facts in the Information Memorandum to be correct: I believe [the Licensee] had some responsibility.”

2.3 The complainant and her husband went on to purchase LMN (“the business”) for \$326,500 pursuant to an agreement for sale and purchase of a business dated 30

November 2009. In their complaint the complainant stated that after 22 days of owning the business “we found out we were losing 70%-80% of the business. We rang [the Licensee], he wasn’t interested.”

- 2.4 The complainant alleged the Information Memorandum which they had relied on (the complainant stated this was “a huge part of us buying [the business]”) contained false information including “false” “pictures”, the stated reasons for the vendors selling the business were “false” or misleading as was the business model, details of staffing and trading hours, products and services and profitability. There was an allegation the Licensee had sold the complainant a business “without the suppliers contracts.”
- 2.5 There was an additional allegation the Licensee had “discussed confidential information” with the complainant’s business coach, Mr S, “without permission”.
- 2.6 The complainant provided a copy of a statement she had made to the Licensee’s employer post settlement. That showed the complainant had “got back \$145,000” from the vendors following settlement “making the business [now worth] \$180,000.”
- 2.7 In summary the complainant alleged the Licensee had conducted himself in breach of the Code of Professional Conduct Client Care and was “incompetent and negligent in the way he sold [the business] to us”. The complainant sought monetary compensation for the mental, physical and financial suffering they had endured “because of [the Licensee’s] incompetence and negligence.”

Information and Material Considered

- 2.8 The Real Estate Agents Authority (“the Authority”) received the complaint against the Licensee on or about 12 April 2010.
- 2.9 The Authority referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the REAA, on 17 May 2010 the Committee considered the complaint under section 79 and determined to inquire into it.

- 2.10 The Committee invited the Licensee to provide a written response to the complaint and this was received on or around 3 June 2010. The Committee directed an investigator in the Compliance Unit of the Authority to interview the vendor of the business. A copy of a file note documenting the information provided by the vendor (Ms K) by telephone with the investigator was before the Committee.
- 2.11 The Licensee explained the fact that information contained in Information Memoranda is often commercially sensitive and prepared without the broker having “an intimate role to play in this process as it may be perceived there is a conflict of interest.” He stated that he initially emailed the complainant information memoranda for two businesses he believed would interest them as they were within their price range. The complainant he stated presented an offer for the first business which was rejected by the vendor following which “they then express an interest in making an offer for [LMN].” The Licensee stated “they had inspected the business and spent almost 2 hours on the premises inspecting the product range....it was pointed out by the [vendor] then that the product range varied from time to time and products in the Information Memorandum were representative of the range but may not match exactly. The suppliers....were however regular suppliers and had been for some time ...and discussed with the vendors the operation of the business in detail including suppliers and staff and the plant and equipment. The vendors told [the complainant] that a full list of suppliers and staff would be made available after a conditional agreement was in place and at that point an introduction to both would be undertaken by them.”
- 2.12 The Licensee stated that one error in the Information Memorandum was identified by the vendor (under the heading “the Business Model”) at this meeting and this was pointed out to the complainant during their inspection of the business
- 2.13 The Licensee maintained he had been advised by the complainant they were experienced business owners having recently sold a successful tyre business which led him to believe “they would have no difficulty understanding the

business from both the Information Memorandum and the 2 hours spent on the premises with the vendors.”

- 2.14 The Licensee stated he took all reasonable care to ensure the information contained in the Information Memorandum was correct and he confirmed that the information presented was sourced from the vendors and before distribution was presented in hardcopy to them for their confirmation as being correct. The Information Memorandum was forward to the complainant once the Licensee had received the vendors’ confirmation in this regard.
- 2.15 The Licensee stated he was “astounded” to hear that shortly after taking possession of the business the complainant had lost some of their suppliers and that “they wanted to sell the business straight away.” He maintained there had been no indication from either the vendors or the complainant that any of the suppliers “would be about to cease using [LMN].”
- 2.16 The Licensee met with the complainant at their home at which point, he stated, a number of matters were discussed as were potential remedies for them. In particular the complainant is alleged to have stated they “did not like the business and were having difficulty learning it as they said that the vendors had poor/complex in-house business systems. They had also been advised that they were to lose some suppliers. They wanted me to sell the business for them. I discussed the potential difficulties than an immediate sale posed.”
- 2.17 When the complainant asked for advice on how to improve the business (in-house systems, staffing and training for example) the Licensee stated he offered to introduce them to a Mr S who specialises in business consultancy/coaching. The Licensee stated “they subsequently established an ongoing working relationship [with Mr S] which [he believed was] beneficial” to he complainant.
- 2.18 The Licensee stated he recommended the complainant consider introducing a staff uniform for the business.

- 2.19 The Licensee stated there was discussion about the Information Memorandum and the complainant alleged there were “a number of inconsistencies in it.” The Licensee maintained he explained it had been prepared from information supplied by the vendor and the vendor had confirmed it as being true and correct.
- 2.20 The Licensee stated that “many of the issues they raised in the Information Memorandum should have been investigated during the Due Diligence period...issues such as suppliers, staff, trading hours, product range etc...” He maintained the complainant told him their Due Diligence “consisted of a 10 minute conversation between their accountant and the vendors’ accountant”. The Licensee stated “Please note that their solicitor, when drafting the Agreement (a copy was provided) was particular in that clauses 16.0 and 19.0 are included for her clients’ protection. I agreed as clause 16.0 (Due Diligence) is a clause I insist is inserted in each Agreement when I sell a business...” The Licensee stated “this was a great disappointment to me as I had contacted [the complainant] during the Due Diligence period to remind and urge them to make a full investigation.” Documentation evidencing this correspondence between the complainant and the Licensee was provided to the Committee. The Licensee maintained that “towards the end of the 10 working day period the vendors had informed me that they were a little mystified as to why they had not had a visit from [the complainant].”
- 2.21 The Licensee responded to the allegations relating to the false information which the complainant alleged was contained in the Information Memorandum. He explained the source of the information (the vendors) and other relevant matters.
- 2.22 In terms of the allegation about selling a business without suppliers contracts the Licensee maintained he told the complainant there were few businesses of this type that had suppliers contracts in place and he referred to clause 16.1 in the Agreement which specified that in due diligence the Purchaser may take into account such matters as the availability and the terms of distribution, supply and purchase agreements. He stated this clause was drafted by the complainant’s solicitor and that he would have expected the solicitor to have stressed the

importance of completing due diligence in relation to supply contracts at that time.

- 2.23 Within his response the Licensee supplied information from his employer, Ms F, responding to the complainant's statements about their conversations post settlement. It is not necessary to summarise this information suffice to say that she declined to give any compensation to the complainant but did agree to resell the business for them "now or in the future". She referred to a "full and final settlement" which the complainant reached with the vendor.
- 2.24 In relation to the allegation the Licensee disclosed confidential information to the complainant's business coach, this was denied. The Licensee did not deny telephoning Mr S and that he asked him about progress of the complainant's business. After he had seen the statement which the complainant had faxed to his employer which disclosed that the complainant and the vendor had "settled" he mentioned this to Mr S and was under the impression Mr S knew about it and the amount of the settlement (\$145,000). He stated at that point he did not know there was a confidentiality clause in the settlement agreement and when he became aware of this he stated he was astounded the complainant had disclosed details of the settlement to his employer in breach of that clause.
- 2.25 In summary the Licensee stated he believes he exercised skill, care, competence and diligence at all times during the sale process and "provided all information I had available to the [complainant] and encouraged them to actively engage in Due Diligence to ensure they had all information needed to complete the sale. In fact I will reiterate that their lawyer composed all Special Conditions in the Agreement. All information needed to make a knowledgeable acquisition was available to the [complainant]."
- 2.26 The vendor confirmed that the Licensee prepared the Information Memorandum but that she checked it and agreed that "it was fine". She stated the product range stated in the Information Memorandum was correct but that the pictures were "samples". The vendor advised that this was explained to the complainant when

she met them after their conditional offer was made. She confirmed the complainant came and spent a few hours at the business after the conditional offer was made; once in December 2009 and once in January 2010 but that they came in only once during the Due Diligence period. The vendor stated she encouraged the complainant to see her at the warehouse in December/January as this was the busiest time for the business but “they never came”. The vendor stated her husband spent two weeks with the complainant after settlement on 2 February 2010 and she spent one month with them. The vendor stated she is sure she explained to the complainant “before the deal went unconditional” the error in the Information Memorandum and the correction about commission being paid by the suppliers and not by the supermarkets (DEF/UVW). The vendor confirmed she was not aware at the relevant time that DEF was about to centrally warehouse products rather than use LMN and stated that she had warned the complainant that losing suppliers could happen at any time and in that event staffing would need to be reduced. The vendor provided some details relating to the settlement reached with the complainant post settlement when she learnt the suppliers had informed the complainant they no longer wished to use LMN to warehouse their products.

- 2.27 The Committee invited the complainant to comment on the Licensee’s response. Comments were received by email on 29 June 2010. The complainant denied she was ever told the pictures in the Information Memorandum were samples. She reiterated she never gave the Licensee permission to discuss her private and confidential matters that she had faxed to his employer. She stated again “we brought [sic] a product from [XYZ], licensee Mr C for \$326,000 with a net surplus of \$221,639 before depreciation, owners’ remuneration and interest and now we are struggling to keep the door open. We admit we should have done our homework better. The Information Memorandum was the main reason we bought the business. I still believe [the Licensee] has a responsibility to get the information memorandum right before he puts anything up for sale.”

3 **Hearing**

3.1 Having received the Licensee's written response to the complaint and the other information described above, and having satisfied itself that it had completed its inquiry into the complaint, on 26 July 2010 the Complaints Assessment Committee conducted a hearing with regard to the complaint, under section 89(1) of the REAA.

3.2 The hearing was conducted on the papers pursuant to section 90 of the REAA. In accordance with section 90(2) the Committee made its determination on the basis of the written material before it, as referred to above.

4 **Complaints Assessment Committee Determination and Reasons**

4.1 The Committee has made a determination under section 89(2)(c) of the REAA to take no further action with regard to the complaint or any issue involved in the complaint.

4.2 Having received the information outlined above, and having considered all of that information, it appears to the Committee that having regard to all the circumstances of the case, no further action is necessary.

4.3 The Committee does not consider that it has been proved the Licensee has engaged in unsatisfactory conduct (as that term is defined in section 72 of the Act) in any respect.

4.4 On the information before it the Committee is satisfied the Licensee at all times acted on the instructions and in the best interests of his client, the vendor, while at the same time he dealt fairly with his customer, the complainant.

4.5 The Committee is satisfied the Licensee provided all the information that he had available to him from the vendors pertaining to the business, and that he actively encouraged the complainant to undertake appropriate due diligence to ensure that they had sufficient information in order to complete their purchase of the business. In the Committee's view it was entirely a matter for the complainant the

extent to which they undertook or made due diligence enquiries and any failure on their part to do in this case cannot fairly or reasonably be held to have been the responsibility of the Licensee. The Committee is satisfied the complainant was aware of their rights under the Agreement to undertake Due Diligence, as was their solicitor who drafted the relevant clause.

- 4.6 The Committee does not consider that a Licensee has a professional obligation personally to verify all information which a vendor supplies to him or her for the purposes of an information memorandum when selling a business. In the Committee's view a Licensee is entitled to rely on such information as true and correct when marketing a business, particularly if a vendor has verified the information as such. Only in the event a customer or prospective purchaser queries the Licensee specifically about information contained in the memorandum, and if the Licensee cannot accurately answer the query, can the Licensee reasonably be expected to take steps to verify the information with the vendor. In the event the Licensee is not satisfied he can verify the information then he or she should advise the customer or prospective purchaser to make further inquiries on the issue/s themselves.
- 4.7 The Committee carefully considered the Licensee's responses to the allegations in relation to the false or misleading information contained in the Information Memorandum. In its view the Licensee's responses were comprehensive and credible. The Committee does not consider there is any merit in this aspect of the complaint and does not consider any further inquiries are necessary.
- 4.8 In relation to the alleged breach of confidentiality, the Committee accepts the complainant's evidence that she did not give specific permission for the Licensee to discuss matters relating to the settlement they reached with the vendor. However having considered the Licensee's response on this issue the Committee is not minded to take this matter any further. It is clear the circumstances were such that the Licensee believed Mr S was already aware of the settlement details, and was unaware the agreement was the subject of a confidentiality clause (given

the complainant had disclosed details of the settlement to the Licensee's employer).

- 4.9 In summary, the Committee has determined to take no further action with regard to the complaint or any issue with regard to the complaint.

5 Publication

- 5.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)).

- 5.2 The Committee has determined that this decision should be published in the interests of ensuring the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of standard setting

- 5.3 The Committee hereby authorises the Authority to publish this decision by whatever means it considers appropriate provided that the names and identifying details of both the complainant and the Licensee including and any other named or identified third parties, and the name of the business, are suppressed from publication.

6 Right of Appeal

- 6.1 A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against a determination of the Committee within 20 working days of the date of this notice.

- 6.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

- 6.3 Further information on lodging an appeal is available by referring to the Guide to Lodging an Appeal at www.justice.govt.nz/tribunals.

DATED this 6th day of August 2010

A handwritten signature in blue ink, appearing to read 'Jo Hughson', written in a cursive style.

Jo Hughson
Chairperson