

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

And

In the Matter of **Complaint No CA2334891**

In the Matter of



Determination of Complaints Assessment Committee

Dated this 19th day of April 2010

Complaints Assessment Committee:

CAC No: 100024

1 Determination of Complaints Assessment Committee

2 Background

2.1 The Licensee, [REDACTED], holds a salespersons licence and an agent licence. He works for [REDACTED] Real Estate Limited (trading as [REDACTED]) in Christchurch. [REDACTED] has worked in the real estate industry for over twelve years.

3 Complaint

3.1 The complainant, [REDACTED] listed his parents' property at [REDACTED] Christchurch ("the property"), with [REDACTED] in June 2009. [REDACTED] listed the property with [REDACTED] who was his friend, on behalf of his elderly parents (for whom he held power of attorney). [REDACTED] parents had recently moved into a retirement village.

3.2 The property was placed on the market in June 2009 and marketed for \$279,000. On 15 July 2009 a [REDACTED] signed a conditional agreement for sale and purchase of the property for \$285,000. A deposit of \$100,000 was payable under the agreement. Settlement was not to be effected until 30 November 2009.

3.3 [REDACTED] believed he could make an arrangement for payment of his parents' retirement village fees, despite the "long settlement date".

3.4 [REDACTED] was alleged to have asked [REDACTED] to meet him at his offices after hours on 15 July 2009 to sign the agreement for sale and purchase. [REDACTED] and his partner, [REDACTED] so. [REDACTED] alleged [REDACTED] explained that the offer he had received from [REDACTED] was the "best he could get". [REDACTED] alleged he and his partner asked [REDACTED] what would happen if the sale "fell over" to which [REDACTED] is alleged to have advised "the beauty of this offer was that they were paying \$100,000 to safeguard [him] and if the sale fell over, [his] parents' estate

would be \$100,000 better off.” [REDACTED] alleged he also asked [REDACTED] what his fees would be and was informed that commission would be \$12,000. [REDACTED] stated there was some “friendly banter” as he believed the commission was high considering, he alleged, misinformation which [REDACTED] had placed in the marketing campaign (to the effect the property was a two bedroom house when it was actually three bedroom; and poor photographs he placed on the [REDACTED] website) [REDACTED] stated he signed the agreement for sale and purchase “without reading it fully as I trusted [REDACTED] advice”.

3.5 [REDACTED] stated there was “some mix up” which required him to sign or counter-sign the agreement for sale and purchase or the listing agreement. When [REDACTED] agent brought him the document to sign, [REDACTED] refused when he noticed the commission payable was recorded as \$12,000 plus GST. [REDACTED] stated [REDACTED] never mentioned that GST would be payable on the \$12,000 he was quoted as described above.

3.6 [REDACTED] stated that “within minutes” he received a telephone call from [REDACTED] asking him why he had not signed the agreement. When [REDACTED] explained why he had not signed, [REDACTED] “agreed to honour the fee he had quoted.” [REDACTED] agent returned with the agreement and [REDACTED] signed it.

3.7 [REDACTED] stated the [REDACTED] commission was deducted from the deposit which was paid by [REDACTED]. [REDACTED] used the “entire deposit” (paid into the trust account of his lawyers) to secure an apartment for his parents at the retirement village.

3.8 [REDACTED] stated that in late September/early October 2009 [REDACTED] notified his lawyer that she could no longer meet her obligations under the agreement for sale and purchase of the property. [REDACTED] stated this caused him “much stress and concern” because [REDACTED] sought a refund of the deposit she had paid under the agreement for sale and purchase. [REDACTED] stated that when his lawyer informed him of this request he was “totally shocked” because [REDACTED] had “clearly stated that the entire deposit would be kept by [his] parents’ estate.

- 3.9 [REDACTED] stated that [REDACTED] insisted on ensuring the property was placed back on the market as soon as possible. [REDACTED] ultimately agreed with this strategy. [REDACTED] signed another listing agreement with [REDACTED]. When [REDACTED] asked [REDACTED] what his fee would be [REDACTED] allegedly stated “not to worry about it, that it would be the same as before, and that it didn’t matter because it would come out of the first deposit.” [REDACTED] signed the listing agreement.
- 3.10 On Wednesday, 7 October 2009 [REDACTED] informed [REDACTED] he had received an offer (via another [REDACTED] agent) and that he ([REDACTED]) should “sign straight away” otherwise the offer would be “lost”. [REDACTED] alleged he told [REDACTED] he would not sign until he had spoken with his lawyer; that his lawyer was not available and that [REDACTED] would have to wait. [REDACTED] alleged [REDACTED] “continued to pressure me to sign on Thursday 8th and Friday 9th” October 2009 on the basis “the offer wouldn’t last if I didn’t sign”. As [REDACTED] was to be in Australia over the coming weekend he asked [REDACTED] to liaise directly with the “agent representing the purchaser” [REDACTED] stated he contacted that agent on Friday, 9 October 2009 and informed him he was not able to sign the agreement for sale and purchase until the close of business on Monday, 13 October 2009. [REDACTED] alleged the agent told him the proposed purchaser was a “reasonable man” and would understand the delay.
- 3.11 [REDACTED] stated that [REDACTED] called him on Sunday, 11 October 2009 and told him he “must sign” or “we would lose it”. [REDACTED] alleged he told [REDACTED] again that he would not act until he had spoken to his lawyer. [REDACTED] was alleged to have stated that [REDACTED] lawyer “couldn’t be trusted to do a good job, he still has an old message on his answerphone.” [REDACTED] alleged [REDACTED] called and texted him five times that day but [REDACTED] told [REDACTED] “not to keep asking as nothing would happen before [his] lawyer was able to see [him] the next day, Monday”.

- 3.12 [REDACTED] stated he was not able to see his lawyer until the afternoon of Tuesday 13 October 2009. [REDACTED] agreed to sign the agreement for sale and purchase for a purchase price of \$279,000. Settlement was to be effected on 30 November 2009. [REDACTED] took the agreement to [REDACTED] work the following morning and [REDACTED] duly signed it. [REDACTED] alleged that when he asked [REDACTED] to confirm that his fee would be the “same as before” [REDACTED] told him “it may not be, due to the price difference”.
- 3.13 [REDACTED] stated that when he received the deposit the sum of \$12,904.32 had already been deducted by [REDACTED]. The deposit had apparently been paid into [REDACTED] trust account at [REDACTED] request. [REDACTED] alleged the deposit should have been paid into his lawyers’ trust account.
- 3.14 [REDACTED] stated he instructed his lawyer to contact [REDACTED] and “recover the overcharged fee of \$904.32”. The Manager of [REDACTED] [REDACTED], replied on the basis he had discussed “the issue” with [REDACTED] and no further action would be taken.
- 3.15 [REDACTED] alleged both [REDACTED] and [REDACTED] breached the REINZ Code of Ethics (Clause 13.12 which provided that a member shall render services with absolute fidelity, honour and courtesy). Further [REDACTED] alleged [REDACTED] breached Clause 13.3 of the Code of Ethics) by giving him incorrect advice in relation to the deposit paid under the first agreement for sale and purchase.
- 3.16 [REDACTED] seeks reimbursement of the sum of \$904.31 being the amount of commission he believes he was “overcharged” in respect of the second agreement for sale and purchase.

4 **Information and Material Considered**

- 4.1 The Real Estate Agents Authority (“the Authority”) received [REDACTED] complaint against [REDACTED] on 27 November 2009 and referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the Real Estate Agents Act 2008 (the REAA), on 20 January 2010 the Committee

considered the complaint and determined to inquire into it. The Committee was satisfied that although the complaint related to conduct which occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into the complaint.

- 4.2 The Committee invited [REDACTED] to provide a written response to the complaint. A written response was received from [REDACTED] on 5 February 2010. [REDACTED] response was detailed and comprehensive and was supported by documents and some contemporaneous “transaction notes” which he stated he made “at a stage of proceedings [when] it became obvious there was a problem arising.”
- 4.3 [REDACTED] admitted he made a mistake when he told [REDACTED] he would be entitled to “keep the whole deposit” payable under the agreement for sale and purchase with [REDACTED]. [REDACTED] claimed he made this mistake because “on most transactions where 10% deposit is paid and clause 9.4 in the sale and purchase agreement comes into effect, along with aggrieved vendors being able to claim compensation for another commission arising from a second sale and legal costs etc.” [REDACTED] stated he is sure [REDACTED] lawyer advised him of this also. [REDACTED] provided the Committee with a copy of a letter from [REDACTED] lawyers to [REDACTED] lawyers dated 29 September 2009. In that letter [REDACTED] lawyers stated “the deposit was properly paid according to the terms of the agreement and is not returnable to the purchaser”.
- 4.4 [REDACTED] contemporaneous “transaction note” for 22 October 2009 recorded that at 10.20am he apologised to [REDACTED] for making this error and gave him an explanation for why he had made that mistake (as above).
- 4.5 [REDACTED] advised that the issue in relation to the commission payable under the agreement for sale and purchase with [REDACTED] (\$12,000) was resolved and was “satisfactory” to [REDACTED] at the time [REDACTED] agreed to charge \$12,000 GST inclusive.

- 4.6 In response to [REDACTED] allegation that there was “misinformation” in the [REDACTED] advertisement for the property [REDACTED] stated that one advertisement in *The Press* was incorrect in the way it described the property as having two bedrooms; but that was the newspaper’s fault and one for which he [REDACTED] received an apology [REDACTED] stated that no other advertisements contained any misinformation or were factually incorrect. Examples of the advertisements [REDACTED] [REDACTED] in the [REDACTED] (July 2009 and October 2009 respectively) were provided.
- 4.7 [REDACTED] stated it was on 15 July 2009 that he agreed to [REDACTED] request to charge commission in the sum of \$12,000 (GST inclusive) only. That was the day the first agreement for sale and purchase was signed by [REDACTED]
- 4.8 [REDACTED] stated that when [REDACTED] advised through her lawyer that she would not be able to fulfil her obligations under the agreement for sale and purchase, he was “more than cooperative and agreed to giving [REDACTED] the first purchaser, access to sell the property, and agreeing that if she was successful with a sale [he] would cancel our listing and expect no further payment or commission”. Correspondence between [REDACTED] lawyers and [REDACTED] lawyers and [REDACTED] dated around the time of this (late September 2009) was enclosed and an email of 6 October 2009 supported [REDACTED] statements in this regard.
- 4.9 [REDACTED] stated the situation was ultimately remedied because another sale was effected on the same settlement date as was contemplated under the agreement for sale and purchase [REDACTED] had entered into with [REDACTED] [REDACTED] stated “this meant arrangements between the complainant, WINZ and the rest home were all satisfied on time and on the same date as the first agreement.” [REDACTED] stated it is his understanding that on 22 October 2009 [REDACTED] negotiated (through his lawyer) with [REDACTED] and retained \$35,000 from the original deposit and charged her for the commission payable under the second agreement for sale and purchase plus his legal fees.

- 4.10 [REDACTED] denied he telephoned [REDACTED] and insisted he ‘get the house back on the market as soon as possible’. [REDACTED] stated he spoke with [REDACTED] lawyer about [REDACTED] inability to settle on 30 November 2009 and that they both agreed “we had time to try and sell a second time within the timeframe of the first agreement.” [REDACTED] stated he was ultimately instructed by [REDACTED] to proceed in this manner and that he “did not phone insisting on re-listing.”
- 4.11 [REDACTED] denied he told [REDACTED] the commission payable the second time would be the “same as before” [REDACTED] stated he had no idea what price he may achieve the second time and any commission negotiation had to be approved by [REDACTED] management. [REDACTED] stated the second offer (written by a [REDACTED] agent in the [REDACTED] office) received was “a great offer” because it was “full asking price of \$279,000”; it was “completely unconditional...”; it had the same settlement date as the first agreement with [REDACTED] and a 10% deposit payable upon confirmation.”
- 4.12 In response to [REDACTED] allegations that on Sunday 11 October 2009 [REDACTED] ‘hounded him’ by calling him “at least five times”, [REDACTED] stated initially he telephoned [REDACTED] on his mobile and then when [REDACTED] texted him he sent return text messages. [REDACTED] accepted he feared the potential purchaser “wanted an answer and could not understand why an offer at full asking price and with no conditions... would not be accepted readily”.
- 4.13 [REDACTED] denied that on 14 October 2009 he agreed to charge [REDACTED] the same commission as he had charged him under the first agreement for sale and purchase. [REDACTED] stated that on 19 October 2009 when [REDACTED] signed the agreement with the second purchasers he told [REDACTED] the commission would not be \$12,000 because “...purchasers paying and was part of the default fee.” [REDACTED] stated that [REDACTED] “got agitated and said, better not be more than \$12,500 plus GST or you can rip up the contract.” When [REDACTED] lawyer asked [REDACTED] on 22 October 2009 for details of the commission he would charge (he required this information to negotiate the default fee payable by [REDACTED] with her

lawyers), [REDACTED] advised he informed the lawyer he would charge \$12,904.31 including GST (that is, less than \$12,500 plus GST).

4.14 [REDACTED] transaction notes dated 22 October 2009 contained a record of what occurred during the cancellation period in the agreement for sale and purchase with [REDACTED]. There were negotiations between [REDACTED] lawyer and [REDACTED] lawyers in relation to the default fee payable by [REDACTED]. [REDACTED] stated that at one stage [REDACTED] sought a reduction in his fee by the sum of \$5000 but [REDACTED] refused to agree to this. [REDACTED] ultimately signed the second agreement for sale and purchase and the first agreement was cancelled. The second purchasers paid the deposit into the [REDACTED] trust account.

4.15 [REDACTED] alleged in his complaint that [REDACTED] at no stage contacted him or his lawyer to discuss his [REDACTED] complaint about being overcharged commission on the second sale. [REDACTED] provided the Committee with copies of correspondence from [REDACTED] to [REDACTED] lawyer dated 25 November 2009 and an email of 30 November 2009 offering to meet with [REDACTED] “to discuss his complaint”.

4.16 In his concluding remarks [REDACTED] stated:

“The resulting sale with a date of settlement the same as the first, and with the first purchaser paying default fees, commission and legal fees meant the complainant and his family and their commitment to the parents future care was not put in jeopardy and/or extra costs.

I realise there may have been some extra stress and inconvenience to [REDACTED] however this was not of our making and great care was taken at all times with the sale and purchase agreements to protect his interests. At all times the prime concern was achieving the best possible result for [REDACTED] and his family.

4.17 In summary the Committee received and considered the following written material:

- a. Letter of complaint and supporting documentation including: an email from [REDACTED] to his lawyer dated 26 November 2009 outlining details of his complaint against [REDACTED], agreement for sale and purchase between [REDACTED] and [REDACTED] dated 15 July 2009, agreement for sale and purchase between [REDACTED] and [REDACTED] (19 October 2009), letter from [REDACTED] to [REDACTED], letter from [REDACTED] lawyer to [REDACTED] dated 19 November 2009, and response dated 25 November 2009, and letter from [REDACTED] to [REDACTED] undated but late November 2009 ;
- b. [REDACTED] written response to the complaint, dated 2 February 2010 and supporting documentation including: contemporaneous handwritten notes of [REDACTED] dated October 2009, [REDACTED] Listing Card for the property dated June 2009, [REDACTED] listing card for the property dated September 2009, [REDACTED] document entitled Confirmation of Real Estate Contract (July 2009) faxed to [REDACTED] lawyer, advertising of the property ([REDACTED] email from [REDACTED] to [REDACTED] dated 15 October 2009 updating [REDACTED] in relation to marketing campaign and suggesting to [REDACTED] it would be “great if you could get time to tidy up lawns...(before the open home), correspondence dated late September 2009/early October 2009 between [REDACTED] lawyers, [REDACTED] lawyers and [REDACTED], email dated 5 October 2009 from [REDACTED] to [REDACTED] lawyers confirming [REDACTED] instructions to re-list the property, email dated 19 October 2009 from [REDACTED] to [REDACTED] advising of offer received, [REDACTED] Confirmation of Real Estate Contract faxed to [REDACTED] lawyer on 19 October 2009 and handwritten fax to [REDACTED] lawyer confirming payment of the deposit, and correspondence in late November 2009 between [REDACTED] lawyers, [REDACTED] and [REDACTED] relating to [REDACTED] complaint about being overcharged commission on the second sale and purchase agreement

4.18 Having received [REDACTED] written response to the complaint and having satisfied itself that it had completed its inquiry into the complaint, on 8 April 2010

the Complaints Assessment Committee conducted a hearing with regard to the complaint, under section 89(1) of the REAA.

- 4.19 The hearing was conducted on the papers pursuant to section 90 of the REAA. Pursuant to section 90(2) the Committee made its determination on the basis of the written material before it as described above.

5 **Complaints Assessment Committee Determination and Reasons**

- 5.1 The Complaints Assessment Committee has determined under section 89(2)(c) of the REAA that it will take no further action with regard to the complaint or any issue involved in the complaint.

- 5.2 There is no doubt that [REDACTED] made an error advising [REDACTED] that his parents' estate would be entitled to retain the \$100,000 deposit paid by [REDACTED] under the agreement for sale and purchase dated 15 July 2009. [REDACTED], when first challenged about this advice by [REDACTED] immediately admitted he had made a mistake and he accepted this in his response to the Committee. The Committee accepted his explanation for the mistake and the Committee is satisfied that no further action is necessary. The Committee notes further that [REDACTED] was legally advised throughout the sale process and the clause in the agreement for sale and purchase pertaining to the deposit did not provide for the retention of the deposit in the event the sale "fell over". Further [REDACTED] own lawyer repeated the same error as [REDACTED] in his letter to [REDACTED] lawyer dated 29 September 2009 when he informed [REDACTED] lawyers that "the deposit was properly paid according to the terms of the agreement and is not returnable to the purchaser". The Committee considers it reasonable to infer that too must have been the advice [REDACTED] received from his own lawyer.

- 5.3 The Committee did not regard any of the other aspects of [REDACTED] conduct which was the subject of the complaint as falling short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(a). Nor did it consider [REDACTED] had carried out real estate agency

work which was incompetent or negligent (s 72(c)) or which would reasonably be regarded by agents of good standing as being unacceptable (s 72(c)). As the complaint related to conduct which occurred before the commencement of the Real Estate Agents Act 2008 the Committee did not consider that section 72(b) could apply in this case because section 72(b) refers to contraventions by a licensee of the 2008 Act or of any regulations or rules made under this Act. Taking into account all the circumstances described above, in the Committee's view there is no basis upon which it could make a finding of unsatisfactory conduct in respect of the other aspects of [REDACTED] conduct which were the subject of [REDACTED] complaint.

- 5.4 In relation to the complaint regarding the commission quoted by [REDACTED] as payable on the first sale and purchase agreement, [REDACTED] promptly agreed, when challenged by [REDACTED], to honour the terms of his quotation. The sum of \$12,000 inclusive of GST was ultimately what was paid by [REDACTED]. The Committee regards this aspect of the complaint as inconsequential and has determined that no further action be taken in relation to it.
- 5.5 In respect of the complaint about the commission paid under the second agreement for sale and purchase there can be no question [REDACTED] was entitled to charge commission on this (second) sale. He 'did his job' and obtained a buyer for the property. As to the amount of commission charged the Committee preferred [REDACTED] explanation that he did not tell [REDACTED] when he re-listed the property that the commission would be the same as under the first agreement for sale and purchase (as at the relevant time he was unable to give a quote because he did not know the price he would ultimately achieve and any agreement in relation to commission had first to be approved by [REDACTED] management). In any event, the amount of commission ultimately charged was passed on to or paid by the first purchaser, [REDACTED] as part of the default payment she made as a consequence of the cancellation of her agreement for sale and purchase. It was not paid by [REDACTED]. For this reason the Committee did not consider there had been any "overpayment" by the complainant, [REDACTED]. The Committee considered that

this aspect of [REDACTED] complaint was also inconsequential ([REDACTED] suffered no actual loss as he recovered the commission and his legal fees from the first purchaser) and it was not a matter which the Committee considered should be taken any further.

5.6 For these reasons the Committee has determined under section 89(2)(c) of the REAA that it take no further action with regard to the complaint or any issue involved in the complaint.

5.7 The Committee notes that even if it had made an adverse finding against the Licensee, the Committee could only have made an order in the nature of a penalty that could have been made against the Licensee at the time the conduct occurred (under the now repealed Real Estate Agents Act 1976). As the conduct the subject of the complaint occurred prior to the commencement of the Real Estate Agents Act 2008 the powers to make orders conferred on the Committee under section 93 would not have been available by virtue of section 172(2). The effect of this would have been that the remedies sought by the complainant (reimbursement of the sum of \$904.31 being the amount of commission he believed he had been overcharged) would not have been available in any event.

6 Publication

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

6.2 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 and it is in the public interest that the decision be published.

6.3 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 (including the address of the property) and the

Licensee (including the name of his employer) and any named or identified third parties are suppressed from publication.

7 Right of Appeal

- 7.1 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.
- 7.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 7.3 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 19th day of April 2010



Jo Hughson
Chairperson