

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

And

In the Matter of **Complaint No CA2295561 and No CA2370747**

In the Matter of **Lawrence Lalit Naidu**
Licence No 10005457

And

In the Matter of



Determination of Complaints Assessment Committee

Dated this 13th day of April 2010

Complaints Assessment Committee:

CAC No: 10025

1 Determination of Complaints Assessment Committee

2 Background

- 2.1 The Licensee, Mr Lawrence Lalit Naidu (“Mr Naidu”) is a salesperson at Segal Realty in Auckland. Mr Naidu has been licensed/certified as a real estate salesperson since early 2007. Since he entered real estate Mr Naidu has worked as a salesperson for three different real estate companies including Segal Realty.
- 2.2 [REDACTED] is Mr Naidu’s employer. He holds both a salesperson and agent licence. He has worked in real estate for a number of years and has run his own real estate company trading as [REDACTED] since 7 July 2008. Before starting his own business [REDACTED] worked for four different real estate companies.

3 Complaint

- 3.1 The complainant, [REDACTED] contacted Mr Naidu to market her and her husband’s property in [REDACTED] Auckland in October 2009. Mr Naidu had been recommended to her by a friend, [REDACTED] who had told her Segal Realty was “cheaper” than any of the other agencies in the area because they did not have offices and operated solely through the internet. The friend advised [REDACTED] that Segal Realty charged 3% for the first \$300,000 of the sale price and 2 % thereafter.
- 3.2 [REDACTED] signed a listing agreement with Segal Realty on 14 October 2009.
- 3.3 [REDACTED] alleged that prior to signing the listing agreement (on an earlier day) she had asked Mr Naidu what his fees were. She maintained that Mr Naidu informed her that the commission payable would be 3% on the first \$300,000 of the sale price and 2% thereafter. This accorded with what her friend had advised her as what she had been charged. [REDACTED] maintained that when she signed the listing agreement on 14 October 2009 Mr Naidu went over with her the terms

- on the first page of the listing agreement and then asked to sign where indicated on the second (final) page. She did so. She stated that her husband did not sign the agreement.
- 3.4 [REDACTED] stated that at no point prior to her signing the agreement did Mr Naidu discuss the commission payable on the terms [REDACTED] was to later discover, were recorded on the second page of the agreement.
- 3.5 [REDACTED] accepted an offer of \$390,000 on the property on 16 October 2009, two days after [REDACTED] signed the listing agreement.
- 3.6 On 30 October 2009 [REDACTED] went to their lawyer to sign “the paperwork” as he was about to move to Taranaki to commence a new job the following day and therefore needed to sign the documentation before he went. When shown “the bill” from Sega Realty [REDACTED] immediately disputed the amount of commission payable and advised the lawyer not to pay it and to discuss it with his wife when she met with him on 2 November 2009.
- 3.7 On 2 November 2009 [REDACTED] attended at the offices of her lawyer to sign the “paperwork”. Her lawyer showed her a copy of a document headed Solicitor Proforma Statement of Commission from Sega Realty. This recorded the commission payable on the sale as being in the sum of \$14,300.00 plus GST of \$1787.50 (a total of \$16,087.50).
- 3.8 [REDACTED] maintained that she was “considerably upset” by this as she had calculated the commission that would be payable to be \$10,800.00 based on the advice [REDACTED] maintained she had received from Mr Naidu orally (as referred to above) prior to signing the listing agreement.
- 3.9 [REDACTED] stated she told her lawyer the commission had not been calculated on the basis she had agreed with Mr Naidu before she signed the listing agreement and she instructed him not to pay the commission charged [REDACTED] stated her lawyer asked her if she had “signed anything with the agent agreeing to any fee” and that she could not recall having done so. Her lawyer advised her that if she

had not signed anything then she was not required to pay the commission charged; he advised her to contact Mr Naidu and discuss her concerns with him. She said she would do so.

3.10 [REDACTED] stated she contacted Mr Naidu that afternoon/evening and advised him that the commission charged as recorded on his “account” was not what she had been expecting to pay. She stated that Mr Naidu assured her “it was a mistake” made by his employer, [REDACTED] and that he (Mr Naidu) would “sort it out” and get back to her. [REDACTED] stated no mention was made by Mr Naidu of the commission payable as specified on the listing agreement.

3.11 Not having heard from Mr Naidu [REDACTED] stated she tried to contact him on his mobile on 4 November 2009. The call was not answered but [REDACTED] was able to contact him on another phone at which time Mr Naidu told her he would “sort it out” and get back to her. [REDACTED] stated she tried to contact Mr Naidu again two days later when she had not heard from him. She left him a message and subsequently received a text message to the effect that Mr Naidu would ring her that evening and go and see her the following morning and “explain”. [REDACTED] stated Mr Naidu did not contact her that evening.

3.12 [REDACTED] stated that the following morning, 7 November 2009, she found the listing agreement which she had signed on 14 October 2009. She stated she had “completely forgotten” that she had signed “anything” and that when she looked at the agreement that morning, she realised for the first time that the commission stated on the agreement as payable was “very different” from what Mr Naidu had informed her would be payable. The listing agreement recorded the commission payable would be a “basic fee” of \$500; 4% on the first \$300,000 of the sale price; 2% of the balance of the sale price; plus GST.

3.13 [REDACTED] stated she telephoned Mr Naidu “straight away as I was understandably not impressed at all by this.” She maintained that Mr Naidu apologised and admitted he had misinformed her “at the beginning” [REDACTED] stated that Mr Naidu told her that he had “forgotten that their fees had gone up.”

She stated that when she disputed the GST claimed, Mr Naidu told her that “all their fees have GST”. [REDACTED] stated that at no time prior to her signing the listing agreement did Mr Naidu inform her that the commission price he had quoted her was exclusive of GST. [REDACTED] stated further that at no time did Mr Naidu mention that a base fee would also be payable.

- 3.14 [REDACTED] claimed further that Mr Naidu never reminded her during any of these conversations that she had signed a listing agreement under which she had agreed to pay a higher rate of commission.
- 3.15 [REDACTED] acknowledged that she should have read the second page of the listing agreement before she signed it but claimed that at no time did Mr Naidu take her through the terms specified on that page or advise her that the commission that would actually be charged would be different from what he had advised her orally would be payable (which accorded with what her friend had told her she was charged).
- 3.16 [REDACTED] instructed her lawyer not to pay the balance of the commission claimed by Segal Realty (the majority of the commission had been taken out of the deposit funds which Segal Realty already held in the trust account but there was a balance of \$1087.50 claimed as owing by the [REDACTED]). She stated she told Mr Naidu she would not be paying the balance amount claimed as owing and he told her he would discuss that issue with his employer and get back to her.
- 3.17 When [REDACTED] contacted her lawyer on 9 November 2009 he confirmed he had not received any advice from Segal Realty confirming their agreement not to pursue the balance of the commission claimed.
- 3.18 [REDACTED] claimed that her attempts to contact Mr Naidu in the week following were “ignored” and out of frustration on 16 November 2009 she contacted [REDACTED] [REDACTED], she stated, claimed he did not know of “the dispute”. [REDACTED] is claimed to have told [REDACTED] the reason Mr Naidu had not returned her calls was because Mr Naidu had not paid his mobile phone bill and his phone had been

cut off. Her attempts to negotiate a resolution with [REDACTED] on her terms were unsuccessful but [REDACTED] agreed not to pursue her for the balance of the commission claimed as outstanding. [REDACTED] confirmed this in writing by facsimile to [REDACTED] lawyer the following day.

- 3.19 In summary, the essence of [REDACTED] complaint was that she was “deliberately misled” by Mr Naidu as to the actual commission that would be payable (and this ultimately led to him securing the listing). Further, that Mr Naidu “deliberately lied” to [REDACTED] when she first contacted him to discuss the commission “discrepancy” by informing her that [REDACTED] had made a mistake and that he would “sort it out”. [REDACTED] maintained that Mr Naidu and [REDACTED] actions were “dishonest, unprofessional and unethical”.

4 **Information and Material Considered**

- 4.1 The Real Estate Agents Authority (“the Authority”) received [REDACTED] complaint against Mr Naidu and [REDACTED] by email on 18 December 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 Mr Naidu and [REDACTED] to provide written responses to the complaint. A written response from Mr Naidu was received on 5 February 2010 and [REDACTED] written response was received on 4 February 2010.
- 4.3 Mr Naidu disputed [REDACTED] version of events. He claimed (wrongly) that both [REDACTED] signed the listing agreement on 14 October 2009. The Committee is satisfied that only [REDACTED] signed the agreement. Further, he maintained that the commission payable as stated on page two of the listing agreement “just above where they signed” was “clearly explained and disclosed to

both vendors prior to their signing”. Mr Naidu maintained that he was contacted by [REDACTED] on 17 November 2009 disputing the commission and that he told her that “if there was a mistake” his “boss would get it sorted”. Mr Naidu stated he told [REDACTED] on 18 November 2009 to “have a good look for the signed listing form”. He stated that later that day when she phoned him to tell him she had found the agreement [REDACTED] told him she would not be paying “a cent more”. Mr Naidu stated he told her that he could not confirm whether that was acceptable as it was “entirely up to [my] boss”. [REDACTED] was alleged to have stated “you guys were getting too much money for 48 hours worth of work” and told Mr Naidu that he should “take a cut in [his] commission”. Mr Naidu stated he later met with his employer, [REDACTED], and was “not happy” with him having agreed to discount the commission because he (Mr Naidu) believed he had “done nothing wrong”.

4.4 [REDACTED] response was in the main based on Mr Naidu’s version of events as he had interviewed Mr Naidu about the complaint. [REDACTED] did state that prior to him sending his commission statement to the [REDACTED] lawyer on 27 October 2009, he had received confirmation from Mr Naidu that the amount claimed was correct and in accordance with the listing agreement. [REDACTED] claimed that on 9 November 2009 he drew to [REDACTED] attention the commission claimed was payable in full as it was calculated in accordance with what was stated in the listing agreement. He stated that while he was willing (and agreed) to waive the balance of the commission owing (\$1087.50) “as a respect and form of sympathy for her concerns” he was not in a position “to accommodate the changes” [REDACTED] had requested.

4.5 The Committee provided [REDACTED] with copies of the responses it had received from Mr Naidu and [REDACTED]. [REDACTED] wrote separate letters responding to and disputing a number of aspects of Mr Naidu’s and [REDACTED] responses. To an extent the matters [REDACTED] raised are incorporated in the summary of the complaint in paragraph 2 above. In any event they have all been taken into account by the Committee.

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

- a. Letter of complaint and supporting documentation including a copy of the listing agreement signed on 14 October 2009 by [REDACTED] facsimile from [REDACTED] to the complainant's lawyer confirming his agreement to waive the balance of the commission claimed to be owing to Segal Realty, and a copy of Segal Realty's Solicitor Proforma Statement of Commission in respect of the sale of the complainant's property;
- b. Email correspondence between the complainant and the Authority Complaints Unit case administrator, [REDACTED];
- c. Letter of Response to complaint from Licensee Mr Naidu, received on 5 February 2010 and reference from [REDACTED] in support of Mr Naidu;
- d. Letter of Response to complaint from Licensee [REDACTED] dated 2 February 2010 and supporting documentation from Segal Realty's file in respect of the sale;
- e. Letters from [REDACTED] (written under separate cover; March 2010) responding to the responses the CAC received from the Licensees referred to above at c. and d.;
- f. Job Sheet – Authority Complaints Unit

4.7 Having received Mr Naidu's and [REDACTED] written responses and comments in response from [REDACTED] 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. Both the complainant and the Licensees were advised of the hearing date several weeks in advance.

4.8 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)(b) of the REAA that it has been proved, on the balance of probabilities (more probable than not) that Licensee Mr Naidu, has engaged in unsatisfactory conduct, as that term is defined in section 72 of the REAA.

5.2 The Committee preferred the account of events given by the complainant and her husband over the accounts given by Mr Naidu and [REDACTED]. [REDACTED] account was detailed and compelling, and to an extent corroborated by her husband on the key matter as to their understanding of the commission they expected to pay on the sale.

5.3 The Committee accepted the evidence of [REDACTED] as to what she claimed was discussed with Mr Naidu prior to her signing the listing agreement. The Committee attached some significance to her evidence that what she was advised orally by Mr Naidu as to the commission that would be payable was consistent with what she had been told by her friend that Sega Realty had charged her; and therefore that she ([REDACTED]) had no reason to question what he had told her when she put her signature to page two of the listing agreement. The Committee accepted [REDACTED] evidence that as soon as they saw the Statement of Commission from Sega Realty at their lawyer's office, they disputed the amount charged. The Committee also accepted [REDACTED] evidence as to her contacts with Mr Naidu in the subsequent period and her evidence that Mr Naidu explained the discrepancy between what he had told her would be payable and what she was ultimately charged by Sega Realty was "a mistake" which he would "sort out" with his employer. The Committee was not satisfied that Mr Naidu had adequately responded to those allegations and in those circumstances preferred [REDACTED] unchallenged evidence on those issues. The Committee regarded it

as more likely than not that Mr Naidu made no mention of the signed listing agreement in the context of those discussions he had with [REDACTED] about the discrepancy and formed the view that he should have immediately referred to the agreement and then gone back to [REDACTED] and explained the commission she had been charged was in accordance with the agreement she had signed. If he was satisfied he had gone through the terms of the agreement with [REDACTED] before she signed it (including page two) in the detailed manner he claimed in his written response to the complaint, then in the Committee's view he had no reason not to refer to the agreement in the context of those discussions. Had he done so that would, at least from his perspective, put an end to the matter.

5.4 Unsatisfactory conduct is defined in section 72 as:

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that-

(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

(c) is incompetent or negligent; or

(d) would reasonably be regarded by agents of good standing as being unacceptable.

5.5 The Committee is satisfied that Mr Naidu's failure to adequately and accurately explain the commission that would be charged to the complainant and her husband falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee. Further the Committee is satisfied that it would reasonably be regarded by agents of good standing as being unacceptable conduct. The Committee considers it is vital that a licensee accurately explains the basis on which commission will be charged on a sale and

when doing so, takes the proposed vendor through the terms of the written listing agreement in some detail prior to asking them to sign it. The Committee accepts that in this case the complainant did have some responsibility to, and should have read, the entire listing agreement before she signed it. However in the Committee's view, that did not in any way affect the professional obligation on Mr Naidu to correctly and adequately explain the terms on which commission would be charged with specific reference to the relevant term of the listing agreement. Mr Naidu's actions ultimately breached the trust and confidence which the complainant and her husband had placed in him, and were entitled to place in him as their real estate agent.

5.6 For the purposes of setting appropriate professional standards, promoting public confidence in the performance of real estate agency work and providing accountability the Committee is satisfied that a finding of unsatisfactory against Licensee Mr Naidu is warranted in this case.

5.7 The Committee has determined under section 89(2)(c) that it will take no further action with regard to the complaint or any issue involved in the complaint to the extent that it relates to [REDACTED]. The Committee does not believe [REDACTED] should be held accountable for the unsatisfactory conduct of his salesperson in all the circumstances of this particular case.

5.8 In all of the above circumstances the Committee is of the view it is not necessary to take the matters raised in the complaint to the extent that it relates to [REDACTED] any further.

6 **Penalty**

6.1 Having determined under section 89(2)(b) of the REAA that it has been proved to the required standard that Mr Naidu has engaged in unsatisfactory conduct, the Committee has the power by virtue of section 172(2) to make any order in the nature of a penalty that could have been made against Mr Naidu at the time when the conduct occurred. As the conduct occurred prior to the REAA coming into

force on 17 November 2009 the orders available under the Real Estate Agents Act 1976 (now repealed) may be made. The powers to make orders conferred on the Committee under section 93 of the REAA are not available.

- 6.2 Before it determines whether to make any of the orders available under the 1976 Act the Complaints Assessment Committee invites Mr Naidu to make any submissions he may wish to make on penalty. [REDACTED] are also invited to make any submissions they may wish to make on penalty. Any such submissions must be made within 7 days from the date of this determination.

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 13th day of April 2010



Jo Hughson
Chairperson