

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

And

In the Matter of **Complaint No CA2344305**

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

And

In the Matter of



Determination of Complaints Assessment Committee (Penalty)

Dated this 23rd day of April 2010

Complaints Assessment Committee:

CAC No: 100024

Determination of Complaints Assessment Committee

(Penalty)

1 Introduction

1.1 By its decision dated 13 April 2010 the Complaints Assessment Committee made a determination under section 89(2)(b) of the Real Estate Agents Act 2008 (“the REAA/the 2008 Act”) that Licensee, Mr Lawrence Naidu of Auckland, has engaged in unsatisfactory conduct as that term is defined in section 72 of the Act.

1.2 The Committee has now considered the issue of penalty.

1.3 The Committee sought written comments both from the Licensee and the complainant [REDACTED] before determining the issue. Written comments were received from both parties. For reasons which will be apparent from the analysis below the Committee does not consider it necessary to summarise the submissions received, other than to say the complainant considered that she should be entitled to some monetary compensation (in essence representing the difference between the commission she was told by the Licensee would be payable on the sale of her property and the difference she actually paid, together with compensation for the “time and stress” she suffered as a result of the established unsatisfactory conduct).

2 Analysis

2.1 As this determination was of a complaint about conduct that occurred before 17 November 2009 (when the REAA came into effect), section 172 of the 2008 Act applies to the issue of penalty. Section 172 provides:

172 Allegations about conduct before commencement of this section

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee

in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—

- (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
 - (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

2.2 The Licensee Mr Naidu was an approved salesperson under the Real Estate Agents Act 1976 (“the 1976 Act”) at the time the conduct in issue occurred.

2.3 The Committee was satisfied, when it first considered [REDACTED] complaint, that it had jurisdiction under section 172(1) to investigate the complaint. The Committee was satisfied that at the time of the occurrence of the conduct Mr Naidu could have been complained about under the 1976 Act in respect of the conduct the subject of the complaint. Further it was satisfied that Mr Naidu had not been dealt with under the 1976 Act in respect of that conduct.

2.4 Having found Mr Naidu guilty of unsatisfactory conduct in respect of conduct which occurred prior to the commencement of the REAA, by virtue of section 172(2) the Committee is prevented from making any order in the nature of a penalty that could not have been made against Mr Naidu at the time when the conduct occurred. The effect of section 172(2) is that the powers to make orders conferred on the Committee under section 93 of the REAA are not available in this case.

- 2.5 In determining the issue of penalty the Committee considered what orders could have been made against Mr Naidu in respect of the established conduct, under the 1976 Act.
- 2.6 Although the Committee found Mr Naidu guilty of unsatisfactory conduct, his conduct did not rise to the level of misconduct which could have resulted in orders being made against him by the Real Estate Agents Licensing Board under the 1976 Act.
- 2.7 The Committee then considered the disciplinary options available under the 1976 Act, below the level of the Real Estate Agents Licensing Board.
- 2.8 The 1976 Act provided for disciplinary proceedings before Regional Disciplinary Committees and, below that, Regional Disciplinary Sub-Committees. The Committee understands that for whatever reason, no Regional Disciplinary Committee was ever established under the 1976 Act. This means that, as a matter of fact, at the time of Mr Naidu's conduct he could not have had orders made against him at the level of a Regional Disciplinary Committee.
- 2.9 It follows that that only leaves open to the Committee, orders that could have been made by Regional Disciplinary Sub-Committees (which were established).
- 2.10 Disciplinary proceedings could be taken before Regional Disciplinary Sub-Committees for a breach of the Rules made under the 1976 Act. The available orders were a maximum fine of \$750 and censure. However, there is a difficulty in that disciplinary proceedings before Regional Disciplinary Sub-Committees were conducted on a vicarious basis based on the concept of "effective control". What this means is that, although a complaint about a breach of the Rules could be made concerning an approved salesperson or branch manager under Rule 16.2, the responsible party against whom orders could be made was the licensee who was in effective control of the salesperson or branch manager (rather than the salesperson or branch manager personally).
- 2.11 This was made clear by Rule 16.22 which relevantly provided as follows:

“Where the RDS [Regional Disciplinary Sub-Committee] finds a breach of duties and obligations imposed by the Act or these rules:

16.22.1 It may exercise one or more of the following disciplinary powers:

16.22.1.1 Order the member, or, where the member is a company, the principal officer of the company, to pay the institute such sum by way of penalty [not exceeding the sum prescribed by s70(1)(O) of the Act [\$750]) as the RDS thinks fit;

16.22.1.2 Censure the member, or, where the member is a company, the principal officer of the company.”

2.12 There is another difficulty in that although Mr Naidu was an approved salesperson under the 1976 Act, and the Committee understands he was an affiliate member of the REINZ from March 2007 to April 2008, he was not a “member” (i.e. a licensed real estate agent) at the time the conduct occurred.

2.13 On that basis the Committee is satisfied that no orders in the nature of a penalty could have been made against Mr Naidu in respect of the conduct the subject of [REDACTED] complaint, at the time when that conduct occurred.

2.14 The effect of this is that the Complaints Assessment Committee is prevented from making any orders against Mr Naidu by virtue of the operation s 172(2) of the 2008 Act.

2.15 The Committee recognises this is likely to be highly unsatisfactory from the complainant [REDACTED] perspective. However, it represents the position under the 1976 Act which continues to apply in this case because the conduct occurred while the 1976 Act was still in force. These difficulties no longer remain for conduct that occurred after the 2008 Act came into force on 17 November 2009. However unfortunately that does not assist [REDACTED] here.

3 **Publication**

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

- 3.2 The Committee regards its publication function as one of the means to educate and raise industry standards by making public the nature of conduct which the Committee considers to be unsatisfactory. Publication also gives effect to the purpose of the Act in section 3 of the REAA by ensuring transparency in the disciplinary process.
- 3.3 For these reasons the Committee has determined that its decision of 13 April 2010 and this decision ought to be published.
- 3.4 The Committee hereby authorises the Real Estate Agents Authority to publish these decisions by whichever means it considers appropriate. Any such publication should not occur until the Authority is satisfied that Mr Naidu has been notified of this decision as to penalty.
- 3.5 The names of the complainant and her husband and the address of the property should be suppressed from publication. The name of the other Licensee involved in this case, [REDACTED], should also be suppressed from publication. However the name of the company by whom Mr Naidu was employed at the time of the relevant events, Segal Realty, may be published.

4 Right of Appeal

- 4.1 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.
- 4.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

- 4.3 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 23rd day of April 2010

A handwritten signature in blue ink, appearing to read 'Jo Hughson', with a long horizontal stroke extending to the right.

Jo Hughson
Chairperson