

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

And

In the Matter of **Complaint No CA2349201**

In the Matter of **XYZ Realty Limited**
Licence No XXXXXX

Determination of Complaints Assessment Committee

Dated this 6th day of May 2010

Complaints Assessment Committee:

CAC No: 100025

Determination of Complaints Assessment Committee

1 Licensee Background

- 1.1 The Licensee against whom the complaint was made is XYZ Realty Limited trading as XYZ Ltd (New Zealand).

2 Complaint

- 2.1 The complainant, Mr A, is a Solicitor who practises on his own account in New Zealand.

- 2.2 Mr A's complaint was made on behalf of his client, Mr C. Attempts by an investigator in the Complaints Unit of the Real Estate Agents Authority ("the Authority") to contact Mr C during the course of the Complaints Assessment Committee's inquiry were unsuccessful.

- 2.3 Mr A stated that Mr C and his estranged wife had instructed the Licensee (through its representative Mr B) to list their property at "the property" in New Zealand, "for sale for the best possible price". Mr A maintained that the property was listed with XYZ Realty Limited but in the meantime, Mr B "has taken instructions from the client's mother in law, who claims to have transferred a mortgage to her, to list the property as a mortgagee tender sale situation." XYZ Ltd had since commenced marketing the property as a "mortgagee tender". An advertisement for the property which appeared on XYZ's website in this regard was enclosed with the complaint. Mr A alleged that XYZ Ltd did not have a valid authority to sell on behalf of a mortgagee.

- 2.4 Mr A complained that his client, Mr C "was not given any notice of any change of mortgagee nor has he been accounted to by the mortgagee in terms of the Property Law Act requirements regarding default under the mortgage. As far as Mr C is concerned he was not in default under the mortgage".

- 2.5 Mr A alleged further that “in the meantime the real estate company was also instructed to deal with the rental management aspects of the property and they were instructed to direct the rent for the property as received to the client and his wife’s joint account, which was funding a mortgage with “the mortgage company”. Without any further notice to my client, XYZ Realty, New Zealand, Ms D, has taken instructions direct from the mortgagee to appropriate that money to the account of the mortgagee. Again we had no notice of this until such time as my client’s realised from their bank statements [on or about 3 December 2009] that money was missing.” Mr A alleged that this money had been “misappropriated” by Ms D and XYZ Realty Ltd as his client and his wife had given no valid instructions to “do anything other than pay the rent direct to their joint account”. Mr A stated “we regard this as a fraud on my client and his wife”. He alleged that XYZ Realty had not taken appropriate steps to protect the registered proprietors’ position in relation to the property from whom “their original instructions to maintain the rental management and listing of the property” came.
- 2.6 Mr A requested that XYZ Realty New Zealand be “thoroughly investigated and charged with fraud” and he advised that the matter would also be referred to the Police for investigation.
- 2.7 Mr A enclosed with his complaint, “relevant correspondence to XYZ Realty and solicitors for the mortgagee [The Solicitors]” all dated 3 December 2009 and from Mr A. In a letter signed by Mr C to XYZ Realty New Zealand dated 3 December 2009 (a copy of which Mr A also supplied with the complaint), Mr C purported to give notice that the company was to “cease administering the tenancy” of the property and he confirmed he had instructed his solicitor to make a complaint to the Real Estate Agents Authority (“the Authority”). Notice was also given by Mr C of a potential damages claim against the company for failing to provide him with “a statement as to the position of the loan” and details pertaining to the rent paid by the tenants.

Information and Material Considered

- 2.8 The Authority received Mr A's complaint against the Licensee on 10 December 2009. The Authority referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the REAA, on 20 January 2010 the Committee considered the complaint under section 79 and determined to inquire into it. The Committee was satisfied that although the complaint related to conduct which in the main had occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into all aspects of the complaint.
- 2.9 The Committee invited the Licensee to provide a written response to the complaint and this was received on or around 8 February 2010. The Licensee's response was made by Ms E who is the Principal.
- 2.10 The following points were made in response to the complaint:

Fraud Allegation in relation to the Rental

- a. XYZ Realty New Zealand had been managing the property for Mr and Mrs C since 1 May 2008. The company was aware that Mr and Mrs C had separated and that Mrs H, Mrs C's mother, "was involved with the mortgage of the property". Rent money was paid into Mr and Mrs C's joint account with no issue.
- b. On 12 October 2009 the Licensee received a letter from Mrs H's solicitors in New Zealand, advising that Mrs H has stepped into the shoes of Sovereign as first mortgagee in relation to the property. A Property Law Act Notice has been served on the registered proprietors some time ago and we advise under section 137 of the Property Law Act 2007 [a copy of which was enclosed], we request all further rental payments to be credited to our trust account on behalf of Mrs H. We attach our trust account deposit slip for this purpose;"

- c. In accordance with the above instructions received from “the Mortgagee Solicitors”, on 3 December 2009 the Licensee (through Property Manager Ms D) paid the sum of \$2516.94 into the trust account of “the Mortgagee Solicitors”. Shortly after that payment was made, and after having been contacted by Mr A, Ms E sought advice from the company’s solicitors (Company Solicitors) and also from Mrs C’s solicitors at that time (Mrs C Solicitors) whether or not the rent money should be paid to “the Mortgagee Solicitors” as they (the Licensee) had been instructed to do. Ms E explained that she “put the next rent money into our trust account until I had received [the legal advice I had sought]”.
- d. The advice which the Licensee received from these solicitors, including Mrs C’s solicitors, was that the remainder of the rent money for the property should be paid into “the Mortgagee Solicitors” trust account in accordance with that firm’s instructions.

Mortgagee Tender

- e. Following discussions with the mortgagee’s solicitors (Mortgagee Solicitors) on 6 November 2009, Mr B of XYZ Realty New Zealand had listed the property for sale as a mortgagee tender. The Residential Listing Authority and tender documents which XYZ Realty New Zealand received from Mortgagee Solicitors were provided to the Committee. The vendor was recorded on the Listing Authority as Mrs H and the document was signed by a Mr F as “the mortgagee’s authorised signatory”. Mr F is a solicitor in Mortgagee Solicitor;
- f. Ms E stated that when XYZ Realty New Zealand is conducting a mortgagee auction or tender “we act for the mortgagee, usually a bank or a lawyer and unless the owners are living at the property we don’t have any association with them at all”;

- g. Ms E explained that the Licensee was contacted by Mr A on 3 December 2009 after the advertising campaign had commenced. Mr A spoke to the Property Manager, Ms D. Ms D's handwritten file note of the conversation she had with Mr A on that occasion was before the Committee. It is clear from the file note that the conversation was 'heated'. Ms E subsequently telephoned Mr A and advised him she was the Principal and that in future he was to talk to her rather than "abusing our property manager".
 - h. When Mr A telephoned Ms E in response Ms E informed him that the company was "working under instruction from "the Mortgagee Solicitor" and that he should contact them." Ms E stated "we are not privy to the financial state of mortgagee clients and I didn't think it was our place to get involved."
 - i. Ms E stated that the following day she received a visit from Mr C. Ms E explained that "we had a professional and amicable conversation and he understood our situation in that we were just following instructions from Mrs H's lawyers and that if he needed to contact them as we couldn't and didn't know the answers to his financial situation."
 - j. After Mr A advised the Licensee he was making a complaint to the Authority no further contact was had with him.
 - k. The Licensee proceeded to sell the property and settlement was effected on 22 January 2010 "with no hiccups".
- 2.11 Following a meeting on 11 March 2010 the Committee wrote to Mr A and to the Licensee and invited them to make any further comments they wished before the Committee proceeded to hear the matter on 21 April 2010. A copy of the Licensee's response to the complaint was provided to Mr A.
- 2.12 The Committee also sought information from the mortgagee's solicitors, "Mortgagee Solicitors", including a copy of the relevant Property Law Act Notice which the firm had claimed in their letter to the Licensee of 12 October 2009

- (referred to above) had been served on Mr and Mrs C. Confirmation of service of that Notice was also sought.
- 2.13 By letter dated 31 March 2010 Mortgagee Solicitors provided a copy of a Property Law Act Notice dated 12 August 2009 and service reports from MFI Documents Limited. The service reports confirmed the Notice had been served by hand on Mr C on 18 August 2009 after he had acknowledged his identity and accepted service; and on Mrs C in the same manner the following day, 19 August 2009. In addition Mortgagee Solicitors provided the Committee with a copy of a Deed of Assignment between ABC Company Limited and Mrs H dated 7 October 2009 (referring to loan agreements between the Assignor and Mr and Mrs C), and a Notice of Taking Possession of Mortgaged Land signed by Mrs H and dated 11 December 2009. Of interest to the Committee was Mortgagee Solicitors advice that these documents had been provided to the complainant, Mr A on 16 December 2009 and therefore “in the circumstances [the firm was] surprised this matter continues”.
- 2.14 In his letter to the Committee dated 19 March 2009 Mr A made no mention of having received any of the above documentation from Mortgagee Solicitors. In his letter Mr A reiterated his complaint that XYZ Realty New Zealand had an obligation to clarify with “their clients” (a reference to Mr and Mrs C) “what was going on” when correspondence was first received from Mortgagee Solicitors. Mr A claimed that Mr C “was not aware that a mortgagee sale was to take place until he saw that in the newspaper”; and further “Mortgagee Solicitors have not provided any details to Mr C and it was via title searches that we have tried to put together what had happened”.
- 2.15 Mr A stated that Ms D’s refusal to provide him with any details when he spoke to her on 3 December 2009 formed part of his complaint. He stated “these people have chosen to completely ignore Mr C’s rights and they have failed to consider him at all.”

- 2.16 Mr A reiterated his allegations of “fraud and dishonesty” (in very strong terms) against the Licensee and in his concluding remarks stated “this is not a situation where XYZ had the right to “just follow instructions” from a lawyer. They were fully aware [sic] of a family conflict on at least two fronts and they failed to properly remain impartial as agents whose job it was to manage the property.”
- 2.17 Mr A sought that the Licensee be “properly disciplined” and he submitted that the company “should be ordered to compensate” Mr C.

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 21 April 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.
- 3.3 In summary, at the hearing the Committee considered the following written material:
- a. Mr A’s complaint dated 4 December 2009 and the supporting documentation referred to above;
 - b. Letter from the Licensee in response to the complaint, dated 8 February 2010 and the supporting documentation referred to;
 - c. Letter from Mr A to the Committee dated 19 March 2010;
 - d. Letter from Mortgagee Solicitors to the Committee dated 31 March 2010 and the enclosures including Property Law Act Notice dated 12 August and service confirmations, Deed of Assignment dated 7 October 2009 and

Notice of Mortgagee entering into possession dated 11 December 2009;
and

- e. Job Sheet of the investigator in the Complaints Unit of the Authority who assisted the Committee with its investigation.

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 Complaints Assessment Committee is satisfied that in all the circumstances of this case the Licensee acted, and was entitled to act, on the legitimate instructions it had received from the mortgagee's solicitors. The Committee did not regard the Licensee to have engaged in unsatisfactory conduct (as that term is defined in section 72 of the Real Estate Agents Act 2008) in any respect.
- 4.4 Having satisfied itself that a valid Property Law Act Notice was served both on Mr C, and his (estranged) wife in August 2009, and having considered the other documentation made available by Mortgagee Solicitors which confirmed that the firm's advice to the Licensee was legitimate, in the Committee's view the Licensee acted appropriately.
- 4.5 The Licensee took reasonable and responsible steps to clarify the instructions it had received from the mortgagee's solicitors that rental was to be paid into Mortgagee Solicitors' trust account going forward. The Committee accepted the Licensee's explanation that when first contacted by Mr A in early December 2009, it sought advice from two different lawyers (the company's lawyer and Mrs C's lawyer) as to whether or not they should continue to act in accordance with

those instructions. In the Committee's view the Licensee was entitled to follow the advice it ultimately received from those lawyers, which was to proceed as they had been instructed by "the Mortgagee Solicitors".

- 4.6 Given the position of the mortgagee at the time the Licensee received the instructions from "the Mortgagee Solicitors" (both as to listing the property as a mortgagee tender, and in relation to the rental payments), the Committee did not consider the Licensee had a professional obligation to contact Mr C about those matters (although as a courtesy the Licensee could have done).
- 4.7 In any event the Licensee (through its Principal, Ms E) met with Mr C when he visited on 4 December 2009. Ms E discussed with Mr C the nature of the instructions which the Licensee had received from the mortgagee's solicitors (and explained that they were acting on them). The Committee had no reason to doubt the meeting occurred, that it was a "professional and amicable conversation" and that Mr C understood the company's situation, as Ms E reported. It would appear that Mr C did not communicate details of this meeting to his solicitor.
- 4.8 In all the circumstances the Committee considered Mr A's allegations that the Licensee had an obligation to clarify with Mr C "what was going on" and that it had "completely ignored" his rights, were without foundation. It is clear Mr C was in fact advised of the situation by the Licensee.
- 4.9 The Committee was satisfied that the allegations of dishonesty and fraud against the Licensee were without factual foundation and therefore, do not need to be taken any further. There is no evidence the Licensee (through any of its representatives/employees) behaved dishonestly, fraudulently or otherwise inappropriately in the manner in which it followed the instructions it had received on behalf of the mortgagee, or in any other respect.
- 4.10 The Committee wishes to record that it had some concerns about the manner in which the complaint was presented by Mr A. Mr A's allegations against the Licensee were without doubt, serious. They warranted prompt enquiry. If Mr A

was in fact provided with the information which Mortgagee Solicitors advised it had made available to him (and which the firm provided to the Committee under the cover of its letter of 31 March 2010) in December 2009 then in the Committee's view Mr A should have made that information available immediately to enable the Committee to properly consider it at the earliest opportunity. The information contained in the documentation provided by Mortgagee Solicitors, in particular the letters from the process server who served Mr and Mrs C with the Property Law Act Notices in August 2009, was inconsistent with some aspects of Mr A's complaint. The documentation was also inconsistent with, or gave rise to questions about the validity of, some of the statements Mr A made in his second letter to the Committee, dated 19 March 2010. Had the Committee received that information at an earlier stage in its inquiry, this matter may have been able to have been concluded more promptly for all concerned.

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 and any named or identified third parties are suppressed from publication. In addition the address of the property identified in the decision should also be suppressed.

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 May 2010



Jo Hughson
Chairperson