

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

And

In the Matter of **Complaint No CA2349534**

In the Matter of **Suzanne Cottle**
Licence No 10015826

Determination of Complaints Assessment Committee (Penalty)

Dated this 27th day of May 2010

Complaints Assessment Committee:

CAC No: 100025

Determination of Complaints Assessment Committee

(Penalty)

1 Introduction

1.1 By its decision dated 4 May 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, Ms Suzanne Cottle of Levin, 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 complainants, Mr and Mrs W, before determining the issue. No written comments were received from either party.

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 Ms Cottle 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 Mr and Mrs W’s 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 Ms Cottle could have been complained about under the 1976 Act. Further it was satisfied that Ms Cottle had not been dealt with under the 1976 Act in respect of the conduct the subject of the complaint.
- 2.4 Having found Ms Cottle 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 Ms Cottle 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 Ms Cottle in respect of the established conduct, under the 1976 Act.
- 2.6 Although the Committee found Ms Cottle guilty of unsatisfactory conduct, her conduct did not rise to the level of misconduct which could have resulted in orders being made against her 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 Ms Cottle’s conduct she could not have had orders made against her 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 Ms Cottle was an approved salesperson under the 1976 Act, the Committee understands she was not a “member” (i.e. a licensed real estate agent) at the time the relevant conduct occurred. The Committee understands that Ms Cottle was an affiliate member of REINZ from 16 January 1998 through to 20 April 1999; and that she became an affiliate member again on 24 April 2003 but her affiliate membership was cancelled on 29 July 2005. The Committee received advice from REINZ that Ms Cottle has been a “non-member” since then.
- 2.13 On these bases the Committee is satisfied that no orders in the nature of a penalty could have been made against Ms Cottle in respect of the conduct the subject of Mr and Mrs W’s 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 Ms Cottle by virtue of the operation s 172(2) of the 2008 Act.
- 2.15 The Committee recognises this is likely to be unsatisfactory from the complainants’ 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 Mr and Mrs W 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 4 May 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 Ms Cottle has been notified of this decision as to penalty.
- 3.5 The names of the complainants and the address of the property should be suppressed from publication.

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 27th day of May 2010



Jo Hughson
Chairperson