

Complaints Assessment Committee – Decision on Orders

Background

On the 17th day of December 2009 the REAA received a complaint from “Mr A” regarding the conduct of licensee Martin MacKenzie. The complaint was referred to Complaints Assessment Committee 10011. The Committee noted Rule 9.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which provides that '*A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure*'.

The Committee met on 6th April 2010 and considered the nature of the coercion/pressure complained of by the complainant and found, taking into account the totality of the circumstances, that the conduct of the licensee amounted to a breach of Rule 9.2 and that the licensee had engaged in unsatisfactory conduct in terms of section 89(2)(b) of the Act.

The Committee made a finding of unsatisfactory conduct (decision dated 29th April 2010). The parties were invited to comment on the appropriate order(s) to be imposed in light of this finding.

Relevant Provisions

Having made a finding of unsatisfactory conduct against Martin MacKenzie the Committee must now decide what orders, if any, should be made under no 93 of the Act.

Section 93 provides:

93 Power of Committee to make orders

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
 - (a) make an order censuring or reprimanding the licensee:
 - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
 - (c) order that the licensee apologise to the complainant:
 - (d) order that the licensee undergo training or education:
 - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:
 - (f) order the licensee—
 - (i) to rectify, at his or her or its own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:
 - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:
 - (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:
 - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

Discussion

Panel members considered the submissions made by each of the parties relating to the finding of unsatisfactory conduct against the licensee. All members concluded that an inappropriate level of pressure had been brought to bear against the complainant. The licensee was contracted to act for the complainant and his estranged wife as vendors of the relevant property. The actions of the licensee caused the complainant to believe that his best interests were not being served and rather the licensee had acted in a manner that served the interests of the wife over those of the complainant as the other vendor.

When the licensee sought to obtain the complainant's agreement to sell the property he attended on him late in the evening. The complainant describes feeling extreme pressure to sign what he perceived to be an unsatisfactory contract immediately as a result of the licensee describing legal consequences that he would face at the instigation of his wife if he did not sign. The complainant understood these consequences to be definite even though it transpired that they were not. The threat of legal pressure combined with a property sale required as a consequence of a relationship breakdown made the circumstances particularly unnerving for the complainant and the licensee ought to have been mindful of this. Panel members noted that the licensee, by his own admission, had instigated contact with the solicitor for the wife and considered it possible to infer that he used the information obtained in those discussions to apply pressure to the complainant. The licensee made no contact with the solicitor for the complainant to consider his position in the matter.

The panel noted the licensee's acknowledgement that he had done some of the things that the complainant had indicated as contributing to the pressure he felt around the time of presentation of the offer for his property, particularly canvassing his wife's options (as a result of the discussion with her lawyer) if he chose not sign the offer. Whilst the licensee has indicated that he did not present these options as a matter of fact that he could enforce on her behalf, the panel considered that discussion of the several different possibilities in the circumstances that the parties were in would have been sufficient to exert significant pressure on the complainant whether or not he knew that they were certain outcomes.

It was noted in favour of the licensee that, in spite of the unsatisfactory experience of the complainant, the licensee did achieve a sale of the property that was the subject of the complaint. In addition, the panel noted the advice from the complainant that he was not in a position to have discussions in the day following his meeting with the licensee but it considered that the complainant could have taken other steps to assist himself prior to finally signing the offer on his property.

In considering the letter from the licensee dated 14 May 2010, the panel noted his offer to make an apology to the complainant and a willingness to undergo training or education. The panel considered that it would be difficult to undergo training to address the behaviour complained of in this instance.

Decision

Pursuant to section 93 REAA 2008 the panel orders:

- That the licensee be censured for the improper pressure that he brought to bear on the complainant (section 93(1)(a)),
- That the licensee be ordered to refund to the complainant \$2000 plus GST (if any) from the complainant's half share of the \$12,000 plus GST commission paid on the sale of 48 Hope Farm Avenue (section 93(1)(e)). Payment is to be made within 20 working days of the date of receipt of the decision; and
- That the licensee apologise to the complainant (section 93(1)(c)).

Publication

The Committee directs that this decision is to be published.

Right of Appeal

A person affected by a determination of a Complaints Assessment Committee may appeal to the Disciplinary Tribunal against a determination of the Complaints Assessment Committee within 20 working days after the date of this notice.

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

Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

Deirdre McNabb
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 9 June 2010