

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

And

In the Matter of **Complaint No CA2642313**

In the Matter of **XYZ Limited trading as ABC
Licence No XXXXXXXX**

Determination of Complaints Assessment Committee

Dated this 9th day of July 2010

Complaints Assessment Committee:

CAC No: 10026

Determination of Complaints Assessment Committee

1 Licensee Background

- 1.1 The Licensee, XYZ Limited trading as ABC has been licensed since 1999 (“the Licensee”). The complaint relates to the conduct of salesperson Ms B and also of the Manager of the Licensee, Ms G.

2 Complaint

- 2.1 In July 2008, the complainant, Mr A of Wellington, through a company known as CL Limited, entered into an agreement for the sale and purchase of a rural property in Northland (“the property”). The property is situated at “the property”, which the Committee understands is north of Dargaville. Settlement was effected on or about 5 September 2008.
- 2.2 The complainant alleged that the property had been advertised by the Licensee as having a total area of 252 acres of which “there was one paddock of grass with an area of about 15 acres” the remainder of the property consisting of protected forest. The complainant alleged he “double checked with the agent” (Ms B) that the 15 acres of grass were contained “in the one paddock advertised”.
- 2.3 The complainant stated that an “after-the-sale” measurement of the paddock yielded a total grass area of less than 5 acres.
- 2.4 The complainant alleged that Ms B whom he described as “an expert in rural properties” had not done her job in checking the information which the vendor had provided and that he had been misinformed about the property that she had sold him. Mr A alleged the Manager (Ms G) “promised to investigate how such a mistake could occur”, but this had not been done.
- 2.5 The complaint was supported by relevant documentation including pre-contractual email correspondence between Ms B and Mr A, a copy of the ABC Flyer for the

property, copies of two window cards for the property (one produced around 2003 and the second relating to the marketing of the property in 2008), a copy of the agreement for sale and purchase, and email correspondence between Mr B and Mr A post-settlement once Mr A had discovered “the one paddock at the front measures a maximum of 5 acres rather than the 15 advertised”. There was also email correspondence between Mr A and Ms G in March 2009 prior to the complaint being made.

Information and Material Considered

- 2.6 The Real Estate Agents Authority (“the Authority”) received Mr A’s complaint against the Licensee on or about 21 January 2009. The complaint was received from REINZ to whom Mr A had written his complaint on 7 June 2009.
- 2.7 The Authority referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the REAA, on 22 March 2009 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 had occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into the complaint.
- 2.8 The Committee invited the Licensee to provide a written response to the complaint and this was received on or around 12 April 2010. The response consisted of Ms G supplying the Committee with a copy of all of the documents which the Licensee had provided to REINZ in 2009 in response to Mr A’s complaint. Some of the documents provided had previously been provided by Mr A. The additional documents provided included:
- A letter from Ms B to REINZ in which she set out her account of her dealings with Mr A in respect of his purchase of the property;
 - A letter from the vendors of the property dated 3 July 2009 relating to the advertising of the property by ABC on their instructions;

- Email correspondence between Mr A and Ms B in the period from 29 May 2008 and 1 September 2008.

2.9 In her letter, Ms B set out her version of events. She confirmed that Mr A first enquired about the property on 29 May 2008 and that she offered to show him the property but he declined, saying he would look at it when he next passed through. Ms B stated that before signing an offer on the property Mr A “went over the property again at least once to my knowledge” and that “at NO time did he question the effective grassed area”. Ms B agreed she had advertised one paddock but “NEVER stated that the effective grass was just one paddock”. She stated that the “15 acres is made up of the paddock on the road boundary plus a strip along the western boundary and also an area at the north western boundary”. Ms B expressed her shock and dismay that Mr A had made a complaint “AFTER the fact that he viewed this property at least twice and was happy to purchase the property”.

2.10 In the letter from the vendors (Mr N and Ms S) they wrote:

“...We had always thought the cleared land to be roughly 10 acres at the top with extra along the side and more cleared flat land at the bottom end of the property, thus amounting to about 15 acres. Although this had never been measured we had it advertised over the years with numerous other agents and no-one ever disputed this. Nor did any potential buyers or viewers ever dispute or query the area of cleared land...”

2.11 Before it held its hearing, the Committee sent a copy of the Licensee’s response to Mr A and invited him to make any further comments he wished in support of his complaint and/or in response to the Licensee’s response. An email was received from Mr A on 18 May 2010. His response was essentially a reiteration of his initial complaint. In particular Mr A stated:

- a. His complaint is related to what he “perceived to be a false advertisement of the property in question” and is not at all related to market conditions or any other external factors;
- b. “the property has been advertised as having 15 acres of grass, one paddock” and “after the inspection I asked Ms B in very clear terms whether the 15 acres of grass are all contained in the grassy area at the top (visible from the road) and the answer was yes (denied by Ms B). Thus I relied on her professionalism and expertise to buy this land with a vision and a plan for future business that requires two structures on this acreage as allowed by the local bylaws.”
- c. “After the purchase, my GPS measurements indicated that the grassy area at the top measures just over 4 acres that also includes a generous area of bush. It is astonishing to see now that the story has changed and the one paddock advertised is not in fact 15 acres but “probably” 10. Well, it is 4 acres and when one reads an ad that says “15 acres of grass, one paddock”, the first thought that comes to mind is that all of the grass is in one place rather than if we add 4 acres here, a strip of grass along the fence there, and all the other grassy patches through [sic] a 250 acres property we might get 15 acres. This is what the complaint is all about”;
- d. “The complaint is also about a potential loss of business as the local bylaws do not permit the building of two structures on a 4 acre area. The strip of grass along the fence is not wide enough for a garden shed, and the other grass patches at the northwestern border of the property are 1.6 km away through protected dense bush;”
- e. “Finally this complaint is also about a lack of professionalism from both Ms B who admitted that she relied on information from the vendors and is not sure about what lies at the northwestern side of the property and from Ms G who after an impressive quick first contact stopped answering any emails related to this topic.”

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 June 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 and as referred to above.

4 **Complaints Assessment Committee Determination and Reasons**

Complaint against Ms B

4.1 To the extent the complaint related to the conduct of Ms B, the Committee determination is by a majority. Recorded below are the reasons for the decision of the majority (Deputy Chairperson Jo Hughson and panel member Peter McDermott) of the Committee. The dissenting decision of the Chairperson (Colin Thomson) is also recorded.

Reasons of the Majority

4.2 The majority of 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.

4.3 In respect of the complaint as it relates to Ms B's conduct on balance the majority of the Committee is not satisfied that it has been proved that the Licensee has engaged in unsatisfactory conduct as that term is defined in s 72 of the REAA.

4.4 Having received the information outlined above, and having considered all of that information, it appears to the majority of the Committee that having regard to all the circumstances of the case, no further action is necessary.

4.5 It is clear from the documentation that the complainant first enquired about the property by responding to a Trade Me advertisement on 29 May 2008. The complainant made a specific classified enquiry of Ms B, through Trade Me, as follows: “Hi Ms B, Would you be able to provide me with more information related to the location of this property? I am planning to check it out in GoogleMaps first. Thanks Mr A.” Ms B replied the following day informing Mr A that the property was on “the property”, north of Dargaville.

4.6 The ABC Flyer advertising the property was written with a heading “BUSH BLOCK” and contained three photographs of the property.

4.7 Written beneath the three photographs was the following description:

“102 HA (252 ACRES) 15 ACRES EFFECTIVE

1 Paddock, GREAT VIEWS AND BUILDING SITES,

COVENANTS ON BUSH AREA

\$280,000

B/L 310”

4.8 It is clear from the complaint that the complainant read and understood this advertisement to be representing that there were 15 acres effective and that those 15 acres effective were contained in the 1 paddock referred to in the advertisement. It is not clear when the complainant first read this advertisement however the Committee accepts that he did so pre-contractually and that at least in part he relied on it.

4.9 The majority of the Committee understands the complainant’s position. However it considers that the advertisement does not represent that the 15 acres effective are contained in the one paddock referred to; and that it is not a false advertisement. In the majority’s view that would have been the position had the words “1 paddock” been positioned immediately alongside the words “15 hectares effective” (rather than beneath them on the next line as they were).

- 4.10 On this basis the majority accepted Ms B's contention that she had not advertised the property in the manner alleged by Mr A and that while she had advertised one paddock, she had "never stated [in the advertisement] that the effective grass area was just one paddock."
- 4.11 There is some support for this position in the information contained in the two ABC window cards which were before the Committee.
- 4.12 The first window card which was prepared "approximately five years ago" (five years prior to 2008) when the property had been on the market recorded the area of the property as being "102 HA (252 ACRES) 10 ACRES EFFECTIVE APPROX". The window card specified (ten lines down) there were 2 paddocks and in the comments two lines down from that it was recorded "BUSH BLOCK WITH 10 ACRES GRASS EXCELLENT VIEWS....".
- 4.13 In the window card for the sale in question the area of the property was specified as "102 HA (252 ACRES) 15 ACRES EFFECTIVE APPROX". Again, ten lines down from those details it was recorded there were 2 paddocks and in the "comments" two lines down from that it was stated "BUSH BLOCK WITH 15 ACRES IN GRASS EXCELLENT VIEWS...".
- 4.14 In the majority's view the window cards could not reasonably be read as suggesting the 15 acres effective were contained in one paddock. They simply represented that of the 102 hectares, 15 hectares were effective/in grass. It is noted there was a disclaimer at the bottom of the window card for the transaction in question which provided that "all care has been taken to ensure accuracy induced in preparing of the particulars contained herein, however any presentations, warranties, statements, agreements or undertakings of any nature made by or on behalf of the Vendor of Agent, the purchaser unconditionally and irrevocably waives any claims, rights or Remedies which the purchaser might otherwise have had in relation to any of those representations, warranties, statements, agreements or undertakings.

- 4.15 The Committee had regard to the fact that Mr A visited the property at least once (Ms B claimed he had visited at least twice) and visually inspected it before he entered into an agreement for sale and purchase. In the majority's view, if the development plans which Mr A disclosed in his email of 18 May 2010 hinged on there being sufficient effective land to construct two structures in accordance with local planning laws then it considers that there was an onus on him to obtain accurate measurements before he contracted to purchase the property. The Committee considers that it would have been prudent for him to have obtained GPS measurements before he purchased the property rather than afterwards, which was when such measurements appear to have first been taken.
- 4.16 In an email Mr A wrote to Ms B on 5 January 2009 he stated "...This holiday I was able to spend more time at "the property" that I purchased a few months back. I did some measurements and the one paddock at the front measures a maximum of 5 acres rather than the 15 advertised." He went on to state "At the time of purchase you have confirmed that the front area (the 5 acre one) is the only grass area on the property, the remainder being bush. I attach the first page of the ad posted to me". He then went on to seek an explanation for the "discrepancy between ABC's website (indicating 10 acres) and your ad on trademe which indicated 15 acres. I was told the correct figure is 15 acres."
- 4.17 Ms B's response was that the 15 acres was "what the owner of the property always quoted to us as the amount that would be effective, I think they also counted parts at the bottom of the bush where they said was more grass area...Also the area down the side of the bush was also spoken about from them. I am not sure if the owners ever measured it or not. ...". This information is corroborated by the information contained in the vendors' letter referred to above. Ms B's response couched as it was in these terms is entirely consistent with the position she maintained in her subsequent letter to REINZ in response to the complaint, which was that the reference to the 15 acres effective was made up not only of the one paddock on the road boundary (which she acknowledged she had

referred to in the Flyer) but also two other areas of the property (the strip along the western boundary and an area on the north western boundary).

4.18 On balance the majority of the Committee preferred the account of Ms B and considered that it was more probable than not that Mr A ever questioned her (verbally) about the effective grassed acreage before he entered into the agreement for sale and purchase. There is no email correspondence or other records documenting any such enquiries having been made by Mr A pre-contractually, as one would expect had such enquiries been made. Ms B's response to the query in Mr A's email of 5 January 2009, in the majority's view, indicates that this was the first time Mr A had raised the issue with Ms B. In the Committee's view had Ms B been asked about this matter before Mr A had contracted to purchase the property, she would more likely than not have advised him that she was relying on information from the vendors (as the Committee accepted she was) so that at the time of his 5 January 2009 email he would already have been in possession of that information.

4.19 In relation to the allegation that Ms B acted unprofessionally by relying on information she had been given by the vendors, the majority is satisfied that in all the circumstances of this case Ms B discharged her professional responsibilities. Having preferred her version of events to the effect she was never asked verbally to confirm the effective area was 15 acres in the one paddock (and that Mr A never questioned the effective grassed area) in the majority's view she was entitled to continue to rely on the advice she had received from vendors (which had been their advice to ABC since at least 2003) as to the effective area. Had the majority accepted that she had been asked specifically to confirm that there was in fact 15 acres effective (and/or that it was in fact 15 acres contained solely in the one paddock) then in the majority's view only then should could she be expected to have taken steps to verify the information she had been provided from the vendors. If after making those enquiries the position was not clear, then she would then have been expected to have advised Mr A of that and encouraged him to have made his own enquiries.

4.20 In all of the circumstances, the Committee is of the view it is not necessary to take any of the matters raised in the complaint relating to Ms B's conduct any further.

Reasons of the Minority

4.21 The minority has decided there is evidence, if accepted by the Real Estate Agents Disciplinary Tribunal, on which the Disciplinary Tribunal could reasonably find Ms B guilty of misconduct. The minority considers that under section 89(2)(a) of the REAA the complaint (as it relates to the conduct of Ms B) should be considered by the Disciplinary Tribunal.

Complaint against Ms G

Reasons of the Committee

4.22 In respect of the allegations against Ms G, the (full) Committee has some doubts as whether it has jurisdiction to consider a complaint relating to the way in which a Manager deals with a complaint (internally) about a salesperson's conduct. It considers that the definition of "real estate agency work" in section 4 (upon which a finding of "unsatisfactory conduct" in s 72 hinges or must ultimately relate) does not cover the internal management of a complaint as that is not considered to be "work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction" ("transaction" is also defined in section 4).

4.23 Even if it is accepted the Committee has jurisdiction to consider that issue in this case the Committee's view is no further action is considered necessary (and determines as such under s89(2)(c). The email correspondence between Ms G and Mr A shows an expressed and genuine willingness on Ms G's part to discuss the concerns he had raised with her. Mr A was invited to meet with Ms G but it would appear no such meeting occurred. On 11 March 2009 Ms G emailed Mr A and asked him to put his concerns in writing so that she could address them with the vendor and Ms B. There is no evidence of that having been done and it appears that instead Mr A complained directly to REINZ. That was entirely a matter for

him and he was within his rights to do so. However on the information before it the Committee does not consider there is any reason to call into question any aspect of Ms G's involvement in the matters which gave rise to the complaint. It would appear she acted reasonably in all the circumstances of this case.

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 by a majority 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 including Ms B and Ms G, and any other named or identified third parties are suppressed from publication.

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 9th day of July 2010

A handwritten signature in blue ink, appearing to read 'Jo Hughson', is positioned in the upper left quadrant of the page.

Jo Hughson
Deputy Chairperson