

# Complaints Assessment Committee - Decision to take no further action

## 1. The Complaint

- 1.1 Mr and Mrs J have complained to the REAA about the conduct of XYZ. This complaint was originally filed with the REINZ and transferred to the REAA with the consent of Mr and Mrs J on 21 January 2010.

## 2. Background

- 2.1. Mr and Mrs J live in Australia. They own a property in Riverhead which was managed by XYZ. On 10 June 2008 Mrs J became aware (as a result of an email from Ms D, a salesperson at XYZ) that an application had been placed with tenancy services for mediation/eviction as rent had been unpaid for a couple of weeks. Problems with the rental payments continued intermittently and by 13 February 2010 the tenants were nine weeks in arrears of rent. The tenancy was eventually terminated.
- 2.2 Mr and Mrs J complained to REINZ about their dissatisfaction with the property management services. Notes provided by REINZ (headed "REINZ Investigation subcommittee report") summarised the complaint as "The complainants believe that [XYZ] mismanaged their rental property by not communicating effectively, not cancelling tenancy when requested, not paying accounts when due and by charging for work not completed."
- 2.3 The REINZ sub-committee had not finalized its decision before the Real Estate Agents Act 2008 came into effect. Accordingly, the complaint was forwarded to the REAA.

## 3. Relevant Provisions

### (a) Real Estate Agents Act 2008

Section 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;

(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.

Section 72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that –

(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

(b) contravenes a provision of this Act or of any regulations or rules made

- under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

Section 73    Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of –
  - (i) this Act; or
  - (ii) other Acts that apply to the conduct of licensees; or
  - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

Section 4    Interpretation

Real estate agency work or agency work –

- (a) means any work done or any services provided, in trade, on behalf of another person for the purpose of bringing about a transaction....

Transaction means –

- (b) the grant, sale, purchase or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies)

Section 80    Decision to take no action on complaint

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- (2) Despite anything in subsection (1), the Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

## **(b) Real Estate Agents Act 1976**

### Section 70 Rules of Institute

(1) The Institute may from time to time make rules (.....) for all or any of the following purposes:

.....

(m) Prescribing a code of ethics for regulating the professional conduct of members of the Institute and the conduct of salespersons and branch managers employed by members:

.....

Code of Ethics

Rule 13.1

Members shall always act in accordance with good agency practices, and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession

## **4. Discussion**

### **4.1 Jurisdiction**

4.1.1 The Complaints Assessment Committee (the "Committee") is satisfied that the matters raised by Mr and Mrs J fell within the jurisdiction of the Real Estates Agents Act 1976 ("the 1976 Act"). Accordingly, Mr and Mrs J would have been entitled to make a complaint under the 1976 Act.

4.1.2 At the time of the conduct complained of, the agent managing the property held an approved salesperson certificate issued under the 1976 Act. Under that Act the licensee of XYZ was responsible for the conduct of salespeople.

4.1.3 A question arises as to whether the complaint has been "dealt with" under section 172(1)(b) of the Real Estate Agents Act 2008 ("the 2008 Act"). The Committee considers that the complaint cannot be described as "dealt with" as the REINZ process had not been completed as although an investigation had been conducted and recommendations forwarded to the REINZ national council for ratification, no final decision had been produced prior to the inception of the REAA in 2008.

### **4.2 The discretion under s172 and s80**

4.2.1 Section 172(1) of the 2008 Act allows that a Committee "may" consider a complaint. This confers a discretion, rather than creates a requirement to consider a complaint.

4.2.2 Section 80 also creates a discretion to take no action on a complaint, or no further action.

4.2.3 The Committee acknowledges that the earlier REINZ investigation, while not upholding the complaint (as it found there had not been a breach of Rule 13.1 of the Code of Ethics), made some adverse comments about the management of the property and recommended a letter of reprimand, a 'more hands on approach' by the manager, and that a formal letter of apology be sent to Mr and Mrs J. It appears that this has not happened as a result of the changes in the legislation coming into force before matters were finalized. As a result of the

new legislation, the Committee is limited to a finding under the current Act.

- 4.2.4 Therefore the issue for the Committee to decide in this complaint is whether the conduct complained of amounts to “misconduct” under the Real Estate Agents Act 2008. (Section 72 of the 2008 Act, referring to “unsatisfactory conduct”, cannot apply in this instance as it refers only to conduct in carrying out real estate agency work and property management services are excluded from the definition of ‘real estate agency work’ by virtue of the exclusion of such services in the definition of ‘transaction’.)
- 4.2.5 The threshold for a finding of “misconduct” is relatively high, as shown by the words “disgraceful”, “seriously incompetent or seriously negligent”, “willful or reckless” used in the section.
- 4.2.6 Although a further investigation has not been undertaken, the Committee has had the benefit of examining the original complaint and material provided by Mr and Mrs J to REINZ and the responses of the licensee to REINZ. In the Committee’s view, the conduct complained of, even if fully proven (as it is noted that some parts of the complaint were disputed), could not amount to misconduct as described by the 2008 Act.

## 5. Decision

As a result of the above, the Committee considers that nothing could be gained by taking further action on the complaint and accordingly any further action is unnecessary (Section 80(2) of the 2008 Act).

## 6. Publication

The Committee directs that this decision is to be published. The complainant and licensee are not to be identified in the published decision.

## 7. 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](http://www.justice.govt.nz/tribunals).

Signed



Anne Darroch  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority  
Date: 3 August 2010