

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

And

In the Matter of Mr C
Complaint No: CA2692785

In the Matter of South Island Business Brokers Limited (Link
Christchurch)
License Number: 10016519

Decision of Complaints Assessment Committee

Dated this 22nd day of December 2010

Complaints Assessment Committee:

CAC10030

Deputy Chairperson: Patrick Waite

Panel Member: Denise Bovaird

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

The Complaints Assessment Committee (the CAC) met on 30 March 2010 to consider a complaint from Mr C on behalf of Company A in regard to Licensee South Island Business Brokers Limited (SIBB) which had been referred on 9 February 2010 from the Real Estate Institute of New Zealand. The complaint dated 9 July 2009 alleges that the Licensee was aware that the Complainant had a sole agency on a property however they chose to proceed with an agreement knowing their general agency was of no effect.

The CAC reconsidered this matter on 14 July 2010 and requested further information in regard to the decision of the Real Estate Institute of New Zealand hearing in October 2009. The CAC met again on 6 December 2010 and after consideration of the information received as well as responses from SIBB now issues its determination.

Material Facts

1. The Complainant Company A obtained a sole agency for 5 months to sell a property (the property) on 21 May 2009.
2. On or about 9 June 2009 Licensee South Island Business Brokers Limited obtained a general agency from the owner of the property. At the time that this was signed the vendor mentioned to SIBB that he had signed an agency with the Complainant's firm however he was unaware of the terms. Whilst alerted to the issue it would seem that SIBB did not seek clarification of the terms of the agency.
3. On 1 July 2009 the Complainant became aware that SIBB had a general agency on the business and sent a fax that day informing SIBB that they had a sole agency and as they understood from the vendor that SIBB had a party interested in the business, asking the salesperson from SIBB to make contact.
4. It would seem that when SIBB received the fax SIBB knowing that one of the salespeople was negotiating with an interested party chose not to inform their salesperson of this and an agreement for the sale of the business was reached on 3 July 2009.
5. During this time the Complainant advises that no request was made by SIBB for a conjunctive sale nor any acknowledgement made of the Complainant's sole agency.
6. The Real Estate Institute of New Zealand Investigation Sub Committee investigated this complaint and had prepared a report of their findings and recommendations addressed to their National Council on 12 October 2009 as follows:
 - 6.1 By failing to request a conjunctive sale with the Complainant or acknowledge the Complainant's sole agency, and to proceed to negotiate an

agreement on the business knowing that they did not have an enforceable agency SIBB has not acted in accordance with good agency practice. SIBB has breached Rule 13.1 (of the Real Estate Institute of New Zealand rules) by not acting in accordance with good agency practices and conducting themselves in a manner that reflects well on the Institute, its members and the real estate profession.

6.2 By failing to seek clarification of an existing agency before signing another agency SIBB has breached their duty of care to the vendor. SIBB has breached Rule 13.11. Acceptance by a member, either directly or through a Licensee by whom the member is engaged or employed as a salesperson, of any agency appointment imposes the obligation to render skilled and professional service.

6.3 It would seem that whilst the report was completed the recommendations in the report were never acted on and the investigation report was never considered by the Council.

Relevant Provisions

Whilst the complaint relates to conduct alleged to have occurred prior to the commencement of the Real Estate Agents Act 2008 Section 172 allows for a Complaints Assessment Committee to consider such a complaint.

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 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 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.

The CAC confirmed that SIBB was licensed under the Real Estate Agents Act 1976 and he has not been dealt with under that Act in respect of the conduct subject to this complaint.

1. The CAC examined the information supplied by the Complainant in his written complaint to determine whether S72 or S73 of the Real Estate Agents Act 2008 applied i.e. was there evidence which would indicate that SIBB could be considered guilty of unsatisfactory conduct (S72) or misconduct (S73)

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.

Discussion

The hearing was conducted on the papers pursuant to Section 90 of the REAA. Pursuant to Section 90(2), the CAC made its determination on the basis of the written material before it.

There is no dispute between the parties that the vendor signed a sole agency with the Complainant. SIBB has suggested that perhaps the vendor did not understand that he had signed such an agreement as he later gave SIBB a general agency. There are different views from both the Complainant and SIBB as to what followed. SIBB has advised that they, on becoming aware of the Complainant's sole agency, told the vendor that they would have to conduct any sale opportunity with the Complainant. It would seem however that this didn't occur and it is puzzling as to why SIBB didn't make contact and work out an arrangement with the Complainant.

This complaint was investigated by the Real Estate Institute of New Zealand but it appears that for whatever reason findings and recommendations of their Investigation Sub-Committee were not acted on.

It is of concern that SIBB when becoming aware of the Sole Agency issued by the vendor to the Complainant didn't follow the correct procedure act in accordance with the client's instructions i.e. he had issued a sole agency to the Complainant (S9.1). It is the opinion of the CAC that on becoming aware of the existence of the sole agency SIBB should have advised the vendor that they could not accept an agency listing whilst the sole agency was current.

The CAC considers if there was confusion in the vendor's mind as to the agency that he had given to the Complainant SIBB should have assisted in clarifying for the vendor with the Complainant the consequences for him in giving a sole agency to the Complainant and a general agency to SIBB i.e. the vendor could be exposed to the payment of two commissions.

The dispute between the two firms has exposed the industry to disrepute which could have been avoided if SIBB had followed good industry business practice e.g. seeking a conjunctual arrangement

Decision

It is the opinion of the Committee that the Licensee's performance in relation to this transaction is unsatisfactory as prescribed in S 72(a) "Falls short of the that standard a reasonable member of the public is entitled to expect from a reasonably competent licensee".

Orders

The Committee has decided that unsatisfactory conduct has been proved against SIBB but because the only orders which may be made against SIBB are those which could have been made under the 1976 Act, in the circumstances of this case the Committee is not able to make any order against the Licensee. The reasons for the Committee's decision follow."

Because the complaint relates to an event that occurred prior to the Real Estate Agents Act 2008 it is necessary in considering what orders would be appropriate to look at the application of the Real Estate Agents Act 1976.

- 1.1 South Island Business Brokers Limited (SIBB) was an approved Licensee under the Real Estate Agents Act 1976 (the 1976 Act) at the time the conduct in issue occurred. Mr C's complaint against SIBB has not been dealt with under the 1976 Act.

- 1.2 Leaving aside those preliminary matters the Committee has just addressed, s 172 creates a three step process:

Step 1: Could the licensee have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3: If so, only orders that could have been made against the licensee under the 1976 Act in respect of the conduct may be made against the licensee.

Step 1

- 1.3 Section 70 of the 1976 Act provided for rules to be made by the Real Estate Institute of New Zealand Incorporated (REINZ), containing disciplinary provisions among other things (see s 70(1)(m) to (o)). Rule 16.2 of REINZ's rules (the Rules) provided that:

“... any person may lodge a complaint with the Institute, alleging a breach of the rules, the Act or regulations, concerning:

16.2.1: A licensee, or the principal officer of a company, where the company is a licensee; or

16.2.2: A salesperson; or

16.2.3: An officer of a licensee company; or

16.2.4: A branch manager.”

- 1.4 The distinction drawn in rule 16.2 between a licensee (or the principal officer of a company where the company is a licensee), and a salesperson or a branch manager, reflects the fact that under the 1976 Act salespersons or branch managers required approval under the 1976 Act but were not required to be licensed provided they worked under the effective control of a licensee. That position has changed under the 2008 Act.

- 1.5 A licensee under the 1976 Act was licensed as a “real estate agent”. A licensed real estate agent under the 1976 Act was automatically a “member” of REINZ (s 67(1) of the 1976 Act). The Rules refer to the duties and obligations on “members”, but Rule 16.2 makes clear that a complaint could be made about a breach of the rules concerning not just “members” (licensees) but also salespersons and branch managers.

- 1.6 SIBB was a licensee at the time the conduct in issue occurred.

- 1.7 Under rule 16.2 of the Rules, a complaint could be made alleging a breach of the rules, the Act or regulations under the Act.

- 1.8 The obligations created by the Rules made under the 1976 Act were wide ranging. The Committee considers that in this case a complaint could have been made (and in fact was made) concerning an alleged breach of rule 13.13 by SIBB. Rule 13.13 provided as follows:

A member must be fair to all parties in negotiations and in the preparation and execution of all forms and agreements, and protect the public against unethical practices in connection with real estate transactions

The Committee therefore considers that the requirements of S 172 (1) are satisfied.

Step 2

- 1.9 "Real estate agency work" is defined in section 4 of the Act to mean, inter alia, any work done or services provided in trade, on behalf of another person for the purpose of bringing about a transaction. "Transaction" is defined to mean any one or more of the specified activities which include the sale, purchase or other disposal of a freehold estate or interest in land.
- 1.10 In this case, the CAC is satisfied that SIBB was engaged in real estate work.

Step 3

- 1.11 Having found SIBB guilty of unsatisfactory conduct, the Committee must determine what orders, if any, should be made.
- 1.12 Section 172(2) prevents the Committee from making an order against SIBB that could not have been made against them in respect of the conduct at the time the conduct occurred. At the time the conduct occurred, the 1976 Act applied.
- 1.13 The Committee must therefore consider what orders could have been made against SIBB in respect of the conduct under the 1976 Act.
- 1.14 The first point is that although the Committee has found SIBB guilty of unsatisfactory conduct, their conduct does not rise to the level of misconduct which could have resulted in orders being made against SIBB by the Real Estate Agents Licensing Board under the 1976 Act. The disciplinary options available under the 1976 Act below the level of the Real Estate Agents Licensing Board Must therefore be considered.
- 1.15 The 1976 Act provided for disciplinary proceedings before Regional Disciplinary Committees and, below that, Regional Disciplinary Sub-Committees. 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 SIBB's conduct they could not have had orders made against them at the level of a Regional Disciplinary Committee. That only leaves open orders that could have been made by Regional Disciplinary Sub-Committees, which were established.

- 1.16 Disciplinary proceedings could be taken before Regional Disciplinary Sub-Committees for a breach of the Rules. The available orders were a maximum fine of \$750 and censure. However, the difficulty is 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.
- 1.17 This is 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.”
- 1.18 Although SIBB was an approved Licensee under the Real Estate Agents Act 1976, SIBB was not a member (i.e. a licensed real estate agent). Therefore, orders could not have been made against SIBB in respect of the conduct that is in issue in this complaint at the time the conduct occurred. This means that the Committee is prevented from making any orders against SIBB by s 172(2) of the 2008 Act.
- 1.19 The Committee recognises this is highly unsatisfactory from the Complainant’s perspective. 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, but unfortunately that does not assist the Complainant here.
- 1.20 In summary the Committee finds SIBB guilty of unsatisfactory conduct but are unable for the reasons described above to make any orders against them.

Publication

One of the Committee’s functions pursuant to section 78(h) of the Act is to publish its decisions.

Publication gives effect the purpose of the Real Estate Agents Act of ensuring that the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of setting standards and that it is in the public interest that the decision be published.

The Committee directs publication of its decision, but omitting the names and identifying details of the complainant (including the address of the property), and any third parties in the publication of its decision.

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



Patrick Waite
Deputy Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 22 December 2010