

DETERMINATION OF COMPLAINTS ASSESSMENT COMMITTEE (PENALTY)

1. Introduction

- 1.1 By its decision dated 27 July 2010 the Complaints Assessment Committee made a determination under section 89(2)(b) of the Real Estate Agents Act 2008 ("the REAA"/"the Act") that the Licensee, Brendon Heenan, of GBR Realty Limited, has engaged in unsatisfactory conduct as that term is defined in section 72 of the Act.
- 1.2 Having made a determination under section 89(2)(b) the Committee may make one or more of the orders set out in section 93 of the Act.
- 1.3 The Complaints Assessment Committee invited Mr Heenan (and the complainant) to make any comments or submissions he wished within ten days from the date of the Committee's determination. No written submissions or comments were received from either Mr Heenan or Mrs M as at the date of this decision.

2. Principles considered

- 2.1 The Committee, when determining whether or not to make an order under section 93(1), has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings. They include:
 - a. Promoting and protecting the interests of consumers and the public generally
Section 3(1) of the REAA sets out the purpose of the legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work." One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (section 3 (2)).
 - b. Maintenance of professional standards
This function has been recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; *Taylor v The General Medical Council* [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720). In the Committee's view this function is also applicable in the disciplinary processes under the REAA.
 - c. Punishment
The Committee accepts that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment - indicated by the power the Committee has to impose a fine (section 93(l)(g)); or make an order of censure (section 93(l)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.)
 - d. Where appropriate, rehabilitation of the professional must be considered
The Committee regards its power to make an order requiring a licensee to undergo training or education as indicative of this function applying in the context of professional disciplinary processes under the REAA.

2.2 The Committee acknowledges that when making an order under section 93, the order/s made must be proportionate to the offending and to the range of available orders.

3. Complaints Assessment Committee Determination under section 93

3.1 Mr Heenan engaged in unsatisfactory conduct in that he was not in possession of a signed listing agreement at the time when he erected his sign over Mrs M's own for sale sign on 23 October 2009.

3.2 Mrs M did not live in the same area as the relevant property. She therefore could not understand why the telephone enquiries dried up all of a sudden after October 2009.

3.3 It was only when Mrs M drove past the property in January 2010 that she saw Mr Heenan's sign completely blocking hers.

3.4 Once Mr Heenan's sign was removed by Mrs M, the phone enquiries regarding the property started up almost immediately.

3.5 Although Mr Heenan maintained that Mrs M was not disadvantaged by his "over eagerness", Mrs M believes that they had suffered a potential loss of sale due to no-one being able to contact them which affected them financially. Mrs M assessed the loss of chance of an earlier sale to be a period of three months. In that time they were paying \$890 interest per month on borrowed funds, \$32.76 per week on rates and \$40 every six weeks for maintenance. Mrs M has claimed \$3,140 in compensation.

3.6 As the property was sold not long after Mr Heenan's sign was removed, the Committee accepts that Mrs M suffered a loss. As it is difficult to establish how long it would have taken for the property to sell with only Mrs M's private for sale sign, the Committee has decided that payment of an amount of \$1,500 inclusive of GST (if any) should be a fair step by Mr Heenan to provide relief to Mrs M from the consequences of Mr Heenan's error.

3.7 Having regard to the facts of this case as in the Committee's determination dated 27 July 2010, and the established unsatisfactory conduct and functions which the imposing of a penalty is designed to serve, the Committee has determined to make the following orders under section 93(1):

3.7.1 Mr Heenan is to pay the complainant the amount of \$1,500 inclusive of GST (if any) pursuant to section 93(1)(f)(ii). This payment must be made within 21 days of receipt of this penalty determination and proof thereof provided to the REAA;

3.7.2 That Mr Heenan undergoes training pursuant to section 93(1)(d). In this regards the Committee directs that Mr Heenan must undergo formal training in ethics by completing course 26152 (Explain the principles of ethics applying to real estate practice) at the Open Polytechnic at Mr Heenan's expense within 12 months of receipt of this penalty determination. If for some reason Mr Heenan cannot enroll and complete the said course, he shall identify a suitable alternative training course ("the replacement course") using an accredited provider **and** obtain approval from the REAA for the replacement course before enrolling. In such an instance the replacement course must be completed at Mr Heenan's expense within 12 months of receipt of this penalty determination. Mr Heenan must supply formal proof of completion of the required training to the REAA within 12 months of receipt of this penalty determination.

3.8 The Committee does not consider that it is necessary to make any of the other orders specified in section 93(1).

4 Publication

- 4.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)). The Committee has the power under section 84(2) to direct such publications of its decisions under section 93 as it considers necessary or desirable in the public interest.
- 4.2 The Committee regards the 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 and the consequences for licensees engaging in such conduct. Publication also gives effect to the purpose of the Act set out in section 3 by ensuring transparency in the disciplinary process.
- 4.3 The Complaints Assessment Committee considers that to ensure the principal purpose of the Act is achieved, its decision dated 27 July 2010 and this decision ought to be published. Publication is regarded as necessary for the purposes of standard setting in this case and it is also in the public interest that the decisions be published.
- 4.4 The Committee hereby authorises the Real Estate Agents Authority to publish these decisions by whichever means it considers appropriate provided that the names and identifying details of the complainant and any named third parties (but not that of the licensee or his employer) are omitted from publication. Any such publication should not occur until the Authority is satisfied that Mr Heenan has been notified of this decision as to penalty.

5 Right of Appeal

- 5.1 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.
- 5.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 5.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 21 September 2010