

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

And

In the Matter of **Complaint No CA2733987**

In the Matter of **Brendon Heenan**  
**License Number 10011826**

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Decision of Complaints Assessment Committee

Dated this 27<sup>th</sup> day of July 2010

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**Complaints Assessment Committee:**

**CAC10031**

**Chairperson: Debbie Van Zyl**

**Deputy Chairperson: Marina Neylon**

**Panel Member: Peter McDermott**

# Complaints Assessment Committee - Decision finding unsatisfactory conduct

## Decision

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### **1. The Complaint**

- 1.1 This is a complaint lodged by Mrs M on the 2<sup>nd</sup> of March 2010 against Brendon Heenan. Mr Heenan is a licensee under the Real Estate Agents Act 2008 (“the Act”). Mr Heenan holds a salesperson’s license and is employed by GBR Realty t/a First National Otaki.
- 1.2 Mrs M’s complaint is about Mr Heenan erecting a “For Sale” sign over their private sale sign without an agency agreement being signed.

### **2. Material Facts**

- 2.1 Mrs M had a private for sale sign erected at her section situated at “the property”.
- 2.2 Mrs M was phoned by Mr Heenan on or about the 23<sup>rd</sup> of October 2009 and asked if she wanted to list with Mr Heenan.
- 2.3 Mr Heenan said that Mrs M appeared receptive to the idea of listing with him during the phone call – they discussed the forthcoming “new home buyers” seminar to be held by GBR Realty t/a First National Otaki, Mrs M’s price expectation and an exclusive two month listing.
- 2.4 Mrs M said that she informed Mr Heenan “that they might think about it”, but as they received regular calls re the section, they held off listing with Mr Heenan.
- 2.5 Mr Heenan asked Mrs M’s email address to forward the listing documentation to her and he sent a reminder email on the 28<sup>th</sup> of October 2009 requested the signed listing documentation back.
- 2.6 Mr Heenan stated that, as “it was my understanding that Mrs M was happy for me to list the section in conjunction with our promotion that was to take place on the 12<sup>th</sup> of November 2009”, he erected a sign on the property on the 23<sup>rd</sup> of October 2009.
- 2.7 Mrs M lives in Napier. It was not until Christmas that they realized that the phone calls they have received in September - October 2009 have dried up. When Mrs M drove past the property on the 17<sup>th</sup> of January 2010, she noted that Mr Heenan has erected a “For Sale” sign “over top” of their private sale sign.
- 2.8 Mrs M said that they were “disgusted, frustrated and furious” and that they phoned Mr Heenan immediately to find out why his sign was on the property.
- 2.9 Mrs M said that Mr Heenan replied that “he was going to take it down” that day as he had an open home around the corner.
- 2.10 Mrs M and her husband then removed the sign and she said that “almost immediately calls began again from potential purchasers.”
- 2.11 Mrs M believes that they have “potentially ‘loss of sale’ due to no-one being able to contact” them and that this “has effected us financially as unable to attract private buyers and

wanting to sell at well under what Brendon has estimated.” 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. They therefore claim \$3,140 in total in compensation.

- 2.12 Mr Heenan admitted that “I did put up the sign in my eagerness, and did not follow up after the second email, but that I do not feel that they have been disadvantaged in any way by having the First National sign on their property over this period” and he apologized for any upset.
- 2.13 As part of his correspondence Mr Heenan provided statistics and written records of sections sold during that period which showed that he has sold 5 sections over that relating period.
- 2.14 Mr R, the Principal of GBR Realty t/a First National Otaki, stated that they were extremely busy during the relevant period of time and he admitted that a mistake was clearly made by “not following through the listing form sent to Mrs M to ensure the Vendors were ‘still aboard’ and willing to participate in proceedings”.
- 2.15 Mr R further states that this “has been a salutary reminder, to Brendon to curb his natural enthusiasm until the paperwork has been completed, and for ourselves, to ensure more robust systems around securing and following up of the paperwork for listings.”

### **3. Relevant Provisions**

3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).

3.2 Section 72 of the Act defines unsatisfactory conduct:

#### **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.

3.3 Section 73 of the Act defines misconduct:

#### **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.

- 3.4 Rule 5 of the Real Estate Agents Act (professional Conduct and Client Care) Rules 2009 (“the Rules”) deals with standards of professional competence. Rule 5.2 states that: “A licensee must have a sound knowledge of the Act, regulations made pursuant to the Act, rules by the Authority (including these rules) and other legislation relevant to real estate agency work.”
- 3.5 Rule 9 of the Rules deals with client care and dealings with customers. Rule 9.15 states: “Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.”
- 3.6 Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee conducted a hearing with regard to the complaint under Section 89 (1) of the REAA.
- 3.7 The hearing was conducted on the papers pursuant to Section 90 of the REAA. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

#### **4 Discussion**

- 4.1 Section 72 of the Act specifies the conduct that represents “unsatisfactory conduct”. Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or rules made under the Act is classified as unsatisfactory conduct. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.
- 4.2 Although the conduct complained of has started before the Act came into effect, most of the conduct complained of was continued after the Act came into force. This complaint will therefore be dealt with pursuant to the Act.
- 4.3 Mr Heenan admitted in his letter dated 8<sup>th</sup> of April 2009 that he put up the sign in his eagerness. It is clear that Mr Heenan was not in possession of a signed agency agreement at the time he erected the sign.
- 4.4 Although Mr Heenan is a relatively inexperienced real estate agent and that he was under the impression that Mrs M was happy for him to list the property, the erection of the sign is a clear breach of Rules 5.2 and 9.15 as Mr Heenan does not appear to have a sound knowledge of the Rules and neither was he in possession of a signed agency agreement.
- 4.5 Section 73 of the Real Estate Agents Act 2008 specifies the conduct that represents “misconduct”. The position under section 73(b) is the same as under section 72. Section 73(b) is concerned with “seriously incompetent or seriously negligent real estate agency work”, again excluding conduct in the provision of property management services. Section 73(c) is limited to wilful or reckless contraventions of the Acts, or the rules and regulations that apply to the conduct of licensees.
- 4.6 Paragraph (a) of section 73 is wider and in the Committee’s view it applies to conduct by licensees both in the course of carrying out real estate agency work and also in the course of carrying out other types of work. However in the Complaints Assessment Committee’s view conduct is only caught by the 2008 Act if it reaches what is called the “threshold” for misconduct (the word “disgraceful” is used in section 73(a)).
- 4.7 Under section 172(2) of the 2008 Act the Complaints Assessment Committee can only determine whether the Licensee is guilty of unsatisfactory conduct or whether a charge should be laid in the Tribunal alleging misconduct.

- 4.8 For the reasons set out above, Mrs M's allegations against Brendon Heenan has met the test for unsatisfactory conduct, but even taking the view most favourable to the Complainant, the Complaints Assessment Committee has decided that Mr Heenan has apologised and that there are no reasonable grounds for concluding that the conduct complained about reaches the threshold for misconduct (section 73(a)).

## **5 Decision**

- 5.1 The Complaints Assessment Committee met on 25 June 2010 to consider the complaint against Brendon Heenan. The Complaints Assessment Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Heenan has engaged in unsatisfactory conduct.

- 5.2 Having determined that Mr Heenan is guilty of unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in section 93(1) of the Act.

## **6 Orders**

The Committee will conduct a separate hearing on the papers to decide what orders, if any, should be made under s 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.

The Committee requires the investigator authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Brendon Heenan under either the Real Estate Agents Act 1976 or the Real Estate Agents Act 2008, if any such decision exists, and provide it to the Committee and Mr Heenan and Mrs M.

Mr Heenan and Mrs M may file submissions within 10 days from the date on this determination on what orders, if any, should be made.

## **7 Publication**

- 7.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.
- 7.2 The Committee directs that this decision is to be published in the interest 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

## **8 Right of Appeal**

- 8.1 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.
- 8.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 8.3 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



Debbie van Zyl  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 27 July 2010