

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

And

In the Matter of **Complaint No: CA2767647**

In the Matter of John McKenzie
Licence Number: 10014002

Decision of Complaints Assessment Committee

Dated this 21st day of April 2011

Complaints Assessment Committee:

10034

Chairperson: PA Morten

Deputy Chairperson: Rob Crozier

Panel Member: Denise Bovaird

Complaints Assessment Committee

Decision on Orders

Background

The Complaints Assessment Committee (the Committee) refers to its previous decision finding unsatisfactory conduct. It has received submissions from Mr C (the complainant) and from the licensee, Mr McKenzie (through his legal adviser, Mr L).

Relevant Provisions

Having made a finding of unsatisfactory conduct against John McKenzie the Committee must now decide what orders, if any, should be made under section 93 of the Real Estate Agents Act 2008 (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.

Discussion

Mr C submitted an offer for the property on 2 December 2009, which went unconditional on 22 December 2009.

He states that he bought the property for \$1.58 million on the basis that there was a vacant top floor which could be redeveloped. He had a loan of \$140,000 from Company C, which he expected to service from a net holding income of \$131,474. In fact, he says the property produced an income of \$87,394. But for the representation about the vacant top floor, he says he would never have bought the property.

Applying a capitalisation rate of 9% to the income he expected to receive from the building, and the income actually received, he says that he has suffered a capital loss of \$489,777.77.

He says the 9% capitalisation rate has been supplied by "my valuer". The valuer is not named in his submission, and we have no supporting submission or evidence from his valuer.

In addition, he says that he has lost an unencumbered right to develop the top floor into self storage as he saw fit, because part of the floor (40 m²) was leased to Company A for four years. At \$130 per square metre, he calculates a loss over a four-year period of \$20,800.

Those two sums combined represent his damages claim. He seeks \$510,577.77 by way of damages.

He says it has proved an uphill battle over the last 12 months to try and improve the income from the property, and to satisfy his lender's requirements. His 12 month term loan expires on 27 February 2011. He states that on renewal, he will be obliged to accept whatever terms the lender offers him.

Because of the misrepresentation regarding the vacant space on the top floor, he says he has had no alternative but to lease the front half of the top floor, putting an end to his short-term plans for self storage.

In addition, he seeks an order that Mr McKenzie be required to undergo training or education. He

believes that will protect the public interest.

He seeks an apology.

Finally, he seeks an order censuring or reprimanding Mr McKenzie.

In his submission on behalf of the licensee, Mr L says that the information memorandum was not prepared by the licensee. It was prepared by another agent, and checked by one of the agency's directors.

He argues that any finding of unsatisfactory conduct should be made against the agent who prepared the memorandum, and against the agency, rather than against him. In light of the involvement of the other agent and the agency, he says that the Committee should "reverse" its finding of unsatisfactory conduct.

If the Committee is not prepared to do that, then he submits that any orders should be made against the other agent and the agency, rather than just against his client.

He says that the complainant was always on notice that the property was on the market as a mortgagee sale, and that Mr McKenzie had been told that as information was received from the mortgagee, information in the information memorandum would be updated. He says that is in fact what occurred, and that through his client's involvement, the complainant received the most accurate and correct information relating to the property.

He states that the complainant was aware before his conditional purchase agreement became unconditional that the income produced by the property was \$95,000. He asserts that that was the basis upon which the complainant arranged his funding.

He submits that the complainant had the opportunity to conduct his own due diligence before declaring the purchase contract unconditional. In light of that, he suggests that any order made by the Committee should be at the minor end of the scale, and should not take into account the alleged financial loss claimed by the complainant, which in any event he says is unfounded.

The Committee has carefully considered the submissions by the respective parties.

The Committee is not prepared to "reverse" its finding of unsatisfactory conduct. The agent has a right of appeal. If he wishes to appeal, he must do that through the Real Estate Agents Disciplinary Tribunal (the Tribunal).

While the Committee is prepared to take into account the role the other agent or the agency played in the preparation of the information memorandum, the Committee obviously has no jurisdiction, when hearing submissions on penalty, to make a finding of unsatisfactory conduct against the other agent or the agency itself.

In respect of the complainant's submission for a monetary penalty, the Committee notes that where it is not practicable to rectify an error or omission by an agent, it may order a licensee "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".

That power is contained in section 93 (1)(f)(ii) of the Act. The subsection is silent about whether this "relief" is only available to a complainant (as opposed to a third party); whether the relief includes the power to order financial compensation direct to the complainant; and if so, whether the relief is to compensate for loss suffered as a direct result of the licensee's conduct. If "relief" can be a lump-sum payment, the Committee notes there is no limitation as to the amount of financial relief the Committee might direct.

Compare and contrast the powers of the Tribunal under section 110 (1) and (2): where the Tribunal finds a licensee guilty of the more serious charge of "misconduct", it may make any of the orders the Committee could have made under section 93 (which includes the power to order relief from the consequences of the error or omission: section 110 (2) (a)). In addition, where it appears to the Tribunal that "any person" (not just the complainant) has "suffered loss by reason of the licensee's misconduct", it may order the licensee to pay that person "compensation" not exceeding \$100,000.

This raises the issue whether the "relief" that can be ordered under section 93 of the Act is different from "compensation" that can be ordered under section 110 for loss suffered by reason of a licensee's misconduct.

What is contemplated by the use of the word "relief" in section 93(1) (f) (ii) can wait for another day.

Even if the subsection in law permits the Committee to order the agent to pay compensation to the complainant, the Committee is not prepared to make such an order on the facts in this case.

There is conflicting evidence about what the complainant learned about the 40 m² of space on the top floor, before the contract went unconditional. The agent says that he told the complainant part of the top floor was leased. The complainant says he believed the small area leased to Company Z was not on the top floor. There is no proper valuation evidence, or other evidence for that matter,

quantifying the loss that the complainant states that he has suffered. There is conflicting evidence about the income the complainant might have expected to earn from the property, and about the property's operating expenses, with the agent arguing that the agency was unable to fix operating expenses with any precision because of complexities arising from the mortgagee sale. The agency has provided an e-mail from Company C advising that the credit decision was based on a net income from the property of \$95,000. The complainant has made no attempt to justify the capitalisation rate which he says should be applied to his income figures.

The Committee is not prepared to order payment of "relief" by the agent of approximately \$500,000 (or even some lesser amount) on the basis of vague evidence of this type about losses said to have been incurred. The position would be no different even if the Committee took the view that the information memorandum had been drafted by the complainant.

In this case, the Committee considers a damages claim of the type the complainant is seeking is a complicated commercial issue that ought to be properly argued in Court, where the evidence can be carefully tested, and where a judge can make findings of fact about issues of income and operating expenses, and resolve precisely what information the complainant was aware of at the time he entered into the contract.

Company A had an agreement to lease, dated 10 October 2005. The term of the lease commenced on 1 November 2005, or earlier if agreed. There were two rights of renewal, for two years each. The lease therefore had the potential to run through to 2011. The 40 m² area on the top floor was leased to Company A pursuant to a variation of lease put in place by a letter dated 26 January 2006. This lease of the top floor area was not information that the Committee considers that the agent can claim he was unaware of by reason of the fact that it was a mortgagee sale.

The advertisement for the mortgagee sale, describing the 770 m² vacant floor as having the potential to convert to residential, and also describing "the second floor completely vacant", had the name of Mr McKenzie and another agent recorded on it, together with their contact details. The information memorandum repeated the same error.

The Committee has found that the agent had an obligation to identify, in the clearest terms, that the second floor was not vacant, and also that the income and operating expense information was potentially suspect. It is not just the complainant who was potentially misled. It was members of the public who read the information memorandum and the advertisement advertising the mortgagee sale. The Committee has found that the agent failed to make these points clear. As we said in our decision on liability, the agent must take at least some responsibility for that. He cannot lay off the blame on the agency and the other agent.

In the circumstances, the Committee considers that this is a case where it is appropriate to make an order censuring the agent, under section 93 (1) (a) of the Act.

The agent has made no apology. The Committee orders him to do so, pursuant to section 93 (1) (c) of the Act.

The Committee has the power to order the agent pay a fine of up to \$10,000. The conduct that the Committee has identified is not at the top end of the range of "unsatisfactory conduct". But the top floor was not vacant, and that was a matter that was easy to verify. It is clear from the advertisement and the information memorandum that the agent and the agency considered that buyers would be attracted by the claim that the top floor was vacant.

The Committee considers that a fine of \$2000 would be appropriate.

We suspect that this has proved a salutary lesson for Mr McKenzie. We do not consider that there is any need to order Mr McKenzie to undergo training or education. That request for relief by the complainant is therefore declined.

Decision

The Committee makes an order censuring the agent; that the agent apologise in writing to the complainant within seven days of the date of receipt of this decision (with a copy of his letter of apology to be provided to the Committee prior to being sent to the complainant); and that the agent pay a fine of \$2000 to the Authority within 14 days of receipt of the decision.

Publication

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

Publication gives effect to the purpose of the 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), the agency and any third parties in the publication of its decision.

The Authority will publish the Committee's decision after the appeal period has ended. Any

application for an order preventing publication must be made to the Disciplinary Tribunal.

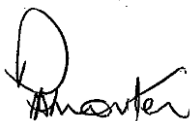
Right of Appeal

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

A handwritten signature in black ink, appearing to read 'PA Morten', written over a faint circular stamp.

PA Morten
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 21 April 2011