

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

And

In the Matter of **Ms C1 and Ms C2**
Complaint No: CA2835921

In the Matter of **Beverley Missen**
License Number: 10010008

Decision of Complaints Assessment Committee

Dated this 29th day of October 2010

Complaints Assessment Committee:

CAC10030

Deputy Chairperson: Patrick Waite

Panel Member: Denise Bovaird

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

This is a complaint that was originally sent to REINZ in September 2009 and subsequently referred by REINZ to the Authority. REINZ appear to have mislaid this complaint and it was never investigated by them.

The complainants (the purchasers) are complaining that the licensee withheld information from them about a proposed development on the adjacent property and that the development has impacted upon their privacy and the value of their property.

Background

1. In June 2008 the complainants Ms C1 and Ms C2 bought a property in Hamilton (the property) from Ms V. The licensee for the transaction was Beverly Missen who is employed by Lodge Real Estate.
2. Six months after the complainants took possession of the property a two storied four apartment development was built next door. At the time of the purchase the complainants were not aware that this development had been planned. The complainants are complaining that the licensee withheld information about the proposed development from them and that the development has impacted upon their privacy and the value of their property.
3. The complainants have instituted civil proceedings in the Disputes Tribunal against both Ms V (vendor) and Missen (licensee) alleging a breach of clauses 6.1 (1) and 6.2 (2) of the Sale and Purchase agreement by both Ms V and Missen not disclosing their knowledge of the development of the adjoining property (the adjoining property). The hearing was scheduled for 16 July but we have no further information about these proceedings.
4. Information provided to the Committee includes documents filed in the Disputes Tribunal as well as the Authorities own investigations.

Chronology of events:

24 June 2005	Resource consent submitted for a 4 unit apartment development and subdivision by unit title at the adjoining property
2 August 2005	Ms V, the owner of the property submits written objections to proposed development to Council
23 September 2005	Ms V formally withdraws objections to the property
29 November 2005	Proposed development at the adjoining property approved and approval issued on 21 January 2006
6 September 2007	Licensee Bev Missen attends the adjoining property and conducts property appraisal with Ms V. Ms V advises that she had approached the owner of the adjoining property to see if he was interested in buying her property as she was aware that he was keen to develop his property.
8 October 2007	Missen begins marketing the property
31 March 2008	C1 and C2 view the property and make an offer of \$270k, conditional on lawyers' approval and Lim report. Offer accepted within the hour.
24 April 2008	Purchase agreement moves to unconditional
30 May 2008	Settlement of property in favour of C1 and C2
12 June 2008	Ms V visits C1 and C2 and gives them the 2005 resource consent application. She states that the development is not going ahead because she had not given her approval.
January 2009	Development of four apartments on the adjoining property commences

Material Facts**Statements of complainant C1 and C2**

1. The complainants first visited the adjoining property on 31 March 2008. They advise that they were not told of the potential development of the next door property at this visit. They signed a sale and purchase agreement to buy the property for \$270,000 (\$19,000 less than the asking price) conditional on

lawyers' approval, a builders report and LIM report. The offer was accepted within the hour.

2. The LIM report obtained showed under the heading "Notified resource consent applications that are currently being processed at adjoining properties" – none for this property. The Council has stated that nothing was showing for this property because at this stage the resource consent for the development at the adjoining property had been processed and approved.

3. The complainants further visited the property on 16 April 2008 together with C2's mother. Both Missen and Ms V were present. Discussions about wiring and insulation took place but according to the complainants there was no mention of the development proposed for the adjoining property. Ms C3 (C2's mother) has supplied a statement confirming that in relation to the visit on 16 April 2008 "at no time did the Real Estate Agent, Bev Missen talk about the new development that has been built next door to the adjoining property." A sale and purchase agreement became unconditional on 24 April 2008 and settlement took place on 30 May 2008.

4. The complainants state that they first knew about the potential development of the adjoining property the month after they had taken possession of the property. The vendor came to collect some of her mail and gave them a copy of the plans for a proposed development of the next door property and a resource consent application. The complainants maintain that the vendor told C1 and C2 that she had not given approval for the development and the property developers would need to contact them (C1 and C2) for their approval before it could go ahead. Based on this advice the complainants made no enquiries about the potential development.

5. When the development started in January 2009 the complainants were totally surprised and outraged. C1 contacted the Council and was shown a letter from Ms V to the Council withdrawing her objection to the development.

6. The complainants said they contacted Ms V who still maintained she had not given approval for the development but when confronted with the information given to them by the Council said "Oh I guess I must have." When asked why she had not mentioned it to them when they were purchasing the property Ms V said "I assumed that Beverly Missen would have told you". The complainants maintain that when pushed further about not mentioning the development to them Ms V said she was very busy at the time and must have forgotten and "I guess I will have to sell my house and buy this one back".

7. In July 2009 the complainant's lawyer contacted Lodge Real Estate alleging deception by Beverly Missen and seeking compensation of \$50,000. This appears to be subsequently reduced to a claim for \$15,000.

Beverly Missen

In her brief of evidence for the Disputes Tribunal Beverly Missen states that:

- When performing her appraisal of the property at the adjoining property she was advised by Ms V that she had approached the owner of the property at the adjoining property as the owner was proposing to carry out a town house development.
- In October 2007 she began marketing the property at the adjoining property for \$339,000 (subsequently reduced to \$289,000). Over the next six months a number of potential buyers inspected the property. She informed all potential buyers of the potential town house development however she could not confirm whether the development would proceed because as far as she was aware it had only been proposed at that stage.
- During the course of marketing the property she asked the vendor if she had heard anything more about the development and the vendor never suggested that she had given her permission to the proposed development.
- She accompanied the complainants on a number of visits to the house for building and valuer's inspections. On one of these visits she mentioned the townhouse development to C1 and C2 as they were walking down the driveway discussing the state of the fence and said that if the townhouse development went ahead a new one would be built.

In a statement to the Authority Beverly Missen further states that she cannot remember exactly when she informed Ms C1 and Ms C2 of the proposed development at the adjoining property. At no time did she have any communications with the vendor relating to her having consented to the

proposed development at the adjoining property nor was she aware that the vendor had consented to the proposed development.

When contacted by the Authorities investigator Beverly Missen advised she had diary notes of other potential buyers of the property who viewed that property at the marketing stage but was reluctant to disclose these over concerns regarding client confidentiality. The investigator was therefore unable to contact any of the other potential buyers to ascertain if they had been advised of the proposed development.

Ms V

The Authority was asked by Ms V's barrister to take Ms V's statements as filed for the Disputes Tribunal as her response to the CAC's requests. In her brief of evidence she states (amongst other things):

- That she has no recollection of the conversations with C1 and C2 that they have included in their brief of evidence
- That she did not see it as necessary to mention the proposed Application for the property at the adjoining property as she had informed the licensee of the proposed development and assumed she would have passed this on to C1 and C2
- That Beverly Missen as her real estate agent was aware of the development at all material times
- That she believes she was rushed into signing the agreement for the sale of the adjoining property by Beverly Missen and not encouraged to get legal advice
- That she assumed the offer from C1 and C2 to buy her property at \$19,000 less than the asking price took account of the proposed development.
- That she initially opposed the development plans for the adjoining property and after consultation with the developer withdrew her opposition to the development in a hearing of the Statutory Management Committee of the

Council in mid to late 2005 but after this was not contacted or consulted again.

Relevant Provisions

Because the complaint relates to a period prior to the commencement of the Real Estate Agents Act 2008 it was necessary for the CAC to satisfy itself that it had the authority to consider this complaint which relates to March-June 2008.

Section 172 of the Real Estate Agents Act 2008 is applicable in this situation.

Section 172 Allegations about conduct before commencement of this section

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

Having satisfied itself that it had the jurisdiction to examine the complaint the CAC examined the information supplied by the Complainants in their 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 the Licensee 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 licensee maintains that she advised all potential purchasers of the adjoining property of the potential development of the adjoining property but goes on to say that she could not confirm to any potential purchaser whether or not a development of the property at the adjoining property would proceed. The licensee however has provided no evidence to corroborate her statements that she advised potential purchasers of the adjoining property of a potential development of the adjoining property.

The licensee and the vendor appear to contradict some of each other's material facts and appear to blame each other for not disclosing critical information about the development.

The complainants have been steadfast in their statement that they were never aware of the development of the adjoining property prior to the purchase of the adjoining property and have statements from third parties who can attest

to the development never being mentioned at times when it normally would have been expected.

On the basis of all the information that is before the Committee, the Committee finds it implausible that if the licensee had mentioned the proposed development as she states she did, the complainants would not have asked follow up questions about the development or inquired further about it at all. The failure may well have been an inadvertent oversight, but we find that the licensee did not disclose her knowledge of the development to the complainants in this case.

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 standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee".

We find that the licensee omitted to tell the purchaser about the prospective development of the adjoining property whether inadvertent or otherwise and that the omission had a material impact on the purchasers decision to buy the property. The account provided by the licensee was equivocal on the material fact of whether or not the purchaser was told about the development. In counterpoint the purchaser was unequivocal about the omission and has third parties who can support this. Therefore on balance the CAC prefers the account of the complainants on this critical point and feels there is sufficient evidence that they had not been advised that a development was planned prior to purchasing the property

Because of its seriousness for the purchaser and the lack of corroborating evidence on the part of the licensee we find that there has been unsatisfactory conduct on the part of the licensee.

Orders

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 Beverly Missen was an approved salesperson under the Real Estate Agents Act 1976 (the 1976 Act) at the time the conduct in issue occurred. Ms C1 and Ms C2's complaint against Beverly Missen 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 Beverly Missen was not a licensed real estate agent at the time the conduct in issue occurred. She was an approved salesperson working under the effective control of a licensed real estate agent with Lodge Real Estate.
- 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, concerning Beverly Missen as a salesperson.
- 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 concerning an alleged breach of rule 13.13 by Beverly Missen. 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 Beverley Missen was engaged in real estate work.

Step 3

- 1.11 Having found Beverly Missen 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 Beverly Missen that could not have been made against her 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 Beverly Missen in respect of the conduct under the 1976 Act.
- 1.14 The first point is that although the Committee has found Beverly Missen guilty of unsatisfactory conduct, her conduct does not rise to the level of misconduct which could have resulted in orders being made against Beverly Missen by the Real Estate Agents Licensing Board under the 1976 Act. What, then, were the disciplinary options available under the 1976 Act below the level of the Real Estate Agents Licensing Board?
- 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 Beverly Missen's conduct she could not have had orders made against her 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 Beverly Missen was an approved salesperson under the Real Estate Agents Act 1976, she was not a member (i.e. a licensed real estate agent). Therefore, orders could not have been made against Beverly Missen 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 Beverly Missen by s 172(2) of the 2008 Act.
- 1.19 The Committee recognises this is highly unsatisfactory from Ms C1 and Ms C2'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 Ms C1 and Ms C2 here.

Publication

The Committee hereby authorises the Authority to publish this decision by whatever means it considers appropriate provided that the names and identifying details of the complainant (including the address of the property) and any named or identified third parties are withheld from publication.

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 blue ink, appearing to read 'Patrick Waite', with a large loop at the start and a long horizontal stroke extending to the right.

Patrick Waite

Deputy Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date 29 October 2010