

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

And

In the Matter of **Complaint No: CA2849565, CA2850618, CA2850663, CA2850735**

In the Matter of Company A
Licence Number: XXXXXXXXXXX

In the Matter of Mr R
Licence Number: XXXXXXXXXXX

In the Matter of Campbell Scott
Licence Number: 10017121

In the Matter of Mr A
Licence Number: XXXXXXXXXXX

Decision of Complaints Assessment Committee

Dated this 17th day of January 2011

Complaints Assessment Committee:

CAC 10034

Chairperson: PA Morten

Deputy Chairperson: Denise Bovaird

Panel Member: Rob Crozier

Complaints Assessment Committee

Decision finding unsatisfactory conduct

The Complaint

Mr B1 and B2 ("the complainants") were the executors of the estate of the late Mr B. The estate owned a property in the central north Island.

B1 approached Mr A on 10 February 2009 to market and sell the property. Mr A was an approved salesperson under the Real Estate Agents Act 1976 ("the 1976 Act").

He worked for Company A, a licensee company under the 1976 Act.

B1 says that he explained to Mr A that he would need B2's signature on the listing agreement, to make the agreement binding. He says that despite that advice, Mr A took photos of the property, posted an advertising sign on the fence, and drafted advertisements.

As it happened, B2 did not want Mr A representing the property, and B1 advised Mr A accordingly.

Campbell Scott phoned B1 on 13 February 2009. Mr Scott was an approved salesperson under the 1976 Act, and the sales manager at one of Company A's branches. B1 says that Mr Scott asserted that Company A had a valid contract; that he was willing to take it to the lawyers; and that he would make it very difficult for the listing to go ahead with any other agent.

This conduct, at a time when B1 and B2 were mourning the very recent death of their father/brother, is one of the complaints that the complainants have made against the agents involved in the sale of the property.

B1 visited the branch office, and reached an agreement with Mr Scott that the listing would proceed, as long as Mr A was not involved. The complainants say that although Mr Scott offered to terminate the listing, given his earlier threats they felt they had no option but to stay with the agency.

In due course, Company A invoiced the complainants \$XXX (on 16 February) for advertising the property. Mr Scott advised, by phone, that if the complainants signed a new listing form by 20 February, the advertising fee would be wiped.

By e-mail dated 19 February, B1 confirmed listing details. There were five explicit instructions. Item 5 was as follows: "Mr A is not to be involved in the sale of this property".

Mr Scott replied by e-mail dated 20 February 2009. He said (among other things) that Mr A would be involved with the listing, but that Mr Scott would manage access to the property and any interest that resulted.

The complainants replied on the same date and declined to list the property with Company A, because of Mr A's proposed involvement.

Following further correspondence, the listing proceeded. The parties agreed on 23 February 2009 that Mr A would not be involved.

On 26 February, B1 pointed out to Mr Scott that Mr A's name was still on various websites, and

sought clarification. On the same day, Mr Scott e-mailed that the website listings had been suspended the day before, and usually did not take effect until overnight.

In that e-mail, Mr Scott stated that he was waiting for the new agency [listing] to be returned, so Company A could commence the new campaign. Everything was in place to begin as per the parties' agreement.

Then he noted: "*however we have already once made the error of starting before we had a valid agency*". The Committee will come back to this statement in the discussion section below.

On 15 April 2009, a sale and purchase agreement for the property was signed. Possession date was 30 April 2009. There was a special condition in the agreement regarding the purchaser obtaining a building report to his satisfaction. If the purchaser, in good faith, was not satisfied with the building report, he had the option of giving notice, within a tight timeframe, terminating the agreement. Failure to give such notice within the timeframe meant that the purchaser was deemed to have waived the special condition.

In the weekend of 18 or 19 April, B1 and B2 were told by a woman from Company A who was at the property that Mr A would be showing the builder through the property for inspection on the following Tuesday. B1 and B2 thought this advice was clearly mistaken, given the agreement that Mr A would not be involved, and did not advise Mr Scott.

As it happened, the father of the agent who sold the house died shortly before that weekend. The funeral was on 20 April 2009. The agent was not able to show the builder through the property. Mr A did so. Understandably, when B1 and B2 learnt about this later, it became a source of real concern to them, since it appeared to be a flagrant breach of the listing terms they had negotiated with Mr Scott. More about that below.

The sale of the property settled on 12 May 2009. Despite the earlier agreement about the costs of marketing being waived, the estate was invoiced for marketing costs. In due course, those costs, which had been deducted from the sale proceeds, were reimbursed.

The complainants complain on the basis of the principle that this mistake should never have happened. They accept that the mistake has been admitted, and the money has been reimbursed. They deplore what they regard as poor accounting practice by the agency.

The invoice had Mr A's name on it. B1 and B2 complained to Mr Scott on 1 June 2009. He replied on 18 June 2009.

He recorded that the marketing costs had been reimbursed.

He explained that he considered "it would have been irresponsible" of him to have discussed the condition that Mr A not be involved with the sale of the property with anyone other than Mr A himself.

He denied threatening B1 and B2 during the course of the 13 February 2009 telephone conversation.

B1 and B2 felt they were getting nowhere, so they complained to the three directors of the company.

One of those complaints was answered by Mr R, a director of the company. Mr R was an approved salesperson under the 1976 Act.

Mr R carried out an in-house investigation, and met B2 and advised him of his findings. The complainants say that Mr R told them that Mr Scott should never have made the phone call on 13th February 2009.

He put his findings in writing, in an e-mail dated 2 July 2009. In that e-mail he said that the agent whose father had died forgot to arrange to have someone present at the property to give the builder access. The builder fronted up to Company A's branch office. Mr A was the only one there. Torn between his ethical duty to uphold the vendor's best interests, and his obligation to have no involvement with the sale, Mr A, concerned at what might happen if the builder was not given access to the property, elected to let him in.

Mr R stated that Mr A ought to have called Mr Scott or another manager, and asked them to meet the builder. He said that Mr A did not think of that at the time.

Mr R apologised for Mr A's further involvement, and said that Mr A also apologised for his involvement, and for any stress his involvement may have caused the complainants.

There is some discrepancy between the information that has been provided to the complainants about why Mr A was the one who let the builder through the property. Did the agent forget to sort out access arrangements for the builder? Did the staff (who did not know that Mr A was not to be involved with the sale) simply arrange for Mr A to give the builder access? Did the builder front up to the office at a time when only Mr A was available?

The complainants speculate that they have been lied to; and complain that Mr R failed to carry out a proper investigation of their complaints. They assert that Mr R has been negligent.

The complainants also complain about the fact that only one of a number of multiple offers was presented to them in writing. The Complaints Assessment Committee (the Committee) has carefully considered this aspect of the complaint. That aspect of the complaint is dismissed: there is no evidence to support it.

Summary:

The complainants conclude by saying that they believe it was Company A and Mr Scott's intention that Mr A would be the listing agent. The Committee takes that to be an allegation that despite agreement that Mr A would not be involved, the complainants allege it was Company A's intention that he would remain involved.

They complain that it was irresponsible of Mr Scott not to inform his staff that Mr A was not to be involved in the sale. They accuse Mr Scott of showing a fundamental disregard for the terms of the listing contract, and their situation, and that he told "lie after lie to cover things up", specifically in relation to Mr A getting access to the builder.

They complain that they were bullied into the second listing by Mr Scott, who took advantage of their lack of knowledge about whether or not the first listing was valid, in effect to force them into the second listing, albeit with an agreement that Mr A would not be involved with the sale.

Material Facts

Further information has been supplied to the Committee by the parties.

In his letter dated 16 June 2010, Mr Scott states that Mr B1 cancelled the original listing because he changed his mind, despite having represented to Mr A before he signed a listing that he had the authority to sign on behalf of both executors.

Mr Scott accepts that he disputed that the agency listing was invalid. He says he invited B1 to take legal advice about that. He denies making any threats during the 13 February 2009 telephone conversation.

He denies that the complainants were bullied into entering into the second listing. He agrees that

he offered the complainants the opportunity to cancel the first listing, despite the fact that he regarded the first listing as valid.

He says that the agreement was not that Mr A would not be involved "whatsoever in this listing", as the complainants stated in the complaint, but rather that Mr A would not be involved in the listing. He says Mr A was not involved in the listing.

He says that if the complainants had told him, on 18 or 19 April, that Mr A was going to let the builder into the property, he would have made sure that that job was attended to by someone else.

He explains that the invoicing issue was simply an unintentional human error, rectified as soon as possible, and that apologies for the error had been proffered on several occasions.

As to the access given to the builder, he says that the agent who sold the property was not aware Mr A was not to be involved; and Mr Scott himself was not aware that Mr A had been asked to assist with access. Had he been aware, he would have made other arrangements.

In a statement dated 17 June 2010, Mr A says that B1 told him he was authorised to sign the listing on behalf of both executors. He says that on 13 February 2009, B1 invited him to take photos of the property, and he was given access inside the house and outside to do so. He hung a sign on the property at the time. It was in fact four days later, he says, that B1 rang to withdraw the property from the agent.

In relation to access to the builder, he says that he was invited by the agent who had sold the property to open it up on 20 April to allow the builder access. He was aware that the unconditional date was imminent and that there was some urgency. He was the only person available from the office to assist. He says he was placed in an invidious situation, and thought that the interests of the vendors dictated that he provide access accordingly.

The complainants have replied. In their letter dated 9 July 2010, they raise a number of points. The Committee has already recorded many of them.

They say that Mr A knew he should not have given access to the building, but he did so regardless, and that was a breach of contract, negligent, and unprofessional.

They say that the threatening call they received from Mr Scott was heard on speakerphone, by both the complainants, B1's wife, and another real estate agent.

They draw attention to the fact that Mr Scott has admitted, in his 26 February 2009 e-mail, that the first listing was not a valid listing.

They are critical of the fact that Mr Scott failed to advise the rest of his staff that Mr A was to have nothing to do with the sale. They say his negligence in not advising the rest of the staff meant that he was kept out of the loop when decisions had to be made at short notice.

They say that they were never advised that the purchasers were nervous about buying the property. They speculate that the sale would not have been terminated if the builder could not have been shown through the property at another time.

The agent who overheard the 13 February 2009 conversation between Mr Scott and B1 and B2 has provided information to the investigator appointed to assist the Committee. She recalls that Mr Scott was not willing to release B1 and B2 from the contract, and said that they would be discussing this with their lawyer.

Mr B2 has also been interviewed by the investigator. He says: "*The guy went off his tree when B1 told him he wanted to cancel saying that they had spent \$1000s on advertising. B1 told the guy that he had got another agent and that is why he was ringing to tell him that. Scott then threatened*

in way that he would take it further... I think it was something to do with going to a lawyer. It was a very sad moment as they had lost their mother and then their father. They did not need this extra threat from the agent. It was in very poor taste."

Relevant Provisions

These complaints involve conduct that occurred before the Real Estate Agents Act 2008 (the 2008 Act) came into force. Section 172 of the 2008 Act is therefore relevant. It provides:

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 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.

(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

At the time the conduct occurred, Mr Scott, Mr R, Mr A, and Company A were all licensed or approved under the 1976 Act. All of them could have been complained about or charged under that Act in respect of that conduct. None of them have been dealt with under the 1976 Act in respect of that conduct.

The Committee therefore determined to investigate the matter under the 2008 Act.

Section 72 of the 2008 Act is relevant. It provides:

Section 72 of the Act provides as follows:

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.

At the time of the conduct, the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 were not in force. For the purposes of the consideration of these complaints, those Rules will be ignored.

Discussion

In respect of the complaint about the invoice, the Committee notes that Company A admits a

mistake was made; and both parties agree that the \$XXX has been refunded. Apologies have been proffered on several occasions. The Committee rejects the allegation by the complainants that a mistake of this type should never have happened. Mistakes happen, in any profession. One mistake is not a sign of incompetence or negligence. Viewed on its own, the Committee does not consider that this conduct could be classified as "unsatisfactory" under section 72 of the 2008 Act. This aspect of the complaint is therefore dismissed.

The complaint against Mr R centers around his investigation of the conduct of Company A, Mr A and Mr Scott. The complaint is that Mr R has conducted his investigation negligently. Putting aside the Committee's doubts about whether or not this constitutes "real estate agency work" as defined in section 4 of the 2008 Act, this aspect of the complaint is also dismissed.

Mr R has carried out a bona fide investigation. He has properly identified two errors, namely the initial 13 February 2009 conversation between the complainants and Mr Scott, which he says ought not to have occurred; and Mr A's part in allowing access to the builder, which he also accepts ought not to have taken place. He has offered apologies for both.

The Committee does not consider that any aspect of Mr R's conduct constitutes unsatisfactory conduct in terms of section 72 of the 2008 Act.

More problematic is Mr A's role in allowing access to the builder. Mr A knew that he was not permitted to be involved in the sale of the property. As Mr R has accepted, allowing the builder access was a technical breach of the terms of the listing agreement that the complainants had carefully negotiated with Mr Scott.

Mr Scott considered that it was inappropriate that he advise his staff that Mr A was not allowed to be involved in the sale in any way. The Committee considers that that view was misguided. His obligation under the listing agreement was to ensure that the terms of the contract he had negotiated with his clients were honoured. They were not.

Unfortunately, it is not precisely clear what happened. Whether the agent forgot to arrange to have someone at the house, and Mr A filled in the void, as it were; or whether the staff, ignorant of the arrangement, left it to Mr A to let the builder in is not a matter that the Committee is prepared to make a finding about, in a hearing conducted on the papers.

It is clear that Mr A should have made other arrangements, as Mr R has found.

The Committee is not quite as dismissive about the consequences which might have flowed from the builder not having access to the property as the complainants make out. The timeframe for the purchaser to obtain a building report was a tight one. Major problems can arise when, for one reason or another, a purchaser fails to satisfy a condition inserted into a contract which is entirely for the purchaser's benefit.

Mr A has apologised for his conduct. So has Mr R.

Is Mr A's conduct unsatisfactory, in terms of section 72 of the 2008 Act? On balance, the Committee does not consider that on these facts, inconclusive as they are, that a reasonable member of the public would regard his conduct as falling short of the standard expected from a reasonably competent licensee; or that the conduct would reasonably be regarded by agents of good standing as being "unacceptable". The complaint against him is therefore dismissed.

Is Mr Scott's conduct in relation to this issue "unsatisfactory" in terms of the 2008 Act? The Committee does not consider that Mr Scott has properly managed Company A's contractual obligations in respect of the listing agreement. Staff ought to have been advised of the situation. Mr A ought to have known that in any situation arose where his involvement might be required, he simply had to take the advice of Mr Scott or another manager. The blame for that, we consider, falls squarely on Mr Scott's shoulders.

Nevertheless, the Committee does not consider that this involvement by Mr A, technical breach of the terms of the listing agreement though it was, warrants the degree of censure of Mr Scott that a finding of unsatisfactory conduct under the 2008 Act denotes.

This aspect of the complaint, whether it be against Mr Scott or Company A itself, is also dismissed.

There is one point that the Committee wishes to make clear, before moving on to consider the final aspect of the complaint, which is whether or not Mr Scott's conduct on 13 February 2009 was unsatisfactory. That point relates to monies paid to Mr A as the listing agent.

The complainants assert that it was Company A's and Mr Scott's intention that Mr A would always remain involved with the sale. That assertion is not based on any evidence, and is rejected by the Committee. But the Committee suspects that the complainants are not aware of the difference between a fee paid to an agent who lists a property for sale, and a commission paid to the agent who sells the property.

Mr A was the listing agent. Irrespective of the specific terms of the second listing agreement, as between Mr A and his employer, Company A, Mr A was always entitled to a fee as the listing agent. As the Committee understands it, he was paid a listing fee of approximately \$XXXX.

The arrangement between the complainants and Company A did not mean that Mr A would not be entitled to his contractual listing fee.

Mr A did not get a commission fee. He was not the agent who sold the property. He was not involved in marketing the property at all, on the evidence that the Committee has been provided with. If he had been paid a commission fee that would have been evidence that Mr A had been involved in marketing the property.

Put another way, the fact that Mr A got paid a listing fee does not establish in any way that Company A or Mr Scott intended, contrary to their contractual obligations, to keep Mr A involved in the sale of the property.

We now turn to the final aspect of the complaint, relating to Mr Scott's conduct during the course of the 13 February 2009 telephone conversation with the complainants, overheard by B1's wife, and by an independent real estate agent.

For what it is worth, Mr R says that conversation ought never to have taken place. The Committee agrees entirely.

The agent does not recall threats as such, but does remember that Mr Scott was not willing to release B1 and B2 from the first listing agreement. She remembers that lawyers were mentioned.

B2 describes Mr Scott as "going off his tree". In his interview, he uses the word "threat" twice.

B1 described the threat of a lawyer being raised by Mr Scott. He also describes Mr Scott as threatening to make it difficult for B1 and B2 to market the property through other agents.

Mr Scott says he used the word lawyer, but only in the sense of offering B1 the opportunity to take legal advice. He denies that he threatened to make it difficult to list the property elsewhere; and doubts whether you could do such a thing.

B1 had just lost his father. There was clearly a threat made by Mr Scott that B1 and B2 would not be released from the listing agreement. Subsequently, in a 26 February 2009 e-mail, Mr Scott has stated that the first listing arrangement was not valid.

On the basis of the information provided to the Committee, the Committee accepts that during the course of the 13 February 2009 telephone conversation, Mr Scott refused to release B1 and B2 from the first listing agreement; threatened them with legal action; and threatened to make it difficult for them to list the property elsewhere.

The complainants were not to know whether or not the first listing arrangement was legally binding, or whether Mr Scott had the ability to prevent the property being listed by other agencies. Rightly or wrongly, the Committee accepts that B1 and B2 felt obliged to enter into the second listing

arrangement with Company A, even though Mr Scott said they could back out of it if they wanted.

Was this unsatisfactory conduct? Without hesitation, the Committee finds that the conduct was conduct that agents of good standing would find unacceptable. Irrespective of the rights or wrongs of the validity of the listing arrangement, Mr Scott's timing and sense of judgment were poor. If ever there was a case where a client should have been told "Fair enough, if you do not want us to list the property for sale, we will not do so; but if we can help you in any way, do not hesitate to come back to us" this was that case.

In the circumstances, the conduct was therefore unsatisfactory conduct, a breach of section 72 (d) of the Act.

Decision

After conducting an inquiry into the complaint, pursuant to section 89(1) of the 2008 Act, the Committee held a hearing with regard to that complaint. In accordance with section 90(1) of the 2008 Act, the Committee conducted the hearing on the papers, and pursuant to section 90(2) the Committee's determination was made on the basis of the written material before it.

The Committee has determined under section 89(2)(b) of the 2008 Act that it has been proved, on the balance of probabilities, that Mr Scott has engaged in unsatisfactory conduct.

The complaints against all other parties are dismissed.

Orders

Section 172 (2) of the 2008 Act prevents the Committee from making an order against Mr Scott that could not have been made against him in respect of the conduct at the time the conduct occurred. At the time the conduct occurred, the 1976 Act applied.

Mr Scott was an approved salesperson under the 1976 Act. He was not a member (i.e. a licensed real estate agent).

The conduct which is the subject of this complaint falls at the lower end of the scale of unsatisfactory conduct. It does not rise to the level of misconduct which could have resulted in orders being made against Mr Scott by the Licensing Board under the 1976 Act.

At the time of the conduct, Mr Scott could not have had orders made against him at the level of a Regional Disciplinary Committee: no such committees had ever been established under the 1976 Act.

Disciplinary proceedings could have been taken before Regional Disciplinary Sub-Committees for a breach of the REINZ Rules. The maximum fine was \$750 and a censure. But such an order could only have been made against the licensee who was in effective control of Mr Scott and not against Mr Scott himself.

It follows that orders could not have been made against Mr Scott under the 1976 Act in respect of the conduct at issue in this proceeding.

All the Committee can do is record a finding of "unsatisfactory conduct" under the 2008 Act. It cannot impose any further penalty: see Decision No. [2010] NZREADT 06, 19 October 2010.

Publication

One of the Committee's functions pursuant to section 78(h) of the 2008 Act is to publish its decisions.

Publication gives effect the purpose of the 2008 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 Committee may appeal by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.

Appeal is by way of written notice to the Tribunal. 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 'Morten', written over a faint, illegible printed name.

PA Morten
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 17 January 2011