

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

And

In the Matter of **Complaint No: CA3016776**

In the Matter of Shaun Higgins
License Number: 10010580

Decision of Complaints Assessment Committee

Dated this 12th day of April 2011

Complaints Assessment Committee:

CAC10037

Chairperson: Sandra Gill

Deputy Chairperson: Robyn Wilson

Panel Member: Denise Bovaird

Complaints Assessment Committee

Decision on Orders

1. The Complaint

- 1.1. This is a complaint lodged with the Real Estate Agents Authority (the Authority) by Ms A on 16 March 2010 against Mr Shaun Higgins (Mr Higgins). Mr Higgins holds a salesperson's licensee under the Real Estate Agents Act 2008 (the Act) and is employed by Gold Real Estate Group Limited trading as Harcourts Gold as part of the Harcourts Group (Harcourts).
- 1.2. Ms A's complaint is that despite Company A holding a Sole Agency Agreement on a property, Mr Higgins took prospective buyers through the property and wrote up a Sale and Purchase Agreement without having a Listing Authority nor any formal discussion or agreement with Company A having taken place.

2. Material Facts

- 2.1. Ms A outlined her complaint in a letter dated 9 March 2010 and provided supporting documentation.
- 2.2. Ms A states that Mr W, a salesperson for Company A listed a sole agency in Christchurch (the property) on 4 February 2010.
- 2.3. The property had two Company A signs displayed which clearly informed people that Company A had the listing for the property (photos provided).
- 2.4. On 16 February 2010 at 9.30am, Ms A was informed by Mr W that Mr Higgins had shown a person through the property and was working on a Sale and Purchase Agreement with a prospective purchaser. The vendor arrived with Mr W.
- 2.5. Ms A states that Mr W informed her that he had told Mr Higgins that the property was listed as sole agency with Company A but that Mr Higgins told Mr W that he had checked with his manager and been told it was okay.

- 2.6. Ms A then explained to the vendor that Harcourts had no listing for the property and that he (the vendor) should not be put in the position of paying two commissions.
- 2.7. At 2.30pm that afternoon, Ms A called the vendor and was informed by the vendor that Mr Higgins had the Sale and Purchase Agreement fully signed and that Harcourts was expecting a full commission but was willing to negotiate. During the course of the conversation the vendor informed Ms A that Mr Higgins had arrived with his manager to get a listing signed.
- 2.8. On 18 February 2010 Ms A phoned the vendor who informed her that Harcourts had insisted he sign a Listing Authority as they were not prepared to continue the process without one in place.
- 2.9. Later that day, Ms A wrote to the manager at Harcourts requesting an explanation. She states that she received no reply.
- 2.10. On 22 February 2010 Ms A phoned Harcourts requesting a copy of the Sale and Purchase Agreement. She states she did not receive a copy, nor did she receive a return phone call.
- 2.11. Ms A goes on to state that the vendor also came to her office on 22 February to pay the commission owing to Company A with a post-dated cheque that would be banked into the Trust Account once confirmation of the sale was provided.
- 2.12. Ms A then wrote to the office administrator at Harcourts on 25 February 2010 requesting a copy of the Sale and Purchase Agreement. She states that once again no copy was provided.
- 2.13. On 3 March 2010 Ms A received confirmation that the sale had been cancelled.
- 2.14. Ms A states that it was only after the sale of the property fell through that the manager of Harcourts contacted her.
- 2.15. Mr Higgins replied in a letter dated 26 April 2010 and also provided supporting documentation.
- 2.16. Mr Higgins states that he first saw the property on a website and had a client who he thought might be a possible buyer.

- 2.17. Mr Higgins phoned the vendor and discussed this with him. The vendor was happy for Mr Higgins to show his client the property. Mr Higgins states that there was no mention of Company A during that conversation.
- 2.18. On 10 February 2010 Mr Higgins phoned the vendor and made arrangements to show his client the property.
- 2.19. Mr Higgins states that he attempted to arrange a time for the vendor to sign a Listing Authority but the vendor was always busy. He states that the vendor informed him that he was happy for Mr Higgins to show the property to his client and would sign a Listing Authority if the client was interested in purchasing it.
- 2.20. Mr Higgins did see the Company A sign when he arrived at the property but assumed it was for a different unit.
- 2.21. Mr Higgins goes on to state that when he arrived at the vendor's unit, there was a second Company A sign but that it did not have any wording on it signifying an exclusive listing so he took his client through the property.
- 2.22. Mr Higgins then had a discussion with the vendor about the Company A sign. He states that the vendor informed him that he had just listed with Company A but couldn't remember exactly when. Mr Higgins informed the vendor that he (Mr Higgins) would not have taken a client through the property if he had known it was listed with another company.
- 2.23. Mr Higgins states that the vendor then informed him that if he could get \$215,000 for the property, the vendor would be happy to pay both the Harcourts commission and Company A a 1% commission.
- 2.24. Mr Higgins states that given the property was listed on TradeMe and the fact that the Company A sign did not indicate an exclusive listing "*I could reasonably assume it was a general listing*".
- 2.25. Mr Higgins says that it is incorrect to state that he did not have a Listing Authority signed when the Sale and Purchase Agreement was signed. He says that "*the contract was not accepted, fully signed or dated until the vendor was happy with and had signed a Listing Authority*".

- 2.26. Mr Higgins states “*I believe I acted in the best interest of the vendor, showing a high level of professional conduct and client care throughout this process in trying to achieve a maximum price for the property for him. I completely disagree with the accusations of misconduct*”.
- 2.27. Mr Higgins provided a copy of an e-mail from the vendor which stated “*I had agreed to be presented an offer from your potential purchasers but would not sign an agreement with Harcourts as I already had an existing contract with Company A*”.
- 2.28. The vendor goes on to state “*On receipt of the purchaser’s contract I signed the listing agreement and signed the Sale and Purchase Agreement*”.

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. Section 127 of the Act states

127 Approved guide to be provided before agency agreement for residential property signed

- (1) An agent must not enter into an agency agreement with a person for the sale of residential property unless the agent or a licensee on the agent's behalf—
 - (a) has provided the person with a copy of the approved guide before he agreement is signed by or on behalf of the person; and
 - (b) has received a signed acknowledgement from the person that the person has been given the approved guide.

3.5. Mr Higgins does not appear to have provided the vendor with an approved guide as set out in section 127 along with any signed acknowledgement that he had done so.

3.6. 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."

3.7. Rule 6.2 deals with standards of professional conduct. Rule 6.2 states: "A licensee must act in good faith and deal fairly with all parties engaged in a transaction."

3.8. Mr Higgins acknowledges that he did see the Company A signs and although he thought

the initial one referred to a different unit, he acknowledges that he did realise that the second sign related to the vendor's unit.

- 3.9. While Mr Higgins states that "*I could reasonably assume it was a general listing*", he was fully aware that Company A did have a listing for the property, and this was confirmed to him by the vendor.
- 3.10. Mr Higgins made no attempt to contact Company A to discuss the fact that he might have a prospective purchaser interested in the property and went on to take clients through the property and write up a Sale and Purchase Agreement for the property without any contact with Company A.
- 3.11. Mr Higgins did not have a listing agreement between himself and the vendor prior to taking his client through the property nor when he filled in the Sale and Purchase Agreement which the prospective purchaser signed prior to taking it to the vendor.
- 3.12. By his actions, Mr Higgins ignored the Company A agency listing for the property, and did not check to ascertain what type the listing was. The vendor did inform Mr Higgins that he "*had just listed with Company A but couldn't remember exactly when*" so a phone call by Mr Higgins to Company A would have immediately clarified the situation.
- 3.13. While Mr Higgins states "*I believe I acted in the best interest of the vendor, showing a high level of professional conduct and client care throughout this process in trying to achieve a maximum price for the property for him. I completely disagree with the accusations of misconduct*", the fact remains that the vendor was caught in the middle of Mr Higgins' lack of communication with the agency that held the listing for the unit.
- 3.14. Rule 9.5 states that: "An appraisal of land or a business must be provided in writing to the client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses."
- 3.15. Mr Higgins did not undertake this requirement of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.
- 3.16. 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.”

- 3.17. Mr Higgins did not have a signed agreement between himself and the vendor prior to taking his client through the property nor when he wrote the Sale and Purchase Agreement which his prospective purchaser signed prior to Mr Higgins taking it to the vendor. This is confirmed in the e-mail from the vendor dated 5 May 2010.
- 3.18. In summary, Mr Higgins made no attempt to contact Company A to discuss the fact that he might have a prospective purchaser interested in the property and went on to take clients through the property and write up a Sale and Purchase Agreement for the property without any contact with Company A nor any signed listing agreement in place, nor having provided the vendor with the approved guide.
- 3.19. Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee (the Committee) conducted a hearing with regard to the complaint under Section 89(1) of the Act.
- 3.20. The hearing was conducted on the papers pursuant to Section 90 of the Act. 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. For the reasons set out above, Ms A’s allegations against Mr Higgins have met the test for a finding of unsatisfactory conduct.

5. Decision

- 5.1. The Committee met on 7 December 2010 to consider the complaint against Shaun Higgins. The Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Higgins has engaged in unsatisfactory conduct.
- 5.2. Following the decision reached on 7 December 2010, both Ms A and Mr Higgins were given the opportunity to make submissions regarding penalty and both made written submissions which were then discussed by the Committee prior to a final decision being made regarding penalty.
- 5.3. The Committee also requested that the investigator authorised to assist the Committee with its inquiry obtain a record of any previous disciplinary decision in respect of Shaun Higgins under either the Real Estate Agents Act 1976 or the Act, if any such decision existed, provide it to the Committee and Mr Higgins and Ms A.
- 5.4. Mr Higgins has no previous disciplinary record under either, the Real Estate Agents Act 1976 nor the Act.

6. Orders

- 6.1. 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.

6.2. After receiving submissions from both Ms A and Mr Higgins, and taking these submissions into account, the Committee makes the following Order under section 93(1) of the Act.

6.3. An Order that Mr Higgins is to pay to the Authority a fine of \$2,000 under section 93(1)(g) which is to be paid to the Authority within 30 days of receipt of this Determination.

6.4. The Committee's findings of unsatisfactory conduct, and the imposition of the penalty set out above, are not only based on Mr Higgins failure to contact the sole agent, but also on the fact that he has not adhered to the explicit rules in the Professional Code of Conduct and Client Care.

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

- 7.3. 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.
- 7.4. 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.

8. Right of Appeal

- 8.1. A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against a determination of the 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.

Signed



Sandra Gill
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 12 April 2011