

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

And

In the Matter of **Complaint No: 3105066**
In the Matter of Maurice Weaver
Licence Number: 10004988

Decision of Complaints Assessment Committee

Dated this 22nd day of December 2010

Complaints Assessment Committee:

10034

Chairperson: PA Morten

Deputy Chairperson: Denise Bovaird

Panel Member: Rob Crozier [not present]

Complaints Assessment Committee
Decision finding unsatisfactory conduct

The Complaint

Mr C (the complainant) operates a company called Company B, which buys and sells properties, and has been doing so for several years. They have dealt with a number of real estate agencies over that period.

Company B had five sections for sale.

Mr Weaver is a licensed salesperson. At the time of the conduct which is the subject of this complaint, he was an approved salesperson working for Coutts & Co Limited (which trades under the Harveys franchise group).

In 2009, Mr Weaver phoned and said he had a client who was interested in two, and possibly more, of 5 sections Company B had for sale.

The complainant says that he advised Mr Weaver at the outset that a development contribution was payable on all sections. The sections were bare sections. The purchaser was a builder. As soon as a builder applies for a building consent, the council invoices the builder for the development levy.

Negotiations in April 2009 for the sale of lot 4 came to nothing, because the purchaser had no access to finance.

Mr Weaver contacted Mr C again, in July 2009. A listing form was signed on 25 July 2009.

Mr Weaver came armed with a sale and purchase agreement. Mr C asked Mr Weaver whether or not the agreement should specifically refer to the development contribution, which was to be met by the purchaser. Mr Weaver told him that there was no need to do so: the purchaser had already done due diligence, and had made an unconditional offer.

Acting on that advice, on 26 July 2009, Company B entered into a sale and purchase agreement in respect of Lot 4, for \$169,000.

In October 2009, the builder contacted Mr C, and asked for Company B to pay the building development levy of \$10,442.

Company B contacted Mr Weaver, and told him Company B had no intention of paying the building development levy, as they had disclosed to Mr Weaver on many occasions that this was something the purchaser would have to pay. The complainant says that Mr Weaver told him he thought the builder was "just trying it on".

Mr Weaver does not respond to this allegation in his reply.

In due course, the builder took the case to the Disputes Tribunal. The agent denied that he had ever been told about the need for the purchaser to pay the development levy. Company B has

been ordered to pay the development cost.

In effect, Mr C's company has only received \$158,600 for the section. Company B maintains that they would never have sold the Lot for that price "any day of the week".

Mr C complains that Company B was misled by Mr Weaver into signing the contract. Mr Weaver assured him it was unnecessary for the contract to be amended to include a specific reference to the development contribution levy. He states that Mr Weaver was negligent in not writing the development contributions clause into the contract.

Material Facts

By letter dated 10 November 2009, a director from Coutts & Co wrote to a law firm denying that Company B had ever advised there was an outstanding levy; and saying that they therefore did not advise the buyer that there was a deferred development levy to be paid.

In a response to the complaint dated 20 June 2010, Mr Weaver says that Mr C never referred to the fact that Company B had deferred the development contribution on all sections in the subdivision. In his view, that ought to have been a matter that was specifically included in the listing agreement that Mr C signed. It was not.

In that response, he states however that: "There was mention of a financial contribution payable prior to uplifting a building consent". He says he assumes that this is what Mr C talked about with them. But he repeats that there was no mention of a deferred payment for the levy.

As to the financial contribution, Mr Weaver specifically records that he had to pay a financial contribution prior to uplifting a building consent in respect of his own property, and remarked how expensive it was despite the fact that the property was already developed.

He argues, despite that, that the ability to defer payment of the levy is something that is little-known, the point being that it was therefore highly important there was reference to it in the agency listing.

He makes the point that another agency had recorded on their agency listing for Company B the fact that there was a " development contribution to pay (\$12,000 approximately)".

Relevant Provisions

172 Allegations about conduct before commencement of this section

- (2) (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.

- (3) 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.

Mr Weaver was an approved salesperson under the Real Estate Agents Act 1976 at the time of the conduct about which Mr C complains. Mr C could have complained about that conduct under the 1976 Act. Mr Weaver has not been dealt with under the 1976 Act in respect of that conduct.

The matter can therefore be considered under section 72 of the Real Estate Agents Act 2008.

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.

Discussion

On 3 August 2010, Mr C replied to the information provided by Mr Weaver. He reiterates that he specifically asked Mr Weaver whether a clause needed to be added regarding the development contribution. Mr Weaver said the agreement did not need to include such a clause.

He says that they were happy to fill in the listing form, really as a matter of form. Mr Weaver had come up with an unconditional sale and purchase agreement offer. Company B was counter offering on price. If the offer was accepted, the section was sold. So the listing agreement was filled in very quickly.

He makes the point that it was not Company B that filled in the listing form. Mr Weaver did. There was no indication by Mr Weaver that the listing form was needed to market the property. Quite the contrary: Mr Weaver said that the section was sold, subject to agreement on price. He states that Mr Weaver made no attempt to complete an accurate listing form, or gather relevant information, or present the property for sale. Why would he, he asks, Mr Weaver was selling it unconditionally, and this was simply a matter of filling out forms.

He states that having just been told there was no need to alter the sale and purchase agreement to include a reference to the development levy, it is no surprise that Company B did not suggest that the listing form needed to include a reference to the fact that the buyer would have to pay the development levy!

He makes the point that Mr Weaver was made aware of that requirement to pay the development levy, it was part of the negotiations, and they only signed the sale and purchase agreement after Mr

Weaver said there did not need to be any specific reference to the development levy in it.

He refers to a similar exercise Company B subsequently went through with another agent, who very carefully filled in the listing forms when she first listed the property. That agent completed two sale and purchase contracts with a clause covering the deferred building development levy and the fact that the purchaser was obliged to pay it when collecting the building consent.

Mr C notes that the sale and purchase agreements had sale prices of \$168,000, showing that the market price was not the \$159,000 that Lot 4 has in effect been sold for.

Mr C refers to the fact that Mr Weaver was aware, from his own personal experience, of the need to pay a levy, and that the levy was significant, it was not just a matter of a few hundred dollars. He states that the levy Mr Weaver paid when he built an additional house on his property is exactly the same development contribution levy that Mr C told him any purchaser of the sections would also have to pay.

The Committee has carefully considered the submissions made by the complainant and the agent.

Mr Weaver acknowledges that Mr C had a discussion with him about the fact that there was "a financial contribution payable prior to uplifting a building consent". It is implicit that this was a discussion that took place before the sale and purchase agreement was executed by Company B.

There may be confusion between the parties about the name by which this financial contribution is called. But it is clear from Mr C's submissions, and from what Mr Weaver has said, that the financial contribution Mr Weaver paid was the same development levy that Mr C discussed with him and told him would need to be paid by the purchaser.

There is simply no logic in Company B agreeing to sell the section for \$169,000, with a deposit of \$250.00, when the balance of the purchase price was not due to be paid until settlement, a date no later than seven months from the date the purchaser entered into the sale and purchase agreement.

There is no dispute that as soon as the builder applied for building consent, the council would invoice the builder for the development levy. If what Mr Weaver says is true, that meant that Company B would have to pay out the approximately \$11,000 levy at the outset: after all, attached to the sale and purchase agreement were final building plans, that Company B signed off as part of the sale and purchase agreement.

Why would Company B pay that sort of money out, when there would be a six or seven months delay before the purchaser settled the sale of the section with it? That simply makes no sense.

In the circumstances, the Committee accepts that Mr C told Mr Weaver about the need for the purchaser to pay the development levy.

Mr Weaver is silent about the assertion by Mr C that he asked Mr Weaver's advice about whether or not there should be specific reference to the development levy in the sale and purchase agreement. Again, the Committee accepts Mr C's evidence that he raised the point with Mr Weaver, and that Mr Weaver advised, incorrectly as we now know, that there was no need to do so.

Real estate agents commonly negotiate contracts between vendors and purchasers, and procure the making of contracts. The quid pro quo is that they are paid a commission by the principal for

that aspect of their expertise.

In this case, Mr Weaver failed to give his client proper advice about the inclusion of a special clause in the sale and purchase agreement. If this was a matter outside his experience, then Mr Weaver ought to have ensured that the matter was attended to by Company B's solicitors. He did not do so.

As a consequence, Company B has ended up meeting the development costs which ought to have been paid by the purchaser, had Mr Weaver paid proper attention to his client's request.

The Committee determines that that is conduct which falls short of standards a reasonable member of the public is entitled to expect from a competent agent; and that it is also conduct which would reasonably be regarded by agents of good standing as unacceptable.

The Committee therefore finds Mr Weaver guilty of unsatisfactory conduct, a breach of section 72 of the 2008 Act.

Decision

After conducting an inquiry into the complaint, pursuant to section 89(1) of the Real Estate Agents Act 2008, the Committee held a hearing with regard to that complaint. In accordance with section 90(1) of the 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 REAA 2008 that it has been proved, on the balance of probabilities, that the agent has engaged in unsatisfactory conduct.

Orders

Section 172 (2) of the 2008 Act prevents the Committee from making an order against Mr Weaver 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 Weaver 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 Weaver by the Licensing Board under the 1976 Act.

At the time of the conduct, Mr Weaver 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 Weaver, and not against Mr Weaver himself.

It follows that orders could not have been made against Mr Weaver 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 Act is to publish its decisions.

Publication gives effect to the purpose of the Real Estate Agents 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 Complaints Assessment 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

PA Morten

Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 22 December 2010