

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

And

In the Matter of **Complaint No: CA3489213**

In the Matter of **Michael Benns**
License Number: 10000715

Decision of Complaints Assessment Committee

Decision on Orders

Dated this 2nd day of February 2011

Complaints Assessment Committee:

CAC10041

Chairperson: Chris Rogers

Panel Member: Denise Bovaird

Complaints Assessment Committee

Decision on Orders

Background

By its decision issued on 12th November 2010 the Committee (CAC10041) determined under Section 89 (2) (b) of the Real Estate Agents Act 2008 (the Act) that it had been proved on the balance of probabilities that licensee Michael Benns had engaged in unsatisfactory conduct in terms of section 72 (a) and 72 (b) of the Act.

Having made a determination under Section 89 (2)(b) the Committee may make one or more of the orders set out in Section 93 of the Act.

Parties to the complaint were invited to make submissions on orders.

The Committee received and considered submissions on behalf of licensee Michael Benns and Complainant Mr C.

Relevant Provisions

Having made a finding of unsatisfactory conduct against Michael Benns the Committee must now decide what orders, if any, should be made under s 93 of 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.

Complainant's Submission

In summary, submissions on behalf of Mr C (the complainant) propose that the Committee orders a cancellation or refund of fees charged pursuant to s93 (1)(e) of the Act.

The complainant believes that an order of this nature would potentially prevent licensee Michael Bennis benefiting financially from work considered to be unsatisfactory.

Respondent's Submission

In summary, submissions on behalf of licensee Michael Bennis propose that a finding of unsatisfactory conduct pursuant to s89 (2)(b) of the Act would in itself be sufficient censure.

The respondent further suggests that any orders relating to a refund or cancellation of fees for service would be inappropriate given the circumstances.

Discussion

The Committee has carefully considered submissions from all parties to the complaint.

It is also important to consider the stated purpose of the Act:

'The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work'

Whilst the Committee has found that the conduct of licensee Michael Bennis was unsatisfactory, we consider the conduct to be at the lower end of the scale.

We found no evidence of deceit or misrepresentation that might have elevated the nature of the conduct beyond an inadvertent error of judgment.

We believe that licensee Michael Bennis simply did not take reasonable steps to ensure that his assumption of comprehension and understanding on the part of his customer client was in fact correct.

Neither did he encourage his customer client to seek independent advice that may have identified any misunderstanding.

If the proposed title requisition and petition to cancel the contract made by the purchaser is accepted by the vendor then the deposit would be refundable to the purchaser.

Should the vendor not accept the requisition as bone fide then they have avenues of action available to them to enforce the contract or have it cancelled in which case the retention, refund or dispersal of the deposit being held by Barfoot and Thompson is a matter of contractual positions to be resolved between the parties.

This is clearly not an issue to be determined by this Committee.

Decision

The Committee finds as follows:

A decision of unsatisfactory conduct will be entered against the record of licensee Michael Benns.

The Committee does not consider that it is necessary to make any of the other orders specified in section 93(1) of the Act.

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 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, consisting of several loops and a long horizontal stroke extending to the right.

Chris Rogers
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 2 February 2011