

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

Dated this 12th day of November 2010

Complaints Assessment Committee:

CAC10041

Chairperson: Chris Rogers

Panel Member: Denise Bovaird

Complaints Assessment Committee

Decision finding unsatisfactory conduct

The Complaint

The complainant maintains that an unconditional contract for the sale of a property belonging to his wife Mrs C in Auckland (the property), failed to settle due to the negligent conduct of licensee Michael Bennis.

The complainant believes that while introducing a purchaser to the property and subsequently negotiating a sales contract, Michael Bennis failed to adequately inform the purchaser of potential water ingress issues related to the complex, issues that had been clearly communicated by the vendor to both Barfoot and Thompson and licensee Michael Bennis.

Material Facts

The property was listed for sale through the agency of Barfoot and Thompson on 14 September 2009.

An offer from Ms P to purchase the property for \$90,000 was presented to the vendor by licensee salesperson Michael Bennis on 8 January 2010. Ms P was not able to inspect the property directly due to tenants being in-situ.

The offer was countersigned at \$95,000 by the vendor and accepted by the purchaser.

Included in the original contract is an acknowledgement by both parties that they had been supplied with a copy of the Real Estate Agents Authority 'Residential Property and Sale and Purchase Agreements Guide' prior to signing.

Subsequent to acceptance, a further term of sale (clause 16) was added to the contract by licensee Michael Bennis and initialed by first the vendor and then the purchaser.

The additional term outlined an acknowledgement by the purchaser that issues and /or potential issues of water penetration to the property had been disclosed to the purchaser by the vendor.

The additional term also contained a statement indemnifying the vendor against liability for any expense or loss suffered by the purchaser in relation to the defect or potential defect so disclosed.

A deposit of \$10,000 was paid by the purchaser to the Barfoot and Thompson trust account.

On 19 January 2010 the purchaser through her solicitor requisitioned the title to the property and purported to cancel the agreement.

The ability of the purchaser to cancel the agreement is in dispute and to our knowledge the deposit remains in trust.

Discussion

There is no doubt that an unconditional sale and purchase agreement for the property was negotiated and completed by licensee Michael Bennis.

There is also no doubt that clause 16 in the agreement clearly spells out acknowledgment by both parties of defects or potential defects to the subject property.

Barfoot and Thompson's listing authority, for the subject property, contains reference to water penetration issues.

After considering statements from all parties it seems recollections of the events surrounding the sale differ in fact.

Licensee Michael Bennis maintains that full disclosure of potential water penetration was made to the purchaser during the sales process and prior to the purchaser signing the agreements.

The purchaser maintains that she was unaware of the potential water penetration issues until being made aware by her solicitor subsequent to him receiving a copy of the completed contract.

The complainant maintains that the further term of sale (clause 16) outlining acknowledgement of the water penetration issue, was added at their insistence.

Licensee Michael Bennis maintains that clause 16 was inserted by his own volition to satisfy the complainant and to clarify verbal advice he had given to the purchaser.

The purchaser maintains that her understanding of written English is poor and that she accepted licensee Michael Bennis' word that the contents of the agreement were safe for her to agree to and to sign.

Licensee Michael Bennis has stated in an interview on 21 July 2010 that he considered the purchaser's understanding of spoken English to be good enough to fully understand the importance of the water penetration issue.

In an interview conducted on 9 August 2010, licensee Michael Bennis stated that although he believed the purchaser's understanding of written English to be poor, the purchaser understood the meaning of clause 16 when he asked her to read it.

Licensee Michael Bennis also stated he was aware that the purchaser may have been relying on trust and not really comprehending what was in writing. While knowing this to be the case, licensee Michael Bennis appears to have made no attempt to ensure an adequate understanding of the contract by directing the purchaser to seek independent advice or the assistance of legal counsel before moving ahead with a signed agreement.

The question of how the deposit is to be dealt with is dependent on the outcome of the dispute over cancellation and interpretation of the contract of agency between the vendor and Barfoot and Thompson. It is in any case a matter for consideration by a different authority.

The Committee finds that whilst technically completing the function of agency in that an unconditional contract was negotiated and confirmed for the sale of the subject property, the licensee has failed to adequately ensure that the purchaser was fully cognisant of the content and implications of the further terms of sale included in the contract for sale and purchase.

Relevant Provisions

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.

Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009

6 Standards of professional conduct

6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects, the licensee must either–

- (a) obtain confirmation from the client that the land in question is not subject to defect; or
- (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

Decision

The Committee has determined this complaint by a hearing on the papers, in accordance with section 90(1) of the Real Estate Agents Act 2008 (the Act).

After considering the information provided by the investigation the Committee finds that the licensee has failed to adequately ensure that the purchaser was fully cognisant of the content and implications of the further terms of sale included in the contract for sale and purchase.

The Committee has determined under Section 89 (2) (b) of the Act that it has been proved, on the balance of probabilities, that the licensee, Michael Bennis, has engaged in unsatisfactory conduct in terms of section 72 (a) and 72 (b) of the Act.

Penalty

Having determined under Section 89 (2)(b) of the Act that the licensee, Michael Benns, has engaged in unsatisfactory conduct the Committee has the power by virtue of Section 93 of the Act to make an order in the nature of a penalty.

The Committee will conduct a separate hearing on the papers to decide what orders, if any, should be made under s 93 of the Act.

Licensee Michael Benns and Mr C (the complainant) may file submissions within 10 working days of receipt of this decision on what orders, if any, should be made.

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.

Publication

The Committee directs that this decision is to be published.

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.

The Committee has yet to finally determine this complaint because the parties are being given an opportunity to make submissions on orders before the Committee determines what orders should be made, if any.

The Committee considers that the 20 working day appeal period does not commence until it has

finally determined this complaint by deciding what orders should be made, if any.

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 be 'Chris Rogers', with a large loop at the start and a long tail.

Chris Rogers
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 12 November 2010