

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

And

In the Matter of **Complaint No: CA3586332**

In the Matter of **Hoda Haddad**
License Number: 10011625

Decision of Complaints Assessment Committee

Dated this 7th day of December 2010

Complaints Assessment Committee:

CAC10044

Chairperson: Paul Morten

Deputy Chairperson: Anna Tierney

Panel Member: Barrie Barnes

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

1. Ms C (the complainant) complained in May 2010 about the conduct of Hoda Haddad (the agent). Ms Haddad is licensed as a salesperson. She works for Image Realty Ltd (trading as Harcourts).
2. The complainant operated a cafe business, called Company A. The business was owned by Company C, a company in respect of which the complainant was apparently the sole director and shareholder.
3. The agent was retained to sell the business. An "authority to sell business" form was signed by the complainant on 29 January 2010. The form records the business name as "Company A". It contained a commission clause. Because the meaning of the clause is contentious, we set it out in full:
"If a sale, exchange or lease is effected by you or through your instrumentality or to anyone introduced by you at such price and such conditions as I/We agree to accept, I/We will pay your fee on the sale price to \$100,000, \$6000 over \$100,000, 6% plus GST on all fees."
4. On 18 March 2010, a purchaser agreed to buy the business for \$17,000 plus GST (if any).
5. On 25 March 2010, the complainant received a commission invoice, for \$6750, approximately 40% of the business price.
6. The complainant's solicitors wrote a letter dated 29 March 2010 to the agency, listing a number of items for concern, and requested a review of the commission the agency proposed charge. The commission has not been altered.
7. The agent responded by a letter dated 31 March 2010.
8. The complainant complains that:
 - A. she was forced to sign the listing agreement under pressure, without consultation;
 - B. the commission she was forced to pay on sale of her business was 40% of the sale price, not the 6% commission the salesperson represented the complainant would have to pay;
 - C. she was pressured to sign a business sale and purchase agreement, without the opportunity to consult a lawyer;
 - D. the sale and purchase agreement contained an unnecessary warranty of turnover for the first week;
 - E. the sale and purchase agreement had multiple mistakes, which have had to be corrected by the complainant's solicitors;
 - F. the licensee was rude and shared private information about the complainant with the purchasers.
9. The complaints are vigorously denied by the agent.

Material Facts

10. We deal in turn with each complaint, and the agent's response, using the lettering above:

A: she was forced to sign the listing agreement under pressure, without consultation:

The Complainant says that the agent talked consistently and hindered her reading of the document by constantly explaining things verbally and asking questions.

For reasons which are not clear, the agent has not responded specifically to the complainant's letter of complaint. Instead, she has simply provided a copy of her response to the solicitor's letter referred to in paragraph 6 above.

This is unfortunate. The risk an agent faces by not dealing with a complaint on a point by point basis is that aspects of the complaint will go unanswered, leaving the Committee to resolve that aspect on the only evidence before it, namely the evidence of the complainant.

The 31 March 2010 response by the agent addresses the signing of the listing agreement in passing. She refers to a discussion about the price the complainant expected to get for the business; and about commission. She says she "explained everything" to the complainant.

Despite the inadequacy of this response, the Committee does not consider that there is sufficient evidence here to justify a finding of "unsatisfactory conduct" on this aspect of the complaint.

B that the commission she was forced to pay on sale of her business was 40% of the sale price, not the 6% commission the salesperson represented the complainant would have to pay:

The complainant says that in her discussion with the agent, the agent indicated that her fees were 6% of the business sale price, which the complainant agreed was reasonable. In a subsequent e-mail, dated 1 August 2010, the complainant explains that she understood from the agent's verbal remarks and the document that there were two options about commission: if the sale price was up to \$100,000, fees were 6% plus GST; over \$100,000, fees were \$6000 +6% plus GST.

The agent says that the complainant told her she wanted \$10,000 for the business, and that she told the complainant that her fees would be \$6000 plus GST, a total of \$6750. She says she told the complainant she should list the business for \$17,000 to cover the expected commission. She told the complainant she would try her best to sell the business of that

amount. She says the complainant was well aware of the commission payable on sale, as she explained to her at the beginning.

The complainant denies this, and says she told the agency wanted \$20,000 for the business, but a little less would be okay.

We will discuss this matter further below, in light of provisions in the Real Estate Agents Act 2008 (the Act), and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Client Care Rules).

C: that she was pressured to sign a business sale and purchase agreement, without the opportunity to consult a lawyer:

The complainant says that when the agent found a purchaser, she called the complainant in to sign the sale and purchase agreement. She was told it had to be signed immediately, then and there, and when the complainant asked whether it would be a good idea for her lawyer to review it, the agent said that it was a cash sale, and that she should sign the document immediately, or risk losing the sale.

Following the agreement being signed, the complainant's lawyer did become involved. He complains that he suggested several amendments to the agreement. He says that the agent called the complainant and the purchaser into her office to initial changes to the agreement, without his knowledge, and without his client being given the opportunity to call him for advice.

The agent says she explained everything to her client; and that she never told her client to sign the document right away. She says the complainant did not sign under pressure, and never mentioned advising her lawyer. She only told the complainant she would lose the buyer after the complainant advised that her lawyer wanted to cancel the original agreement, and draw up a new one.

As to the amendment to the agreement, the agent does not deal with the substance of the complaint. She simply records that the amendments to the agreement were done after the complainant and his solicitor requested her to do so, by phone.

The complainant's solicitor, in an e-mail dated 3 September 2010, says that the last statement is untrue: he attended to all amendments to the agreement directly with the purchaser's solicitor. In an e-mail to his client on 1 April 2010, he states that he told the agent the agreement needed to be amended, but says that in that conversation he did not cover all of the things that were wrong with it. He says the agent made the amendments off her own bat, not at his request.

Again, we will discuss this issue further below.

D: that the sale and purchase agreement contained an unnecessary warranty of turnover for the first week:

The sale and purchase agreement contained a turnover warranty clause. On the front page of the agreement, there appears the following:

"Turnover warranty (clause 6.5): \$1000 (excluding GST) covering the period from 10/4/10 to 16/4/10."

The Complainant says she asked the agent why the clause was there. She says the agent told her to ignore the clause, because it did not matter in this case.

The agent has not responded to this complaint. We will discuss it further below.

E: that the sale and purchase agreement had multiple mistakes, which have had to be corrected by the complainant's solicitors:

Both the complainant and her solicitor refer to "multiple mistakes" in the sale and purchase agreement which was drafted by the agent. The complainant's solicitors says they include: the agent inserting the name of the complainant's solicitor, to act for both the vendors and the purchaser; the agent listing an incorrect vendor; the agent incorrectly describing the business being sold; and the agent incorrectly describing the terms of the business lease.

The complainant says the possession date was wrong; tangible and total purchase prices were wrong; and the lease commencement date was wrong.

The agent asserts that the complainant told the purchaser it would be all right for the solicitor to act for both buyer and seller. She says the complainant could not make her mind up about the name of the seller. She says the complainant misled the agency about the terms of the lease. She says she never described the business that was being sold.

We will discuss the sale and purchase agreement below.

F: that the licensee was rude and shared private information about the complainant with the purchasers:

The complainant says the agent was rude. She does not give details about this. She also says that the agent divulged sensitive personal information about her to the purchasers.

The agent did not originally respond to this complaint. But on 27 July 2010, by e-mail, the agent says that she learnt the information about the complainant from staff working there at the time the purchaser went back to look at the business.

This aspect of the complaint has been investigated further by the Authority's investigator. Information supplied is inconclusive. The Committee considers that there is insufficient evidence about this aspect of the case to justify a finding of unsatisfactory conduct.

Relevant Provisions

11. 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.

12. The Client Care Rules are practice rules which set out the standard of conduct and client care that agents, branch managers or salespersons are required to meet when carrying out real estate agency work and dealing with clients. They set minimum standards that licensees must observe, and are a reference point for discipline. Rules relevant to this complaint are set out below.
13. Rule 5 provides that a licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
14. Rule 6.2 requires a licensee to deal fairly with all parties engaged in transactions.
15. Rule 6.3 provides that licensees must not engage in conduct likely to bring the industry into disrepute.
16. Rule 9.2 provides that a licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.
17. Rule 9.3 records that a licensee must not take advantage of a client's inability to understand relevant documents, where such inability is reasonably apparent.
18. Rule 9.8 requires a licensee to explain to a prospective client, in writing, when inviting signature of an agency agreement, the conditions under which the commission must be paid, and how commission is calculated, including an estimated cost (actual \$amount) of commission payable by the client.
19. Rule 9.9 provides that when inviting signature of either, an agency agreement or a sale and purchase agreement, or other contractual documents, a licensee must ensure a prospective client, client, or customer is aware they can, and may need to, seek legal, technical or other advice and information. The licensee must allow the prospective client a reasonable opportunity to do so.

Discussion:

The commission issue:

20. Rule 9.8 is clear. The licensee's obligation is to explain to a prospective client, in writing, the estimated cost (an actual dollar amount) of commission payable. The agent has not done so. That is a breach of Rule 9.8.
21. The commission clause contained in the "authority to sell business" listing document is poorly drafted, and does not help the situation at all. But that is not a shelter for the licensee. It is the licensee's obligation to make sure that the client is clearly informed about the commission payable.
22. On the evidence, the Committee does not consider that the agent has tried to take advantage of the complainant. This is simply a job inadequately carried out by the agent.

Pressure to sign the sale and purchase agreement; and the adequacy of the agreement itself:

23. The complainant and her solicitor complain that the complainant was pressured to sign the original agreement; and also amendments.
24. It is common ground that the agreement was drafted by the agent; and not seen by the solicitor until it had been executed by the purchaser.
25. There is no dispute that the agreement, once executed, required amendment beyond the amendments that the agent got the complainant and the purchaser to initial, following discussion with the complainant's solicitor.
26. It is also common ground that there was confusion about the name of the vendor, the agent noting that the complainant had told her that she needed the name—by which we think she means the company name—for her cake decorating business.
27. So, the vendor's name on the sale and purchase agreement was initially recorded as "Ms C", and then was altered to the company name. The business was initially described on the sale and purchase agreement as "Company A", then it was altered to record the company name, then it was altered back to Company A.
28. The "lease details" recorded on the first page of the sale and purchase agreement, are hopelessly inadequate. Beside the words "lease details" is written "2 x 2". The "term" of the lease is similarly recorded. Presumably this is a reference to "years". The right of renewal clause has been left blank, though the previous information suggests the possibility of a two-year rental term, with a right of renewal for a further two years. The rental is described thus: "320 include GST, Rate, insurance". There is no \$; there is no description as to whether the rental is weekly, fortnightly, or monthly.
29. The complainant queried the warranty clause. The agent blithely told her not to worry about it.
30. It would appear that the agent was well out of her depth when it came to drafting the sale

and purchase agreement. She ought to have encouraged the complainant to take legal advice. She did not. When the complainant's solicitor suggested amendments to the sale and purchase agreement, she should have left that to the experts. She did not. The Committee considers that a breach of Rule 9.9 has been established.

31. The sale and purchase agreement itself shows a lack of skill, care, and competence: that is a breach of Rule 5.
32. Did the agent put the complainant under pressure to sign the agreement, and/or sign the alterations to the agreement? On balance, particularly in light of the fact that she called the complainant and the purchaser in to sign amendments to the agreement, before the amendments she had made could be scrutinised by the complainant's solicitor (who had suggested them in the first place), the Committee considers that there was undue pressure. That is a breach of Rule 9.2.
33. "In New Zealand, real estate agents very commonly negotiate contracts between vendors and purchasers and procure the making of contracts (often subject to conditions, such as conditions as to finance or solicitors' approval) before solicitors are engaged": Cooke J, in *Previews Inc v UEB Industries Limited* [1985] 1 NZLR 468, 475. With that power comes considerable responsibilities.
34. Section 3 of the Act records that its purpose is to promote and protect the interests of consumers in respect of transactions relating to real estate, and to promote public confidence in the performance of real estate agency work. The Act achieves that purpose by regulating licensees; raising industry standards; and providing accountability through its disciplinary process.
35. Bearing that in mind, is the conduct of the licensee in this case also a breach of rule 6.3? The Committee reluctantly considers that, on the evidence of this case, it is.
36. In the circumstances, the committee finds the licensee guilty of unsatisfactory conduct in that her conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (section 72(a)); contravenes rules under the Act (section 72(b)); and would reasonably be regarded by agents of good standing as being unacceptable (section 72(d)).

Decision

37. Having conducted a hearing on the papers, in accordance with section 90(1) of the Act, the Committee determines pursuant to section 89(2)(b) that it has been proved on the balance of probabilities the licensee has engaged in unsatisfactory conduct.

Orders

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.

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.

The Committee requires the investigator authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of the licensee under either the Real Estate Agents Act 1976 or the Real Estate Agents Act 2008, if any such decision exists, and provide it to the Committee and the licensee and the complainant.

The licensee and the complainant may file submissions, within 21 days of the date of receipt of this decision, on what orders, if any should be made. If the complainant has suffered financial consequences as the result of the inclusion of the warranty clause in the sale and purchase agreement, the complainant should supply full details of that to the Committee.

Publication

The Committee directs that this decision is to be published.

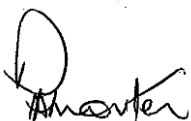
Right of Appeal

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.

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 black ink, appearing to read 'Paul Morten', written over a faint circular stamp.

Paul Morten

Chairperson

Complaints Assessment Committee

Real Estate Agents Authority

Date: 7 December 2010