

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

And

In the Matter of **Complaint No: CA 3586332**

In the Matter of Hoda Haddad
Licence Number: 10011625

Decision of Complaints Assessment Committee

Dated this 10th day of May 2011

Complaints Assessment Committee:

CAC10044

Chairperson: Paul Morten

Deputy Chairperson: Anna Tierney

Panel Member: Barrie Barnes

Complaints Assessment Committee

Decision on Orders

Background

The Complaints Assessment Committee (the Committee) has found Hoda Haddad (the licensee) guilty of unsatisfactory conduct.

The Committee has found a breach of rule 9.8 of the Real Estate Agent (Professional Conduct and Client Care) Rules 2009. (the Professional Conduct rules). The licensee failed to explain to Ms C (the complainant), in writing, the estimated cost of commission payable for the sale of her business.

The Committee has found a breach of rules 9.9 and rule 5 of the Professional Conduct rules. The details recorded by the licensee on the sale and purchase agreement were inadequate; and the licensee ought to have advised the complainant of the need to seek legal, technical or other advice and information. Amendments to the sale and purchase agreement, following its execution by the parties, should have been dealt with by the parties' lawyers.

The Committee has found a breach of rule 9.2. The licensee called the complainant and the purchaser in to sign amendments to the agreement (which had been suggested by the complainant's solicitor) before they could be scrutinised by the complainant's solicitor. The Committee found on balance that there was undue pressure exerted by the licensee.

On balance, the Committee found the conduct of the licensee breached rule 6.3, and tended to bring the industry into disrepute.

The Committee found breaches of section 72 (a); (b); and (d) of The Real Estate Agents Act 2008 (the Act).

Relevant Provisions

Having made a finding of unsatisfactory conduct against the licensee the Committee must now decide what orders, if any, should be made under section 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 undue 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.

Discussion

The Committee has invited submissions from the complainant and the licensee.

We have been advised that the commission charged by the licensee (\$6000 plus GST) has been reduced to \$1000 (inclusive of GST); and that the licensee has apologised to the complainant for her conduct. The complainant has forgone her claim for a contribution to her legal costs. As between the parties, the matter is at an end.

The complainant's solicitor urges that the complaint should be dismissed, and that would be an

appropriate result. The Committee does not consider that it has the jurisdiction to reverse its findings of unsatisfactory conduct. Even if it had jurisdiction, the Committee would not have agreed to dismiss the complaint.

We therefore consider the detailed submissions made on behalf of the complainants' solicitor.

The complainant says that she did not receive notice of the requirement for submissions prior to consideration of the complaint. As a result, she says that the Committee's findings of fact are based on uncontested evidence.

The complainant's correspondence was supplied to the licensee, and she was invited to respond to the complainant's complaints. It is up to a licensee to decide what form that response should take, and the amount of detail that needs to be supplied to a Committee.

The Act makes it clear that there is a presumption that the Committee will conduct a hearing on the papers (section 90). The Committee is not obliged to provide explicit notice, once responses have been received by the parties, that submissions are invited before it will conduct its hearing.

That being so, it is open to the Committee to make a decision on evidence by a complainant that has not been contested by a licensee.

In relation to the finding regarding the commission costs, the licensee argues that there was a conflict of evidence between the parties; and criticises the Committee for a failure to explain why the complainant's evidence was preferred. The licensee says the decision should have gone in her favour.

The Committee notes a tendency by licensees against whom findings of unsatisfactory conduct have been made to challenge those findings in their submissions on penalty. Licensees have appeal rights. The proper place for a challenge to findings is by appeal to the Real Estate Disciplinary Tribunal (the Tribunal). The Committee therefore puts to one side this aspect of the licensee's submissions in relation to the commission agreement.

The Committee notes that the licensee accepts that the listing authority does not comply with the Professional Conduct rules. It states that this was a standard Harcourts' form in common use until late 2009, despite the fact that a new form had been prepared for when the new Rules came into place. The licensee's use of the form was inadvertent and unfortunate.

The Committee will take into account the unavailability of the new form when making its decision

on penalty. Even so, the Committee notes that it is the licensee's obligation to explain the commission arrangement, and the failure to do so lies behind much of this complaint.

In relation to the complaint regarding pressure over the initial signing and subsequent amendment of the sale and purchase agreement, the licensee again criticises the finding by the Committee. For the reasons set out above, the Committee puts those criticisms to one side.

In fact, the finding by the Committee does not relate to the initial signing of the agreement, but rather the complaint that the parties were pressured to sign subsequent amendments to the agreement, before they could be scrutinised by the complainant's solicitors, who had suggested the amendments in the first place.

The Committee accepts that it is very common for parties selling properties and businesses to be under pressure to sign agreements. The Committee accepts that the initial pressure from the buyer to get the complainant to sign the agreement was real, and not a figment of the licensee's imagination. The Committee also accepts that the complainant had the opportunity to take legal advice before committing to the sale and purchase agreement.

But when it came to post execution amendments, the licensee, who herself acknowledges her relative inexperience in business sales, ought to have left this to the complainant's lawyer, rather than getting the complainant to commit to amendments which were outside the licensee's experience.

In relation to the complaint about the inclusion of the warranty clause, the licensee states that it is common practice for a turnover warranty to be included in the sale and purchase agreement; that the clause was inserted for the benefit of the purchaser; and that the complainant had an opportunity to remove the clause if she was unhappy with it. The licensee says there is no evidence to support the Committee's view that "the agent blithely told her not to worry about (turnover warranty)", which the licensee considers suggests a callous disregard for the truth. The licensee states that the turnover was minimal, and should have been capable of being fulfilled without difficulty.

The evidence from the complainant is that she discussed with the licensee whether or not there was a need for a warranty clause. The warranty clause was not deleted by the licensee and sent back to the purchaser as a counter-offer. It would have been easy for the licensee to have done that. She did not do so.

In response to the finding regarding "multiple mistakes" in the sale and purchase agreement, the

licensee says a finding of unsatisfactory conduct requires the Committee to determine the matters complained of comprised a failure to achieve a reasonable standard. We agree.

The licensee says the complainant has identified some of the terms of the agreement as "mistakes", when what she really meant was that she might have preferred terms to be different; that other "mistakes" were based on errors made by the complainant and faithfully recorded by the licensee in the listing authority; and that the errors relating to the incorrect seller, description of the business sold and terms of the lease were not mistakes attributable to the agent.

Even so, the licensee accepts that the drafting of the agreement "was less than ideal" and that the contract drafting was "sub-standard". The Committee agrees, and addresses this specifically in its decision on penalty, where it orders the licensee to undergo retraining.

The licensee states that she has now received additional training in the Rules and in contract drafting from the branch manager in the office in which she works. The Committee notes that advice; but considers that more structured training is required.

The licensee unreservedly accepts the requirement to comply with the rules. The licensee's solicitor has explained to the branch manager the necessity to closely supervise all contract drafting by the licensee. Apparently, that has been in place for a number of years.

The licensee says that this was an isolated incident, while the branch manager was out of the office and not available to supervise the licensee's drafting of the agreement.

He states that the licensee is mature and responsible, and takes her job seriously. The failings arise from her relative inexperience in business sales and lack of supervision in early 2010.

He states that the licensee regrets this conduct has occurred, and is committed to ensuring there is no repetition. He states that she has voluntarily undertaken all procedures available to compensate the complainant, apologise for the distress incurred, and to retrain.

The licensee has provided a number of references.

The Committee has carefully considered the submissions by and on behalf the licensee. The Committee is particularly concerned about the licensee's relative inexperience, especially in relation to drafting contractual documents. The Committee notes that the licensee has been under supervision by the branch manager for some time. Even so, the licensee in this case has failed to achieve reasonable standards on the facts of this case. More formal training is required.

In the circumstances, and given the multiple breaches of the Rules, the Committee makes an order reprimanding the licensee (pursuant to section 93 (1) (a) of the Act); in light of the apology by the licensee to the complainant, the Committee makes no order requiring the licensee to apologise; and the Committee orders (pursuant to section 93 (1) (d) of the Act:

- that the Licensee attend (at her own cost) and complete a course or assignment/s from one of the accredited providers specified by the Real Estate Agents Authority on their website: <http://www.reaa.govt.nz/page/Licensing/Qualifications/qualifications>;
- that the course attended must include a component regarding the completion of listing authorities and sale and purchase agreements;
- that the salesperson is to report to the Authority on completion of that course by 30 September 2011

Decision

The Committee makes an order reprimanding the licensee; and orders the licensee to undergo training or education.

Publication

One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.

Publication gives effect 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) in the publication of its decision.

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.

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 'P. Morten'.

Paul Morten
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 10 May 2011