

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

And

In the Matter of **Complaint No: CA3808092**

In the Matter of **Sant Raj**  
**Licence Number: 10007961**

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## Decision of Complaints Assessment Committee

Dated this 17th day of March 2011

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**Complaints Assessment Committee:**

**CAC10048**

**Chairperson: Debbie van Zyl**

**Deputy Chairperson: Rob Crozier (not participating)**

**Panel Member: Denise Bovaird**

# Complaints Assessment Committee

## Decision finding unsatisfactory conduct

### **1. The Complaint**

- 1.1 This is a complaint lodged by Mr S on 8 July 2010 against licensee Sant Raj, who is a licensee under the Real Estate Agents Act 2008 (“the Act”). Mr Raj holds an active salesperson licence and he currently works for ABC Limited (“ABC”). At the time of the conduct complained about, Mr Raj worked for Ryan Realty Limited (“RRL”).
- 1.2 Mr S’s complaint is that Mr Raj failed to provide him with an agreement for sale and purchase, that Mr Raj failed to declare his personal interest in the property and finally that the chattels promised were not delivered.
- 1.3 The conduct complained of occurred prior to the Act coming into force.

### **2. Material Facts**

- 2.1 On 2 April 2007 Mr Raj (together with other parties) signed an agreement for sale and purchase to purchase the property in question for \$315,000 with a settlement date of 7 May 2007.
- 2.2 Pursuant to an agreement for sale and purchase dated 30 July 2007 (“the Agreement”), Mr Raj sold the property to Mr S and his wife for \$385,000. From the Agreement it is not clear whether Mr Raj is noted as a vendor on the Agreement, but it was agreed by the parties that he was the agent involved in bringing about the transaction.
- 2.3 According to Mr S, Mr Raj did not provide them with a copy of the Agreement and he did not disclose his interest in the property. Mr S said that Mr Raj informed them that the property was owned by an old couple who had gone to Australia.
- 2.4 Mr S said that he trusted Mr Raj and called him “brother in law”. Mr and Mrs S have never purchased a house before and they were influenced by Mr Raj.

- 2.5 According to Mr S he did not receive all the chattels promised to him by Mr Raj.
- 2.6 Mr Raj denied all the allegations. He said that he left a copy of the Agreement with Mr S after it was signed. Mr Raj pointed out that one of the conditions contained in the Agreement was a finance clause and therefore Mr S must have had a copy of the Agreement to provide to his bank to enable finance to be approved.
- 2.7 Mr Raj said that he put his and his wife's names on the vendor page and he alleges that Mr S was aware that he was one of the vendor's.
- 2.8 Mr Raj said that there were negotiations for the carpets to be fitted over the polished floors, which Mr S chose and Mr Raj had fitted. According to Mr Raj, he denied any further negotiations or representations and confirmed that he did not promise Mr S a dishwasher.
- 2.9 In a telephone discussion with the Real Estate Agents Authority ("the Authority") Investigator, when asked if he told Mr S that he was selling his own home and whether he advised Mr S to get an independent valuation or legal advice Mr Raj replied that he gave Mr S the keys to the property nine days before settlement.

### **3. Relevant Provisions**

- 3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).
- 3.2. Section 172 of the Act deals with allegations about conduct before commencement of the Act:

#### **172 Allegations about conduct before commencement of this section**

- (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.
- (2) 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

3.3 Section 72 of the Act defines unsatisfactory conduct:

#### **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.

3.4 Section 73 of the Act defines misconduct:

#### **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.

## **4. Discussion**

- 4.1 As the conduct complained of eventuated prior to the commencement of the Act, the Committee is satisfied that Mr Raj was either licensed or approved under the Real Estate Agents Act 1976 (“the 1976 Act”) and could have been complained about or charged under the 1976 Act in respect of the conduct complained about; and further that Mr Raj has not been dealt with under the 1976 Act in respect of the conduct complained about and that the Committee could therefore consider the complaint.
- 4.2 Section 72 of the Act specifies the conduct that represents “unsatisfactory conduct”. Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or Rules made under the Act is classified as unsatisfactory conduct.
- 4.3 Section 73 of the Act specifies the conduct that represents “misconduct”. The position under section 73(b) is the same as under section 72. Section 73(b) is concerned with “seriously incompetent or seriously negligent real estate agency work”. Section 73(c) is limited to wilful or reckless contraventions of the Acts, or the Rules and regulations that apply to the conduct of licensees.
- 4.4 It appears that Mr S used the same solicitor for the purchase of the property that Mr Raj used when he purchased the property earlier in the year. Although this is not significant in itself, where the purchaser has never bought a property before and is relying on the real estate agent as a friend, the real estate agent has an extra duty of care when he is selling his own house to such a purchaser. Mr Raj should have clearly disclosed his interest and he should have advised Mr S to obtain an independent valuation and independent legal advice before any agreement was entered into.
- 4.5 The Complaints Assessment Committee (“the Committee”) is of the opinion that there is not enough evidence that Mr Raj did not provide a copy of the Agreement to Mr S and also that any further chattels were promised.
- 4.6 The Committee cannot understand why Mr S waited so long before he lodged a complaint.
- 4.7 It is inconclusive if Mr Raj disclosed his interest in the property and the Agreement is not of much help in that respect.
- 4.8 However, due to the fact that Mr Raj sold the property for \$70,000 more than what he purchased it for only about 3 months prior to the sale to Mr S, the Committee feels that Mr

Raj did not act responsibly when he did not encourage Mr S to get an independent valuation as well as independent legal advice before the Agreement was entered into. It did not help Mr S to have been provided with the keys nine days prior to settlement, as the Agreement was unconditional at that stage. It appears that Mr Raj took advantage of Mr S.

- 4.9 On the balance of probabilities the Committee therefore believes that Mr Raj contravened section 72(d) of the Act.

## **5. Decision**

- 5.1 After conducting an inquiry into the complaint, pursuant to section 89(1) of the Act, 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.

- 5.2 The Complaints Assessment Committee met on 14 February 2011 to consider their complaint against Sant Raj. The Committee determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Raj has engaged in unsatisfactory conduct.

## **6. Orders**

- 6.1 Having made a determination under section 89(2)(b) of the Act, the Committee may make one or more orders set out in section 93 of the Act, but subject to section 172 (2). This means that in making any order the Committee may not make any order in the nature of penalty that could not have been made against that person at the time when the conduct occurred.

- 6.2 In this instance the Committee did not invite either Mr S or Mr Raj to make any comments or submissions before making an order, as the Committee felt that it had all the information needed to make an order.

- 6.3 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.

## 6.4 Principles considered

6.4.1 The Committee, when determining whether or not to make an order under section 93(1), has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings. They include:

- a. Promoting and protecting the interests of consumers and the public generally  
Section 3(1) of the Act sets out the purpose of the legislation. The principal purpose of the 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." One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (section 3 (2)).

- b. Maintenance of professional standards  
This function has been recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; *Taylor v The General Medical Council* [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720). In the Committee's view this function is also applicable in the disciplinary processes under the Act.
  
- c. Punishment  
The Committee accepts that a penalty in a professional discipline case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment - indicated by the power the Committee has to impose a fine (section 93(l)(g); or make an order of censure (section 93(l)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.)
  
- d. Where appropriate, rehabilitation of the professional must be considered  
The Committee regards its power to make an order requiring a licensee to undergo training or education as indicative of this function applying in the context of professional disciplinary processes under the Act.

6.4.2 The Committee acknowledges that when making an order under section 93, the order/s made must be proportionate to the offending and to the range of available orders and it must further be subject to section 172(2).

6.5 Having regard to the facts of this case as summarised above, the long period of time before a claim was lodged and the above principles, the Committee has determined that it is limited to finding that the licensee has engaged in unsatisfactory conduct and that this be recorded against his name in the register.

## **7. Publication**

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

decisions.

- 7.2 The Committee directs that this decision is to be published in the interest 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.
- 7.3 The Committee therefore directs publication of its decision, but omitting the identifying details of all the other parties in the publication of its decision (including ABC Limited), except for the name of the licensee found guilty of unsatisfactory conduct and the agency for which he worked at the time of the conduct complained about.

## **8. Right of Appeal**

- 8.1 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.
- 8.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 8.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at [www.justice.govt.nz/tribunals](http://www.justice.govt.nz/tribunals).

Signed



**Debbie van Zyl**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 17 March 2011