

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

And

In the Matter of **Complaint No: CA3837576**

In the Matter of **Michael Utting**  
**License Number: 10002721**

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## Decision of Complaints Assessment Committee

Dated this 20<sup>th</sup> day of December 2010

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**Complaints Assessment Committee:**

**CAC10037**

**Chairperson: Sandra Gill**

**Deputy Chairperson: Robyn Wilson**

**Panel Member: Denise Bovaird**

# Complaints Assessment Committee

## Decision finding unsatisfactory conduct

### **The Complaint**

The Licensee, Mr Michael Utting (Mr Utting), currently holds a Salesperson's Licence. He works for Tommy's Real Estate Limited – franchisee of Tommy's Group (Tommy's).

Mr M alleges that Mr Utting failed to complete legal requirements by not providing him with the Sale and Purchase Guide as required by s133 of the Real Estate Agents Act (the Act).

The alleged conduct leading to the complaint occurred in May 2010 and is covered by the Act.

The complaint was received by the Real Estate Agents Authority (the Authority) on 21 July 2010.

### **Material Facts**

Mr M outlined his complaint in an Authority complaint form dated 18 July 2010.

Mr M also provided further information in written form along with a Building Report from Company A Ltd undertaken for Mr B (the vendor of the property), copies of e-mail correspondence between Mr M and his legal advisors, the sale and purchase agreement, and an overview of information relating to his complaint from Mr M's viewpoint.

Much of the information sent by Mr M relates to his complaint against a different licensee.

Mr M's complaint against Mr Utting is that Mr Utting did not provide him with the Sale and Purchase Guide as required by s133 of the Act.

Mr M's complaint was sent to Mr Utting to respond, and once Mr Utting's response was received by the Authority, Mr M was given the chance to respond. Mr M responded in a letter dated 13 September 2010.

In relation to his complaint regarding Mr Utting, Mr M states that he agrees that both he and Mr Utting "were jointly responsible for the failure to meet legal requirements. I am pleased that he accepts his share of the responsibility, and I do not therefore wish to pursue that complaint".

### **Relevant Provisions**

This complaint is covered under s133 (2) (a)(b) of the Act.

Section 133 (2) (b) of the Act sets out provisions in respect of partnerships and companies:

#### **133 (2) (a)(b) Approved guide to be provided when contractual document provided**

- (2) The agent or a licensee on the agent's behalf must have –  
(a) provided the person with a copy of the approved guide;  
And

- (b) received a signed acknowledgement from the person that the client has been given the approved guide.

Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee conducted a hearing with regard to the complaint under Section 89 (1) of the Act.

The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

## **Discussion**

Mr Utting responded to Mr M's complaint in a letter dated 16 August 2010.

Mr Utting acknowledges that *"As much as I would like to defend my position on this [not providing Mr M with the Sale and Purchase Guide as required by s133 of the Act] I cannot. This was a small lapse in judgment on my part and I did fully intend to get the booklet to Mr M. In my defence, if I can call it that, Mr M's offer was heavily conditional and he was fully aware of his options and rights as a purchaser. As he [Mr M] stated in his complaint he was aware of his entitlement to the book but happily signed the document anyway"*.

Mr Utting states that Tommy's have now added the disclosure to their sales and purchase agreement and *"every time they get a client to sign a Sales Agreement, they sign for the Booklet also"*.

Mr Utting goes on to state that Tommy's have made it clear to the salespeople the importance of adhering to all aspects of the REAA including the need to ensure that the Booklets are given out.

Mr Utting concludes that *"As I said earlier, I did let the side down given I didn't follow policy, however I can assure you it won't happen again"*.

## **Decision**

The Complaints Assessment Committee (the Committee) met on 12 October 2010 to consider the complaint against Mr Utting and reach a determination. The Committee has determined under section 89(2)(b) of the Act that it has been proven that Mr Utting has committed a breach of the Act under s133 (2) (a)(b).

Having determined that Mr Utting is guilty of a breach of the Act, the Committee has the power to make one of the orders set out in section 93(1) of the Act.

Section 93 provides:

- (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.

Based on the established fact that Mr Utting has acknowledged that he failed to provide Mr M with the approved guide (Booklet) and was in breach of the Act.

The Committee makes the following Order under section 93(1) of the Act.

- an order that Mr Utting is to pay to the Authority a fine of \$500 (five hundred dollars) under s93(1)(g) which is to be paid to the Authority within 30 (thirty) days of receipt of this Determination.

In making an Order at this level of penalty, the Committee has taken into account that Mr Utting has acknowledged his mistake and also acknowledges the importance of ensuring that all aspects of the Act are adhered to. Policy has also been implemented to ensure that these circumstances do not arise in the future.

## **Publication**

One of the functions of the Committee is to publish its decisions (s78(h)).

The Committee has determined that this decision should be published in the interests of ensuring the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of standard setting and it is in the public interest that the decision be published.

The Committee hereby authorises the Authority to publish this decision by whatever means it considers appropriate provided that the names and identifying details of the complainant (including the address of the property) and any named or identified third parties are omitted from publication.

## **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](http://www.justice.govt.nz/tribunals).

Signed

A handwritten signature in blue ink, appearing to read 'Sandra Gill', written in a cursive style.

**Sandra Gill**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority  
Date: 20 December 2010