

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

And

In the Matter of **Complaint No: CA3843948**

In the Matter of Ernest James Twigg
License Number: 10012019

Decision of Complaints Assessment Committee

Dated this 12th day of January 2011

Complaints Assessment Committee:

CAC10048

Chairperson: Debbie van Zyl

Deputy Chairperson: Rob Crozier

Panel Member: Denise Bovaird

Complaints Assessment Committee

Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 This is a complaint lodged by Mr C on 26 July 2010 against licensee Ernest James Twigg who is a licensee under the Real Estate Agents Act 2008 (the Act). Mr Twigg holds an active salesperson licence and he works for Arthur Gordon Pryde t/a Franklin Real Estate (FRE).
- 1.2 Mr C's complaint is that Mr Twigg was unwilling to cancel the listing prior to expiration date, that Mr Twigg brought buyers to see the property and then left for another appointment which meant that Mr C had to finish the showing and lastly that Mr Twigg continued to list the property two months after expiry date.

2. Material Facts

- 2.1 Mr C listed his property (the property) with FRE. Part of the listing agreement had a handwritten note that stated: "The vendor agrees to reimburse James \$199 for website marketing + \$150 for administration fees should the property be withdrawn from the market or the agency is cancelled prior to there being a sale and purchase agreement in place." This handwritten note was not initialed or signed by Mr C.
- 2.2 Mr C provided copies of various email correspondence between himself and Mr Twigg in which Mr C stated that he wanted to terminate the listing and Mr Twigg replying that if Mr C wanted to cancel the agency he first had to reimburse Mr Twigg the \$349 as per the listing agreement. Mr C requested the identity of the prospective purchasers that Mr Twigg previously shown the property to.
- 2.3 Mr C alleges that they listed the property with Mr Twigg as they were assured by Mr Twigg that they could cancel the contract if they were not happy with his performance.
- 2.4 Mr C further alleges that Mr Twigg told them that he would list their property on the internet and in real estate publications and newspapers, but that he only placed it on the internet, which they could have done themselves.
- 2.5 According to Mr C all viewings were rushed and the last buyers were left with him as Mr Twigg had another meeting.
- 2.6 Mr C alleges that Mr Twigg was not honest with him at the time of listing when he accepted the listing price – he should have told Mr C that the price was too high.
- 2.7 Mr C states that he did not think that they had to formally cancel the listing as that is why they have the contract with a certain timeframe.
- 2.8 Mr Twigg stated that the listing was never formally cancelled. He states that the listing should have been cancelled with FRE, not himself.
- 2.9 Mr Twigg states that the buyers that he allegedly left with Mr C were late in arriving and after he had shown them through the property, they wanted to go back through the house. As Mr C was in the sitting room at that stage, Mr Twigg alleges that he asked Mr C if he would mind if the purchaser stayed on as he had to go to another appointment – according

to Mr Twigg Mr C said that it would be fine and at no time did he indicate that it would not suit him.

- 2.10 Mr Twigg alleges that this is a case where the property has not sold and the frustrated vendor is taking it out on the sales person. Mr Twigg states that Mr C is the third vendor that is trying to get out of paying the amount as per the listing agreement.
- 2.11 According to Mr Twigg the listing was a three month sole listing which then reverted to a general listing when it was not formally cancelled. Because of the general listing, Mr Twigg continued to include the property in his marketing, but as soon as he received the first correspondence from the Authority, he removed the property from all marketing.
- 2.12 Mr Twigg confirms that the marketing was done at his expense and that since Mr C stated that they wished to withdraw the property, he had no viewings at all.
- 2.13 Upon further investigation by the Authority's Investigator authorised to assist the Complaints Assessment Committee (the Committee), Mr C confirmed that Mr Twigg did not provide an appraisal of the property nor advised that the price Mr C wanted was too high.

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 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.

3.3 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.

3.4 Rule 9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 deals with client care and dealings with customers.

3.4.1 Rule 9.1 states:

“A licensee must act in the best interests of a client and act in accordance with the client’s instructions unless to do so would be contrary to law.”

3.4.2 Rule 9.5 states:

“An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses.”

4. Discussion

- 4.1 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. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.
- 4.2 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.
- 4.3 From the email correspondence it is clear that Mr C wrote to Mr Twigg with the instructions/wish to cancel the listing. The payment of the amount claimed by Mr Twigg is a separate issue of a commercial nature that is irrelevant to the cancellation of a listing.
- 4.4 The Committee therefore finds that Mr Twigg did not follow his client’s instruction to cancel the listing and therefore did not act in the best interest of his client. This is a breach of Rule 9.1.
- 4.5 The Committee does not accept Mr Twigg’s premise that a listing can only be cancelled with the real estate agency holding the listing and not the agent representing that real estate agency. This is not required by the Act and to accept such a suggestion is impractical.
- 4.6 The Committee notes that Mr Twigg did not provide an appraisal of the property as required by Rule 9.5 and he is therefore in breach of that Rule.
- 4.7 The Committee did consider the other conduct complained about, but felt that that was sufficiently explained by Mr Twigg’s response.
- 4.8 The Committee comments that by inserting such a handwritten clause about costs Mr Twigg is opening himself up for disputes. In this case the clause was not countersigned by the client – and even if it was, the clients might not have appreciated the implication. For Mr Twigg to rely on such a clause the onus would rest on him to show that he explained the effect and repercussions of the clause to the clients before they signed the listing. The Committee comments that this complaint could probably have been prevented if Mr Twigg rather asked for marketing/advertising costs upfront and clearly stated the amount in the listing agreement.

5. Decision

- 5.1 After conducting an inquiry into the complaint, pursuant to section 89(1) of the Real Estate Agents Act 2008, 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 8 December 2010 to consider their complaint against Ernest James Twigg. The Complaints Assessment Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Twigg has engaged in unsatisfactory conduct.

6. Orders

- 6.1 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.
- 6.2 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.
- 6.3 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 Ernest James Twigg 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 Ernest James Twigg and Mr C.
- 6.4 Ernest James Twigg and Mr C may file submissions on what orders, if any should be made. Mr C may file submissions within 10 working days from the date of the decision. These submissions, if any, will then be provided to Ernest James Twigg with a timeframe for filing

final submissions.

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 Publication gives effect to 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.
- 7.3 The Committee directs publication of its decision, but omitting the names and identifying details of the complainant (including the address of the property), and any third parties in the publication of its decision.

8. Right of Appeal

- 8.1 A person affected by a determination of a Complaints Assessment Committee may appeal by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.
- 8.2 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.
- 8.3 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.
- 8.4 Appeal is by way of written notice to the Tribunal. Further information on lodging an appeal is available by referring to the Guide to Lodging an Appeal at www.justice.govt.nz/tribunals.

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 12 January 2011