

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

And

In the Matter of **Complaint No: CA3976464**

In the Matter of Summit Real Estate Ltd
License Number: 10020168

Decision of Complaints Assessment Committee

Dated this 1st day of June 2011

Complaints Assessment Committee:

CAC10012

Chairperson: Robyn Wilson

Deputy Chairperson: Peter McDermott

Panel Member: Marina Neylon (Not participating)

Complaints Assessment Committee

Decision on Orders

1. Background

- 1.1 In a decision dated 6 March 2011, the Complaints Assessment Committee (the Committee) found Summit Real Estate Ltd (the Licensee), guilty of unsatisfactory conduct due to its insertion of an agency appointment within a residential property management agreement which did not comply with the requirements of the Real Estate Agents Act 2008 (the Act). David Lewis, (the Complainant), and the Licensee were provided with an opportunity to make submissions on the appropriate penalty. Both parties have provided a response.
- 1.2 The Complainant's submissions were, in summary, that the Committee was bound, giving its findings, to make an order under section 93 (1) (e) to cancel any claim for commission, direct that the Licensee no longer has a term appointing itself as agents for the sale in residential property management agreements, order that all landlord customers of the Licensee be told that the clause in the property management agreement is unenforceable and to pay his (the Complainant's) legal costs in dealing with the Licensee's claim for commission, being \$3651.29 plus GST. (\$4,198.00 incl. GST)
- 1.3 The Licensee's submissions were that it had made strenuous efforts to comply with the Act. They have spent money in excess of \$20,000 on training their property management team in the Act, which has in some ways been wasted due to the Act precluding property managers' involvements in sales. They say the error was inadvertent due to them not being alerted to the need to also change residential property management contracts and that they have now altered their procedures to comply. The Licensee further states that due to the newness of the Act, some compliance issues required clarification which this complaint has provided. The issue was raised in the media by the Complainant and that this has been a penalty in itself and that the company has a good reputation and this should be viewed as an isolated lapse. They do have a valid claim for commission but will not seek recovery of that amount due to the Committee's findings.

2. Relevant Provisions

- 2.1. 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 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.

3. Discussion

- 3.1. The Committee accepts that some weight should be given to the newness of the Act at the time the property management agreement was signed and the fact that the complaint has had media attention, which has not been positive for the Licensee. However, the Licensee did have an opportunity to re-think its claim for commission once the objection to pay it was made by the Complainant, but decided to pursue it. The legal costs incurred by the Complainant due to the demand for commission are also considered relevant as they are a direct result of the Licensee's actions.
- 3.2. Factors referred to in the parties' submissions that have not been taken into account, either due to irrelevancy or factual discrepancies that the Committee has no wish to investigate further, include the parties' respective conduct in discussions trying to resolve the dispute and the Licensee's concern about the new Act's effect on property managers' ability to sell property. While the Committee is pleased to hear that steps have been taken by the Licensee to rectify the problem, presumably by removing the clause from its property management agreement, rectifying contracts to avoid breaching the Act is not a factor that mitigates any penalty.
- 3.3. The Committee does not accept that the offending clause was unacceptable only in reference to the technical requirements of the new Act but views it as an inappropriate inclusion within a property management agreement.
- 3.4. The Committee's view is also not that the breach was a technicality; there was demand for a significant amount of money and the repeated assertion of the right to claim commission. We have decided on a fine of \$2200. The fine is at the lower end due to the fact that the Licensee is also required to reimburse the Complainant's legal costs incurred due to this dispute being \$4198.98 (incl. GST). Given the Licensee have said that they will no longer seek commission, an order cancelling the claim for commission is not required.
- 3.5. The Committee did consider the Complainant's submission to order that the clause be removed from existing and future property management agreements and landlords in his position be advised that the agency appointment is unenforceable but has declined to do so. Such an action is not justified because the orders made under section 93 must flow from the determination made which only considers the Complainant's complaint and circumstances.

4. Decision

4.1 The Licensee is to:

1. Pay the Complainant the sum of \$4,198.00 (incl. GST); and
2. Pay the Authority the sum of \$2,200.00

Both payments are to be made by 30 June 2011.

5. Publication

- 5.1. One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.
- 5.2. Publication gives effect the purpose of the 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.
- 5.3. The Committee directs publication of its decision, identifying details of the Complainant and Licensee but omitting the address of the property, and omitting any third parties in the publication of its decision.
- 5.4. 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 Real Estate Agents Disciplinary Tribunal (the Tribunal).

6. Right of Appeal

- 6.1. A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the date of this notice.
- 6.2. Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 6.3. Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Robyn Wilson
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 1 June 2011