

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

And

In the Matter of **Complaint No: CA4076805**

In the Matter of **Custom Residential Limited**
License Number: 10022936

Decision of Complaints Assessment Committee

Dated this 24th day of May 2011

Complaints Assessment Committee:

CAC10060

Chairperson: Sue Matehaere-Patten

Panel Member: John Auld

Complaints Assessment Committee

Decision finding unsatisfactory conduct

1. The Complaint

- 1.1. Ms E (the Complainant) is the Solicitor who acted on behalf of the purchasers. This complaint is made against Custom Residential Limited (the Respondent). The Complainant alleges that a deposit held by the Respondent, as stakeholder, pursuant to an agreement for the sale of a property in Auckland (the property), was paid out without legal authority or entitlement as the contract was on the date of payment still conditional on the issue of a new certificate of title.
- 1.2. The Complainant is entitled to make a complaint under section 74 of the Real Estate Agents Act 2008 (the Act). It is noted that this complaint was not made by either of the parties nor is it alleged that either party has suffered any financial loss.
- 1.3. The Respondent currently holds a company license under the Act.

2. Material Facts

- 2.1. The Complainant outlined her complaint in a Real Estate Agents Authority (the Authority) complaint form dated 15 November 2010.
- 2.2. The Complainant also provided further information together with a copy of the sale and purchase agreement for the property (the agreement). The conditional agreement was entered into on 7 September 2010 between the vendor Company B and Ms J and Mr W (purchasers). The agreement was conditional on a new certificate of title being issued for the property which occurred on 10 November 2010.
- 2.3. The agreement is in the form of the Eighth Edition of the Real Estate Institute of New Zealand Inc. and Auckland District Law Society form. This is the most commonly used form of agreement for real estate transactions in New Zealand and thus its terms are, or should be, well known to persons engaged in the real estate industry. In the instant case the agreement has been amended in handwriting to record that it is a conditional agreement. These amendments appear both on the front page of the agreement and in clause 17 (a strange clause as it is not apparent what was intended by the drafter, it is expressed as a warranty and does not override sub clause 3.16 of the agreement). The relevant condition in the agreement in relation to the issue of a new title is sub clause 3.16; New Title Provision. The agreement was, pursuant to the provisions in this clause, conditional, at the

latest, until the requisition period in clause 5 was complete, if the agreement was not cancelled for some other legally justified reason prior to that date. The agreement does not provide for its cancellation if the title fails to issue by a prescribed date.

2.4. A deposit of 10% of the purchase price (\$60,500) was paid upon acceptance of the offer and deposited into the Respondent's trust account on 8 September 2010.

Sub clause 2.4 of the agreement provides;

"2.4 The person to whom the deposit is paid shall hold it as a stakeholder until;

- (1) The requisition period in clause 5 is completed without either party cancelling this agreement; and
- (2) where this agreement is entered into subject to any condition(s) expressed in this agreement, each such condition has been fulfilled or waived; or
- (3) this agreement is cancelled pursuant to sub clause 5.2(3)(c) or avoided pursuant to sub clause 8.7(5)."

2.5. On 30 September 2010, whilst the contract was still conditional as the new Certificate of Title had not been issued and dealt with in compliance with clause 3, the deposit funds were disbursed as follows:

Promotional payment to the respondent	1 459.00
Commission payment to respondent	17 887.50
Balance to Vendor's solicitor	<u>41 135.50</u>
	\$60 500.00

2.6. The Complainant notified the respondent in writing on 23 and 24 September 2010 expressing concern at the early disbursement of the funds before the time when disbursement was permitted under the terms of the agreement. The Complainant requested the respondent to reinstate the deposit monies into its trust account.

2.7. The Complainant received an email on 23 September from respondent stating that "the residue of the deposit would be returned from the vendor's solicitor and they have agreed". A further letter from the lawyer acting for the vendor, dated 30 September 2010, advised "we received the balance of the deposit...we are required to hold these funds as a stakeholder and we will continue to do so until title has been issuedand/or you authorise us in writing to pay the funds out."

2.8. At no time did the Respondent confirm that the monies it had transferred from its trust account to its own benefit had been returned even though it had been put on notice. The

Respondent also had an obligation as stakeholder to ensure the funds disbursed to the vendors' solicitor were promptly returned.

- 2.9. The Respondent claims that the disbursement of the deposit was made in error. Counsel for the Respondent, Mr H, submitted that the disbursement had been made in good faith, the Respondent believing that the agreement for sale and purchase was unconditional. He argues, by way of mitigation, that neither the vendor nor the purchaser has suffered any loss and that the persons entitled to the monies received it.

3. Information Considered

- 3.1. The Authority received the complaint on or about 15 November 2010.
- 3.2. The Authority referred the complaint to this Complaints Assessment Committee (Committee). Pursuant to section 79(b) of the Act, on 16 December 2010, the Committee considered the complaint and decided to enquire into it.
- 3.3. The Committee invited written a response from the Respondent.
- 3.4. In his response, Mr H, submitted that on the face of it, the contract was unconditional. He further stated that there was no intention to act in any other way than bona fide and that there was no loss suffered by any party to the agreement.

4. Discussion

- 4.1. Having received the Respondent's written response and the other information described above, and having satisfied itself that it had completed its enquiry into the complaint, 28 April 2011, the Committee conducted a hearing with regard to the complaint, under section 89(1) of the Act.
- 4.2. The hearing was conducted on the papers pursuant to section 90 of the Act. In accordance with section 90(2) the Committee made its determination on the basis of the written material before it as referred to above.

5. Relevant Provisions

- 5.1. 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).

5.2. 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.

5.3. 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.

5.4. Clause 4.1 defines real estate work:

real estate agency work or agency work—

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
- (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
- (c) does not include—
 - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
 - (ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or
 - (iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
 - (iv) the lending of money on mortgage or otherwise; or

- (v) the provision of investment advice; or
- (vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006

5.5. Section 122 of the Act outlines the duty of an agent in respect to money received in the course of business:

122 Duty of agent with respect to money received in course of business

- (1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.
- (2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.
- (3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.
- (4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.
- (5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money.

Compare: 1976 No 9 [s 56](#)

6. Decision

- 6.1. The Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that the Respondent has engaged in unsatisfactory conduct.
- 6.2. The Committee has determined that in relation to the Respondent, the complaint met the requirements of section 72(b) which refers to contravention of a provision of the Act, in this instance section 122(1) and (2).

- 6.3. In this case, the issue is the disbursement of the deposit monies prior to the agreement for sale and purchase becoming unconditional. The agreement is clearly conditional and the Respondent by its Counsel has acknowledged that “it erroneously disbursed the deposit contrary to the provisions of clause 2.4 of the agreement.”
- 6.4. The deposit of \$60,500 was paid as per the agreement “upon acceptance of this offer”. As the agreement was completed the deposit was correctly allocated in the final event. However, the basic precept was breached. The Respondent had a duty as stakeholder to hold the deposit in trust until it could be legally paid out in terms of the agreement. In this instance, the funds were disbursed without legal authority; commission on the sale payable by the vendor was paid to the Respondent earlier than it was entitled to; the money in the trust account was more properly the property of the purchaser and was certainly not the property of the vendor to be used to meet its contractual payments to the Respondent, and the balance paid to the vendor’s solicitor.
- 6.5. The term “Stakeholder” encompasses the duty to hold the funds for the rights and obligations of both parties to the agreement. The Respondent in this case does not appear to have appreciated that, even accepting it initially made an error as to the status of the agreement, it was obliged on being put on notice to immediately take all reasonable steps to recover the money both from its own account and from the vendors’ solicitors trust account. Having disbursed the funds it should have immediately transferred sufficient funds from its own account into the trust account until such time as the vendor’s solicitors had refunded the money.
- 6.6. This case is made more serious for the reason that despite requests from the Complainant for the entire deposit to be returned and retained in the Respondents trust account until the agreement for sale and purchase was unconditional, this did not happen. The Complainant was entitled to expect a written reply, and confirmation, from the Respondent. The Respondent was wrong to assume that matters could be left on the basis that vendor’s solicitor had written to the purchasers’ solicitor about the funds it was holding in its trust account. The vendors’ solicitor had no right to hold these monies without the consent of the Complainant, or her clients’, and would have known that that was the position.
- 6.7. The Respondent has observed, through its Counsel’s submission, that “most salespersons do not understand that (sic) full legal complexities of clause 2.4, clause 5 and their provisions and obligations there under”. A very strong reason if that is indeed the case why it was entirely proper for a legally qualified Complainant to bring this complaint to the Authority which has as its primary function under the Act to protect consumers who may be

ignorant, for instance, about what has transpired with a deposit paid to the vendors agent. A purchaser would at least believe that their money would be held intact so as to be able to be immediately refunded in circumstances where the agreement was for any reason legally able cancelled by them.

- 6.8. It is to be hoped that publication of this decision will serve to educate the industry. The Committee does not accept the Respondent's view of current industry practice. Agreements which are conditional upon the issue of a new title are very common place and great care needs to be taken with regard to deposits in such circumstances because invariably there is a considerable time lapse between the date of the agreement and the availability of a search copy of the new title. Lawyers, as is demonstrated in this case, rightly regard deposits paid on conditional agreements as a significant risk and frequently will wish to see substantial sums, such as in the instant case, deposited in an interest bearing trust account until such time as the funds are able to be legally disbursed. At the time the agreement is declared unconditional the deposit becomes part payment of the purchase price (sub clause 2.3) and frequently represents a substantial part of the purchasers equity and may on occasion be funds provided by way of a loan to the purchaser from a third party to which the purchaser may well have entered into legal obligations concerning the status of the funds pending issue of a new title and completion of the transaction.
- 6.9. In summary, the Respondent was obliged to hold the purchasers' deposit so that in the event of the contract being legally cancelled by the purchasers, in accordance with their contractual rights under the agreement, the whole of the money was immediately available to be repaid without deduction. The Complainant cannot be criticized for raising this matter with the Authority.

7. Orders

- 7.1. 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.

7.2. Pursuant to section 93 of the Act, the Committee orders the licensee to make a payment to the Authority of \$1,000. This amount is to be paid within 14 days of the date of this decision.

8. Publication

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

8.2. 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.

8.3. 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.

8.4. 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 Disciplinary Tribunal.

9. Right of Appeal

- 9.1. 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.
- 9.2. Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 9.3. Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Sue Matehaere-Patten
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 24 May 2011