

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

And

In the Matter of **Complaint No CA2347338**

In the Matter of **[REDACTED]**
Licence No [REDACTED]

**Decision of Complaints Assessment Committee under section 80(2) of the Real
Estate Agents Act 2008**

Dated this 31st day of March 2010

Complaints Assessment Committee:

CAC No: 100025

Decision of Complaints Assessment Committee

1 Background

- 1.1 The Licensee, [REDACTED] (“the Licensee, [REDACTED]”) is a salesperson at [REDACTED] in Auckland. The Licensee also holds an individual agent’s licence and has twelve years experience in the real estate industry.

2 Complaint

- 2.1 The complainant, [REDACTED] alleges that at a pre-auction open home on Saturday 31 October 2009 and before entering into a sale and purchase agreement for the purchase of the property at [REDACTED] [REDACTED] (“the property”) at the auction, he and his wife asked the Licensee for confirmation that the two houses situated on the property were “legal”. They were particularly concerned to know whether the “second house” (described as a “newer two bedroom cottage”) situated at the back of property had a Code Compliance Certificate.
- 2.2 The complainant maintains his wife first sought this information at the pre-auction open home and he says that because she remained concerned about this he asked for the same confirmation (separately) from the Licensee at that open home.
- 2.3 The complainant says the Licensee told him and his wife that the second house had the required Code Compliance Certificate. The complainant says that when he asked the Licensee to “prove it” the Licensee informed him that the LIM Report for the property “had been lost when the city council [REDACTED] City Council] transferred their office and documents”. The complainant maintains further that the Licensee informed him that he had asked the vendor about this (as late as two days ago) and he (the Licensee) had been “promised” that all buildings on the

property have a Code Compliance Certificate; and the vendor “warranted” to this effect.

- 2.4 The complainant says the Licensee told him that normally in an auction, Clause 7.0 of the sale and purchase agreement is “crossed out” but that in this case the vendor is “happy to keep it”.
- 2.5 The complainant maintains the Licensee told him that the meaning and effect of Clause 7.0 of the sale and purchase agreement was that the vendor warrants and undertakes that at the date of the agreement the vendor has not received any notice or demand and has no knowledge of any requisition or outstanding requirement from any local or government authority or other statutory body; or under the Resource Management Act 1991; and that the vendor has not given any consent or waiver which directly or indirectly affects the property and has not been disclosed in writing to the purchaser. The complainant alleges the Licensee then told him (in the presence of him, his wife and the auctioneer) that Clause 7.0 protected him and he could “breach the agreement if there is no CCC”. The complainant says that this statement by the Licensee was misleading as he (the complainant) understood that phrase to mean that he could “stop the agreement” if there was no Code Compliance Certificate. The complainant maintains it was on that basis he and his wife agreed to purchase the property. They purchased the property at the auction for [REDACTED] with a proposed settlement date of 11 December 2009.
- 2.6 On the Monday, 2 November 2009 the complainant says he phoned [REDACTED] City Council and asked whether there was a LIM Report for the property. The woman to whom he spoke at the Council informed him that there was a LIM Report available. The complainant ordered one to be provided to him on an urgent basis. The following day the LIM Report was provided to the complainant. He referred it to his lawyer at [REDACTED]. It was then he had it confirmed that the “second house” did not have a Code Compliance Certificate because of a weather tightness issue (and an electrical issue).

- 2.7 The complainant then tried to stop the cheque for the deposit payable under the sale and purchase agreement; on the basis he and his wife did not want to purchase a house without a Code Compliance Certificate or a “leaky house”.
- 2.8 On 6 November 2009 the complainant’s solicitor wrote to the vendor’s solicitor at [REDACTED] (this letter was before the Committee) and requested Code Compliance Certificates be obtained prior to settlement; and that the proposed settlement date be amended to 11 December 2009 or five working days after a Code Compliance Certificate had been issued for the relevant building consents.
- 2.9 The complainant alleges the Licensee and the vendor forced him “continuously” to purchase the property and he alleges further that they “spread rumours” in the “real estate field by saying we cancelled the cheque without any reason”. He alleges that on 10 November 2009 (the date he wrote a letter of complaint to [REDACTED]), when he attended another auction, he was told by [REDACTED] representatives that he would be “banned for further bidding”. The complainant says this “really upset” him and his wife “because it is not only damaged our fame, but also further affected our further investment. We had bought several properties from your company before. This is the first time we were treated like a criminal. “
- 2.10 The complainant and his wife wrote a letter of complaint about the conduct of [REDACTED] to [REDACTED] management on 10 November 2009. They also attended a meeting with the Manager of the [REDACTED] Branch of [REDACTED]. At the meeting the complainant apparently told [REDACTED] that he would be happy to proceed with the purchase if the property had a Code Compliance Certificate and he asked [REDACTED] to “resolve the situation”.
- 2.11 [REDACTED] undertook to make some inquiries. It appears he spoke to the vendor’s solicitors and asked them to investigate the issue of the Code Compliance Certificate and it “being lost by [REDACTED] Council”.

- 2.12 In response to his complaint the complainant received two letters from [REDACTED] [REDACTED] dated 17 November 2009; one from the Branch Manager, [REDACTED] and one from the Licensee, [REDACTED].
- 2.13 In his letter [REDACTED] advised the complainant that the vendor's solicitors had informed him they had been told by the vendor there was a Code Compliance Certificate for the second house; it was that information which had been "passed on" to the Licensee when the property was listed and which was conveyed to prospective purchasers prior to the auction. The vendor's solicitors had advised further that they now understood [REDACTED] Council had no record of any such Code Compliance Certificate. The solicitors had advised they were in the process of obtaining a Code Compliance Certificate prior to settlement date.
- 2.14 In [REDACTED] letter he apologised "for any inconvenience that have been caused in regard to your misunderstanding of the transaction process" in the purchase of the property. [REDACTED] said he was aware of [REDACTED] offer to provide details of an engineer who could advise about the possibility of subdividing the property so the two houses could be sold separately. [REDACTED] enclosed a brochure for a firm of engineers. He also enclosed a business card for one of [REDACTED] rental managers in the event the complainant wished for the company to find tenants for the houses on the property. [REDACTED] also advised that he would be happy to assist in the re-sale of the property for him at any stage. The complainant maintains [REDACTED] told him he could on-sell the property even with no Code Compliance Certificates.
- 2.15 The complainant and his wife settled the purchase of the property on 16 December 2009, the date on which a Code Compliance Certificate was issued.
- 2.16 The complainant is not satisfied with the way he and his wife have been "treated by [REDACTED]" and he believes he should be entitled to "some compensation for what we have had to go through. This has taken up a lot of time. It has cost us over \$1000 extra to sort this out with our lawyer". Further "the vendors also left the property with rubbish and it is because of what had happened

with [REDACTED]. This has caused us a lot of stress also and my wife has had to go to the doctor. We should get a letter of apology from them and an undertaking not to damage our fame or to ban us from auctions.”

Information and Material Considered

- 2.17 The Real Estate Agents Authority received [REDACTED] complaint against [REDACTED] on 10 December 2009 and referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the Real Estate Agents Act 2008 (the REAA), on 20 January 2010 the Committee considered the complaint and determined to inquire into it. The Committee was satisfied that although the complaint relates to conduct which occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into the complaint.
- 2.18 The Committee invited [REDACTED] to provide a written response to the complaint and this was received on or around 12 February 2010. [REDACTED] response was full and detailed and was supported by a number of documents including correspondence between [REDACTED] and the vendor’s solicitors relating to the warranty clause and documents from [REDACTED] file in respect of the property.
- 2.19 [REDACTED] denies he told the complainant the property was “legal” and had a Code Compliance Certificate. However in response to the complaint about the representations he allegedly made to the complainant and his wife regarding the Code Compliance Certificates, he maintains that even if he had made those representations they would have been correct at the time they were made based on assurances which had been given by the vendor’s solicitors that the vendor was able to provide the warranties in the sale and purchase agreement.
- 2.20 [REDACTED] denied that he ever told the complainant and his wife that they would not have to settle the purchase if there was not a Code Compliance Certificate or that settlement could be delayed. He and [REDACTED] maintain that it was the complainant who said he would not settle without a Code Compliance Certificate;

and that in response to that [REDACTED] had said that if he wanted to do that then he was entitled to make that decision; but that he should take legal advice before taking that step.

2.21 [REDACTED] provided a copy of an email recording details of a telephone call he received from the complainant one hour after the auction (at about 5.00pm) in which the complainant told him that his wife “didn’t like the property and could I give him details of the under bidders.” [REDACTED] recorded that he informed the complainant he was not in a position to provide him with this information and could not without the permission of [REDACTED]. [REDACTED] explained that when the deposit cheque was banked on the Monday, 2 November 2009 on special answer, it was discovered that the complainant had tried to stop the cheque. The complainant’s allegations that he had been misled by [REDACTED] about the warranties did not arise until after that date.

2.22 The complainant’s claim that [REDACTED] and [REDACTED] tried to encourage him to on-sell the property without a Code Compliance Certificate was also denied as not what was said; in his letter to [REDACTED] of 17 November 2009 [REDACTED] had said he would be happy to assist in the re-sale of the property; but he did not suggest resale without a Code Compliance Certificate.

2.23 In addition to receiving a full written response from the Licensee, the Committee also received a letter from [REDACTED], the firm of solicitors who acted for the vendor of the property. The letter from [REDACTED] is dated 11 February 2010 and was made available to the Committee at the request of the Licensee.

2.24 [REDACTED] stated that in their view there was no foundation to the complaint. They explained the background to the sale of the property and in particular that it had been ordered sold by auction by the Family Court. [REDACTED] had been appointed by the Court as agents to conduct a sale and [REDACTED] had been appointed as solicitors to act for the vendor. [REDACTED] explained difficulties they had had in contacting the vendor around the time the property was being listed; [REDACTED] had advised they were not in a position

to confirm whether the warranties and undertakings in Clause 7.0 could be given and it was for that reason [REDACTED] requested this warranty clause to be deleted from the particulars and conditions of sale. [REDACTED] advised that subsequently they had been able to contact the vendor, who had advised that all building work on the property had been done subject to building consents and Code Compliance Certificates had been issued. [REDACTED] then contacted [REDACTED] and requested that in the light of that advice the warranty clause (Clause 7.0) could be reinserted into the agreement for sale and purchase.

2.25 It would appear that any representations which the Licensee made to prospective purchasers, including the complainant and his wife, about the vendor's warranties was based on that information provided by the vendor through [REDACTED].

2.26 [REDACTED] also provided information pertaining to subsequent events including the steps taken to obtain Code Compliance Certificates prior to settlement, and the vendor's agreement to defer the complainant's purchase of the property pending the issue of the Code Compliance Certificates. [REDACTED] also confirmed the Licensee's denial that he had ever told the complainant or his wife that they could delay settlement until Code Compliance Certificates had issued.

2.27 Having received [REDACTED] written response to the complaint, on 10 March 2010 the Complaints Assessment Committee met to discuss the material it had obtained to date and to determine whether or not any further inquiries or action were necessary.

2.28 In summary, at the meeting the Committee considered the following written material:

- a. Complaint and supporting documentation including [REDACTED] letters to [REDACTED] of 10 November 2009 and [REDACTED] [REDACTED] responses of 17 November 2009 as described above;
- b. Clause 7.0 of the agreement for sale and purchase (Vendor's warranties and undertakings);

- c. An excerpt from the LIM report for the property;
- d. Letter from [REDACTED] to [REDACTED] and his wife dated 18 December 2009;
- e. Statement of [REDACTED] taken on 11 February 2010 by an investigator in the Complaints Unit of the Real Estate Agents Authority;
- f. Letter of Response from Licensee to complaint, dated 11 February 2010 and a number of annexures in support including the documents from [REDACTED] file (including listing agreement, title search, Family Court Order; Residential Listing Full Report for auction, particulars and conditions of sale and details of sale given to vendor, emails from [REDACTED] to [REDACTED] dated 30 October 2009 confirming the vendor able to provide the relevant warranties, a letter dated 13 November 2009 from [REDACTED] to [REDACTED] customer care manager; and correspondence between [REDACTED] and [REDACTED] relating to obtaining the Code Compliance Certificates in early December 2009)
- g. Letter from [REDACTED] dated 11 February 2010.

3 **Decision under section 80(2)**

- 3.1 At its meeting on 10 March 2010 the Committee made a decision pursuant to section 80(2) of the REAA, not take any further action on the complaint.
- 3.2 Having received the Licensee's response to the complaint and the supporting documentation, and the letter from [REDACTED] referred to above, and having considered that material along with the other material before the Committee, it appears to the Committee that, having regard to all the circumstances of the case, no further action is necessary.
- 3.3 The Committee is satisfied that any representations which the Licensee may have made to the complainant and his wife about the warranties and the effect of

Clause 7.0 were made in good faith and on the basis of information, advice and assurances which the Licensee had received from the vendor through the vendor's solicitors. In the Committee's view the Licensee was entitled to rely on the assurances he had been given by [REDACTED] and to make representations based on them; he cannot be held responsible for passing on information provided to him by his client's lawyer (even if that information turned out subsequently to be incorrect).

- 3.4 The Committee does not accept the complainant's claim that he was misinformed and/or misled by the agent about the legal position in relation to the effect of Clause 7.0. The Committee prefers the Licensee's account on this issue.
- 3.5 The Committee notes the complainant was legally advised in the purchase process. It is clear that he took and received advice from his solicitor about the information contained in the LIM report, including confirmation there were no Code Compliance Certificates; and that a breach of the warranty clause gave him a right to a claim for damages and not a right of cancellation, which is the correct legal position.
- 3.6 The Committee is satisfied the Licensee took appropriate steps to clarify the position, in relation to the Code Compliance Certificates and the warranty clause both prior to the auction and afterwards. The Licensee did all he reasonably could be expected to have done to seek assurance from the vendor that Code Compliance Certificates had been obtained and as to the warranties. The Committee is of the view that this contributed to the difficult position the Licensee found himself in after the sale when it transpired that there was a breach of the vendor's warranty.
- 3.7 The Committee regards as unfounded the complainant's complaints about the alleged insistence by the Licensee to purchase the property once it had transpired there was a breach of the warranty clause. Again, the complainant was legally advised on this issue and his lawyer's advice that a breach of this clause did not give him a right of cancellation was correct. If the Licensee told the complainant

he had to proceed with the purchase then he would have been correct in giving that advice, backed as it was by legal advice to the same effect which the complainant had obtained from his own lawyer.

- 3.8 There was no evidence before the Committee supporting the complainant's contention that the Licensee (and the vendor) had spread rumours about him and threatened him that he would be unable to bid at future [REDACTED] auctions. Any such behaviour would in the Committee's view have been unacceptable. However for the purposes of assessing this complaint, there is no information before the Committee which substantiates this allegation. The Committee does not believe it is necessary or appropriate to take that issue any further, whatever the position.
- 3.9 In all of the above circumstances the Committee is of the view it is not necessary to take the matters raised in the complaint any further.
- 3.10 The Committee notes that even if it was minded to take the matter further (which it is not), or if it had made an adverse finding against the Licensee, the Committee could only have made an order in the nature of a penalty that could have been made against the Licensee at the time the conduct occurred (under the now repealed Real Estate Agents Act 1976). As the conduct the subject of the complaint occurred prior to the commencement of the REAA the powers to make orders conferred on the Committee under section 93 would not have been available by virtue of section 172(2). The effect of this would have been that the remedies sought by the complainant (compensation and an apology) would not have been available in any event.
- 3.11 It is noted that when the Committee gives the complainant written notice of this decision a copy of the Licensee's response to his complaint will also be provided to him.

4 Right of Appeal

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

DATED this 31st day of March 2010



Jo Hughson
Chairperson