

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 11th day of March 2011

Complaints Assessment Committee:

CAC10012

Chairperson: Robyn Wilson

Deputy Chairperson: Peter Mc Dermott

Panel Member: Marina Neylon (not participating)

Complaints Assessment Committee

Decision finding unsatisfactory conduct

The Complaint

David Lewis has complained about a clause in his property management agreement purporting to entitle Summit Real Estate Ltd (Summit) to commission if the property was sold to his tenant and its attempts to enforce the term. He says the term was not brought to his attention when he signed the agreement and should have been. He says Summit seems to believe it doesn't have to comply with the Real Estate Agents Act 2008 (the Act) requirements in respect of signing an agency agreement.

Material Facts

Mr Lewis engaged Summit to manage his property in the Nelson area on 22 January 2010. He signed a contract headed Residential Managements Authority which included Clause 8.2. which reads:

If the Owner sells the property to a tenant (or some third party connected to the tenant) introduced to the property through the Manager's instrumentality the Owner hereby appoints Summit Real Estate Ltd (the manager) as agents for the sale of the property. In the absence of other written agency terms the manager's fee will be 3% of the purchase price plus GST.

Mr Lewis says he did not notice the term when he signed the contract. He was approached by his tenant to purchase the property. The property was sold by private treaty to the tenant signed on 9 September and settled on 17 September 2010. Following the sale and cancellation of the parties' property management agreement Summit approached the complainant for its commission relying on the signed property management. Mr Lewis took the view that Summit were in breach of the Act in respect of section 126 about the requirement for an agency agreement, section 127 about providing an approved guide, section 128 about the contents of an agency agreement, and section 133 about providing an approved guide before a sale and purchase agreement is signed.

Allister Nalder a director of Summit says the terms about sale to a tenant are very clear and not hidden in the agreement. They say they offered to explain the contract to the complainant's wife but she declined and said Mr Lewis would attend to it. They say Mr Lewis had the document for a

week before it was signed and returned. Summit says any breach by it of the Act was caused by Mr Lewis's failure to comply with their contract in relation to notifying the tenant of the property going on the market and giving notice, and in respect of termination of the management agreement. Mr Nalder says if Mr Lewis did what he should have, Summit would have provided the required guides and agency agreement before any contracts for sale were signed.

In an attempt to resolve the dispute Summit offered to reduce its commission from \$30,000 to \$12,000 being a commission based on an average house sale for the area. This was not accepted by Mr Lewis.

Relevant Provisions

Section 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.

Section 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.

Section 126

No entitlement to commission or expenses without agency agreement

- 1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
 - a) the work is performed under a written agency agreement signed by or on behalf of—
 - i) the client; and
 - ii) the agent; and
 - b) the agency agreement complies with any applicable requirements of any regulations made under [section 156](#); and
 - c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.
- 2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.
- 3) A court may not make an order described in subsection (2) unless satisfied that—
 - a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
 - b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
 - c) failure to make the order would be unjust

Section 127

Approved guide to be provided before agency agreement for residential property signed

- 1) An agent must not enter into an agency agreement with a person for the sale of residential property unless the agent or a licensee on the agent's behalf—
 - a) has provided the person with a copy of the approved guide before the agreement is signed by or on behalf of the person; and
 - b) has received a signed acknowledgment from the person that the person has been given the approved guide.

- 2) In this section—

approved guide means a guide that—

- a) is about the sale of residential property;
- b) has been approved by the Authority for the purposes of this section

residential property does not include any property that—

- a) has been developed with other properties in a continuous area; and

- b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.
- 3) A contravention of this section does not affect the validity of the agency agreement.

Section 128

Agency agreement must disclose rebates, discounts, and commissions

- 1) An agent is not entitled to any expenses from a client for or in connection with any real estate agency work carried out by the agent for the client in connection with a transaction unless the agency agreement under which the agent performs that work contains a statement that—
 - a) identifies the source of all rebates, discounts, or commissions that the agent will or is eligible to receive in respect of those expenses; and
 - b) specifies the estimated amount of those rebates, discounts, or commissions (to the extent that the amount can reasonably be estimated).
- 2) This section does not limit the liability of any person under the [Secret Commissions Act 1910](#).

Section 133

Approved guide to be provided when contractual document provided

- 1) An agent must ensure that subsection (2) is complied with before a person signs a contractual document if the contractual document—
 - a) relates to the proposed sale of a residential property in respect of which the agent is carrying out real estate work; and
 - b) was provided to the person by the agent or by a licensee on behalf of the agent.
- 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 acknowledgment from the person that the client has been given the approved guide.
- 3) In this section—
 - approved guide means a guide that—
 - a) is about the sale of residential property;
 - b) has been approved by the Authority for the purposes of this section.
- 4) A contravention of this section does not affect the validity of any contract.

Real Estate Agents (Duties of Licensees) Regulations 2009 (SR 2009/281)

Agency agreement must contain statement by agent relating to rebates, discounts, and commissions

- 1) An agency agreement must contain a statement by the agent relating to rebates, discounts, and commissions.
- 2) The statement described in subclause (1) must be in form 1 of the Schedule.

Discussion

The Complaints Assessment Committee (the Committee) accepts that the clause was not hidden in 'small print' being the same size as the rest of the terms but agrees with the complainant that the heading of clause 8 "Property on the Market" would not quickly alert a reader to the purported agency appointment. The Committee does not accept that it is a usual term in a property management agreement that a consumer could expect and for this reason, it would ideally have been brought specifically to the Lewis's attention. However the Committee notes that Summit says their offer to go through the agreement with Mrs Lewis was not accepted.

The Committee's view is that the management contract does not suffice as an agency agreement within the meaning of section 126 1 (a) or (b) of the Act. The agreement was not signed by the agent and the regulations in respect of an agency agreement require a statement about rebates, discounts and commissions that was not in the management contract. So while Clause 8.2 in the contract purports to appoint Summit as an agent in the event of a sale to a tenant, it cannot do so and comply with the Act and regulations made under the Act. It is beyond the role of the Committee to consider subsections (2) and (3) which allow a court, if proceedings are taken to recover commission, to order that a commission be paid despite non-compliance with subsection (1) of the Act.

The Committee is also of the view that it was a breach of section 127, the requirement to provide an approved guide before an agency agreement is signed because the property management agreement by virtue of clause 8.2 "relates to the proposed sale of a residential property in respect of which the agent is carrying out real estate work" albeit real estate work in the future and the intention that Summit will be appointed as an agent without the necessity of doing any work to assist the sale. Compliance with section 128 does not arise because there was no claim for expenses from the Lewis's. The Committee accepts that Summit was not in a position to provide the approved guide about the sale of residential property before Mr Lewis signed the sale and purchase agreement as it was not aware of the impending sale.

The Committee has sympathy with the complainant's view that he paid Summit what was required

to find a tenant and manage the property and that Summit did no additional work in relation to the tenant buying the property. Mr Lewis says the effect of Summit's claim is to increase his property management fees by \$30,000, the claimed commission amount.

The Committee doesn't accept the argument of Summit that its breach was only caused by the complainant not telling them of the sale as required under the contract. The contract does not require the owner to do anything except appoint Summit as an agent if the property is sold to a tenant. That is, the requirement to appoint comes after the sale. The warranty in 8.1 that the property is not on the market and will not be for six months was not breached.

In summary, the Committee has found that Summit's property management agreement breaches the Act by purporting to effect an appointment of an agent without an agency agreement being signed and by attempting to do so without providing the approved agency guide. Accordingly the Committee finds that Summit Real Estate Ltd has engaged in unsatisfactory conduct pursuant to section 72 (b) of the Act.

Decision

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.

The Committee has determined under section 89(2) (b) of the REAA 2008 that it has been proved, on the balance of probabilities, that Summit Real Estate Ltd has engaged in unsatisfactory conduct.

Orders

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.

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.

The Committee requires the investigator authorised to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Summit Real Estate Ltd 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 Summit Real Estate Ltd and David Lewis.

Summit Real Estate Ltd and David Lewis may file submissions on what orders, if any should be made. Mr Lewis may file submissions within 10 working days from the date of the decision. These submissions, if any, will then be provided to Summit Real Estate Ltd, with a timeframe for filing final submissions.

Publication

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

The Committee has deferred making any decision on publication until its hearing to decide what

orders, if any, should be made.

Right of Appeal

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.

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.

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.

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



Robyn Wilson
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 11 March 2011