

Before the Complaints Assessment Committee

Complaint No: C41215

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

And

Licensee 1: **Licensee 1 (xxxxxxx)**

Licensee 2: **Licensee 2 (xxxxxxx)**

The Agency: **Agency (xxxxxxx)**

Decision to take no further action

28 March 2023

Members of Complaints Assessment Committee: CAC2108

Chairperson: Andrew Hayes

Deputy Chairperson: Denise Evans

Panel Member: Ian Keightley

Complaints Assessment Committee

Decision to take no further action

1. The Complaint

- 1.1. On 6 August 2021, the Real Estate Agents Authority (the Authority) received a complaint against Licensee 1, Licensee 2, and the Agency from the Complainant.

How the complaint arose

- 1.2. The Complainant was sitting outside his property¹ when he was approached by the Licensees, who are both Licensed Real Estate Salespersons under the Real Estate Agents Act 2008 (the Act). They asked the Complainant whether he wanted to sell his property. The Complainant said that he would if they brought him an offer over \$1 million.
- 1.3. The Complainant, and the Licensees agreed to meet the next day. After meeting with the Licensees on several occasions, the Complainant signed an Agreement for Sale and Purchase to sell his property. The transaction went unconditional and eventually settled.

Complaint

- 1.4. Against this background the Complainant complains that the Licensees took advantage of his limited English in that they:
- (a) Failed to ensure that he understood the documents required for listing and selling his property;
 - (b) Failed to provide him with a written appraisal prior to him signing the listing agreement;
 - (c) Did not recommend that he got legal advice;
 - (d) Misrepresented the purpose of their visit to him on the 1st of March 2021.

2. Issue

- 2.1. We (the Complaints Assessment Committee) must consider the following issues:
- (a) Were either Licensee 1 or Licensee 2 guilty of unsatisfactory conduct in relation to the services provided to the Complainant in that:
 - i. Did either Licensee 1 or Licensee 2 take advantage of the Complainant's limited English by failing to ensure he understood the documents he signed or misrepresent the purpose of their visit to him?
 - ii. Did the Licensees fail to provide the Complainant with an appraisal prior to him signing the listing agreement.
 - (b) Did the agency meet their obligations to supervise the Licensees?

¹ The property

3. Consideration of the Issue

3.1. Section 72 Real Estate Agents Act 2008 provides that:

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 the 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.

Did either Licensee 1 or Licensee 2 take advantage of the Complainant's limited English by failing to ensure he understood the documents he signed or misrepresent the purpose of their visit to him on the 1st of March 2021?

- 3.2. The Complainant's complaint was articulated by his solicitor who described the Complainant as "being from Cambodia with an extremely limited understanding of English" and as a "relatively unsophisticated person."
- 3.3. The Complainant says that the Licensees misrepresented the purpose of the meeting on the 1st of March 2021, although he does not specifically say at which meeting. The Complainant says that he only became aware he had signed a binding legal contract to sell his property when he spoke with his lawyer on the 5th of March 2021.
- 3.4. The Licensees say that they had a number of conversations with the Complainant, all of which were conducted in English.
- 3.5. The first of these discussions occurred on the 12th of February 2021 when the Licensees first met the Complainant outside his property and there was a discussion between them about the possibility that the Complainant might want to sell his property.
- 3.6. There was a further discussion between the Licensees and the Complainant on the 13th of February 2021 when they visited the property to complete the appraisal. During this meeting the Licensees said that they made a number of recommendations which included the need to clean and tidy up the property, that the Complainant should auction the property to get the best price and that he should get legal advice.
- 3.7. On the 28th of February 2021, the Complainant made a telephone call in English to Licensee 2 and asked whether she had a buyer for his property and to further discuss the sale of the property. As a result of that phone conversation the Licensees arranged to meet with the Complainant at 5.30pm on the 1st of March 2021.
- 3.8. We accept the evidence of the Licensees that they had discussions with the Complainant first on the 13th of February 2021. We also accept that there were further detailed discussions held with the Complainant on the 1st of March 2021 both during the meeting which occurred at 5.30 pm and again during the meeting held later that evening when the Complainant signed the Agreement for Sale and Purchase.

- 3.9. The Licensees said that during the meeting which occurred at 5.30pm, the Complainant declined to get legal advice on the basis he understood everything. They said he also declined their recommendation that he get legal advice before he signed the offer.
- 3.10. We find that the Complainant appears to have understood the requirements for completion of the Listing agreement including the AML obligations and provided the Licensees with the verification documents including providing the Licensees with his driver's licence, passport, utility bill and lawyer details.
- 3.11. We accept that the Licensees are experienced licensees and are aware of the requirements of the Act that an agent must not undertake any action to bring about a sale of a property without a listing agreement in place. We are therefore satisfied that the purpose of the meeting at 5.30pm was clear to both parties.
- 3.12. After the Complainant signed the Listing agreement, the Licensees said they would meet with the prospective purchaser. We do not know what was said by the Licensees about bringing a purchaser to the property.
- 3.13. The Licensees say that when they met with the prospective purchaser, he said that he did not need to see the property as he was only interested in the land. The prospective purchaser then made an offer of \$1,250,000.00 to purchase the property. The Licensees took this offer in person to the Complainant at about 9pm on the 1st of March 2021.
- 3.14. The Complainant signed the offer and importantly he also initialled the specific Buy/Sell Clause in the agreement.
- 3.15. There is no evidence to suggest that there was any pressure on the Complainant to sign the offer on the 1st of March 2021.
- 3.16. We accept that it was reasonable for the Complainant to expect a prospective purchaser to view the property, however in this case that did not happen, and we accept the Licensees' evidence that the purchaser did not want to view the property.
- 3.17. We consider that as the Complainant had been engaged in real estate transactions on two occasions in relation to this particular property, first when he bought the property with other people in 2015 and secondly when he sold and bought the property in his own name that he had knowledge of the sale process.
- 3.18. Licensee 2, herself is a speaker of English as a second language, confirmed that she is experienced working with clients for whom English is a second language. Both she and Licensee 1 have worked in the diverse community of South Auckland for many years.
- 3.19. the Complainant also communicated through text with The Licensees in English, and we note that the Complainant not only provides address details for his solicitor, he also thanked Licensee 1 in that text.
- 3.20. We find therefore that there is insufficient evidence to establish that the Licensees took advantage of the Complainant's limited English, or that they did not recommend he get legal advice before signing the Listing Agreement or the Agreement for Sale and Purchase. We also find that there is insufficient evidence to establish that there was any misrepresentation by either the Licensees of the purpose of either meeting held on the 1st of March 2021.

Did The Licensees fail to provide the Complainant with an appraisal prior to him signing the listing agreement?

- 3.21. The Complainant says that he was not provided with a written appraisal before he signed the listing agreement on the 1st of March 2021.
- 3.22. The Licensees are obliged to provide the Complainant with an appraisal of the property which must be in writing and provide information about the property to assist in establishing a price range for the property.²
- 3.23. The Licensees said that they appraised the property on the 13th of February 2021 and had told the Complainant that they would get the written appraisal to him on the 14th of February 2021. The Licensees offered to email the appraisal to the Complainant, however the Complainant said his email was not working at that time.
- 3.24. The appraisal was not delivered to the Complainant because Auckland went into a 2-week Covid 19 lockdown which meant without an email address the Licensees were not able to deliver the appraisal to the Complainant.
- 3.25. The Licensees say that they showed the appraisal to the Complainant during their meeting on the 1st of March 2021. They said they were unable to print it at the time because they were not able to access their office due to Covid 19 restrictions and their home printer was out of ink.
- 3.26. The copy of the appraisal available to the Committee is dated the 2nd of March 2021, which is after the date when the Listing Agreement and the Agreement for Sale and Purchase were signed by the Complainant. We asked The Licensees specific questions as to why the appraisal was dated the 2nd of March. We also requested information from the Licensee's laptop to verify the date when the appraisal was created.
- 3.27. The Licensees said that the date on the appraisal reflects the date on which the document was printed. They advised that the laptop had been stolen on the 7th of May 2021 and provided a Police report to confirm the same.
- 3.28. We are satisfied that the Licensees showed the Complainant the appraisal when they met on the 1st of March 2021. However, the Complainant was not provided with a printed copy of a written appraisal. We believe that this failure was a technical breach only and, when considered in light of the restrictions which were imposed during the Covid lockdown, is explicable. Accordingly, the Committee does not consider that there was unsatisfactory conduct on the part of the Licensees in these circumstances. It is noted that the sale price for the property exceeds price which was set out in the appraisal.

Outcome

- 3.29. Taking all matters into account we have determined that neither Licensee 1 or Licensee 2 are guilty of unsatisfactory conduct in relation to the services provided to the Complainant and therefore we have decided to take no further action in respect of the Complainant's complaint.

² Rule 10.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

Complaint Assessment Committee's investigation of the Agency

- 3.30. We considered whether there may have been an issue with the level of supervision provided by the Agency to The Licensees. On our own motion, we decided to inquire into this aspect of the complaint under section 78(b) of the Act.
- 3.31. The Agency provided detailed information about the ongoing professional development offered by the Agency and undertaken by the Licensees.
- 3.32. The Committee does not consider that there is sufficient evidence that the Agency failed to provide adequate supervision for the Licensees and therefore it determined to take no further action in respect of this matter.

4. Publication

- 4.1. The Committee directs publication of its decision. This decision will be published without the names or identifying details of the Complainant (including the address of the Property), the Licensee and any third parties.
- 4.2. The Authority will publish the Committee's decision after the period for filing an appeal has ended, unless the Real Estate Agents Disciplinary Tribunal (the Tribunal) receives an application for an order preventing publication. The Authority will not publish the Committee's decision until the Tribunal has made a decision on the application.
- 4.3. Publishing the Committee's decision supports the purpose of the Act by ensuring that the disciplinary process remains transparent, independent and effective. The Committee also considers that publishing this decision helps to set industry standards and that is in the public interest.

5. Your right to appeal.

- 5.1. If you are affected by this decision of the Committee, the right to appeal is set out in section 111 of the Act. You may appeal in writing to the Tribunal within 20 working days after the date notice is given of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has the discretion to accept a late appeal filed within 60 working days after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- 5.2. The Notice of Appeal form, which includes information on filing an appeal, can be located on the Ministry of Justice's website: <https://www.justice.govt.nz/tribunals/real-estate-agents/apply/>.

6. Provisions of the Act and Rules referred to

- 6.1. The provisions of the Act and the Rules referred to in this decision are set out in the Appendix.

Signed



Andrew Hayes
Chairperson



Denise Evans
Deputy Chairperson



Ian Keightley
Member
Date: 28 March 2023

Appendix: Provisions of the Act and Rules referred to

The Real Estate Agents Act 2008 provides:

78 Functions of Committees

The functions of each Committee are—

- (a) to inquire into and investigate complaints made under section 74:
- (b) on its own initiative, to inquire into and investigate allegations about any licensee:
- (c) to promote, in appropriate cases, the resolution of complaints by negotiation, conciliation, or mediation:
- (d) to make final determinations in relation to complaints, inquiries, or investigations:
- (e) to lay, and prosecute, charges before the Disciplinary Tribunal:
- (f) in appropriate cases, to refer the complaint to another agency:
- (g) to inform the complainant and the person complained about of its decision, reasons for the decision, and appeal rights:
- (h) to publish its decisions.

79 Procedure on receipt of complaint

- (1) As soon as practicable after receiving a complaint concerning a licensee, a Committee must consider the complaint and determine whether to inquire into it.
- (2) The Committee may—
 - (a) determine that the complaint alleges neither unsatisfactory conduct nor misconduct and dismiss it accordingly:
 - (b) determine that the complaint discloses only an inconsequential matter, and for this reason need not be pursued:
 - (c) determine that the complaint is frivolous or vexatious or not made in good faith, and for this reason need not be pursued:
 - (d) determine that the complaint should be referred to another agency, and refer it accordingly:
 - (e) determine to inquire into the complaint.

89 Power of Committee to determine complaint or allegation

- (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
- (2) The determinations that the Committee may make are as follows:
 - (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:
 - (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct:
 - (c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.

- (3) Nothing in this section limits the power of the Committee to make, at any time, a decision under section 80 with regard to a complaint.

111 Appeal to Tribunal against determination by Committee

- (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.
 - (1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—
 - (a) a copy of the notice given to the person under section 81 or 94; and
 - (ab) the prescribed fee, if any; and
 - (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
- (3) The appeal is by way of rehearing.
- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

The Rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 referred to in this decision are: Rules 9.7, 10.2 and 10.3