

In brief from
RAINEY COLLINS
LAWYERS
AGENT CARE

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In This Issue: Duty to Disclose • Special Conditions • New Act – Take Care

WELCOME to the Agent Care edition of Rainey Collins' newsletter.

Your Duty To Disclose Information To The Vendor – How Far Does It Go?

A purchaser has come to you interested in purchasing a property that you have had on your listings for a few months. You know the Vendors are not overly worried about the speed of the sale, and are simply looking to downsize.

You have acted for this purchaser before and he is becoming well known in the industry as an investor who is always keen for a quick sale with maximum profit when he on-sells. Do you need to tell the Vendor that information?

You will no doubt be familiar by now with the case involving the Auckland real estate agency which was ordered to pay compensation to a Vendor they represented for failure to disclose material information to them. That case has a very similar fact pattern to the example above.

What information was not disclosed?

That the agent had acted for the purchaser in the past and had hoped to act for him again in the future, and that the purchaser was an experienced property trader. The agency was found to have failed to disclose material information which created a conflict of interest and that should have been disclosed to the Vendor.

An important aspect of the case which has not yet been widely publicised was the courts' consideration of the 'fiduciary duty' owed to a Vendor by an agent. This is significant for agents as it increases the degree of responsibility to disclose information. It also has the potential to significantly increase the level of liability for failing to disclose.

What is a fiduciary duty?

A fiduciary duty is an obligation of loyalty arising as a result of the inherent nature of a particular relationship. The Court

has affirmed in the recent case that a fiduciary duty, or legal obligation of loyalty, arises under an agent's agency agreement with a Vendor.

You therefore have a fiduciary duty to your principal (the Vendor) to always prefer their interests to anybody else's (including any purchaser who approaches you). You as an agent must act in good faith and must not obtain a benefit for yourself or for any other person without the consent of your principal.

What information must be disclosed?

The Court recognised that every situation will be slightly different and any potential conflict will depend on exactly what you have been engaged to do. However, it seems clear now that if the information you withhold alters the outcome of the transaction then you may well be found to have breached your fiduciary duty.

In the recent case the agent gave the Vendors the impression that the purchaser was buying the home to live in, whereas the purchaser's true intention (that the agent was aware of) was to on-sell at a profit. The Vendors indicated that they would not have sold to him in those circumstances had they known.

While the case confirms a high legal standard of loyalty to your Vendor, it does not prevent agents from involving someone they know or have previously acted for. Instead it very clearly imposes on agents a duty to remain loyal to your Vendor's interests ahead of your own or other third parties' at all times. Any conflict of interest or other material information must be disclosed or agents could be liable.



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Our Guarantee

When buying or selling residential property we provide a risk free guarantee. We guarantee that our clients will be absolutely delighted with our service. If our service lets them down in any way we will fix the problem promptly at our cost.



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The New Real Estate Agents Act... Be More Careful Than Ever!

The disciplinary procedures under the new Real Estate Agents Act 2008 that comes into force later this year will introduce a range of penalties against agents who are found to have breached the Act. These include fines of up to \$40,000.00 for individuals and \$100,000.00 for companies.

As an agent you are usually "in the middle" of a negotiation that can be emotional and stressful for Vendor and Purchaser. Often both Vendor and Purchaser are regularly on the telephone to you. This will happen both before the contract is signed and probably also around the date or dates that special conditions are due to be confirmed. Having good records can be very important.

Consider the following situation:

A Purchaser's lawyer has left it until late on a Friday afternoon to confirm a builder's report condition in an agreement. On reviewing the builder's report the Purchaser's lawyer noticed that the report referred to alterations and additions that had been carried out on the dwelling. The Purchaser's lawyer informed the Purchaser that additions and alterations require approval and signoff from the City Council. The Purchaser asked the agent to check with the Vendor whether the Council's approval and signoff had been obtained for the alterations. The Vendor confirmed that the work done by the Vendor had been approved by the Council and a Code Compliance Certificate issued. The agent confirmed to the Purchaser what the Vendor had told the agent, so the Purchaser instructed their lawyer to confirm the building condition in the contract. The deposit was paid and both parties were pleased with the result. However, a week later an angry Purchaser called the

agent to accuse her of misleading conduct. Apparently, two sets of alterations had been done to the house (once by the Vendor and once by a previous owner) and it was only the work done by the Vendor that had been approved and signed off by the Council. The Purchaser insisted that they were told all the work had been approved and the agent's different recollection of the discussion when the contract was confirmed only incensed them further!

It is not always going to be possible to agree when memory is relied on. What you can do, however, is minimise the risk of a complaint being made about you, or, if one is made, of it succeeding.

Tip 1 - A good starting point is to keep a full diary note of conversations with Vendors and Purchasers so that (as in the above case) you have more than just your memory to fall back on where a dispute arises.

Tip 2 – Confirm discussions in writing where possible. Again this can minimise the chances of any misunderstanding.

In the situation described above, an agent who is able to produce a diary note and/or follow up written communication recording the actual discussions has a much greater chance of convincing the Purchaser (or a Disciplinary Tribunal) that their version of events is the correct one!



SUSIE MILLS

Did You Know... We Do Wills Too!

It is important to have an up-to-date Will. The last thing you want is to work hard to build up and protect your assets, only for them to end up with someone you didn't intend them to. We are experts at helping draft Wills that suit your needs and of course updating your existing Will if your circumstances have changed. Call Fintan Devine or Susie Mills on (04) 473 6850.

Need Help?

We are happy to field calls of a general nature to answer those little queries that come up from time to time or to accept ideas for an issue you would like covered in our next edition.

We value your feedback and invite you to call us on 0800 RC AGENT (0800 722 4368) and ask for Fintan Devine, or email Sarah Edwards on sedwards@raineycollins.co.nz with any questions or ideas you may have.



SARAH EDWARDS

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