

8 July 2020

[REDACTED]

By email only: [REDACTED]

Dear [REDACTED]

Official Information Act #19.182 - Advertising of mortgagee sales

1. We refer to your request received on 12 June 2020 for information held by the Commerce Commission (Commission) about a ruling or statement on the requirements to disclose whether a sale is a mortgagee sale on advertising copy.
2. We have treated this as a request for information under the Official Information Act 1982 (OIA).

Our response

3. We have decided to grant your request.
4. The Commission does not make rulings; only the Courts can rule on whether a breach of the law has occurred. The Commission has issued a warning letter, published an article and given compliance advice on the requirements in relation to advertising of mortgagee sales.

2004 - Warning letter

5. In 2004, the Commission warned Monarch Real Estate Limited (Monarch) in relation to its advertising of a mortgagee sale.
6. In this instance, the fact the property was being sold as a mortgagee sale was not disclosed in advertising by Monarch.
7. The Commission considered that Monarch may have breached sections 9 and 14(1)(b) of the FTA and stated:

Because of certain conditions present in mortgagee sales, that are not present in other sales, failure to disclose the mortgagee sale may be detrimental to prospective purchasers. These conditions are:

- *Chattels may not be included in the sale.*
- *The mortgagee is not required to give vacant possession.*
- *The property is sold subject to existing tenancies.*
- *Under certain conditions the sale can be cancelled at any stage prior to settlement.*

Given the often acrimonious circumstances surrounding mortgagee sales, other factors that could influence prospective purchasers (and about which they require to be informed) include the increased risk of damage to the property, problems associated with access to the property and even issues of personal safety.

Failure to disclose the interest of the Mortgagee in the property may also be in breach of section 14(1)(b) of the Act. Silence in relation to the sale of land has been held by the courts to be misleading where the potential buyer is likely to have a reasonable expectation that the information would be disclosed. In this case it is the Commission's view that, because of the factors outlined above, potential buyers would have a reasonable expectation that the fact of the mortgagee sale would be disclosed.

It is the Commission's view that information of this nature should be disclosed at the earliest possible opportunity. This is because the first impression may well influence a course of action by prospective purchasers.

8. The Southland Building Society was also warned in relation to the same matter.
9. A warning is not a finding of non-compliance; only the Courts can decide whether a breach of the law has occurred. The purpose of a warning letter is to inform the recipient of our view that there has been a likely breach of the law, prompt change in their behaviour and encourage future compliance.

2004 - Article

10. We have **attached** an article on 'Advertising of Mortgagee sales' written by our then Fair Trading Manager, dated April 2004.

2008 - Compliance advice

11. In 2008, the Commission provided compliance advice to Bluestone Group Pty Limited in relation to the advertising of mortgagee sales.
12. In this instance, the fact that properties were being sold as mortgagee sales was not disclosed in advertising by Bluestone Mortgages NZ Limited (Bluestone).
13. The Commission considered that Bluestone may have breached sections 11 and 14(1)(b) of the FTA and stated the same as paragraph [7] above, with the addition of:

For the above reasons, it is our view that an advertisement for a mortgagee sale which does not clearly disclose that fact, is likely to be in breach of section 11 of the Act.

14. Compliance advice is not a finding of non compliance. The purpose of compliance advice is to educate; it is to advise of the risk of conduct breaching the law and how to avoid a potential breach in future. Only the Courts can determine whether a breach of the law has occurred.

Further information

15. Please note the Commission will be publishing this response to your request in the Official Information Act register on our website.¹ Your personal details will be redacted from the published response.
16. Please do not hesitate to contact us at uia@comcom.govt.nz if you have any questions about this request.

Yours sincerely

Mary Sheppard
OIA Coordinator

¹ <https://comcom.govt.nz/about-us/requesting-official-information/oia-register>

Advertising of Mortgagee Sales

by Stuart Wallace

Categories: Fair Trading, Marketing

Date: 01-Apr-2004

Source: NZ Real Estate

The Commerce Commission has recently considered this issue and whether the practice is in fact in breach of the Fair Trading Act. Mortgagee sales may differ from other real estate sales in one or more of the following ways:

- chattels may not be included in the sale;
- the mortgagee is not required to give vacant possession;
- the property is sold subject to existing tenancies;
- under certain conditions the sale can be cancelled at any stage prior to settlement;
- if there are acrimonious circumstances there may be an increased risk of damage to the property, problems associated with access to the property and even issues of personal safety.

A recent Commerce Commission investigation raised the issue of whether omitting the fact that a sale is in fact a mortgagee sale when advertising a property amounted to misleading conduct. The Fair Trading Act definition of engaging in conduct includes, "omitting to do an act". In other words a real estate agency or agent may still breach the Fair Trading Act even if they make no positive statements which are false or misleading.

One of the most helpful court precedents in this area involved the issue of whether an agent should have disclosed to the purchaser of an Auckland waterfront property that a local yacht club was proposing to move its clubhouse to a position directly in front of the property, thus significantly affecting the view. The High Court concluded that the real estate agent's failure to inform the buyer of the impending change in the view was misleading and deceptive conduct under section 9 of the Fair Trading Act. The Judge in that case stated that in his view the appropriate test of whether silence can be misleading is whether a potential buyer would have a reasonable expectation that the information would be disclosed.

In the Commerce Commission's opinion most consumers would expect the fact that a property is on the market as the result of a mortgagee sale to be disclosed because of the potentially different sale conditions that apply to the purchase. It is also the Commission's view that this type of information should be disclosed at the earliest possible opportunity, that is, in the advertising.

It is well established legally that it is not acceptable to publish advertisements which would mislead potential customers into making enquiries they would not otherwise have made had they known the full facts. This is because the first impression may well influence a course of action by prospective purchasers and the customer is then introduced to a salesperson who is trained in completing sales. Misleading real estate advertisements can also be unfair to rival agencies by falsely inducing potential buyers.

In the case investigated by the Commerce Commission, the financial institution had directed the real estate agency to advertise the property without any reference to the fact it was a mortgagee sale. The Commission warned both the financial institution and the real estate agency that in its view, by omitting to mention that it was a mortgagee sale, they had both breached the Fair Trading Act.

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NEW AUCTION CODE