

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

**And**

**In the Matter of** Mr V

Complaint No: CA2349705

**In the Matter of** James Duff

Licensee No: 10015188

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Determination of Complaints Assessment Committee

Dated this 27<sup>th</sup> day of August 2010

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**Complaints Assessment Committee**

**CAC: 10006**

**Chairperson: Robyn Wilson**

**Deputy Chairperson: Peter McDermott**

**Panel Member: Chris Rogers**

## **Determination of Unsatisfactory Conduct**

### **1. The Complaint**

- 1.1. Mr V, a director of ABC Ltd, has complained about Jim Duff's conduct in respect of a weather tightness inspection undertaken. He says Mr Duff reacted angrily to the findings of the report and made threats and unreasonable demands. Mr V describes Mr Duff's behaviour as 'appalling'.

### **2. Material Facts**

- 2.1 ABC Ltd was asked to do a weather tightness inspection for Mr W, presumably the vendor. Mr Duff was the agent for the sale of the property.
- 2.2 The inspection was undertaken by Mr B on behalf of the ABC. Mr B advised Mr Duff by phone that there were high moisture readings and he would be recommending to Mr W that invasive moisture testing should be undertaken. Mr V says Mr Duff threatened to sue Mr B if his finding was incorrect and if he didn't change the report.
- 2.3 Mr V was then contacted and asked to meet with LMN which had also undertaken investigations to reconcile the different finding. When Mr Duff was told they wouldn't meet as the client had not seen the report or given them authority to release the report, he says Mr Duff said ABC would be bad mouthed and that his decision not to meet would cost him his business. Mr V says he believes Mr Duff was trying to coerce him into changing the report before the client saw it. He said that he believed Mr Duff's action was extremely unethical.
- 2.4 Mr W in his reply dated 29 October 2009 says Mr Duff's call was not in anger and that he made no threats, merely pointing out there had been another inspection with different results. He says the situation could have been easily resolved if there had been an agreement to meet on site to resolve the differences and that ABC's client was happy for such a meeting to take place. He also notes that Mr B had provided the moisture readings to Mr Duff in response to the complainant's response that they could not meet until their client had seen the report and gave them authority to do so.

He also says that Mr Duff simply wanted him to recheck his readings which would have taken him 15 minutes.

- 2.5 Mr C says that Mr Duff did not make any threats and was not trying to get him to change the report. Mr Duff has a letter of support from Mr W the client who commissioned the report saying he believes Mr Duff's intention was only to find a way to reconcile the two reports.

### **3. Relevant Provisions**

#### **3.1 Real Estate Agents Act 2008**

#### **3.2 Allegations about conduct before commencement of this section –**

Section 172 provides that –

(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—

(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the [Real Estate Agents Act 1976](#) and could have been complained about or charged under that Act in respect of that conduct; and

(b) the licensee or former licensee has not been dealt with under the [Real Estate Agents Act 1976](#) in respect of that conduct.

(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

#### **3.3 Unsatisfactory Conduct**

#### **3.4 Section 72 provides that –**

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.

#### **4. Rules of the Real Estate Institute of New Zealand**

##### ***REINZ***

##### **4.1 *Code of Ethics***

**R 13.** Members shall always act in accordance with good agency practices and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession.

**R 13.12** A member shall render service with absolute fidelity, honour and courtesy.

##### **4.2 *Discipline***

**R 16.2** Subject to Rule 16.3, any person may lodge a complaint with and Institute, alleging a breach of the rules, the Act or regulations, concerning –

**R 16.2.1** A licensee, or the principal office of a company, where the company is a licensee; or

**R16.2.2** A salesperson; or

**R 16.2.3** An officer of a licensee company; or

**R16.2.4** A branch manager.

#### **5. Discussion**

5.1 The essence of the complaint is about Mr Duff's behaviour, not about how any differences in inspection report should be dealt with or the accuracy or otherwise of the two reports referred to by the parties.

5.2 The CAC has accepted that Mr Duff did make the comments referred to in his call to the complainant in particular that he would 'bad mouth ABC Ltd at real estate conferences', and that it would 'cost your business' and also that the comments were unacceptable in the context of the situation.

- 5.3 The Licensee and his manager's response to the effect that the matter could have easily been resolved if ABC did what was being asked of them is somewhat irrelevant to the complaint about conduct.
- 5.4 As this complaint predates the operation of the Real Estate Agents Act 2008, the CAC is restricted in its power to deal with agents who were not licensed real estate agents under the old Act by section 172 (2), which states a CAC cannot make any order in the nature of a penalty that could not be made at the time when the conduct occurred.
- 5.5 While Regional Disciplinary Committees could hear complaints against non-members of the REINZ, they had no ability to censure or fine salespersons. As Mr Duff holds a salesperson's license, he is not someone that could be fined or censured. The CAC can however make a finding that his conduct was unsatisfactory albeit with no penalty attached.
- 5.6 As an aside, Mr V had sought an apology which is one of the orders a CAC can make under section 93 in respect of post 17 November 2009 conduct that may well have been considered the appropriate order if it were available.
- 5.7 The CAC has made a finding of unsatisfactory conduct on the basis Mr Duff's conduct towards the complainant was unacceptable measured against the reasonable member of the public s72(a) and/or of agents of good standing s72 (d).

## **6. Decision**

- 6.1 Pursuant to section 89(2)(b) the CAC finds on the balance of probabilities that Mr Duff is guilty of unsatisfactory conduct in terms of section 72(a) & (d).

## **7. Orders**

- 7.1 Power of the Committee to make orders

- 7.2 Section 93 provides that –

- (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.

7.3 CAC has no power, by virtue of section 172(2), to impose a penalty that could not have been made at the time the conduct occurred. No order has been made against Mr Duff on the basis that he could not have been fined or censured under the Real Estate Agents Act 1976(now repealed).

## **8. Publication**

8.1 The Committee directs that this decision is to be published but with identification of the complainant removed.

## **9. Right of Appeal**

9.1 A person affected by a determination of a Complaints Assessment Committee may

appeal to the Disciplinary Tribunal against a determination of the Complaints Assessment Committee within 20 working days after the date of this notice.

- 9.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

Further information on lodging an appeal is available by referring to the Guide to Lodging an Appeal at [www.justice.govt.nz/tribunals](http://www.justice.govt.nz/tribunals).

Signed

A handwritten signature in blue ink, appearing to be 'R Wilson', with a long horizontal flourish extending to the right.

Robyn Wilson

**Chairperson**

Date: 27 August 2010