

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

And

In the Matter of **Complaint No CA2652177**

In the Matter of **Mr and Mrs R against Mr D**

Determination of Complaints Assessment Committee

Dated this 24th day of June 2010

Complaints Assessment Committee:

CAC No: 10019

Chairperson: Sandra Gill

Deputy Chairperson: Peter McDermott

Panel Member: Kay McKelvie

Determination of Complaints Assessment Committee

1 Complaint

- 1.1 The Licensee, Mr D, currently holds all three classes of Licence Agent's, Salespersons and Branch Manager. He works for XYZ Cambridge.
- 1.2 The alleged conduct leading to the complaint occurred during early 2009 and is covered under s172 of the Real Estate Agents Act 2008 (REAA).
- 1.3 The complaint was received by the Real Estate Agents Authority (the Authority) on 27th January 2010.
- 1.4 The complaint was initially sent to the Real Estate Institute of New Zealand Inc (REINZ) but referred to the Authority following the implementation of the new REAA.

2 Background

- 2.1 The complainants, Mr and Mrs R, in a letter of complaint dated 17th August 2009 to the REINZ, state that Mr D is unsuitable to be a Real Estate Agent as he is not of good repute nor character. They allege that he is unprofessional in his actions.
- 2.2 Included with their letter of complaint were documents relating to the case they took to the Tenancy Tribunal following the sale of the property in question.
- 2.3 They also believe that Mr D is responsible for their property selling prior to auction which meant that their daughter was unable to purchase it.

- 2.4 Mr and Mrs R's property was lost to them as a result of the actions of Mr W who they state used their property to prop up his own finances. Mr W was later jailed for fraud.
- 2.5 In 1993, Mr and Mrs R state that they signed their property over to Mr W for financial reasons.
- 2.6 They state that unbeknown to them, in December 2007, Mr W reorganized his finances with "the bank". When his fraudulent activities were discovered, their property, which was now in Mr W's name, was put up for sale by "the bank" to cover monies owed by Mr W.
- 2.7 Mr and Mrs R engaged lawyers in an attempt to recover their property but were unsuccessful and solicitor's for "the bank" appointed Mr D to auction the property.
- 2.8 Their daughter, Ms C, offered to buy the property at a negotiated price but was informed by the Bank that they had to get the best possible price so unless she was offering valuation then her offer would be turned down.
- 2.9 Mr and Mrs R state that 2 (two) days before the auction, Mr D informed their daughter that there had been an offer made on the property and asked her if she would like to put in an offer as well. Ms C declined and decided to wait for the auction.
- 2.10 Mr and Mrs R go on to state that their daughter told Mr D that she "was a keen bidder but didn't want to have to pay more for a property that was rightfully ours".
- 2.11 Two and a half hours before the auction was due to start, Mr and Mrs D state that they were told that the auction had been withdrawn.

- 2.12 They go on to say that initially Mr D told them he didn't know why it had been withdrawn, but when confronted by their daughter, told them it had been sold prior to auction.
- 2.13 On 19th May 2009, Mr and Mrs R had a meeting with "the bank" to discuss their concerns. The concerns outlined in their letter are as follows
- 2.13.1 the property could sell so close to auction when it was made clear they were keen bidders
- 2.13.2 why was the property sold under valuation when they had been told that this couldn't happen
- 2.14 They state that the explanation given to them by "the bank" was that *"the bank" said that they had been told that there was likely to be a "disturbance" at the auction, so decided to sell it prior"*.
- 2.15 Mr and Mrs R state that their daughter questioned the agent, she was told that it was a member of the family but they are adamant that this was a lie as they wanted their daughter to purchase the property.
- 2.16 Prior to the sale of the property, they state that Mr D told them that the settlement date would be negotiable and that if they didn't buy the property, they would have time to find somewhere else to live.
- 2.17 They state that this turned out to be untrue as the property settled two weeks after the sale and that XYZ then supported the purchasers by recommending a high rent that Mr and Mrs R could not afford to pay.
- 2.18 Mr and Mrs R then took a case to the Tenancy Tribunal which they won.

2.19 Mr and Mrs R believe that Mr D played a role in everything that happened to them and was unprofessional in his actions.

3 Licensee Response

3.1 Mr D replied to the Authority in a letter dated 18th March 2010. Included with his letter was documentation that he had previously sent to REINZ in response to the complaint.

3.2 In his letter to REINZ dated 20th October 2009, Mr D states that he could understand why Mr and Mrs R were upset at the time of the mortgagee sale as due to the actions of Mr R's brother Mr W, they lost their family home through no fault of their own.

3.3 Mr D states that he had indicated to the family that XYZ were happy to work with the family to purchase the property.

3.4 XYZ were selling the property under instructions from "the bank".

3.5 He states that he was told by Mr and Mrs R that their daughter, Ms C was looking after the business side of things for them and that he strongly encouraged her to put in an offer prior to auction.

3.6 Mr D states he informed Ms C *"that the solicitors acting for "the bank" had indicated that the Bank would look at and likely sell prior to if they were happy with the offer"* but that Ms C did not think that "the bank" would sell early.

3.7 Mr D provided a copy of the advertisement for the property which clearly states *"Mortgagee Auction (unless sold prior)"*.

- 3.8 On 29th April 2009, the scheduled date of the auction, Mr D received notification from the solicitor acting for “the bank” that their client had instructed them to withdraw the property from public auction today (Copy of document provided to the Committee).
- 3.9 Mr D states that his instructions were that he was not to tell Mr and Mrs R that the property had sold prior to auction but that it had been withdrawn. Mr D states that this was *“a decision I was not entirely comfortable with but obliged to follow as this was the solicitor’s instructions”*.
- 3.10 In regard to Mr and Mrs R’s allegation that the explanation given to them by “the bank” was that *“the bank” said that they had been told that there was likely to be a “disturbance” at the auction, so decided to sell it prior* and that *“This is a lie”*, Mr D states that he had a duty to his client, “the bank”, to inform them of comments made by Mr R that he (Mr R) would *“have his say on auction night, they would cut down trees and pull gardens out, etc.”*.
- 3.11 Mr D is clear that he believes that Ms C had every opportunity to put in an offer prior to the auction and was strongly encouraged by him on more than one occasion but chose not to and that this is why they were not successful in purchasing the property.

4 Information and Material Considered

- 4.1 The Authority received Mr and Mrs R’s complaint against Mr D on 27th January 2010 from the REINZ and referred the complaint to the Complaints Assessment Committee (the Committee). Pursuant to section 79(1) of the REAA, on 11th March 2010 the Committee considered the complaint and determined to inquire into it.

- 4.2 The Committee invited Mr D to provide a written response to the complaint. A written response dated 18th March 2010 was received by the Authority, and attached to this was the response sent to the REINZ by Mr D dated 20th October 2009.
- 4.3 The Committee further considered the complaint on 22nd April 2010 and determined that Mr D's response be sent to Mr and Mrs R for comment. Mr and Mrs R were requested to respond within 10 (ten) days of receipt of the letter if they wished to provide any further comment.
- 4.4 In a telephone call with an Investigator from the Authority on 20th May 2010, Mrs R confirmed that they did not wish to provide a written response. The only comment that they wished to provide was to state that they had not damaged the property when they vacated it.
- 4.5 Having considered all the written information and supporting documentation provided by Mr and Mrs R and also Mr D, and having satisfied itself that it had completed its inquiry into the complaint, the matter was again considered by the Committee on 26th May 2010.
- 4.6 The hearing was conducted on the papers pursuant to section 90 of the REEA. Pursuant to section 90(2) the Committee made its determination on the basis of the written material before it.

5 Complaints Assessment Committee Determination and Reasons

- 5.1 The Committee has determined under section 89(2)(c) of the REAA that it will take no further action with regard to the complaint or any issue involved in the complaint.

- 5.2 Mr D was acting under instruction from “the bank” Bank and they were his client to whom he had a duty of care.
- 5.3 The advertisement for the property concerned stated that the property was to be sold at auction, but also included the rider “*unless sold prior*”. This made it clear to potential buyers that offers could be put in prior to the auction and that the property would be sold if the offer reached the required standard.
- 5.4 Mr and Mrs R state in their letter of complaint that their daughter did offer to buy the property at a negotiated price but was told by the Bank that unless she was offering valuation she would be turned down. They go on to say that their daughter then decided that she would wait for the auction.
- 5.5 From the information provided by both Mr and Mrs R and Mr D, it appears that Ms C never actually provided a written offer for the property but instead chose to wait until the auction. There is a file note in the diary notes provided by Mr D that he was under the impression that Ms C might sign up an offer on 27th April 2009 at his office but it appears that she did not do so and the only written offer received by “the bank” was the successful purchaser.
- 5.6 Unfortunately the decision by the R family to not put forward a signed offer prior to the auction alongside the decision to wait for the auction, despite being aware that the property was clearly advertised as an auction unless sold prior, lost them the opportunity to purchase the property.
- 5.7 Unfortunately, Mr and Mrs R were the unwitting victims of another family members actions and the loss of their home to a mortgagee sale through no fault of their own would have been traumatic to say the least.

- 5.8 The Committee did not regard any of the aspects of conduct which was the subject of the complaint as falling short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(a)).
- 5.9 As the complaint related to conduct which occurred before the commencement of the REAA the Committee did not consider that section 72(b) could apply in this case because section 72(b) refers to contraventions by a licensee of the 2008 Act or of any regulations or rules made under this Act.
- 5.10 Nor did it consider Mr D had carried out real estate agency work which was incompetent or negligent (s 72(c)) or which would reasonably be regarded by agents of good standing as being unacceptable (s 72(c)).
- 5.11 Taking into account all the circumstances described above, in the Committee's view there is no basis upon which it could make a finding of unsatisfactory conduct in respect of any aspect of conduct which were the subject of complaint.
- 5.12 For these reasons the Committee has determined under section 89(2)(c) of the REEA that it take no further action with regard to the complaint or any issue involved in the complaint.

6 Publication

- 6.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)).
- 6.2 The Committee has determined that this decision should be published in the interests of ensuring the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this

decision as desirable for the purposes of standard setting and it is in the public interest that the decision be published.

- 6.3 The Committee hereby authorises the Authority to publish this decision by whatever means it considers appropriate provided that the names and identifying details of both the complainant (including the address of the property) and the Licensee (including the name of his employer) and any named or identified third parties are suppressed from publication.

7 Right of Appeal

- 7.1 A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against a determination of the Committee within 20 working days of the date of this notice.
- 7.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 7.3 Further information on lodging an appeal is available by referring to the Guide to Lodging an Appeal at www.justice.govt.nz/tribunals.

DATED this 24th day of June 2010



Sandra Gill
Chairperson