

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

And

In the Matter of **Complaint No: CA3587943**

In the Matter of Joanne Dewson
License Number: 10016091

Decision of Complaints Assessment Committee

Dated this 2nd day of November 2010

Complaints Assessment Committee:

CAC10050

Chairperson: Ms Wilson

Deputy Chairperson: Rob Crozier

Panel Member: Peter McDermott

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

Mr W has complained about Licensee Joanne Dewson (also referred to as Joanne McCook) misrepresenting the status of an access to the property they purchased. He says it was represented as a shared driveway whereas the drive on access was sited entirely on the adjoining property.

Material Facts

The Ws were not in New Zealand when they purchased the property in question. They viewed it on the internet and had friends inspect it for them. Settlement was 7 October 2007. Mr W has provided a copy of an email dated 18 September 2007 from Joanne Dewson stating “The communal drive is off “road A”, approximately 100 meters, and is maintained by both properties.” The Complaints Assessment Committee (CAC) does not have a copy of the preceding email which presumably asked a question about the drive. It was quite some time after the purchase that the complainant found out that the drive was not owned by them, after he says an altercation between his tenants and the neighbours about the drive. His tenants were also the vendors of the property and had also sold the adjoining owners their property. He says the lack of a drive-on access devalues the property and putting one in, will cost something in the region of \$10,000. He believes Ms Dewson knew the correct information and deliberately misled them

Joanne Dewson says most of her dealing was over the internet with a few telephone conversations between her and Mrs W. She says Mrs W asked her if there were any issues with the property and she says the only one she was aware of was the lack of the final code of compliance for the house that had been re-sited on the property. She says the vendors, the Ls, told her that the two drives were adjacent to each other. She says they said “*We both have our own legal access but we both use the metalled section*”. She says she was not told specifics of where the graveled section was situated. She says she relayed the information from the Ls to the Ws. She says that Mrs W acknowledged the verbal agreement between the neighbours, however it is not said what that agreement was. She says Mrs W was happy that they had legal access and was unconcerned about the detail of it. She says she did not show the boundaries of the property to the Ws or either of their agents that viewed the property for them.

She also comments that her husband recalls Mrs W saying after they purchased the property that she would be 'much happier with having my own access.' The CAC assumes this point is made to suggest that they would have decided to form their own private access in any event, rather than meaning that the Ws knew they did not have their own exclusive access as the complaint is not about the drive not being solely owned by the Ws. Ms Dewson has also provided a copy of a Property Summary Report for the "road A" property from the Property Guru, a Terralink database showing the outline of the property. Possibly the point being made with this is that the shape of the sections suggests there could be two drives adjacent to each other.

Relevant Provisions

Section 172 Allegations about conduct before commencement of this section

- (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.

Section 72 Unsatisfactory conduct

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.

Section 73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

Discussion

There is no doubt that the Ws were supplied with incorrect information about the drive-on access to their property by it being described as being communal or shared when it was owned solely by the adjoining property owner without any legal right for the Ws to use it. Ms Dewson agrees she described it in words suggesting shared ownership. What is not clear and in dispute is whether Ms Dewson knew the correct situation and therefore whether it was an intentional or unintentional misrepresentation. Mr W says in his initial complaint that "*It appears that Ms. Mc Cook deliberately misrepresented the property to make the sale*" and in later communication to the Real Estate Agents Authority, describes Ms Dewson's behaviour as fraudulent. He does not say why he believes it was an intentional misrepresentation.

Ms Dewson says she only repeated what she had been told by the vendors suggesting that it was an unintentional misrepresentation. The CAC view is that a question about the legal right to use the drive-on access for the property is significant and it is not enough for a licensee to excuse such a misrepresentation by saying they relied on what the vendor said. An agent could in a situation like this say, for example, that they don't know the legal situation about the drive or the boundaries of the property but have been told 'x' by the vendor.

As these events preceded the commencement of the Real Estate Agents Act 2008 (the new Act) the complaint is governed by section 172 of the new Act. A licensee can be found guilty of unsatisfactory conduct or misconduct under the new Act so long as the action being complained about could have been complained about under Real Estate Agents Act 1976 (the old) Act and any orders that are made could have been made under the old Act. Because the CAC is not satisfied that the misrepresentation was intentional, the conduct is not the more serious misconduct envisaged by section 73 of the new Act, for example disgraceful behaviour, serious incompetence or negligence. As Ms Dewson was not a holder of a license under the old Act, the CAC is limited in its powers in relation to unsatisfactory conduct to making a finding without any penalty or censure because that was the only power held by Regional Disciplinary Sub Committees in dealing with real estate agents who did not hold an agent's license. As an aside, the power to deal with licensed real estate agents for unsatisfactory conduct before 17 November 2009 is also relatively limited being a censure or fine up to \$750.00. Under the new Act, there can be a penalty of up to a \$10,000 fine and/or requiring the licensee to remedy any error or omission. The CAC notes Mr W appears to be seeking something like a civil award for damages from this process which could be sought in other venues.

Determination

The CAC has determined this matter by undertaking a hearing on the papers as provided for under section 90(1) of the Act. Its determination is made pursuant to section 90(2) of the basis of the written material before it.

The CAC has determined, pursuant to section 89(2)(b) of the new Act that Ms Dewson is guilty of unsatisfactory conduct under section 72(a) of the new Act.

Publication

The Committee directs that this decision is to be published.

The Committee directs publication of its decision but omitting the names and identifying details of the complainant (including the address of the property) and any third parties in the publication of its decision.

Right of Appeal

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.

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.

Signed

A handwritten signature in blue ink, consisting of a stylized 'W' followed by a long horizontal stroke that curves upwards at the end.

Ms Wilson
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 2 November 2010