

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

And

In the Matter of **Complaint No: CA4011267**

In the Matter of **Janette Wallbutton**
License Number: 10017391

Decision of Complaints Assessment Committee

Dated this 17th day of December 2010

Complaints Assessment Committee:

CAC10058

Chairperson: Marina Neylon

Deputy Chairperson: Debbie van Zyl

Panel Member: Barrie Barnes

Complaints Assessment Committee

Decision finding unsatisfactory conduct

The Complaint

This is a complaint instigated by Complaints Assessment Committee 10058 against licensee Janette Wallbuton who is a licensee under the Real Estate Agents Act 2008 (“the Act”). Ms Wallbuton is a director and agent licensee for JD & J Real Estate Limited, trading as Century 21 Countrywide Real Estate Limited in Whakatane.

The Committee determined to inquire into whether or not Ms Wallbuton had breached the Act, in that she failed to report serious misconduct on the part of another licensee to the Real Estate Agents Authority as required under Rule 7.2 of the Professional Conduct and Client Care Rules 2009.

Background

On the 24th August 2010 the Real Estate Agents Authority received a complaint against the licensee in question of JD & J Real Estate Ltd. The complaint was made by Person X. The complaint alleged that the licensee had stolen approximately \$90,000 from funds held by JD & J Real Estate Ltd on behalf of their clients.

During the course of the Committee’s investigations, it became apparent that the co-director of the company Janette Wallbuton became aware of the misappropriation of client funds by the licensee on 12th July 2010. To her credit Ms Wallbuton took immediate action to remove the individual from their position and to begin the task of assessing the extent of the offenses and ensuring the funds were replaced.

Ms Wallbuton interviewed her staff then contacted her accountant, her auditor, her franchisor, banker and solicitor. Over the next six weeks she carefully and tirelessly ensured that all the client funds held by her business were recouped and correct. She did not however report the matter to the REAA.

Relevant Provisions

Section 72 of the Act provides:

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.

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.

Professional Conduct and Client Care Rules 2009

7. *Duty to report misconduct or unsatisfactory conduct*

- 7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct¹ may make a report to the Authority.
- 7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct² must make a report to the Authority.
- 7.3 A licensee must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.
- 7.4 If a licensee learns that a person is committing an offence by undertaking real estate agency work without a licence, the licensee must immediately report the matter to the Authority.

The Committee invited Ms Wallbuton to supply an explanation as to why she had not reported the conduct of the licensee to the REAA.

Discussion

The Committee considered the response from Ms Wallbuton where she described the "horrific situation" she found herself in. Ms Wallbuton said that she did not want to accuse the other licensee without having the full facts and that her priority was to ensure the public did not suffer any loss. This is both understandable and commendable.

The Committee accepts that the first few days and possibly even for several weeks the situation required that Ms Wallbuton's full attention would be focused on those matters but once the extent of the offending became clear she had an obligation to inform the REAA and this should have been done as a matter of course. Rule 7.2 is absolutely clear on this in that it states a licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct MUST make a report to the Authority.

The Act required Ms Wallbuton to report the matter as soon as she had reasonable grounds to suspect the licensee had been guilty of misconduct. When such serious misconduct had been admitted by a licensee the onus is on Ms Wallbuton to fulfill that duty.

The question the Committee then considered was the fact that the Rule is silent as to a time frame for reporting. Ms Wallbuton infers in her response that she would have got around to reporting the

matter but that she perceived the individual was no longer a threat to the public due to her ill health and bemoans the fact that other agents heard gossip and made the complaint. The Committee took issue with both these assertions. Firstly, if Ms Wallbutton had decided to report the matter to the Authority, the Authority would determine what, if any, action would be appropriate to take against the licensee. Second, that the compliance by other agents with their duty under 7.2 was correct and as more than six weeks had elapsed between the matter becoming evident and the complaint being made there was ample opportunity for Ms Wallbutton to act.

Decision

After conducting an inquiry into the complaint, pursuant to section 89(1) of the Real Estate Agents Act 2008, the Committee held a hearing with regard to that complaint. In accordance with section 90(1) of the Act, the Committee conducted the hearing on the papers, and pursuant to section 90(2) the Committee's determination was made on the basis of the written material before it.

The Committee has determined under section 89(2)(b) of the REAA 2008 that it has been proved, on the balance of probabilities, that by breaching Rule 7.2 Ms Wallbutton has engaged in unsatisfactory conduct.

Having determined unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in section 93(1) of the Act.

Section 93 provides:

93 Power of Committee to make orders

- (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.

The Committee hereby elects to censure the licensee for this breach.

Publication

One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.

Publication gives effect the purpose of the Real Estate Agents Act of ensuring that the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of setting standards and that it is in the public interest that the decision 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 by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.

Appeal is by way of written notice to the Tribunal. Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Marina Neylon
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 17 December 2010