

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

This is a complaint by Mr A about Debbie Lovegrove and Lovegrove Realty Limited. Ms Lovegrove is a licensee under the Real Estate Agents Act 2008 ('the Act') and she holds a salespersons license. She is a director and shareholder of Lovegrove Realty Limited which holds an agent's license and the licensed agent of that company is Geoffrey Lovegrove.

Mr A engaged Ms Lovegrove in her capacity as a representative of Lovegrove Realty Limited to sell his house at ('the property').

Mr A has complained that Ms Lovegrove breached his privacy and compromised his security by using photographs he only authorized her to use for the sale of his property in order to seek a tenant for the person who purchased it from him. He complains that she used those materials prior to settlement of his sale when he and his family were still occupying the property. He says that she and Lovegrove Realty Limited published them on significant websites without his authority and that this and other conduct outlined was inappropriate and designed to achieve financial reward for herself.

Material Facts

On 30 October 2009 Mr A signed a listing agreement for the sale of his property with Lovegrove Realty Limited using Ms Lovegrove as his agent.

On 22 November 2009 an agreement was signed between Mr A and his wife and a third party for the sale and purchase of "the property". The agreement was subject to the purchaser confirming finance within 7 working days and also to approval of a LIM and builder's report within 10 working days of the date of the agreement. There was no provision in the agreement for prospective tenants of the property to be permitted to view that property prior to settlement of the sale.

Mr Lovegrove on behalf of Lovegrove Realty Limited advised that on 23 November 2009 the Business Development Manager of the company (Alex Watson), at the request of Ms Lovegrove, conducted a rental valuation of the property. He advised that this was conducted without Mr Watson entering the property based on his local knowledge and familiarity with the area. This assessment took place without the knowledge of Mr A.

Ms Lovegrove has confirmed that she spoke with the purchaser of the property on 25 November 2009, found that the property was intended to be an investment property and proposed that the business development manager of Lovegrove Realty Limited discuss renting options with him. A property management contract was signed between Lovegrove Realty Limited and the purchasers on 15 December 2009. This was subsequently changed so that on 8 February 2010 the purchaser signed an agreement with an unrelated property management company to manage the rental of his property. That company found a tenant for the property.

On 4 December 2009 Mr A contacted Ms Lovegrove by email confirming that the house sale had gone unconditional. He asked her to return the key either by putting it in the letterbox or leaving it at her reception for him to collect. The following day Ms Lovegrove emailed a response to Mr A saying that she keeps the key to give the purchaser on settlement and that she will need it if she is showing tenants in. She says 'But of course we will be calling first'. Mr A insisted on the key being returned and said that any tenant inspections would require him or his wife to be present. He was not told at this point that Lovegrove Realty Limited was managing and publicly advertising the

property for rent.

On 17 December 2009 Mr A emailed Ms Lovegrove asking her to remove the 'SOLD' sign outside the property prior to Christmas. She responded 4 days later saying 'We normally keep them up till settlement. I would really appreciate this as this helps me get new business'. Mr A had to insist on his request again before the sign was taken down.

Around 12 January 2010 Mr A became aware through neighbours that people were walking around on his property and looking through the windows of the house. This gave him cause for concern. On 21 January 2010 he arrived at his property for a pre-arranged buyer inspection to find strangers walking around the house. These people told him that they were potential tenants who had been told about the house by an agent. He contacted the company (company I) he thought was going to manage the property for his purchaser to find out what was going on and found that it was not listed with them.

At this point Mr A investigated the matter further and found that his property was listed on Trade Me and Real Estate NZ for rental. These sites had a full residential address set out on them and there were 11-13 photographs of the inside and outside of the house with the personal items of the A family in view on those websites. At this point Mr A became very concerned about security particularly because his wife and baby were at home during the day. He did not want strangers walking around their house when he was not there. He discovered that Lovegrove Realty Limited were trying to find a tenant for his purchaser. Neither that company nor Ms Lovegrove had contacted him to say that the property was on their books for rental. In addition neither party sought his permission to use the photographs that had been taken to assist in the sale of his house, to help his purchaser to find a tenant to move into the property following settlement. Mr A also says that even after telling Lovegrove Realty Limited to remove his family's personal details from these websites those details remained there for several days and more people came on to his property the following weekend. Mr A contacted these websites directly to try and speed up the removal of his personal information from their databases.

An email was sent by Ms Lovegrove to Mr A on 25 January asking whether he would agree to a viewing sought by his purchaser on 25 January 2010 at 12.45. When Mr A asked whether this was for the final inspection Ms Lovegrove advised that it was not for that but rather it was for a valuer. Mr A subsequently saw from the 'Real estate' website that the property was advertised for viewing by prospective tenants on that date between 12.45 – 2.00pm and a copy of that screen with the viewing information was provided to the CAC.

In response to Mr A's query about Ms Lovegrove using his photographs to market the property for rental Ms Lovegrove wrote to him by letter dated 4 February 2010. She said that the photos were supplied by Professionals and taken by Debbie Lovegrove and not supplied by him. She also said that they had permission to use the photos as they chose based on section 1(d) of the listing agreement that he had signed which states that 'Any signs, photograph(s), electronic advertising or display materials that you consider necessary may be displayed or used for marketing or promotional purposes'. Ms Lovegrove said that the listing form was signed by him and so he was deemed to accept all aspects of the listing agreement and she considered this to give her authority to use the photographs.

Relevant Provisions

The Real Estate Agency Act 2008 provides as follows:

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.

The Real Estate Agency Act (Professional Conduct and Client Care) Rules 2009 provides as follows:

6. Standards of professional conduct

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

9. Client care and dealings with customers

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

Discussion

The CAC has considered all of the documentation and explanations provided to it by Mr A, Ms Lovegrove and Mr Lovegrove on behalf of Lovegrove Realty Limited.

It is clear that Mr A is dissatisfied with the way in which the licensees dealt with him during the sale of his property and up until the date of settlement, particularly with regard the conduct of Ms Lovegrove regarding the prospective letting of his property for the purchaser following settlement.

In making its decision on the conduct of the licensee the CAC noted the following preliminary matters:

- Ms Lovegrove has confirmed that the response to the complaint that came signed by Mr Lovegrove was prepared by her with him and that the content was her response.
- The listing agreement was entered into for the purposes of selling the property for Mr A and his wife. The authority for using marketing and promotional materials in section 1(d) of that agreement relates to those materials being used for the purposes of marketing the property for sale on behalf of the vendor (Mr and Mrs A) and not for marketing it for a different person (his purchaser) as a rental proposition. Thus the CAC does not consider that Ms Lovegrove and/or Lovegrove Realty Limited had authority to use the photographs to obtain

a tenant for the property whilst Mr and Mrs A were still in occupation.

The CAC noted a number of aspects of the licensees conduct that contributed to the dissatisfaction of the complainant. In particular it noted:

- The licensees had no authority to use materials brought into existence for the purposes of selling the property for the unauthorized purpose of finding a tenant for the purchaser.
- Publication of these materials on house renting websites available to the general public meant that private information was made widely available without the knowledge or consent of the complainant and this aggravated the nature of the conduct.
- Similarly, the failure to immediately remove the materials from these websites exacerbated the negative impact of the conduct.
- There was no authority in the agreement for the sale of the property that allowed the purchaser to show prospective tenants through prior to settlement. In light of this any viewing of the property for these purposes was at the benevolence of the complainant who had no requirement to allow people through the house.
- It is reasonable to infer that potential tenants of the property may go onto the property if the address was disclosed and this was not in the best interests of the complainant who was the client of the licensees.
- Advertising a viewing time for the property for rental purposes at a time when access had been arranged for valuation purposes (see email from Ms Lovegrove) was a misuse of the authority to go onto the property.
- The manner in which Ms Lovegrove sought to withhold the key from the complainant when he asked for it to be returned was unacceptable.
- Seeking to override the complainant's express wishes about having the 'SOLD' sign taken down before Christmas contributed to an overall impression of the licensee conducting herself in an arrogant manner that contributed to the dissatisfaction experienced by the complainant.

The CAC noted that Lovegrove Realty Limited had responsibilities in its capacity of engaging in real estate agency work, to the vendor who made this complaint. It also had responsibilities in its capacity as a property manager to the purchasers of the property when it sought to obtain a tenant for them. The CAC found that Lovegrove Realty Limited had a sufficient degree of interaction with both the property selling agent and the property management agent who dealt with these matters which, along with an overarching responsibility for the conduct of the business meant that both licensees Lovegrove Realty Limited and Debbie Lovegrove are responsible for the conduct complained of. After taking into account the totality of the conduct of the licensees the CAC concluded that their conduct has been unsatisfactory and therefore in breach of the Act.

Decision

After taking into account the totality of the conduct of the licensees the CAC concluded that each of the licensees is guilty of unsatisfactory conduct in breach of section 72(a) and (d) of the Act. The conduct complained of amounts to a breach of Rules 6.3 and 9.1 of the REAA (Professional Conduct and Client Care) Rules 2009.

Orders

The Committee will conduct a separate hearing on the papers to decide what orders, if any, should be made under s 93 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 requires the investigator authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Ms Lovegrove under either the Real Estate Agents Act 1976 or the Real Estate Agents Act 2008, if any such decision exists, and provide it to the Committee and Ms Lovegrove and Mr A.

Ms Lovegrove, Lovegrove Realty Limited and Mr A may file submissions within 10 days following date of determination on what orders, if any should be made.

Publication

The Committee directs that this decision is to be published with the complainant's identifying information removed.

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 several loops and a long horizontal stroke.

Deirdre McNabb
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 14 September 2010