

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

and

In the Matter of **Complaint No.CA2674236**

In the Matter of **Valma Olliver**
Licence No.10004662

Determination of Complaints Assessment Committee

(Penalty)

Dated this 2nd day of August 2010

Complaints Assessment Committee

CAC10029

Chairperson: David Barker

Deputy Chairperson: Joan Harnett-Kindley

Panel Member: Paul Morten

DETERMINATION OF COMPLAINTS ASSESSMENT COMMITTEE

(PENALTY)

1 Introduction

- 1.1 By its decision dated 14 June 2010, the Complaints Assessment Committee made a determination under Section 89(2)(b) of the Real Estate Agents Act 2008 (“the REAA”/“the Act”) that the licensee, Mrs Valma Olliver of Whangamata has engaged in unsatisfactory conduct as that term is defined in Section 72 of the Act.
- 1.2 Having made a determination under Section 89(2)(b) the Committee may make one or more of the orders set out in Section 93 of the Act.
- 1.3 The Complaints Assessment Committee invited Mrs Olliver and the complainant to make any comments or submissions. A written submission was received from the complainant dated 19 June 2010. A written submission from Counsel for Mrs Olliver, Mr B was received on 29 June 2010. The Committee has carefully considered the submissions received. A summary of the relevant parts of the submissions is set out below.

2. Complainants Submission

- 2.1 The complainant believes the determination of unsatisfactory conduct is “light” to describe the actions of Mrs Olliver. The complainant believes Mrs Olliver made every effort to have the vendor disclose to her his minimum price. The complainant believes that the entire reason for the vendor investing his trust in an agent is to give the vendor the best opportunity for the maximum price.
- 2.2 The complainant alleges Mrs Olliver has attempted to commit a fraud which was an attempt to have the vendor agree to an agreement with an extra commission clause in it leaving the vendor to assume that the complainant as sole agents had agreed to an increased commission split to the licensee. The complainant also alleges that Mrs Olliver attempted to have the deposit paid into her agency’s trust account in an attempt to divert the commission away from the complainant’s company.
- 2.3 The complainant believes that had they not noticed the added clause in the agreement at the last minute then this would have left the vendor in the position of needing to pay two commissions.

- 2.4 The complainant contends that Mrs Olliver has exposed both the vendor and the purchaser to her unprofessional conduct leaving an impression on them which is in direct contrast to everything that the industry is trying to correct and stamp out.
- 2.5 The complainant believes that at a minimum the commission paid to Mrs Olliver's agency of \$2,576 plus GST should be refunded to the complainant. They believe her actions added a huge amount of stress to their sales person and to the vendor and has created extra unnecessary work involved in the sale.
- 2.6 The complainant also believes that it is clear that Mrs Olliver is not a fit and proper person to be a representative of the industry and should therefore be prohibited from holding a license.

3. Licensee's Submission

- 3.1 Mr B makes a number of comments with regard to the findings of the Committee as set out in the determination dated 14 June 2010. Some of his submissions, particularly in paragraph 13, go to the Committee's substantive findings. We note Mr B's advice that it is likely Mrs Olliver will forego her right of appeal against the determination. In the circumstances, the Committee puts those submissions to one side.
- 3.2 Mr B notes that the determination records the complainant's allegation that Mrs Olliver's actions upon which this complaint is based were not the first time this "sort of activity" had occurred. Mr B notes that the complainant has provided no corroborating evidence for this allegation. The Committee records that it has placed no weight on the allegation of prior misconduct, when reaching its decision on penalty.
- 3.3 Mr B also points out, at paragraphs 7 and 8 of his submission, that the determination dated 14 June records that Mrs Olliver inserted a clause in the Agreement of Sale and Purchase to protect her position in relation to commission. He submits that the determination fails to correctly record Mrs Olliver's evidence that the clause in question was inserted by the agency on the advice of her manager. He contends that while the Committee might not consider that this completely exonerates Mrs Olliver, he believes it certainly is a relevant consideration. He contends it is incorrect to attribute the conduct in question to her alone.

- 3.4 Mr B at paragraph 8 states that the issue between Mrs Olliver and the complainant was one that went to the percentage split of the commission, rather than whether or not Mrs Olliver was entitled to any commission at all. The Committee takes into account the fact that there was an agreed commission split of 80/20.
- 3.5 Mr B, at paragraph 9, points out his client's evidence that at the time she contacted the vendor, she knew the vendor was trying to list the property, but was not then aware the vendor had entered into a sole agency agreement with the complainant.
- 3.6 Mr B asks the Committee to note that the majority of evidence presented on behalf of the complainant is hearsay evidence from Mr T. He makes the point that the text message from the vendor (if faithfully transcribed) is the only direct statement from the vendor of what transpired during the course of his initial discussion with Mrs Olliver. He submits that the text message does not show the vendor was overly concerned or that this was a source of anxiety to him.
- 3.7 Mr B notes at paragraph 11 and paragraph 12 that the complainant's communications clearly indicate an antipathy toward the agency with whom Mrs Olliver is engaged and apparently Mrs Olliver herself such that he is prepared to make allegations designed to damage her reputation (in relation to alleged prior conduct) without any supporting evidence.
- 3.8 Mr B advises at paragraph 14 that Mrs Olliver is distressed by the Committee's determination and has asked him to convey her sincere apologies for the actions which have given rise to the complaint. He notes that the vendor was known to her and was also a real estate salesperson. He says that this affected her perception of the sophistication of the vendor and his understanding of commission split issues. This background provides context to her approach to the vendor which he believes should be taken into account.

He submits that her apology, coupled with her explanation, should go a long way towards meeting any concerns that the Committee might otherwise have.

3.9 Mr B submits that if the Committee considers any further sanction, then any sanction imposed by the Committee should not go beyond reprimand. He believes this is not a case which warrants a fine at any level. That is because no party has suffered any financial loss (in fact he says the complainant benefited from the introduction of Mrs Olliver's client). He says there is no evidence of any stress or emotional harm caused to the vendor, or the complainant.

Mr B finishes by inviting the Committee to put little weight on Mr T's submissions as to penalty, because of Mr T's apparent antipathy to Mrs Olliver and/or the competing agency. He says there is no basis for any external costs order in favour of the complainant.

4. Principles Considered

4.1 The Committee, when determining whether or not to make an order under Section 93(1), has also had regard to the functions which the imposition of a penalty usually serves in professional disciplinary proceedings. They include:

a) Promoting and protecting the interests of consumers and the public generally

Section 3(1) of the REAA sets out the purpose of the legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (Section 3(2)).

b) Maintenance of professional standards

This function has been recognized in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings: *Taylor v The General Medical Council* (1990) 2 A11 ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720, particularly at pages 724-725). In the Committee's view this function is also applicable in the disciplinary processes under the REAA.

c) Punishment

The Committee accepts that a penalty in a professional discipline case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view the punitive aspect of disciplinary proceedings under the Act is indicated by the power the Committee has to impose a fine (Section 93(1)(g); or make an order of censure (Section 93(1)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see for instance *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future).

d) Where appropriate, rehabilitation of the professional must be considered

The Committee regards its power to make an order requiring a licensee to undergo training or education as indicative of this function applying in the context of professional disciplinary processes under the REAA.

- 4.2 The Committee acknowledges that when making an order under Section 93, the order/s made must be proportionate to the offending and to the range of available orders.

5. Complaints Assessment Committee Determination Under Section 93

- 5.1 The Committee notes that on Mrs Olliver's own evidence (see her letter dated 16 April 2010), her first discussion with the vendor was to ascertain whether the property was listed as a sole agency or a general agency. Despite being told by the vendor that a sole agency existed, Mrs Olliver then questioned the vendor about the price he wanted to achieve, justifying this on the grounds that her potential buyers "had a budget to work to". Once Mrs Olliver learned of the sole agency, she should then have gone straight to the listing agent, without attempting to obtain any further information from the vendor.

- 5.2 Mrs Olliver contacted the listing agency in due course, and attempted to negotiate a commission split. She was told the listing agency would agree to an 80/20 split. Mrs Olliver wanted a 60/40 split, but that was firmly rejected.
- 5.3 After making an appointment with the listing agency, Mrs Olliver took her clients through the property, discussed what was to go into the sale and purchase agreement, and quite properly sent the contract off to the listing agent to draw up the offer. That agreement, in the normal way, recognised that XYZ was the listing agent.
- 5.4 Mrs Olliver then collected the sale and purchase agreement, and discussed its terms with her clients. Alterations were made to the sale and purchase agreement, which was returned to the listing agent.
- 5.5 Mrs Olliver (on the advice of her "manager") accepts that she inserted a clause in that Sale and Purchase Agreement entitling her firm to 40% of the commission. She had no right to do so. She was well aware that this higher commission split had been rejected by the sole agent. There is no evidence that she alerted the listing agency to the insertion of this new clause. The clause was inserted, she says, "to protect our position in relation to the commission".
- 5.6 The Committee considers that Mrs Olliver had no commission position to protect. She had been told what the commission arrangement was. Her clients had no interest whatsoever in the commission arrangement as between the vendor, the sole agent, and Mrs Olliver. The new clause was inserted in the sale and purchase agreement entirely out of self-interest, at a time when she knew the high commission split had been firmly rejected.
- 5.7 Mr T stated that before inserting the clause in the sale and purchase agreement, Mrs Olliver had spoken to the vendor, in an effort to get him to pay 40% of the commission direct to her firm. Mr T said the vendor told him the clause was inserted to confirm the commission split that had been agreed with XYZ.
- 5.8 The Committee notes that Mrs Olliver's 16 April 2010 response is silent about those allegations. The Committee is entitled under section 88 of the Act to receive evidence whether or not that evidence would be admissible in a court of law. We note Mr B's submission that the evidence is hearsay. Mrs Olliver had an opportunity to deny it. She has not done so.

5.9 The Committee does not uphold the assertion of Mr T described in clause 2.3. The member has not responded to this allegation. Whether or not it is correct, the Committee considers that had the vendor been a less knowledgeable person there was a real risk he would have been innocently involved in a commission dispute, as a direct result of Mrs Olliver's actions.

5.10 The Committee considers that whether or not her office manager assisted in the preparation of the Sale and Purchase Agreement, Mrs Olliver must take responsibility for installation of the clause in the sale and purchase agreement. Mrs Olliver is an experienced agent, and she should have recognized that it was not good agency practice to undertake this sort of activity.

5.11 Having regard to the facts of this case as summarized in the Committee's determination dated 14 June 2010, and after carefully considering Mr B's submissions on behalf of Mrs Olliver and in light of the established unsatisfactory conduct and the functions which the imposition of a penalty is designed to serve, the Committee has determined to make the following orders under Section 93(1):

a) Mrs Olliver will receive a reprimand under Section 93(1)(a).

b) Mrs Olliver is to apologise to the complainant for her actions in terms of Section 93(1)(c).

c) Mrs Olliver is to pay to the Authority a fine of \$5,000 pursuant to Section 93(1)(g). This payment to be made within 21 days of receipt of this determination.

6. Publication

6.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (Section 78(h)). The Committee has the power under section 84 (2) to direct such publications of its decisions under section 93 as it considers necessary or desirable in the public interest.

6.2 The Committee regards the publication functions as one of the means to educate and raise industry standards by making public the nature of conduct which the Committee considers to be unsatisfactory and the consequences for licensees

engaging in such conduct. Publication also gives effect to the purpose of the Act set out in Section 3 by ensuring transparency in the disciplinary process. Publication reflects the reluctance of courts to order suppression of name after conviction.

6.3 The Committee considers that it is necessary and desirable, in the public interest, to ensure the principal purpose of the Act is achieved, for its decision dated 14 June 2010 and this decision should be published. Publication is regarded as necessary for the purposes of standard setting in this case and it is also in the public interest that the decisions be published, to ensure transparency of the disciplinary process .

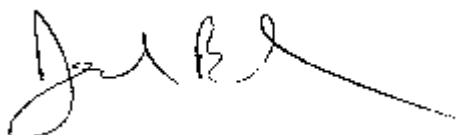
6.4 The Committee authorizes the Real Estate Agents Authority to publish these decisions in the appropriate section of the Authority's website. Any such publication should not occur until the Authority is satisfied that the licensee has been notified of this decision as to penalty and that rights of appeal have not been exercised.

7. Right of Appeal

7.1 As stated in the Committee's earlier decision, 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.



David Barker
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 2nd August 2010