

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

And

In the Matter of **Complaint No: CA2788626**

In the Matter of Marie Kahukura
License Number: 10010641

Decision of Complaints Assessment Committee

Dated this 11th day of February 2011

Complaints Assessment Committee:

CAC10032

Chairperson: Stuart Rose

Deputy Chairperson: Peter Ward

Panel Member: David Russell

Complaints Assessment Committee

Decision finding unsatisfactory conduct

1 The Complaint

- 1.1 Mr V has on 22 February 2010 complained to the Real Estate Agents Authority (“The Authority”) about the conduct of Marie Kahukura, a licensee under the Real Estate Agents Act 2008 (“the Act”) of Queenstown Real Estate (1998) Ltd (Cromwell).
- 1.2 The Complaints Assessment Committee (“The CAC”) met on 22 April 2010 and determined to enquire into this matter. A full response was requested from the Licensee.
- 1.3 The CAC reconsidered this matter on 22 June and again on 8 December 2010 and now issues its determination.

2 Material Facts

- 2.1 This is a complaint involving two licensees registered under the Real Estate Agents Act 2008. The Complainant, Mr V of “real estate company A”, claims Marie Kahukura did not respect his company’s exclusive agency listings. Mr V, in his letter to the Authority, says he initially attempted to deal with this matter by phoning the branch manager of Mrs Kahukura’s office. He says he was advised that the behaviour he complained of would not re-occur. He claims it did.
- 2.2 Mr V’s complaint is that Ms Kahukura contacted the vendors of four properties that were listed exclusively with his agency. He claims that in each case an approach was directly made to the vendors and the words “I have a buyer wanting to look through your property, who should I contact?” or similar were used.
- 2.3 Ms Kahukura, in her letter to the Authority, in the main accepts Mr V’s accounts of events, although with one of the properties she says there was no signage indicating that a sole agency was in place. This is denied by Mr V. Ms Kahukura also maintains that she only said she had had enquires about the properties.
- 2.4 Mr V says that contacting vendor clients directly when a sole agency is held, falls short of professional expectations the industry should uphold and is disturbing to vendors.

3 Relevant Provisions

3.1 Real Estate Agents Act 2008

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) one consists of a willful 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 that reflects adversely on the licensee's fitness to be a licensee.

3.2 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009

Rule 6 Standards of professional conduct

- 6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

4 Discussion

4.1 In this case the CAC is satisfied that Ms Kahukura was engaged in real estate work.

4.2 The CAC has fully reviewed the complaint and Ms Kahukura's response. That response has been provided to Mr V for comment and his response has been considered by the Committee.

- 4.3 The issue therefore is for the CAC to determine whether the conduct of Ms Kahukura amounts to unsatisfactory conduct or misconduct in terms of the Act.
- 4.4 Having received written responses from the licensees and having satisfied itself that it had completed its enquiry into the complaint the CAC conducted a hearing with regard to the complaint under Section 89 (1) of the Act.
- 4.5 The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to s90(2) the CAC made its determination on the basis of the written material before it.
- 4.6 The CAC first measured Ms Kahukura's actions against the high level of misconduct set by section 73 of the Act. This section talks of behaviour that is 'disgraceful', 'seriously incompetent' and 'seriously negligent'. In the committee's view, Ms Kahukura's conduct fell short of these severe behavioural thresholds.
- 4.7 We next looked at this complaint in light of section 72 (d) of the Act, which finds conduct unsatisfactory if it is conduct that would reasonably be regarded by agents of good standing as being unacceptable.
- 4.8 The CAC believes that where vendors of properties elect to appoint an exclusive sole agent for the sale of their property, that contractual relationship and decision by the vendors should be respected by other licensees. The vendors have effectively notified other agents that all contact should be through their elected sole agent and not direct to them. Without this restriction licensees could potentially use the conduct to undermine the relationship and confidence the vendor of a property has with their sole agent.
- 4.9 The CAC finds that while on occasions it may not be clear that a property is being marketed under a sole agency, and in those circumstances direct contact by a licensee to a vendor may be permissible, where it is clear to the licensee that a property is marketed under a sole agency all contact should be through that sole agent. The CAC does not believe that one-off instances of a breach of this principle should generally mean that a licensee is found guilty of unsatisfactory conduct under section 72 (d), but where there are a number of instances indicating a pattern of behaviour or modus operandi by a licensee, then this generally would amount to conduct that would be reasonably regarded by agents of good standing as being unacceptable.

- 4.10 Without forming a view as to the exact words used by Ms Kahukura in her contact with four vendors, in the CAC's opinion a licensee ringing a vendor and saying "I have a buyer for your property", or words to that effect, when in fact all the licensee has is someone who would like to view the property, is misleading and has the potential to undermine a sole agency relationship.

5 Decision

- 5.1 For the above reasons it is the finding of this Complaints Assessment Committee under section 89(2)(b) of the Act that it has been proved on the balance of probabilities that Ms Kahukura has been involved in conduct that is unsatisfactory in terms of section 72(d) of the Act.
- 5.2 Notwithstanding this finding it is the CAC's view that this conduct is at the lower end of the scale of unsatisfactory conduct. It is the decision of the CAC that it impose no further penalty or censure other than that our finding will be entered on the register of the Authority as required under s66(1)(v).

6 Publication

- 6.1 One of the CAC's functions pursuant to s78(h) of the Act is to publish its decisions.
- 6.2 Publication gives effect the purpose of the 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.
- 6.3 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.

7 Right of Appeal

- 7.1 A person affected by a determination of a CAC may appeal by way of written notice to the Disciplinary Tribunal against a determination of the CAC and must do so within 20 working days from the date of the determination.
- 7.2 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

A handwritten signature in black ink, appearing to read 'S. Rose', written in a cursive style.

Stuart Rose
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 11 February 2011