

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

And

In the Matter of **Complaint No: CA2974026**

In the Matter of **Jason De Montalk**
License Number: 10005485

Decision of Complaints Assessment Committee

Dated this 24th day of November 2010

Complaints Assessment Committee:

CAC10038

Deputy Chairperson: John Auld

Panel Member: Kay McKelvie

Complaints Assessment Committee – Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 Ms G (the complainant) has complained to the Real Estate Agents Authority (REAA) about the conduct of Jason De Montalk of RE/MAX Property Tauranga Ltd. At the time of the conduct complained of, Jason De Montalk was an approved real estate salesperson employed by L J Hooker of Papamoa.

2. Background

- 2.1. In February 2010 Ms G contacted Mr De Montalk and signed the appropriate documentation to list her house for sale with L J Hooker Papamoa on the understanding she was contracting with L J Hookers for a three month period.
- 2.2 One week later on Tuesday 9th February the complainant alleges that she received a phone call from Mr De Montalk advising that he had now joined Remax and 'could he come around straight away and re-sign the contract.'
- 2.3 On questioning the current status of the agreement with L J Hooker Mr De Montalk allegedly replied 'I held it back on purpose.' The complainant was uneasy about this turn of events and re-visited L J Hookers with her partner and was told by the Manager, Mr D, that they had not received the original documentation that had been signed by the complainant and that such holding back of documentation knowing that a salesperson is going to another company is inappropriate behaviour for an agent or salesperson.
- 2.4 On 1 March 2010 Ms G filed a complaint with the REAA.

3. Relevant Provisions

(a) Real Estate Agents Act 2008 (the Act)

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 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 for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

4. Discussion

4.1 Jurisdiction

- 4.1.1 The provisions of the Act relating to complaints came into effect on 17 November 2009. The conduct complained of occurred after this date and therefore the Committee may inquire into the complaint by virtue of section 172 of the Act.
- 4.1.2 The issue for the Committee to decide in this complaint is whether the conduct complained of amounts to unsatisfactory conduct under section 72 of Act, or whether a charge of misconduct (section 73 of the Act) should be laid in the Tribunal.

4.2 Assessment of complaint *"Unprofessional Conduct"*

- 4.2.1 Mr De Montalk disputes the claim that he acted unprofessionally. He says that when he met with the complainant and signed up a listing authority with L J Hooker he had not made his decision to move to Re/Max.
- 4.2.2 In addition Mr De Montalk claims he had an agreement with Mr F of RE/MAX that for any listings he brought over to RE/MAX he would pay Hookers their normal share of the fee if the property sold during the original agency term.

Mr F confirms that RE/MAX have a 'listing transfer agreement for these situations.'

- 4.2.3 Unfortunately such a listing transfer agreement was never the subject of discussion with L J Hooker and L J Hooker had no knowledge of the signed listing contract with their agency until the complainant advised them of it. The paperwork had never been provided to the office by Mr De Montalk and therefore the presumed listing transfer agreement is unlikely to have ever been honoured.
- 4.2.4 No response or explanation was received by this authority from Mr De Montalk on the issue of attempting to persuade a client to cancel a legal contract of agency although the fact that a legal contract had been entered into by the complainant and signed by Mr De Montalk on L J Hookers letterhead is not disputed.

4.2.5 In the Committee's view, given the evidence of the parties and their explanations this conduct amounts to unsatisfactory conduct under section 72(d) of Act in that it 'would reasonably be regarded by agents of good standing as being unacceptable' for an agent or real estate salesperson to persuade a client to cancel a legal contract of agency.

5. Decision

The Committee has determined this complaint by a hearing on the papers, in accordance with section 90(1) of the Act. It is satisfied that the complaint has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct; he has breached section 72 (d) of the Act. The Committee has determined this complaint under section 89(2) (b) of the Act.

The Committee notes that no financial loss would appear to have been suffered by the complainant. The licensee's breach arises from an act of unethical behaviour, involving deception and dishonesty. The Committee considers that an appropriate remedy for the complainant would be to require a written apology to be made by the licensee to the complainant. Accordingly, the Committee, pursuant to section 93 (1) (a)&(c) of the Act, orders the licensee to formally apologise to the complainant in writing for his actions. The apology is to be delivered to the complainant within twenty one days of the date of this decision and a copy is also to be delivered to the Authority within the same time-frame.

6. Publication

The Committee directs that this decision be published.

7. 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 that reads "Kay McKelvie". The signature is written in a cursive style with a large initial 'K'.

Kay McKelvie
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 24 November 2010