

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

And

In the Matter of **Complaint No: CA3179136**

In the Matter of **Mr C**
License Number: XXXXXXXX

Decision of Complaints Assessment Committee

Dated this 26th day of July 2010

Complaints Assessment Committee:

CAC10033

Chairperson: David Towle

Deputy Chairperson: Pat Waite

Panel Member: Peter McDermott

Complaints Assessment Committee - Decision to take no further action

The Complaint

The Complainant has lodged a formal complaint concerning the conduct of the Licensee during and around an aborted auction for a property in February 2010. In essence, the Complainant alleges that the Licensee:

- a) wrongfully sought to undermine the sales process by circulating a list of “defects” to potential buyers at the auction;
- b) arranged for or assisted his wife to adopt her maiden name when presenting as a potential purchaser of the property so as not to reveal her identity to the vendors;
- c) contacted the owner’s bankers seeking to have the bank require the owners to sell the property to the Licensee and/or his wife.

Material Facts

1. The Complainant is one of the trustees of “the trust” which is the owner of a property situated at “the property”. The property was listed for sale at auction by XYZ Realty (manager Ms V; sales person Mr Y).
2. The Complainant states that on the day of the auction (24 February 2010) the Licensee drove to the auction rooms with the intention of “sabotaging” the auction by distributing a list of alleged faults with the property which, it is said, was given to potential genuine bidders with the intention of scaring them off. The inference is that the purpose of this activity was to position the Licensee to be able to acquire the property on favourable and less competitive terms.
3. The Complainant also alleges that the Licensee’s current wife, Mrs C attended “posing” as Mrs M (her maiden name) and was thereby attempting to put an offer on the property, by posing as a genuine buyer without disclosing her relationship with the Licensee to the relevant real estate agents acting for the vendor and ultimately to the trust as the vendor itself.
4. After the filing of the first formal complaint against the Licensee, the Complainant by letter to the Authority dated 26th April 2010 alleged a further matter of complaint. In that letter it was alleged that the Licensee had contacted the trust’s bankers (ABC) suggesting that the bank should “force” the trust to accept an offer from the Licensee’s wife.
5. In response the Licensee denies that he acted inappropriately at any time and, specifically, states as follows:
 - a) The Licensee stated that at all times he was acting in a private capacity and was not at any time acting as an agent for any potential purchaser of the property.
 - b) The Licensee says that prior to the auction he had a meeting with the principal of the selling agents, Ms V, and explained to her fully his intentions, through his wife, to bid on the property. He indicated that whilst he held a sales person’s license, the property was being sold by XYZ and he had no affiliation with them whatsoever and was confirming that he was acting in a private capacity.
 - c) Also during that meeting, the Licensee says that he advised Ms V that he and his wife had undertaken extensive due diligence on the property and was concerned

that the property had a number of issues that should have been disclosed in presale documents. Ms V then asked if she could take his concerns and discuss them with her colleagues. The Licensee says that Ms V took a document which the Licensee had prepared headed "*Points for further investigation as at 15/02/2010 on due diligence "the property"*" and discussed the contents of that document with other agents.

- d) The Licensee also said that he discussed with Ms V the fact that his wife intended to bid in her maiden name as she did not want to have the Licensee's family exposed as buyers if they were successful at the auction. Ms V is alleged to have indicated that this was both legal and acceptable.
 - e) The Licensee states that as a result of the concerns that the various agents became aware of following the provision of the "defects list" the auction was aborted and the selling agent announced to the collective purchasers that "due to unforeseen circumstances" the property was "withdrawn from auction." The Licensee then says the listing agent asked any interested buyers to remain and complete any offers by way of tender. During that process, the Licensee says that he went in to a private office with his wife and she completed a tender which was an unconditional cash offer \$65,000 over the capital value of the property. The Licensee also states that his wife in fact made four signed unconditional offers to purchase the property at various times.
 - f) In relation to the list of alleged "defects" Mr C said that it had been prepared largely for his own use but that when the selling agents became aware of it they felt the need to disclose its contents to all prospective purchasers. Mr C denies that he prepared the list with a view to it being given to any purchasers or that he intended to undermine or interfere with the sales process in any way.
 - g) In relation to the allegation that he and his wife wrongfully contacted the ABC to put pressure on the bank to sell to them, the Licensee accepted that they had attended a meeting with a rural lending manager of the ABC in January 2010 to make enquiries about the property. During that meeting they were told by the Bank's representative that the property was to be sold under a court order but at that stage the bank was letting it be marketed privately by the owners in order to achieve a sale. Subsequently, the ABC advised the Complainant's wife that the bank was not in fact forcing a sale and advised her to deal with the vendors and their agents direct.
6. As part of their investigation, members of the Authority staff have contacted the selling agents concerned for both written and oral statements which the committee has considered. In general terms, the evidence of the selling agents substantially corroborates the evidence of the Licensee with some relatively minor differences. In particular, Ms V confirms that she was approached by the Licensee prior to the auction and asked for a private meeting. In that meeting the Licensee advised that he was acting in a private capacity and that his wife would be bidding at the auction in her maiden name. Ms V also confirms that she was told by the Licensee that he was aware of some problems with the property as he had been doing some investigations. During the meeting, Ms V further confirms the Licensee gave her a copy of the list of "defects" referred to above which she then took to discuss with the other agents involved. Ms V confirmed that at least some of the items (and in particular the fact that the property had no Code Compliance Certificate) were of relevance and were matters that she felt needed to be disclosed to potential purchasers.

There is some conflict between the various parties involved as to the importance or relevance of some of the more minor items on the list but all seem to accept that at least some of them had some substance.

7. Ms V is certain in her recollection that the Licensee at no stage gave a copy of the defects list to anybody other than herself. In her oral statements to the Authority investigator she states that the list of defects was in fact handed out to prospective purchasers by one of the selling agents. Overall, the clear impression from Ms V's written and verbal statements is that the Licensee was at all times acting entirely properly.

Relevant Provisions

The Committee has considered the application of two alternative provisions of the Real Estate Agents Act 2008 as follows:

Section 72 of the Act provides for "unsatisfactory conduct" and states as follows:

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.

Alternatively, the Committee has considered whether the material before it could cross the threshold test of "misconduct" under Section 73 of the Act which provides as follows:

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.

Discussion

1. The Committee has considered first whether the material before it can constitute “unsatisfactory conduct” under Section 72 of the Act. The component parts of Section 72 require the Committee to be satisfied that the evidence demonstrates that the Licensee has carried out “*Real Estate Agency work*”.
2. “*Real Estate Agency work*” is defined in Section 4 of the Act as meaning “...*any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction.*”
3. “*Transaction*” for current purposes includes the “*sale, purchase, or other disposal or acquisition of a leasehold stake or interest in land...*”.
4. Therefore, the starting point for the Committee is to determine whether the Licensee based on the material submitted by all parties can be found to be carrying out “real estate agency work”. All of the evidence confirms that the Licensee was at all material times acting entirely in a private capacity as an interested purchaser (albeit by nominating his wife to purchase the property). Not only did the Licensee disclose the basis of his involvement to the selling agents, there is no evidence whatsoever that he was engaged in any business capacity to act for any party in the matter. This issue was also addressed by the Complainant in her letter of reply to the authority of 17 May 2010 under the heading “private capacity”. The Complainant does not seek to challenge Mr C’s assertion that he was at all times acting in a private capacity but confirms the complaint is as to his “integrity and behaviour” as a representative of the real estate industry.
5. Accordingly, the Committee finds no evidence in the material before it that satisfies the statutory requirement under Section 72 that the Licensee carry out “real estate agency work”.
6. For completeness, even if the Committee is wrong in that conclusion, the Committee can find no basis on the facts before it to result in a finding of unsatisfactory conduct. Whatever the ultimate motives of the Licensee in disclosing the “defects list”, we do not believe that these actions or the other matters complained of (including the use of his wife’s maiden name and contacting the vendor’s bankers) breach the provisions of Section 72.
7. Having made its finding in respect of Section 72, the Committee is also obliged to consider whether the material before it could constitute “misconduct” under Section 73 such as to warrant laying a charge to that effect with the Tribunal. The Committee considered this matter in the context that Section 73 does not in fact require a Licensee to be engaging in “real estate agency work”. The Committee determines that none of the evidence before it, if proven, could cross the threshold test for misconduct under S73, and in particular could support a finding that the actions of the Licensee could “...*be regarded by agents of good standing, or reasonable members of the public, as disgraceful*”.
8. The Committee has determined on the basis of all of the evidence before it, that there is nothing that could justify the laying of charges for breach of Section 73.

Decision

For the reasons given above, the Committee finds as follows:

1. At all material times the Licensee was not carrying out “*real estate agency work*” within the definition of Section 72 of the Act and;
2. The evidence does not meet the threshold test for “misconduct” under Section 73 of the Act

and;

3. Pursuant to Section 80(2) of the Real Estate Agents Act 2008, the Committee in its discretion determines not to take any further action on the complaint.

Publication

The Committee directs that this decision is to be published but that the names of all parties are to be deleted from the published document.

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



David Towle
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 26th July 2010