

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

And

In the Matter of **Complaint No CA3473049**

In the Matter of **Ka (Daniel) Leung  
License No 10003867**

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Decision of Complaints Assessment Committee

Dated this 8<sup>th</sup> day of September 2010

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Complaints Assessment Committee:

CAC10042

**Chairperson: Debbie Van Zyl**

**Deputy Chairperson: Peter Ward**

**Panel Member: David Russell**

# Complaints Assessment Committee - Decision finding unsatisfactory conduct

## Decision

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### **1. The Complaint**

- 1.1 This is a complaint lodged by Mr R on 17 of April 2010 against Ka (Daniel) Leung. Mr Leung is a licensee under the Real Estate Agents Act 2008 ("the Act"). Mr Leung holds a salesperson's license and is employed by Barfoot & Thompson Limited.
- 1.2 Mr R's complaint is about Mr Leung supplying misleading information about the value of a property.

### **2. Material Facts**

- 2.1 Mr R was interested in purchasing a property at "the property". Mr Leung was acting as the salesperson for the vendor of the property.
- 2.2 Mr R was living overseas and negotiations over the sale were conducted by email. Mr R requested Mr Leung to provide him with the full details of the property, including the capital value (CV), rental appraisal and current market value. Mr R also wanted to know the price of 2 & 3 bedroom houses purchased in the area in the last year to help him determine an appropriate price.
- 2.3 Mr Leung sent an email to Mr R on 17 February 2010, which among other things, stated that: "The property CV \$435,000 in 2007, at that time the new dwelling was not yet built."
- 2.4 Mr R states that he believed the information contained in the email, and based on this information he entered to an Agreement for Sale and Purchase dated 8 March 2010 to purchase the property for \$470,000 inclusive of GST (if any). The purchase price was later reduced to \$468,000 before settlement.
- 2.5 Mr Leung states that the information he used in the email of 17 February was obtained from the vendor and the Waitakere City Council Rates and Property Search website.
- 2.6 Mr Leung states that the vendor had spent about \$160,000 building the second dwelling on the property. This work was carried out after 1 September 2007.
- 2.7 A LIM report obtained and dated 17 March 2010, records the current rating valuation as \$435,000 with the "Effective Date of Valuation" 1 September 2007.
- 2.8 Mr R is the owner of several other properties in New Zealand.
- 2.9 After the agreement became unconditional, Mr R queried the valuation with Mr C of the Waitakere City Council. The following extract is part of the email correspondence between Mr R and Mr C and relates specifically to the email dated 28 April 2010 sent by Mr C:

"To clarify, the "Effective Date of Valuation" shown on the LIM report is not the date that the last valuation change was made. It is the date on which all valuations are currently being based and is the date that the last revaluation of Waitakere City Council took place. This means that until the next revaluation of the City takes place any change to a properties rating valuation as a result of subdivision or building improvements, etc. are assessed on what the property would have been worth in the state as at the 1 September 2007 not what

the current market valuation would be.

As an example the valuation undertaken in April 2008 on “the property” due to the construction of the second dwelling indicates what the property would have been worth in that state on the 1 September 2007 not what its actual market valuation would have been in April 2008 when the valuation was made.”

2.10 The following is an extract of part of an email dated 25 June 2010 from Mr C to the REAA Investigator:

- “5. The council valuation for the property on September 2007 was \$350,000
6. On 30 April 2008 council received a new valuation following a revalue of the property with the completed minor dwelling.
7. With the addition of the minor dwelling the property was revalued at \$435,000 on (or about) 30 April 2008 and the rating valuation changed from \$350,000 to \$435,000.
8. The September 2007 reference means \$435,000 would be the value of the property in September 2007, had the minor dwelling/unit existed at that point.”

2.11 Mr R said: “For me it was important to negotiate only the properties which are priced close or less than the CV value, and the CV is a determining factor, this is because physically I cannot see the property as I am far distanced, so when the property is below or close to the CV I know I would be on the safe side, then remaining would be the house condition and the rents I can judge these from others opinions.”

### **3. Relevant Provisions**

3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).

3.2 Section 72 of the Act defines unsatisfactory conduct:

#### **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.

3.2 Section 73 of the Act defines misconduct:

#### **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.

- 3.3 Rule 5 of the Real Estate Agents Act (professional Conduct and Client Care) Rules 2009 (“the Rules”) deals with standards of professional competence. Rule 5.1 states that: “A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.”
- 3.4 Rule 6.4 of the Rules deals with standards of professional conduct. Rule 6.4 states: “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.”
- 3.5 Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee (“Committee”) conducted a hearing with regard to the complaint under Section 89 (1) of the REAA.
- 3.7 The hearing was conducted on the papers pursuant to Section 90 of the REAA. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

#### **4 Discussion**

- 4.1 Section 72 of the Act specifies the conduct that represents “unsatisfactory conduct”. Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or rules made under the Act is classified as unsatisfactory conduct. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.
- 4.2 The Committee understands from Mr C’s emails that the property was revaluated in April 2008 and that the capital value of the property therefore increased from \$350,000 to \$435,000 to reflect what the value of the property would have been in September 2007 with the second dwelling constructed. To clarify, the value of \$435,000 therefore includes the value of the second minor dwelling, but effective September 2007.
- 4.3 The Committee understands that it is a basic expectation in the real estate field that real estate agents and salespeople should be familiar with the valuation regime of their the local councils. This includes knowledge of what “Effective Date of Valuation” means.
- 4.4 It is clear to the Committee that the email sent by Mr Leung to Mr R, gave a false impression of the property’s valuation. Although the underlying premises used to establish a local council ratable value might be difficult for the public to understand, it is reasonable to expect a real estate salesperson, such as Mr Leung, to be familiar with this well established system. From the information before it, the Committee believes Mr Leung failed to meet this expected level of competency. The Committee accepts however that it does not appear to have been Mr Leung’s intention to deliberately mislead Mr R.
- 4.5 Notwithstanding, the Committee considers that Mr Leung, by sending the email containing the false information, breached both rules 5.1 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and further that his conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.
- 4.6 For the reasons set out above, Mr R’s allegations against Ka (Daniel) Leung has met the test for unsatisfactory conduct, but even taking the view most favourable to the Complainant, the Complaints Assessment Committee has decided that that there are no reasonable grounds for concluding that the Mr Leung’s conduct complained about reaches the threshold for misconduct (section 73(a)).

#### **5 Decision**

- 5.1 The Complaints Assessment Committee met on 9 August 2010 to consider the complaint against Ka (Daniel) Leung. The Complaints Assessment Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Leung has engaged in unsatisfactory conduct.
- 5.2 Having determined that Mr Leung is guilty of unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in section 93(1) of the Act.

## 6 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 Ka (Daniel) Leung 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 Mr Leung and Mr R.

Mr Leung and Mr R may file submissions within 10 days from the date on this determination on what orders, if any, should be made.

## 6 Publication

- 6.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.
- 6.2 The Committee directs that this decision is to be published in the interest 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

## 7 Right of Appeal

- 7.1 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.
- 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](http://www.justice.govt.nz/tribunals).

Signed



Debbie van Zyl  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 8 September 2010