

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 Leung**
License No: 10003867

Decision of Complaints Assessment Committee

Dated this 11th day of November 2010

Complaints Assessment Committee:

CAC10042

Chairperson: Debbie Van Zyl

Deputy Chairperson: Peter Ward

Panel Member: David Russell

Complaints Assessment Committee – Decision on Orders

1. Introduction

- 1.1 By its decision dated 8 September 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, Ka (Daniel) Leung, of Barfoot & Thompson Limited, 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 both Mr Leung and Mr R to make any comments or submissions they wished within ten days from the date of the Committee's determination.
- 1.4 Mr R provided an emailed submission in which he submitted that:
- There are two issues in this case – the public interest and his losses
 - He requests the Committee to make the appropriate order of compensation to cover his losses in time, efforts and money.
 - He claims the following:
 - \$42,016 compensation due to incorrect capital value ("CV") calculated by him using an arithmetic ratio in relation to the values of another property
 - \$1,360.69 for his solicitor's costs
 - \$8,000, being 40 hours spent on searching and correspondence at a rate of \$200/h
 - \$5,000 for stress & anxiety compensation, which brings the total amount claimed by Mr R, to \$56,378.69
- 1.5 Mr Leung, through his lawyer, McElroys Litigation Lawyers, provided written submissions in which he stated that an appeal will be lodged by them. Some of the submissions, however, deal with aspects of their proposed appeal and do not have bearing on the penalty decision and therefore not all the submissions are summarised here or addressed:

- It is Mr Leung's contention that no orders pursuant to s 93 should be made. The only reason provided by Mr Leung that has bearing on the penalty decision (and not the proposed appeal), is the following:
 - That Mr R has not suffered any loss as a consequence of reliance on the capital value, as the property was purchased for \$468,000 and was appraised by Ray White at approximately \$580,000- \$680,000. Therefore it is their contention that Mr R did not suffer any quantifiable loss.

2. Principles considered

2.1 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 must serve 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 recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; *Taylor v The General Medical Council* [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720). 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 disciplinary case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment - indicated by the power the Committee has to impose a fine (section 93(l)(g)); or make an order of censure (section 93(l)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see *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.

2.2 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.

3. Complaints Assessment Committee Determination under section 93

3.1 In its decision the Committee concluded that the email sent by Mr Leung to Mr R, gave a false impression of the property's valuation. The Committee felt that it was reasonable to expect a real estate salesperson, such as Mr Leung, to be familiar with their local Council's rateable regime. The Committee believed that Mr Leung failed to meet this expected level of competency. In its decision the Committee accepted that it did not appear to have been Mr Leung's intention to deliberately mislead Mr R.

3.2 In its decision the Committee found 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.

3.2 The Committee has read and discussed the submissions from both parties and concurs with Mr Leung's submission that Mr R has not proven any quantifiable loss. The Committee finds that there is no foundation on which Mr R could base his comparative claim for alleged loss due to "incorrect" capital value, or for this research and correspondence time or his alleged stress and anxiety. The only loss that could have been quantified in the Committee's opinion, was Mr R's claim for his legal expenses. Unfortunately Mr R did not provide any evidence to establish the quantum of this claim.

3.3 Having regard to the facts of this case as in the Committee's determination dated 8 September 2010, and the established unsatisfactory conduct and functions which the imposing of a penalty is designed to serve, the Committee has determined to make the following orders under section 93(1):

3.3.1 The Committee is censuring Mr Leung.

3.4 The Committee does not consider that it is necessary to make any of the other orders specified in section 93(1).

4 Publication

4.1 One of the functions of the 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.

4.2 The Committee regards the publication function 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.

4.3 The Committee considers that to ensure the principal purpose of the Act is achieved, its decision dated 8 September 2010 and this decision ought to 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.

4.4 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. Any such publication should not occur until the Authority is satisfied that Mr Leung has been notified of this decision as to penalty.

5 Right of Appeal

5.1 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.

- 5.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 5.3 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, appearing to be 'Debbie van Zyl', written in a cursive style.

Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 11 November 2010