

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

And

In the Matter of **Complaint No: CA3553446**

In the Matter of **Ross Cooper Real Estate Ltd**
Licence Number: 10017604

Decision of Complaints Assessment Committee

Dated this 9th day of February 2011

Complaints Assessment Committee:

CAC10043

Chairperson: Deirdre McNabb

Deputy Chairperson: Sue Matchaere-Patten

Panel Member: Barrie Barnes

Complaints Assessment Committee

Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 Mrs M has lodged a complaint regarding the price advertising of a property for sale by the licensee, Ross Cooper Real Estate Limited. The property in Rotorua (the property) was advertised with the description 'Buyer Enquiry Over \$295,000'. Mrs M made an opening offer on the property of \$270,000 which she states was verbally counter-offered by the vendors at \$315,000.
- 1.2 Mrs M was not prepared to pay that much for the property but counter-offered at \$300,000 which instigated a written counter-offer from the vendors at \$310,000. Negotiations did not continue and a contract did not proceed. After this process had taken place Mrs M spoke to several agents from the licensee company, telling them that she believed the 'Buyer Enquiry Over' advertising that had taken place for the property was misleading. She had offered a sum higher than the 'Buyer Enquiry Over' price and this had not been accepted.

2. Material Facts

- 2.1 On 21 April 2010 the licensee on its website www.coopersrealestate.co.nz advertised the property in Rotorua with the price for that property described as 'Buyer Enquiry Over \$295,000'. In addition, in a property guide current to 23 April 2010 the licensee ran an advertisement with an accompanying photograph of the same property that described the price as 'B.E.O. \$295,000'.
- 2.2 A series of written offers and counter-offers for the sale and purchase of the property took place between the vendors of the property and the complainant. The documentation provided to the Committee shows prices of \$270,000 and \$300,000 crossed out on a draft agreement for sale and purchase of real estate with a final price of \$310,000 which has been initialed by the vendors but not the complainant.
- 2.3 The parties acknowledge that Mrs M insisted on the licensee agents presenting the vendors with an offer for the property at a price of \$270,000. On behalf of the licensee Ross Cooper states that she insisted on this course of action despite being told that the owner's price expectations were above \$295,000. Negotiations took place between the parties but a successful contract was not concluded.

- 2.4 The licensee acknowledges that Mrs M expressed dissatisfaction with the advertised price guide because she did not see it as a fair indication of the owner's price expectation. Mr Cooper states that he believed (and conveyed that belief to Mrs M) that the expectations were 'within the Commerce Commission guidelines'. He states that the owners had indicated that if Mrs M was prepared to increase her counter-offer to \$305,000 they would seriously consider selling to her. Mrs M recalls Mr Cooper indicating to her that the Commerce Commission guidelines required that a Buyer Enquiry Price had to be within 10% of a vendor's expected price and says that she spoke to the Commission who told her that this was incorrect and that the buyer enquiry price had to be a fair indication of the price the vendor was wanting to get for the property.
- 2.5 The 'Promotion/marketing authority' that the licensee obtained from the vendors of the property refers to an 'Estimated Appraisal Price' of \$280,000 - \$310,000 and a 'Listing Price' of 'BEO \$295,000'.
- 2.6 The vendor of the property has indicated to the Committee through its investigator that their minimum price would have been \$300,000 (although they did not accept an offer of that sum from Mrs M). Mr V (one of the vendors) says that he told the agent when listing the property that he and his partner wanted around \$300,000. He says that the agent indicated that the 'Buyer Enquiry Over' way of marketing was the best way to go rather than to specify a specific target and that they decided on \$295,000. He says further that they would not have sold the property for \$295,000 and that they told the agent this at the time when they listed the property and when the offer came in from the complainant.

3. Relevant Provisions

3.1 Real Estate Agents Act 2008 (the Act)

Section 72 Unsatisfactory conduct provides that -

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 provides that -

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.

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

Rule 9 Client care and dealings with customers provides that –

9.6 An advertised price must clearly reflect the pricing expectations agreed with the client.

9.7 A licensee must not mislead customers as to the price expectations of the client.

4. Discussion

4.1 The parties acknowledge that the property was advertised on the basis of 'Buyer Enquiry Over \$295,000'. The vendor of the property has made it clear that he and his partner told the licensee that they would not sell for less than \$300,000. It was against this background that the property was listed at 'Buyer Enquiry Over \$295,000'.

4.2 The licensee indicates that he considers this method of advertising to be 'within Commerce Commission guidelines'. In fact use of the description 'buyer enquiry over' when listing properties for sale has been the subject of recent litigation in the case of *Commerce Commission v Whitehead, HC Wellington, CIV-2006-485-88, 4 July 2007*. It is clear from that case that there is no '90% within sale price' test to be applied when the 'Buyer Enquiry Over' method of advertising is used. Rather each case will require consideration of whether the 'Buyer Enquiry Over' price was

misleading on all of the facts. In that case the Court accepted that it was possible that the agent could have made a reasonable mistake about the vendor's bottom line price in the early stages of marketing the property but at the later stages of negotiation he could not have been mistaken about her bottom line.

4.3 In the present case the vendor of the property is clear that he conveyed to the licensee that he and his partner would not accept less than \$300,000 for the property, both at the time of listing and later when Mrs M's offer was presented to them. The Committee concluded from the vendor's description of events and the licensee's indication to the complainant that Mr Cooper on behalf of the licensee believed a 'buyer enquiry over' price could be within 10% of the price expected by the vendor of a property. The Committee noted that the vendors of the property were encouraged to market their property in this way rather than by using a specific price.

4.4 The Committee considered that the clear indication provided by the vendors to the licensee at the outset of their property being marketed (as well as later when the offer from the complainant was presented) meant that there was not likely to have been any mistake about the bottom price that the vendors would take for their property. On this basis the Committee concluded that the advertised price did not clearly reflect the pricing expectations agreed with the client. It also concluded that use of the 'Buyer Enquiry Over \$295,000' marketing when the vendors would not accept less than \$300,000 was misleading to potential customers.

5. Decision

5.1 After conducting an inquiry into the complaint, pursuant to section 89(1) of the Real Estate Agents Act 2008, the Committee held a hearing with regard to that complaint. In accordance with section 90(1) of the Act, the Committee conducted the hearing on the papers, and pursuant to section 90(2) the Committee's determination was made on the basis of the written material before it.

5.2 The Committee has determined under section 89(2)(b) of the REAA 2008 that it has been proved, on the balance of probabilities, that Ross Cooper Real Estate Limited has engaged in unsatisfactory conduct.

6. Orders

6.1 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.

6.2 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.

6.3 The Committee requires the investigator authorised to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Ross Cooper Real Estate Limited 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 Ross Cooper Real Estate Limited and Mrs M.

- 6.4 Ross Cooper Real Estate Limited and Mrs M may file submissions on what orders, if any should be made. Mrs M may file submissions within 10 working days from the date of the decision. These submissions, if any, will then be provided to Ross Cooper Real Estate Limited, with a timeframe for filing final submissions.

7. Publication

- 7.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.
- 7.2 Publication gives effect the purpose of the Real Estate Agents 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.
- 7.3 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.

8. Right of Appeal

- 8.1 A person affected by a determination of a Complaints Assessment Committee may appeal by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.
- 8.2 The Committee has yet to finally determine this complaint because the parties are being given an opportunity to make submissions on orders before the Committee determines what orders should be made, if any.
- 8.3 The Committee considers that the 20 working day appeal period does not commence until it has finally determined this complaint by deciding what orders should be made, if any.
- 8.4 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 blue ink, consisting of several overlapping loops and a long horizontal stroke.

Deirdre McNabb
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 9 February 2011