

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

And

In the Matter of **Complaint No.CA3575064**

In the Matter of **Mr A**
Licence No.XXXXXXXX

DETERMINATION OF COMPLAINTS ASSESSMENT COMMITTEE

Dated this 5th day of July 2010

Complaints Assessment Committee:

CAC No: 10048

Chairperson: Debbie van Zyl

Deputy Chairperson: Rob Crozier

Panel Member: Denise Bovaird

Complaints Assessment Committee - Decision to take no further action

1. The Complaint

- 1.1 This is a complaint lodged by Mr K on the 28th of April 2010 against Mr A. Mr A is a licensee under the Real Estate Agents Act 2008 ("the Act"). Mr A holds a salesperson's license and is employed by XYZ Limited.
- 1.2 It appears that Mr A was not engaged as agent for Mr K, but acted as an agent for Mr K's estranged wife, Mrs K.
- 1.3 Mr K complains that Mr A interferes in Mr K's matrimonial problems.

2. Material Facts

- 2.1 Mrs K's solicitor in Fiji has copied Mr A in on some email correspondence on the 7th of April 2010 addressed to Mr K's solicitor to which Mr K took exception.
- 2.2 Mr K emailed XYZ Limited alleging that Mr A "is interfering with my matrimonial problems". Mr K further alleges in that email that Mr A is "having an affair with my ex wife and messing around with my kids".
- 2.3 XYZ Limited replied that the issues raised by Mr K "are those of a personal nature and have no relation to Mr A's activities as a real estate salesperson."
- 2.4 Mr K then wrote to the Real Estate Agents Authority on the 27th of April 2010 complaining that Mr A interferes in his matrimonial problems and he further alleged that Mr A is influencing his ex-wife and having an affair with her.

3. Relevant Provisions

- 3.1 A complaint must be in relation to conduct of a licensee that falls to be assessed under the provisions of the Act. Real estate agency work, unsatisfactory conduct and misconduct are all defined in the Act. A complaint can only be made about alleged unsatisfactory conduct or misconduct.
- 3.2 Real estate agency work is defined in clause 4 of the Act:
real estate agency work or agency work—
 - (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
 - (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
 - (c) does not include—
 - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
 - (ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or
 - (iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
 - (iv) the lending of money on mortgage or otherwise; or
 - (v) the provision of investment advice; or
 - (vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006

3.3 A transaction pursuant to the Act means:

Transaction means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
- (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
- (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952:
- (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
- (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

3.4 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.

3.5 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.

3.6 There is no doubt that Mr A was not carrying out real estate agency work for Mr K.

3.7 Pursuant to section 79(2)(a) the Complaints Assessment Committee is satisfied that the complaint alleges neither unsatisfactory nor misconduct and the Complaints Assessment Committee therefore conducted a hearing with regard to the complaint under Section 89 (1) of the REAA.

3.8 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 From the information Mr K has provided in the letter of complaint and supporting documentation, it appears that Mr A's conduct complained about alleges neither unsatisfactory conduct nor misconduct. It appears further that the complaint does not relate to real estate agency work as defined by the Act and it can therefore not be classified as unsatisfactory conduct.
- 4.2 Section 73 of the Real Estate Agents Act 2008 specifies the conduct that represents "misconduct". Section 73(b) is concerned with "seriously incompetent or seriously negligent real estate agency work", again excluding conduct of allegedly interfering with marital problems. Section 73(c) is limited to wilful or reckless contraventions of the Acts, or the rules and regulations that apply to the conduct of licensees.
- 4.3 Paragraph (a) of section 73 is wider and in the Committee's view it applies to conduct by Licensees both in the course of carrying out real estate agency work and also their conduct. However in the Committee's view the alleged conduct only caught by the Act if it reaches what is called the "threshold" for misconduct (the word "disgraceful" is used in section 73(a)).
- 4.5 Under section 172(2) of the 2008 Act the Committee can only determine whether Mr A is guilty of unsatisfactory conduct or whether a charge should be laid in the Tribunal alleging misconduct.
- 4.6 The complaint against Mr A does not allege unsatisfactory conduct and as the complaint relates to conduct that falls outside the definition of real estate agency work it cannot be deemed to be unsatisfactory. Further, even taking the view most favourable to the Complainant, the Complaints Assessment Committee, has decided that, apart from the complaint not alleging misconduct, there are no reasonable grounds for concluding the conduct Mr K has complained about reaches the threshold for misconduct (section 73(a)) and therefore this is not a case where a charge should be laid before the Disciplinary Tribunal.

5 Decision

- 5.1 The Complaints Assessment Committee met on 16 June 2010 to consider the complaint against Mr A. The CAC has, in its discretion, decided to dismiss the complaint pursuant to section 79(2)(a) of the Real Estate Agents Act 2008 as the complaint does not allege either unsatisfactory conduct or misconduct.

6 Publication

- 6.1 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
- 6.2 The Committee hereby authorises the Authority to publish the decision by whatever means it considers appropriate provided that the names and identifying details of both the complainant and the licensee (including the name of his employer) and any named third parties are suppressed from publication.

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.

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 5 July 2010