

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

And

In the Matter of **Complaint No: CA3675279**

In the Matter of Robin David Owen
Licence Number: 10010873

Decision of Complaints Assessment Committee

Dated this 23rd day of December 2010

Complaints Assessment Committee:

CAC10011

Chairperson: Deirdre McNabb

Deputy Chairperson: Denise Bovaird

Panel Member: Rob Crozier

Complaints Assessment Committee
Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 This complaint is from Ms C against (Robin) David Owen, a licensee under the Real Estate Agents Act 2008 ('the Act') working for Southern Wide Real Estate Limited in Waimate.
- 1.2 Ms C complains that Mr Owen wrote to her manager on 26 May 2010 claiming to have introduced a customer to a property that she sold. She states that is not the case and that the purchasers of the property have been her customers for some time. She complains that this is not the first time that the licensee has behaved inappropriately and rudely to customers during the sale of a property.
- 1.3 The CAC, having considered the complaint, made a decision pursuant to section 79(1) of the Real Estate Agents Act 2008 (the Act) to inquire into it and accordingly sought a response from the licensee.

2. Material Facts

- 2.1 This complaint arises from the purchase of a section in Makikihi by a Mr and Mrs B on 24 May 2010. The complainant, Ms C, prepared an agreement and completed negotiations for the sale and purchase of that section between the parties.
- 2.2 The CAC were advised that there were a number of adjacent sections for sale in the same part of Makikihi. The licensee's response advised that there were a number of adjacent sections which had been created when a paddock had been divided into smaller sections a number of years ago. He advised that there were 5 or 6 sections available for sale under multiple listings, 3 or 4 for which his company, Southern Wide Real Estate Limited, had listings.
- 2.3 Mr B, one of the purchasers of the section to which this complaint relates, has provided the Authority with a clear description of his recollection of events on the day that they were introduced to the property. This is set out below:

- He made contact with Ms C on the morning of 23rd May 2010 (a Sunday) and arranged to meet her to view a particular section in the afternoon of that day at 4.30pm. He knew exactly which section she would be meeting with him about because he had had it pointed out to him several years prior by its owner when he had expressed an interest in other property belonging to her.
- After lunchtime on that Sunday he contacted Mr Owen and arranged to meet him to view another section in the same subdivision that he had listed at a price of \$19,500.
- Both Mr B and Mr Owen acknowledge that when they met to view the \$19,500 section Mr B told Mr Owen early on in their discussions that he had made calls to other salespeople about some of the other sections in the area. Mr B is clear that he told Mr Owen he had an appointment with another agent the same day to view the section by the trees (the one he and his wife eventually purchased) and that he pointed the section out to Mr Owen.
- Mr B says that he asked Mr Owen to point out the boundaries of the \$19,500 section. He noted that Mr Owen was unable to do so with certainty despite trying to locate boundary pegs. When Mr Owen told Mr B that the section did not run all of the way to the rear boundary Mr B indicated that he had no further interest in it because he wanted a section that went to the boundary. Mr Owen then offered to call on another owner who had two sections that might fit that criteria and he proceed to show the Bs those sections.
- When the Bs and Mr Owen had finished viewing these sections Mr B excused himself from his wife and Mr Owen saying that he wanted to look at the section they were intending to view [with Ms C] before the agent arrived. He noted that Mr Owen appeared reluctant to leave. Shortly after Mr B had begun to inspect the section more closely his wife and Mr Owen came to this section as well.
- Mr B went back to his vehicle followed by his wife and Mr Owen. Mr Owen sought to identify which agent he was meeting with. Mr B says that he told Mr Owen that he didn't recall the name of the agent but that his appointment was at 3.30. In fact the appointment was at 4.30 and Mr B was aware of that. He advised that he told Mr Owen 3.30pm in the hope that he would leave as he appeared to be 'hanging around'.
- Mr B is clear that he was aware of the potential for difficulty between competing agents when being introduced to a property and that it was for

that reason that he made Mr Owen aware that he had an appointment with another agent for the section he subsequently purchased. He is adamant that he concluded his business with Mr Owen prior to entering that section specifically so that there would be no ambiguity about who introduced him to it. He notes that Mr Owen followed him on to the section uninvited.

- 2.4 Mr Owen disagrees with Mr B's recollection of the events relating to viewing the section that Mr B purchased in that he considers himself to have shown the Bs the section that is the subject of this complaint.

3. Relevant Provisions

3.1 Real Estate Agents Act 2008

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;

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 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 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 6 Standards of Professional Conduct

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

4. Discussion

4.1 The CAC is satisfied that Mr Owen was engaged in real estate work.

4.2 The CAC has fully reviewed the complaint and responses received from the parties and the purchaser of the section that was the subject of this complaint.

4.3 The CAC must decide whether the conduct of Mr Owen amounts to unsatisfactory conduct or misconduct in terms of the Act.

4.4 Having received a written response from the licensee and having satisfied itself that it had completed its inquiry into the complaint, the CAC conducted a hearing with regard to the complaint under Section 89 (1) of the Act.

4.5 The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to Section 90 (2) the CAC made its determination on the basis of the written material before it.

4.6 The CAC considered the submission made by the licensee stating that he met the Bs who were parked outside the subject property and that he showed them that section first. This submission conflicts with the detailed description given to the CAC by Mr B about the introduction to that section. Mr B says that he went to some lengths to ensure that it could not be suggested that Mr Owen may have introduced him to the property.

4.7 The CAC considered the two explanations and the content of the complaint lodged by Ms C. It found that Mr Owen did show some of the sections in the subdivision to

the Bs. It also found that the Bs had made a specific appointment with Ms C to view the section they purchased. The CAC concluded that it was reasonable to infer that this prior appointment would have made Mr B mindful of the need to separate off the viewing of that section from any others Mr Owen chose to show them, as he said it did. It also noted that the parties were in agreement that Mr B had told Mr Owen early on in their discussions that he had an appointment with another agent to view one of the sections such that Mr Owen was on notice that the Bs had made arrangements with another agent.

4.8 The CAC found the explanation provided by Mr B to be clear, detailed and comprehensive. It also found that the outcome of this complaint would be immaterial to Mr B and concluded that his explanation was likely to be an objective recollection of events as they unfolded. In his explanation Mr B was adamant about the way that he dealt with the viewing of this section and the fact that he specifically sought to take a preliminary look at it without being guided by Mr Owen. It is apparent that Mr B had specifically turned his mind to the potential for trouble over the introduction to a property by different agents and he already had a prior appointment regarding this one. It appears from both explanations that Mr Owen was in no hurry to leave after the Bs had finished their business with him. The CAC found, given that the Bs had an appointment with another agent that they had told Mr Owen about, that it was likely that they were aware of time and therefore noticed that Mr Owen was consciously staying around. The fact that Mr B told Mr Owen that his next appointment was at an earlier time than that arranged was not considered material to the CAC, given that there would be an understandable preference that the Bs did not have two agents to deal with at the same time.

4.9 The CAC preferred Mr B's explanation of how the introduction to the section came to pass and found that this was consistent with Ms C's description of events that gave rise to this complaint. Accordingly it found that Mr Owen could not properly claim that he had introduced the Bs to the section. A clear and prior contact had been made between the complainant and the Bs and the CAC found that Mr B was careful to ensure that Mr Owen did not take him over the section that he had made an appointment to view and eventually purchased.

5. Decision

5.1 For all the above reasons it is the decision of this Committee under Section 89(2) (b) of the Act that it has been proved, on the balance of probabilities, that Mr Owen has been involved in conduct that is unsatisfactory in terms of Section 72 of the Act. In particular, by claiming to have introduced the purchaser to the property sold by the

complainant, Mr Owen did not act in good faith as required by Rule 6.2 of the Real Estate Agent's Act (Professional Conduct and Client Care) Rules 2009 and thereby engaged in conduct likely to bring the industry into disrepute in terms of Rule 6.3 of those Rules.

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 Robin Owen 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 Robin Owen and Ms C.
- 6.4 Robin Owen and Ms C may file submissions on what orders, if any should be made. Ms C may file submissions within ten working days from the date of the decision. These submissions, if any, will then be provided to Robin Owen with a timeframe of 5 working days from the date of receiving these submissions for filing his 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 to 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



Deirdre McNabb

Chairperson

Complaints Assessment Committee

Real Estate Agents Authority

Date: 23 December 2010