

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

And

In the Matter of **Complaint No: CA3707472**

In the Matter of Antonia Peters  
**License Number: 10003232**

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## Decision of Complaints Assessment Committee

Dated this 15<sup>th</sup> day of December 2010

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**Complaints Assessment Committee:**

**CAC10012**

**Chairperson: Robyn Wilson**

**Deputy Chairperson: Peter McDermott**

# Complaints Assessment Committee

## Decision finding unsatisfactory conduct

### **The Complaint**

This is a complaint by Mr and Mrs S against Antonia Peters. Ms Peters is a licensee under the Real Estate Agents Act 2008 (“the Act”) and at the time of the complaint was a salesperson for Whangaporoa Real Estate Limited trading as Century 21.

Mr and Mrs S complain that Ms Peters sold them a property which she advertised as 4 bedrooms, a rumpus room and a double garage. When the complainants moved into the property they discovered that their two vehicles would not fit into the garage.

### **Material Facts**

1. Ms Peters was the listing salesperson for a property listed by Century 21 at “the property”.
2. Her advertising for the property states that the property has “4 bedrooms, rumpus room, carport and a double garage”.
3. Mr and Mrs S viewed the property on several occasions and on the 30<sup>th</sup> March 2010 an agreement for sale and purchase prepared by Ms Peters was executed by the complainants and the seller. The agreement was conditional upon a satisfactory Land Information Memorandum, the sale of the complainants’ own property and a builder’s report as well as provisions relating to occupation of the property by the complainants prior to settlement and an escape clause for the benefit of the seller.
4. The agreement became unconditional and Mr and Mrs S took possession of the property as agreed prior to settlement (17<sup>th</sup> May 2010). This was the first opportunity they had to drive into the garage as the driveway was unusable during previous inspections. Mr and Mrs S’s vehicles, a Subaru Legacy 4 door Sedan and a Mitsubishi Legnum, would not fit into the garage. The garage dimensions are 4.5m in length and 4.83 in width.

### **Relevant Provisions**

#### **Real Estate Agents Act 2008**

Section 72 of the Act provides:

#### **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.

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

### **5 Standards of professional competence**

5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

### **6 Standards of professional conduct**

6.4 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.

6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real estate market,<sup>1</sup> that land may be subject to hidden or underlying defects, the licensee must either—(a) obtain confirmation from the client that the land in question is not subject to defect; or

- (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

## **Discussion**

The Committee met on 7 July 2010 and determined to inquire into the complaint. Ms Peters sent her response which was considered by the Committee when it reconvened to hear the complaint on 26 August 2010. The Compliance Unit also supplied material relating to the Building Code from the Department of Building and Housing and Rodney District Council (RDC) requirements for size of garages for the Committee to consider. The RDC does not have a minimum size for garages in their district plan and the building code has no minimum size specification for garages. The fact that the local district council has no minimum size stipulated for a double garage means that the

current building is compliant with the Building Code.

The hearing was held based on the papers pursuant to Section 90 (1).

The Committee considered Mr and Mrs Ss' complaint that they had been misled by the advertising and had they known the garage was not a double they would not have made an offer on it. They say that the Department of Building and Housing recommend double garages be 6 x 6 meters, and that a "standard double garage" of 5.6 x 5.5 which is significantly larger than what they have, doesn't leave sufficient room to get in and out of vehicles. They say Christchurch City Council's design guide says a double garage minimum width is 5.6 m x 5.5 m long. There is also reference to a standard AS2890, an Australian standard, which means a double garage should be a minimum of 5.5 long and 4.8 wide. It appears that the house may have been altered since it was built in 1986 as the plans show the garage to be 5.12 wide (the Ss' measure is 4.83) and 4.906 long (Ss' measure is 4.5). The Ss are seeking compensation from the licensee for misrepresentation.

Ms Peter's position is that she obtained the information about the garage being a double from two reliable sources, RPNZ data which states "mainroof garages 2" and the owner who also stated it was a double garage. The owner had not occupied the property and gave a statement to the Compliance Unit that the property had been tenanted prior to the sale and the tenant had not mentioned any issues with the garage size.

Ms Peters say she did not measure the garage herself and was not aware of any issue until this complaint was made. Ms Peters further states that she feels the complainants had ample opportunity to satisfy themselves on the size of the garage both by site visits and in having their agreement conditional upon a builder's report. The Committee notes that while the agreement for sale and purchase was conditional on a builder's report the S's opted to only obtain a verbal opinion from a family member with building experience.

The Committee considered the likelihood that Ms Peters was aware of the issue and purposely misled the complainants and decided that there was no evidence to suggest that this was the case. She is able to point to the source of the information she relied, the vendor's description and the information on RPNZ, a website relied on by real estate agents for information on properties. The fact that the garage door was always up when the S's viewed it and there was work preventing people from driving into the garage does not present as evidence of an intention to prevent buyers noticing the size of the garage. The Committee's view is that we can't presume Ms Peters would have noticed the size of the garage as being smaller than a usual double garage simply because of her experience of being a real estate agent. Neither the S's nor their brother-in law, who looked

at the property for them, noticed anything about the size of the garage. The Committee's view is that as it has not been established that Ms Peters knew the garage was small, that she has not breached the Professional Conduct and Client Care Rule 6.5 in respect of disclosing known defects.

Similarly the Committee is not persuaded that Ms Peters should have known or suspected that the size was smaller than is considered usual for a double garage or that the S's would not have been able to fit in their two cars due to her 'knowledge and experience of the real estate market'. The size has not been shown to be obviously small since neither the complainants, their brother in law nor the owner of the property (who had not lived in it) noticed it nor is it such a well-known problem that agents could be expected to be 'on notice' about.

The Committee has determined that on the balance of probabilities and under these circumstances, this particular issue was a hidden defect which the licensee was not required to discover.

However the Committee has formed the view that the advertisement for the property describing the garage as a double was in fact misleading. While there is not a precise definition of the meaning of a "double garage", our view is that the average person purchasing a house would reasonably assume that a garage described as a double would fit two ordinary sized vehicles. While we were not satisfied that an intention to mislead on the part of Ms Peters was likely, our understanding of Client Care Rule 6.4 is that it does not require an intention to mislead in the same way the Fair Trading Act does not require an intention to mislead. Section 72 (a) and Rule 5.1 requires an agent to exercise reasonable skill and care and not ensuring the accuracy of an advertisement is also arguably a breach of these provisions. The Committee's view is that while other reasonably competent agents may have made the same mistake, the purpose of the Real Estate Agents Act 2008 is to protect the public and that agents need to ensure their advertising of properties are accurate and does not create a false assumption on behalf of buyers.

Due to our finding that Ms Peters probably was not aware that the garage was too small for two ordinary sized cars, had no intention to mislead when she used the description "double" and that other real estate agents could have made the same error, our view is that her conduct is at the lower end of unsatisfactory conduct and consequently have decided pursuant to section 93 that she be censured and not fined. The Committee is aware that this does not assist the S's with their problem of garaging for their vehicles but the dominant purpose of the Act is to protect consumers by regulating the conduct of real estate agents as opposed to providing damages or compensation when other civil remedies may be available.

The Committee's view is also that the use of the word 'double' is unlikely to have been the only reason the S's did not realise or put their mind to the capability of the garage to fit their vehicles.

## **Decision**

The Committee therefore determined that Ms Peters is found guilty of unsatisfactory conduct in respect of the misleading advertising and be censured pursuant to section 93 (1) (a).

## **Publication**

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 name of the complainants is to be removed.

## **Right of Appeal**

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.

Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

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



**Robyn Wilson**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 15 December 2010