

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

And

In the Matter of **Complaint No's: CA3766998 & CA3767052**

In the Matter of **Latoya McDonald**  
**License Number: 10010432**

and

**Mr L**  
**Licence Number: XXXXXXXXX**

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## Decision of Complaints Assessment Committee

Dated this 28th day of March 2011

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**Complaints Assessment Committee:**

**CAC10048**

**Chairperson: Debbie van Zyl**

**Deputy Chairperson: Rob Crozier (not participating)**

**Panel Member: Denise Bovaird**

# Complaints Assessment Committee

## Decision finding unsatisfactory conduct

### **1. The Complaint**

- 1.1 This is a complaint lodged by Ms C1 and Mr C2 on 28 June 2010 against licensees Latoya McDonald and Mr L who are licensees under the Real Estate Agents Act 2008 (the Act). Ms McDonald holds a salesperson licence and Mr L holds an agent's licence. Ms McDonald works for Next Step Realty Limited trading under the Ray White franchise (NSRL).
- 1.2 Ms C1 and Mr C2's complaint is that they were not advised that a multi-offer situation had arisen and further that the multi offer process was not followed by the licensees.

### **2. Material Facts**

- 2.1 Ms C1 and Mr C2 requested to view a property in Christchurch (the property) through Mr L2 a licensee at a different Ray White agency. Mr L2 was not the listed real estate sales person and he arranged a viewing through Ms McDonald, as the property was listed with NSRL.
- 2.2 Mr L2 confirmed that he was advised by Ms McDonald that there was interest in the property from other parties when he arranged a time to view the property. According to Mr L2 he then asked whether Ms McDonald had any offers on the table, to which Ms McDonald allegedly said no. According to Mr L2 he advised Ms McDonald that if it was going to be a multi offer situation he would require this to be presented by either her branch manager or his branch manager and that he would hand the offer to the person who was going to present the offer to the vendors. Mr L2 then phoned both his branch manager as well as Mr L, because Mr L2 was not going to be available over the period the offers were to be presented and he wanted to make sure that everything would be in place in case a multi offer situation arose.
- 2.3 Mr L2 informed Ms C1 and Mr C2 that it might be a possible multi offer situation and they advised they wished to view the property before putting in an offer. When Ms C1 and Mr C2 arrived at the property on 5 June 2010, Ms McDonald was showing another prospective

purchaser through the property.

- 2.4 Later that same day the complainants asked Mr L2 to phone Ms McDonald (using Ms C1' mobile phone on speakerphone) to ask if there were any other offers. Ms McDonald allegedly confirmed that no other offers had been received and therefore the complainants proceeded with a single negotiable offer without a multi offer clause.
- 2.5 Ms C1 confirmed that she was present when Mr L2 phoned Ms McDonald to ask whether any other offers had been received and that she heard the confirmation that there were no other offers on the table.
- 2.6 According to Mr L2 he was informed by Ms McDonald to leave his clients' offer under the bin outside her office. He refused and arranged to meet Ms McDonald outside her office where he handed her the complainants offer – not in a sealed envelope as it was not a multi offer situation – after allegedly again receiving confirmation from Ms McDonald that this was the only offer on the property.
- 2.7 At about 7.30 pm that Saturday, 5 June 2010, Mr L2 was phoned by Ms McDonald informing him that it was a multi offer situation and that Ms C1 and Mr C2 were unsuccessful. When Mr L2 phoned the complainants they were very upset as they were denied the opportunity to present their best offer.
- 2.8 According to Ms McDonald, Mr L2 was aware that it was a multi offer situation. She thought it was unprofessional when he did not present the offer in a sealed envelope.
- 2.9 Ms McDonald acknowledged that she did not follow the NSRL process for dealing with multi offers. She was aware that these offers are required to be presented by a manager. Ms McDonald confirmed that she did not notify her manager of the situation and that she presented the offers to the vendor herself – in total three offers were presented – two by clients of Ms McDonald (which offers contained a multi-offer clause) and the offer from the complaints (which did not contain a multi offer clause).
- 2.10 At the time of presentation of the offers to the vendor, Ms McDonald discovered that a multi offer form was not included with the complainants' offer. Notwithstanding that, Ms McDonald continued to present the offers to the vendor upon which the vendor accepted an offer presented by one of Ms McDonald's clients.
- 2.11 Mr L confirmed that he was phoned by Mr L2 on Friday 4 June 2010 about a possible multi

offer situation, but that he was not aware that a multi offer situation existed until after Mr L2 rang him on Saturday evening (5 June 2010) to tell him the offers were presented to the vendor by Ms McDonald and that an offer was accepted.

- 2.13 NSRL confirmed that protocol was not followed by Ms McDonald. According to NSRL all sales people are aware of the multi offer procedures as outlined in their Risk Management documentation. As a NSRL internal remedy, Ms McDonald was required to undergo remedial training and also donate \$500 to a charity.
- 2.14 It was further acknowledged that a manager should have been present as per their internal procedures to present the offers and that it was unsatisfactory conduct on the part of Ms McDonald when this was not done.
- 2.15 The complainants confirmed that they are experienced property developers. According to them they are always very clear to ensure that any offer they make is at their highest level if it is a multi offer situation or at a low level to negotiate hard when it is not a multi offer. That is why they requested Mr L2 make sure other offers had been received before they made an offer. The offer they made was at the low end and was a negotiable offer – they understood that they would be advised if it changed to a multi offer situation.
- 2.16 The complainants further confirmed that neither they nor Mr L2 were informed that it was a multi offer situation until it was too late. Apart from the fact that due process was not followed, they specifically (through Mr L2) asked and were very clearly told that their offer was not part of a multi offer situation and they therefore expected to be in sole negotiations with the vendor. According to the complainants, they have been denied a fair and reasonable opportunity to put in their best offer and to sign the multi offer documentation. They also feel aggrieved that, as their offer was not confidential and sealed, other purchasers could possibly have viewed it as their offer was the first offer to be received on that day.

### **3. Relevant Provisions**

- 3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).
- 3.2 Rule 6 of the Real Estate Agent's Act (Professional Conduct and Client Care) Rules 2009 (Rule or Rules) deals with 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 in to disrepute.

3.3. 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.

3.4 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.

## **4. Discussion**

4.1 Section 72 of the Act specifies the conduct that represents "unsatisfactory conduct". Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or Rules made under

the Act is classified as unsatisfactory conduct. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.

- 4.2 Section 73 of the Act specifies the conduct that represents “misconduct”. The position under section 73(b) is the same as under section 72. Section 73(b) is concerned with “seriously incompetent or seriously negligent real estate agency work”. 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 The Complaints Assessment Committee (the Committee) is satisfied that Ms McDonald did not keep her principle informed and that NSRL was therefore unaware of the situation until it was too late.
- 4.4 The Committee notes that actions were taken by Mr L2 to contact his manager and Ms McDonald’s manager so as to be prepared for a multi offer situation. This contact is confirmed by NSRL. To subsequently submit a sale and purchase agreement that did not meet multi offer requirements was clearly of no benefit to Mr L2 or the complainants if they genuinely knew it was a multi offer situation.
- 4.5 The Committee is satisfied that on the balance of probabilities Ms McDonald is in breach of Rules 6.2 and 6.3. It appears that Ms McDonald did not ensure that Mr L2 (and therefore the complainants) knew that it was a multi offer situation when she was clearly dealing with other parties as well.
- 4.6 By her own admission Ms McDonald did not follow NSRL procedure when the offers were presented to the vendor. She knew that a manager had to present these offers, but chose to do it herself. Further, when she realised that the complainants’ offer did not contain a multi offer clause, instead of halting the presentation, Ms McDonald chose to carry on with the presentation of the offers to the vendor herself.
- 4.7 The Committee feels that Ms McDonald acted unprofessionally when she requested Mr L2 to leave his client’s offer under the bin outside her office.
- 4.8 On the balance of probabilities, the Committee is satisfied that Ms McDonald is guilty of unsatisfactory conduct.
- 4.9 For the reasons set out above, Ms C1 and Mr C2’s allegations against Latoya McDonald have met the test for unsatisfactory conduct, but even taking the view most favourable to

the Complainant, the Committee has decided that that there are no reasonable grounds for concluding that Ms McDonald's conduct reaches the threshold for misconduct (section 73(a)).

- 4.10 Furthermore for the reasons set out above, Ms C1 and Mr C2's allegations against Mr L would not meet the test for unsatisfactory conduct. Further, even taking the view most favourable to the complainants, the Committee has decided there are no reasonable grounds for concluding Mr L's conduct reaches the threshold for misconduct (section 73(a)) and that this is therefore not a case where a charge should be laid before the Disciplinary Tribunal against Mr L.

## **5. Decision**

- 5.1 After conducting an inquiry into the complaint, pursuant to section 89(1) of Act, 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 met on 14 February 2011 to consider the complaint against Latoya McDonald and Mr L.
- 5.3 The Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Latoya McDonald has engaged in unsatisfactory conduct.
- 5.4 The Committee has determined under section 89(2)(c) of the Act to take no further action with regard to the complaint or any issue involved in the complaint against Mr L.

## **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 authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect Latoya McDonald 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 Latoya McDonald and Ms C1 and Mr C2.

6.4 Latoya McDonald and Ms C1 and Mr C2 may file submissions on what orders, if any should be made. Ms C1 and Mr C2 may file submissions within 10 work days from the date of the decision. These submissions, if any, will then be provided to Latoya McDonald with a timeframe for filing final submissions.

## 7. Publication

One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.

The Committee has deferred making any decision on publication until its hearing to decide what orders, if any, should be made.

## 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 work 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 work 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](http://www.justice.govt.nz/tribunals).

Signed



**Debbie van Zyl**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 28 March 2011