

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

This is a complaint by Mr Z against licensee Grahame Carey who is a licensee under the Real Estate Agents Act 2008 (“the Act”).

Mr Z complained that he had not been told of leaks in the home which he purchased through the licensee Grahame Carey in January 2010. He contends that Mr Carey knew about the leak and failed to disclose it despite being asked about leaking issues during inspections of the property.

The Complaints Assessment Committee (The Committee) met on 2nd August 2010 and determined to enquire into the complaint. The Committee requested a written response from the Licensee and this was considered on 16th September 2010 along with further submissions from Ms T and Ms Z.

Material Facts

Mr Carey works for Champion Realty Ltd as a salesperson. On the 30th August 2009 he listed “the property”, for sale and the vendors advised there was an intermittent leak in the conservatory which should be made known to all prospective purchasers.

Mr Z viewed the property on several occasions in January 2010. Mr Z had a friend (Ms T) act as a translator. During the inspections the parties agree that discussions took place regarding “leaky homes”. An offer was drawn up which included a clause requiring a satisfactory building report to be obtained and approved by the purchaser. The report does not mention leaking issues in the conservatory.

The sale became unconditional and was settled in April 2010. Shortly after the settlement Mr Carey received a phone call from Ms T advising that there was a leak in the conservatory. Mr Carey was also contacted by Mr L (previous owner) as he had also received a call from Ms T about the leak. Mr Carey says that he told Mr L that he (Carey) would meet the purchaser (Mr Z) to discuss the situation.

Mr Carey met with Mr Z and Ms T at the property on 29 April 2010. During this meeting Mr Carey agreed to help by arranging contractors to ascertain the issues and get quotes for repairs and also to contribute towards the cost of these repairs. Mr Carey paid \$600 to Pilcher and Edwards Limited for the leak test.

When the quotes for the repairs came in at approximately \$12,000 Mr Carey was contacted by Mr Z’s daughter in Australia to say that she believed he (Carey) was completely responsible for the cost of the repair as he had not disclosed the “leaks” in the building. Mr Carey denies this.

Relevant Provisions

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.

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.

Discussion

Ms T has said that she was present and acted as a translator when the discussions took place between Grahame Carey and Mr Z regarding the property. She says that Carey was adamant that the property had “no problems” and subsequently that he told Mr Z that he “forgot to mention it” when the leaks were discovered. Linda says that Grahame Carey admitted he was responsible but later changed his mind.

Mr Z’s daughter, Ms Z says that during the negotiations she was in contact with her father via webcam and her evidence is that it was made clear to her father by Grahame Carey that the property was in good condition and had no problems with leakage. Ms Z believes Grahame Carey is fully responsible for the cost of repairs because he knew about the leaks and did not disclose this to Mr Z.

Grahame Carey says that the “leaky homes” issue was brought up during the inspection process but that although he initially did tell the buyers about the leak in the conservatory, he felt there was more concern about it being a “leaky building” in the context of the cladding. He also states that he encouraged Mr Z to obtain a builder’s report and that he offered to contribute to the cost of the repairs out of a sense of moral obligation rather than a legal one. Mr Carey feels that the language barrier may have led to a miscommunication between the parties. He says that he has acted in good faith and tried to assist Mr Z wherever possible.

The Committee considered the areas of conflicting evidence and concluded that, although a previous customer had been told of the leaking issue by Matt Hindle (another licensee at Champion Realty Ltd), it was more likely than not that, Mr Carey did not communicate the issue of the leaking conservatory to Mr Z. The actions and “ownership” of the problem demonstrated by Mr Carey indicate that he was taking more than moral responsibility for the problem. The committee accepts the evidence of Ms T and Ms Z in this regard.

The fact that a building inspection was received by Mr Z does not remove the requirement for Grahame Carey to disclose any known defects to his customer as per the standards of professional conduct specified in 6.4 of the Real Estate Agents Professional Conduct and Client Care Rules which states

- 6.4 A licensee must not mislead a customer or a client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

Decision

The Committee met on 16th September 2010 to consider the complaint against Grahame Carey. The Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Carey has engaged in unsatisfactory conduct.

Having determined that Mr Carey is guilty of unsatisfactory conduct, the Committee has the power to make one of the orders set out in section 93(1) of the Act.

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.

The Committee invites Mr Carey and Mr Z to make any comments or submissions relating to the orders available prior to the imposition of the order, such submissions to be communicated by 5pm on the 8th October 2010.

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 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.

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.

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.

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.

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.

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



Marina Neylon
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 24 September 2010