

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

And

In the Matter of **Complaint No: CA3852237**

In the Matter of Diane Wright
License Number: 10012182

Decision of Complaints Assessment Committee

Dated this 15th day of February 2011

Complaints Assessment Committee:

CAC10056

Chairperson: Patrick Waite

Deputy Chairperson: Debbie van Zyl

Panel Member: Barrie Barnes

Complaints Assessment Committee

Decision on Orders

1.0 Introduction

1.1 By its decision dated 19 November 2010 the Complaints Assessment Committee made a determination under section 89(2)(b) of the Real Estate Agents Act 2008 ("the Act") that licensee Diane Wright of Austar Realty Limited, Titirangi has engaged in unsatisfactory conduct as that term is defined in section 72 of the Act.

1.2 Having made a determination under section 89(2) (b) the Committee may make one or more of the orders set out in section 93 of the Act.

1.3 The Complaints Assessment Committee invited Ms Wright and the complainants, Mr and Mrs W, to make any comments or submissions they wished within ten days from the date of the Committee's determination.

1.4 Mr and Mrs W provided a written submission dated 1 December 2011 in which they requested that the order take the form of a financial restitution to them of \$116,296.73 which is fifty percent of the costs which they calculated as follows:

- Value of land that they believe they had been misled to think was theirs: \$126,550.00
- Architects fees incurred which are of no use \$731.25
- Cost of replacing the roof sooner rather than later \$2,000.00
- They have had to compromise on the extent of the alterations which they believe has had an affect on their investment potential \$100,000.00
- Increase in costs when extending as they believe that they will have to get a resource consent due to the road reserve \$3,316.00

1.5 Ms Wright provided a written submission in which she responded to the claims made by Mr. and Mrs. Ws:

- Whilst Mr and Mrs W have claimed \$126,550 for the 537.32 square metres they

believed was theirs Ms Wright points out that there is no discrepancy in the land purchased i.e. the total land that they own is 0.11 ha which is the amount of land listed on the certificate of title and which is exactly what was purchased.

- In response to the claim of \$100,000 as being loss of investment potential Ms Wright states *“the complainants have not provided any valuation evidence to support their claim for loss of investment potential. At the time the complainants made their offer it was a ‘multiple offer’ situation and there were a number of buyers all prepared to pay at or about the purchase price for this property. There is no evidence to support the view that the complainants have suffered any loss.”*
- Whilst Mr and Mrs W have included in their claim architects fees Ms Wright states *“the architect made it quite clear to me that the work which has been claimed at \$731.25 was undertaken after the complainants were aware of the correct boundaries for the land.”*
- In response to the claim of \$2,000 by Mr and Mrs Ws to replace the roof “sooner than they had anticipated”, Ms Wright points out that the contract was conditional upon a satisfactory builders report and that a builders report was obtained. *“Complainants did not rely upon any information given by me as to the condition of the building. They obtained the specialist building report exactly for the purpose of obtaining the appropriate advice on the condition of the property.”*
- Mr and Mrs W have claimed additional costs that they might need to incur in obtaining resource consent. Ms Wright responded *“The Complainants have not established any evidentiary basis for this claim. Costs will be incurred with the Council in any event when applying for resource consent. There is no evidence of any additional costs.”*
- In summary Ms Wright disputes the claim made by Mr and Mrs W. On the key matters she states *“(a) I made it clear I could not find the boundary pegs. The purchasers must take responsibility for their particular requirements for the land. If the location of the boundaries was of particular importance to them then they could not reasonably rely upon assumptions made by them as to its location when I specifically advised them I could not find the pegs; and (b) the purchasers obtained a builders report as to the condition of the property.”*

Ms Wright concludes: *“I submit that this is a matter where only censure is*

appropriate. The contract was a conditional one where the purchasers had the ability to make full investigations as to their requirements and they obtained a builders report. Further they engaged their solicitor. Ultimately I am the vendor's agent and not the purchaser's agent or lawyer."

2.0 Relevant Provisions

2.1 Having made a finding of unsatisfactory conduct against Diane Wright the Committee must now decide what orders, if any, should be made under s 93 of the Act.

2.2 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 apologize 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.

3.0 Discussion

Principles considered

3.1 The Committee, when determining whether or not to make an order under section 93(1), has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings. They include:

a. Promoting and protecting the interests of consumers and the public generally

Section 3(1) of the REAA sets out the purpose of the legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work." One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (section 3 (2)).

b. Maintenance of professional standards

This function has been recognized in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; *Taylor v The General Medical Council* [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720). In the Committee's view this function is also applicable in the disciplinary processes under the REAA.

c. Punishment

The Committee accepts that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment - indicated by the power the Committee has to impose a fine (section 93(l) (g); or make an order of censure (section 93(l) (a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.)

d. Where appropriate, rehabilitation of the professional must be considered

The Committee regards its power to make an order requiring a licensee to undergo training or education as indicative of this function applying in the context of

professional disciplinary processes under the REAA.

- 3.2 The Committee acknowledges that when making an order under section 93, the order/s made must be proportionate to the offending and to the range of available orders.

4.0 Complaints Assessment Committee Determination under section 93

- 4.1 In its decision on 2 November 2010 the Committee determined that Ms Wright's performance in relation to the transaction was unsatisfactory as prescribed in s72(a) "Falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent Licensee". Whilst the Committee in reaching its decision on 2 November 2010 saw no evidence to suggest that Ms Wright deliberately attempted to deceive the Complainants and indeed would seem to have tried to help them identify boundary pegs and pointed out the stains in the ceiling, more care should have been taken. In both cases, i.e. the location of the boundary pegs and the question of the roof, the question should be asked as to why Ms Wright did not approach the vendor to seek clarification and ensure that the Complainants had adequate information on which to make a purchase decision. On the other hand the purchasers engaged a builder who provided them with a builder's report in which the roof was identified and concerns as to its condition raised. In addition whilst they obtained a Council Property Bag search which would have assisted Mr and Mrs Ws with questions around boundaries they have stated that they didn't take much notice of this information as they relied on what Ms Wright had told them.
- 4.2 Whilst Mr and Mrs Ws believe that they have suffered or may suffer a loss on the value of the land and a possible loss of investment potential the reality is that no loss has been incurred. Mr and Mrs Ws advise that they have had their property on the market but have had no offers. Whilst they may believe that the main reason the property did not sell was because of the boundary issue, property markets are less than buoyant at present and there is no evidence, anecdotal or otherwise which would indicate that the boundary issue is a key factor in the lack of a sale. In any case there has been no loss incurred on which to make a judgment as to what loss, if any, which could be attributed to the boundary issue.
- 4.3 The Committee does have some sympathy to the argument by Mr and Mrs Ws that they might require resource consent when extending due to the road reserve although there is no evidence that additional costs could be incurred nor is there any certainty that they will extend. However the Committee considered that it could be reasonable to look for a contribution from Ms Wright to both these and the architect fees incurred i.e. total of around \$4,000.

4.5 Having regard to the facts of this case as recorded in the Committee's determination dated 2 November 2010, and the established unsatisfactory conduct and functions which the imposing of a penalty is designed to serve, the Committee has determined to make the following orders under section 93(1):

3.5.1 The Committee is censuring Ms Wright;

3.5.2 Ms Wright is to pay Mr & Mrs Ws the amount of \$1,000 inclusive of GST (if any) pursuant to section 93(1)(f)(ii). This payment must be made within 21 days of receipt of this determination and proof thereof provided to the Real Estate Agents Authority ("the Authority");

4.6 The Committee does not consider that it is necessary to make any of the other orders specified in section 93(1).

5.0 Publication

5.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)). The Committee has the power under section 84(2) to direct such publications of its decisions under section 93 as it considers necessary or desirable in the public interest.

5.2 The Committee regards the publication function as one of the means to educate and raise industry standards by making public the nature of conduct which the Committee considers to be unsatisfactory and the consequences for licensees engaging in such conduct. Publication also gives effect to the purpose of the Act set out in section 3 by ensuring transparency in the disciplinary process.

5.3 The Complaints Assessment Committee considers that to ensure the principal purpose of the Act is achieved, its decision dated 2 November 2010 and this decision ought to be published. Publication is regarded as necessary for the purposes of standard setting in this case and it is also in the public interest that the decisions be published.

5.4 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. Any such publication should not occur until the Authority is satisfied that Ms Wright has been notified of this decision.

6.0 Right of Appeal

- 6.1 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.
- 6.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 6.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Patrick Waite
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 15 February 2011