

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

And

In the Matter of **Ms C**
Complaint No: CA3876843

In the Matter of Susan King
License Number: 10001370

Decision of Complaints Assessment Committee

Dated this 17th day of December 2010

Complaints Assessment Committee:

CAC10056

Chairperson: Patrick Waite

Deputy Chairperson: Debbie van Zyl

Panel Member: Barrie Barnes

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

The Complaints Assessment Committee (the CAC) met on 6 September 2010 to consider a complaint from Ms C with regard to the conduct of Licensee Susan King. Ms C alleges Ms King visited her cousin in hospital regarding her cousin's house which had been jointly listed with Company A and CRT seeking an opportunity to show people the property despite Ms King's firm not holding an agency for the property.

The Committee reconsidered this matter on the 1 December 2010, at which time a response received from the licensee and comments to this response from the complainant were considered. The Committee now issues its determination.

Material Facts

1. Ms H who was in hospital as a result of a fall, gave her cousin, complainant Ms C, power of attorney on 22 February 2010 to sell her house located in Canterbury.
2. The house was listed on 8 March 2010 with Company A and CRT under a joint exclusive agency with an independent advertising programme and the commission on a "winner takes all" basis.
3. The salesperson at Company A (Ms L2) advises that she received a phone call from the licensee Sue King advising her that she had people interested in the property and asking if she could show them the house. Ms L2 told her that she couldn't do that as she was doing a deadline sale and already sharing with another company and would not share the commission with the licensee. She invited the licensee to send potential buyers to her. Whilst she didn't take a note of the date she received the call she believes it was in the week beginning 22 March 2010.
4. On either 28 or 29 March 2010 the licensee went to the hospital to visit Ms H and is alleged to have asked her for the keys of the property so that she could show people through it. Ms H asked her to contact the complainant and according to the licensee Ms H gave her a telephone number. The licensee denies that she asked for the keys to the property but this is contradicted by Ms H who has supplied a witness statement that she did not give the licensee the complainant's telephone number but confirms that she was asked for the keys.
5. The licensee phoned and left a message for the complainant and is alleged to have said that she had been to see Ms H who had indicated that the complainant would hand over the keys. The complainant did not return the call.
6. The property was eventually sold with no involvement in the sale by the licensee.

Relevant Provisions

The CAC examined the information supplied by the complainant in her written complaint to determine whether S72 or S73 of the Real Estate Agents Act 2008 applied i.e. was there evidence which would indicate that the licensee could be considered guilty of unsatisfactory conduct (S72) or should a charge for misconduct be laid with the Tribunal (S73).

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 for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

Discussion

Whilst there is no dispute between the parties that the licensee did visit Ms H in hospital and following that left a message for the complainant there is a lack of certainty as to whether keys were asked for although there is no doubt in the mind of Ms H who has made a statement that she was asked for the keys. This is also backed up by the complainant who has stated that she was left a phone message to that effect. The licensee in the various discussions with the Authority's investigator has been unclear on a number of the key issues, doesn't seem to have kept a record of key events such as the hospital visit but recognises that she has erred and admits that her behaviour has upset the complainant and her cousin.

In her defence the licensee has provided verification from clients that they had asked her to find out more about the property and her Manager has provided a letter in support of her. Whilst there is no evidence of deliberate intent of undermining the appointed agencies and perhaps her unprofessional approach could be attributed to over enthusiasm in an effort to assist her clients she has in the view of the CAC not met the standards expected and is in breach of the following Rules as set out in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009:

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

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

9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.

Decision

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

The CAC believes that it has taken adequate steps to ensure that both the complainant and the licensee have had an appropriate time to consider each other's responses and after full consideration of all available material, it is the opinion of the Committee that the licensee's performance in relation to this transaction is unsatisfactory as prescribed in S 72(a) "Falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee".

Publication

The Committee directs that this decision is to be published after first removing all identifying information of complainant and property information.

Orders

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.

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 requires the investigator authorised to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Susan King 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 Susan King and Ms C.

Susan King and Ms C may file submissions on what orders, if any should be made. Ms C may file submissions by 31 January 2011. These submissions, if any, will then be provided to Susan King, with a timeframe for filing final submissions.

Right of Appeal

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.

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.

Signed



Patrick Waite
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 17 December 2010