

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

And

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

In the Matter of Susan King
License Number: 10001370

Decision of Complaints Assessment Committee

Dated this 8th day of April 2011

Complaints Assessment Committee:

CAC10056

Chairperson: Patrick Waite

Deputy Chairperson: Debbie van Zyl

Panel Member: Barrie Barnes

Complaints Assessment Committee

Decision on Orders

1. Introduction

- 1.1. In its decision dated 17 December 2010 the Complaints Assessment Committee (the Committee) made a determination under section 89(2)(b) of the Real Estate Agents Act 2008 (the Act) that licensee Susan King of Realty Corner, Timaru 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 Committee invited Ms King and the complainant, Mrs C, to make any comments or submissions they wished within forty five days from the date of the Committee's determination.
- 1.4. Mrs C chose not to make any submissions in respect of the determination.
- 1.5. Ms King provided a written submission in which she recorded regret that her actions had caused distress. Her submission concludes with the statement "Again I would like the opportunity to apologise to Ms H and Mrs C, as my intentions were not to cause them any problems. I always try to consider other people's feelings and rights, and realise that in this profession, I must always uphold a high level of conduct and honesty. I do hope you can see that I am truly sorry and will endeavor in future to be more sensitive to other people." She enclosed a written apology for Ms H and requested that the Real Estate Agents Authority (the Authority) forward it to her.

2. Relevant Provisions

- 2.1. Having made a finding of unsatisfactory conduct against Susan King 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. 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 Act 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 Authority.

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 Act.

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. Decision

4.1. In its Decision of 17 December 2010 the Committee determined that Ms King's performance in relation to the transaction was unsatisfactory as prescribed in section 72(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 saw no evidence to suggest that Ms King deliberately attempted to undermine 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 Committee 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.

4.2. The Committee does acknowledge that Ms King is a relatively inexperienced real estate salesperson and it accepts her statement that she recognises that in conducting herself in the real estate industry she must always uphold a high level of conduct and honesty. The Committee accepts that Ms King has shown genuine remorse as evidenced by her submission and her letter of apology to the person affected. Whilst not wanting to dampen her enthusiasm and accepting that she will have learned a lesson from the experience an order must be made to recognise that the behavior that was the subject of the complaint is not acceptable.

4.3. Having regard to the facts of this case as recorded in the Committee's determination dated 17 December 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):

4.3.1 The Committee is censuring Ms King

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

5. Publication

- 5.1. One of the functions of the 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 Committee considers that to ensure the principal purpose of the Act is achieved, its decision dated 17 December 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 and any third parties in the publication of its decision. Any such publication should not occur until the Authority is satisfied that Ms King has been notified of this decision.
- 5.5. The Authority will publish the Committee's decision after the appeal period has ended. Any application for an order preventing publication must be made to the Disciplinary Tribunal.

6. 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: 8 April 2011