

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

And

In the Matter of **Complaint No CA2283159**

In the Matter of



Determination of Complaints Assessment Committee

Dated this 27th day of April 2010

Complaints Assessment Committee:

CAC No: 100023

Determination of Complaints Assessment Committee

1 Licensee Background

- 1.1 The Licensee, [REDACTED] is the director of [REDACTED] trading as [REDACTED] in [REDACTED]. She holds an agent licence under the Real Estate Agents Act 2008 (“the REAA”).
- 1.2 [REDACTED] is also a licensed auctioneer and an associate member of the Real Estate Institute of New Zealand.

2 Complaint

- 2.1 The complainant, [REDACTED] of Rotorua, offered to purchase the property (residential) at [REDACTED], Tokoroa (“the property”) in October 2009.
- 2.2 The Licensee was the vendors’ real estate agent in respect of the proposed sale of the property. She signed a listing agreement with the vendors on 15 October 2009.
- 2.3 The allegations in [REDACTED] complaint can be summarised as follows:
- a. Until he insisted on more than one occasion, [REDACTED] did not follow his original instructions to her as to the clauses/conditions which he wanted to insert into the offer document and the content of those clauses;
 - b. Until he insisted on more than one occasion, [REDACTED] did not fulfil her alleged duty/responsibility to prepare an offer document which “faithfully represented the terms of the purchaser’s/my offer/wishes”;
 - c. As Principal/Licensee, [REDACTED] “tried to alter the terms of my offer to favour the interests of either the vendor/s or herself” without good reason and against the complainant’s specific instructions and interests.

- 2.4 The complainant alleged that on 16 October 2009 he inspected the property with [REDACTED]. He stated that this was not the first property he had viewed in Tokoroa and as such he was able to make a “same-day decision” to proceed with an offer for the property.
- 2.5 [REDACTED] stated he gave [REDACTED] his “pre-prepared written instructions” for the preparation of the offer document; and he went through the details on his instructions with her. [REDACTED] drew the Committee’s attention to two items on his “pre-prepared written instructions”; the clause to allow for a LIM Report and property inspection report (this read “Standard for LIM report – satisfactory to me as purchaser”), and the clause pertaining to settlement date (this read “Settlement date to be at the mutual agreement of vendor and myself, but no later than 28 days after confirmation”).
- 2.6 In respect of the clause allowing for a LIM Report and a property inspection report, [REDACTED] stated he verbally advised [REDACTED] that she was to allow 10 working days for him to obtain these reports. [REDACTED] alleged that he verbally confirmed his “specific written instruction” to the effect that the settlement date to be inserted into the offer document was to be “at the mutual agreement of vendor and myself, but no later than 28 days after confirmation” as stated on his written instructions. Another clause required confirmation of finance within 7 working days. [REDACTED] alleged that before he left the office he checked with [REDACTED] that she understood his instructions as to what he wanted to see on the offer document; and [REDACTED] responded by saying she saw no problem with what he had requested as “the details were standard”.
- 2.7 [REDACTED] alleged that later in the day, 16 October 2009, [REDACTED] contacted him by email to advise the offer document she had prepared would be available for him to inspect at 3.00pm. [REDACTED] called at [REDACTED] office and viewed the “typed offer document” in the presence of [REDACTED]. [REDACTED] stated that his attention was drawn to the following matters;

- a. The clause in the typed offer document which [REDACTED] had prepared relating to the LIM Report and the property inspection report sought these reports within 7 days rather than the 10 days he had instructed her to specify. [REDACTED] stated that when he drew this to [REDACTED] attention she “physically made a sneering face...talking down to me in saying “...so you are going to have clauses with two different dates (7 days in the finance clause and 10 days for the LIM and property inspection) before confirmation of the offer” [REDACTED] stated he told [REDACTED] that while he had some control and confidence in determining finance within 7 days he had less control over obtaining the LIM and property inspection reports within that timeframe. He stated he saw no issue with two different dates for the fulfilment of conditions and that if [REDACTED] had a problem then she was to “alter the confirmation of finance clause to read as ‘10 days’ to align with the other conditions; otherwise, I emphasised that my original instruction/s were to be followed”; and
- b. The typed offer document specified a settlement date of “43 days after the agreement becomes unconditional”. [REDACTED] stated that when he pointed out that this was not what he had instructed her to include in the offer, [REDACTED] advised him that the vendors were making a back-up offer for a property at [REDACTED] in Tokoroa, and that she would have to change the dates on their back-up offer if he ([REDACTED]) insisted on his instructions. [REDACTED] allegedly further advised [REDACTED] that the vendors did not want to move from the property until late in January 2010. [REDACTED] alleged that “for the second time her manner was that of talking down to a customer...” and when he pointed this out to her she offered “no apology, but simply smiled” [REDACTED] stated that he explained to [REDACTED] that “any inconvenience to her in respect of a separate property arrangement for the vendors need hardly affect the terms of my offer and if the vendors preferred a settlement date later in January 2010 for whatever reason, then they could specify same as part of any counter-offer.” [REDACTED]

█████ insisted that █████ amend the offer document to reflect his earlier specific written instruction and verbal confirmation of that instruction.

2.8 █████ stated he then instructed █████ to send an amended offer document to his solicitors at █████ in Rotorua, with a copy to him. █████ emailed a copy of the revised offer document to █████ at 4.06pm. █████ stated he “found she had altered the dates relating to the LIM and property inspection reports back to my original instructions but had still retained her own preference as to a settlement date.” There was then an email exchange between █████ and █████ and then “my final express reminder to her that an offer document is to reflect the purchaser’s wishes not hers”.

2.9 █████ acknowledged that when he called at █████ office at 5.30pm she “finally amended (with “handwritten alterations....”) the offer document to reflect my original instructions (and any other items noticed by myself and/or my solicitor in the interim)”. On that basis █████ stated he signed the offer document.

2.10 █████ claimed that over the weekend of 17-18 October 2009 █████ rang him to advise him of the terms of the vendors’ “counter-offer”. These included clauses dependent on the acceptance by the owners of the █████ property, of the vendors’ “back-up offer”, along with a settlement date in the New Year. █████ maintained he declined the “counter-offer” and asked █████ to send him an email the following day (19 October 2009) to “either confirm that the vendors had allowed my offer to expire without accepting same or to acknowledge receipt of my decline of the vendors’ counter-offer”. █████ did so, he stated.

2.11 On 28 October 2009 █████ alleged █████ sent him another email to advise him that the vendors’ circumstances had changed and they may be willing to re-consider an offer by him for their property █████ stated that he had “no

wish to re-open dealings with [REDACTED] from my earlier experience I did not trust her, and no property is worth further exposure to such conduct.”

- 2.12 [REDACTED] stated that in his view his complaint is not an inconsequential matter. He advised that he has bought and sold properties previously but he has not experienced “conduct as that shown by [REDACTED]” before; he alleged that [REDACTED] “may be seen to have placed either her own interest or that of the vendor/s ahead of her responsibilities under the Act.” He maintained that it was because of her conduct that he declined to pursue the property further when a second opportunity presented itself, and which moved him to make a complaint.

Information and Material Considered

- 2.13 The Real Estate Agents Authority (“the Authority”) received [REDACTED] complaint against [REDACTED] on 10 November 2009 (prior to the commencement of the REAA). The Authority referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the REAA, on 9 December 2009 the Committee considered the complaint under section 79 and determined to inquire into it. The Committee was satisfied that although the complaint related to conduct which had occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into the complaint.
- 2.14 The Committee invited [REDACTED] to provide a written response to the complaint and this was received on or around 11 January 2010.
- 2.15 In her letter of response to the complaint, [REDACTED] made the following points:
- a. At 12.30pm on 15 October 2009 she had an appointment with [REDACTED] to show him two properties in Tokoroa; neither property was what he was looking for;

- b. During the afternoon of 15 October 2009 [REDACTED] listed (on behalf of another staff member) the [REDACTED] property owned by [REDACTED] and [REDACTED] for \$259,000 subject to certain conditions;
- c. One of the vendors, [REDACTED] informed [REDACTED] that he and [REDACTED] would only sell their property if they purchased the [REDACTED] property (referred to above). An offer had already been drawn up for [REDACTED] and [REDACTED] for the [REDACTED] property (which was to be presented in the next two days). The listing agreement which [REDACTED] signed with [REDACTED] and [REDACTED] specified that the sale of the property was “condition upon purchase of ... [REDACTED]”;
- d. When [REDACTED] returned to the office she telephoned [REDACTED] and made arrangements for him to view the [REDACTED] property which had just been listed;
- e. [REDACTED] took [REDACTED] to view the property on 16 October 2009; during the 30-35 minute inspection by [REDACTED], [REDACTED] stated she explained to [REDACTED] that the property had come on to the market as the owners were submitting an offer on another property ([REDACTED]); that it was going to be a multiple offer (not a back-up offer as [REDACTED] alleged) and if the vendors were unable to purchase that property then they would not be selling their property. [REDACTED] stated she also explained to [REDACTED] that the [REDACTED] property which the vendors were putting an offer on, was tenanted and the tenants had to be given 42 days notice under the Residential Tenancies Act if the property was sold. [REDACTED] maintained [REDACTED] had told her the previous day that he works for [REDACTED] in Rotorua and informed her he was very familiar with the rights of a tenant;
- f. [REDACTED] returned to the office with [REDACTED]. [REDACTED] presented her with his “written instructions” for the drawing up of a sale and purchase agreement on his behalf. [REDACTED] stated she again explained

to [REDACTED] that the tenants of the property the vendors wanted to purchase would need to be given 42 days notice from the unconditional date for the [REDACTED] property and that if the vendors' offer was accepted for that property then the settlement date which [REDACTED] wanted (as specified in the written instructions) would not match; [REDACTED] stated she told [REDACTED] she would need to discuss his proposed settlement date with [REDACTED] and [REDACTED]; and

- g. [REDACTED] stated it was she who requested that a copy of the offer document be sent to [REDACTED] lawyer to consider and amend if [REDACTED] wished, before he signed it; [REDACTED] alleged that [REDACTED] told her under no circumstances was she to contact his lawyer – “that he was the client and that I was to follow his instructions only and not do what I [REDACTED] wanted to do”. [REDACTED] described [REDACTED] behaviour as “domineering and totally over the top”. [REDACTED] stated she was “very aware of the conditions and dates for the [vendors’] offer for ... [REDACTED] and tried to explain to [REDACTED] that it would be in his best interest if he wished to purchase the property to be flexible and to work together re dates”.
- h. Arrangements were made for [REDACTED] to return to her office to sign the offer documents he had instructed her to prepare, at 3.00pm. When [REDACTED] returned to the office for that meeting he read the offer documents which [REDACTED] had prepared and [REDACTED] maintained, he “totally lost it”. [REDACTED] behaviour was described as “aggressive”.
- i. [REDACTED] stated [REDACTED] concerns were with the clauses pertaining to the settlement date and the LIM and property inspection reports for which she had allowed 10 days for satisfaction. [REDACTED] maintained [REDACTED] would not listen to her explanations. [REDACTED] agreed to “retype the offer if he wished to continue” and advised [REDACTED] that before she saw him again she would email the retyped offer to his lawyers

and to him “for discussion and approval before we would proceed any further”;

- j. ██████████ stated she also told ██████████ that she would contact her clients (██████████) to ask them whether they would be able to find somewhere to live so that his settlement date could be “28 days or by mutual consent” (as he had specified in his written instructions)
- k. ██████████ stated she subsequently contacted ██████████ who said he would need to speak to his partner before he could make a decision.
- l. ██████████ then retyped the offer, emailed a scanned copy to ██████████ (at 4.06pm) and faxed it to his lawyers to view;
- m. Email correspondence showed that at 4.21pm ██████████ emailed ██████████ and advised her that she was “specifically instructed, both in writing and verbally, to ensure that settlement date was to be shown as by mutual consent of vendor and purchaser but no later than 28 days – you have shown it as 43 days. I consider your actions to be unprofessional.
- n. At 4.43 pm ██████████ emailed ██████████ and informed him that she had spoken to her clients about the settlement date issue and she communicated the advice she had received which was that one of the vendors would need to speak to his partner over the weekend and that “in the meantime I would advise that you have your solicitor amend the date if you so wish.”
- o. ██████████ received a further email from ██████████ at 5.05pm 16 October 2009 with further instructions to amend his offer. ██████████ made these amendments. ██████████ maintained that as there was no mention in this email outlining his lawyers’ instructions to change the settlement date (from 43 days to 28 days) she “presumed that this problem had been sorted”;

- p. ██████ stated that at 5.30pm ██████ came into the office to view the amended offer document she had prepared. She was alone as the office had closed for business for the day. ██████ read over the offer, alone in the interview room. After 10 minutes ██████ came out, requested a change to the settlement date to reflect his written instructions (which ██████ did) and he then signed the offer. Ultimately all of the changes which ██████ had insisted on at the outset, including the settlement date, had been made in accordance with his wishes.
- q. The following day, 17 October 2009, ██████ presented ██████ offer to her clients. At that meeting ██████ stated she told her clients the ramifications of the settlement date ██████ had specified in his offer (that they would need to find alternative accommodation for three weeks) and she stated she advised them to seek legal advice before signing the offer.
- r. ██████ received instructions from ██████ and ██████ that they would not consider ██████ offer until their offer on the ██████ property was presented later that afternoon;
- s. ██████ and ██████ offer on the ██████ property was not accepted when it was presented later that day ██████, acting on instructions she had received from her clients, maintained she informed ██████ that his offer was not accepted because her clients' offer on the ██████ property had not been accepted. She stated that she advised ██████ that her clients could not consider an offer from him unless it contained a "subject to purchase clause";
- t. On 21 October 2009 ██████ contacted ██████ by email to enquire if he was still interested in purchasing her clients' property explaining there had been a change in the vendors' personal circumstances which meant they would be in a position to consider another offer from him. ██████ replied on 23 October 2009 advising ██████ that he had made

a complaint against her. The property was withdrawn from the market on 28 October 2009.

- u. [REDACTED] stated in her concluding remarks that she believed “[REDACTED] wanted to be in total control and have everything done the way he wanted and was not prepared to compromise....I tried to bend over backwards to keep everyone happy and within the law and I feel I was between a rock and a hard place. This complaint is spiteful..... I feel I was professional in my dealings with [REDACTED] gave fair, informed, professional constructive advice to overcome the settlement problems...If [REDACTED] really wanted to purchase [the property] he was given every opportunity when the vendors had reconsidered their position and asked if he wished to re submit an offer.”
- 2.16 In the course of the Committee’s investigation a letter dated 22 January 2010 was received from [REDACTED] one the vendors of the property the subject of [REDACTED] complaint. [REDACTED] stated he instructed [REDACTED] to carry out his instructions “as per the property listing, IE that we would have to allow 42 days for the tenant to vacate [REDACTED]” Further, “I would also like you to note that [REDACTED] done [sic] her very best to satisfy all parties concerned, she acted in the most professional manner, she advised us to seek legal advise [sic], however due to [REDACTED] demands, we would could not reach a suitable agreement.”
- 2.17 On 8 March 2010 the Committee wrote to [REDACTED] and provided her with a copy of [REDACTED] letter. [REDACTED] was invited to make any further comments she wished before the Committee held its hearing. A further letter containing submissions was received from [REDACTED] on 18 March 2010. The letter was detailed and comprehensive and supported by further documentation from her file. [REDACTED] made the following additional points;
- a. When she first took [REDACTED] to view the property on 16 October 2009 she gave him “the information as per the listing sheet”;

- b. During the initial inspection [REDACTED] asked several question including the reasons why the vendors were selling [REDACTED] stated she acted on the instructions of her clients and informed [REDACTED] that the sale of the property was subject to her clients buying another property and that a multiple offer (not a back-up offer as [REDACTED] claimed) was being presented shortly; she also informed [REDACTED] that the house her clients were putting an offer on was rented and as such the tenants would need to be given 42 days notice to vacate (upon an agreement for sale and purchase becoming unconditional);
- c. When [REDACTED] first gave her his written instructions as to the conditions he required in the offer document, [REDACTED] told him again that the “[settlement] dates were not going to work because of the tenancy on [REDACTED] and requested that I send the typed contract to his lawyer before we proceeded any further...I was not prepared to go against the instructions of my vendor but if the lawyer amended anything then I couldn’t be blamed for not having followed the instructions of the vendor. This was absolutely refused...”;
- d. When the offer was (at her insistence) sent to [REDACTED] lawyers after the 3.00pm appointment on 16 October 2009, [REDACTED] received an email from [REDACTED] outlining the changes which he stated his lawyer had recommended. Because there was no mention of settlement date in that email, the 43 days [REDACTED] had initially put into the offer remained in the document as she understood that issue had been resolved. The settlement date was changed at the later meeting [REDACTED] had with [REDACTED] at her office (held at 5.30pm), and on the instructions of [REDACTED] (not on the instructions of his lawyer). It was at that meeting that [REDACTED] signed the offer;
- e. [REDACTED] had not specified 10 days for the obtaining of LIM and property inspection reports, in his written instructions; [REDACTED] stated it was

her suggestion to have a 10 day period for this to occur, made on the basis that if there was a hiccup with finance (for which 7 days was specified) then [REDACTED] would not have to incur undue and unnecessary expenses.”

- f. Ultimately all of the conditions which [REDACTED] wanted in his offer, were included and on his terms;
 - g. [REDACTED] denied telephoning [REDACTED] to advise him of the terms of the vendors’ “counter-offer”. She stated there was no counter-offer signed to present to him. The only message she left was that the vendors’ offer to purchase the [REDACTED] property was not accepted and therefore his offer for the [REDACTED] property was declined.
- 2.18 On 8 March 2010 the Committee sent [REDACTED] a copy of the response it had received from [REDACTED] dated 6 January 2010 and invited him to make any further written comments or submissions before the Committee held its hearing. A further letter was received from [REDACTED] dated 3 April 2010 and his letter was considered in full. [REDACTED] referred the Committee back to his original letter of complaint and submitted that in his view the issue before the Committee was “straightforward”. [REDACTED] concluded by saying “the Licensee saw some self-determined prerogative/right for herself to override the rights of the offeror by altering the terms of the original offer document to favour herself and/or the vendor, and against the express wishes and instructions, both verbal and written, of the offeror. She did not have any such prerogative; she had no such right.”

3 **Hearing**

- 3.1 Having received [REDACTED] written responses to the complaint (and obtained the other information referred to above) and having satisfied itself that it had completed its inquiry into the complaint, on 12 April 2010 the Complaints Assessment Committee conducted a hearing with regard to the complaint, under section 89(1) of the REAA.

3.2 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 as described above.

3.3 In summary, the Committee considered the following written material:

- a. [REDACTED] letter of complaint dated 5 November 2009 and supporting documents including [REDACTED] written instructions to [REDACTED] email correspondence between [REDACTED] and [REDACTED] on 16 October 2009 and a copy of the “finalised offer document signed by me on 16 October 2009”;
- b. Letter from [REDACTED] dated 6 January 2009 and supporting documentation including listing form for the [REDACTED] property, [REDACTED] written instructions with [REDACTED] handwritten notes thereon, handwritten further terms and conditions prepared by [REDACTED] [REDACTED] for her clients, email dated 19 October 2009 from [REDACTED] to [REDACTED] advising the vendors would not accept his offer without the addition of a ‘subject to purchase’ clause which he had refused; and an email dated 23 October 2009 from [REDACTED] to [REDACTED] notifying her of his complaint;
- c. Letter from [REDACTED] dated 22 January 2010;
- d. Certificate of Title to the [REDACTED] property;
- e. Letter from [REDACTED] dated 15 March 2010 and supporting documentation including email dated 16 October 2009 from [REDACTED] to [REDACTED] attaching scanned copy of the offer document and covering notes which she had faxed to his lawyer for discussion together with facsimile verification sheet; facsimile from [REDACTED] to [REDACTED] [REDACTED] and attached draft offer for [REDACTED] and some marketing information for [REDACTED]; and

- f. Letter from [REDACTED] to the Complaints Assessment Committee dated 3 April 2009.

4 **Complaints Assessment Committee Determination and Reasons**

- 4.1 The Complaints Assessment Committee has determined under section 89(2)(c) of the REAA that it will take no further action with regard to the complaint or any issue involved in the complaint.
- 4.2 There is no dispute that [REDACTED] was acting as an agent for her clients who were the vendors of the property the subject of the complaint. She had signed a listing agreement with them on 15 October 2009. In her capacity as the vendors' agent she owed contractual obligations to them under the listing agreement. She also owed fiduciary obligations to them as her clients. She had a professional responsibility to act in the best interests of her clients and in accordance with her clients' instructions, unless to do so would have been unlawful.
- 4.3 It is clear to the Committee that [REDACTED] acted in accordance with the instructions she received from her clients at all times and respected the circumstances surrounding their desire to purchase another property prior to agreeing to accept an offer on their property that did not contain a 'subject to purchase' condition. It is also clear she communicated her clients' instructions to her customer, prospective purchaser [REDACTED] on several occasions.
- 4.4 The issue is whether in discharging her responsibilities to her clients, she engaged in unsatisfactory conduct in the manner in which she dealt with [REDACTED]
- 4.5 The Committee is satisfied that the obligations [REDACTED] owed to [REDACTED] as a customer or prospective purchaser/offeree differed from the obligations she owed to her clients, [REDACTED] and [REDACTED]
- 4.6 Having carefully considered all of the material before it, the Committee is satisfied that in this case [REDACTED] discharged the professional responsibilities she owed to [REDACTED] in his capacity as a customer or proposed

purchaser/offeree. In the Committee's view when the facts are considered objectively, [REDACTED] acted in good faith and dealt fairly with [REDACTED]. The Committee did not accept [REDACTED] contention that [REDACTED] had sought to take advantage of him or placed her own interests or the interests of the vendors ahead of his interests.

- 4.7 The Committee is satisfied that [REDACTED] was advised by [REDACTED] throughout of nature of the instructions she had from her clients as to the terms under which they were likely to enter into an agreement for sale and purchase of their property.
- 4.8 On the evidence before it, the Committee is of the view that the way in which [REDACTED] prepared [REDACTED] offer was ultimately fair to all parties. Her actions can be characterised as an attempt by her to obtain an offer from [REDACTED] in a form which she believed her clients would accept. [REDACTED] who the Committee noted was ultimately legally advised on the terms of his offer, ignored or refused [REDACTED] advice as to the vendors' requirements in relation, particularly to an acceptable settlement date. Her advice in this regard was accurate and in accordance with her instructions. It is clear to the Committee on the evidence before it that [REDACTED] wanted to ensure [REDACTED] offer was presented in the manner most likely to attract her clients and with his interest in purchasing the property protected as best it could be.
- 4.9 Ultimately the offer which [REDACTED] signed and which [REDACTED] presented to her clients contained all of the clauses which he had initially instructed her to include in the agreement. [REDACTED] followed [REDACTED] instructions and amended his offer, however as she expected and had advised [REDACTED] throughout, the offer was not acceptable to her clients on those terms.
- 4.10 On the information before it the Committee is satisfied [REDACTED] acted reasonably and in good faith and she dealt fairly with both parties engaged in the offer process, in what the Committee considered were difficult circumstances for her.

4.11 In all of the circumstances the Committee is of the view it is not necessary to take the matters raised in the complaint any further.

5 Publication

5.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)).

5.2 The Committee has determined that this decision should be published in the interests of ensuring the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of standard setting.

5.3 The Committee hereby authorises the Authority to publish this decision by whatever means it considers appropriate provided that the names and identifying details of both the complainant and the Licensee (including the name of [REDACTED] and any other identifying details of her real estate agency) and any named or identified third parties are suppressed from publication. In addition the names of the properties identified in the decision are also to be suppressed.

6 Right of Appeal

6.1 A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against a determination of the Committee within 20 working days of 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.

DATED this 27th day of April 2010

A handwritten signature in blue ink, appearing to read 'Jo Hughson', written in a cursive style.

Jo Hughson, Chairperson