

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

And

In the Matter of **Complaint No CA3285615**

In the Matter of **Ocena (Maree) Clarke**
License No: 10017302

Decision of Complaints Assessment Committee

Dated this 10th day of September 2010

Complaints Assessment Committee:

CAC10042

Chairperson: Debbie Van Zyl

Deputy Chairperson: Peter Ward

Panel Member: David Russell

Complaints Assessment Committee - Decision finding unsatisfactory conduct

Decision

1. The Complaint

- 1.1 This is a complaint lodged by Mr and Mrs V on 1 April 2010 against Ocena (Maree) Clarke. Ms Clarke is a licensee under the Real Estate Agents Act 2008 ("the Act"). Ms Clarke holds an agent's license and works for Re/Max Latitude 36.
- 1.2 Mr & Mrs V's complaint is about Ms Clarke sending them an offensive email.

2. Material Facts

- 2.1 Mr & Mrs V used Mr B of Re/Max Latitude 36 in Albany as the sales person assisting them to sell their business. The Authority to sell the business was signed on 18 September 2009.
- 2.2 Mr & Mrs V sent an email to Mr B on 1 March 2010 to enquire about the advertising and sale of their business.
- 2.3 On 3 March Mr & Mrs V were inadvertently copied in on an email ("the email") sent by Ms Clarke to Mr B. The following are extracts from parts of that email:

"I will sort her out – if they have taken it upon themselves to assume my buyers came in just for them well...they are totally wrong."

"I have my buyer under control and they are cautious – not hot. Don't worry, I will put Mrs V in her place. Perhaps I should have been left with these matters to oversee while you are away?"

There was no one to call off last week's ad therefore Mrs V has NO reason to be sitting there Smug – she'll only be setting herself and Mr V up for a huge let down. I know how the Asians work!"

- 2.4 Mr & Mrs V complained about the contents of the email and received a response from Mr B dated 8 March 2010. Extracts from the email follow:

"I am not usually left speechless but this is one of those rare occasions."

"I have read the e-mails that have led to the upset – and there is nothing I can say to alleviate the way you feel in respect of same. Just not the way I conduct business is all I will say."

- 2.5 Mr & Mrs V had a meeting with Mr B on 9 March 2010 to discuss the email. Ms Clarke offered a verbal apology through Mr B (Mr & Mrs V did not allow her to be part of the discussions or wish her to apologise in person). Mr B offered a reduction in commission and stated that this would come from his own pocket. Mr & Mrs V felt that there was no repercussion for Ms Clarke. Mr B confirmed by email the next day that the commission would be reduced from 7.5% + GST to 6% +GST as a gesture of goodwill.

- 2.6 On 10 March 2010 Mr & Mrs V requested in an email that they be refunded \$22,000 (being the amount they had advanced for advertising). Mr B replied that that would not be possible because funds had already been spent on advertising.
- 2.7 After a further flow of correspondence between Mr & Mrs V and Mr B, the V's terminated the agency agreement and demanded the full advertising advance of \$22,000 be refunded to them. An unspent balance of \$9,076.76 was returned by Re/Max to Mr & Mrs V's bank account. This left \$11,250.00 still in dispute.
- 2.8 Mr & Mrs V asked for a detailed breakdown on what the \$11,250 advertising charge had been spent. A copy of a tax invoice dated 6 Nov 2009 from a company called ABC was supplied. The services entered on the invoice stated, "Business Migration Services – Buying a business Newsletters and website advertising." No detailed breakdown of the placements was given on the invoice. An email dated 14 Nov 2009 from Mr B offered a little more information when he reported that, "Cost of newsletters to a database of in excess of 100,000 intending migrants was negotiated from \$21,500+GST to a final figure of \$10,000 Plus GST albeit that this literally took several weeks to accomplish." Notwithstanding Mr B's response, the V's don't believe they have received a satisfactory explanation to their request for a detailed breakdown of the \$10,000 plus GST (\$11,250) claimed advertising spend.
- 2.9 Mrs V stated that they were concerned about the service they were receiving from Re/Max relating to the erection of street sale sign. They received the first proof of the sign on 14 October 2009 and the sign was only erected on the 22 October 2009.

3. Relevant Provisions

- 3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).
- 3.2 Section 72 of the Act defines unsatisfactory conduct:

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.

- 3.2 Section 73 of the Act defines misconduct:

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.

3.3 Rule 5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules") deals with standards of professional competence. Rule 5.1 states that: "A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work."

3.4 Rule 6.3 of the Rules deals with standards of professional conduct. Rule 6.3 states: "A licensee must not engage in any conduct likely to bring the industry into disrepute."

3.5 Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee ("Committee") conducted a hearing with regard to the complaint under Section 89 (1) of the REAA.

3.7 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.

4 Discussion

4.1 Section 72 of the Act specifies the conduct that represents "unsatisfactory conduct". Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or rules made under the Act is classified as unsatisfactory conduct. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.

4.2 In the opinion of the Complaints Assessment Committee, the offensive email sent by Ms Clarke on 3 March 2010 falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and it also breaches Rule 6.3 of the Rules.

4.3 By sending the email Ms Clarke further possibly breached Rule 5.1 as it is difficult to comprehend how someone using care, skill and competence could have sent such an email.

4.4 The Committee noted the claimed delay between approving the copy for the promotional sign and its erection. The Committee's view is that the delay, while arguably long, had no significant detrimental effect on the potential sale of the business.

4.5 For the reasons set out above, Mr & Mrs V's allegations against Ocena (Maree) Clarke has met the test for unsatisfactory conduct, but even taking the view most favourable to the Complainant, the Complaints Assessment Committee has decided that there are no reasonable grounds for concluding that the Ms Clarke's conduct complained about reaches the threshold for misconduct (section 73(a)).

5 Decision

5.1 The Complaints Assessment Committee met on 9 August 2010 to consider the complaint against Ocena (Maree) Clarke. The Complaints Assessment Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Ms Clarke has engaged in unsatisfactory conduct.

5.2 Having determined that Ms Clarke is guilty of unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in section 93(1) of the Act.

6 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 authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Ocena (Maree) Clarke 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 Ms Clarke and Mr & Mrs V. In the Committee's view, insufficient details have been provided by Mr B on where \$10,000 plus GST was spent promoting the V's business. The Committee requests that this issue be addressed in any submissions Ms Clarke may make. The Committee further requires the investigator authorized to assist the Committee with its inquiry to obtain the details on where the \$10,000 plus GST was spent promoting the V's business.

Ms Clarke and Mr & Mrs V may file submissions within 10 days from the date on this determination on what orders, if any, should be made.

6 Publication

- 6.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.
- 6.2 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

7 Right of Appeal

- 7.1 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.
- 7.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 7.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 10 September 2010