

In the Matter of

Part 4 of the Real Estate Agents Act 2008

And

In the Matter of

Mr P

Complaint No CA2349354

In the Matter of

Debbie Lovegrove

Licence No 10004678

Determination of Complaints Assessment Committee

Dated this 6th day of August 2010

Complaints Assessment Committee

CAC No: 10011

Chairperson: Deirdre McNabb

Deputy Chairperson: Denise Bovaird

Panel Member: Rob Crozier

Determination of Complaints Assessment Committee

1 The Complaint

- 1.1 This is a complaint from Mr P about Debbie Lovegrove. Ms Lovegrove is a licensee under the Real Estate Agents Act 2008 ('the Act'). Ms Lovegrove holds a salespersons license and is employed by Lovegrove Realty Limited (trading as Professionals). She is also a shareholder of Lovegrove Realty Limited.
- 1.2 Mr P is a Franchisor for XYZ Inspections Limited ('XYZI'), a property inspection company predominantly conducting building inspections for prospective purchasers of residential properties reporting on building construction and related matters. Mr P is a qualified builder of some 20 years' experience and a BOINZ accredited Building Surveyor.
- 1.3 Mr P complains that Ms Lovegrove is steering customers away from using XYZI to conduct their pre-purchase building inspections and that she is inserting a clause in purchase agreements saying 'building inspection company of your choice except XYZ Inspections'.

2 Material Facts

- 2.1 Mr P has been a director and shareholder of XYZI since June 2005. Mr P alleges that over the past year up until December 2009 when he first lodged his complaint with the REAA, Ms Lovegrove has been discouraging residential property purchasers wishing to commission a building inspection in the area where Mr P operates from using XYZI to conduct these inspections.
- 2.2 Part of his complaint is that Ms Lovegrove includes in agreements for sale and purchase of properties a clause to allow purchasers to obtain a pre-purchase building inspection with the 'building inspection company of your choice except 'XYZ Inspections'. Mr P provided the CAC with a sample of the clause used in an agreement entered into in 2009.
- 2.3 In September 2009 Mr P retained a solicitor who wrote to Ms Lovegrove on 15 September 2009 asking her to cease this practice and to discuss any issues that Lovegrove Realty Limited has with the quality of services provided by XYZI with

XYZI directly so that those issues could be addressed. That solicitor noted that Mr P was one of only two BOINZ (Building Officials Institute of New Zealand) accredited building surveyors in Auckland. Mr P lodged his complaint with the REAA because he understood the conduct to be on-going.

2.4 Ms Lovegrove was invited to respond to the complaint lodged with REAA and did so on 2 March 2010. Her response stated that Mr P had built a reputation of “being over the top with his inspections, hence a lot of vendors do not want him to do an inspection of their home due to the fact he makes gross over extraction [sic] on his reports and scares a lot of potential buyers off”. She also stated that Mr P was not her first choice if a client asks her to recommend a building inspector and said "I work for the vendor and feel it is my duty to advise if asked, we give the vendors the choice of whether they have the clause in their agreements which excludes XYZI or not.' Ms Lovegrove went on to explain that she had 'never said that they did a bad job or anything to that fact'.

2.5 Debbie Lovegrove and Geoff Lovegrove are in business together via the company Lovegrove Realty Limited. Mr and Ms Lovegrove met with Mr P in early May 2010 in order to address the conduct that Mr P has complained to the REAA about.

2.6 Ms Lovegrove has confirmed to the REAA that she and Mr Lovegrove agreed with Mr P at that meeting that the clause excluding the ability of the purchasers to use XYZI to conduct their pre-purchase building inspections would no longer be used in the sale and purchase agreements completed through Mr and Ms Lovegrove and Lovegrove Realty Limited. She advised further that this was notified to the administration section of Lovegrove Realty Limited within 30 minutes of the ending of that meeting and that it will never be used again in their sale and purchase agreements.

3. Relevant Provisions

3.1 This conduct began prior to the new Real Estate Agents Act 2008 coming into force on 17 November 2009 and potentially falls to be determined under section 172 of that Act. In terms of that section the CAC must consider whether the conduct complained

about could have been the subject of a complaint or charge under the 1976 Act. It was on this basis that the CAC decided to enquire into the matter on 28 April 2010.

3.2 If the CAC concludes that the conduct has been on-going after 17 November 2009 then it can consider the conduct under the 2008 Act.

3.3 Section 72 of the 2008 Act provides:

‘Unsatisfactory Conduct’

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the license 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.’

3.4 Section 73 of the 2008 Act provides:

‘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.

4. Discussion

- 4.1 The CAC noted that the complainant became aware of the conduct complained of prior to 17 November 2009. It also noted from the initial complaint and both from the explanation of the conduct provided by Ms Lovegrove on 2 March 2010 and her subsequent acknowledgement that she would cease using the offending clause after meeting with Mr P in May 2010 that the conduct had been ongoing during 2010 and had in fact only ceased after May 2010 when Ms Lovegrove instructed her administration department to stop using the offending clause. Accordingly the CAC considered the on-going nature of the conduct brought it within the scope of the 2008 Act.
- 4.2 The CAC considered the explanation provided by Ms Lovegrove on 2 March 2010 in respect of the content of the complaint from Mr P. It also considered the suggestion by Mr P that Ms Lovegrove's attitude to XYZI may have been the result of an unfavourable outcome of a presentation she made to a school that he is associated with (included in his initial complaint received at REAA 7 December 2009) and her suggestion that he may be affected by his mother being in the real estate industry and a potential competitor of hers. The CAC disregarded each of these unsubstantiated suggestions and instead focused on the behaviour of the licensee that was under scrutiny, namely the use of a printed clause in agreements for sale and purchase that provides for the purchaser undertaking a building inspection from a builder of their choice 'except for XYZI'.
- 4.3 Essentially the explanation received from Ms Lovegrove in respect of this behaviour indicates that she considers Mr P to be too critical in his reports to the point that purchasers are often scared off from completing purchases. She has clearly formed the view that it is against the interests of her vendors to have inspections completed by XYZI for this reason although she states that she has never said that XYZI did a bad job.

- 4.4 The CAC considered rule 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. That rule states:
“ A licensee must not engage in any conduct likely to bring the industry into disrepute.”
- 4.5 The CAC found that Ms Lovegrove had engaged in conduct that sought to exclude prospective property purchasers from using XYZI to complete pre-purchase building inspection reports for their properties. By her own explanation Ms Lovegrove did not state that XYZI did a bad job with the work they were doing, rather she considered them to be 'over the top' in their reports such that her vendors may have been losing sales by purchasers being scared off.
- 4.6 The CAC noted Mr P's explanation of his experience as a qualified builder in the building industry for some 20 years and his solicitor's confirmation of his accreditation with BOINZ indicating that he was well qualified to conduct the work undertaken by XYZI. The CAC took the view that, in the absence of clear evidence that XYZI was not conducting building inspections competently, it was unacceptable that Ms Lovegrove seek to exclude XYZI as a potential provider of building inspection services on the basis that his reports may be 'over the top'. It noted that, whilst a less thorough building inspection report may make confirmation of a property sale more likely and therefore helpful to a vendor, a potential purchaser could be correspondingly disadvantaged by such an approach.
- 4.7 The CAC took the view that the parties should be free to choose the provider of services such as those provided by XYZI and should not be excluded from making a particular choice by an agent acting for the vendor in any particular case. The actions of Ms Lovegrove had the effect of firstly potentially reducing the choices available to property purchasers and secondly excluding the complainant from conducting business freely with purchasers who were contracting with her clients. Whilst Ms Lovegrove would be free to recommend providers of such services if requested, by including a printed clause excluding XYZI in agreements for sale and purchase she went beyond what the CAC considered acceptable conduct by a real estate agent.

The CAC concluded that she had engaged in conduct likely to bring the industry into disrepute.

5. Decision

- 5.1 The CAC finds on the balance of probabilities that Ms Lovegrove has been guilty of unsatisfactory conduct in terms of section 72(d) of the Act in that she engaged in conduct that would be reasonably be regarded by agents of good standing as being unacceptable and was likely to bring the industry into disrepute in breach of Rule 6.3 of the 2009 Rule.

6. Orders

- 6.1 The committee will conduct a hearing on the papers to decide what orders, if any, should be made under section 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.

6.2 In deciding what orders should be imposed under section 93 of the Act the Committee will receive any written submissions that the parties wish to make within 10 days of receiving this notice before reaching a decision on the orders.

7 Publication

7.1 One of the Committee's functions in accordance with section 78(h) of the Act to publish its decisions.

7.2 Publication of the Committee's decision will be considered upon the orders being made. The Committee will direct that the complainant's identifying information be omitted from any decision published.

8 Right of Appeal

8.1 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.

8.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

8.3 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 6th day of August 2010



Deirdre McNabb

Chairperson