

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

And

In the Matter of **Complaint No CA2300106**

In the Matter of **Mr C**  
**Licence No XXXXXXXXX**

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**Determination of Complaints Assessment Committee**

Dated this 3<sup>rd</sup> day of May 2010

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**Complaints Assessment Committee:**

**CAC No: 10025**

## **Determination of Complaints Assessment Committee**

### **1 Licensee Background**

1.1 The Licensee, Mr C (“the Licensee”) holds a salesperson licence under the Real Estate Agents Act 2008 (“the REAA”). He is employed by XYZ Real Estate Limited (Auckland).

1.2 Mr C markets himself in his profile on the YXZs’ website as a “seasoned sales professional who has spent more than 25 years in high value sales.”

### **2 Complaint**

2.1 The complainant, Mrs R, and her husband offered to purchase the property (residential) at “the property” on 1 November 2009. The Licensee was the vendors’ real estate agent. The vendors were a Mr and Mrs P.

2.2 The complainant alleged that during the negotiation process the Licensee was “at best dishonest and inept and at worst manipulation [sic] of two interested parties with the express intention of removing a weather tight clause from a sale agreement.”

2.3 Mrs R stated that at 6.00pm on Wednesday 11 November 2009 the Licensee wrote up a sale and purchase agreement constituting her and her husband’s offer to purchase the property. The offer contained a condition which Mr and Mrs R wanted to include specifying the purchaser’s right “for a leaking deck to receive an independent evaluation”. The complainant stated that at 8.00pm the Licensee phoned her from the vendors’ premises “to ask us to increase our offer”. Mrs R stated she asked the vendors to counter offer so that negotiations could begin, “which they did verbally”.

2.4 The complainant stated the Licensee telephoned her and her husband back with a counter offer “and in addition advised us that we were now in a “multi-offer

situation” and that we may lose the ability to negotiate as he would be receiving another offer that night and could not deal with two parties simultaneously.” Mr and Mrs R then increased their offer and advised the Licensee they were flexible with the settlement date. The complainant maintained she asked the Licensee to telephone her with the vendors’ counter offer and the Licensee agreed to do so. Mrs R stated she and her husband “mistakenly believed that [the Licensee] would proceed with our negotiations to fulfilment and would then begin negotiations with the other interested party and present both completed offers to the vendor.”

2.5 When after an hour, Mr and Mrs R had not heard from the Licensee Mrs R stated they telephoned him to “ask what was going on”. Mrs R stated she was “shocked to be told that the vendors were considering both proposals. I believed we were in negotiations and were waiting for [the Licensee’s] response as it was [the Licensee’s] responsibility to put our best offer to the vendor. This didn’t happen”.

2.6 The complainant maintained that ten minutes later the Licensee telephoned to advise “that we were unsuccessful”; that the vendors’ decision had been made not on price but on possession date. The complainant stated she reiterated to the Licensee she and her husband were flexible on the issue of the possession date. She stated that as the “second offer was verbal it was his responsibility to communicate that”. Mrs R stated that when she pressed the issue the Licensee advised her that the competing offer was not subject to a “conditional clause for the leaky building issue”.

2.7 Mrs R stated she spoke to her lawyer the following morning and took his advice to telephone the Licensee and present the “increased offer that we were unsuccessful in presenting the night before”. The Licensee advised Mrs R that she and her husband’s increased offer “would still not have got us the right to negotiate”.

2.8 The complainant stated on Friday, 13 November 2009 she received a telephone call from the Licensee advising that “negotiations has [sic] stalled and I should sign a competitive “back up” offer”. The Licensee was advised that Mr and Mrs R

would increase the price, agree to the vendors' preferred settlement date and remove their condition pertaining to the weathertightness assessment. Mrs R maintained the Licensee told her the price they were offering would "most likely purchase the property". The Licensee was said to have pushed Mr and Mrs R to present another offer but after having spoken to their lawyer they advised the Licensee they wished the vendors to withdraw from their negotiations with the other party and conclude negotiations with them (Mr and Mrs R) by "our deadline of 4pm". The complainant stated "it was [the Licensee] who was labouring the point previously that he could not deal with two parties, but with negotiations stalled on the competitive offer he appeared to be doing just that."

- 2.9 The complainant stated she and her husband were then advised by the Licensee that there was a conditional clause in the competing offer that was due to expire at 5.00pm and if he got the vendors to counter their [Mr and Mrs R's] original offer with the new conditions "we should automatically own the property at 5.01pm". The complainant maintained that the Licensee "insisted" he was not dealing with two parties simultaneously.
- 2.10 The complainant stated that at 3.00pm the Licensee presented her and her husband's "original agreement countersigned by the owners with our new conditions and the advice that should the other party not go unconditional at 5pm, we would own the property". When the Licensee was asked about the nature of the condition which was due for satisfaction the complainant maintained she was told it was "similar to our clause" (relating to the weathertightness assessment). Mr and Mrs R then concluded the Licensee had lied to them earlier when he had told them the competitive offer did not include such a clause. They also concluded the Licensee "was using our second unconditional offer to persuade the other party to remove their weather tight clause in order to secure the property over us".
- 2.11 In her concluding remarks Mrs R reiterated that "throughout the process [the Licensee] laboured the point that he was not allowed to play two parties off

against each other. With the benefit of hindsight I realise now that is exactly what he did”.

### **Information and Material Considered**

2.12 The Real Estate Agents Authority (“the Authority”) received Mrs R’s complaint against Mr C on 18 November 2009. The Authority referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the REAA, on 20 January 2010 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.

2.13 The Committee invited the Licensee to provide a written response to the complaint and this was received on or around 19 February 2010. In summary the Licensee made the following points;

- a. Six days prior to Mr and Mrs R preparing their offer (on 5 November 2009), a Mr and Mrs RY had made an offer on the property for \$1,050,000 which offer was countersigned by the vendors at \$1,225,000. When the countersigned offer was presented to Mr and Mrs RY they advised they wished to withdraw from negotiations to pursue another option at auction later in the week;
- b. On 7 November 2009 Mr and Mrs R attended the first open home at the property. “Full disclosure on issues relating to a previous leaking deck and a Department of Building and Housing (“the B & H report”) water tightness investigation report were discussed in overview details. They were offered a full copy of the B & H report.”
- c. Between 8 November 2009 and 11 November 2009 Mr and Mrs R’s respective parents viewed the property at separate times and Mrs R requested further information pertaining to the property including a full

LIM report and advice that repair work had been carried out. Following a meeting at 11.30am on 11 November 2009 Mrs R was provided with the plans of the house/land footprint, as she had requested.

- d. After Mrs R told him she and her husband wanted to put an offer in the Licensee met them at their Auckland home at 6.00pm (“the 6.00pm offer meeting”). The meeting lasted one and one quarter hours. The Licensee stated he gave Mr and Mrs R a copy of the B & H report and advised them to discuss it with their lawyer (which he stated he was told they had already done and were comfortable with the situation). The Licensee stated Mr and Mrs R asked many questions and an offer was “written up” (price offered \$1,120,000; subject to 7 days builder’s inspection clause and with possession date to be in 4 weeks). The Licensee maintained he told Mr and Mrs R he “would try to present the offer to the Vendors that night and call them later in the evening to update them on the outcome”. The Licensee stated that during this meeting Mr and Mrs RY had left a message on his voicemail asking that he call them, but he did not return their call at that time.
- e. Mr and Mrs R’s offer was presented to the vendors at 8.00pm but the vendors advised him they would not countersign the offer because of the conditions. The Licensee claimed the vendors were “very annoyed that I could even present such an offer, especially after the stern conversation they had with me after the last low offer from the [RY’s]”.
- f. The Licensee was instructed by his clients to advise Mr and Mrs R they did not want to enter negotiations “at this price level and conditions”. The Licensee maintained he did this and asked Mr and Mrs R if they would like to reconsider “their current position in relation to the strength of their offer”. The Licensee stated he advised Mrs R that the vendors had expressed to him that they would reconsider if there was an improvement on price, a reduction in the number of days for the satisfaction of the

building inspection clause and a longer settlement date. Mrs R stated she would telephone him back in 5-10 minutes.

- g. Some minutes later Mrs R contacted the Licensee and told him she and her husband would increase the price to \$1,145,000 “full and final offer, we will not go a cent over this price”; they wished the 7 days builders clause to be left in their offer but stated that they were “very flexible on the settlement date”. The Licensee stated he told Mrs R he would relay this to the vendors as he was still at their home; and that he “also conveyed again to the R’s that if the vendor was to commence negotiations on [their] improved offer then [he] would need to get the changes in writing.”
- h. The vendors were “again annoyed with the price level of the offer”, when advised of Mr and Mrs R’s improved offer. As the price was not in their “required range” the vendors instructed the Licensee to advise Mr and Mrs R they did not intend to treat with their offer “and if that was their full and final offer then the offer and negotiations had come to an end” The Licensee claimed that upon being told this “again Mrs R vented her frustration and anger to me.”
- i. After his call to Mrs R the Licensee advised the vendors of the voicemail message he had received from the RY’s; he stated the vendors asked him to telephone the RY’s “right then”, which he did. The RY’s asked the Licensee if they could meet with him to discuss their current situation. At 9.30pm the vendors instructed the Licensee to meet with the RY’s as soon as possible; and also to advise Mr and Mrs R they were going to pursue other interest in the property.
- j. When he advised Mrs R that the vendors would not negotiate with them and had instructed him to work with other interested parties, the Licensee stated Mrs R was “very annoyed” and “clearly very upset”. When he asked Mrs R if she wanted to improve their offer the Licensee stated he was told

he had already received their “best full and final offer”. The Licensee maintained he reiterated to Mrs R the vendors’ instructions.

- k. In response to the voicemail messages Mrs R subsequently left on his mobile phone, at 11.05pm the Licensee stated he called Mrs R and advised her that another negotiation for the property was “currently taking place as per the vendor’s instructions.” At 11.50pm a conditional contract was signed between the vendors and Mr and Mrs RY for a purchase price of \$1,180,000 subject to a two day builder’s inspection clause and with a possession date on 2 April 2010.
- l. The following morning (12 November 2009) Mrs R contacted the Licensee and advised him that she and her husband wanted to increase their offer to \$1,160,000 and that this was their “full and final offer”. The Licensee advised Mrs R that a conditional contract had been signed on the property;
- m. On the morning of 13 November 2009 the Licensee telephoned Mrs R and asked her if she and her husband wished to put a “back up offer in behind the current agreement”. Because Mrs R did not understand what a back up offer was the Licensee stated he “talked her through the process”. He also suggested she seek legal advice. One hour later Mrs R contacted the Licensee and advised her solicitor had approved that they put in a back up offer.
- n. At 2.45 pm “a standard back up offer was agreed” between Mr and Mrs R (purchase price of \$1,180,000; removal of the building inspection clause on their solicitors advice; and possession date on 2 April 2010) to take effect from 5.0pm on 13 November 2009. However the RY contract went fully unconditional later that afternoon and so the back up offer was at an end.

2.14 During the course of the investigation the Committee received an email from the vendors of the property (the Licensee's clients) dated 1 March 2010. The vendors, Mr and Mrs P, advised that the Licensee's response to the complaint (which they had read) was a "true and accurate record of events". They stated further that the Licensee "went to great lengths to explain to the potential purchaser [a reference to Mrs R] that it was a multi offer situation and to talk her through the mechanics of this" and that he "talked us through the process". Significantly, Mr and Mrs P stated that "we were keen to have both parties playing off against each other. However [the Licensee] was adamant we could only get into formal negotiations with one party." Further, they stated the Licensee "asked the potential purchaser to put their best offer forward on more than one occasion"; "there was no ambiguity in his communications, as we were in the room as he explained the situation."

2.15 Mr and Mrs RY were contacted by the Licensee during the investigation. By SMS/text dated 25 March 2010 to the Licensee Mr and Mrs RY advised they did not want to be involved in the complaint process but they thanked him for his "professionalism and dedication in making this purchase possible."

### 3 **Further meeting**

3.1 Having received the Licensee's written response to the complaint and the email from the Licensee's clients dated 1 March 2010 on 21 April 2010 the Complaints Assessment Committee met again to discuss the material it had obtained and to determine whether or not any further inquiries or action were necessary.

3.2 In summary, at the meeting the Committee considered the following written material:

- a. Mrs R's complaint dated 17 November 2009;
- b. Letter from the Licensee in response to the complaint, dated 19 February 2009;

- c. Profile of the Licensee obtained from the XYZs' website;
- d. Advertisement for the property downloaded from the XYZs' website on 19 February 2010;
- e. Email from the vendors of the property, Mr and Mrs P, dated 1 March 2010; and
- f. Email from the Licensee forwarding the SMS/text message he had received from the purchasers of the property, Mr and Mrs RY.

**4 Complaints Assessment Committee decision under section 80(2) of the REAA and reasons**

- 4.1 At its meeting on 21 April 2010 the Committee made a decision under section 80(2) of the REAA, not to take any further action on the complaint.
- 4.2 The reason the Committee made this decision is that having received the information outlined above, and having considered all of that information, it appears to the Committee that having regard to all the circumstances of the case, no further action is necessary.
- 4.3 The Committee is satisfied the Licensee's explanation of the events the subject of the complaint was comprehensive and credible. Further his response was corroborated by his clients (Mr and Mrs P) on the key issue of what the Licensee informed the parties and allowed to occurred, in terms of a vendor's ability only to formally negotiate with one party when there is a multi offer situation.
- 4.4 The Committee accepted the Licensee's evidence that he advised the complainants about the mechanics of a multi offer situation. The Committee recognises it is vital (for reasons of fairness and good practice) that in such a situation a licensee clearly explains to both the vendors and all prospective purchasers/offerors that formal negotiations can occur with only one party (until such time as they have been concluded with that party); and that a licensee

encourages offerors to put their best offer forward as a means of best securing the opportunity to negotiate.

- 4.5 The Committee is satisfied the Licensee met these obligations in this case. The Committee placed weight on the fact that the complainants accepted in their complaint that they were told the Licensee could not “play two parties off against each other” and allow a vendor to “deal with two parties” at once in a multi offer situation. The Committee also placed weight on the statement of the vendors to the effect that the Licensee had advised them, contrary to their wishes, that they could not “have both parties playing off against each other” (the RY’s and the R’s) and they could only formally negotiate with one party. In addition, the Committee is satisfied, on the information available to it, that the complainants were advised to put their best offer forward on several occasions.
- 4.6 In his capacity as the vendors’ agent the Licensee owed contractual obligations to the vendors under the listing agreement he would have had with them. He also owed fiduciary obligations to them as his clients. The Licensee had a professional responsibility to act in the best interests of his clients and in accordance with his clients’ instructions, unless to do so would have been unlawful. It is clear to the Committee that the Licensee acted in accordance with the instructions he had received from his clients throughout. It is also clear the Licensee communicated his clients’ instructions to his customers, prospective purchasers Mr and Mrs R, on several occasions.
- 4.7 Having carefully considered all of the material before it, the Committee is satisfied that in discharging the obligations he owed to his clients, the Licensee also discharged the professional responsibilities he owed to Mr and Mrs R in their capacity as customers or proposed purchasers/offerors. In the Committee’s view when the facts are considered objectively, the Licensee acted in good faith and dealt fairly with Mr and Mrs R, and indeed with all parties engaged in the offer process.

- 4.8 The Committee is satisfied that in this case the Licensee did not allow a situation to occur whereby the vendors were in negotiations with two parties simultaneously.
- 4.9 The Committee did not consider there was substance to Mr and Mrs R's contention that the Licensee had in fact manipulated two parties or allowed them to play off against each other. Nor did the Committee consider there was substance to the allegation that the Licensee had been "dishonest and inept" in the manner the complainant alleged (relating in particular to the weather tightness clause). On the basis of the information before it the Committee is satisfied the conclusions which Mr and Mrs R stated they drew including that the Licensee was using their "second unconditional offer to persuade the other party to remove their weather tight clause in order to secure the property over us", were misconceptions. For that reason the Committee is satisfied the dishonesty allegation is without foundation.
- 4.10 In all of the circumstances, the Committee is of the view it is not necessary to take any of the matters raised in the complaint any further.
- 4.11 It is noted that when the Committee gives the complainant written notice of this decision a copy of the Licensee's response and the email received from the vendors of the property will also be provided to her.

## 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 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](http://www.justice.govt.nz/tribunals).

**DATED** this 3<sup>rd</sup> day of May 2010



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**Jo Hughson**  
**Chairperson**