

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

And

In the Matter of **Complaint No CA2357301**

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

Determination of Complaints Assessment Committee

Dated this 13th day of April 2010

Complaints Assessment Committee:

CAC No: 10024

1 **Determination of Complaints Assessment Committee**

2 **Background**

2.1 The Licensee, Mr A, is a salesperson at XYZ Real Estate in Wellington. He holds a salesperson's licence. Mr A advised the Complaints Assessment Committee he has sold real estate for over 6 years.

3 **Complaint**

3.1 The complainant, Ms B, and her former husband, Mr C, had engaged the Licensee to market for sale their property at "the property", Wellington ("the property"). They had signed a listing agreement with XYZ Real Estate (Mr A) on 3 March 2008.

3.2 During a discussion about the marketing of the property during the later afternoon on 1 April 2008 Mrs B stated she told Mr A (in her husband's presence) that the neighbours were intending to build on their property. Ms B claimed she and her husband asked Mr A whether they "needed to do anything with this information". Ms B stated Mr A told her "no" and that they "didn't need to worry about this".

3.3 The property was advertised in the *Dominion Post* as "positioned for all the sun that's going" and "set on a private, family sized section with established trees".

3.4 The property sold for \$430,000 pursuant to an agreement for sale and purchase dated 27 April 2008 to a Ms M. Settlement was effected on 20 June 2008.

3.5 On 27 July 2009 Ms M filed proceedings against Ms B and Mr C (as first defendants) and Mr A (as second defendant) in the District Court at Wellington. Ms M claimed that Ms B and Mr C and Mr A acting as their agent made various representations as to the amenity, privacy and shading values to be enjoyed from the property in the advertisements for the property described in paragraph 2.4 above. Ms M alleged the representations were misleading and deceptive because

Ms B and Mr C (through Mr A) had withheld from her knowledge (by silence) the impending construction of a new two storey dwelling on the adjoining site at “the property” which, she alleged would impact significantly on the amenity, privacy and shading values of the property promoted by them.

3.6 The information before the Committee was that on 7 November 2007 Mr and Mrs H had sought and obtained from Ms B and Mr C, written approval of a resource consent application for the erection of a new two level dwelling on their property at The Property (consent was required because the proposed dwelling exceeded by 2.2 metres the maximum height requirement for a single dwelling in the Outer Residential zoning, Wellington City District Plan). A resource consent had been granted to Mr and Mrs H on 18 December 2007.

3.7 Ms M alleged Ms B and Mr C had breached the warranty clause in the agreement for sale and purchase Clause 6.1(2) and that but for the breach of warranty Ms M would not have entered into the agreement for sale and purchase on the terms she did. Ms M claimed this breach had caused loss to her in the sum of \$9000.00. The District Court proceedings are yet to be resolved.

3.8 Clause 6.1(2) provided that the vendors warranted and undertook that at the giving and taking of possession the vendor had not given any consent or waiver which directly or indirectly affected the property and which had not been disclosed in writing to the purchaser.

3.9 Ms B claimed that Mr A did not draw to her and her husband’s attention clause 6.1 of the agreement for sale and purchase and nor did he pass on the information that the “neighbours were intending to build”, to the purchaser either verbally or in writing.

4 Information and Material Considered

4.1 The Real Estate Agents Authority (“the Authority”) received Ms B’s complaint against Mr A by email on 14 December 2009 and referred the complaint to the Complaints Assessment Committee. Pursuant to section 79(1) of the Real Estate

Agents Act 2008 (the REAA), on 20 January 2010 the Committee considered the complaint and determined to inquire into it. The Committee was satisfied that although the complaint related to conduct which occurred prior to the REAA coming into force, the Committee had jurisdiction under section 172(1) to inquire into the complaint.

- 4.2 The Committee invited Mr A to provide a written response to the complaint. A written response was received from Mr A on 8 February 2010. On 10 March 2010 the Committee sought further information from Mr A including copies of relevant extracts from his diary which he had referred to in his written response, and a copy of his file in respect of the property. This information was received on 18 March 2009.
- 4.3 Mr A rejected the complainant's allegations. He stated that prior to the property going on the market he had five meetings with Ms B and he spent considerable time "going over details and covering off the many issues that her property presented and getting documentation in order". Diary notes and notes of these meetings were provided.
- 4.4 Mr A was adamant that at no time did Ms B mention that she and her husband had given their written consent to the construction of a townhouse at The Property, or that they had had discussions with the neighbours about this.
- 4.5 Mr A stated if he had known a townhouse was to be constructed he would certainly have asked for details of the plans and made them available to potential purchasers. He stated he did this with ECNZ documents and correspondence relating to a pylon tower and high tension wires adjacent to the property. He stated he also gave interested purchasers contact telephone numbers at ECNZ if they required further information. Mr A stated there was no benefit to him/XYZ's in withholding such information.
- 4.6 Mr A maintained the only time the neighbour's property was mentioned was prior to the first open home when he called in to place a lock box on the property. Ms B

invited him in to meet her husband; she apparently said she was very happy with the advertisement for the property and then stated that she wondered if mention should be made that the property was sub-dividable. Mr A stated Ms B and Mr C told him they thought it probably would be because a neighbour was looking into whether or not his property could be subdivided and if the neighbour's was then theirs would also be sub-dividable. Mr A stated the complainant and her husband "gave the clear impression that the neighbours were very much just at the "looking into it stage" and that Mr A "assured me there was nothing I needed to know." Mr A denied he was told "the neighbours [were] building".

- 4.7 Mr A stated that Ms B had been very professional and helpful "all along" and had provided documents and information willingly on a number of issues (including the pylons). He stated therefore he had no reason to suspect that Ms B had not passed on "full information" to him. Mr A claimed he was "as surprised as the new purchasers to learn that contractors arrived next door shortly after the vendors had moved out".
- 4.8 Mr A provided the Committee with a copy of a standard form letter sent by XYZ's Real Estate to vendors at the time of listing their property. He stated that Ms B would have received this letter. This was not disputed by Ms B. The letter is sent out with a copy of the standard sale and purchase agreement and with a suggestion that the vendors familiarise themselves with the agreement and in particular, Clause 6.1 (the warranty clause) and their obligations under that clause. Mr A stated that he could not "see how a person with her [Ms B] intellect could fail to be aware of her obligations irrespective of any subsequent or previous dialogue we may or may not have had."
- 4.9 Mr A stated he was open and honest with all the potential buyers of the property and in hindsight he believes it is evident that "full facts were withheld" from him.
- 4.10 In his further letter to the Committee dated 18 March 2010 Mr A referred to a meeting he had with Ms B at a café in Wellington on 8 December 2009. Mr A maintained that Ms B claimed she had told him of the subdivision of the

neighbour's property and that she had her sister as a witness of this disclosure. Mr A stated he "firmly corrected" Ms B on this and "said that this was simply not true, to which she replied that maybe it was all just a misunderstanding." Mr A claimed that Ms B then "added that she wasn't aware of the need to disclose that she knew of the neighbour's intention to build a townhouse."

4.11 The Committee provided Ms B with a copy of Mr A's written response of 8 February 2010. Further comments were received from Ms B on 27 March 2010. In her email of 27 March 2010 Ms B confirmed that Mr A was correct to state that she did "not talk about consent for the building at "the property", but [she] did disclose that the neighbours were building". She reiterated that when she advised Mr A of this and queried whether they needed to "do anything about that" Mr A replied "no". Ms B claimed that she and her husband were "first home sellers" and were "completely unaware of what needed to be passed onto the new owners, hence why we hired the services of a professional to represent and guide us through this process. [sic] Advising Mr C that the neighbours were building as well as passing on information on the pylon towers."

4.12 In summary the Committee received and considered the following written material:

- a. Letter of complaint and supporting documentation including a copy of the Listing Agreement signed on 3 March 2008, a copy of the Statement of Claim and Statements of Defence filed in the District Court at Wellington in the proceedings described above;
- b. Statement of Ms B taken by an investigator in the Complaints Unit of the Authority on 1 February 2010;
- c. Mr A's written response to the complaint, dated 8 February 2010 and supporting documentation including pro forma letter sent by XYZ's at the time a vendor lists their property with the company and which includes a statement "in particular, you should read carefully and understand Clause

6 relating to Vendor's warranties and undertakings"; and copy of the XYZ's Client Satisfaction Survey completed by Ms B;

- d. Statement of Mr C taken by an investigator in the Complaints Unit of the Authority on 8 February 2010;
- e. Statement of Ms CLB (Ms B's sister) dated 17 February 2010;
- f. Letter from Mr A dated 18 March 2010 and enclosed diary notes and copy of XYZ's file for the property which the Committee had requested him to provide;
- g. Letter from XYZ's Real Estate Directors (Mr P and Mr H) dated 22 March 2010 in support of Mr A; and an
- h. Email from Ms B dated 27 March 2010 commenting on aspects of Mr A's written response.

4.13 Having received Mr A's written responses to the complaint and comments in response from Ms B (and obtained the other information referred to above) and having satisfied itself that it had completed its inquiry into the complaint, on 8 April 2010 the Complaints Assessment Committee conducted a hearing with regard to the complaint, under section 89(1) of the REAA.

4.14 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.

5 Complaints Assessment Committee Determination and Reasons

5.1 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

- 5.2 The Committee has reached its decision in the main on the basis of the undisputed fact that Mr A was not told specifically by Ms B and/or Mr C that they had given their written consent to the construction of a townhouse on the neighbouring property.
- 5.3 The Committee did not consider that to determine the complaint it had to resolve the factual conflict between Ms B and Mr A as to what was discussed between them and when, relating to the neighbours property. Ms B contended she told Mr A on 1 April 2008 that the neighbours “were building”. Mr A contended Ms B told him the day before the first open home that a neighbour was “looking into whether or not his property could be subdivided” but gave the impression that the neighbours were very much just at the “looking into it stage”. The fact was that the key information Mr A did not have in his possession at any relevant time was that his clients had given their written consent (only four/five months earlier, on 7 November 2007) to the neighbour’s proposal to build. They had not told him about this specifically and in the Committee’s view, the fact that they should have but did not, is determinative of the complaint against Mr A.
- 5.4 The complainant and her husband had signed a Listing Agreement with Mr A/XYZ’s as early as 3 March 2008. A period of four weeks elapsed between then and the time Ms B claimed to have disclosed to Mr A that the neighbours “were building” (on 1 April 2008). In that time Ms B and Mr C had received a letter from XYZ’s at the time of listing, advising them of the need to pay particular attention to Clause 6.1 of the proposed agreement for sale and purchase. The meaning and intent of Clause 6.1(2) ought to have been clear to the extent it referred “any consents” which “directly or indirectly affect[ted] the property” and which had “not been disclosed in writing to the purchaser”. If the meaning was not clear to Ms B and her husband then there was ample time for them to discuss its meaning with Mr A (or with a lawyer) prior to the agreement being signed with Ms M. Further Ms B had several meetings with Mr A to discuss the marketing of the property for sale and during which she had disclosed in some detail potential issues with the property or other matters relating to the electricity pylon adjacent

to the property. Ms B also had discussions with Mr A about the manner in which the property should be advertised and she and her husband had presumably given their approval to Mr A to advertise the property in the manner it was advertised in *The Dominion Post* (as referred to above in paragraph 2).

- 5.5 In summary, Mr A had advised Ms B and Mr C specifically of the need to consider Clause 6.1 at or shortly after they listed the property in early March 2008. Further, it is clear to the Committee there was ample opportunity for Ms B during her many discussions with him about the property, to have disclosed to him she and her husband had given written consent to a proposal which they were aware, or ought to have been aware, directly or indirectly affected the property which they were selling. In those circumstances the Committee found it difficult to accept Ms B's contention that as a "first time seller" she and her husband were not aware of the extent of their disclosure requirements; or her contention that she believed it was sufficient simply to have advised that "the neighbours are building" (again, this was disputed by Mr A).
- 5.6 The Committee accepted Mr A's contention that it was reasonable for him to assume at the material time (during the marketing campaign/pre-contractually) given the level of information/detail which Ms B had given him about other matters, that he had received "full information" about the property or matters affecting the property, from Ms B. The Committee has no reason to doubt Mr A's contention that had he been made aware his clients had given a written consent to the neighbour's building proposal he would have sought further information (for example, plans) to pass on to proposed purchasers. Mr A sought and obtained further information from ECNZ after Ms B had told him about the pylon adjacent to the property and in the Committee's view this is strongly supportive of his contention as to what action he would have taken had he been aware of his clients' written consent to the neighbour's proposal.
- 5.7 In the Committee's view, in all the circumstances of this case, the complainant's (and her husband's) failure to disclose to Mr A specifically that they had given

their written consent to the neighbour's proposal to build a townhouse at The Property, and what transpired subsequent to the sale of the property, cannot fairly be matters for which Mr A can or ought to be held responsible professionally. In the Committee's view Mr A adequately discharged his professional obligations to his clients and to proposed purchasers of the property given the circumstances under which he was carrying out real estate agency work for Ms B and Mr C in March and April 2008 as referred to above.

- 5.8 For these reasons the Committee has determined under section 89(2)(c) of the REAA that it take no further action with regard to the complaint or any issue involved in the complaint.

6 Publication

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

- 6.2 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.

- 6.3 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 (including the address of the property) and the Licensee (including the name of his employer) and any named or identified third parties are suppressed from publication.

7 Right of Appeal

- 7.1 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.

- 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.

DATED this 13th day of April 2010

A handwritten signature in blue ink, appearing to read 'Jo Hughson', is written over a light blue rectangular background.

Jo Hughson
Chairperson