

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

And

In the Matter of **Complaint No: CA2378145**

In the Matter of Janice Long
License Number: 10014129

Decision of Complaints Assessment Committee

Dated this 30th day of September 2010

Complaints Assessment Committee:

CAC10012

Chairperson: Robyn Wilson

Deputy Chairperson: Peter McDermott

Panel Member: Marina Neylon

Complaints Assessment Committee – Decision finding unsatisfactory conduct

The Complaint

Mr A has complained that Jan Long misrepresented the property he purchased by advertising that there was the possibility of purchasing some adjoining land. He says the situation was also misrepresented in her email of 12 December 2007 and by her reply in her email of 25 September 2008 about whether the vendors had previously attempted to buy paper road. He says she knew about the history of attempts to buy the paper road. He says he paid a price based on him having a reasonable possibility of purchasing the paper road whereas there was no possibility given the neighbour's, Mr B's, opposition. This complaint was originally filed with the REINZ prior to the coming into force of the Real Estate Agents Act 2008 but was not fully dealt with.

Material Facts

Jan Long was the listing agent for "the property". The land was advertised on the internet and the newspapers with the statement, "An opportunity may exist to acquire some additional adjoining land." Mr A made a conditional offer to purchase it for the sum of \$190,000 on 12 March 2008. It was subject to three conditions including the sale of his property. The contract came to an end on 25 September 2008 as he had failed to sell his property. A second sale and purchase agreement was agreed on 21 October 2008. It was an unconditional contract for the sum of \$162,500 with settlement on 24 October 2008.

In addition to the advertisement about the property, Jan Long, in an email dated 12 December 2007, said the vendors had negotiated with the District Council to purchase a paper road and that there was another paper road 'on the southern side of the property which perhaps could be purchased from the council to increase the size of the section further again.' Before the second sale and purchase agreement was finalised Mr A asked, via email on 24 September 2008, about whether the vendors had attempted to buy the other paper road and was told by Ms Long that they had not tried to buy it.

Jan Long admits the information she gave in her email of 25 September was incorrect. She says she had contacted the vendor's representative Mr C before replying to ensure her reply was accurate but has not provided any information about what he said. Graeme Vining, the principal officer of Vining Realty Group, also says in his letter dated 5 August 2009 that Jan Long checked with the vendor before responding to the email of 24 September 2008. Ms Long says she had overlooked information provided to her by Mr and Mrs C in 2007 in a letter dated 12 November. In that letter Mr C explains that they would have claimed the other piece of paper road, but the neighbours had wanted to keep the option (of the road) open in case they subdivided. He also says he thinks the neighbours would not object in the future as they had changed the location of their access.

The REAA investigator has spoken to Mr and Mrs C, Ms Long and Mr B, the neighbour who objected to Mr and Mrs C purchasing the paper road.

Mr B said he wanted to keep the paper road for future developments and had suggested to the owners (dealing with Mr C or Mr D as agents for the owners) that they could have half each. He described that as an agreement between him and the group that owned the property.

Jan Long said the advertisement about the possibility of purchasing adjoining land was referring to the paper road that had not been purchased and some adjoining rural land. She said she understood there was a possibility of purchasing the paper road and had not spoken to the neighbours, Mr and Mrs B, about the paper road. She said she made an error when she told Mr A

that the vendor hadn't tried to purchase it. She says she called Mr C to double check her understanding. She confirmed that the information she gave was in conflict with the letter she had on file from Mr C which said he had approached Mr and Mrs B, who had objected to him buying the road, and with what Mr C had told her.

Mr A has expanded on his initial complaint saying he believes Jan Long used the paper road as a marketing tool when it was in fact a negative aspect of the property. He says it was dishonest to market purchasing it as a possibility when there was effectively none, due to Mr and Mrs B's opposition, and that there was intent to mislead in her email of 25 September suggesting she had spoken to Mr and Mrs C when she had not. He says she should have checked with Mr and Mrs C before providing the reply to his query.

Relevant Provisions

Section 172 Allegations about conduct before commencement of this section

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that –
 - (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
 - (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

Section 72 Real Estate Agents Act 2008

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.

Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

Discussion

The Complaints Assessment Committee accepts that Jan Long made an incorrect statement by saying there had been no attempts to purchase the paper road by the vendor when there had been. She explained in her statement to the REAA investigator on 26 July 2010 that she had overlooked the letter on the file and refers to her illness at the time that may have contributed to this lapse. She has not provided an explanation about why she said there had not been an approach when it appears, based on the information she has provided, that she had no basis on which to make that statement.

In relation to the advertising, it is not clear that it was misleading to say the possibility of purchasing additional land existed. It was, literally speaking, a correct statement, in relation to the second paper road and possibly in relation to the other 'rural land' referred to by the Ms Long. The CAC's assumption is that, despite Mr and Mrs B's previous objection and belief that a half share for each had been agreed, purchasing it was still fairly described as a possibility.

The CAC is not satisfied that the advertisement was misleading but has found the statement in her email dated 25 September 2008 "The vendors have not attempted to purchase the other portion of the paper road" was clearly wrong and misleading.

Ms Long had a salesperson's license when the conduct occurred. Due to section 172 limiting the powers of the CAC in making a determination on penalties to what was available under the Real Estate Agents Act 1976, for conduct that is less serious than that outlined in section 73 of the Real Estate Agents Act 2008 it is limited to a finding of unsatisfactory conduct as there was no power to censure or fine agents who were not members of the REINZ or held an agent's license. The CAC is not satisfied that the misleading statement is at the disgraceful or seriously negligent level so has made a finding of unsatisfactory conduct. The CAC does not accept that Mr A had made a loss due the misleading statement. For example, Mr and Mrs B could have objected to the paper road being added to Mr A's land regardless of whether they had turned down the idea before and could also have changed their position over time.

Determination

The Complaints Assessment Committee (the Committee) has found Ms Long guilty of unsatisfactory conduct pursuant to section 72 (a) and (c) but with no penalty other than the finding itself.

Publication

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

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 and it is in the public interest that the decision be published.

The Committee directs publication of its decision but omitting the names and identifying details of the complainant (including the address of the property) and any third parties in the publication of its decision.

Right of Appeal

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

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

Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals.

Signed



Robyn Wilson
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 30 September 2010