

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

And

In the Matter of **Complaint No CA2627859**

In the Matter of **Ivan Sherburn
10008576**

Determination of Complaints Assessment Committee

Dated this 27th day of September 2010

Complaints Assessment Committee:

CAC10014

Chairperson: David Towle

Deputy Chairperson: Anna Tierney

Panel Member: David Russell

Complaints Assessment Committee – Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 Mr A has complained to the Real Estate Agents Authority (“REAA”) about the conduct of Ivan Sherburn, Online Realty Limited (Hamilton) trading as Ray White Hamilton. The complaint was received by the REAA on 29 January 2010. Mr A initially complained to REINZ in September 2008. The complaint was placed on hold due to part of the matter being subject to legal action.
- 1.2 Mr A purchased a property through Ivan Sherburn from Ray White Hamilton in 2008.
- 1.3 Mr A has complained that Mr Sherburn failed to disclose that a major road project (the southern links bypass) by Transit New Zealand was being proposed (“the proposal”).

2. Material Facts

- 2.1 On 23 February 2008 Mr A and his wife met with Mr Sherburn to discuss a land sale at “the property” that he had advertised. Mr Sherburn was both the agent selling the property and the owner.
- 2.2 Two days later on 25 February Mr and Mrs A signed a sale and purchase agreement for the property conditional on ascertaining costs of the foundations and builder’s and solicitor’s approval. A deposit of \$30,000 was paid to Online Realty Limited.
- 2.3 Two weeks later, while at the section, Mr and Mrs A met the adjoining property owners, Mr and Mrs B. Mr and Mrs B told them that Transit New Zealand was proposing to build a “Major Arterial” road network which would run either through or adjacent to the site.
- 2.4 Mr A carried out his own enquiries with Transit New Zealand to confirm the proposal existed.

- 2.5 Mr A also discovered that there had been a neighbourhood watch meeting at Mr Sherburn's home in January 2008 where the proposal had been discussed. Mr and Mrs B had also told Mr and Mrs A that they had discussed the proposal with Mr Sherburn on 14 February 2008. This was all prior to Mr and Mrs A signing the sale and purchase agreement.
- 2.6 On 25 March 2008 Mr and Mrs A complained to Ray White about:
- 2.6.1 Failure to disclose the proposal.
 - 2.6.2 Foundation costs – that Mr Sherburn told Mr and Mrs A that the foundations would cost \$5,000, but Mr and Mrs A were later advised they would cost \$15,500 plus.
 - 2.6.3 LIM report – that Mr Sherburn advised Mr and Mrs A not to get a LIM report.
- 2.7 Mr and Mrs A, through their solicitor in a letter dated 7 April 2008, sought to have the contract cancelled on the basis of the non-disclosure and misrepresentation in that Mr Sherburn had not told them of the proposal.
- 2.8 On 15 April Mr Sherburn's lawyer wrote to Mr and Mrs A's lawyer accepting the cancellation of the contract and stating that Mr Sherburn acknowledged that he did not advise Mr and Mrs A of the proposal. The letter also advised that Mr Sherburn would be "prepared to make a reduction in the sale price of the property" and hoped that they "will reconsider the cancellation of the contract."
- 2.9 Mr and Mrs A were refunded their deposit on 18 April 2008.
- 2.10 On 21 April 2008 Mr and Mrs A's lawyer wrote to Mr Sherburn's lawyer acknowledging that their clients would consider a new agreement for the property but expected full disclosure from Mr Sherburn.
- 2.11 On 23 April 2008 Mr and Mrs A met with the principal of Ray White with Mr and Mrs B to discuss the complaint.

- 2.12 On 26 April 2008 Mr Sherburn wrote personally to Mr and Mrs A outlining his version of events as follows:
- 2.12.1 Failure to disclose the proposal – Mr Sherburn stated that he did not see the proposal “as a serious concern” however he “should have mentioned it and a couple of times I thought about it when we were talking about different matters”.
- 2.12.2 Foundation costs – Mr Sherburn stated that the differing prices related to different aspects of the foundations.
- 2.12.3 LIM report – Mr Sherburn stated that he thought Mr and Mrs A could save money by going to the council themselves or their lawyer could have changed the agreement to require a LIM report.
- 2.13 Mr Sherburn also informed Mr and Mrs A that he was no longer selling the section at that time.

3. Relevant Provisions

3.1 (a) Real Estate Agents Act 2008

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;
- (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 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.

Section 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 that reflects adversely on the licensee's fitness to be a licensee.

3.2 (b) Real Estate Agents Act 1976

Section 70 Rules of Institute

(1) The Institute may from time to time make rules (...) for all or any of the following purposes:

...

(m) Prescribing a code of ethics for regulating the professional conduct of members of the Institute and the conduct of salespersons and branch managers employed by members:

...

Code of Ethics

Rule 13.1

Members shall always act in accordance with good agency practices, and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession.

4. Discussion

4.1 Jurisdiction

4.2 The Complaints Assessment Committee (“CAC”) is satisfied that the matters raised by Mr A fell within the jurisdiction of the Real Estate Agents Act 1976 (“the 1976 Act”) by virtue of section 70 of that Act. Accordingly, Mr A was entitled to make a complaint under the 1976 Act.

4.3 At the time of the conduct complained of, Mr Sherburn held a license issued under the 1976 Act.

4.4 Therefore, the issue for the CAC to decide is whether the conduct of Mr Sherburn amounts to unsatisfactory conduct or misconduct under the Real Estate Agents Act 2008 (“the 2008 Act”). (We note that sections 72(b), 73(c)(i) and 73(c)(iii) of the Real Estate Agents Act 2008 do not apply to this consideration as they relate to

breaches of the 2008 Act, Rules and Regulations which were not in force at the time of the conduct complained of by Mr A).

4.5 Consideration of the complaint

4.6 The CAC has considered the complaint from Mr A and the responses from Mr Sherburn.

4.7 In the CAC's view there is sufficient evidence to show that Mr Sherburn knew about the proposal and did not disclose it to Mr and Mrs A when he was obliged to. Mr Sherburn himself admits to knowing about the proposal and not advising Mr and Mrs A.

4.8 The CAC acknowledges that Mr Sherburn cancelled the contract and refunded the deposit to Mr and Mrs A. However, in the CAC's view the significance of the non-disclosure cannot be ignored.

4.9 The CAC agrees that the actions of Mr Sherburn fall below the general level of competence and care that should be expected by Mr and Mrs A.

5. Decision

5.1 As a result of the above, the CAC has found that Mr Sherburn's conduct was unsatisfactory within the meaning of Section 72 (a) in that it falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and breached Rule 13.1 of the rules of REINZ on the basis his conduct did not reflect well on the member or the real estate profession. Accordingly the complaint is upheld.

6. Orders

6.1 The CAC has decided to censure Mr Sherburn for his conduct.

7. Publication

7.1 The CAC directs that this decision is to be 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.

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

A handwritten signature in black ink that reads "Anna Tierney". The signature is written in a cursive, flowing style.

Anna Tierney

Deputy Chairperson

27 September 2010