

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

And

In the Matter of **Complaint No CA2915679**

In the Matter of Samuel Rogers
10012476

Determination of Complaints Assessment Committee

Dated this 22nd day of November 2010

Complaints Assessment Committee:

CAC10028

Chairperson: Anna Tierney

Deputy Chairperson: Stuart Rose

Panel Member: Barrie Barnes

Determination of Unsatisfactory Conduct

1. The Complaint

- 1.1 Mr and Mrs C have complained to the Real Estate Agents Authority (REAA) about the conduct of Samuel Rogers (Mr Rogers). At the time of the conduct complained of, Mr Rogers was working for Trends Realty Ltd. The complaint was received by the REAA on 4 March 2010.
- 1.2 The Cs have complained that Mr Rogers:
 - 1.2.1 Failed to disclose a proposal for a high density development directly opposite the property that the Cs had signed a sale and purchase agreement for.
 - 1.2.2 Misrepresented in the negotiations for the property that there was a multi-offer situation in order to achieve a higher price for the property.
 - 1.2.3 Presented the property unprofessionally, appeared as if he had no specific knowledge of the property and made no effort to “show” the property during their private viewing.

2. Material Facts

- 2.1 The complainants decided they wanted to buy a property in Christchurch. They contacted Cs L, an agent they knew who worked for Company A. Cs L took them to an open home at the property (the property) in Christchurch.
- 2.2 The Cs met Mr Rogers at the open home where he was taking people’s names. The Cs liked the property immediately and had a further private viewing with Sam Rogers. The Cs complain that they asked Mr Rogers a number of questions about the property which they expected as a real estate agent he should have been able to answer but he was not able to.
- 2.3 The property did however meet the C’s requirements and they decided to put in an offer. On Monday 21 September 2009 the Cs were told that it was a multi offer and that all offers were to be presented a couple of days later on Wednesday 23 September at 5pm.
- 2.4 The property had been advertised for offers over \$495,000 and initially the C’s maximum price was \$500,000. However, the Cs say that they were initially told that

there were to be around four offers. This was then revised to three. The Cs decided to put in a strong bid due to the multi offer and put in an unconditional offer of \$530,000.

- 2.5 At 4.30pm on the afternoon of the Wednesday when the offers were to be presented, the Cs were rung by another agent and told that it was now not going to be a multi offer and did they want to adjust their offer. The Cs adjusted their offer down \$5,000 to \$525,000 to meet the deadline for the offer which they believed was still 5pm.
- 2.6 The offer was accepted.
- 2.7 On 29 November 2009 Mr Rogers met with the Cs at the pre-settlement inspection.
- 2.8 A week before possession date, on 3 December 2009 two people from the property opposite the C's new property visited them. They confirmed that the Cs were the purchasers of the property and asked if they were aware of their intent to develop residential units across the road. Mr C advised them that they were not aware. The visitors advised Mr C that the vendors had signed the resource consent and left documents about the development for the Cs to read.
- 2.9 The C's looked at the documents and discovered that a high density development that they had no knowledge of, with 17 small sections was going to be developed directly opposite the house they had purchased and were taking possession of in a week's time.
- 2.10 Mr C called Ms L at Company A to ask her what was going on. Ms L advised that Mr Rogers had called her earlier in the day asking for the C's contact details which she had refused to give. Mr C says that Ms L acknowledged to him that she was aware of the potential subdivision but said it had been on the go for a number of years and needed all residents in the immediate vicinity to give consent which seemed unlikely.
- 2.11 Mr C advised Ms L that there was no way that they would have considered the property if they had thought a high density subdivision was going to be across the road. Mr C expressed his annoyance that Mr Rogers and the vendors had not even mentioned the subdivision.

- 2.12 Mr C then called Mr Rogers and informed him of the visitors and queried why he did not disclose such a significant development. Mr C said that he would be discussing the situation with his lawyer. Mr C says that Mr Rogers said that he was happy to work with the Cs to resolve the issue, was happy to discuss it with their lawyer and mentioned the possibility of compensation. Mr Rogers suggested that Cs L should share some blame for non-disclosure as she knew of the development.
- 2.13 Mr Rogers called Cs L who then called Mr C. Mr C says that she said that maybe she shared some blame for nondisclosure of the potential development.
- 2.14 On 4 December 2009 the lawyer acting for the Cs wrote to Mr Rogers informing him that it had come to his client's attention that the vendors of the property had signed the resource consent for a proposed development in the area after the contract had gone unconditional. He expressed the C's opposition to the development and concerns that Mr Rogers had not disclosed the development when he had specific knowledge about it. The lawyer asked Mr Rogers what he would be prepared to compensate the Cs for the failure to disclose the development.

3. Relevant Provisions

(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

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 willful 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.

Section 89 Power of Committee to determine complaint or allegation

(1) A Committee may make one or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.

(2) The determinations that the Committee may make are as follows:

- (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:
- (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct
- (c) a determination that the Committee take no further action in regard to the complaint or allegation or any issue involved in the complaint or allegation.

Section 90 Hearings on papers

(1) A hearing conducted under section 89(1) by a Committee is to be a hearing on the papers, unless the Committee otherwise directs.

(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

4.1.1 The Complaints Assessment Committee (CAC) has considered the matters raised by the Cs and is satisfied that these matters fell within the jurisdiction of the Real Estates Agents Act 1976 (the 1976 Act). Accordingly, the Cs would have been

entitled to make a complaint under the 1976 Act.

4.1.2 At the time of the conduct complained of, Mr Rogers held an approved salesperson certificate issued under the 1976 Act.

4.1.3 Therefore, the issue for the CAC to decide is whether the conduct of Mr Rogers 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 the Cs.)

4.2 Consideration of the complaint

4.1 The CAC has considered the complaint from Mr and Mrs C and the response from Samuel Rogers and other parties.

Failed to disclose a proposal for a high density development

Mr Rogers stated in his response to the REAA that he sold property in the area and knew of the subdivision. He also states that Ms T was not a local agent or resident of the area and was unaware of the subdivision. We note that Mr Rogers stated in his response to the complaint that the property was listed through Ms T. However in the CAC's view Mr Rogers was also acting as an agent on the sale of the property. The CAC has examined details of the sales commission from the property and notes that the gross commission plus expenses was split between Mr Rogers (52%), Ms T (35%) and Ms L (13%). In the CAC's view Mr Rogers was obliged to disclose the proposed high density development to any buyer and had a duty to disclose this information to the Cs.

Misrepresented in the negotiations for the property that there was a multi-offer situation in order to achieve a higher price for the property

4.2 The Cs have stated that they were originally going to put in an offer for \$500,000 (as a starting point for negotiation) and only offered \$530,000 because they believed that

there was a multi offer. They were given less than one hour to decide whether to change their offer. In the CAC's view the multi offer created an unnecessary sense of urgency for the Cs in deciding the price to offer for the property. The listing agent Cs T has confirmed that the vendors wanted \$480,000 for the property and the Cs ended up paying \$525,000.

Further to this in the CAC's view Mr Rogers has provided no evidence of the multi offer. The evidence is to the contrary. The two parties put forward by Mr Rogers as part of the multi offer shows that both parties did not recall even looking at the property. In the absence of any documentary evidence of a multi offer the CAC agrees with the complainant's view that the multi-offer situation was misrepresented in the negotiations for the property in order to achieve a higher price.

Presented the property unprofessionally, appeared as if he had no specific knowledge of the property and made no effort to "show" the property during their private viewing.

4.3 It was Mr Roger's responsibility to the vendor to market the home. There has been no complaint of dissatisfaction expressed by the vendor as to Mr Roger's role in marketing the property.

4.4 In the CAC's view there is insufficient evidence to support a finding that the actions of Samuel Rogers amount to unsatisfactory conduct.

5. Decision

5.1 The CAC has determined under section 89(2)(b) of the REAA that it has been proved on the balance of probabilities, that Mr Rogers has engaged in unsatisfactory conduct..

5.2 It is clear from the evidence provided to the CAC that the behaviour of Mr Rogers falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee within the meaning of Section 72 (a). Accordingly the complaint is upheld.

6. Orders

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

7. Publication

7.1 The CAC directs that this decision is to be published in the interests of ensuring the disciplinary process remains transparent, independent and effective.

7.2 The complainant and any other named individual or firm are not to be identified in the published decision.

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.

Signed

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

Anna Tierney

Chairperson

Complaints Assessment Committee

22 November 2010