

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

And

In the Matter of **Complaint No CA3575577**

In the Matter of **Richard Lancaster**  
**Licence No: 10001597**

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Decision of Complaints Assessment Committee

Dated this 15<sup>th</sup> day of September 2010

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**Complaints Assessment Committee:**

**CAC10048**

**Chairperson: Debbie Van Zyl**

**Panel Member: Denise Bovaird**

# Complaints Assessment Committee - Decision finding unsatisfactory conduct

## Decision

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### 1. The Complaint

- 1.1 This complaint is lodged by Ms. G on 3 May 2010 against Richard Lancaster. Mr Lancaster is a licensee under the Real Estate Agent's Act 2008 ("the Act"). Mr Lancaster holds a salespersons license and works for Elysium Realty Ltd, part of the Harvey's Group.
- 1.2 Ms G's complaint is about Mr Richard Lancaster not disclosing a conflict of interest as agent as well as vendor.

### 2. Material Facts

- 2.1 Ms G was interested in "the property" and made an enquiry through the Harvey's website in February 2010. According to Ms. G the enquiry was responded to by Mr Lancaster who then took her through the property.
- 2.2 According to Ms. G, Mr Lancaster advised her that only a cosmetic "do-up" was required and the property had been vacant for six weeks. At the time that Ms G was taken through the property by Mr Lancaster, there were no for sale signs outside from either XYZ or Harvey's.
- 2.3 Ms. G then made an offer and emailed the agreement to Mr Lancaster. The offer was accepted and Mr Lancaster arranged for Mr O of XYZ to collect the deposit. According to Mr Lancaster Mr O was now the listing agent as the listing with Harvey's had expired and the property was listed with XYZ at the time Ms. G made the offer.
- 2.4 Ms. G later arranged with Mr O to have a builder inspect the property. Her builder told her that she would require more than \$20,000 to get the house in a decent condition. Ms. G checked up on the vendor details and found out that Richard Lancaster was in fact a co-director of [ABC Ltd] (the vendor). Ms. G states that Mr Lancaster had deliberately and knowingly failed to disclose a conflict of interest as agent as well as vendor and that he stands to gain from the transaction. Ms. G further alleges that Mr Lancaster did not act in good faith and deliberately misled her into believing the property was in better condition than it actually was. As owner, he should have had an in-depth knowledge of the property's condition.
- 2.5 Ms. G states that she later found out through the power supply company that the property was vacant for more than six months and that there is also a water restriction on the property due to non-payment of overdue water charges to the amount of \$1,700.
- 2.6 Ms. G is seeking \$5,000 damages from Mr Lancaster and requires Mr Lancaster's licence to be revoked immediately.
- 2.7 Mr Lancaster replied that the property was given to XYZ to sell on or around 1 March 2010 and the listing was officially withdrawn from the Elysium Realty Ltd on 1 March

2010. Mr Lancaster further replied that as he was the initial contact and he still had possession of the keys he continued to liaise with Ms. G.

- 2.8 Mr Lancaster states that he warned Ms. G the property had been vacant for a lengthy period of around six months.
- 2.9 Mr Lancaster received an email from Ms. G on 21 March 2010 stating "I have been unsuccessful trying to get hold of the builder/handyman to look at [the property]. In view of this I am prepared for a cash offer of \$190,000 for the property if it is not sold yet." Mr Lancaster says that he is sure he informed Ms. G of his involvement as vendor, but he could not recall the date and it was not until Ms. G brought it to his attention that he had any idea she was not aware of him being one of the directors of the vendor company. Mr Lancaster alleges that during a phone conversation on 8 April 2010 Ms. G informed him that her husband did not want to sign the documents required for finance and as a result she wanted to pull out of the deal. Mr Lancaster further alleges that Ms. G informed him that she would sue him if he did not let her out of the contract. Mr Lancaster states that his solicitor later informed him that they had not received any lack of finance notification from Ms. G's solicitor.
- 2.10 Mr Lancaster states that he was under some pressure from the financier to sell the property.
- 2.11 Mr Lancaster states that Ms. G had ample opportunity to obtain advice re the condition of the property - she decided on her own to stop waiting for the builder and make a cash unconditional offer.
- 2.12 Mr Lancaster points out that Ms. G inspected the property with a builder on 1 April and, until settlement on 20 April, no mention of the problems were made to himself, Mr O or the solicitors.
- 2.13 Mr Lancaster admitted that he understands why Ms. G viewed him as the agent of the property, but states that he did not receive any commission for this transaction and only remained the main point of contact as a courtesy to Ms. G.
- 2.14 Mr Lancaster states "The moment I became aware that [Ms. G] claimed not to know about my relationship to the property, I offered to consider how I could help get her out of the contract if that is what she really wanted. Before I had an opportunity to do anything about that, I had received a txt from [Ms. G] saying she would settle, and notification from my solicitor that she was not claiming any inability to settle. Therefore [Ms. G] settled the property with full knowledge of my status, with the intention of later using that to her advantage."

### **3. Relevant Provisions**

- 3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (Section 72 of the Act) or alleged misconduct (Section 73 of the Act).
- 3.2 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.

### 3.3 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 for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

### 3.4 Section 136(1) of the Act states:

- 1) A licensee who carries out real estate work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.

### 3.5 Rules 6.2 – 6.5 of the Real Estate Agent's Act (Professional Conduct and Client Care) rules 2009 ("Rule" or "Rules") state:

- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction".
- 6.3 A licensee must not engage in any conduct likely to bring the industry in to disrepute.
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided by a customer or client.
- 6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely on the basis of the licensee's knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects, the licensee must either:
  - (a) obtain confirmation from the client that the land in question is not subject to defect; or
  - (b) ensure that a customer is informed of any significant potential risks so the customer can seek expert advice if the customer so chooses.

### 3.6 Having satisfied itself that it had completed its enquiry into the complaint, the Complaints Assessment Committee ("the Committee") conducted a hearing with regard to the complaint under Section 89 (1) of the Act.

### 3.7 The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

## **4. Discussion**

- 4.1 Section 72 of the Act specifies conduct that represents unsatisfactory conduct. Unsatisfactory conduct must relate to the carrying out of real estate work. Section 72 (b) is implicit in that a contravention of the Act or any regulation or rules made under the Act is classified as unsatisfactory conduct. A contravention of the rules therefore automatically amounts to unsatisfactory conduct.
- 4.2 The Committee believes that it received a plausible answer from Mr Lancaster, but as Mr Lancaster admitted that he knew that Ms. G viewed him to be the real estate agent in the transaction, Mr Lancaster was remiss in not advising Ms. G that he was the vendor.
- 4.3 Although Mr Lancaster alleges that he did not receive any benefit from the transaction, the Committee disagrees with his statement. Mr Lancaster admitted that he was under pressure from his mortgagee to sell the property and a sale would therefore have benefited Mr Lancaster's company by alleviating that financial pressure. Therefore Mr Lancaster either directly or indirectly benefited from the sale.
- 4.4 In the opinion of the Committee Mr Lancaster breached Section 136 (1) of the Act as well as Rules 6.2, 6.3, 6.4 and 6.5 by not disclosing his involvement. A real estate agent in that position should perhaps ask the question - how would the situation appear to the purchaser. Obviously this was not done in this case as Mr Lancaster sent the agreement for sale and purchase to Ms. G, although Mr O was allegedly already the agent for this transaction. The confirmation that the offer was accepted by the vendor was further notified by Mr Lancaster to Ms. G and not through Mr O.
- 4.5 For the reasons set out above Ms. G's complaint against Mr Lancaster has met the test for unsatisfactory conduct, but even taking the view most favourable to Ms. G, the committee has decided that there are no reasonable grounds for concluding that the Mr Lancaster's conduct complained about reaches the threshold for misconduct (section 73(a)).

## **5. Decision**

- 5.1 The Complaints Assessment Committee met on 23 August 2010 to consider the complaint against Richard Lancaster. The Complaints Assessment Committee has determined under Section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Lancaster has engaged in unsatisfactory conduct.
- 5.2 Having determined that Mr Lancaster is guilty of unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in 93.1 of the Act.

## **6. Orders**

The Committee will conduct a separate hearing on the papers to decide what orders, if any, should be made under s 93 of the Act.

Section 93 provides:

### **93 Power of Committee to make orders**

- 1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
  - (a) make an order censuring or reprimanding the licensee;

- (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;
  - (c) order that the licensee apologise to the complainant;
  - (d) order that the licensee undergo training or education;
  - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint;
  - (f) order the licensee –
    - (i) to rectify, at his or her or its own expense, any error or omission; or
    - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission;
  - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company;
  - (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order;
  - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- 2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

The Committee requires the investigator authorised to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Richard Lancaster under either the Real Estate Agents Act 1976 or the Real Estate Agents Act 2008, if any such decision exists, and provide it to the Committee and Ms. G and Mr Lancaster.

Ms. G and Mr Lancaster may file submissions within 10 days from the date on this determination on what orders, if any, should be made.

## **7. Publication**

- 7.1 One of the committee's functions pursuant to Section 78 (h) of the Act is to publish its decisions.
- 7.2 The committee directs that this decision be published in the interest of ensuring that the disciplinary process remains transparent from an independent and effective. The committee also regards publication of this decision as desirable for the purpose of setting standards, and that it is in the public interest that the decision be published.

## **8. Right of Appeal**

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.

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

Signed

A handwritten signature in blue ink, appearing to be 'Debbie Van Zyl', enclosed within a faint rectangular border.

**Debbie Van Zyl**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority

Date: 15 September 2010