

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

And

In the Matter of **Complaint CA3813771**

In the Matter of **Maryke van Iersel**

Licence Number: 10009609

Decision of Complaints Assessment Committee

Dated this 25th day of November 2010

Complaints Assessment Committee:

CAC10054

Chairperson: Chris Rogers

Deputy Chairperson: Deirdre McNabb

Panel Member: Joan Harnett-Kindley

Determination of Unsatisfactory Conduct

1. The Complaint

- 1.1 Ms T (the complainant) maintains that licensee Maryke van Iersel failed to disclose that cell phone towers (antennas) were to be erected on the buildings across the road from a property the complainant was negotiating to purchase.

2. Material Facts

- 2.1 "The property" was listed for sale with Waiheke First National Limited on 28 January 2010.
- 2.2 The original owner of the property had passed away approximately two years earlier and since that time the home had been used as family bach.
- 2.3 The executors of the estate were the vendors.
- 2.4 The listing licensee was Ms W.
- 2.5 On or about 15 March 2010 the complainant viewed the property with licensee Maryke van Iersel.
- 2.6 An offer to purchase the property was drafted and signed by the complainant. The terms of offer were:
- a) Purchase price \$360,000;
 - b) Deposit \$36,000;
 - c) \$284,000 to be paid on the settlement date being 26 March 2010.
- 2.7 A delayed settlement of 6 months for the balance of \$40,000. No special conditions were included.
- 2.8 Initial negotiations took place however the offer was withdrawn by the complainant on or about 18 March 2010.

- 2.9 On 22 March 2010 a second offer was drafted by licensee Ms W on behalf of licensee Maryke van Iersel at the request of the complainant and signed by the complainant.
- 2.10 The relevant terms of sale were -
- a) Purchase price \$380,000;
 - b) Deposit \$38,000;
 - c) Settlement date 9 April 2010;
 - d) No special conditions were included.
- 2.11 This offer was accepted by the vendors.
- 2.12 The complainant maintains that on 26 March 2010 whilst attending the club located directly across the road from the property she had purchased, she was informed by club members that cell phone antennas were to be erected on the roof of the club in the near future.
- 2.13 On 31 March 2010 the complainant purported to cancel the sale and purchase contract however this proposal was declined by the vendor.
- 2.14 Vodafone New Zealand Limited had been granted resource consent to install telecommunication antennas and associated equipment on the site on 16 July 2008.
- 2.15 Vodafone New Zealand Limited informed residents of (the street of “the property”) by mail on 8 February 2010 that installation of the antennas was imminent.
- 2.16 The complainant settled the purchase of “the property” on 1 June 2010 incurring penalty interest for late settlement.
- 2.17 Telecommunication antennas were installed at the site opposite “the property” later in June 2010.
- 2.18 Erection of telecommunication equipment at this site had been the subject of

public debate and protest in Waiheke Island media and manifest as signage and banners displayed on local properties since 2008.

2.19 The complainant believes that telecommunication antennas installed on the roof of the property opposite will have an extremely detrimental effect on the market value of her new home.

2.20 The Committee is in receipt of two registered valuations carried out on the subject property. One commissioned by the complainant dated 28 April 2010 and the other by Waiheke First National dated 8 September 2010.

3. Relevant Provisions

3.1 Real Estate Agents Act 2008

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

3.2 **Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009**

Rule 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 to a customer or client

4. Discussion

- 4.1 During the course of this investigation the CAC has been provided with an inordinate amount of material relating to cell phone sites and the relevant positions held by telecommunication companies, researchers and local residents on the perceived risks to the personal health of those exposed to radiofrequency emissions and the impact of cellular phone towers on property values.
- 4.2 We will not attempt to debate these positions outside of the facts of the complaint before us.
- 4.3 The complainant alleges that licensee Maryke van Iersel had knowledge of the proposed telecommunication antennas and failed to disclose this information to her while viewing "the property" prior to purchase.
- 4.4 The complainant maintains that had she been informed that telecommunication antennas were to be erected on the bowling club opposite "the property", she would not have entered into negotiations to purchase the property.
- 4.5 Licensee Maryke van Iersel has conceded to having knowledge of the

proposed antennas to be erected on the bowling club however not to having knowledge of the consent granted to Vodafone or when the installation may occur.

- 4.6 Licensee Maryke van Iersel believes that the proposed telecommunication antenna installation was common knowledge within the community at large on Waiheke Island.
- 4.7 Licensee Maryke van Iersel maintains that information regarding the proposed telecommunication antenna was not deliberately withheld by herself or any other employee of Waiheke First National, however because the debate and protest over the proposed antennas had been going on for approximately four years with no apparent conclusion it was not front of mind when marketing nearby property for sale.
- 4.8 Whether telecommunication installations actually affect the health of those exposed to them or the value of surrounding real estate is debatable however the fairness of withholding information about a matter that had attracted such significant local concern is not.
- 4.9 The complainant was dealing with a real estate professional in the expectation that she would be treated in a manner consistent with the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

5. Decision

- 5.1 The Committee has determined this complaint by a hearing on the papers, in accordance with section 90(1) of the Real Estate Agents Act 2008 (“the Act”).
- 5.2 After considering the material provided by the investigation the Committee finds that licensee Maryke van Iersel has failed to disclose to the complainant relevant information about proposed telecommunication antennas to be erected on the Club buildings, denying the complainant the ability to make an informed decision regarding the purchase of “the property”.
- 5.3 The Committee has determined under Section 89 (2) (b) of the Act that it has

been proved, on the balance of probabilities, that the licensee, Maryke van Iersel, has engaged in unsatisfactory conduct in terms of section 72 (a) and 72 (b) of the Act.

- 5.4 In terms of section 72(a) the Committee considers that Maryke van Iersel has carried out real estate agency work which falls short of the standard expected from a reasonably competent licensee. Furthermore, the Committee considers that Maryke van Iersel engaged in unsatisfactory conduct in terms of section 72 (b) by contravening rule 6.4 of the REAA Rules 2009.

6. Penalty

- 6.1 Having determined under Section 89 (2)(b) of the Act that the licensee, Maryke van Iersel, has engaged in unsatisfactory conduct the Committee has the power by virtue of Section 93 of the Act to make an order in the nature of a penalty.
- 6.2 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.
- 6.3 Section 93 provides:
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.

6.4 Licensee Maryke van Iersel and Ms T (the complainant) may file submissions within 10 working days of receipt of this decision on what orders, if any should be made.

7. Publication

7.1 The Committee directs that this decision is to be published with the identifying details of the complainant omitted.

8. Right of Appeal

8.1 A person affected by a determination of a Complaints Assessment Committee may appeal by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.

8.2 The Committee has yet to finally determine this complaint because the parties are being given an opportunity to make submissions on orders before the Committee determines what orders should be made, if any.

8.3 The Committee considers that the 20 working day appeal period does not commence until it has finally determined this complaint by deciding what orders should be made, if any.

8.4 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 blue ink, appearing to be 'Chris Rogers', with a large loop at the start and a long tail.

Chris Rogers
Chairperson
Complaints Assessment Committee
Dated: 25 November 2010