

Decision No: [2013] NZREADT 16

Reference No: READT 034/11

IN THE MATTER OF of a charge laid under s.91 of the Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS
AUTHORITY (CAC 10017)**

AND **SHENG (BRYAN) XU**

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr J Gaukrodger - Member
Ms J Robson - Member

APPEARANCES

Mr LJ Clancy, Counsel for the Committee
Mr T Rea, Solicitor for the defendant

HEARD at Auckland on Friday 14th December 2012

Introduction

[1] Mr Xu faces a charge brought by the Complaints Assessment Committee ("CAC"). The charge laid by the CAC is as follows:

1. *Following a complaint made by Northcorp Developments Limited ("the complainant") Complaints Assessment Committee 10017 ("CAC 10017) charges the defendant, Sheng Xu, with misconduct under s 73(b) of the Real Estate Agents Act 2008 ("the Act") in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.*

Particulars

(a) *In or about August 2007 the defendant failed to act in the complainant's best interests as follows:*

- (i) *As at 24 August 2007 the complainant was the owner of Lot 2 Tauroa Street, Whangarei (**property**);*
- (ii) *On 24 August 2007 the complainant entered into an agency listing agreement with the defendant to sell the property;*

- (iii) *On 24 August 2007 the defendant had received interest in the property from potential purchasers Tauroa Age Care Limited (**Tauroa**) and York Yu;*
 - (iv) *On 24 August 2007 the defendant presented the complainant with an offer from Tauroa to purchase the property for \$650,000;*
 - (v) *On 24 August 2007 the complainant entered into a conditional agreement with Tauroa to sell the property to Tauroa for \$650,000 (**Tauroa agreement**);*
 - (vi) *On or between 24 August 2007 and 26 August 2007 the defendant had discussions with York Yu about York Yu's interest in the property;*
 - (vii) *On 26 August 2007, before the Tauroa agreement had been declared unconditional, the defendant entered into an agency listing agreement with Tauroa to on-sell the property;*
 - (viii) *On 26 August 2007 the defendant presented Tauroa with an offer from York Yu to purchase the property for \$760,000;*
 - (ix) *On 26 August 2007 Tauroa entered into a conditional agreement with York Yu to on-sell the property to York Yu for \$760,000 (**York Yu agreement**);*
 - (x) *The defendant obtained commissions in respect of both the Tauroa agreement and the York Yu agreement.*
- (b) *In conducting himself as set out above the defendant negotiated the sale of the property in the best interests of Tauroa and not the complainant.*

[2] The parties had reached an agreement on a summary of facts. This is set out below:

*The complainant in this case is Peter Finlay, the sole director of Northcorp Developments (**Northcorp**).*

*The licensee is Bryan Xu. In 2007, Bryan Xu was an approved salesperson under the Real Estate Agents Act 1976, working at the Birkenhead branch of Barfoot & Thompson Ltd (**Barfoot & Thompson**).*

In mid-August 2007, Northcorp was in discussions with Sina Hosseini of Barfoot & Thompson about the possible sale of its property at Lot 2 Tauroa Street, Whangarei (property) as a proposed retirement village project. Ms Hosseini told the licensee about the property as he had been involved in selling vacant sections for development in the past.

*James Zhao is the sole director of Tauroa Age Care Limited (**Tauroa**). On 16 August 2007, James Zhao told the licensee that Tauroa was interested in purchasing a retirement village development.*

The licensee told Mr Zhao about the property and Mr Zhao expressed an interest in it. The licensee also received interest in the property from others, including a York Yu. Mr Yu did not make an offer on the property at that stage or advise that he wanted to do so.

Subsequently, on 24 August 2007, Northcorp entered into an agency agreement with Barfoot & Thompson for the sale of the property. The listing agent was Mr Hosseini. The licensee was present at the meeting at which Northcorp entered into the agency agreement with Barfoot & Thompson.

The listing price for the property was \$650,000. The licensee was provided with concept drawings for the development and advised that if the property was sold at the listing price

Northcorp would obtain the necessary building and resource consents to enable the new purchaser to proceed with the development.

Later the same day, 24 August 2007, the licensee presented an offer from Tauroa to Northcorp to purchase the property for \$650,000. In doing so, the licensee did not go back to Mr Yu or other interested parties to see whether they wanted to make an offer on the property. The licensee did not advise Northcorp of the interest in the property of Mr Yu and other parties or that it was open to Northcorp to instruct the licensee to go back to Mr Yu and other interested parties to attempt to obtain a higher offer.

Northcorp accepted Tauroa's offer on 24 August 2007 (sale to Tauroa).

Between 24 August 2007 and 26 August 2007, the licensee had further discussions with Mr Yu about the property. Mr Yu made an offer to purchase the property for \$760,000.

*On 26 August 2007, Tauroa entered into an agency agreement with Barfoot & Thompson and an agreement for sale and purchase for the property with Mr Yu for \$760,000 (**on-sale to Mr Yu**).*

Commission was payable to the licensee on both the sale to Tauroa and the on-sale to Mr Yu. The sale to Tauroa and the on-sale to Mr Yu did not settle.

[3] However they did not reach agreement as to whether or not the facts constituted seriously incompetent or seriously negligent real estate agency work under section 73(b) of the Real Estate Agents Act 2008.

[4] The issues for the Tribunal are:

- (a) Does the Tribunal have jurisdiction to consider the charge?
- (b) Was Mr Xu's behaviour so negligent that he is in breach of section 73?
- (c) If not, could section 72 apply to Mr Xu's conduct?

Issue 1 : Does the Tribunal have jurisdiction?

[5] Mr Rea submits that the Tribunal has no jurisdiction to hear the charge. The facts the subject of this charge took place in August 2007. This is before the Real Estate Agents Act 2008 ("the Act") came into force. Mr Rea submits that the Tribunal have no jurisdiction to consider conduct which took place before the Act came into force unless it falls within the transitional provisions of section 172 of the Real Estate Agents Act 2008. He submits that this case does not fall within those provisions and therefore the charge must be dismissed.

[6] Mr Rea further submits that all that is alleged by the CAC is that Mr Xu was negligent in failing to go back to other potentially interested purchasers or advising the initial vendors that this should be done before presenting an offer to the complainant. He submits that this cannot amount to serious negligence under s.73.

[7] The transitional provisions of the Act have been examined in many cases and in the decision of *Dodd* [2011] NZREADT 1 the Tribunal sets out the three stage test that the Act requires in s.172.

[8] The three step process identified is as follows:

Step 1 Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2 If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3 If so, only penalty orders which could have been made against the defendant under the 1976 Act may be made by this Tribunal.

[9] Mr Rea submits that the Tribunal must also take into account s.7 of the Interpretation Act 1999. Section 7 provides that legislation does not have retrospective effect. Section 5 of the Interpretation Act 1999 provides:

“Ascertaining meaning of legislation.

- (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.*
- (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.*
- (3) Examples of those indications are preambles, the analysis, table of contents, headings to parts and sections, marginal notes, diagrams, graphics, examples and explanatory material and the organisation and format of the enactment.”*

[10] Section 7 is subject to any contrary intention expressed in the Act itself.

[11] The Supreme Court has observed in Commerce Commission v Fonterra Co-operative Group Limited [2007] 3 NZLR 767 at 22:

It is necessary to bear in mind that section 5 of the Interpretation Act makes text and purpose the key drivers and statutory interpretation. The meaning of an enactment must be ascertained from its text and in light of its purpose.

Even if the meaning of a text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of section 5. In determining purpose, the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[12] The Real Estate Agents Act is designed to improve the accountability of real estate agents. The purpose is recorded in s.3 of the Act:

“To promote and protect the interests of consumers in respect of transactions that relate to real estate and promote public confidence in the performance of real estate agent’s work.

- (2) The Act achieves its purpose by –*
 - (a) Regulating agents, branch managers and salespersons;*

- (b) *Raising the industry standards;*
- (c) *Providing accountability through a disciplinary process that is independent, transparent and effective.*

[13] It is against this statutory background that we must interpret s.172. Mr Xu could have been complained under the 1976 legislation as a licensed salesperson. However, charges could only have been laid against the licensee.

[14] Mr Rea submits that in applying s.7 of the Interpretation Act and considering s.172, the Tribunal must take notice of the fact that no charge could have been laid against Mr Xu under the 1976 Act. He submits that:

“Unless s.172 were entirely clear in its intention that the salesperson could be able to be prosecuted for disciplinary charges when no charge could have been laid at the time the conduct occurred the Tribunal needs to interpret it so as to avoid retrospectivity”.

[15] Mr Rea submitted that s.172 does not over-ride s.7 of the Interpretation Act 1999 and thus the common law presumption against retrospective legislation must apply.

[16] Section 172 says a complaint can be heard by the Tribunal in two situations:

- (a) If the agent could have been complained about; or
- (b) If the agent could have been charged under the 1976 Act.

[17] The interpretation Mr Rea urges upon the Tribunal is that s.172 should be read as follows:

“The Tribunal may hear a charge.... if the licensee... could have been charged under the Act in respect of that conduct”.

[18] We do not accept that interpretation. Our reading of the Act is that the Tribunal may consider any complaint and/or charge provided that the defendant could have been either complained about or charged. This interpretation is in line with both the words (or not and) of the section and the purpose of the Act – (to increase consumer protection and make agents more accountable). This can only be achieved by interpretation of this section to ensure that those who were capable of being complained about under the 1976 legislation are also capable of being dealt with under the 2008 legislation. The presumption against retrospective legislation is not offended by this interpretation as an agent cannot be subject to any penalty that was not able to be imposed upon them under the 1976 Act and they could have been complained about under the 1976 Act.

[19] Further, an interpretation of this section which allows salespersons to avoid serious charges because of their conduct was able to be dealt with under the 1976 Act by complaint, but not by charging them personally is not an interpretation which satisfies the purposes of the Act.

[20] After the conclusion of the hearing and before this decision was issued the High Court delivered a decision in *Kumandan v Real Estate Agents Authority* [2012]

NZHC 3555. This decision was an appeal against a finding of the Tribunal that Mr Kumandan was guilty of misconduct under s 73 of the Real Estate Agents Act 2008. The penalty imposed upon him was that his license be cancelled. The Court determined that in determining the penalty to be applied under the 2008 Act for conduct that occurred prior to the commencement of the 2008 Act the Tribunal must take into account the “good character tag” on penalty set out in the Real Estate Agents Act 1976. Mr Rea for Mr Xu submits that this decision of the High Court has an impact on this case as it reinforces the submission that the Tribunal misinterpreted s 172 of the Real Estate Agents Act by not having proper regard to s 7 Interpretation Act 1999.

[21] The REAA submits that the decision of *Kumandan* simply confirms that s 172 requires consideration of the character test applicable under the Real Estate Agents Act. They submit this is relevant only to the question of penalty. The REAA submitted that the High Court accepted (paragraph 57) that the first two steps identified by the Tribunal in *Dodd* [2011] NZREADT 1 were uncontroversial. The REAA therefore submitted that the decision in *Kumandan* made no difference to the interpretation point as argued by Mr Rea.

[22] The Tribunal have carefully considered the decision in *Kumandan* and does not consider that that decision does assist the Tribunal in the interpretation of the s 172 as urged upon us by Mr Rea. The contention for Mr Rea is that we have to ignore the word or in s 172 in order to avoid s 7 Interpretation Act. We do not accept an interpretation which requires us to ignore the clear words of the statute.

[23] We conclude that as Mr Xu could have been complained about under the 1976 Act and thus this charge falls within s.172.

Issue 2. Was in any event Mr Xu's conduct seriously negligent so as to constitute breach of s.73?

[24] Mr Rea referred the Tribunal to a decision of Justice Tompkins in *Sime v The Real Estate Institute of New Zealand Inc* (HC, Auckland, M73/86, 19 August 1986). This case was frequently cited by the Real Estate Agents Licensing Board as authority for the proposition that a very high threshold needed to be met in order to establish that a salesperson was of such character that his/her certificate of approval ought to be cancelled or suspended (decision page 16). That is not the test set by s.73. Section 73(b) requires the CAC to prove serious negligence. The question of character in the 1976 legislation is not required under s.73. Section 172 makes it clear that the tests in s.72 and/or s.73 are applied if the initial threshold is reached (see above paragraph [8]). The question therefore is whether or not the conduct of Mr Xu is such that it would be seriously incompetent or seriously negligent under s.73(b).

[25] The Tribunal have not had the benefit of cross examination or of hearing the witnesses but only of an agreed summary of facts. From these we see that Mr Yu (the subsequent purchaser) did not make an offer or advise that he wanted to when the first offer was accepted. However, very shortly after the initial agreement was entered into Mr Yu did indicate a further interest and the defendant began

negotiating with Mr Yu shortly after the agreement for sale and purchase from Tauroa to Northcorp was signed. The agency agreement between Mr Yu and Mr Xu was executed on 26th August 2007.

Is this Serious Negligence?

[26] The agreed summary of facts says that the licensee Mr Xu did not advise Northcorp of any interest in the property by Mr Yu or suggest that it was open to go back to any other parties to obtain a higher offer. It also records as set out above that Mr Yu did not express ongoing interest. We do not consider that the failure to advise of any interest or suggest he should go back to the other parties was seriously negligent. Mr Yu had not shown any active interest on the 24th. Northcorp did make an offer on the 1st day the property was listed. The other parties did not. Given the short timeframe (one day) it was not seriously negligent not to try and get other offers. However there was clearly a great deal of interest, as evidenced by Mr Yu's continued interest and new offer less than two days later.

[27] Mr Rea submits that a finding against Mr Xu will have serious repercussions in the industry – what level of interest will be required before an agent must go back to the other interested parties? Floodgates arguments are rarely persuasive. Each case depends on its facts. In this case the property was listed, sold and resold within two days. This timeframe creates the obligation on Mr Xu to ask the vendor about seeking offers from other parties. He could have explained the pros and cons of such an approach. The vendor could have then decided what it wished to do. Mr Xu did not do that.

[28] In circumstances where there was obviously much interest in the property such that an agreement for sale and purchase was entered into on the same day that it was listed made it behoved the agent concerned to at least raise with the vendor that there may be other interested parties.

[29] Our understanding of the facts would have been made easier by having heard from the parties but we find that in the circumstances of this case it was unsatisfactory conduct for Mr Xu not to have at least asked Mr Yu and the other interested parties if they wanted to make an offer and/or checked with the vendors whether they wanted any further checking to be done with other interested parties before accepting an offer. Not to have done so raises the suspicion that an agent was putting their own interests before achieving the best price for the vendors.

[30] Mr Rea submitted that there is no duty on the holder of a general agency to take any positive steps to sell a property. However, the obligation on any agent who is negotiating a sale is the same regardless of whether it is a sole agency or a general agency. The difference between the two as shown in the authorities provided by Mr Rea is that the general agent does not have any positive obligation to market the property.

[31] Having made this finding under s.72, the Tribunal can impose no penalty upon Mr Xu as no penalty was able to be imposed upon a licensed salesperson under the 1976 Act.

[32] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 22nd day of February 2013

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Ms J Robson
Member