

Decision No: [2014] NZREADT 44

Reference No: READT 075/13

**IN THE MATTER OF** s.111 of the Real Estate Agents Act 2008

**BETWEEN** **CHENG BO YUAN**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC20002)**

First Respondent

**AND** **MICHAEL OWERS**

Second Respondent

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport QC - Chairperson  
Ms N Dangen - Member  
Ms C Sandelin - Member

**APPEARANCES**

Mr Yuan in person  
Mr McCoubrey for the First Respondent  
No appearance for the Second Respondent

**HEARD** at Auckland on 9<sup>th</sup> May 2014

***Introduction***

[1] Mr Yuan appeals against both the decision and the penalty decision of the Complaints Assessment Committee (“CAC”). Mr Yuan is a licensed salesperson working in Auckland.

[2] The second respondent Mr Owers complained to the Real Estate Agents Authority (“REAA”) about Mr Yuan’s conduct in October 2012.

[3] Mr Owers is the co-owner of a property at Upland Road, Remuera. He purchased the property on 15 August 2012 from Ming Zhang. Barfoot and Thompson were the selling agents. Settlement took place on 19 September 2012. After purchase the owners advertised the property for rent/lease on Trade Me. On 23 October 2012 the second respondent was told by a prospective tenant that the property was also listed on Trade Me for sale for \$990,000. Mr Owers was astounded to hear this news and immediately looked on Trade Me. He found the property had been listed by Mr Yuan,

then working for Property Asia Realty Limited. He immediately sent an email through the Trade Me system telling Mr Yuan as follows:

*“This property is not for sale. I am the owner of this property and I want this delisted immediately. I have advised my lawyer... and he will be in contact with you.”*

[4] This email was sent by Mr Owers on 23 October at 11.00 am. Mr Owers also complained to Trade Me. He also spoke to his lawyer and an attempt was made to speak to Mr Yuan. Mr Yuan apparently told the person who contacted him that the property was owned by a Chinese vendor. He did not remove the property from Trade Me but Trade Me themselves determined that they would remove the property from the listing and did so. This was done on 23 October at 9.00 pm.

[5] Mr Yuan says that Property Asia Limited had a general listing with Mr Zhang which had not been terminated. He provided a copy to the REAA of this listing authority which showed that the property had been listed with Property Asia Limited in May 2011 by Mr Zhang.

[6] Mr Zhang subsequently listed the property on 31 May 2012 with Barfoot and Thompson and Harcourts in a joint sole agency. Barfoots sold the property in August 2012.

[7] Some two months after the sale to Mr Owers had been concluded Mr Yuan decided to advertise the property on Trade Me. He says that the office tried to contact Mr Zhang but they could not reach him. However Mr Yuan listed the property on Trade Me. Mr Yuan did not search the title.

[8] The CAC found that Mr Yuan had been guilty of unsatisfactory conduct. The CAC concluded that when he re-advertised the property for sale on 11 October 2012 he did not have an agency agreement with the owners of the property. Rule 9.15 of the Professional Conduct and Client Care Rules 2009 is clear that without an agency agreement the agent cannot market the property or advertise the property up on any websites.

[9] The CAC noted the fact that Mr Yuan did not know that the property had been sold by the vendor with whom he had a previous listing agreement. However they concluded that this did not absolve him from responsibility to check to see if the agency still had a listing. They found that neither Barfoots nor the previous owner had an obligation to advise the licensee that the agreement had been terminated and the property sold.

[10] Mr Yuan was fined the sum of \$3,000 by the CAC. The CAC undertook an analysis of recent decisions on similar cases where a fine had been imposed. After this analysis they reached a view that \$3,000 was the appropriate penalty.

### **The Appeal**

[11] Mr Yuan submitted to the Tribunal that the fine was excessive and that no finding of unsatisfactory conduct should have been made against him. He submitted that the owner had not told the agency that the agreement had been terminated nor that the

property had been sold. He submitted further that another agent in Property Asia Limited was in fact the listing agent and that it was her responsibility to check whether the property was still available for sale. Finally he submitted that the vendors had not suffered any damage and had not lost anything.

[12] He referred the Tribunal to a previous decision of *Summit Real Estate Limited v Real Estate Agents Authority* [2011] NZREADT 38.

[13] Mr Yuan submitted to the Tribunal that in that case the agent did not have any agency agreement and received a \$2,200 fine. From this he deduced that his fine was excessive.

[14] Under cross examination Mr Yuan acknowledged the agency agreement had been signed some 15 months before he advertised the property. However when asked whether it was his duty to make sure that there was a listing agreement in place he said it was the other agent who listed the property and not his responsibility. He did accept that what he did was “*not good enough*” and said he now would check with the vendor.

[15] The Tribunal has considered Mr Yuan’s appeal. The Tribunal do not allow the appeal. The Tribunal confirms the decision of the CAC.

### **Reasons**

[16] Despite Mr Yuan’s attempts to pass the responsibility onto another agent in his agency, he made no effort to check whether the property was still on the market despite it being some 15 months after it had been listed with his company as a general agency. He did not check the title and when he (or the agency) received no response to his call to the owner he did not persevere. Instead he listed it on Trade Me. As the CAC noted, it was his responsibility to check whether or not the property was still available for sale and owned by Mr Zhang.

[17] The CAC were correct when they concluded that he did not have an agency agreement with the vendor of the property when he placed it on the website. As best we can ascertain Mr Yuan did not promptly remove the property from the website when Mr Owers challenged him. It was not until Trade Me removed the advertisement that it came down from the website. It is a fundamental obligation for any agent who has an outdated listing authority to check that he or she still does have a listing authority from the vendor or if the property is in fact still owned by the vendor. When challenged Mr Yuan did not immediately respond to Mr Owers. He should have done so.

[18] We confirm the CAC’s decision that Mr Yuan was in breach of Rule 9.11.

[19] We have considered the decision in *Summit Real Estate Limited v Real Estate Agents Authority* [2011] NZREADT 38. In that case the issue for the Tribunal was whether the fine imposed by the CAC was excessive. The agent had been fined \$2,200. This dispute revolved around the appellant licensee having inserted in a clause in the management contract with the complainant the right to receive commission if the property was sold by the owner to a tenant or associated person. The complainant says that this was not brought to his attention when he signed the tenancy management agreement and it should have been. The property was sold to a tenant and no commission was paid despite the clause in the Residential Management

Authority form which entitled Summit Real Estate to charge 3% of the purchase price plus GST.

[20] The licensee was fined following the CAC's decision to find him guilty of unsatisfactory conduct.

[21] The Tribunal does not consider that this case has the same issues or facts as Mr Yuan's case. However, it is an indication of the level of fine that would be imposed for a finding of unsatisfactory conduct where the agent has erred but where the offence is not at the most serious end of culpability.

[22] The Tribunal can find no error in the decision of the CAC to impose a \$3,000 on Mr Yuan for this significant breach of his obligations. We still retain some residual concern as to whether or not Mr Yuan understands that regardless of whether one is a selling or listing agent the obligation remains to ensure that there is an agency agreement in place. Mr Yuan's comments alternated between seeming to understand the error and considering that the obligation to check rests with the listing agent. We hope that this decision will reinforce this obligation for Mr Yuan.

[23] The Tribunal accordingly upholds the decision of the CAC on culpability and penalty.

[24] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

**DATED** at AUCKLAND this 9<sup>th</sup> day of June 2014

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Ms K Davenport QC  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member