BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 77

READT 003/14

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**THE REAL ESTATE AGENTS AUTHORITY (PER CAC 20004)**
	Prosecutor
AND	**ZHONG (SAM) LI**
	First defendant
AND	**JANE WANG**
	Second defendant
AND	**CHRISTOPHER SWANN**
	Third defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

SUBSTANTIVE CASE HEARD at AUCKLAND on 10 and 11 April 2014 (with subsequent sequence of written submissions)

DATE OF SUBSTANTIVE DECISION 1 September 2014 [2014] NZREADT 67

DATE OF THIS DECISION 30 September 2014

COUNSEL

Mr M J Hodge for the prosecutor/Authority
Mr T D Rea for the three defendants

DECISION OF THE TRIBUNAL ON APPLICATION FOR RECALL OF DECISION CONCERNING SECOND DEFENDANT

Introduction

[1] On 1 September 2014 we issued our decision with respect to charges laid against Zhong Li, Jane Wang and Christopher Swann by the Complaints Assessment Committee 20004. We found that Messrs Li and Swann had engaged in unsatisfactory conduct, and that misconduct was proved against Ms Wang.

[2] On 1 September 2014 counsel for the defendants filed a memorandum seeking that judgment against the second defendant be recalled on two grounds namely:

[a] That at paragraph [170] of the judgment reference is made to Ms Wang wilfully contravening the Act and its Regulations, when the amended charge against her was one of serious incompetence or negligence.

[b] That the reasoning in the recent High Court decision *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077 means that our disciplinary finding against Ms Wang should be unsatisfactory conduct only.

Stance of the Prosecution

[3] The prosecution's position on each of these grounds is as follows:

[a] It does not oppose the recall of the judgment to amend paragraph [170].

[b] It opposes recall for the judgment on the basis of the recently released High Court decision in *Jhagroo*.

[4] In his written submissions of 5 September 2014, Mr Hodge advises that the prosecution does not oppose our paragraph [170] being amended to remove the words *"and she has wilfully contravened the Act and its Regulations"* from the end of the last sentence of that paragraph. This could be done on the basis that the prosecution withdrew the charge based on a wilful or reckless contravention of the Act and its regulations, as our judgment records. Mr Hodge puts it that our reasoning and analysis is clearly predicated on the issue of serious negligence, so no substantive amendments are required to the judgment. However, it is also put by him that if we consider that, read in isolation, the words referred to above might give the impression of a proved breach of s.73(c) of the Act, then there is no opposition from the prosecution to removing those words.

[5] The prosecution also submits that there is nothing in the High Court's recent decision in *Jhagroo* which justifies a recall of our decision and that, to the contrary, the *Jhagroo* decision emphasises the deference and respect to be paid to our assessment of what constitutes serious negligence, as opposed to mere negligence, which (he puts it) lends support to our decision in Ms Wang's case.

[6] Mr Hodge also puts it that the defendants are seeking to have us undertake our assessment of the gravity of Ms Wang's conduct afresh; and that is not a proper use of the recall procedure.

[7] Mr Hodge adds that our assessment of Ms Wang's culpability is inherently a factual assessment in the sense that it is a judgment involving the application of the facts of the case to the relevant legal test. There is no suggestion that we have applied the wrong legal test. He remarks that the position would be different if the High Court had set out a test for serious negligence which we had not applied here; but that is not the case. Mr Hodge notes that the issue is our assessment of the gravity of Ms Wang's negligence, and that is not the kind of assessment to be the basis for recall of our judgment; nor is it justified as a result of the *Jhagroo* decision. We agree with those views of Mr Hodge.

Our Views

[8] We have, of course, considered the submissions from Mr Rea herein dated 1 September 2014. We accept that in formulating our decision of 1 September 2014 we did not have the benefit of the extremely helpful reasoning of Justice Thomas in *Jhagroo* which was issued by the High Court at Auckland at 4.30 pm on Friday 29 August 2014, but we do not think that anything in *Jhagroo* could have led us to alter our reasoning in the present case. We note that our Chairperson received and perused Justice Thomas' decision late Friday afternoon 29 August 2014.

[9] We consider that there is very limited benefit in contrasting such factually different cases as the present and that of *Jhagroo*. We do not accept the submission for the defendants that it is impossible to reconcile the findings in *Jhagroo* with our finding in the case of Ms Wang. We consider we have gone to quite some effort to comprehensively provide reasons for our decisions regarding the present defendants.

[10] Also, we take the view that there is no need to correct our paragraph [170] as referred to above; even though the words *"and she has wilfully contravened the Act and its Regulations"* are beside the point in terms of the final form of the charge against her, and would better have been omitted. Our reasoning for our finding against Ms Wang is clearly based on the issue of serious negligence as charged.

[11] We find no convincing basis to allow Mr Rea's application on behalf of Ms Wang for recall of our said decision herein of 1 September 2014, and that application is hereby dismissed.

[12] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____

Judge P F Barber
Chairperson

_____

Ms N Dangen
Member

_____

Ms C Sandelin
Member