

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 23

READT 17/14

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

**BETWEEN** **COMPLAINTS ASSESSMENT  
COMMITTEE (per CAC 20005)**

Prosecutor

**AND** **YUQIN (JACKIE) CUI (licensed  
salesperson)**

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Mr G Denley - Member

**HEARD** at AUCKLAND on 6, 7 and 8 October 2014

**DATE OF SUBSTANTIVE DECISION HEREIN** 7 January 2015 ([2015]  
NZREADT 1)

**DATE OF THIS “ON THE PAPERS” DECISION ON PENALTY** 10 April 2015

**COUNSEL**

Mr L J Clancy counsel for the prosecution  
Mr R J Latton and Ms K M Kenealy, counsel for the defendant

**DECISION OF THE TRIBUNAL ON PENALTY**

***Introduction***

[1] By a 7 January 2015 decision, *CAC v Cui* [2015] NZREADT 1, we found Ms Cui guilty of misconduct having wilfully or recklessly breached the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in acting on the sale of a property subject to a Council Notice To Fix relating to illegal building works.

[2] More particularly, we found:

[a] Ms Cui should have raised with the purchaser, Mr Xu, (at the time that she facilitated offers for the property) that the property was subject to the

Notice To Fix, which required significant remedial works that had not been completed within the specified time.

- [b] That, had the Notice To Fix and related quotations been brought properly to the attention of the purchasers, the evidence suggests the purchasers would not have made further offers for the property.
- [c] That is “*not good enough*” for a real estate salesperson to fail to have particulars of auction sale available to prospective purchasers within a sufficient time before the auction for them to absorb the terms of sale and to obtain advice prior to auction.
- [d] That it was not acceptable for Ms Cui not to have read important correspondence from her vendor client regarding the property or, in the circumstances, to have failed to look at the Council property file before this was sent out to purchasers.
- [e] That “*alarm bells should have rung*” in Ms Cui’s head from the start of her sale instructions and she should have ensured that the issues with the property were fully and clearly highlighted to the purchasers in simple language.

[3] We preferred to view Ms Cui’s conduct as reckless or seriously negligent rather than wilful; and we accepted that some of the failures may have occurred due to the busyness of her practice.

[4] On penalty, we indicated our initial view as follows:

*“[157] ... at present, we do not contemplate interfering in any way with the defendant’s license but feel that she should be censured, fined about \$6,000 and, as well, ordered to contribute about \$3,000 towards costs.”*

### ***The Submissions for the Authority on Penalty***

[5] Mr Clancy observed that it is well established that decisions of professional disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence; and, while this may result in orders having a punitive effect, this is not their purpose – refer *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[6] The Authority respectfully agrees with us that the licensee’s misconduct in this case can appropriately be marked by a significant financial penalty rather than a period of suspension.

[7] Mr Clancy noted that the findings against Ms Cui relate to conduct in late 2012 when the Real Estate Agents Act 2008 had been in force for nearly three years. The Act introduced financial penalties for unsatisfactory conduct and misconduct going significantly beyond the orders available where similar conduct was established prior to November 2009 under the Real Estate Agents Act 1976.

[8] The increased financial penalties introduced by the 2008 Act are a key part of the new disciplinary process, through which that Act seeks to achieve its purpose: i.e. to promote and protect the interests of consumers in respect of transactions that

relate to real estate and to promote public confidence in the performance of real estate agency work – refer s.3(l) of the 2008 Act.

[9] In *CAC v Spencer* [2013] NZREADT 55, at [15]-[16], we agreed in principle that penalties imposed should promote accountability and include a deterrent element, with financial penalties set at a level to provide an effective deterrent taking into account modern commission rates.

[10] Mr Clancy respectfully submits that our indicated fine of \$6,000, set against the maximum of \$15,000, is appropriate, subject to his submissions on compensation which we cover below. He submitted that, if we conclude that an order for compensation should not be made, then an increased fine in the range \$10,000 to \$15,000 would be warranted to reflect the principle discussed in *Spencer*.

### *Compensation*

[11] Given our finding that the purchasers would not have made further offers for the property had the Notice To Fix been fully and carefully brought to their attention, Mr Clancy submits that we should also make an order for compensation under s.110(2)(g) of the 2008 Act which reads:

***“110 Determination of charges and orders that may be made if charge proved ...***

*(2) The orders are as follows:*

*...*

*(g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.”*

[12] Mr Clancy notes that the purchaser/complainants have provided information in support of their claim that they have suffered considerable loss as a result of having purchased the property. He advises that the Authority accepts that we are unlikely to make an order for the full amount claimed by those purchasers (which includes, for example, a claim for \$15,000 for mental injury), but submits that a limited order for compensation would be justified.

[13] The documents provided by the purchasers referred to their having incurred:

- [a] Approximately \$7,900 in miscellaneous building-related costs;
- [b] \$1,225.65 in Auckland Council fees;
- [c] \$862.50 in legal fees;
- [d] \$273.86 interest on the late paid deposit.

[14] It is put for the Authority that we may feel that an order for compensation of \$10,000, while much less than the amount sought by the complainants, would recognise the expenses listed above and meet the consumer protection purpose of the Act.

[15] Accordingly, the Authority respectfully invites us to impose penalty orders as follows: censure; a fine of \$6,000 (or \$10,000-\$15,000 if compensation is not ordered); and compensation to the complainant purchasers of \$10,000.

### ***The Submissions for the Defendant on Penalty***

[16] The defendant respectfully accepts our 7 January 2015 decision and our indication about what we then regarded as an appropriate penalty.

[17] However, the defendant is concerned that the informant Authority submits that we also order compensation at \$10,000 under s.110(2)(g) of the Act; and, indeed, that the informant goes on to suggest that if we do not order compensation, then the level of fine should be increased to “\$10,000 to \$15,000”. Counsel for the defendant opposes both that any compensation is appropriate or that an increased level of fine should be ordered.

[18] Counsel for the defendant notes that the informant agrees that a fine of \$6,000 is appropriate unless we decline an order for compensation in which case Mr Clancy puts it that an increased fine would be warranted to reflect the principle discussed in *Spencer*. Counsel for the defendant observed that *Spencer* states that penalties imposed should promote accountability and provide an effective deterrent. However, counsel submits that there is no basis for making a fine dependent on the amount of compensatory damages (if any); and that compensation is not a penalty but is an order to compensate for actual loss suffered.

[19] In short, counsel for the defendant submit that fines and any compensatory damages must be considered independently of each other.

[20] We consider that the detail of submissions from counsel for the defendant under the head “*compensatory damages*” contain much merit so that we set them out as follows:

#### *“Compensatory Damages*

- 2.4 *An order for compensatory damages is neither appropriate nor justified. ...*
- 2.5 *The complainants were briefly questioned at the hearing as to how much money they had spent remediating issues which the Auckland City Council had identified in its Notice to Fix. Neither Annie Cui nor George Xu (the complainants) gave pointed or substantiated evidence in answer.*
- 2.6 *Some 50 pages of receipts and payment sheets have now been served by the informant (in support of its submission on penalty). It is simply too late to adduce evidence on remedial works done at the property. Ms Cui has had no opportunity to assess the veracity of the evidence, what work the alleged costs relate to, and the effect on the value of the property.*
- 2.7 *It is quite possible that the work done was work unrelated to the issues between the parties. Equally, the work done may have increased the value of the property. There is no evidence on any of this.*

- 2.8 *In particular, the complainants would only have suffered a loss if there was a disparity between the amount paid for the property, and its actual value. There is no evidence at all on that.*
- 2.9 *Even if the Tribunal were to admit the evidence on compensatory damages (which it should not), a large portion of the evidence now submitted is unreliable. For example, the works described on pages 56 and 57 are listed in Chinese characters and not in English. Ms Xu in her email 8 February 2015 says builders were paid in cash amounts of around \$10,000 – but there is no other evidence to support this.*
- 2.10 *The works concerned are maintenance (page 3, plumbing repairs (page 4), spending on cosmetic improvements such as purchasing brackets, sink faucets, ceiling hooks and washer taps (pages 22-29) lamps lightshades and knobs (page 22). Other work included installing a door and changing the lock (page 30). There is no way of telling if this is work caused by Ms Cui's conduct.*
- 2.11 *It is not disputed that all prospective purchasers, including Annie Cui and George Xu (the complainants), were aware that the property contained illegal works which needed to be fixed. To a large extent, this spending – a certificate of acceptance (page 21 and page 45) and a Council fee (page 45) for example – were within the complainants' anticipated costs for remedial works. The complainants negotiated a purchase price with such costs in mind."*

[21] In summary, counsel for the defendant respectfully invite us to impose penalty orders as we already had been thinking of, namely, a fine of \$6,000 and an order that the defendant pay a contribution towards the costs of the informant at \$3,000.

### **Discussion and Outcome**

[22] We do not approve any link between compensation and quantum of fine. In our substantive decision we covered our views about the conduct of the licensee and why we found her guilty of misconduct.

[23] We consider that the submissions of counsel for the licensee in opposition to any award of compensation, and we have set those out above, are valid. It has not been demonstrated to us that the purchaser/complainants deserve any compensation from the licensee in this forum. That onus is on the complainants and the standard of proof is the balance of probabilities.

[24] Licensees must maintain professional standards. The aspects of deterrence and denunciation must be taken into account. It is settled law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.

[25] In terms of our assessment of the facts of this case and general sentencing factors, we fine the defendant \$6,000, censure her, and order that she contribute \$3,500 towards the costs incurred by the Authority in the totality of these

proceedings. The fine and costs are to be paid to the Registrar of the Authority at Wellington within 20 working days from the date of this decision.

[26] 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.

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Judge P F Barber  
Chairperson

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Mr J Gaukrodger  
Member

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Mr G Denley  
Member