

[2015] NZREADT 48

READT 100/14

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

**BETWEEN** **COMPLAINTS ASSESSMENT COMMITTEE (CAC 20009)**

Prosecutor

**AND** **YUDING (VICTOR) LI**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport QC - Chairperson  
Mr G Denley - Member  
Mr J Gaukrodger - Member

**HEARD** at AUCKLAND on 9 June 2015

**DATE OF DECISION:** 24 June 2015

**APPEARANCES**

Mr L Clancy for the Complaints Assessment Committee

Mr T Rea for the defendant

***Background***

Following a complaint by Geraldine James, Complaints Assessment Committee 20009 (Committee) charged Yuding (Victor) Li (Defendant) with two charges of misconduct under s 73(c) of the Real Estate Agents Act 2008 (Act), and one charge of unsatisfactory conduct.

**Charge 1**

Misconduct under s 73(c) of the Real Estate Agents Act 2008 in this his conduct constitutes a reckless breach of ss 134 and 136.

Particulars

- (a) The Defendant carried out agency work and charged commission in respect of the purchase of 9 William Souter Street, Forrest Hill, between November 2012 and January 2013, and failed to disclose that a person related to him, namely

Ms Li Li, would acquire the land, or a beneficial interest in the land, to which the transaction related. He did not obtain the consent of the client or provide the client with a valuation.

- (b) The Defendant also failed to disclose that a person related to him, namely Ms Li Li, would benefit financially from the transaction when he assisted her in selling the property at 9 William Souter Street in June 2013.

## **Charge 2**

The Committee further charges the Defendant with misconduct, under s 73(a) of the Act, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

### Particulars

The Defendant provided false information in response to the complaint made by Ms James in:

- (a) A letter from Barfoot & Thompson Ltd to Ms James dated 8 July 2013.
- (b) A signed statement dated 23 October 2013.
- (c) The formal response of Barfoot & Thompson Ltd to the Real Estate Agents Authority dated 24 October 2013.
- (d) An email from Victor Li to Wayne Radovich dated 18 November 2013.
- (e) An interview with Real Estate Agents Authority Investigator on 27 November 2013.
- (f) A letter from Mr Tony Carter, branch manager, Barfoot & Thompson Ltd, Torbay Branch, dated 28 November 2013.
- (g) Instructing Ms Li Li to lie about her relationship to him if asked during the course of the investigation.

## **Charge 3**

The Committee further charges the Defendant with unsatisfactory conduct under s 72(a) of the Act, in that his conduct fell short of the standard that a reasonable member of the public would be entitled to expect from a reasonably competent licensee.

### Particulars

The Defendant carried out agency work and charged commission in respect of the following transactions, and failed to disclose that a person related to him, namely Ms Li Li, would acquire the land, or a beneficial interest in the land, to which the

transaction related. In both cases he did not obtain the consent of the client to provide the client with a valuation.

- (a) The purchase of 1/40 Seaview Road, Glenfield, in April 2009;
- (b) The purchase of 11 Anne Road, Hillcrest, between May and August 2012.

### ***Introduction***

[1] Mr Li is a real estate agent who practises in Auckland. He faces three charges laid by the Complaints Assessment Committee. In the broadest terms the conduct relates to transactions where he had failed to disclose that his niece, Ms Li Li, would acquire the properties. In the relevant sales he did not obtain the consent of the vendor or provide the client with a valuation.

[2] Mr Li pleaded guilty to the charge at the first opportunity. Counsel agree that he and his lawyer cooperated with the Real Estate Agents Authority over the drafting of the charges and an agreed Statement of Facts.

[3] Mr Li's guilty plea is based on the agreed Statement of Facts which is as follows:

- 1 The defendant, Yuding (Victor) Li ("Mr Li"), is a salesperson licensed under the Real Estate Agents Act 2008. Mr Li initially qualified as a salesperson in 2006 under the Real Estate Agents Act 1976.
- 2 At all times that are material to these charges, Mr Li was engaged as a salesperson working for Barfoot & Thompson Limited at its branch office at Northcote, Auckland.

#### *1/40 Seaview Road, Glenfield – Purchase of Property by Ms Li*

- 3 During early 2009, the property at 1/40 Seaview Road, Glenfield, was listed for sale with Barfoot & Thompson Limited.
- 4 The property was purchased by Ms Li ("Ms Li") who became registered on the title of the property on 22 April 2009, prior to the Real Estate Agents Act 2008 coming into force on 17 November 2009.
- 5 Ms Li is the niece of Mr Li, and Mr Li introduced Ms Li to the property and received a share of commission on the sale.
- 6 Mr Li did not disclose to the vendors the fact that Ms Li was related to him.
- 7 This transaction came to the attention of the Real Estate Agents Authority as a result of a response by Mr Li to questioning by the Authority's investigator regarding previous transactions involving Mr Li's assistance of Ms Li in sales or purchases of properties by Ms Li.

#### *11 Anne Road, Hillcrest – Purchase of Property by Ms Li*

- 8 During 2012, after the Real Estate Agents Act 2008 came into force, the property at 11 Anne Road, Hillcrest, was listed for sale with Barfoot & Thompson Limited.
- 9 The property was purchased by Ms Li who became registered on the title of the property on 20 August 2012.
- 10 Mr Li introduced Ms Li to the property and received a share of commission on the sale.
- 11 Mr Li did not disclose to the vendors the fact that Ms Li was related to him, nor did he comply with the requirements of section 134 of the Real Estate Agents Act 2008 in respect of this transaction.
- 12 This transaction came to the attention of the Real Estate Agents Authority as a result of a response by Mr Li to questioning by the Authority's Investigator regarding previous transactions involving Mr Li's assistance of Ms Li in sales or purchases of properties by Ms Li.

*9 William Souter Street, Forrest Hill – Purchase of Property by Ms Li*

- 13 During 2012, after the Real Estate Agents Act 2008 came into force, the property at 9 William Souter Street, Hillcrest, was listed for sale with Barfoot & Thompson Limited. Mr Li was not the listing salesperson, nor was he involved in marketing of the property, other than to show the property to Ms Li.
- 14 The property was purchased by Ms Li at auction on 12 November 2012 for \$756,000 and Ms Li became registered on the title of the property on 31 January 2013.
- 15 Mr Li received a share of commission on the sale on the basis of his introduction of Ms Li to the property.
- 16 Mr Li did not disclose to the vendors the fact that Ms Li was related to him, nor did he comply with the requirements of section 134 of the Real Estate Agents Act 2008 in respect of this transaction.
- 17 This transaction came to the attention of the Real Estate Agents Authority as a result of a complaint by the vendor, Geraldine James.

*9 William Souter Street, Forrest Hill – Purchase of Property by Ms Li*

- 18 On 3 May 2013, resource consent was obtained by Ms Li, allowing the property to be subdivided.
- 19 On 21 May 2013, Ms Li listed the property for sale with Barfoot & Thompson, and Mr Li was the listing salesperson.

- 20 On 20 June 2013, the property sold at auction for \$980,000 to Jie Gao.
- 21 Mr Li did not disclose to the purchaser that Ms Li was related to him, nor did he comply with the requirements of section 136 of the Real Estate Agents Act 2008 in respect of this transaction.

***False/Misleading Responses***

- 22 Ms James raised several concerns with Barfoot & Thompson, including that she thought the purchaser from her of the property at 9 William Souter Street was related to Mr Li.
- 23 Mr Li initially advised, through Barfoot & Thompson, that while the purchaser of the property, Ms Li, had the same name as him, she was not related to him in any way and his only association with her was in a business capacity.
- 24 On 21 August 2013, the Real Estate Agents Authority received a complaint from Ms James.
- 25 In response to the complaint, Mr Li advanced several other accounts of his relationship to Ms Li, including that:
- (a) Ms Li was his cousin's daughter (Mr Li's father's, brother's, son's daughter) / his father's brother's grandchild, and he suggested that he could probably provide proof by way of a certificate;
  - (b) Ms Li had worked as his sales assistant for about 6 months;
  - (c) Ms Li was his cousin; and
  - (d) Ms Li was a customer, having purchased two properties from him in the past.
- 26 Mr Li also directed Ms Li to lie about their relationship if asked, and to inform the REAA investigator that they were second cousins. Ms Li complied with Mr Li's request when interviewed by the REAA investigator.
- 27 Mr Li later admitted that Ms Li is his niece in an email to the REAA investigator and again when he was subsequently interviewed, during which he also voluntarily provided to the investigator information regarding the prior transactions that were not the subject of the complaint, referred to above at paragraphs 3 to 12 inclusive.

[4] To this agreed Statement of Facts should be added that Mr Li finally disclosed that Ms Li Li was his niece on about 2 December 2013.

***Discussion***

[5] Sections 134 and 136 of the Real Estate Agents Act 2008 are designed to ensure that if anyone related to a salesperson wishes to purchase property that the vendor can have confidence that the offer that they are making is fair and at market value. For this reason s 136 requires both disclosure of the relationship and the obtaining of a valuation. Mr Li undertook neither of these steps with respect to the property that his niece purchased at 9 William Souter Street, Forrest Hill, Auckland and with respect to the properties at 1/40 Seaview Road, Glenfield in April 2009 and 11 Anne Road, Hillcrest between May and August 2012.

[6] Mr Li's failures with respect to disclosure of his relationship with Ms Li Li in the purchase of the properties at Seaview Road and Anne Road are charged at the level of unsatisfactory conduct as the Real Estate Agents Authority was unaware of breach of the Rules. Mr Li voluntarily disclosed that he had not made disclosure under s 136 in respect to the purchase of these two properties. Further Seaview Road was acquired prior to the Real Estate Agents Act 2008 coming into force.

[7] However undeniably the most worrying issue is the provision of false information to the Real Estate Agents Authority. As the agreed Statement of Facts sets out Mr Li lied on five separate occasions about his relationship with Ms Li Li. Two of these lies were in signed statements from Mr Li and three from letters sent from Barfoot & Thompson on Mr Li's behalf. Ms Li Li herself, at her uncle's instigation, lied to the investigator about their relationship. The Tribunal expresses its strongest disapproval for this conduct.

### ***Penalty***

[8] The Tribunal now considers what penalty must be imposed upon Mr Li for this conduct.

### Principles of Sentencing

1. A penalty must fulfil the following functions. They are:

11.1 Protecting the public

11.2 Maintenance of professional standards

11.3 Punishment

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*<sup>1</sup> and Lang J in *Patel v Complaints Assessment Committee*<sup>2</sup>.

<sup>1</sup> (1960) 104 CLR 186 at 201-202

<sup>2</sup> HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

11.4 Where appropriate, rehabilitation of the agent must be considered – see B v B<sup>3</sup>.

[9] The facts illustrate such a serious breach of the obligations of an agent that suspension or cancellation of Mr Li's licence is an appropriate penalty. Counsel for Mr Li recognised this.

### **Suspension or Cancellation?**

2. The Courts have provided some guidance to the Tribunal in other professional regulatory bodies. In Patel v Dentists Disciplinary Tribunal Randerson J stressed that in imposing a sentence the Tribunal had to consider the "*alternatives available to it short of removal and to explain why lesser options have not been adopted in the circumstances of the case*"<sup>4</sup>.
3. In A v. The Professional Conduct Committee<sup>5</sup> the Court said the following about suspension from practice:
  1. *The primary purpose of cancelling or suspending registration is to protect the public, but that inevitably imports some punitive element.*
  2. *Secondly, to cancel is more punitive than to suspend and the choice between the two turns on what is proportionate.*
  3. *Thirdly, to suspend implies a conclusion that cancellation would have been disproportionate.*
  4. *Fourthly, suspension is most apt where there is "some condition affecting the practitioner's fitness to practice which may or may not be amenable to cure";*
  5. *Fifthly, and perhaps only implicitly, suspension ought not to be imposed simply to punish".*

### **Penalty decisions under Lawyers and Conveyancers Act 2006**

4. In Daniels v Complaints Committee No 2<sup>6</sup> the underlying purpose of an order suspending a practitioner has been described by the Court in the following terms:

*[24] A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that*

<sup>3</sup> HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093

<sup>4</sup> at para 30 from Patel v Dentists Disciplinary Tribunal [HC Auckland AP 77/02; 8/10/02 Randerson J]

<sup>5</sup> HC Auckland, CIV-2008-404-2927; Keane J

<sup>6</sup> HC Wellington [2011] 3 NZLR 850

*proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.*

*[25] ...The consideration of whether to suspend or not requires wider consideration of all the circumstances. The real issue is whether this order for suspension was an appropriate and necessary response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also to the other purposes of suspension."*

5. Similarly:

*[28] ...The starting point is fixed according to the gravity of the misconduct and the culpability of the practitioner for the particular breach of standards. Thereafter, a balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner."*

### **Suspension or Cancellation**

[10] Both parties agree that the Tribunal would be considering whether or not to suspend Mr Li's licence or to cancel registration of his licence.

### ***Submissions for Counsel***

[11] Counsel for the Real Estate Agents Authority urges the Tribunal to recognise the serious nature of the charges and to cancel Mr Li's registration. Mr Clancy referred to the Tribunal's decision in CAC v Adams [2012] NZREADT 5. He said that this case was significantly more serious than that in Adams. Ms Adams, (the listing agent), did not disclose to the vendors that she was one of the purchasers. However she admitted the charge. Both the vendor and the purchaser supported her. Her non-disclosure had not caused any loss. She had her licence suspended for six months and she was fined \$10,000 and costs.

[12] In Hart v the Auckland Standards Committee 1 and New Zealand Law Society [2013] NZHC 83 the High Court considered whether or not Mr Hart's transgressions were sufficient enough to suspend or cancel his registration. He had failed to provide the Standards Committee with his files and had not responded substantively to the charges against him. The High Court considered he had no justifiable reason to withhold his files for nearly three years and found this failure had prevented the Standards Committee from advancing its investigations into him, which was a serious form of misconduct and the Court said at [208]:

*"Any deliberate refusal by a practitioner to comply with a lawful requirement made by a Standards Committee tasked with investigating a complaint must be regarded as serious. It indicates a lack of candour that may be significant*



*when considering the fitness of a practitioner to remain in the legal profession.”*

[13] Mr Clancy also made reference to *Bolton v the Law Society* [1994] 2 ALL ER 486 where the Court of Appeal said:

“Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitor’s Disciplinary Tribunal. Lapses in the required high standard may of course take different forms and be of varying degrees. The most serious involves proven dishonesty ... In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor ordered that he struck off the roll of solicitors.”

[14] Mr Clancy concluded by submitting that Mr Li’s conduct demonstrated significant dishonesty and that his registration should be cancelled. He also submitted he should pay a significant fine.

### ***Mr Rea’s Submissions***

[15] Mr Rea submitted that Mr Li had pleaded guilty at an early stage and had actively worked with the Authority to cooperate to ensure that his guilty plea was known. Further he cooperated in the drafting of charges.

[16] He noted in mitigation that the purchase of 1/40 Seaview Road, Glenfield was prior to the coming into force of the Real Estate Agents Act 2008 and Mr Li was not required to disclose the relationship under ss 63 and 64 of the Real Estate Agents Act 1976. However Mr Li acknowledged that it was unsatisfactory conduct not to disclose the relationship. Mr Rea submitted he should receive credit for this. He noted that Mr Li had voluntarily advised of the purchase at 11 Anne Road, Hillcrest: again purchased by Ms Li which did involve a breach of s 134 but again this was voluntarily disclosed by Mr Li to the Committee’s investigator.

[17] Mr Rea submitted that the following were mitigating factors:

- (i) Conduct in relation to transactions was not wilful, ie it was not intentional as Mr Li was unaware that the disclosure that Ms Li Li was his niece was required<sup>7</sup> by the Real Estate Agents Act 2008.
- (ii) There was no personal financial gain to Mr Li.
- (iii) There was no evidence of loss to vendors or purchasers.
- (iv) Mr Li’s misleading of the investigator was due to feelings of shame and embarrassment as he did not want to show that his level of knowledge of

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<sup>7</sup> However Mr Clancy did draw to the Tribunal’s attention the letter sent by Mr Li on 23 October 2013 in which he said “my relationship with Ms Li Li is straightforward, she is my cousin’s daughter so she is even further removed from the definition of related person under s 137 of the REAA 2008”, thus illustrating that he had turned his mind to s 137.

his obligations under the Act had been lacking. He had been involved in another case *Wu v Real Estate Agents Authority* [2013] NZREADT on 10 June and he was embarrassed to admit this error to Barfoot and Thompson so soon after the *Wu* case.

- (v) He had shown a high level of cooperation.
- (vi) He had a previously unblemished record and he has provided character references.
- (vii) He expresses remorse for his actions.
- (viii) The personal implications will be serious as he is the sole income earner in his household with three dependent children aged 16, 12 and 10 years.

[18] Mr Rea then suggested that the Tribunal might like to consider whether or not it should adjourn the penalty hearing and decide whether Mr Li could undertake community service as something that was helpful and constructive as an alternative to being deprived of his livelihood and his ability to support his family. Mr Rea's suggestion was that it would be far better to be able to utilise some form of community service, even though this was not provided for in the penalty provisions of the Act. He submitted:

“If the Tribunal were minded to try and structure a more flexible outcome than the blunt instrument available of maybe ordering suspension or cancellation plus a fine it would be open to the Tribunal to issue a minute setting out matters that it considers could appropriately be undertaken in order to earn a reduction in penalty and to adjourn the proceeding for a time to allow appropriate steps to be taken.”

[19] He concluded this by submitting that clearly the REAA did not consider that Mr Li was a danger to the public because it did not seek interim suspension of his licence.

### ***Discussion on alternative penalty***

[20] The Tribunal has available to it the penalties under s 110 which include the penalties available under s 93. The available penalties which include compensation to those affected by the agent's actions, payment of a fine and further education. It does not include any provision for community service.

[21] As has been said at paragraph [10] the purpose of a penalty under the Real Estate Agents Act is to maintain public confidence in the profession and to protect the public. Its primary purpose is not punishment. Mr Li's suggestion that he might do community work does not fit within the objectives of a penalty in a disciplinary case. The suggestion would be more appropriate if the case were a criminal case but is not an appropriate option for the Tribunal to consider.

[22] Mr Li is entitled to a reduction in whatever sentence we determine is appropriate to impose because of his early guilty plea. This has been recognised by the Courts where the Supreme Court has said a reduction of about 30% of the proposed tariff is a reasonable reduction in penalty for an early plea of guilty.

[23] The Tribunal have carefully considered this case. They consider that Mr Li's deception was significant. As outlined in the facts, on numerous occasions, he continued to deny the association with his niece Ms Li Li. While there does not appear to have been any actual harm to any of the three vendors and one purchaser involved there is certainly a perception that Mr Li was either careless or reckless as to his obligations under the Act of the Rules or lacking in basic training as to what the Act required. However an aggravating feature is Mr Li's letter to the REAA in October 2013 when he referred directly to the Act and continued to attempt to lie about his relationship with his niece.

[24] This type of deceptive conduct is behaviour which brings that real estate agency profession into disrepute.

[25] We agree with Mr Clancy that the Tribunal must be very clear in its message to the profession that this type of behaviour is not acceptable. However bearing in mind that the Tribunal must impose the least restrictive penalty on Mr Li we have decided to suspend Mr Li from practice. We consider that this is the most appropriate penalty as it gives Mr Li a chance to return to the profession and be rehabilitated as an agent. The fact that no loss occasioned to any vendor is also a matter that we have taken into account in deciding that suspension is the most appropriate sentence. However because of the deceit involved in the charge it should be a significant period of suspension.

[26] The Tribunal has determined that an appropriate period of suspension for Mr Li would be a period of two years.

[27] From this starting point of two years we must give Mr Li a discount of approximately one third to reflect the early plea of guilty and his cooperation with the Authority once the admission that he had lied had been made. For this reason we will deduct a period of seven months from the two year period. This means that we have determined to suspend Mr Li from practice for a period of seventeen months from the date of this order.

[28] In addition we consider that Mr Li should pay a fine of \$10,000 to reflect the seriousness of his conduct.

[29] The Tribunal also censure Mr Li for his conduct.

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

**DATED** at AUCKLAND this 24<sup>th</sup> day of June 2015

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Ms K Davenport QC  
Chairperson

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Mr G Denley  
Member

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Mr J Gaukrodger  
Member