

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 6

READT 003/14

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

BETWEEN **REAL ESTATE AGENTS AUTHORITY (CAC 20004)**

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

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

DATE OF THIS DECISION (HEARD ON THE PAPERS) ON PENALTY – 20 January 2015

COUNSEL

Mr M J Hodge – for the Prosecuting Authority
Mr T D Rea – for the three Defendants

DECISION OF THE TRIBUNAL

Introduction

[1] On 1 September 2014 we released our decision with respect to charges laid by Complaints Assessment Committee 20004 against Zhong Li, Jane Wang, and Christopher Swann.

[2] We found that Messrs Li and Swann had engaged in unsatisfactory conduct, and that misconduct was proved against Ms Wang. A subsequent recall application on behalf of Ms Wang has been dismissed. We now deal with the issue of penalty.

General principles on penalty

[3] It is settled law that penalty decisions of disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose: *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4.

[4] The Real Estate Agents Act 2008 was introduced to better protect the interests of consumers in respect of real estate transactions. A key means of achieving that purpose was the creation of a wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee, including significant financial penalties.

[5] Having found that the conduct of Messrs Swann and Li amounted to unsatisfactory conduct, we may make any of the orders set out in s.93 of the Act which provides:

“93 Power of Committee to make orders

(1) *If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*

(a) *Make an order censuring or reprimanding the licensee:*

(b) *Order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:*

(c) *order that the licensee apologise to the complainant:*

(d) *order that the licensee undergo training or education:*

(e) *order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:*

(f) *order the licensee—*

(i) *to rectify, at his or her or its own expense, any error or omission; or*

(ii) *where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:*

(g) *order the licensee to pay the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:*

(h) *order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:*

(i) *order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.*

(2) *An order under this section may be made on and subject to any terms and conditions that the Committee think fit.”*

[6] In relation to our having found Ms Wang guilty of misconduct, we may make any of the orders set out in s.110(2) of the Act which provides:

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

...

(2) *The orders are as follows:*

- (a) *1 or more of the orders that can be made by a Committee under section 93:*
- (b) *an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:*
- (c) *an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:*
- (d) *an order that a licensee not perform any supervisory functions until authorised by the Board to do so:*
- (e) *an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be terminated and that no agent employ or engage that person in connection with real estate agency work:*
- (f) *an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:*
- (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.”*

[7] In *CAC v Spencer* [2013] NZREADT 55 at [15]–[16] we agreed in principle that penalties under s.93 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. The prosecution submits that the same applies to financial penalties ordered under s.110 of the Act which must be set at a level so as to “bite” given the commercial reality of commission rates.

The Stance of the Prosecution

Ms Wang

[8] In our decision of 1 September 2014, we considered that Ms Wang was guilty of misconduct “*at a relatively modest level*” and that she had been “*seriously negligent in her instructions to Mr Li*”. We also came to the “*firm view that [Ms Wang’s] conduct was deficient in that she over delegated to Mr Li*”.

[9] Mr Hodge (as Counsel for the prosecution) submits that Ms Wang knew the requirements relating to salespersons of less than six months experience; that the effect of her failing to supervise Mr Li was that those requirements were seriously breached and, in so acting, Ms Wang allowed a junior and inexperienced salesperson to have the majority

of dealings with the complainant purchasers in this case, including in relation to the execution of an unconditional sale and purchase agreement.

[10] Mr Hodge puts it that, given our finding that Ms Wang's misconduct was at a relatively modest level, we may consider that a suspension should not be ordered in this case and, rather, a fine in the upper end of the range should be imposed and he suggested a range of \$12,000 to \$15,000. He submitted that Ms Wang also be censured.

[11] In the case of both Ms Wang and Mr Swann, Mr Hodge raises whether an order for further training would be appropriate as part of the combination of orders to be made. However, he then observes that, in terms of education, we may consider that, in this particular case, the experience of undergoing the Tribunal process the defendants has been itself sufficient in dealing with the breaches which occurred here.

Mr Swann

[12] In our 1 September 2014 decision we acknowledged that Mr Swann appeared in general to be a good manager, but we considered that "*in this case, he had allowed Ms Wang to take much of the control over her team of salespersons which he should have retained*". We also stated that Mr Swann should have been particularly careful supervising employees who all spoke Mandarin when, apparently, he did not.

[13] While he was ultimately found to have engaged in unsatisfactory conduct, we remarked that his failures nearly amounted to misconduct at a low level.

[14] Accordingly, the Prosecution submits that a fine in the upper end of the available range for unsatisfactory conduct, between \$8,000 and \$10,000, is appropriate, together with a censure.

Mr Li

[15] While we found that Mr Li's actions did not amount to misconduct, but rather to unsatisfactory conduct, we noted that his conduct was:

"Unacceptable or falling short of reasonable standards that he be so involved in a purchase transaction with, possibly, unsophisticated prospective purchasers when he knew or should have known that he was not entitled to do that without proper supervision." CAC v Li, Wang and Swann [2014] NZREADT 67 at [167]

[16] Mr Hodge puts it that as Mr Li no longer resides in New Zealand nor practices as a licensee, would appear to have been regarded as the least culpable of the defendants, and given his inexperience and the position he was put in by Ms Wang in particular, the appropriate penalty against him is a fine between \$2,000 and \$3,000, without censure.

Stance of the Defence

Mr Li – Unsatisfactory Conduct

[17] Mr Rea noted that, in our said decision, we found that Mr Li had engaged in unsatisfactory conduct as it was unacceptable, or fell short of reasonable standards, for Mr Li to have been so involved in the transaction when he knew or should have known that he was not entitled to have such a level of involvement. Mr Rea puts it that the background to this was our finding that Mr Li had "*technically*" engaged in conveyancing work but only "*to a small extent*".

[18] Mr Rea puts it that the relevant work undertaken by Mr Li was to make final notations on a standard form of sale and purchase which had been largely completed by another salesperson, Ms Guo, who was suitably qualified to prepare the agreement. Mr Li's notations/additions were to insert the offered amount (on instructions from the complainants), inserting the settlement date, drawing a line across the area designated for any finance conditions, and inserting "no" next to the reference on the standard form to a LIM report and building report.

[19] Mr Rea noted that Mr Li also advised the complainants that an unconditional offer would be taken more seriously by a vendor than a conditional offer. He noted that apart from finding that Mr Li's involvement in the transaction was greater than it should have been, we made no other finding against him on any of the very detailed factual allegations set out in the charges against him; and that we were "*reluctant to be particularly critical of Mr Li*" and considered he had been candid with us and was clearly concerned about the predicament of the complainants. We assessed him as "*a sensible and honest person*". Mr Rea puts that as being in contrast with what we said about the complainants whom we consider "*seemed ... to have a reasonable understanding of commerce ... despite their protestations to the contrary*", and we observed that "in many ways they seemed to know the risks they were undertaking".

[20] Mr Rea then put it:

"10 Following its assessment of Mr Li as being 'sensible and honest', the Tribunal recounted Mr Li's evidence on salient matters, particularly that:

- (a) The complainants advised him that they had pre-approved finance, and they did not tell him it related to a previous prospective transaction;*
- (b) Mr Li found the complainants to be 'intelligent people who knew what they were doing and knew all about the complex in which the property was sited (having lived there for two to three years), and issues associated with it, including the fact that it had been re-clad;*
- (c) Mr Li advised the complainants to obtain legal advice, and arrange finance and reports, such as a building inspection, so they would be in a position to make an unconditional offer;*
- (d) The complainants spent 'about 10 minutes' reading the purchase contract before they signed it.*

11 The Tribunal summarised its finding concerning the standard of real estate agency work undertaken by Mr Li as follows: 'In terms of the evidence overall, his work on behalf of the complainants seems to have been undertaken competently.'

12 In the circumstances, it is submitted that the unsatisfactory conduct finding against Mr Li is sufficient penalty in itself and no further orders against Mr Li are necessary or appropriate."

Ms Jane Wang – Misconduct

[21] Mr Rea noted that we found that by "over-delegating" to Mr Li, Ms Wang engaged in misconduct but this it was "*quite possibly, at a relatively modest level of offending overall*".

[22] Mr Rea notes that no order for compensation is sought by the Authority to be paid by Ms Wang to the complainants despite the availability of such an order. In any case, the potential loss for the complainants could be the deposit of \$37,500 due under their said agreement to purchase and that issue could be dealt with by a civil Court in due course.

[23] Mr Rea submits that there are a number of mitigating factors to be raised on behalf of Ms Wang. He puts it that neither she nor any salesperson in the team associated with her has been the subject of any previous unsatisfactory conduct finding despite the very high level of work achieved by her over the 12 years she has been employed by Barfoot and Thompson Ltd. Mr Rea also put it that the fact we found that the work undertaken by Mr Li was done competently is relevant when considering the appropriate penalty to be imposed on Ms Wang as it confirms that, despite the “*over-delegation*” to Mr Li, he could not have been out of his depth in what he was asked to do by Ms Wang.

[24] Mr Rea then continued:

“18 Particularly significant is the state of knowledge of Ms Wang at the relevant time, and the further precaution taken by her at the time. When permitting Mr Li to attend with the complainants to obtain their signature on the agreement for sale and purchase, Ms Wang:

- (a) Knew that the complainants had bid for the property at an auction held just eight days previously, where such a bid amounted to an unconditional offer by the complainants;*
- (b) Was expressly told by Mr Li that the complainants had specifically assured him that they had approval of finance in place; and*
- (c) Took the further precaution of instructing Mr Li to telephone her if the complainants had any questions so she could deal with them directly.”*

[25] Accordingly with regard to Ms Wang, Mr Rea submits that if we consider that any monetary order (i.e. a fine) is appropriate, it should be for a modest sum only.

Mr C Swann – unsatisfactory conduct

[26] Mr Rea referred to our observation that it is to Mr Swann’s credit that he understands his responsibility in respect of new salespeople and seems to have implemented firm rules of conduct within his branch; and that we recognised that he is no doubt a very good branch manager. However, we held that he engaged in unsatisfactory conduct “*at a reasonably significant level*”. In particular, we consider that he permitted Ms Wang to take much of the control over the other salespeople which he should have retained; and that he ought to have been particularly careful about supervision where the salespeople spoke Mandarin and he did not.

[27] Mr Rea is seeking that we reconsider our assessment of the severity of Mr Swann’s conduct on the scale of unsatisfactory conduct.

[28] Mr Rea referred to the recent High Court decision *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2014] NZHC 2817 where the High Court considered that the proper focus of s.50 of the Act, as had been recognised by us in *Hutt City Ltd v Real Estate Agents Authority* [2013] NZREADT 109, is on process. The *Hutt City Ltd* case involved a lapse of judgement by a salesperson who made an incorrect decision of handing over keys prior to settlement in the absence of the branch manager.

[29] Mr Rea noted that Mr Li's lapse of judgement was his failure to follow Mr Swann's requirement that salespeople with less than six months' experience were not to attend unsupervised for negotiations of any agreement for sale and purchase.

[30] In so far as we have expressed the view that Mr Swann needed to take extra care with supervision of his salespersons because many of them in the branch spoke Mandarin and he did not, Mr Rea submits that situation demonstrates a necessity for delegation to a person (e.g. Ms Wang) who could communicate complex concepts regarding compliance and other aspects of real estate agency work to Chinese customers.

[31] Mr Rea put it that, short of physically accompanying salespersons at all times when they are outside the office, there was nothing more Mr Swann could have done to ensure compliance with his policy as we have referred to it above.

[32] Mr Rea also submits that Mr Swann is a very good branch manager and had implemented firm rules of conduct within his branch; that he had recognised the focus of the requirement under the Act for supervision being on process and not simply outcome. Mr Rea emphasised the mitigating factor that Mr Swann has never otherwise been the subject of any disciplinary finding in his 13 years working full time in the real estate industry.

[33] It concerns Mr Rea that the Authority seeks that a fine be imposed on Mr Swann in the range of \$8,000 to \$10,000 (the latter being the maximum possible fine for unsatisfactory conduct by an individual licensee). Mr Rea submits that in terms of the various mitigating factors he has covered, if we were to consider a fine appropriate then it should be set at a significantly lower level.

Outcome

[34] We adhere to the fairly detailed views about the conduct of each defendant as we expressed then in our decision of 1 September 2014, but we have taken seriously into account the matters we have covered above on penalty.

[35] In all the circumstances, the Committee submits the following orders are appropriate:

- (a) Ms Wang: censure and fine in range of \$12,000 and \$15,000;
- (b) Mr Swann: censure and fine in range of \$8,000 and \$10,000;
- (c) Mr Li: fine in range of \$2,000 and \$3,000.

[36] In the course of the above and in our said substantive decision herein we have dealt with our views about the conduct of each of the three licensee respondents and have covered aggravating and mitigating effects and general sentencing principles.

[37] Accordingly, we fine Mr Li \$750. We fine Mr Swann \$1,500. Both those persons have been found guilty of unsatisfactory conduct.

[38] Ms Wang has crossed the threshold of misconduct in our view as we have covered above. We take into account in particular that these proceedings have been a stressful lesson for her. We fine her \$4000, and order that she be censured.

[39] We do not consider that any further penalty aspects are appropriate in terms of these particular defendants. The fines are to be paid within three months of the date of this decision to the Registrar of the Authority at Wellington.

[40] 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