

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 64

READT 003/14

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

BETWEEN **COMPLAINTS ASSESSMENT**
COMMITTEE (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

HEARD ON THE PAPERS

DATE OF THIS DECISION REGARDING PENALTY 10 September 2015

COUNSEL

Mr MJ Hodge for the prosecuting Authority
Mr T D Rea for the defendants

DECISION OF THE TRIBUNAL ON PENALTY
AGAINST SECOND DEFENDANT

The Issue

[1] In our 20 January 2015 decision *Real Estate Agents Authority (CAC 2004) v Li & Ors* [2015] NZREADT 6, we imposed a \$4,000 fine on Ms Wang and ordered that she be censured. These orders were made pursuant to s 110 of the Real Estate Agents Act 2008 following our having found Ms Wang guilty of misconduct by our

1 September 2014 decision *Real Estate Agents Authority (CAC 20004) v Li & Ors* [2014] NZREADT 67.

[2] Ms Wang appealed our finding of misconduct to the High Court which, in *Wang v Real Estate Agents Authority* [2015] NZHC 1011, substituted a finding of unsatisfactory conduct. This reflected the Court's view that the relevant conduct by Ms Wang was less serious than we had considered, so that it did not meet the threshold of serious negligence or serious incompetence. The High Court then (per Toogood J) observed that: "*On the face of it, the reduction of Ms Wang's offence to one of unsatisfactory conduct should have consequences as to penalty ...*".

[3] Accordingly, we again address the issue of the penalty to be imposed on Ms Wang.

Current Submissions for Ms Wang re Penalty

[4] Mr Rea submits that, in light of the reduction in seriousness of the finding against Ms Wang, the penalty also should be reduced; and that would be consistent with the purpose of fine and censure being also in the nature of punishment; and a reduction of penalty is also required to maintain the fundamental principle of proportionality of sentencing.

[5] He submits that an appropriate reduction in penalty imposed on Ms Wang, following the reduction in the finding from one of misconduct to unsatisfactory conduct, should correspond with the reduction in the maximum level of fines available for unsatisfactory conduct in relation to misconduct.

[6] Mr Rea puts it that as the maximum fine that we could impose for misconduct by an individual licensee is \$15,000, but \$10,000 is the maximum fine for unsatisfactory conduct, a reduction of one third would be appropriate, in order to maintain proportionality. He points out that equates to an appropriate fine of approximately \$2,600; and accepts that the order for censure would remain appropriate.

Submissions for the Authority on Review of Penalty Against Ms Wang

[7] The Committee submits that the existing orders made by us against Ms Wang (\$4,000 fine and censure) should not be disturbed, notwithstanding the High Court's decision.

[8] Mr Hodge observes that, in bald financial terms, the difference between the parties is the relatively modest sum of \$1,400. However, he submits that behind this is the important principle that orders need to have sufficient "*bite*" to act as both a specific and general deterrent.

[9] The Committee's position is that the orders previously imposed by us on Ms Wang remain appropriate even allowing for the High Court's finding of unsatisfactory conduct rather than misconduct.

[10] Mr Hodge puts it that the submissions for Ms Wang might have validity but for two points which apply in this case:

- [a] Our existing decision on penalty for Ms Wang was generous to her and lenient.
- [b] Ms Wang's unsatisfactory conduct was far from minor or trivial; and a fine at only 40% of the maximum available (i.e. the \$4,000 fine with an available maximum of \$10,000) is the least that should be imposed to meet the needs of specific and general deterrence and maintenance of proper professional standards.

[11] Mr Hodge observed that the High Court concluded that Ms Wang's conduct was at least negligent or incompetent and that she was guilty of unsatisfactory conduct at the least; that an experienced salesperson ought to have been alive to the risks which were present in this case and done much more than Ms Wang did; that Ms Wang knowingly acted in breach of Barfoot & Thompson's instructions; and that the salesperson dealing with the complainants needed to be sufficiently experienced to ask the complainants the right questions which arose in their circumstances but, contrary to this, Ms Wang allowed a novice salesperson to conduct the agency work on this transaction.

[12] Mr Hodge noted that, ultimately, the principal reason why the High Court was not prepared to go further and find misconduct was that it considered our finding that Mr Li (as the novice salesperson) carried out his responsibilities competently meant that, although Ms Wang's failures were negligent, they could not be seen as seriously negligent because the work was in fact carried out competently on our finding. Mr Hodge submits that while the Court therefore found that Ms Wang's conduct was unsatisfactory conduct, rather than misconduct, it remains the position that her failures which amounted to unsatisfactory conduct were significant failures.

[13] Mr Hodge referred to counsel for Ms Wang noting (as referred to above) that the High Court observed: "*On the face of it, the reduction of Ms Wang's offence to one of unsatisfactory conduct should have consequences as to penalty ...*". Mr Hodge puts it that it can readily be understood why the Court raised this possibility but it is important nevertheless, to recognise that the Court has been careful to qualify its statement, by "*On the face of it ...*". Mr Hodge observed that the High Court did not hear any argument about penalty and so could go no further than commenting in the qualified way that it did.

[14] Mr Hodge emphasises that the submission for Ms Wang, that there ought to be a reduction in the fine, may well have had validity but for the particular features which apply here. Most importantly (he puts it), the fine previously imposed on her by us was generous to her and lenient, and should not be disturbed as that would reduce the fine to less than 40% of the available maximum. Mr Hodge submits that, in circumstances where the findings in the High Court amounted to significant unsatisfactory conduct, it would be wrong to disturb the existing orders.

Late Developments about Penalty in this Matter

[15] In early August 2015 we were about to fix penalty in terms of the above submissions. However, we then received a series of further submissions about penalty which we summarise below.

[16] On 6 August 2015 Mr Rea filed a further submission referring to a decision of His Honour Judge B A Gibson in the Auckland District Court, namely, *Li v Shiron and*

Barfoot and Thompson Ltd CIV-2013-092-3311. Essentially, the District Court dismissed a claim pursued by the purchaser complainants in this disciplinary case (Saiyad Shiron and Shazra Ali) who had sought to make a third party civil claim against Barfoot and Thompson Ltd relating to the matters the subject of the disciplinary complaints, and those complainants also unsuccessfully defended a claim from the vendors of the property for an unpaid deposit.

[17] For present purposes, Mr Rea's point is that in our substantial findings of guilt in this disciplinary case we had, *inter alia*, put it that the heavy financial consequences (legal costs, interest, and loss of deposit) which the complainants seem to have incurred resulted from Ms Wang's failure to supervise Mr Li; whereas His Honour Judge Gibson found that Mr Shiron and Ms Ali were the sole cause of their own loss. Mr Rea submits that we should adopt Judge Gibson's findings of credibility and take them into account when considering the issue of penalty against Ms Wang.

[18] On 17 August 2015 we received a submission from Mr R S Pidgeon, barrister, of Auckland, on behalf of the complainants. He referred to the above background and seeks the opportunity to intervene on behalf of the complainants with regard to our fixing of penalty against Ms Wang. He wishes to make submissions regarding that penalty with particular emphasis on the effect of Ms Wang's offending on the complainants.

[19] By further memo of 18 August 2015, Mr Rea responded to record Ms Wang's opposition to Mr Pidgeon's request to make submissions to us on behalf of the complainants on the issue of penalty against her. Mr Rea put it that the complainants are not parties to the proceeding which took place before us and, he submits, have no standing in it.

[20] Mr Rea pointed out that the sole issue remaining for our consideration is the question of a reduction in penalty imposed on Ms Wang following that issue being remitted back to us by the High Court as a consequence of the High Court's reduction of our finding of misconduct against Ms Wang to one of unsatisfactory conduct.

[21] We then received a further memo dated 21 August 2015 from Mr Pidgeon on behalf of the complainants seeking not only to be heard on penalty of all defendants but access to all relevant records regarding this case to this stage. He particularly submitted that the complainants have suffered loss which could be compensated for under s 110(g) of the Real Estate Agents Act 2008. We observe that may only apply where we have a situation of misconduct. Accordingly, he sought leave to obtain access to the files of this Registry regarding this matter and a timetable to file submissions on penalty.

[22] Mr Rea filed a further memo on 25 August 2015 pointing out that we are *functus officio* with regard to our final determinations already made in respect of Messrs Li and Swann and, as already indicated above, we are simply dealing with penalty on Ms Wang in terms of the High Court having altered our finding of misconduct against her to one of unsatisfactory conduct.

[23] It does not seem to be in dispute that the complainants feel particularly entitled to compensation from Ms Wang for legal costs (conveyancing and litigation) which they believe arises out of her unsatisfactory conduct.

[24] Mr Rea noted that, in terms of *Quin v Real Estate Agents Authority* [2013] NZAR 38, we have no jurisdiction to award compensation in respect of unsatisfactory conduct and that is a concept we have detailed frequently in our decisions over the past year or so.

[25] Mr Rea referred to s 27 of the New Zealand Bill of Rights Act 1990, as had Mr Pidgeon in terms of seeking natural justice and participation by the complainants.

[26] Finally, we received a 25 August 2015 memorandum from Mr Hodge on behalf of the Authority relating to all the above memoranda from counsel since 6 August 2015.

[27] Mr Hodge put it as regrettable that the complainants have been required to pay a deposit of \$37,500 plus interest and legal costs for a property they were unable to purchase (because having entered into an unconditional contract to purchase that property, they were unable to raise finance as they had anticipated). Mr Hodge observed that our finding was that the work carried out by the real estate salesperson involved in the transaction (Mr Li) was not negligent or incompetent so that, he puts it, regardless of any findings made in the District Court, which are not binding on us, there is a fundamental problem for the complainants in proving causation of loss based on our findings.

[28] In any case he, of course, also noted that because all three licensees have now been found guilty of unsatisfactory conduct only, we have no jurisdiction to award compensation in terms of the *Quin* case.

Outcome

[29] We understood Mr Hodge to observe that, had we the jurisdiction to award compensation, the Authority (as a party to these proceedings relating to the conduct of real estate agents) would have liaised with the complainants (no doubt through Mr Pidgeon) and made submissions in favour of them obtaining compensation if that was a possible outcome, which it is not. He correctly observed that we can make no orders to compensate the complainants at this stage.

[30] We observe that, although the complainants were not parties to the proceedings before us, we would probably have allowed them (particularly, through Mr Pidgeon) to make submissions on the outstanding matter of penalty against Ms Wang had we the power to award compensation or if there had been some other issue where we felt the complainants could assist us. However that is not the situation.

[31] The first and third respondents were finally dealt with in our said decision on penalty of 20 January 2015.

[32] We realise that Mr Hodge renews his submission that the penalty we had previously imposed on Ms Wang remains appropriate.

[33] We observe that for all that has been put to us since 6 August 2015, we retain the view on penalty against Ms Wang that we then had and we express below.

[34] In our said penalty decision of 20 January 2015 we set out, inter alia, some of our general views on penalty.

[35] Having absorbed the further submissions referred to above, consequential to the said finding of Toogood J in *Wang v Real Estate Agents Authority* [2015] NZHC 1011, and addressing Ms Wang's conduct on the basis of it being unsatisfactory conduct rather than misconduct as covered in our said substantive decision of 1 September 2014, we fine Ms Wang \$2,500 and censure her. The fine is to be paid within one calendar month of the date of this decision to the Registrar of the Authority at Wellington.

[36] 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