

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 25

READT 037/15

IN THE MATTER OF

a charge laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC402)**

Prosecutor

AND

XIAOJIU (JOHN) ZHANG

Defendant

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin – Member

HEARD at AUCKLAND on 24 February 2016

DATE OF DECISION 17 March 2016

APPEARANCES

Ms N E Copeland for the prosecutor
Mr T D Rea for the defendant

DECISION OF THE TRIBUNAL

[1] Mr Zhang faces two charges as follows:

Charge 1

Following a complaint by John Appleby (Complainant), Complaints Assessment Committee 402 (Committee) charges Xiaojiu (John) Zhang (Defendant) with misconduct, under s 73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars

- 1. The Defendant was the listing agent for 62 Sprott Road, Kohimarama (Property).*

2. *The Complainant, as director of Ladbrooks Solicitors Trustees Limited, made an offer to purchase the Property on behalf of the Fitzwilliam Trust (Trust).*
3. *The Defendant met with the Complainant, at the Complainant's house, to finalise the sale and purchase agreement.*
4. *Negotiations were conducted in the Complainant's living room. The Complainant had his client file with him, that contained written instructions from the other trustees outlining price options and other matters pertinent to the Trust's negotiations.*
5. *During the course of negotiations, the Complainant briefly left the room. While the Complainant was out of the room, the Defendant took a photograph of those confidential instructions with the camera on his mobile phone.*
6. *Having been confronted by the Complainant, the Defendant deleted the photograph in the Complainant's presence.*

Charge 2

If, after hearing the above charges against the Defendant, the Tribunal finds that the Defendant is not guilty of misconduct, the Committee alleges that the Defendant has engaged in unsatisfactory conduct under s 72 of the Act. The Committee relies on the particulars set out in Charge 1 above.

[2] No evidence was called for the Complaints Assessment Committee as the evidence of Mr Appleby, the complainant, was accepted. His evidence was that he had been acting for a family trust, the Fitzwilliam Trust. He was one of the trustees of this trust. The other trustees were overseas but they wished to make an offer for a property at 62 Sprott Road, Kohimarama. Mr Zhang was the listing agent for this property. Mr Appleby arranged to meet Mr Zhang at his home. The purpose of the meeting was to put together an agreement for sale and purchase that Mr Zhang was going to present to the vendors.

[3] Prior to the meeting Mr Appleby had received an email from the purchasers which he printed and placed on his file. This email had instructions about the additional terms and the price the other trustees wished to offer. During his meeting with Mr Zhang Mr Appleby was referring to his file (and the email) to prepare the additional terms and conditions which related to some alterations that the potential purchasers wanted done on the property. His evidence was that he and Mr Zhang had been sitting on a couch in his living room to review the terms of the contract. Mr Appleby said that the contract required some amendments and he wrote these amendments out on a piece of paper. Mr Appleby then left the room to go and find a ruler. He placed the file (with the email) on the floor beside the coffee table and, he said, out of reach and sight of Mr Zhang. When he returned to the room after being absent for a short time he found Mr Zhang had moved across the couch and had stood up and taken a photograph of the email on the file. He immediately asked Mr Zhang to delete the photograph and Mr Zhang did so. It was accepted by the Complaints Assessment Committee that Mr Zhang had not subsequently used any pricing information on the email.

[4] Mr Zhang's evidence is that this was a spur of the moment decision. He says he was unaware that the email contained pricing information and that his intention in taking the photograph had been to provide himself with a written record of the

additional clauses that Mr Appleby had been asking to have included in the agreement. He said that English was his second language and he was not able to read Mr Appleby's writing as to the additional terms. He said he was embarrassed to ask him to explain the terms again and so decided to simply take a photograph of the email, which he believed contained only the information about the additional clauses, for future reference. He provided a reference from his employer which said that he frequently took "shots" of information to study later.

[5] The question for the Tribunal is whether taking a photograph of an email from the solicitor's file amounts to disgraceful conduct or is unsatisfactory conduct? Mr Zhang has acknowledged that he is guilty of unsatisfactory conduct.

Disgraceful or not?

[6] The Complaints Assessment Committee submit that the conduct is disgraceful because any dishonesty on the part of the licensee is likely to constitute disgraceful conduct. They cite the Tribunal decision in *CAC v Gollins* [2015] NZREADT 002 where the Tribunal said:

"Dishonesty of any nature runs contrary to the principles of registration and privilege that go with any registration. As Tribunals and Courts have said in numerous cases, registration as a professional lawyer, doctor and real estate agent carries with it privileges but also the obligation to behave in a certain way. Dishonesty of any type is met with the highest degree of disapprobation by registration bodies and by members of the public who must retain confidence in the honesty and integrity of agents."

[7] Ms Copeland submitted that the actions of Mr Zhang in taking a photograph of the document whilst Mr Appleby was out of the room were deceitful. Ms Copeland submitted that Mr Zhang's explanation as to why he took the photograph was frankly implausible. She said the fact that Mr Zhang waited until Mr Appleby was out of the room before taking the photograph indicated his dishonesty. She submitted that Mr Appleby's unchallenged evidence was that Mr Zhang could clearly see the email before he took the photograph. She submitted that he was entitled to leave the file on the floor of his home away from Mr Zhang without expecting Mr Zhang to come and photograph confidential information. Ms Copeland submitted that Mr Zhang made a decision to knowingly copy a document which he was not entitled to see. She submitted that in correspondence with the Real Estate Agents Authority Mr Zhang had admitted that he could see what was in the email and that he had continued to accept this under cross-examination.

[8] Mr Rea for Mr Zhang submitted that the conduct was not disgraceful conduct. He submitted that it was simply a sudden and impulsive decision to record the terms of the clauses that he believed were contained in the email. He submitted that Mr Zhang's intention was only to obtain a copy of these clauses so that he could later explain them to the vendor and there was nothing sinister or secretive in the conduct. Mr Rea submitted that there was no inconsistency in saying that there was an admission by Mr Zhang that he could clearly see the document, but was only concerned about the additional clauses. He pointed to the fact that Mr Appleby's brief of evidence made it clear that he did not consider that Mr Zhang had the opportunity to read the email instructions about the pricing as nothing in the subsequent negotiations suggested that the vendor was aware of what the trust was prepared to pay for the property.

Discussion

Is this disgraceful conduct?

[9] The Tribunal therefore must determine whether this single episode of taking a photograph of a document in a lawyer's file is in itself disgraceful conduct or whether the Tribunal must be satisfied that Mr Zhang's intention was dishonest before making such a finding.

[10] What needs to be proved in this charge is simply that Mr Zhang intended to take the photograph (which is the relevant *mens rea*) and his motivation in taking the photograph is irrelevant. It is not possible for us now to determine Mr Zhang's motivation, and indeed with the passage of time he may well be unable to pinpoint what motivated him to take the photograph in the first place. All that can be said is that he took the photograph and he took the photograph of a lawyer's file without asking and while the lawyer was out of the room. We now consider whether this conduct is disgraceful.

[11] The test for disgraceful conduct is whether a reasonable agent (or member of the public) would consider that the conduct was disgraceful. No expert evidence was given to us on this issue but we consider that most agents should recognise that a solicitor's file is confidential, especially when it was moved to a position away from where the agent was sitting. The evidence is clear that Mr Zhang had to move to see the file and that he chose to make this move and take this photograph when Mr Appleby was out of the room. He did not ask if he could do this. It appears that some endeavour had been made by Mr Appleby to hide the file, although the Tribunal acknowledge that the file was left open.

[12] The Tribunal have concluded that this conduct does amount to disgraceful conduct. Our reasons are that an agent needs to behave in an honest and open way and most members of the public and agents would, in our opinion regard taking a photograph of confidential information (belonging to another party) to be dishonest and underhand, even if the full import of the confidential information (regarding pricing expectations) was not appreciated or utilised. This action was compounded by the underhand way in which it was done while the owner of the file was out of the room. That fact that no commercial advantage was obtained was because Mr Appleby insisted on its deletion. The fact that Mr Zhang received no benefit does not detract from the seriousness of the conduct. Each case must be judged on its own facts, and while we are sympathetic to Mr Zhang for what was obviously an impulsive gesture it was also underhand. As the decision of *CAC v Gollins* spelt out, agents are expected to display high standards of honesty. Mr Zhang has fallen seriously short of this standard in his conduct. The impulsiveness of the gesture can be recognised in the penalty. For these reasons we find that the charge has been established at the level of misconduct and is disgraceful conduct.

[13] The Tribunal would normally invite submissions on penalty but we consider that in this case the appropriate penalty is simply to censure Mr Zhang and to impose a fine upon him. The facts do not suggest that this was anything other than a one-off action by this agent. Mr Zhang does not pose a danger to public safety and maintenance of professional standards is met by the finding of misconduct and the fine.

[14] We impose the following penalty upon Mr Zhang:

- (a) We censure Mr Zhang.
- (b) We fine him the sum of \$2,000 to be paid to the Real Estate Agents Authority.

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

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member