

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 53**

**READT 042/17**

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 403

AGAINST JINLEI ZHANG  
Defendant

On the papers

Tribunal: Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms N Dangen, Member

Submissions received from: Mr S Waalkens, on behalf of the Committee  
Ms E Harrison, on behalf of Mr Zhang

Date of Decision: 26 September 2018

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**DECISION OF THE TRIBUNAL  
(PENALTY)**

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## **Introduction**

[1] In its decision issued on 25 July 2018 the Tribunal found a charge of misconduct proved against Mr Zhang (“the substantive decision”).<sup>1</sup> The Tribunal has received submissions as to penalty from counsel for the Committee and Mr Zhang.

## **Facts**

[2] Mr Zhang is a licensed salesperson and at the relevant time was engaged by Pure Realty Ltd, trading as Ray White Mt Albert (“the Agency”). In January 2015, the owners<sup>2</sup> of a property (a vacant section) at Mt Albert, Auckland, listed it for sale with Mr Aaron Drever, a licensed salesperson also engaged at the Agency. Mr Drever asked Mr Zhang if he knew of any buyers for the property. Mr Zhang then introduced an existing client, Mr Yan, to the property. Mr Yan made an offer to buy the property, which was presented to the vendors by Mr Drever. Mr Yan then entered into an agreement for sale and purchase of the property for \$550,000, and paid the deposit of \$55,000.

[3] Some two months later, Mr Yan advised Mr Zhang that there were many problems which made building on the property difficult (including the presence of large lava rocks), and that a different resource consent would be required from the one he had received from the vendor. Mr Yan said that he wanted to get out of the contract, and would rather lose his deposit than pay an unlimited amount later to build on the property.

[4] At around this time Mr Zhang and his wife had discussed buying or building a new home. He mentioned this to Mr Yan who asked if he could nominate his purchase agreement to Mr Zhang. A nomination agreement was then executed by Mr Yan and his wife. Mr Zhang explained that the nomination was to his wife, rather than himself, as her parents had provided the funds to complete the purchase. The purchase by Mr Zhang’s wife was settled in March 2015.

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<sup>1</sup> *Complaints Assessment Committee 403 v Zhang* [2018] NZREADT 30.

<sup>2</sup> The property was owned by a married couple. The Tribunal has been advised that the husband has passed away since the sale of the property.

[5] The vendors subsequently became aware that Mr Zhang was a real estate agent with the Agency. The vendors said that Mr Zhang's association with the Agency had never been disclosed when the property was sold, and they had never been provided with a certified valuation. Mr Zhang advised the Agency, which later reported the matter to the Authority.

[6] Mr Zhang accepted that he did not inform the vendors that his wife had become the nominated purchaser of the property, did not provide the vendors with an independent valuation for the property, and did not obtain the vendors' informed consent for his wife to complete the purchase of the property. He also accepted that he had retained his share of the commission in respect of the sale of the property.

[7] Mr Zhang was charged with misconduct under s 73 (b) of the Real Estate Agents Act 2008 ("the Act") (conduct that is seriously incompetent or seriously negligent real estate agency work) for failing to comply with ss 134 and 135 of the Act by:

- [a] not informing the vendors that his wife had been nominated as the purchaser of the property,
- [b] not obtaining the vendors' consent to his wife becoming the purchaser, and not providing the vendors with an independent valuation of the property, and
- [c] retaining the share of commission paid to him in respect of the sale of the property,

and thereby breaching rr 5.1, 6.1, 6.3, and 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").

[8] Mr Zhang admitted that he failed to comply with ss 134 and 135, and breached provisions of the Rules, but submitted that his conduct amounted to unsatisfactory conduct, not misconduct.

## Sentencing principles

[9] The principal purpose of the Act is 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.”<sup>3</sup> The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and providing accountability through a disciplinary process that is independent, transparent, and effective. Penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

[10] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.<sup>4</sup>

[11] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

- [a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] Impose a fine of up to \$15,000;
- [c] Order cancellation or suspension of the licensee’s licence; and/or
- [d] Order that the licensee pay compensation of up to \$100,000 to any person who has suffered loss by reason of the licensee’s conduct.

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<sup>3</sup> Section 3(1) of the Act.

<sup>4</sup> See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

## **Submissions**

[12] Mr Waalkens submitted for the Committee that general deterrence is the primary element in this case. He submitted that while Mr Zhang presents a low risk of engaging in similar conduct in the future, a strong message should be sent to other licensees about the importance of understanding their disclosure obligations under the Act.

[13] He submitted that ss 134 and 135 place critical obligations on licensees in situations where their interest in acquiring property conflicts with those of their vendor clients, and that the acquisition of client property must occur in the most transparent and informed way possible. He submitted that the Tribunal confirmed in its substantive decision that there can be no doubt that licensees are expected to know what their obligations are, and that those obligations continue to exist until settlement.

[14] Mr Waalkens submitted that at the time of the conduct, Mr Zhang had been a licensed salesperson for 4½ years, so could be expected to have a good level of awareness of his obligations. He submitted that although he did not appear to have had any ill intentions, Mr Zhang's complete failure to turn his mind to, and appreciate, his obligations under ss 134 and 135 fell well below the standard expected of licensees.

[15] Mr Waalkens further submitted that Mr Zhang made no attempt to bring the vendors' attention to the fact that his wife was the nominated purchaser, and did not attempt to seek advice from anyone, yet obtained a commission as a result of the sale. Mr Waalkens accepted that Mr Zhang's conduct was not deliberate or in bad faith, and that there are relevant mitigating factors: Mr Zhang had generally acted reasonably in the conduct of the proceedings, having accepted unsatisfactory conduct, thus significantly shortening the proceedings, and he had shown remorse by offering to repay his share of the commission, and to apologise to the vendors.

[16] Mr Waalkens submitted that the appropriate penalty would be to order censure, a fine of around \$5,000, repayment of commission, and further education and training in the area of managing conflicts of interest.

[17] Ms Harrison for Mr Zhang accepted the relevant background and the penalty principles set out in Mr Waalkens' submissions, and submitted that there is little debate between the Committee and Mr Zhang in relation to penalty. She submitted that Mr Zhang accepts that he should be censured, is willing (as he has been since he was made aware of his errors) to repay the commission, would be very appreciative of further training relating to managing conflicts of interests, and accepts that he should pay a fine.

[18] However, Ms Harrison submitted that the fine should be less than \$5,000. In support of this submission, she submitted that while the principle of general deterrence is engaged, its relevance is as to the starting point for a fine, and that any such starting point may be modified by mitigating factors.

[19] One such factor in this case is that on behalf of Mr Yan, he had asked the listing agent, Mr Drever, to advise the vendor that the section needed to be tidied up prior to settlement and Mr Drever had assured him that the vendor would agree to that. However, when the agreement for sale and purchase was signed, there was no condition relating to clearing the section. Mr Zhang alleges that his request was never passed on to the vendor. While the vendors agreed to deduct \$1,000 from the settlement sum in respect of the state of the section, it cost Mr Zhang \$7,000 to clear it. Ms Harrison submitted that the fine should be reduced in recognition of this additional cost to Mr Zhang.

[20] Ms Harrison also advised that Mr Zhang wished to publicly convey his apology to the vendors. A copy of his letter of apology was attached to Ms Harrison's submissions.

## **Discussion**

[21] Counsel referred us to two penalty decisions concerning a failure to comply with aa 134 and 135 of the Act: *Complaints Assessment Committee 408 v Reed*<sup>5</sup> and *Complaints Assessment Committee 414 v Goyal*.<sup>6</sup>

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<sup>5</sup> *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34.

<sup>6</sup> *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3.

[22] Mr Reed was the listing agent for a property, and made an offer to buy it within two days of the first Open Home. The vendors were aware that he was buying the property, but Mr Reed did not comply with ss 134 and 135: he did not explain the nature and implications of his conflict of interest, did not make formal disclosure by way of a Form 2 consent (set out in the Real Estate Agents (Duties of Licensees) Regulations 2009), did not provide the vendors with an independent valuation, and he did not explain that in the circumstances, they were entitled to cancel the contract.

[23] Mr Reed was found guilty of misconduct under s 73(b) of the Act. Counsel's submissions as to penalty focussed on whether his licence should be suspended (as was sought by the relevant Complaints Assessment Committee). The Tribunal concluded, having considered his previously unblemished record and excellent reputation in the industry, character references, and his ability to pay a fine, that suspension should not be ordered. Mr Reed was censured, and fined \$10,000.

[24] Mr Goyal was the listing agent for two neighbouring properties. He introduced an associate, with whom he had previously done business, to each property. Through his property development company, the associate bought one property at auction, and the second following an approach by Mr Goyal to the owner. Mr Goyal made loans to the associate at the time the deposits were paid, and subsequently.

[25] Prior to settlement of the two transactions, a company incorporated by Mr Goyal was nominated as purchaser. Mr Goyal did not inform either vendor of the nomination, did not obtain their written consent, and did not provide an independent valuation. Neither vendor was refunded commission paid to Mr Goyal. Mr Goyal was found to have breached ss 134 and 135 of the Act, and to have breached rr 6.1, 6.3, 6.4, and 9.1 of the Rules. He was found guilty of misconduct under s 73(b) of the Act. Mr Goyal was censured, his salesperson's licence was suspended for six months, and he was fined \$4,000.

[26] The circumstances of one case are rarely (if ever) on all fours with those of another case. In each of *Reed* and *Goyal*, consideration was given to suspension as part of the penalty, and it was ordered in *Goyal*. The Tribunal noted in *Goyal* that his conduct was more serious than Mr Reed's. Mr Goyal had an interest in the transactions

from the outset (by way of the loans to his associate), his breaches of the Act and Rules persisted for some seven months, and he received commissions on both sales. Mr Reed did not charge a commission, as he treated the transaction as being a private sale.

[27] Mr Waalkens accepted that Mr Zhang's conduct was not at the level of Mr Goyal's, and that there were aspects of Mr Reed's conduct that were more serious than Mr Zhang's. He did not submit that the Tribunal should consider suspending Mr Zhang's licence. We agree that suspension is not called for here.

[28] It is relevant that no question of compliance with ss 134 and 135 arose before an agreement for sale and purchase was entered into by Mr Yan, and that the listing agent (Mr Drever) presented Mr Yan's offer to the purchaser. This is a point of distinction between this case and those of Mr Reed and Mr Goyal, where in each case the personal interest arose before the sale agreement was reached, and the negotiations were carried by each of them.

[29] We also take into account that there are mitigating factors: in particular Mr Zhang's immediate acceptance, once his breach was pointed out, that he had failed to comply with his obligations. We also take into account his expressed willingness to make a formal apology to the vendors, and to refund his commission.

[30] We note Ms Harrison's submission as to the money spent by Mr Zhang in clearing the property, but as the responsibility for his having to do so appears to have arisen because of the failure by Mr Drever to pass on his instructions, it cannot be given significant weight.

[31] In this case, we have concluded that the appropriate fine is \$3,000. Such a fine indicates that failures to comply with ss 134 and 135 are taken seriously, and meets the relevant principles as to sentencing. We do not consider that we should order Mr Zhang to refund the commission he received. This is because Mr Yan's offer was presented by Mr Drever, and accepted by the vendors, before Mr Zhang had any interest in the transaction. This is in contrast to the circumstances in both *Reed* and *Goyal*.



## Orders

[32] We order that Mr Zhang:

[a] is censured;

[b] is ordered to pay a fine of \$3,000, which must be paid to the Authority within 20 working days of this decision; and

[c] is ordered to undertake appropriate training as to management of conflicts of interest and compliance with ss 134 and 135 of the Act, within six months of the date of this decision.

[33] The Tribunal directs that Mr Zhang's letter of apology (attached to Ms Harrison's submissions) is to be forwarded to the vendor.

[34] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms N Dangen  
Member