

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 28**

**READT 029/2020**

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1901
AGAINST	NEW ZEALAND LJ INTERNATIONAL LIMITED First Defendant
AND	XIAN (JACKY) ZENG Second Defendant
Hearing	3 May 2021, at Auckland (penalty submissions filed following the hearing)
Tribunal:	Hon P J Andrews, Chairperson Mr N O'Connor, Member Ms F Mathieson, Member
Appearances:	Ms C Paterson and Ms A-M Davies, on behalf of the Committee Mr Zeng, First Defendant
Date of Decision:	15 June 2021

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**DECISION OF THE TRIBUNAL  
(Charges and Penalty)**

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## Introduction

[1] The first defendant, New Zealand LJ International Ltd (which at all relevant times traded as LJ Hooker Metro City Branch) (“the Agency”), is a licensee agent real estate company. The Agency was first registered on 30 November 2012, and voluntarily suspended its licence on 23 October 2020 for the period to 23 October 2021. The second defendant, Mr Zeng, is a licensed agent and was the principal officer and contact person for the Agency. He was first licensed as an agent on 11 May 2011. Mr Zeng voluntarily suspended his licence on 3 May 2021 for the period to 3 May 2024.

[2] Complaints Assessment Committee 1901 (“the Committee”) has charged the Agency and Mr Zeng under the Real Estate Agents Act 2008 (“the Act”) as follows:<sup>1</sup>

[a] The Agency:

- [i] one charge of misconduct under s 73(c)(i) of the Act, of wilfully or recklessly failing to comply with a Notice issued to it pursuant to s 85 of the Act (“Charge 1”); and
- [ii] one charge of unsatisfactory conduct under s 72(b) of the Act, of seriously incompetent or seriously negligent real estate agency work by contravening ss 134–137 of the Act (“Charge 2”).

[b] Mr Zeng:

- [i] one charge of misconduct under s 73(c)(i) of the Act, of wilfully or recklessly contravening ss 134–137 of the Act, or in the alternative, misconduct under s 73(b) of the Act that his failure to comply with ss 134–137 of the Act constituted seriously incompetent or seriously negligent real estate agency work (“Charge 3”); and

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<sup>1</sup> The Tribunal notes that documents filed in this proceeding referred in their intituling to Complaints Assessment Committee 413. The Tribunal is satisfied that this was a typographical error, as the decision to lay charges was clearly made by Complaints Assessment Committee 1901.

[ii] one charge of misconduct under s 73(c)(i) of the Act, of wilfully or recklessly failing to comply with a Notice issued under s 85 of the Act (“Charge 4”).

[3] The charges were served on the Agency and Mr Zeng by email on 30 September 2020. Pursuant to reg 7 of the Real Estate Agents (Complaints and Discipline) Regulations 2009), they were required to file a response to the charges within ten working days. No response was filed by or on behalf of either the Agency or Mr Zeng within that period, or at all. Attempts were made by the Real Estate Authority (“the Authority”) to contact Mr Zeng by email and telephone, without success. Attempts by the Tribunal’s case manager to contact Mr Zeng were also unsuccessful, as voicemail messages were not responded to.

[4] On 15 December 2020 the Committee applied to the Tribunal for a direction that the charges be dealt with by way of formal proof. The application was served on Mr Zeng by email, and he responded to the Committee’s solicitors the same day, advising that he was “stuck overseas”, and planned to fly back to New Zealand at the end of February 2021. He asked to be kept updated by email.

[5] On 18 December 2020, the Committee’s solicitors enquired of Mr Zeng whether he and the Agency intended to participate in the proceeding. Mr Zeng responded by email the same day that he was “still stuck in China” and that he would contact his lawyer and respond “as soon as possible”. The Committee’s solicitors heard nothing further from Mr Zeng, or any lawyer acting on his behalf.

[6] On 21 January 2021 the Tribunal issued a Minute directing that a hearing was to be scheduled on a date no earlier than 19 April 2021, and that if the defendants wished to participate in the hearing they were to advise the Tribunal no later than 26 February 2021. Directions were also made as to filing of evidence and submissions. The Minute was emailed to Mr Zeng the same day, but he did not respond to it, either to advise that he wished to participate in the hearing or to file any evidence or submissions.

[7] A Notice of Hearing was emailed to Mr Zeng by the Tribunal on 19 April 2021, recording that the hearing was scheduled for 3 May 2021 and advising the venue and starting time. Mr Zeng did not respond to the Tribunal.

[8] Mr Zeng appeared (late) at the scheduled hearing. He did not offer any explanation for having failed to file a response to the charges or having failed to advise that he would participate in the hearing. He remained at the hearing and made submissions.

## **Facts**

[9] The charges focus on two matters:

[a] the Agency's failure to provide trust account audit reports in accordance with the Real Estate Agents (Audit) Regulations 2009) ("the audit regulations") for the financial year ending 31 March 2016 and for the period from 1 April 2016 until it started using New Zealand Real Estate Trust ("NZRET") to hold deposits on real estate sales ("the audit reports issue"); and

[b] Mr Zeng's failure to meet the disclosure requirements under ss 134 to 137 of the Act in relation to the sale and purchase of a rural property at Kawakawa Road, Lake Taupo ("the Kawakawa Road property") ("the disclosure issue").

[10] The matters set out below are taken from an affidavit sworn by Mr Gerald Gallacher, a senior investigator with the Authority, and documents exhibited to the affidavit.

### *The audit reports issue*

[11] In December 2015, the Authority received a report from the Agency's nominated auditors Moore Stephens Markhams ("MSM") that the Agency had failed to comply with certain requirements for operating trust accounts, in that it had not maintained a receipt book as required by reg 7 of the audit regulations and it had not provided

monthly reconciliations in the required timeframes as required by reg 15. A compliance letter was sent to Mr Zeng reminding him of the obligations on 3 December 2015.

[12] On 26 April 2017, Mr Zeng advised the Authority that the Agency's trust account had been closed since 1 April 2016, and indicated that deposits were being held by NZRET.

[13] MSM subsequently advised the Authority that they had ceased acting for the Agency in December 2016, due to issues with obtaining the information required for audit reports. The last audit report for the Agency was provided by MSM on 3 December 2015, for the financial year ended 31 March 2015.

[14] As at 21 July 2017 the Authority had not received a final audit report for the period to 31 March 2016 or for the period until the trust account was closed ("the missing audit reports").

[15] The Authority contacted Mr Zeng in October and November 2017 regarding the missing audit reports. On 12 April 2018 one of the Authority's senior investigators, Mr Johnson, met with Mr Zeng at the Agency's office. Mr Zeng advised that the Agency was now using NZRET, and he would contact his accountant and advise within a week as to whether he had already supplied the missing reports. The Authority did not hear further from Mr Zeng.

[16] On 25 May 2018, NZRET advised the Authority that the Agency had registered with it on 19 July 2013, but no deposits had ever been received from the Agency.

[17] Further inquiries and requests were made of Mr Zeng for the missing audit reports to be provided, and he made commitments to respond, but did not do so.

#### *The disclosure issue*

[18] In early April 2018, the Authority received a referral from the Overseas Investment Office regarding the sale and purchase of the Kawakawa Road property. The documents provided to the Authority showed that Mr Zeng was named on the

agency agreement (dated 24 June 2013) as listing salesperson and that the property was purchased by “Royal Garden Family Trust and/or nominee” under an agreement for sale and purchase dated 25 June 2013. LJ Group New Zealand Limited (“LJNZ”) (of which Mr Zeng holds 100 per cent of the shares) was subsequently nominated as purchaser and settled the purchase on 28 March 2014.

[19] Mr Johnson discussed this purchase with Mr Zeng at their meeting on 12 April 2018 (referred to in paragraph [15], above). He said that the listing salesperson was Mr Derek Wang (notwithstanding that Mr Zeng was recorded as listing agent) and that Mr Wang had approached him about buying the Kawakawa Road property after he became aware that Mr Zeng had missed out on another property. Mr Zeng further said that full disclosure was made to the vendor, and the vendor had his own valuation.

[20] Mr Zeng told Mr Johnson that he would try to locate the property file and provide a copy to Mr Johnson, but the property file was not provided.

#### *Complaints Assessment Committee investigations*

[21] Complaints Assessment Committee 416 determined to inquire into the conduct of the Agency and Mr Zeng on 11 July 2018. Mr Johnson visited the Agency’s offices on 15 August 2018 and was told that Mr Zeng was not available. Although he was asked to do so, Mr Zeng did not contact the investigator. A report as to this investigation was completed by Mr Johnson on 8 October 2018.

[22] With respect to the audit reports, Mr Johnson recorded that the Agency had not met its obligations under regs 14 and 17 of the audit regulations for the financial year ending 31 March 2016 and the period from 1 April 2016 to the date they moved to NZRET. With respect to the disclosure issue, Mr Johnson recorded that despite many messages and telephone calls from himself and the Authority, Mr Zeng had not contacted him and had not provided a copy of the property file.

[23] CAC 416 was disestablished in early 2019 and the matter was transferred to the Committee. The Committee directed a further investigation, which was carried out by Mr Gooch, an Authority investigator. In a letter emailed to Mr Zeng on 14 March

2019, Mr Gooch set out a list of matters in relation to which Mr Zeng was required to provide a written response and/or explanation. These included specific questions relating to the audit reports issue and the disclosure issue.

[24] Mr Zeng was also asked to provide a list of all Agency property sales since April 2013 and documentary evidence showing that property sale deposits went into trust accounts, and all audit reports for years ended 31 March 2016 and 31 March 2017. In relation to the disclosure issue, Mr Zeng was asked to provide the Agency listing agreement and the agreement for sale and purchase for the Kawakawa Road property, and documentary evidence showing that he had fulfilled his obligations under ss 134 to 137 of the Act.

[25] Mr Zeng responded to Mr Gooch on 5 April 2019. Regarding the audit reports, he said that “we are using [NZRET] since April 2015”. Regarding the disclosure issue, he said that Mr Wang was the listing agent and that LJNZ, of which he was the director, had purchased it. He included copies of letters dated 17 July 2013 and 12 August 2013 from Mr Wang to the solicitors for the purchaser and vendor of the Kawakawa Road property, recording that the deposit for the purchase for the property had been paid into the Agency’s trust account, a copy of the agreement for sale and purchase, and a copy of a valuation of the property.

[26] On 3 May 2019 NZRET confirmed that the information it had provided on 25 May 2018 (set out in paragraph [16], above) was correct, that the Agency had registered with it on 19 July 2013, and that its records showed that no deposits had ever been received from the Agency.

[27] Mr Gooch completed an investigation report dated 7 May 2019. With respect to the audit reports issue, he recorded NZRET’s advice that no deposits had ever been received from the Agency, and that the Agency had failed to provide the documents requested in the two investigations that had been undertaken. With respect to the disclosure issue, he recorded that Mr Wang was no longer a licensee and could not be contacted, the solicitor who had handled the transaction for the vendor had died, and no confirmation could be obtained as to whether Mr Zeng had complied with his

obligations under ss 134 to 137. He recorded that Mr Zeng had not provided any evidence that he had complied with those obligations.

[28] The Committee subsequently appointed Mr Gerald Gallacher as investigator for this matter. On 23 November 2019 Mr Gallacher emailed and posted a Notice pursuant to s 85 of the Act (“s 85 Notice”) to the Agency, requiring it to provide the following, by 5 pm on 4 December 2019:

- [a] documentation showing where deposits generated from sales had been deposited into since March 2015, and that that trust account had been audited pursuant to the audit regulations; and
- [b] audit documents for the year ended 31 March 2016, for the part-year of 2017 until the date the Agency moved to NZRET, and from 25 May 2018 to 29 March 2019, and records showing all deposits into NZRET since March 2013.

[29] On the same day, Mr Gallacher emailed and posted a s 85 Notice to Mr Zeng, requiring him to provide, by 5 pm on 4 December 2019:

- [a] the full property file for the Kawakawa Road property; and
- [b] any documentation pertaining to compliance with the disclosure requirements in ss 134 to 137 of the Act.

[30] Mr Zeng sought an extension of time to 5 December 2019, and then to 13 December 2019. Neither the Agency nor Mr Zeng responded to the s 85 Notice within the extended time allowed, although Mr Zeng advised on 9 December 2019 that the Agency’s franchise agreement with L J Hooker had been terminated.

[31] On 30 January 2020 (following a follow-up email from the investigator on 23 January 2020), Mr Zeng sent an email to Mr Gallacher stating “Please see attach the document which you required”. Attached were copies of the letters dated 17 July 2013 and 18 August 2013, referred to in paragraph [25], above, and a copy of the agreement



for sale and purchase for the Kawakawa Road property. No other documents were provided by the Agency or Mr Zeng in response to the s 85 Notices.

[32] Mr Gallacher also served a s 85 Notice on the firm of solicitors who had taken over the practice of the solicitor who acted for the vendor of the Kawakawa Road property. Mr Gallacher reviewed the file provided by the solicitors and advised that it did not contain any consent forms from the vendor client, any independent valuation provided by Mr Zeng, or any document indicating that Mr Zeng had disclosed in writing to every prospective party to the transaction for the sale and purchase of the Kawakawa Road property that he might benefit financially from the transaction.

### **Submissions**

*Failure to respond to the s 85 Notices (Charge 1 (the Agency) and Charge 4 (Mr Zeng))*

[33] Ms Paterson submitted that there is clear evidence that Mr Zeng received the Notices and that each Notice made it clear that he and the Agency were required to comply with them. She further submitted that Mr Zeng had provided only a partial response to the Notice addressed to him personally and had failed to provide any substantive response to the Notice addressed to the Agency. She submitted that the Agency's failure to respond stymied the Committee's investigation into the audit reports issue and meant there was insufficient evidence on which the Committee could determine what had occurred.

[34] Ms Paterson submitted that the Agency's and Mr Zeng's failure to comply with the s 85 Notices reached the threshold of a reckless contravention of s 85 of the Act and showed a disregard by both the Agency and Mr Zeng for their professional obligations, which must be regarded seriously. She submitted that the charges of misconduct under s 73(c)(i) of the Act were made out against each of the Agency and Mr Zeng.

[35] With respect to the s 85 Notice to the Agency, Mr Zeng told the Tribunal that he had told each of the Authority's investigators that the Agency had not used the Agency's trust account since 2015. He believed that audit reports were not required

after that time. In answer to questions from the Tribunal, he said that the Agency was selling properties after 2015, but deposits had been paid into the trust accounts of the vendors' solicitors. We record that this is different from his advice to Mr Johnson on 12 April 2018 (referred to in paragraph [15], above) and to Mr Gooch on 5 April 2019 (referred to in paragraph [25], above). Mr Zeng said he was confused as to what was required, and the Agency may have sent "the wrong documents" in response to the Notices. He said that he took responsibility for the Agency's failure.

[36] Regarding the s 85 Notice to himself, Mr Zeng told the Tribunal that the documents enclosed with his response were the only documents on the Agency's file. He said he had no further documents.

*The disclosure issue (Charge 2 (the Agency) and Charge 3 (Mr Zeng))*

[37] Ms Paterson submitted that ss 134 to 137 impose specific consumer-protection requirements on licensees who seek to acquire a property from a client, either personally or for a person related to them. The Act requires consent of the client in the prescribed form, the provision by the licensee (at the licensee's expense) of an independent valuation of the property concerned, and disclosure by the licensee to every prospective party to the transaction whether they or a related party may benefit from the transaction.

[38] She submitted that it is clear that ss 134 to 137 applied to the purchase of the Kawakawa Road property, for the following reasons:

- [a] Mr Zeng is a licensee;
- [b] Mr Zeng is named in the listing agreement as listing salesperson and regardless of whether Mr Zeng or Mr Wang was the listing salesperson, the Agency and Mr Zeng carried out real estate agency work for LJNZ's purchase of the Kawakawa Road property and Mr Zeng is an officer of the Agency;
- [c] Mr Zeng's company LJNZ purchased the Kawakawa Road property;

[d] Mr Gallacher's evidence was that there was nothing on the property file for the sale of the Kawakawa Road property (obtained from the vendor's solicitors), to indicate that the requirements of s 134 to 137 had been met; and

[e] other than to say (in his meeting with Mr Johnson on 12 April 2018) that "full disclosure" was made to the vendor, Mr Zeng had not produced any evidence that any of the steps required by ss 134 to 137 had been taken either by the Agency or Mr Zeng.

[39] With respect to the Agency, Ms Paterson submitted that the charge was appropriately laid as unsatisfactory conduct under s 72(b) of the Act, as the Agency had a technical degree of removal from the conduct of its licensees, and it appeared that some of the real estate agency work had been carried out by Mr Wang.

[40] Regarding Mr Zeng, Ms Paterson submitted that the nature of the transaction should have raised red flags with him, and it must have been obvious to him that he was potentially breaching his professional obligations by buying a property that he was involved in selling. She submitted that Mr Zeng must have foreseen the possibility of the transaction breaching his professional obligations, but there is no evidence that he took any steps to bring the conflict to the attention of the vendor, or to clarify whether the transaction complied with the Act. She submitted that Mr Zeng's failure to comply with ss 134 to 137 constituted a reckless breach of ss 134 to 137 or, in the alternative, constituted seriously incompetent or seriously negligent real estate agency work, and thus misconduct under s 73(b) of the Act.

[41] Mr Zeng told the Tribunal that in the purchase of Kawakawa Road property by LJNZ he "made a big mistake". He said he knew the vendor of the property, and the vendor had introduced him to the property. He said it was originally intended that the property would be bought by his family trust (Royal Garden Family Trust) but on legal advice his company LJNZ was nominated as purchaser.

[42] Mr Zeng said the vendor had his own valuation of the property, and LJNZ paid more than the valuation. He submitted it is clear that the vendor did not suffer any loss in the transaction.

## **Discussion**

[43] We record that at the conclusion of submissions, Mr Zeng made the following admissions:

- [a] Charge 1: the Agency admitted the charge of misconduct under s 73(c)(i) of the Act in relation to its failure to comply with the s 85 Notice;
- [b] Charge 2: the Agency admitted the charge of unsatisfactory conduct under s 72(b) in relation to the failure to comply with ss 134 to 137 of the Act;
- [c] Charge 3: Mr Zeng admitted the charge of misconduct under s 73(c)(i) in relation to his failure to comply with ss 134 to 137; and
- [d] Charge 4: Mr Zeng admitted the charge of misconduct under s 73(c)(i) in relation to his failure to comply with the s 85 Notice.

[44] The evidence before the Tribunal establishes that the s 85 Notices were properly served on both the Agency and Mr Zeng. The Notices make it clear that recipients are required to comply with them and that it is an offence not to comply. The Agency did not provide any of the documents it was required to provide nor provide any adequate explanation as to why it did not, or could not, do so.

[45] While it is accepted that Mr Zeng advised the Authority and the investigators that the Agency had stopped using its own trust account, he advised that the Agency was using NZRET, and then that the Agency had closed. There is no evidence before the Tribunal that either the Agency or Mr Zeng advised the Authority or the investigators that deposits from transactions were being paid into the trust accounts of vendors' solicitors. We find Charge 1 is proved.

[46] Mr Zeng provided only three documents in response to the s 85 Notice addressed to him personally and did not provide any documents relating to compliance with the requirements of ss 134 to 137 of the Act. We find Charge 4 is proved.

[47] We accept Ms Paterson's submission that the Agency was properly charged with unsatisfactory conduct in relation to the failure to comply with ss 134 to 137 in relation to LJNZ's purchase of the Kawakawa Road property. We accept her submission that it appears that Mr Wang did some real estate agency work in relation to the transaction as well as Mr Zeng. We find Charge 2 is proved.

[48] We also accept Ms Paterson's submission that it must have been obvious to Mr Zeng that the purchase by either his family trust or his company LJNZ would raise issues as to compliance with ss 134 to 137, regardless of whether the vendor knew of the identity of the purchaser and/or had his own valuation. He did not take any of the required steps. We find Charge 3 proved.

## **Penalty**

### *Submissions*

[49] The Tribunal has received submissions as to penalty.

[50] Ms Davies submitted for the Committee that Mr Zeng's failure to comply with ss 134 to 137 of the Act, and his failure to comply with the s 85 Notice, taken separately and cumulatively, demonstrated serious and ongoing departures from the standards expected of licensees. She submitted that the Agency's failure to comply with the s 85 Notice was aggravated by its unsatisfactory conduct in relation to the disclosure issue. In the light of the overlapping nature of the conduct as between Mr Zeng and the Agency, and the fact that as principal officer Mr Zeng effectively "was" the Agency, she addressed the gravity of both defendants' conduct together.

[51] With respect to the s 85 Notices, Ms Davies submitted that the only response received (from Mr Zeng) provided documents that were not sought in the Notice. She submitted that there was no explanation accompanying the response, and Mr Zeng had

not sought clarification of the Notices, or indicated in any way that he did not understand what was required of him or the Agency. She also submitted that failure to comply with a s 85 Notice is a breach of s 86 of the Act, and an offence under s 148 of the Act.

[52] Ms Davies submitted that there had been an ongoing lack of co-operation with the Committee's investigation, which meant that the Committee had not been able to establish a clear factual picture. Ms Davies referred to Mr Zeng's statement to the Tribunal that deposits had been paid to vendors' solicitors' trust accounts and submitted that this could easily have been explained to the investigator. She submitted that if Mr Zeng had provided this advice, the long and frustrating investigations may have been avoided.

[53] With respect to the disclosure issue, Ms Davies submitted that ss 134 to 137 are a prohibition against self-dealing for licensees. She submitted that a failure by licensees to disclose that they are purchasing a property owned by a vendor client goes to the heart of the consumer-protection purpose of the Act, has the potential to cause harm, and to bring the industry into disrepute, and Mr Zeng ignored his obligations. She submitted that the fact that Mr Zeng advised the investigator that he had made "full disclosure" to the vendor, when there was no evidence that the required disclosure had been made, established that he knew that what he had done was wrong and had attempted to cover it up.

[54] Ms Davies submitted that Mr Zeng's and the Agency's failure to engage in the investigations and to respond to the s 85 Notices demonstrated a distinct disregard for the Act's regulatory processes and a lack of candour. She submitted that these failures are significant in assessing Mr Zeng's and the Agency's fitness to remain in the industry.

[55] Ms Davies advised that both Mr Zeng and the Agency have been subject to a previous finding of unsatisfactory conduct, so cannot claim any credit for an unblemished disciplinary history.

[56] Ms Davies referred to Mr Zeng's indication to the Tribunal that he will not continue to work in the real estate industry but submitted that it is still important that findings of misconduct are made, and penalties imposed. She submitted that the penalties imposed must be set at a level which marks the Tribunal's disapproval of Mr Zeng's and the Agency's conduct, deters other licensees, and preserves confidence in the industry. She submitted that in each case, no penalty short of cancellation of licence could mark the seriousness of that conduct.

[57] Mr Zeng admitted and took responsibility for the late responses to the Notices while he was overseas. He submitted that he had told the Authority that the Agency's office was closed. He referred to his communication to the Authority on 26 April 2017 that the Agency's trust account had been closed since 1 April 2016.

[58] With respect to the purchase of the Kawakawa Road property, he submitted that the vendor was his friend, and the vendor and his wife clearly knew that he was a real estate agent. He submitted that the price offered to the vendor was the vendor's asking price, and the vendor was very happy with the price and had leased the property back for two years after settlement. He submitted a copy of a valuation report dated 30 March 2016.

[59] Mr Zeng said he accepted that he had been careless and had delayed but asked the Tribunal to consider his explanation. He submitted that he would accept an order that he complete professional training courses and pay a fine.

[60] Mr Zeng did not address any of the submissions made in the penalty submissions for the Committee.

[61] Ms Davies filed submissions in reply to Mr Zeng's penalty submissions. She submitted that it is not mitigating that Mr Zeng was overseas when the s 85 Notices were served on him, as they were sent to the same email address as he has recently been using for correspondence. She also submitted that Mr Zeng had not previously given evidence that the vendor of the Kawakawa Road property was his friend, that he had paid the vendor was asking for, that the vendor was happy with the price, and that

the vendor had leased the property back from him. She submitted that the Tribunal should not give Mr Zeng's submissions any weight.

[62] Ms Davies also submitted that the valuation report submitted by Mr Zeng substantially post-dates his purchase of the Kawakawa Road so does not assist the Tribunal.

### *Principles as to penalty*

[63] 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>2</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.<sup>3</sup>

[64] In order to meet the purposes of the Act, 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.

[65] 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>

[66] 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:

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<sup>2</sup> Section 3(1) of the Act.

<sup>3</sup> Section 3(2).

<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].



- [a] make any of the orders that a Complaints Assessment Committee may make under s 93 of the Act (following a finding of unsatisfactory conduct);
- [b] order cancellation of the licensee's licence, or suspension for a period not exceeding 24 months; and
- [c] order a licensee to pay a fine of up to \$15,000 (in the case of an individual licensee) or up to \$30,000 (in the case of a company licensee);

### *Discussion*

[67] We refer first to the previous findings of unsatisfactory conduct by the Committee against Mr Zeng and the Agency. These findings followed an investigator's visit to the Agency in August 2018.<sup>5</sup> The investigator noticed a discrepancy between the details of engaged salespersons and property listings recorded on the Agency's website, and the Authority's records: the website referred to six engaged salespersons and 23 listings, whereas the Authority had records of only two salespersons (Mr Zeng and an office manager (Mr Duan)).

[68] A voluntary audit was therefore undertaken of the Agency's listings. This revealed that 14 of the listings were not current and that of the current listings, those for five properties, while signed, lacked appraisals and/or disclosure information. Mr Zeng and the Agency were found to have breached rr 9.6 and 9.9 of the Rules, and guilty of unsatisfactory conduct.<sup>6</sup> In its penalty decision, the Committee ordered that all three licensees were censured. Mr Zeng and Mr Duan were each ordered to pay a fine of \$2,500, and the Agency was ordered to pay a fine of \$5,000.<sup>7</sup>

[69] We note that the voluntary audit referred to above post-dated (by some five years) Mr Zeng's purchase of the Kawakawa Road property. However, the voluntary audit and subsequent Committee determination occurred around the same time as Mr

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<sup>5</sup> This appears to have been the visit by Mr Johnson on 15 August 2018, referred to in paragraph [21], above.

<sup>6</sup> Complaint C27804 re Zeng, Duan, and New Zealand LJ International *Decision finding unsatisfactory conduct*, 30 January 2020.

<sup>7</sup> Complaint C27804 re Zeng, Duan, and New Zealand LJ International *Penalty decision*, 9 June 2020.

Zeng and the Agency were being pressed for information on the audit of the Agency's trust account, and the service of the s 85 Notices. As a result of the Committee's findings both Mr Zeng and the Agency can have been left in no doubt as to the importance of complying with the Rules relating to their real estate agency work, yet their response to the s 85 Notices was either non-existent or inadequate, and without any explanation.

[70] Mr Zeng has been found guilty of misconduct in two respects: his failure to comply with the requirements of ss 134 to 137 of the Act, and his failure to respond adequately to the s 85 Notice. Further, we accept the Committee's submission that over the course of the three investigations, he failed to engage appropriately in the process, and failed to respond appropriately to the investigators' requests for information and documents. The Agency has been found guilty of misconduct in respect of its failure to respond to the s 85 Notice, and of unsatisfactory conduct in relation to the failure to comply with ss 134 to 137 of the Act in relation to the purchase of the Kawakawa Road property.

[71] Mr Zeng and the Agency have been found guilty of serious offending. The failure to give proper disclosure in relation to the Kawakawa Road property purchase was directly contradictory to the purposes of the Act of promoting and protecting the interests of consumers in respect of transactions relating to real estate, and promoting public confidence in real estate agency work. Mr Zeng's and the Agency's failures to respond to the s 85 Notices involved an offence under the Act. The Tribunal must send a clear message to Mr Zeng and the industry that failures to comply with ss 134 to 137 of the Act and with s 85 Notices are regarded seriously.

[72] We were not referred to any Tribunal decisions as to penalty in relation to failure to comply with a s 85 Notice, or breaches of ss 134 to 137 of the Act. Cancellation of licence was ordered by the Tribunal in *Complaints Assessment Committee 20007 v Jarman*.<sup>8</sup> In that case Ms Jarman had purchased two properties and charged commission when she did not have a signed agency agreement and had then on-sold them without disclosing to the purchasers that she would benefit from the transaction.

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<sup>8</sup> *Complaints Assessment Committee 20007 v Jarman* [2015] NZREADT 66.

She admitted two charges of misconduct under s 73(c) of the Act in relation to multiple breaches of the Act and Rules.

[73] In other recent cases, penalties for breaches of ss 134 to 137 of the Act have ranged from orders for censure and fines, to censure, fines, and orders for suspension of licence.<sup>9</sup> In its penalty decision in *Complaints Assessment Committee 20009 v Li*, the Tribunal imposed orders for censure, suspension of licence for 17 months and a fine of \$10,000.<sup>10</sup> In that case, Mr Li admitted one charge of misconduct under s 73(c) of the Act and one charge of misconduct under s 73(a) of the Act. He had failed to disclose to vendors or purchasers of properties marketed by him that a person related to him (his niece) would obtain a financial advantage from the transactions. He had also provided false information to the agency at which he was engaged and to an Authority investigator in the course of investigations into a complaint about the transactions. Further, he admitted a charge of unsatisfactory conduct under s 72 of the Act, in relation to breaches of ss 134 to 137 of the Act.

[74] In deciding to order suspension rather than cancellation the Tribunal noted that the most serious aspect of Mr Li's conduct was the fact that he had lied to the Authority about his relationship to his niece. It considered that his deception was significant and said that while it did not appear that there had been any harm caused to the vendors or purchasers involved, there was a perception that Mr Li "was either careless or reckless as to his obligations under the Act or the Rules or lacking in basic training as to what the Act required".<sup>11</sup>

[75] The Tribunal concluded that suspension was the least restrictive penalty, and appropriate, as it gave him a chance to return to the profession and be rehabilitated. It also took into account that no loss had been occasioned to any vendor. However, because of the deceit involved in the charge, the period of suspension was required to be significant. It took the maximum available suspension period (two years) as its

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<sup>9</sup> See *Complaints Assessment Committee 402 v Dunham* [2016] NZREADT 49, *Complaints Assessment Committee 408 v Reed* [2017] NZREADT 34, and *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3.

<sup>10</sup> *Complaints Assessment Committee 20009 v Li* [2015] NZREADT 15.

<sup>11</sup> *Li*, at [23].

starting point and applied a reduction of five months to reflect Mr Li's guilty plea and his co-operation with the Authority following his admission that he had lied.<sup>12</sup>

[76] In contrast to Mr Li, Mr Zeng's breaches of ss 134 to 137 of the Act concerned only one transaction. However, the Tribunal's comment that Mr Li "was either careless or reckless as to his obligations under the Act or the Rules or lacking in basic training as to what the Act required" applies as well to Mr Zeng's breaches of ss 134 to 137 and his response to the s 85 Notice addressed to him, and his failure to respond to the s 85 Notice issued to the Agency.

[77] We assess the conduct of each of Mr Zeng and the Agency as being at the higher end of the range of misconduct, and the penalty imposed must reflect that assessment.

[78] Against that, no evidence has been given that any person or entity has suffered loss, or been put at risk of loss, as a result of the failure to comply with ss 134 to 137 of the Act in relation to the Kawakawa Road property purchase. Further, Mr Zeng has now (belatedly) offered an explanation in relation to the Agency's failure to comply with the s 85 Notices. Mr Zeng's conduct does not involve the deceit which was present in both *Jarman* and *Li* but he is not entitled to any reduction in penalty on the basis of an early admission of the charges (which were made at the conclusion of the hearing) or any co-operation with the Authority, or previous unblemished record.

[79] The Tribunal has concluded that cancellation of Mr Zeng's and the Agency's licences is not required to achieve the purpose of the Act. The purpose of promoting and protecting the interests of consumers, and promoting public confidence in the performance of real estate agency work, can be achieved by penalty orders short of cancellation.

[80] We have concluded that the appropriate orders are that Mr Zeng is censured, his licence is suspended for a period of 18 months, he is ordered to undertake training before he may have his licence restored, and he is ordered to pay a fine. The Agency will also be censured, its licence suspended, and it will be ordered to pay a fine.

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<sup>12</sup> *Li*, at [25]–[27].

## **Application for costs**

### *Submissions*

[81] Ms Davies sought an order pursuant to the Tribunal's power to award costs under s 110A of the Act. She submitted that a licensee found guilty of charges should generally (although not invariably) be ordered to make a payment of at least some of the relevant Complaints Assessment Committee's costs in bringing the charges. She submitted that this reflects the purposes of the Act, in particular accountability through the disciplinary process, and recognises that the costs associated with charges proceedings are born by members of the industry.

[82] In the present case, Ms Davies submitted that an order requiring Mr Zeng and the Agency to pay at least 50 per cent of the costs incurred by the Committee is appropriate. She submitted that no reduction in the costs order should be made given that neither of them had co-operated with the investigation or the charges proceeding and had not accepted their wrongdoing prior to the conclusion of the hearing before the Tribunal.

[83] Ms Davies submitted a schedule of costs, which set out the Committee's legal costs, totalling \$20,428.00. She sought an order that the defendants pay \$10,214.

[84] Mr Zeng did not make any submissions in relation to the application for costs.

### *Discussion*

[85] Section 110A of the Act provides as follows:<sup>13</sup>

#### **110A Costs**

- (1) In any proceeding under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
- (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this

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<sup>13</sup> Section 110A was inserted by section 244 of the Tribunals Powers and Procedures Legislation Act 2018.

section, the Disciplinary Tribunal may take into account whether and to what extent, any party to the proceedings—

- (a) has participated in good faith in the proceedings:
  - (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
  - (c) has acted in a manner that facilitated the resolution of issues that were the subject of the proceedings.
- (3) [Not relevant to this proceeding]
- (4) A person to whom costs are awarded under this section, but who has not been paid in full, may file a copy of the order in the District Court, where it may be enforced for so much of the amount as is still owing as if it were a judgment of the District Court.

[86] The Tribunal is given a discretion as to orders for costs. That discretion is to be exercised in accordance with the Act, on the particular circumstances of the case before the Tribunal. In his judgment in *TSM v A Professional Conduct Committee*, his Honour Justice Palmer set out established principles as to orders for costs in professional disciplinary proceedings, as follows:<sup>14</sup>

- (a) professional groups should not be expected to bear all the costs of the disciplinary regime;
- (b) members who appeared on charges should make a “proper contribution” towards costs;
- (c) costs are not punitive;
- (d) the practitioner’s means, if known, are to be considered;
- (e) a practitioner’s defence should not be deterred by the risks of a costs order; and
- (f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[87] We accept that the Committee’s legal costs of \$20,428.00 are reasonable.

[88] We also accept Ms Davies’ submission that Mr Zeng and the Agency failed to participate in good faith in the proceeding, failed to co-operate with the process of information gathering by the Committee, and failed to act in a manner that facilitated the resolution of the charges. Those costs should not be borne solely by members of

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<sup>14</sup> *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21], citing *Vatsayann v Professional Conduct Committee of The New Zealand Medical Council* [2012] NZHC 1138, at [34].

the industry. An order will be made that the Agency and Mr Zeng contribute to the Committee's costs.

## **Orders**

### *Charges*

[89] The Tribunal's findings in respect of the charges are as follows:

- [a] Charge 1: The Agency is found guilty of misconduct under s 73(c)(i) of the Act, in relation to its failure to comply with the s 85 Notice addressed to it.
- [b] Charge 2: The Agency is found guilty of unsatisfactory conduct under s 72(b) of the Act, in relation to its failure to comply with ss 134 to 137 of the Act in the Kawakawa Road property transaction.
- [c] Charge 3: Mr Zeng is found guilty of misconduct under s 73(c)(i) of the Act, in relation to his failure to comply with ss 134 to 137 of the Act in the purchase of the Kawakawa Road property.
- [d] Charge 4: Mr Zeng is found guilty of misconduct under s 73(c)(i) of the Act, in relation to his failure to comply with the s 85 Notice addressed to him.

### *Penalty*

[90] The Agency is censured. The Tribunal orders that its licence is suspended for 18 months as from the date of this decision. The Agency is also ordered to pay a fine of \$5,000. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[91] Mr Zeng is censured. The Tribunal orders that his licence is suspended for 18 months as from the date of this decision. The Tribunal further orders that Mr Zeng must complete Unit Standards 23136 ("Demonstrate knowledge of consumer

protection law related to real estate practice”), 23141 (“Demonstrate knowledge of legislation as applied to real estate licensees”), and 23149 (“Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agents Act 2008”) before his licence is re-issued. Mr Zeng is also ordered to pay a fine of \$5,000. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[92] Mr Zeng and the Agency (collectively) are ordered to pay the sum of \$10,214, by way of contribution towards the Committee’s costs. The payment must be made to the Authority within 20 working days of the date of this decision.

[93] 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 N O’Connor  
Member

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Ms F Mathieson  
Member