

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 13

Reference No: READT 016/2021

**IN THE MATTER OF**

Charges laid under s 91 of the Real  
Estate  
Agents Act 2008

**BROUGHT BY**

**COMPLAINTS ASSESSMENT  
COMMITTEE 2002**

**AGAINST**

**YAMING (JESSICA) SUN**  
Defendant

Hearing on the papers

Tribunal:

C A Sandelin (Deputy Chairperson)  
G J Denley (Member)  
P N O'Connor (Member)

Appearances:

Counsel for the Committee:  
The Defendant:

Ms Mok  
Self-represented

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**DECISION (PENALTY)**  
**Dated 9 June 2023**

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## INTRODUCTION

[1] In a decision issued on 6 April 2023, the Tribunal found Ms Sun guilty of misconduct under s 73(b) of the Real Estate Agents Act 2008 (the Act) (the Tribunal's substantive decision). The Tribunal has now received submissions as to penalty.

## BACKGROUND

[2] The background facts are set out in the Tribunal's substantive decision and are summarised below.

[3] At the time of the relevant events, Ms Sun was a licensed salesperson under the Act working at [Real estate company]. Ms Sun voluntarily surrendered her licence on 25 October 2018 and is currently residing overseas.

[4] In 2014, [Property development company] applied to [council] to subdivide a property into 15 lots (the subdivision). Each of the lots, to which this proceeding relates, were subject to rights of way which affected the net available building areas of the various lots (the easements).

[5] [Property developer], was (and remains) the sole director of [Property development company].

[6] The subdivision was approved by the council in April 2016 and [Property developer] engaged Ms Sun to list and sell various vacant lots in the subdivision. Ms Sun had previously been involved in various other attempts to sell lots in the subdivision, but the subdivision plans had not at that time been approved by the council.

[7] On various occasions between January 2016 and June 2016, Ms Sun met with several prospective purchasers (the purchasers) at the subdivision in order to show them the proposed lots. During these visits it was alleged that Ms Sun marketed the subdivision, including by discussing the availability of lots for purchase with the purchasers and their associates.

[8] In early May 2016 [Property developer] provided contour plans for the subdivision to Ms Sun and on or about 8 June 2016, [Property developer] sent Ms Sun two plans of the subdivision outlining the easements which applied to the proposed lots in the subdivision, including to Lots 1, 2 and 3. [Property developer] provided a template Agreement for Sale and Purchase (ASP) for several of the lots.

[9] Listing agreements were not signed for any of the lots in the subdivision until 8 and 15 June 2016.

[10] On or about 26 June 2016, the purchasers and [Property developer] entered into Agreements for Sale and Purchase (the ASPs) for Lots 1, 2, 3, 13 and 15 of the subdivision. Schedule 2 of each of the ASPs was not completed at the time [Property developer] signed the ASPs except to record that [Property development company] was registered for GST and its GST number was recorded.

[11] On 27 June 2016, Ms Sun took the signed versions of the ASPs to [Real estate company]. That same day an office administrator scanned the ASPs into [Real estate company]'s system. The GST information in Schedule 2 of the ASPs for Lots 1, 2 and 15 was not completed.

[12] At some stage after the ASPs had been taken back to [Real estate company] and scanned by the office administrator, and despite the ASPs having already been signed by the parties, Schedule 2 of the scanned versions of the ASPs for Lots 1, 2 and 15 was filled in to record that each of the purchasers was registered for GST.

[13] Deposits were paid in respect of the ASPs in July 2016. Titles were issued for Lots 1, 2, and 3 in November 2017. The net sizes of Lots 1, 2, and 3 were less than had been represented to the purchasers and/or their associates as a result of the effect of the easements which applied to the lots. Specifically:

(a) The net size of Lot 1 was 374 m<sup>2</sup>, not 603 m<sup>2</sup>;

(b) The net size of Lot 2 was 389 m<sup>2</sup>, not 603 m<sup>2</sup>;

(c) The net size of Lot 3 was 456 m<sup>2</sup>, not 601 m<sup>2</sup>.

[14] Prior to settlement, one of the purchasers, [Purchaser], raised concerns with Ms Sun and [Property developer] about the size of Lot 1. On or about 15 February 2018, Ms Sun and [Purchaser] were engaged in a conversation on the messaging application [Messaging platform] regarding the size of Lot 1 and the impact on the easement relating to the lot. Ms Sun sent a message to [Purchaser] informing her that [Property developer] was "very frustrated and anxious" and that his "bank loan is nearly due". [Purchaser] subsequently sought to cancel the transaction.

[15] None of the ASPs relating to the lots referred to above ultimately settled.

[16] The Complaints Assessment Committee (the Committee) inquired into the allegations, investigated and determined to lay charges against Ms Sun in accordance with s 91 of the Act.

### **TRIBUNAL'S SUBSTANTIVE DECISION**

[17] The Committee charged Ms Sun with misconduct pursuant to s 73(b) of the Act in that her conduct constituted seriously negligent or seriously incompetent real estate agency work by:

- (a) marketing and/or offering the five lots for sale without agency agreements being in place, in breach of r 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules);
- (b) misrepresenting the net size of three of the lots (Lots 1, 2 and 3) to the purchasers, and failing to take adequate steps to ensure prospective purchasers were informed of the need to obtain professional advice about the lot sizes, in breach of rr 5.1 and 6.4 of the Rules;
- (c) disclosing confidential information about [Property developer] to the purchaser of Lot 1 ([Purchaser]), in breach of rr 6.1, 9.1 and 9.17 of the Rules;
- (d) failing to ensure that all the versions of the ASPs prepared for Lots 1, 2 and 15 contained the same material particulars in the GST schedules before each version of the ASPs was signed, in breach of rr 5.1 and 9.9 of the Rules.

[18] The Tribunal found that Ms Sun marketed the lots by taking prospective purchasers to the subdivision in order to generate an interest in purchasing lots in the subdivision, which should only occur if she was authorised to do so under an agency agreement.

[19] The Tribunal found that Ms Sun misrepresented the sizes of Lots 1, 2 and 3, and lacked an understanding of the subdivision and the easements outlined in the plans. Ms Sun was out of her depth and should have sought clarification from her supervisor at [Real estate company] or recommended that the purchasers obtain professional advice. As a result of this, the purchasers of Lots 1, 2 and 3 agreed to purchase the lots in reliance on incorrect information.

[20] The Tribunal found that Ms Sun was made aware of confidential information about [Property development company]'s financial situation by [Property developer] in confidence. She should not have passed this information onto [Purchaser] and had no authority to do so. [Property developer] did not give Ms Sun permission to disclose the information.

[21] The Tribunal further found that Ms Sun had a responsibility as the salesperson to ensure that the ASPs were correct and completed in all respects before they were signed by the parties. It was of concern that Ms Sun directed someone else at [Real estate company] to fill out the missing information in the ASPs as she was heading overseas. Ms Sun should have waited until she had confirmation of the purchaser's GST information before presenting the ASPs to the parties for signing. Her explanations under cross-examination for not completing the GST schedules showed a lack of understanding on Ms Sun's part as to the importance of ensuring material particulars in ASPs are filled in before they are signed by the parties.

[22] In conclusion, the Tribunal found that the Committee had proved on the balance of probabilities that Ms Sun's actions were seriously negligent and such that would bring the real estate industry into disrepute. None of her errors were minor or technical and multiple breaches of the Rules took place. The Tribunal found that Ms Sun's conduct constituted a breach of s 73(b) of the Act by:

- (a) marketing the lots to prospective purchasers without agency agreements being in place, in breach of r 9.6 the Rules;
- (b) misrepresenting the net size of three of the lots (Lots 1, 2 and 3) to the purchasers, and failing to take adequate steps to ensure prospective purchasers were informed of the need to obtain professional advice about the lot sizes, in breach of rr 5.1 and 6.4 of the Rules;
- (c) disclosing confidential information about [Property developer] to the purchaser of Lot 1 ([Purchaser]), in breach of rr 6.1, 9.1 and 9.17 of the Rules;
- (d) failing to ensure that all the versions of the ASPs prepared for Lots 1, 2 and 15 contained the same material particulars in the GST schedules before each version of the ASPs was signed, in breach of rr 5.1 and 9.9 of the Rules.

## JURISDICTION AND PRINCIPLES

[23] The Tribunal's jurisdiction to impose penalty orders if misconduct is proven is set out in the Act:

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

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
- (2) The orders are as follows:
  - (a) 1 or more of the orders that can be made by a Committee under section 93 (except under section 93(1)(ha)):
  - (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 and the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law, 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.

...

[24] In determining the appropriate penalty, it is relevant to note the purpose of the Act:

### **3 Purpose of Act**

- (1) The purpose of this 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.
- (2) The Act achieves its purpose by—
  - (a) regulating agents, branch managers, and salespersons:
  - (b) raising industry standards:
  - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[25] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>1</sup>

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[26] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.<sup>2</sup>

[27] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>3</sup>

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<sup>1</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

<sup>2</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *Z*, above n 1, at [151].

<sup>3</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[28] The most appropriate penalty is that which:<sup>4</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

## SUBMISSIONS

### *Submissions for the Committee*

[29] Ms Mok submitted that a lengthy period of suspension would ordinarily be the appropriate starting point for Ms Sun's conduct. However, Ms Sun has already voluntarily surrendered her licence and is currently residing overseas. Ms Mok submitted that the following orders are appropriate:

- (a) censure; and
- (b) a fine in the vicinity of \$10,000.

[30] Ms Mok referred to *McCaig v Professional Conduct Committee* and submitted that penalty orders in disciplinary proceedings engage both specific and general deterrence and that there is a need to ensure that the licensee does not act in a similar way in the future.<sup>5</sup> She submitted that even if the Tribunal was satisfied that repeat conduct was unlikely (for example, because the licensee is no longer practising), a penalty that deters other licensees from acting in a similar way may still be warranted.

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<sup>4</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

<sup>5</sup> *McCaig v Professional Conduct Committee* [2015] NZHC 3063.



[31] Ms Mok submitted that although Ms Sun has already surrendered her licence and there is no immediate risk posed, the level of negligence she displayed raises public protection concerns. Ms Mok submitted that there is a need to send a strong message to other licensees about the consequences of engaging in similar conduct to Ms Sun.

[32] Ms Mok submitted that the level of negligence and incompetence displayed by Ms Sun was high and falls at the upper end of the spectrum of seriousness for misconduct cases of this kind. Ms Mok submitted that Ms Sun's misconduct involved multiple breaches of the Act, and her evidence in the course of the hearing displayed a fundamental misunderstanding of her professional obligations as a licensee. Furthermore, she submitted that Ms Sun did not accept responsibility for her conduct and did not accept any of the underlying facts before the hearing, requiring the Committee to call a number of witnesses and produce a number of documents.

[33] Ms Mok acknowledged that Ms Sun had no previous disciplinary history but other than that there were no other mitigating circumstances.

#### *Submissions of Ms Sun*

[34] Ms Sun submitted that the proceedings have caused her tremendous stress and have taken a toll on her health. She submitted that throughout the whole process she had tried her hardest to be honest and transparent. She submitted that she did not have any legal assistance available to her and she tried to do her best with the limited knowledge she had. She never had any intention to be uncooperative.

[35] Ms Sun submitted that she has no prior history of offending, she surrendered her license straight away after the complaint and that she has shown remorse. She says that she is not capable of paying the amount sought by the Committee as she has no job, her marriage has broken down and she is supporting her two daughters.

#### **DISCUSSION**

[36] We consider Ms Sun's conduct to be at the higher level of misconduct. There were multiple breaches of the Rules by Ms Sun. Ms Sun did not take adequate steps to ensure that she properly understood the sections that she was marketing and selling and should have sought help and clarification from her supervisor.

[37] Whilst giving evidence at the hearing, it was apparent that Ms Sun lacked a fundamental understanding of her professional obligations as a licensee, and of basic

concepts relating to real estate transactions, such as marketing, confidentiality and easements.

[38] Ms Sun did not cooperate with the Committee or accept responsibility for her misconduct. However, it is acknowledged by the Tribunal that Ms Sun has no previous disciplinary history. Furthermore, Ms Sun did voluntarily suspend her license on 25 October 2018.

[39] The Tribunal has previously taken into account circumstances where a licensee has ceased real estate work or has been suspended by their agency, amongst other factors, when considering penalty.<sup>6</sup>

[40] However, in these situations, the licensees had usually cooperated with the Committee and/or shown remorse for their actions. Ms Sun had not cooperated with the Committee or acknowledged any responsibility for her actions until after the hearing. The hearing took place over 7 days and Ms Sun called a number of witnesses to give evidence.

[41] Ms Sun's response on penalty indicated she only had limited funds available and was in no position to pay the financial penalty proposed by the Committee. On 26 May 2023 Ms Sun, at the invitation of the Committee, filed a memorandum responding to the Committee's submissions as to costs which attached some further financial information. Ms Sun is not currently employed, she says she has no assets, she lives in [Country] with her mother who supports her and her two daughters. She also receives financial support from her husband from whom she is separated.

[42] Taking into account Ms Sun's financial position, her previous unblemished disciplinary record and the significant costs award (referred to in paragraph [48] below), we consider an appropriate penalty to be a fine of \$7,500, together with a censure.

## **COSTS**

[43] The Committee seeks a contribution to its costs. It is submitted by the Committee that the orthodox position is that a licensee who is found guilty of misconduct is to pay 50 per cent of the Committee's costs.<sup>7</sup> This reflects one of the purposes of the Act, to provide accountability through an effective disciplinary

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<sup>6</sup> *Complaints Assessment Committee 403 v Elia* [2017] NZREADT 7 at [27].

<sup>7</sup> *Complaints Assessment Committee 2102 v He* [2022] NZREADT 26 at [72].

process, and recognises that members of the profession should not be expected to bear all of the costs incurred in holding fellow members to account.

[44] The Committee attached to its penalty submissions of 4 May 2023 a letter outlining costs and expenses incurred by the Committee in the prosecution the charges, comprising:

- (a) \$51,250.50 for invoices, excluding GST and disbursements (fees of counsel); and
- (b) \$3,292.50 as a final invoice estimate for work in progress, excluding GST and disbursements (fees of counsel).

[45] The Committee seeks a 50 per cent contribution to costs which amounts to \$27,271.50.

[46] The Tribunal's discretion to award costs is set out in s 110A of the Act, which lists certain factors to take into account. The High Court has identified the relevant considerations relating to the award of costs in professional disciplinary cases:<sup>8</sup>

1. Professional groups should not be expected to bear all the costs of the disciplinary regime.
2. Members who appeared on charges should make a proper contribution towards costs.
3. Costs are not punitive.
4. The practitioner's means, if known, are to be considered.
5. A practitioner's defence should not be deterred by the risks of a costs order.
6. In a general way, 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[47] We see no reason to deviate from the orthodox position of 50 per cent of the Committee's reasonable costs. The Tribunal accepts that the Committee's costs of \$54,543 are reasonable for charges of this nature. Ms Sun participated in the

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<sup>8</sup> *McCaig*, above n 5, at [21], citing *Vatsyayann v Professional Conduct Committee of New Zealand Medical Council* [2012] NZHC 1138 at [34].

proceedings in a manner which increased the time and cost required to address and hear the matter.

[48] Accordingly, we award costs of \$27,271.50 to be paid by Ms Sun.

## **ORDERS**

[49] Ms Sun is:

- (a) Censured.
- (b) Ordered to pay a fine of \$7,500 to the Authority within 20 working days of the date of this decision.
- (c) Ordered to pay costs of \$27,271.50 to the Authority within 20 working days of the date of this decision.

[50] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

## **PUBLICATION**

[51] In light of the outcome of this charge and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any of the parties other than Ms Sun.

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C A Sandelin  
Deputy Chairperson

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G J Denley  
Member

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P N O'Connor  
Member