

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 80

READT 018/16

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT
BETWEEN ANEEZ NABI & JIAJING FANG
Applicants
AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)
First respondent
AND MICHAEL ZHOU & TINA SHI
Second respondents

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

Appearances: The appellants for and on behalf of themselves
Ms N Copeland for first respondent
Mr T Rea for second respondents

Decision: 21 December 2016

DECISION ON THE PAPERS

[1] The appellants appeal against the penalty decision imposed upon Michael Zhou and Tina Shi by the Complaints Assessment Committee (CAC) on 7 April 2016.

The facts

[2] Michael Zhou was a licensee at Barfoot and Thompson in Mairangi Bay Auckland. Ms Tina Shi was his assistant. The complaint relates to the appellant's

attempted purchase of 20A Clarice Place, Takanini. The complainants complained that:

- (i) the property was a leaky home and this was not disclosed.
- (ii) the licensees did not disclose that Mr Zhou was the vendor of the property.
- (iii) Mr Zhou pressured the appellants to pay a \$15,000 deposit immediately upon signing the agreement for sale and purchase.
- (iv) the complainants were told that it was a multi-offer situation when it was not.
- (v) Ms Shi dismissed the complainants concerns about the building inspection report.

[3] The Complaints Assessment Committee found that Mr Zhou had engaged in unsatisfactory conduct under s 89(2)(b) of the Act and that Ms Shi had likewise engaged in unsatisfactory conduct.

[4] The CAC found that there was no evidence to support the allegation that the property was a leaky home and made a finding that there was insufficient evidence to support this allegation. The complaint that Mr Zhou acted deceitfully in trying to sell the property without disclosing that there were serious defects was found by the CAC not to be established.

[5] The CAC found that the complainants had viewed the property with Ms Shi, who was the assistant to Mr Zhou, and they were told that the vendor was related to the agency but not that Mr Zhou was the vendor. Ms Shi also did not check the ownership of the vendor company. The Committee found that Mr Zhou failed to comply with the provisions of s 136 of the Real Estate Agents Act and that in failing to disclose that he was the vendor he had departed from acceptable professional standards.

[6] The CAC found that Ms Shi had an obligation to check the name of the vendor and failed to do so.

[7] The CAC found that the multi-offer form that the complainants had signed provided that there **may** be a multi-offer situation. Evidence was produced to the Committee to show that there were grounds for this belief. This complaint was dismissed.

[8] The CAC found that Mr Zhou pressured the complainants to pay a deposit of \$15,000 immediately on acceptance of the offer rather than once the contract became unconditional. This payment was required by Mr Zhou so that the “owner would know they were serious about buying”. The CAC found that this was an entirely self-serving requirement by Mr Zhou. The CAC found that this was unsatisfactory conduct on behalf of Mr Zhou and that there was a financial advantage to Mr Zhou which also breached s 136 Real Estate Agents Act.

[9] Having made these findings, the Committee then imposed a penalty on Mr Zhou and Ms Shi in its decision of 7 April 2016.

[10] The Committee found that Mr Zhou was the most culpable of the 2. He was censured. He was fined \$6,000 under s 93(1)(g), he was ordered to complete unit standard 26149 “demonstrate knowledge of licensing and code of professional conduct” and his name was ordered to be published.

[11] Ms Shi was censured, ordered to pay a fine of \$750 and her name was published.

[12] The appellants appealed this decision against Mr Zhou only, based on the following submissions:

- (i) It is important to be punitive and “*the failure to send a message to the real estate industry highlighting the will of the Tribunal will weaken consumer rights... “the real estate market as a whole” and “provide no confidence that independent, quality and effective decisions are made in*

dealing with alleged breaches of conduct and “significantly erode public confidence in the real estate industry”.

- (ii) They sought to recover their financial loss which they have calculated as \$100,000. This is a 25% increase in market prices since they endeavoured to purchase the property at 20A Clarice Place, Takanini. They strengthened this submission with a statement that they had also suffered lost rental income more than \$15,000 and lost capital gain.
- (iii) They submitted that the fine of \$6,000 made a mockery of the industry and Mr Zhou should pay the entire \$10,000 fine which is available to the Tribunal.
- (iv) They also submitted that there was poor branch leadership by Ms Donkin, the manager of the branch.
- (v) The complainants therefore submitted that the Tribunal should order cancellation of Mr Zhou’s licence, impose a \$15,000 fine and order compensation of \$100,000, require Mr Zhou to apologise to the complainants, and provide compensation for all legal costs that they have unjustly incurred.

[12] The Tribunal are concerned that the appeal might be as to both the findings of the Complaints Assessment Committee against Mr Zhou and the penalty. However, both counsel for the Complaints Assessment Committee and the second respondent have proceeded on the basis that the appeal is against the question of penalty alone.

[13] The Tribunal will address the appeal on penalty but also direct a few remarks to an appeal on the decision not to lay a charge should this have been their intention.

[14] Many of the submissions by the appellants as to the appropriate penalty are not orders available to the Complaints Assessment Committee because of their finding that Mr Zhou was guilty of unsatisfactory conduct.

[15] The Act has a hierarchy of orders available to the Complaints Assessment Committee and to the Tribunal when dealing with a finding of unsatisfactory conduct.

[16] Under s 93 a Committee may (in summary):

- (a) make an order to censure or reprimand the licensee.
- (b) order that the terms of an agreed settlement are to have effect.
- (c) order an apology by the licensee to the complainant.
- (d) order the licensee undergo further training or education.
- (e) order that the licensee reduce, cancel or refund fees.
- (f) order the licensee to rectify at his or her own expense any error or omission.
- (g) order the licensee to pay a fine to the Authority of not exceeding \$10,000.
- (h) order the licensee to make his or her business available for inspection.
- (i) order the licensee to pay the complainant any costs and expenses incurred in respect of the enquiry.

[17] In exercising its powers when dealing with a question of unsatisfactory conduct the Tribunal also only has the power to make these orders.

[18] Therefore, the following orders sought by the appellants outlined above are not available penalties to the Tribunal:

- (a) that Mr Zhou's licence be cancelled or suspended.
- (b) a \$15,000 fine is not available.
- (c) compensation cannot be ordered to be paid to the appellant under the provisions of s 93. Further, since the decision of the High Court in *Quin v Real Estate Agents Authority* [2012] NZHC 3557, it has been clear that CAC's have no power to make any orders of compensation.
- (d) the Tribunal does have power to order Mr Zhou to write a written apology to the complainants.

[19] The appellants had their deposit refunded and have not suffered an actual loss of \$100,000 – this is just their anticipated loss of the market advantage given the delays and time wasting that took place when they signed the agreement and then subsequently cancelled it. No evidence has been produced as to this loss.

[20] Therefore, the only ground on which the Tribunal can consider this appeal is as to the appropriateness of the penalty currently imposed upon Mr Zhou. The Tribunal must consider an appeal against a penalty, (an appeal against an exercise of discretion) based on the limited appeal grounds set out in *May v May*¹ and *K v B* (2010) 28 FRNZ 483. Thus, the appellant must satisfy the Tribunal that there has been an error of law or principle, or the CAC considered irrelevant considerations, or failed to take account of relevant considerations or the decision is plainly wrong. This does not mean that the Tribunal substitutes their own view of the appropriate penalty for that of the Committee. They can only do that if there can be seen to be an error in the decision by the CAC in one of the 4 categories set out above. The onus is on the appellants to show this.

[21] The Tribunal can see that the appellants have been very distressed by finding that the vendor was in fact the agent who sold them the property and that there were some unethical practices that went on with respect to the deposit.

¹ (1982) 1 NZFLR 165.

[22] However as best the Tribunal can ascertain their only out of pocket expenses have been the cost of the building report and the drugs test on the property. The deposit was refunded to them and the other costs are costs which would normally be incurred by a purchaser when checking out that the property was fit to purchase. Purchasers often incur these costs to prevent themselves from having to incur greater costs later if the property is found to be defective.

[23] The emphasis on penalty decisions in a disciplinary context, is to maintain public standards, and to protect the public against agents and sometimes a penalty also imposes an element of punishment such as a fine. It is the actions of the agent which are the appropriate focus for the CAC. They must determine what penalty best fits the criteria for punishment set out above, as well ensuring proper maintenance of standards.

[24] While Mr Zhou's conduct was quite wrong the Tribunal are unable to identify any error of law made by the CAC considering irrelevant considerations, failing to consider relevant considerations or that the decision was plainly wrong. This does not mean that the Tribunal would not have reached a different decision about the level of fine had they been making the decision themselves. However, this is not the test for the Tribunal. The level of fine seems appropriate but perhaps at the slightly lower end of appropriate penalties but not enough to upset the decision as being plainly wrong. The CAC correctly ordered that Mr Zhou undergo further training and censured him. The CAC could have considered ordering an apology but the fact that they did not, again does not fall within the *May v May* categories. In all the circumstances, therefore the Tribunal dismiss the appeal against penalty.

[25] If this appeal is intended to be an appeal against the failure of the CAC to lay a charge, then this question is also analysed in terms of the principles in *May v May* and *K v B* set out above. The appellants have failed to show that in reaching the decision not to prosecute there was any error of law or principle or considering by the Complaints Assessment Committee of irrelevant considerations, or failing to take account of relevant considerations or that the decision is plainly wrong. The Tribunal consider that on the facts it was open to the CAC to find that the conduct did not reach the level of misconduct as that has been explained in *Morton-Jones v Real*

Estate Agents Authority [2016] NZHC 1804 the Court said at [29]: where the Court said that

[29] ... If the charge is under s 73(a) the critical enquiry is whether the conduct is “disgraceful”. Conduct which involves a marked and serious departure from the requisite standards must be assessed as “disgraceful”, rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to “seriously incompetent or negligent real estate agency work”. Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

[26] Misconduct is meant for serious breaches of the Act, seriously negligent work or conduct that would by most persons be described as disgraceful.

[27] For the avoidance of doubt therefore the Tribunal also confirm that there has been nothing in the evidence which they have heard and as set out above which would enable them to find that the Complaints Assessment Committee had erred in its discretion not to send the matter to a Complaints Assessment Committee to lay a charge.

[28] The tribunal therefore dismiss the appellants appeal and draw to the parties’ attention the appeal provisions of s.116 of the Real Estate Agents Act.

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member

READT018-16.doc(jeh)