

In the Matter of

Part 4 of the Real Estate Agents Act 2008

And

In the Matter of

Complaint No. CA3940482, CA3940518 & CA3940608

In the Matter of

**Jin (Henry) Xu
Licence No. 10006990**

**Mr Y
Licence No. XXXXXXXXX**

**Mr Z
Licence No. XXXXXXXXX**

Decision of Complaints Assessment Committee

Dated this 7th day of February 2011

Complaints Assessment Committee:

CAC No: 10031

Chairperson: Debbie Van Zyl

Deputy Chairperson: Marina Neylon

Panel Member: Peter McDermott

Complaints Assessment Committee

Decision finding unsatisfactory conduct

1. The Complaint

- 1.1 These are complaints lodged by Ms D (licensee XXXXXXXXX) on 22 September 2010 against Jin (Henry) Xu, Mr Y and Mr Z. Mr Xu, Mr Y and Mr Z are licensees under the Real Estate Agents Act 2008 (“the Act”). Mr Xu holds an active salesperson’s licence and works for Company A. Mr Y holds an active salesperson’s licence and he works for Company A. Mr Z holds an active Agent’s license and he is also with Company A.
- 1.2 Ms D’s complaints are that:
- Mr Xu did not have the authority through an agency agreement to offer the property to any prospective buyer;
 - Mr Xu put client under unfair pressure;
 - Mr Xu refrained from advising client that by entering into an agency agreement with Company A the client may be liable to pay full commission to more than one agency;
 - and
 - Mr Y is endorsing/encouraging bad behaviour in his sales team and is not encouraging good ethics and client care rules.
- 1.3 As Ms D’s complaints against all three licenses deal with the same fact scenario, they are dealt with in this one decision.

2. Material Facts

- 2.1 Ms D is a licensee who previously worked for Company A until she opened her own agency, Company D, in 2004.
- 2.2 A salesperson working for Ms D obtained a contract of agency on 13 July 2010 from Mr C and Ms F (“the clients”) to auction their property situated at the property (“the property”). The agency agreement gave Company D the sole right to market and to sell the property until 18 October 2010. A cheque for the marketing fees was paid to Company D by the clients.

- 2.3 On 14 July Mr C phoned Company D with a request to put the auction authority on hold as they had a change of heart. The main reason for this was that Ms F was due to again start work shortly. Mr C said that the agency could hold onto the cheque in the meantime.
- 2.4 Ms D alleges that Mr Xu phoned Ms F on 23 August to advise her that he had a prospective purchaser and that he then showed the purchaser through the property without a signed authority. Mr Xu provided an appraisal to the clients in May 2010.
- 2.5 According to Ms D, Mr Xu then presented an offer to the clients later that same evening, 23 August, still without the property authority through an agency agreement. Ms D alleges that the clients showed a copy of their existing agency agreement with Company D to Mr Xu and that after receiving assurance from Mr Xu that they had no obligations whatsoever under the existing agency agreement, the clients signed an Agreement for Sale and Purchase for the property and subsequently a listing authority with Company A relying solely on Mr Xu's advice.
- 2.6 Ms D asserts that Mr Xu did not advise the clients prior to entering into the sale and purchase agreement that the clients would be liable for two commissions, as the clients have previously entered into an agency agreement with Company D which had not been cancelled. Mr Xu knew of the existing agency with Company D as the clients showed him a copy of the agency agreement before entering into the documentation with Company A.
- 2.7 According to Ms D, unfair pressure was exerted by Mr Xu on the clients by saying that his client was flying out of New Zealand later that evening and that there was only a two hour timeframe to conclude the contract. According to Ms D the clients therefore did not have enough time to consider their actions, and were not informed of their rights to obtain legal, technical and other advice.
- 2.8 Ms D states that on 25 August, after hearing the news that the property was sold by Company A, she phoned Mr Y to inform him that her agency agreement has not been terminated. According to her Mr Y was dismissive of her concerns.
- 2.9 Ms D further states that she then spoke to Mr Z who told her that her agency agreement was terminated and that he would not agree to a conjunctural sale.
- 2.10 Ms D is astounded that both Mr Y and Mr Z believed Mr Xu acted in good faith and in accordance with the Real Estate Agents Act 2008 ("the Act") and the Real Estate Agent Act (Professional Conduct and Client Care) Rules 2009 "the Rules" or "the Rule" or "Rule" or

“Rules”). Ms D alleges that it appears that Mr Z and Mr Y encourage such behaviour and that is why she lodged her complaint against all three licensees.

- 2.11 According to Ms D Company A did not act in the best interest of the client.
- 2.12 Ms D states that she did not seek her agency’s commission from the clients as that would have been unfair on the clients.
- 2.13 Ms D seeks an apology from Mr Xu to the clients, a fine to the value of the commission or compensation paid to her to the value of the commission.
- 2.14 Mr C, in an email to Ms D dated 27 August, confirmed that Mr Xu came to the clients’ house on the evening of 23 August with an offer. According to Mr C they showed Mr Xu the existing agency agreement with Company D and informed him that they have placed the Auction agreement with Company D on hold and that no action had taken place. Mr C confirmed in this email that Mr Xu assured them that there would be no issues with Company D, due to the fact that no action had taken place. Mr C stated that upon discussion with Mr Xu and perusal of the Company D agreement, they were assured that they were in their rights to sell. According to Mr C they then signed an agency agreement with Company A. Mr C also stated that it would be fair to say that they were left reasonably numb after the transaction as they did not come home expecting to sell the property that day.
- 2.15 Mr Xu, Mr Y and Mr Z denied all the allegations made by Ms D. Mr Xu produced a copy of their agency agreement in his reply. He confirms that he had an extremely motivated purchaser whose mother was due to depart New Zealand on the evening of 23 August. Mr Xu therefore went through his data base to see if he could find a purchaser and he then phoned Ms F. According to Mr Xu, Ms F informed him that they almost had the property on the market the previous month, but that they have decided to leave it for the time being. Mr Xu alleges that after explaining the opportunity, Ms F was interested.
- 2.16 According to Mr Xu he then visited the clients and that a copy of the existing agency agreement with Company D was shown to him by the clients. Mr Xu alleges that he assessed both the verbal instruction that Company D had been notified within the statutory period not to proceed, that the listing was a historic document for all purposes in that the auction date (18 August) was already past and that he concluded that there was no reason for him to be suspicious or enquire any further from the clients. Mr Xu further alleges that the listing agreement was then signed by the clients and thereafter he took his purchasers

through the property.

- 2.17 According to Mr Xu an offer was presented to the clients by his purchasers, but the offer was not accepted by the clients, and eventually, after two counter-offers by each party an agreement for sale and purchase was entered into. According to Mr Xu additional time was spent with the clients to make sure that they gave full consideration to the fact that the offer was received without the benefit of full market exposure.
- 2.18 Mr Xu alleges that the clients firmly believed that they activated their statutory right to cancel their Agency with Company D within the required timeframe and further that Ms D's actions, by accepting the client's withdrawal and doing no follow-up, suggested to the clients that there was nothing to prohibit them instructing his agency.
- 2.19 In the reply received from the licensees, it states that Mr Xu considered the previous agency was at an end and that no issues of double commission would therefore arise – he based those assumptions on the fact that the clients told him that they had a change of heart and, according to Mr Xu, allegedly took the property off the market the day after signing the agency agreement with Company D. Mr Xu acknowledges however that the Act requires cancellation of an agency agreement to be in writing.
- 2.20 The licensees submit that if Company D required any follow-up in the form of a written cancellation after Mr C's verbal notice, it placed a positive obligation on Company D to request the same and that was not done. This allegedly left the clients in the belief that the agency agreement with Company D was lawfully cancelled and that it was reasonable for Mr Xu to conclude that the Company D agency agreement was no longer in force.
- 2.21 Mr Y denies that he was dismissive of Ms D's call. He alleges that Ms D's manner was aggressive and assumptive. Mr Y states that he listened intently to what Ms D said and then made an effort explaining the situation.
- 2.22 Mr Y further states that he runs an extensive training and compliance programme. According to Mr Y he always upholds the virtues of honesty, integrity and professional conduct.

- 2.23 The licensees submit that there is no substance in the claim against Mr Z. They allege that Mr Z's call to Ms D was genuine in its intention to diffuse the situation.
- 2.24 The licensees state that if anything (and at worst) Mr Xu made a genuine mistake of law and that he is not legally trained.
- 2.25 In her reply to the licensees' responses Ms D says that Mr Xu should have done what any reasonably competent licensee acting in good faith would have done when presented with another signed agency agreement – he should have asked to see the written cancellation or phoned the agent to ascertain the status of the agreement. According to Ms D Mr Xu's reply shows that Mr Xu does not have a sound knowledge of the Act, regulations and Rules.
- 2.26 Ms D confirms that her agency agreement with the clients was never cancelled. She alleges that the clients only believed that they were within their rights to sell the property through Company A, because Mr Xu assured them that it was okay to do so.
- 2.27 In an interview with the Authority's Investigator, Mr C confirmed that he never used the word "cancel" when he phoned Company D – his intention was to place the listing on hold and that Company D should take no further action until further notice from the clients. Mr C further confirmed that they looked to Mr Xu for guidance and that Mr Xu informed them that it would be fine for them to proceed with Company A as nothing had been done by Company D.

3. Relevant Provisions

- 3.1 A complaint can only be made in relation to alleged unsatisfactory conduct (section 72 of the Act) or alleged misconduct (section 73 of the Act).
- 3.2 Section 72 of the Act defines unsatisfactory conduct:

72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or

- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

Section 73 of the Act defines misconduct:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

3.3 Rule 5 deals with standards of professional competence. Rule 5 states:

5. Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- 5.2 A licensee must have a sound knowledge of the Act, regulations made pursuant to the Act, rules issued by the Authority (including these rules) and other legislation relevant to real estate agency work.

3.4 Rule 8 deals with duties and obligations on agents to create awareness of Act, regulations, and rules. Rule 8.3 states:

8.3 An agent who is operating as a business must ensure that licensees engaged or employed by the agent are familiar with the Act and other legislation relevant to real estate agency work, associated regulations, and any rules made by the Authority, including these rules.

3.5 Rule 9 deals with client care and dealing with customers. Rules 9.1 and 9.11 state:

9.1 A licensee must act in the best interest of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

9.11 A licensee must not invite a prospective client to sign a sole agency agreement without informing the prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

3.6 Section 93 provides:

93 Power of Committee to make orders

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
 - (a) make an order censuring or reprimanding the licensee:
 - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint:
 - (c) order that the licensee apologise to the complainant:
 - (d) order that the licensee undergo training or education:
 - (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint:
 - (f) order the licensee—
 - (i) to rectify, at his or her or its own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

- (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company:
- (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order:
- (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

3.7 Having satisfied itself that it had completed its enquiry into the complaint the Complaints Assessment Committee (“Committee”) conducted a hearing with regard to the complaint under Section 89 (1) of the Act.

3.8 The hearing was conducted on the papers pursuant to Section 90 of the Act. Pursuant to Section 90 (2) the Committee made its determination on the basis of the written material before it.

4. Discussion

4.1 Section 72 of the Act specifies the conduct that represents “unsatisfactory conduct”. Unsatisfactory conduct must relate to the carrying out of real estate agency work. Section 72(b) is implicit in that a contravention of the Act or any regulations or Rules made under the Act is classified as unsatisfactory conduct. A contravention of the Rules therefore automatically amounts to unsatisfactory conduct.

4.2 Section 73 of the Act specifies the conduct that represents “misconduct”. The position under section 73(b) is the same as under section 72. Section 73(b) is concerned with “seriously incompetent or seriously negligent real estate agency work”. Section 73(c) is limited to wilful or reckless contraventions of the Acts, or the Rules and regulations that apply to the conduct of licensees.

4.3 It is unclear whether Mr Xu obtained a signed agency agreement from the clients prior to taking the prospective purchaser through the property and obtaining the signed agreement for sale and purchase.

- 4.4 The Committee is of the opinion that there is not enough evidence to substantiate the allegation that unfair pressure was exerted by Mr Xu on the clients. The Committee notes that the purchaser is unavailable for comment.
- 4.5 The Committee however, does not accept Mr Xu's submission that the Company D's agency agreement was cancelled. The Committee is of the opinion that Mr Xu crossed the line when he did not properly ascertain that the agency agreement with Company D was validly cancelled. By doing that he put the clients in a position where they could have been liable for two full sets of commission. By not informing the clients that they could be liable for two commissions, Mr Xu breached Rule 9.11.
- 4.6 Mr Xu's conduct and his interpretation that Company D's agency agreement was either at an end or has never begun, shows a lack of knowledge of the Act and the Rules. This is a breach of Rules 5.1 & 5.2.
- 4.7 The Committee is of the opinion that Mr Xu put his interest before the interest of the client, as it seems that he rather wanted to obtain a sale than making sure that Company D's agency agreement was in fact cancelled. This is a breach of Rule 9.1.
- 4.8 The Committee notes that Mr Xu had put himself in the situation where he gave advice which could have been deemed legal advice, without any legal training. The Committee is satisfied that the clients clearly relied on this advice to enter into the documentation with Company A. This was corroborated by Mr C in his interview with the Investigator from the Authority.
- 4.9 On the balance of probabilities, the Committee is satisfied that Mr Xu is guilty of unsatisfactory conduct.
- 4.10 For the reasons set out above, Ms D's allegations against Jin (Henry) Xu have met the test for unsatisfactory conduct, but even taking the view most favourable to the Complainant, the Complaints Assessment Committee has decided that there are no reasonable grounds for concluding that the Mr Xu's conduct complained reaches the threshold for misconduct (section 73(a)).
- 4.11 Rule 8.3 places an obligation on an agent who is operating a business to train his employees. Although it appears that Company A does provide training and have systems in place for that, the Committee is concerned about the training Mr Xu received. It is clear to the Committee that Mr Xu does not have a sound knowledge of the Act or the Rules.

- 4.12 It appears to the Committee that it could be possible that there is a general lack of compliance within Company A. The Committee had a serious discussion on whether Mr Y and Mr Z are in breach of Rule 8.3, but after a lengthy discussion it was concluded that, on the balance of probabilities, there was probably not enough evidence for such a finding. It appears that some sharp business practice occurred after the clients signed with Company A, but probably not to a standard that was in breach of section 72 of the Act.
- 4.13 For the reasons set out above Ms D's allegations against Mr Y and Mr Z would not meet the test for unsatisfactory conduct. Further, even taking the view most favourable to Ms D, the Committee has decided there are no reasonable grounds for concluding Mr Y & Mr Z's conduct reaches the threshold for misconduct (section 73(a)) and that this is therefore not a case where a charge should be laid before the Disciplinary Tribunal against Mr Y and Mr Z.

5 Decision

- 5.1 The Committee met on 2 December 2010 to consider the complaints against Jin (Henry) Xu, Mr Y and Mr Z. The Complaints Assessment Committee has determined under section 89(2)(b) of the Act that it has been proven on the balance of probabilities that Mr Xu has engaged in unsatisfactory conduct.
- 5.2 The Committee has further determined under section 89(2)(c) of the Act to take no further action with regards to the complaints against Mr Y and Mr Z. It appears to the Committee that, having regard to all the circumstances of the case, any further action is inappropriate or unnecessary.
- 5.3 Having determined that Mr Xu is guilty of unsatisfactory conduct, the Complaints Assessment Committee has the power to make one of the orders set out in section 93(1) of the Act.

6 Orders

- 6.1 Having made a determination under section 89(2)(b) of the Act, the Committee may make one or more orders set out in section 93 of the Act.
- 6.2 The Committee will conduct a separate hearing on the papers to decide what orders, if any, should be made under s 93 of the Act.
- 6.3 Principles considered
- 6.3.1 The Committee, when determining whether or not to make an order under section

93(1), has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings. They include:

- a. Promoting and protecting the interests of consumers and the public generally
Section 3(1) of the REAA sets out the purpose of the legislation. 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." One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (section 3 (2)).
- b. Maintenance of professional standards
This function has been recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; *Taylor v The General Medical Council* [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720). In the Committee's view this function is also applicable in the disciplinary processes under the REAA.
- c. Punishment
The Committee accepts that a penalty in a professional discipline case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment - indicated by the power the Committee has to impose a fine (section 93(l)(g); or make an order of censure (section 93(l)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see *Patel v Dentists Disciplinary Tribunal* (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.)
- d. Where appropriate, rehabilitation of the professional must be considered
The Committee regards its power to make an order requiring a licensee to undergo training or education as indicative of this function applying in the context of professional disciplinary processes under the REAA.

6.3.2 The Committee acknowledges that when making an order under section 93, the order/s made must be proportionate to the offending and to the range of available orders.

6.4 The Committee requires the investigator authorized to assist the Committee with its inquiry to obtain a record of any previous disciplinary decision in respect of Jin (Henry) Xu under either the Real Estate Agents Act 1976 or the Real Estate Agents Act 2008, if any such decision exists, and provide it to the Committee, Ms D and Mr Xu.

Mr Xu and Ms D may file submissions on what orders, if any should be made. Ms D may file submissions within 10 working days from the date of the decision. These submissions, if any, will then be provided to Mr Xu, with a timeframe for filing final submissions.

7 Publication

7.1 One of the Committee's functions pursuant to section 78(h) of the Act is to publish its decisions.

7.2 The Committee directs that this decision is to be published in the interest of ensuring that the disciplinary process remains transparent, independent and effective. The Committee also regards publication of this decision as desirable for the purposes of setting standards and that it is in the public interest that the decision be published.

7.3 The Committee therefore directs publication of its decision, but omitting the identifying details of all the other parties in the publication of its decision, except for the name of the licensee found guilty of unsatisfactory conduct and the agency for which he works.

8 Right of Appeal

8.1 A person affected by a determination of a Complaints Assessment Committee may appeal by way of written notice to the Disciplinary Tribunal against a determination of the Committee and must do so within 20 working days from the date of the determination.

The Committee has yet to finally determine this complaint because the parties are being given an opportunity to make submissions on orders before the Committee determines what orders should be made, if any.

The Committee considers that the 20 working day appeal period does not commence until it

has finally determined this complaint by deciding what orders should be made, if any.

Appeal is by way of written notice to the Tribunal. Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.justice.govt.nz/tribunals

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 7 February 2011