

In the Matter of **Part 4 of the Real Estate Agents Act 2008**

And

In the Matter of **Complaint No: CA3940482**

In the Matter of **Jin Xu**  
**License Number: 10006990**

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## Decision of Complaints Assessment Committee

Dated this 22<sup>nd</sup> day of March 2011

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**Complaints Assessment Committee:**

**CAC10031**

**Chairperson: Debbie Van Zyl**

**Deputy Chairperson: Marina Neylon (not participating)**

**Panel Member: Peter McDermott**

# Complaints Assessment Committee

## Decision on Orders

### **1. Introduction**

- 1.1 By its decision dated 7 February 2011 the Complaints Assessment Committee (“the Committee”) made a determination under section 89(2)(b) of the Real Estate Agents Act 2008 (“the Act”) that the Licensee, Jin (Henry) Xu, of Company A, has engaged in unsatisfactory conduct as that term is defined in section 72 of the Act.
- 1.2 Having made a determination under section 89(2)(b) the Committee may make one or more of the orders set out in section 93 of the Act.
- 1.3 The Committee invited Mrs D and Mr Xu to make any comments or submissions they wished within ten days from the date of the Committee's determination.
- 1.4 In her submission Mrs D stated that she believes the only way some licensees will be taken seriously is if they are made financially accountable. She believes that section 93(1)(g) of the Act should be enforced and that Mr Xu should either pay the Authority a fine of \$10,000 with the company paying a fine of \$20,000, or the commission of \$21,850 should be refunded.
- 1.5 Mr Xu made a detailed submission through his barrister. It states that Company D provided no services to the vendors at the time Mr Xu approached the vendors. It was submitted that, while Mr Xu mistakenly believed that the “putting on hold” of the agency agreement during the cooling off period was sufficient to bring the Company D agency to an end; this does not exonerate him, but is relevant in the context of determining penalty as the surrounding mitigating factors need to be considered.
- 1.6 It was further submitted on behalf of Mr Xu that the property was sold at the highest price and that the vendors themselves did not see that Mr Xu acted contrary to their interest. This was substantiated by an email submitted by the vendors.
- 1.7 Mr Xu's barrister further submitted on his behalf that real estate practitioners in New Zealand have never before dealt with cooling-off periods and that the Committee can

therefore use this decision to educate licensees on what it considers to be the correct procedure in circumstances such as those faced by Mr Xu. According to Mr Xu's barrister, an onerous penalty will not advance that objective.

- 1.8 It was stated that Mr Xu has the unequivocal support of his employer who believes in his future, that he is unlikely to make a similar error in the future and that the vendors do not wish to see him punished.
- 1.9 The feeling was expressed by Mr Xu's barrister that Mrs D's request for a maximum penalty is indicative of an inter-agency vindictiveness. It was stated that this is not a case where the conduct was so egregious that it warrants a maximum fine or where an "example" needs to be made in order for Mr Xu to be put back on the right path.
- 1.10 Mr Xu himself wrote to the Authority and confirmed that he was desperately disappointed in his mis-judgment of the situation. He reiterated that what he did was done in good faith with no intention to hurt another agency or the vendors.

## **2. Principles considered**

- 2.1 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 Act 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 Act.

c. Punishment

The Committee accepts that a penalty in a professional disciplinary 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 Act.

2.2 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.

### **3. Complaints Assessment Committee Determination under section 93**

3.1 The Committee previously determined that Mr Xu had engaged in unsatisfactory conduct.

3.2 The Committee has taken on board that it was not the vendors who made the complaint and that the vendors were in fact supportive of Mr Xu.

3.3 The Committee also accepts that Mr Xu has learned from this experience and that on the balance of probabilities he will in future first make sure that an existing agency agreement is cancelled by contacting the real estate agency purportedly holding the listing, before he gets a client to sign a new listing with him. This will avoid the risk of the clients being liable for two commissions.

3.5 The Committee confirms that Mrs D cannot seek a payment of compensation (or a refund of the commission) to herself or Company D, as section 93(1)(e) of the Act makes it clear that the Committee may “*order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint.*” Mr Xu has done the work for the vendors

and the vendors did not lodge a complaint – in fact they wrote to support the work done by Mr Xu. Mr Xu did not do any work for Mrs D or Company D and therefore Mrs D is not entitled to seek compensation in the form of repayment of the commission.

3.6 The Committee notes that, while it believes that this is not a case where the maximum penalty provisions should be imposed, Mr Xu was found guilty of unsatisfactory conduct and therefore, having regard to the facts of this case as per the Committee's determination dated 7 February 2011, the submissions, the established unsatisfactory conduct and functions which the imposing of a penalty is designed to serve, the Committee has determined to make the following order under section 93(1):

3.6.1 The Committee is censuring Mr Xu;

3.7 The Committee does not consider that it is necessary to make any of the other orders specified in section 93(1).

#### **4. Publication**

4.1 One of the functions of the Complaints Assessment Committee is to publish its decisions (section 78(h)). The Committee has the power under section 84(2) to direct such publications of its decisions under section 93 as it considers necessary or desirable in the public interest.

4.2 The Committee regards the publication function as one of the means to educate and raise industry standards by making public the nature of conduct which the Committee considers to be unsatisfactory and the consequences for licensees engaging in such conduct. Publication also gives effect to the purpose of the Act set out in section 3 by ensuring transparency in the disciplinary process.

4.3 The Complaints Assessment Committee considers that to ensure the principal purpose of the Act is achieved, its decision dated 7 February 2011 and this decision ought to be published. Publication is regarded as necessary for the purposes of standard setting in this case and it is also in the public interest that the decisions be published.

4.4 The Committee directs publication of its decision, but omitting the names and identifying details of the complainant (including the address of the property) and any third parties in the publication of its decision. Any such publication should not occur until the Authority is satisfied that Mr Xu has been notified of this decision as to penalty.

## 5. Right of Appeal

- 5.1 A person affected by a determination of a Complaints Assessment Committee may appeal to the Disciplinary Tribunal against a determination of the Complaints Assessment Committee within 20 working days after the date of this notice.
- 5.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 5.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at [www.justice.govt.nz/tribunals](http://www.justice.govt.nz/tribunals).

Signed



**Debbie Van Zyl**  
Chairperson  
Complaints Assessment Committee  
Real Estate Agents Authority  
Date: 22 March 2011