

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

And

In the Matter of **Complaint No. CA4008873**

In the Matter of **Jian Yu**
Licence No. 10037582

Decision of Complaints Assessment Committee

Dated this 29th day of November 2010

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 This is a complaint lodged by XYZ Real Estate Limited on 5 November 2010 against Jian Yu. Mr Yu is a licensee under the Real Estate Agents Act 2008 (“the Act”). Mr Yu holds a salesperson’s license and worked for XYZ Real Estate Limited (“XYZ”) from 1 April to until 28 September 2010.
- 1.2 XYZ’s complaint is about Mr Yu’s behavior.

2. Material Facts

- 2.1 XYZ Real Estate Limited is an ABC franchise office.
- 2.2 Mr Yu was employed by Ms C, a real estate licensee salesperson working for XYZ. In addition to his employment as a personal assistant to Ms C, Mr Yu had a day job working at a call centre for the JKL Bank.
- 2.3 Mr and Mrs D are the owners of (“the property”).
- 2.4 On 21 September 2010 Mr D phoned the JKL Bank. Mr Yu was the call centre operator who took that call and Mr D advised Mr Yu that they are intending to sell the property.
- 2.5 Without being authorised and without any recourse to XYZ or Ms C, Mr Yu prepared a review of the market in and around the property and compiled what he called a “Market Review and Appraisal” (“the review”).
- 2.6 On 24 September 2010 Mr Yu went to the property and parked outside. He then phoned Mr & Mrs D (Mr Yu advised he got their phone number from the white pages). When Mrs D answered the phone, Mr Yu told her that he was aware that they want to sell the property and he offered her the review. Mrs D enquired as to how Mr Yu came upon the knowledge and Mr Yu allegedly told her that he had a friend at the JKL that gave him the information. Mrs D was upset and unnerved and she terminated the call.
- 2.7 After about five minutes later Mr Yu phoned the Ds again and Mr Yu advised that he was

attempting to explain the reason for his visit during that second call and he was hoping to resolve Mrs D's anger and to apologise for any inconvenience his call and visit has caused.

- 2.8 Later that evening Mr D placed a call to XYZ's office and left a message that he was concerned that Mr Yu obtained confidential information about the Ds' circumstances and that Mr Yu had been sitting outside their house requesting that they let him offer them the review.
- 2.9 On 25 September Mr Yu revisited the property and placed the review and a letter of apology in the mailbox.
- 2.10 When Mr D's message was retrieved by XYZ, a meeting was called for that same day which was attended by Mr S (the sales supervisor), Ms G (the General Manager), Ms C and Mr Yu. The outcome of the meeting was that Mr Yu's employment was terminated with immediate effect.
- 2.11 A statutory declaration seemingly signed by Mr Yu was provided to the Authority. In the declaration Mr Yu admitted the above allegations.
- 2.12 On 16 November 2010 Mr Yu sent an email to the Authority. In this email he stated that he regretted his unprofessional action. He said that he just wanted to help the D's. In the email he admitted that he breached the following conduct with ABC:
- As a professional assistant he was not allowed to represent an appraisal
 - He used private information and breached the Privacy Act
 - He showed up at the wrong place at the wrong time
- 2.13 Mr Yu stated that he lost his job at XYZ as well as his job at JKL Bank through his actions and that he deeply regretted his actions. He stated that he and his wife have a baby and need an income. He further stated that he did not cheat anyone for money or rob or hurt anyone – he alleges that he just tried his best to help someone.
- 2.14 Mr Yu believes that he deserves a chance to correct his mistake and rebuild his business.

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.

3.3 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.

3.4 Rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules") deals with standards of professional competence. Rule 5.1 states: "A licensee must exercise skill, care, competence and diligence at all times when carrying out real estate work."

3.5 Rule 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the Rules”) deals with standards of professional conduct. Rule 6.3 states: “A licensee must not engage in any conduct likely to bring the industry into disrepute.”

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 The Committee determined under S79(2)(c) to inquire into the complaint. Because the Complaints Assessment Committee (“Committee”) had received an admission from Mr Yu, the Committee resolved that that further inquiry was not necessary and 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”. 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 By Mr Yu’s own admission he acted unprofessionally and breached XYZ’s policies. The Committee is of the opinion that Mr Yu’s conduct breached Rules 5.1 and 6.3 and is therefore guilty of unsatisfactory conduct under section 72(b). The Committee considers that Mr Yu is also guilty of unsatisfactory conduct as his behavior fell short of that a reasonable member of the public is entitled to expect from a reasonably competent licensee under Section 72(a)

4.3 Section 73 of the Act specifies the conduct that represents “misconduct”. For the reasons set out above, XYZ Real Estate Limited’s allegations against Jian Yu 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 Yu’s conduct complained reaches the threshold for misconduct.

5 Decision

5.1 The Complaints Assessment Committee met on 18 November 2010 to consider the complaint against Jian Yu. 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 Yu has engaged in unsatisfactory conduct.

5.2 Having determined that Mr Yu 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 In this instance the Committee did not invite either Mr Yu or XYZ Real Estate Limited to make any comments or submissions before making an order, as the Committee felt that it had all the information needed to make an order.

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 It is clear to the Committee that Mr Yu realised his mistakes and that he regretted his actions. Mr Yu already apologised to Mr & Mrs D and the Authority for his actions. As a result of his actions Mr Yu lost his employment with both XYZ and JKL. The Committee feels that Mr Yu behaved inappropriately, but, as he admitted the allegations (and therefore is seen to have pleaded guilty) he learnt a lesson through the consequences of his actions.

6.5 Having regard to the facts of this case as summarised above, the established unsatisfactory conduct and the above principles, the Committee has determined to make an order under section 93(l)(a) censuring Mr Yu.

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

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 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.

8 Right of Appeal

- 8.1 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.
- 8.2 Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.
- 8.3 Further information on lodging an appeal is available by referring to the **Guide to Lodging an Appeal** at www.Yustice.govt.nz/tribunals.

Signed



Debbie van Zyl
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority

Date: 29 November 2010