

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/646

IN THE MATTER of an application under
S.94 of the Real Estate
Agents Act 1976

APPLICANT **REAL ESTATE
INSTITUTE
OF NEW ZEALAND
INCORPORATED**

RESPONDENT **REALTY INSIGHT
LIMITED – a member of
Ray White Real Estate**

IN THE MATTER of an application under
S.99 of the Real Estate
Agents Act 1976

APPLICANT **REAL ESTATE
INSTITUTE
OF NEW ZEALAND
INCORPORATED**

RESPONDENT **WEI (JACK) XIANG**

HEARING: 10th September 2008

DECISION: 18th March 2009

APPEARANCES: T Rea for the Applicant
D Liu for the Respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

Hon W P Jeffries (Chairperson), P Dudding, M Giera, J Harnett-Kindley and D Russell

RECALL OF DECISION

This decision replaces the recalled decision of 28 November 2008. On 2 December 2008 the Real Estate Institute of New Zealand Incorporated [“the Institute”] sought a recall of the 28 November 2008 decision on the grounds that the decision contained two errors of fact

[identified in para. 3(d) and (c) of Mr. Rea's submissions] and two omissions [referred to in para. 3(b) and para. 4 of Mr. Rea's submissions].

The Real Estate Agents Licensing Board ["the Board"] recalled the decision on 8 December 2008. Mr. David Liu, Counsel for the Respondent, replied on 12 December 2008.

The Board refers to its previous decision of 29 July 2008 which analyses the deceptive conduct of Mr. Xiang.

Mr. Rea properly reminded the Board that the new amended application containing allegations admitted by the Respondents are the material matter. Therefore, the Board sets out in full this amended application.

AMENDED APPLICATION

On 2 September 2008 the Institute made an amended application as follows:

AMENDED APPLICATION PURSUANT TO SECTION 94 REAL ESTATE AGENTS ACT 1976

Pursuant to section 94 of the Real Estate Agents Act ("the Act"), the Real Estate Institute of New Zealand Incorporated ("the Institute") hereby applies to the Real Estate Agents Licensing Board to cancel the real estate agents licence held in the name of Realty Insight Limited upon the grounds that:

- A. The principal officer, Wei Xiang, a.k.a. Jack Xiang, has been guilty of misconduct in the course of the respondent's business as a real estate agent, and by reason of that misconduct it is in the interest of the public that the licence be cancelled.
- B. Mr Xiang is of such a character that it is in the interest of the public that the licence be cancelled.

Particulars

1. At all material times, Mr Xiang has been the principal officer of the respondent, responsible among other things for compliance by the respondent with section 56 of the Act, and in particular to ensure that pending the payment to the person lawfully entitled thereto of all money received by the respondent in respect of any transaction in its capacity as a real estate agent, such moneys were:

- (a) Paid by the respondent into a general or separate trust account; and
- (b) Were not drawn upon except for the purpose of payment to the person entitled, or as that person may in writing direct.

Audit of trust account pursuant to Regulation 10, Real Estate Agents Audit Regulations 1977

2. Acting upon information received from Powell Webber & Associates, Barristers & Solicitors, identifying concerns held by their clients, Mr and Mrs Wang ("the Wangs") with respect to the respondent's accounting for monies received in respect of sales of units at properties at 26 & 28 Pomaria Road, Henderson and 312 West Coast Road, Gen Eden, the Institute directed an immediate audit of the trust account of the respondent pursuant to regulation 10 of the Real Estate Agents Audit Regulations 1977 ("the Regulations 10 audit")
3. As a consequence of the Regulation 10 audit, serious irregularities were identified in relation to the respondent's handling of funds and trust account records, including:
 - (a) Falsification of trust account records by Mr Xiang;
 - (b) Photocopies of cheques with payee details altered on the photocopy to conceal the identity of the true payee of the cheques (being Mr Xiang);
 - (c) Deposits of trust monies into a personal bank account of Mr Xiang, in breach of section 56(1) of the Act.

Falsification of trust account records

4. Various cheques drawn on the trust account of the respondent have been recorded in the respondent's ledger as having been payable to the Wangs, in particular:

<u>Cheque number</u>	<u>Amount</u>
100313	19,000.00
100314	19,000.00
100317	19,000.00
100318	19,000.00
100319	19,000.00
100320	19,000.00
100321	19,000.00
100322	19,000.00

100323	19,000.00
100324	19,000.00

Total	\$190,000.00
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5. Despite the above cheques being recorded in the ledger as payable to the Wangs, the original cheques retrieved from the respondent's bank by the Institute's auditor were, in fact, all payable to Mr Xiang.

Photocopies of cheques with payee details altered

6. Photocopies of all of the above cheques were placed on the respondent's sales files supplied to the Institute's auditor. The photocopies all identified the payee in each case as the Wangs. The photocopies were falsified by Mr Xiang in an attempt to create the false impression that the cheques were payable to the Wangs, and not to himself.

Deposit of trust monies into personal account of Mr Xiang

7. All of the above cheques were deposited on 5 December 2007 into a personal bank account of Mr Xiang, being account number 1322 0073477 00, in breach of section 56(1) of the Act.

Further transactions of similar nature

8. A similar process was used in respect of the following cheques:

Cheque number	Actual payee	Amount
100304	Lin Han	249,300.00
100309	Wei Xiang	28,362.50
Total		277,662.50

9. Additionally, cheque number 100310 amounting to \$90,437.50 was paid to Mr Xiang. In the ledger records this cheque is noted as 5 deposits of \$18,087.50 relating to units 1-5 of the 312 West Coast Road Development. The sales ledger records these payments as "Ven", which will be short for Vendor.
10. The total of the transactions identified in paragraphs 5 to 9 above which appear not to have been paid to the vendor, in breach of s56(1) of the Act, is \$558,100.00

Payments to Wangs from sources other than respondent's trust account

11. Mr Xiang caused payments to be made to the Wangs from sources other than the respondent's trust account:

Date	Amount	Source of Funds
19/01/08	\$111,892	Mr Xiang
29/02/08	\$53,915.62	Miss Li Han
29/02/08	\$40,000	Mrs Jiji Chen

12. The above payments to the Wangs were all made after 5 December 2007, being the date on which Mr Xiang paid out funds from the respondent's trust account to his personal account. The Wangs have suffered loss in terms of the failure to account for funds:

- (a) The Wangs have been deprived of the use of funds to which they were entitled from the date on which the funds were removed from the respondent's trust account and converted to a personal account of Mr Xiang;
- (b) There has been no accounting to the Wangs for any interest earned while funds were held in Mr Xiang's personal bank account.

False representations as to commission earned on transactions to franchisor, Ray White (Real Estate) Limited.

13. In respect of the sale of properties located at 312 West Coast Road, Glen Eden and at 26 to 28 Pomaria Road, Henderson pursuant to contracts dated on or about 10 or 11 October 2007, Realty Insight and/or Mr Xiang falsely represented the amount of commission relating to the transactions in information supplied to the franchisor, Ray White (Real Estate) Limited.
14. Although Realty Insight / Mr Xiang purported to charge commission to the Wangs of \$8,000 in respect of each transaction, Realty Insight / Mr Xiang falsely represented to Ray White disclosed that the commission in respect of each transaction was only \$177.78.
15. The Institute is presently unaware of the extent of the loss (if any) suffered by Ray White as a consequence of the false representations, pending the provision of this information sought from Ray White.

Character & Professional Misconduct

16. In the circumstances detailed above:

- (a) Mr Xiang has engaged in conduct that reflects adversely on his honesty and integrity to the extent that he is not a fit and proper person to be the principal officer of a licensed real estate company;
- (b) The conduct amounts to misconduct by Mr Xiang in the course of business of the respondent; and
- (c) It is in the interest of the public that the licence should be cancelled.

The Board refers to the affidavit dated 10 September 2008 of Mr T D Rea filed in support of the Institute's case.

At the commencement of the hearing on 10 September 2008, Counsel for the respondents submitted

"The material facts are not in dispute and are set out in the Applicant's applications and the Board's decision dated 29 July 2008. A chronology is attached to give the Board a better understanding.

Mr Xiang accepts that he has been guilty of serious misconduct in the operation of Realty Insight's trust account and that such conduct reflects adversely on his character. Accordingly there is no dispute as to liability under ss.94 (or 95/96) and 99 of the Act"

The factual allegations of the Institute, as repeated and carefully particularised on 2 September 2008 supported by further affidavit evidence being unchallenged, may now be regarded as findings of fact by the Board having regard to the unqualified admission of the Respondents on 10 September 2008.

The Board holds that Mr. Rea's submissions on two errors of fact contained in the recalled decision are also correct and do not now form part of this decision.

The Board expressly refers to the Institute's allegation [in para. 13 – 15 of the above amended application] concerning the Ray White commission matter. Notably, Mr. Liu did not take the opportunity to challenge or refute these allegations in his reply of 12 December 2008. Mr. Liu, properly, has abided the Respondents' admission of 10 September 2008.

These particular allegations are upheld.

The Board refers to the submissions of the Institute dated 21 November 2008 in respect of the settlement between Mr. Xiang and the Wangs which are now set out in paras. 3 – 8 of the submissions of 21 November 2008. These are:

3. Counsel agreed before the Board that the following was to take place:
 - (a) Mr Xiang was to supply to Mr McGlinn a reconciliation of the trust account up to the date on which the Institute assumed administration pursuant to the orders obtained under section 33 of the Act.
 - (b) Mr McGlinn was to consider the reconciliation and then assess whether or not sufficient funds were held in the trust account to make good the amount of the shortfall.
 - (c) Counsel were then to report the outcome of this process by filing memoranda, either jointly or separately.
4. On 19 September 2008, Mr Xiang, through his counsel, supplied the reconciliation. Mr McGlinn subsequently reported to the Institute to the effect that the sum of \$124,446.02 was held in the trust account and appeared to relate to deposits paid for six units in the two developments identified in evidence in the proceeding. Mr McGlinn had not undertaken an audit of the reconciliation and did not express any audit opinion. His role was limited to a review of the reconciliation for reasonableness and to establish the ownership of the funds.
5. On the assumption that Mr Xiang / Realty Insight Limited would become entitled to commission of \$8,000 per transaction (which is not necessarily accepted by the Institute in light of authorities concerning an agent's disentitlement to commission as a consequence of breach of fiduciary duty), the commission component of the funds retained in the trust account was \$48,000, which would have been sufficient to make good the shortfall calculated by Mr McGlinn of \$16,500 to the Wangs.
6. These events were superseded on 12 November 2008 when the Institute was advised by Mr Webber, Solicitor, of a settlement between his clients, the Wangs and Mr Xiang in terms that included cancellation of all 40 agreements for sale and purchase and an authority given by Mr Webber on behalf of the Wangs for the Institute to release to Yu Lawyers (in their capacity as solicitors for the purchasers, not for Realty Insight

Limited and / or Mr Xiang) of the remaining sums held in the trust account. A copy of Mr Webber's letter to the Institute dated 12 October 2008 is annexed and marked "A"

7. On 14 November 2008, Glaister Ennor on behalf of the Institute wrote to Yu Lawyers (as solicitors for the purchasers, not for Realty Insight Limited and / or Mr Xiang) seeking clarification of various matters. A copy of that letter is annexed and marked "B"

8. The reply from Yu Lawyers dated 14 November annexed and marked "C"

The Board notes that the Institute has accepted instructions given jointly to it by Mr. Webber a solicitor for the vendor (Wangs) and Yu Lawyers in their capacity as solicitors for various purchasers.

The Board, having rectified these factual matters, turns to penalty.

PENALTY

The Board cancels the licence of Realty Insight Limited, on the basis of the misconduct of its Principal Officer, as set out.

The Board also cancels the certificate of approval as a real estate salesperson of Mr. Xiang and imposes on the licensee a fine of \$2000.00 to be paid within 30 days from the date of service of this decision. The basis of this penalty is the admitted misconduct of Mr. Xiang.



Hon W P Jeffries
Chairperson