

REAL ESTATE AGENTS LICENSING BOARD

No. 2009/661

IN THE MATTER of applications under s94
and s99 of the Real
Estate Agents Act 1976

APPLICANT **REAL ESTATE
INSTITUTE OF NEW
ZEALAND INC.**

RESPONDENTS **YU JIN WU &
WEN JING CHEN**

HEARING: 3 November 2009

DECISION: 4 November 2009

APPEARANCES: S Haszard for the Real Estate Institute of NZ Inc.
W Akel for the respondents

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

BACKGROUND

1. On 30 June 2009, the Real Estate Agents Licensing Board ["the Board"] imposed penalties upon Yu Jin Wu also known as Jimmy Wu and Wen Jing Chen also known as Iris Chen ["the respondents"], following their admission of liability in terms of applications filed pursuant to Sections 94 and 99 of the Real Estate Agents Act 1976, by the Real Estate Institute of New Zealand Incorporated ["the applicant"]
- 1.2 By its written decision (Decision 2009/656) on 30 June 2009, the Board on the basis of the admission of liability of the respondents imposed the following penalties;
- 1.3 Jimmy Wu:
 - (a) cancellation of real estate agents licence (held as an individual licence);
 - (b) imposition of fine of \$2,500;
 - (c) suspension of certificate of approval of salesperson for 12 month period.

Iris Chen:

- (a) cancellation of real estate agents licence (held as an individual licence);
- (b) imposition of fine of \$2,500;
- (c) suspension of certificate of approval of salesperson for 12 month period.

2. APPEAL TO HIGH COURT

- 2.1 On 3 July 2009, Counsel for the respondent filed a Notice of Appeal in the High Court at Auckland [“the High Court”]
- 2.2 The appeal filed in the High Court was limited to an appeal against penalty only. The respondents appealed against the penalties imposed, upon the grounds that cancellation of their respective real estate agents licences held as individuals, and the 12 month suspension of their respective certificates of approval as salespersons, together with a fine of \$2,500.00 each, was excessive and disproportionate to the conduct in issue.
- 2.3 The Honourable Justice Heath heard the appeal on 1 October 2009. By virtue of an oral judgment dated 1 October 2009, the High Court set aside the penalties imposed by the Board in its decision dated 30 June 2009 and directed the Board to reconsider penalties with specific reference to s.37(1)(c) and (d) of the Real Estate Agents Act 2008.

The Board respectfully records paras. 17 to 24 of the High Court decision of Heath J.

[17] Towards the end of Mr Akel’s argument, in support of the appeal, it became clear that the Board failed to take account of a relevant consideration. It is no criticism of Mr Akel and Mr Haszard, both of whom appeared before the Board, or the Board itself, that this was overlooked. It related to the effect of s.37(1)(c) and (d) of the Real Estate Agents Act 2008 [“the 2008 Act”]

[18] That Act received Royal Assent on 16 September 2008 and is due to come into force on 17 November 2009, 14 months after the date of Royal Assent in terms of s.2(2) of that Act. Because the Act was not in force, its terms were not in the contemplation of the parties or the Board, at the time of the hearing.

[19] Section 37(1)(c) and (d) set out the categories of persons who are not eligible to hold “a licence” as defined by the 2008 Act. The term “licence” is defined more expansively than it is under the 1976 Act, meaning “a licence granted under [the 2008 Act] to act as an agent,

branch manager or salesperson". Therefore, the current concepts of licensee and salesperson are merged.

[20] Under s. 37(1)(c), a person whose licence or certificate of approval has been cancelled within the preceding five years is ineligible to hold a licence. By s. 37(1)(d), a person whose licence has been cancelled within five years or whose licence has been suspended at the time of application under the 2008 Act, is ineligible to seek a licence under the 2008 Act.

[21] It is conceivable that, had the Board turned its mind to the impact of those provisions, the penalties imposed would have been regarded as too harsh. In effect, the terms of those sections might have had an unintended consequence of extending the period of cancellation or suspension well beyond that contemplated by the Board.

[22] The failure to take into account that relevant consideration vitiates the decision of the Board. I see no option but to allow the appeal. However, the nature of the ground for allowing the appeal is such that it is better reconsidered by the Board, given its multi-disciplinary membership.

[23] Under s 116 of the 1976 Act, I have power to remit the proceeding back to the Board to reassess penalty. I am entitled to direct the Board to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the decisions under appeal. The Board will be required to consider the issue of penalty afresh, having regard to the impact of s. 37(1) of the 2008 Act on the circumstances of both Mr Wu and Ms Chen.

[24] Mr Wu's and Ms Chen's appeals are allowed. The penalties imposed by the Board are set aside. The proceeding is remitted to the Board to reconsider the penalty to be imposed on each appellant for the misconduct found. In assessing that penalty, the Board shall have regard to s.37(1) of the 2008 Act.

- 3 At the hearing both Counsel made broadly similar submissions referring to the form of settlement reached between the Institute and the respondents resulting in the Institute filing a notice of discontinuance. Neither Counsel made alternative submissions as to penalty. It follows, that the Board was without the advantage of any submissions on proper interpretations of S.37(1)(c) and (d) of the 2008 Act. The Board will now reconsider penalties in accordance with the High Court direction and rule on the legal significance, if any, of the notice of discontinuance.
4. With respect, the Board agrees that in its decision of 30 June 2009, it did not take into account the effect of s. 37(1)(c) and (d) of the Real Estate Agents Act which had received Royal Assent on 16 September 2008.
- 5 With respect, the Board agrees with the High Court's preliminary observation that an unintended consequence of the cancellation of the respective licences combined with

the twelve month suspension of certificates of approval of Mr Wu and Ms Chen, may have been to disqualify both these named persons from participation in the statutory licensing system for real estate agents in New Zealand for five years, notwithstanding the limited twelve month suspension of the certificates of approval. The Board respectfully observes the second sentence of His Honour Justice Heath's judgment in Para [20]

- 6 The Board observes that the High Court set aside all penalties previously imposed by the Board without itself giving specific directions on making findings in relation to the monetary penalties previously imposed. The Board respectfully concludes that the High Court in directing an unqualified reconsideration of penalties allowed the Board discretion to reconsider both sets of penalties with the ability to re-adjust the two different penalties, monetary and non-monetary, if justified.
- 7 The reality of the new statute is that this statutory licensing Board may not be able to impose suspension of certificates of approval of licences for shortish periods of time extending into the time of operation of the new statute from 17 November 2009. That is because the application of s.37(1)(c) and (d) and the transition provisions could be construed as operating in such a way as to defeat a limited period of suspension. The new Act automatically disqualifies cancelled licensees from making applications for participation in the new regime for at least five years from the date of cancellation. There is an interpretation argument that s. 37(1)(c) does not necessarily bar a suspended person from re-applying for a salespersons licence, once the suspension period has expired. It is not wise for this Board to proffer an interpretation of the new statute without full submissions from the parties and it does not do so. The Board manifested its intention to limit participation of Mr Wu and Ms Chen in New Zealand's statutory licensing regime for twelve months (a penalty stayed by the Board on account of the notice of appeal filed on 3 July, 2009) when the Board originally suspended their certificates of approval for a period of twelve months. Because of the new statute's confluence of concepts of "salesperson" and "licensee", unintended consequences might cause an unjust result.
- 8 The inevitable consequence is the Board is limited to the imposition of monetary penalties alone which it now chooses to exercise its discretion by ordering payment of the maximum amount allowed by the present legislation.

JURISDICTION

- 9 Prior to the 3rd November 2009 hearing by the Board as to its reconsideration of penalties consequent on the unchallenged admission of guilt of misconduct for the purposes of s.94(1)(b) of the Real Estate Agents Act 1976, as directed by the High

Court, the Institute filed a "Notice of Discontinuance" dated 30th October 2009. The Institute made the following submissions:

- 3.1 The applications were finally determined by the Board at the time it issued its decision on 30 June 2009. The recent decision of, and direction from, the High Court that the penalties imposed by the Board be set aside and that the proceeding be remitted back to the Board to reconsider penalty, has the effect of reviving the applications solely in terms of the issue of penalty.
- 3.2 Following the High Court appeal and direction, the parties have reached an agreement on penalty.
- 3.3 The applicant has filed this notice of discontinuance with the consequence that the applications are no longer extant and, accordingly, no longer need to be determined by the Board.

At the hearing, Mr William Akel, Counsel for the respondents affirmed the submission of the Institute, submitting.

"In this regard if the Board was of the view that it had jurisdiction to decide [sic] the issue of penalty, any decision would be a nullity and invalid given its lack of jurisdiction."

Mr Akel's comprehensive written submission is that the parties have by consent agreed to discontinue the original application "in toto" and the Board no longer has any jurisdiction whatsoever.

The Board is directed by the High Court to re-consider penalties. If the proposition that the Institute, after having secured an admission of guilt on the part of the individual respondents which was not challenged on appeal by the respondents and which the High Court expected to continue to provide the foundation upon which the Board would obey its direction to reconsider penalties, could be set-aside at the instigation of the parties alone, the Board would not be carrying out its obligation to reconsider penalties. Only the High Court has jurisdiction to set-aside the decision-making of this statutory licensing tribunal and it did not do so in relation to liability because the respondents accepted the consequences of their admission of guilt of misconduct with the assistance of competent counsel and chose not to appeal the Board's determination in this respect.

The Board agrees with the submission of Mr Haszard in the second sentence of 3.1

“The recent decision of, and direction from, the High Court that the penalties imposed by the Board be set aside and that the proceeding be remitted back to the Board to reconsider penalty, has the effect of reviving the applications solely in terms of the issue of penalty”.

The Board is “functus officio” with respect to its statutory decision making in relation to liability. The High Court has empowered the Board to reconsider penalty alone. As Counsel for the Institute correctly characterised the matter, the High Court Judgment of Justice Heath “.....has the effect of reviving the applications solely in terms of the issue of penalty.”

Accordingly the Board holds the notice on discontinuance is without legal effect.

The Board imposes the maximum penalty of \$5,000 each in respect of the licences held by Yu Jin Wu and Wen Jing Chen, together with the maximum penalty of \$750.00 in respect of the certificates of approval held in the names of Yu Jin Wu and Wen Jing Chen to be paid by the respondents to the Board within 30 days of the date of this decision.



Hon W P Jeffries
Chairperson