

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-3983

IN THE MATTER OF the Real Estate Agents Act 1976

BETWEEN YU JIN WU AKA JIMMY WU AND
 WEN JING CHEN AKA IRIS CHEN
 Appellants

AND REAL ESTATE INSTITUTE OF NEW
 ZEALAND INCORPORATED
 Respondent

Hearing: 1 October 2009

Counsel: W Akel and S Lynds for Appellants
 S N Haszard and S X Herdson for Respondent
 D R Bigio for Real Estate Agents Licensing Board (leave to
 withdraw)

Judgment: 1 October 2009

(ORAL) JUDGMENT OF HEATH J

Solicitors:

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The appeal

[1] Mr Wu and Ms Chen appeal against orders made by the Real Estate Agents' Licensing Board (the Board) on 30 June 2009. The Board found that Mr Wu and Ms Chen were guilty of qualifying misconduct and decided to cancel their licence and to suspend their certificate as approved salespersons for a period of one year. In addition, Mr Wu and Ms Chen were each ordered to pay a fine of \$2500.

[2] No challenge is brought against the finding of misconduct. The appeal is directed to the penalty imposed. Mr Akel, for the appellants, submits that the penalty is manifestly excessive and disproportionate to the conduct in issue.

Background

[3] A brief summary of the relevant facts is required.

[4] In July 2006, Ms Chen became the registered proprietor of a property situated at 34 Taharoto Road, Takapuna. That property was leased to friends of Mr Wu and Ms Chen, Mr Zhu and Ms Wang.

[5] Between February and March 2007, Mr Wu and Ms Chen approached the owners of the adjoining property, at 34A Taharoto Road, to ascertain whether they were interested in selling that property. An agreement was reached.

[6] Ms Wang, at Ms Chen's request, entered into the agreement for sale and purchase of the property at 34A Taharoto Road. The purchase price was \$645,000. Settlement took place in due course.

[7] In April 2007, another real estate agent approached Mr Wu and Ms Chen to ascertain whether any properties were available to show his client. They referred the agent to the recently acquired property at 34A Taharoto Road. Because that property was in Ms Wang's name, Ms Chen decided to sign the listing authority for the property in Ms Wang's name. The property was listed through the agency operated by Mr Wu and Ms Chen in Pinehill. That agency operated under the "Ray White" brand.

[8] Subsequently, a purchaser for the 34A Taharoto Road property was introduced by the other agent. Ms Wang, at Mr Wu's and Ms Chen's request, signed a further agreement for sale and purchase, to sell the property to the purchaser, Mr Lee. That sale was ultimately settled. The purchase price was \$775,000. Mr Lee took title to that property on 10 May 2007.

The Institute's investigation

[9] The circumstances in which the property was acquired and subsequently sold, came to the attention of the Real Estate Institute of New Zealand Inc (the Institute). The Institute embarked upon an inquiry into Mr Wu's and Ms Chen's conduct. An investigator was appointed to interview Mr Wu and Ms Chen.

[10] The investigator, Ms Gerrard, asked questions of them, to which false answers were given. Ultimately, the Institute brought disciplinary proceedings against Mr Wu and Ms Chen that led to the orders in issue on appeal.

Misconduct

[11] By the time of the penalty hearing before the Board, Mr Wu and Ms Chen had accepted that they were guilty of misconduct for the purposes of s 94(1)(b) of the Real Estate Agents Act 1976 (the 1976 Act). That provision gives jurisdiction to the Board to cancel a licence, in those circumstances.

[12] Mr Wu and Ms Chen each held licences and certificates of approval. The Board was entitled to cancel or suspend the certificate of approval of a salesperson under s 99(1) of the Act. The ground on which suspension was made, by the Board, was that the two agents had been shown to be "of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be ... suspended": s 99(1)(b).

The Board's decision

[13] The findings of fact on which the penalties were imposed are set out in the Board's decision.

[14] The Board found that Mr Wu and Ms Chen combined to implement a scheme involving a purchase and sale of a property and used “a knowingly and growingly unwillingly young person” to facilitate the transactions. That young person was said to possess a “sense of gratitude to” Mr Wu and Ms Chen, having been helped in the past by them.

[15] The Board considered that the “joint attempt” to disguise those underlying facts to the Institute’s investigator was behaviour that reflected adversely on their character, to the extent that their respective licences ought to be cancelled. Similar reasoning formed the basis of the suspension decision, in respect of their certificates of approval as salespersons.

[16] While the point is disputed by the Institute, the Board did not make a positive finding that either Mr Wu or Ms Chen had any intent to sell the property at 34A Taharoto Road for a profit, after its acquisition.

Analysis

[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 relates 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.

Result

[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.

[25] There will be no order as to costs.