Decision No: [2011] NZREADT 37

Reference No: READT 059/11

IN THE MATTER OF of a charge laid under s.91 of the Real

Estate Agents Act 2008s

BETWEEN COMPLAINTS ASSESSMENT

COMMITTEE (CAC 10036)

AND <u>WILLIAM HUME</u>

<u>Defendant</u>

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson Mr G Denley - Member Ms J Robson - Member

APPEARANCES

Mr L Clancy, Counsel for the Committee Ms S Burlace, Counsel for the defendant

Introduction

Mr Hume is a licensed real estate agent living in Wanganui. In February 2010 he worked with Re-Max Results, Wanganui. In February 2010 he met Ann Foster one of the owners of a property at 37 Brassey Road in Wanganui to discuss Ms Foster listing the property for sale with Re-Max. Sometime after the first meeting Ms Foster decided to list her property with Re-Max. Mr Hume is dyslexic and organised for his PA and office staff to post to Ms Foster a package of documents, including the agency agreement. One of the disputes in this case is about what was sent to her. Ms Foster returned the signed agency agreement in late March. However she failed to sign the last page (the schedule) of the agency agreement. At the beginning of April she went into the Re-Max office to sign the agency agreement schedule. On this page the estimate commission and an appraisal figure for the property were set out. There is a dispute between the parties as to whether or not Ms Foster signed a blank schedule which did not have the commission and appraisal price, or signed a copy which contained this information. The Tribunal have copies of two different documents on the file but only one has Ms Foster's signature. Ms Foster's property sold in late April 2010. An issue arose over commission following the sale. Ms Foster had indicated from the beginning of the agency that she wished to negotiate the commission. When she had sold the property she wished to negotiate over the amount of the commission but Re-Max refused to entertain such a discussion. Ms. Foster paid 3% commission and refused to pay the remaining 1%. An action in the Disputes Tribunal was commenced by Re-Max and Ms Foster laid a complaint against the defendant with the Real Estate Agents Authority.

- [2] The Real Estate Agents Authority established a Complaints Assessment Committee which determined to lay a charge against Mr Hume in November 2010, the subject of this hearing. The charge laid by the CAC is as follows:-
 - 1. Following a complaint made by Ann Foster (the complainant), Complaints Assessment Committee 10036 (CAC 10036) charges the defendant with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 (the Act) in that his conduct consists of a wilful or reckless contravention of rules made under the Act.

Particulars

Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules): Failure to provide a written appraisal of the complainant's property at 37 Brassey Road, St John's Hill, Wanganui (the property) to the complainant.

2. CAC 10036 further charges the defendant with misconduct under s 73(iii) of the Act in that his conduct consists of a wilful or reckless contravention of rules made under the Act.

Particulars

Rule 9.8(a) of the Rules: Failure to explain to the complainant in writing, when inviting signature of an agency agreement, how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the complainant based on the appraised price of the property.

3. CAC 10036 further charges the defendant with misconduct under s 73(c)(iii) of the Act in that his conduct consists of a wilful or reckless contravention of rules made under the Act.

Particulars

Rule 9.8(b) of the Rules: Failure to explain to the complainant in writing when inviting signature of an agency agreement, how the property would be marketed.

4. CAC 10036 further charges the defendant with misconduct under s 73(c)(iii) of the Act in that his conduct consists of a wilful or reckless contravention of rules made under the Act.

Particulars

Rule 9.10 of the Rules: Submitting the agency agreement to the complainant for signature without all material particulars inserted into or attached to the document.

5. CAC 10036 further charges the defendant with misconduct under s 73(b) of the Act in that his conduct constitutes seriously negligent real estate agency work.

Particulars

Failing to market the property in a proper commercial fashion, including failing to take a photograph of the property for marketing purposes and/or place any photo in the Re-Max window and failing to list the property on the agency's website or any other site.

6. CAC 10036 further charges the defendant with misconduct under s 73(a) of the Act in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars

- (a) Agreeing to discuss the agency's standard 4% commission at the time of sale, but subsequently refusing to do so.
- (b) The defendant's position, as conveyed to the investigator from the CAC, that:
 - (i) He is too busy to do paperwork and the issues raised in the complaint are a minute matter in his life.
 - (ii) He did not have any time for legal matters or dealing with the Authority, he was too busy selling properties and he just did not want to be involved."
- [3] The Issues to be decided by the Tribunal are:-
 - (a) Did Mr Hume fail to provide a written appraisal of Ms Foster's property? (Charge 1)
 - (b) Did he fail to explain to Ms Foster in writing how the commission was calculated, including an estimated cost for commission payable by her based on the appraised price of the property? (Charge 2)
 - (c) Did he fail to explain to Ms Foster in writing (when giving her the agency agreement) how the property would be marketed? (Charge 3)
 - (d) Did Mr Hume fail to ensure that all of the material particulars were inserted into the agency agreement when it was sent to Ms Foster? (Charge 4)
 - (e) Did Mr Hume fail to market the property in a proper commercial fashion including photographing the property and putting the photograph in the window or listing it on the agency's website or anywhere else? (Charge 5)
 - (f) Did Mr Hume agree to discuss the commission at the time of sale but then refuse to do so and if so what are the consequences of this? (Charge 6(a))
 - (g) Is it disgraceful conduct for Mr Hume to say he is too busy to do paperwork or that the complaint was "a minute matter in his life" and he "did not have any time for legal matters dealing with the Authority" and "he was too busy selling properties and he just did not want to be involved"? Did he in fact say these words? (Charge 6(b))

Preliminary Matters

- [4] The hearing was delayed in starting until approximately 12 noon on Tuesday 8 November because Mr Hume applied on Monday 7 November for two Orders:
 - (a) An order that Ms Robson not sit as a member of the panel; and

(b) That the hearing be adjourned because of Mr Hume's illness.

Disqualification of Ms Robson

- [5] The Tribunal disclosed to the parties that Ms Robson had met on one occasion Mr Nigel Hughes the trustee and co-owner of the property at 37 Brassey Road. Mr Hume objected to Ms Robson sitting saying that there might be a risk of bias because of this meeting. Mr Hughes is a solicitor for Ms Foster and the other trustee/owner of Brassey Road. The Tribunal heard argument on whether or not Ms Robson should be excluded as a member of the panel because of this association.
- [6] The test for bias has recently been set out by the Supreme Court in the Saxmere Co v Wool Board Disestablishment Ltd¹ where the Court held that subject to waiver by the parties and necessity a Judge is disqualified if a fair minded lay observer might reasonably apprehend that there was a real and not a remote possibility that the Judge might not bring an impartial mind to the resolution of the question the Judge was asked to decide. The Court emphasised there should be no attempt to predict or enquire into the actual thought processes of the Judge. Rather it is first necessary to identify what is said might lead a Judge to decide a case other than on its legal and factual merits and secondly to articulate the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.
- [7] This position was reiterated in the High Court disciplinary proceedings in Ranchod v Professional Conduct Committee² in the context of a medical disciplinary case.
- [8] We must determine therefore whether objectively there is a risk that Ms Robson having met Mr Hughes on one occasion in a business setting could be said to be less than impartial in making her decision. The Tribunal do not consider that a fleeting business acquaintance, especially in a country the size of New Zealand can give rise to a real concern that there may be a risk of bias. Mr Hughes is not giving evidence and is only involved as the author of two or three letters as Ms Foster's solicitor in this case. The Tribunal therefore applied the *Saxmere Co v Wool Board* decision and find that there is no risk that Ms Robson's fleeting acquaintance with Mr Hughes should disqualify her from sitting on this matter.
- [9] The next issue for the Tribunal to determine is the issue of an adjournment on the grounds of Mr Hughes' ill health. The Tribunal were presented on Monday with a medical certificate from Dr Prakash and this read:

7 November 2011. To whom it may concern.

Dear Sir, I have seen William today who is under a lot of mental stress. He is not able to stand any further stress at the moment. I have advised him to take a month so he can recover from the stresses.

[10] The Tribunal had a telephone conference with counsel on Monday and asked the Council for Mr Hume to obtain further information about when Dr Prakash

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¹ [2010] 1 NZLR 35

² High Court Auckland CIV 2010-404-008009, 14/6/11 Wiley J

believed that Mr Hume might be fit to attend a hearing and for some more information about his diagnosis. On 8 November Ms Burlace advised that Mr Hume had been admitted to the A & E Department of Wanganui hospital overnight and "was on a drip and was very unwell". The Tribunal asked for further information and received a summary of Mr Hume's admission to A & E for a "virus and stress". In any event Mr Hume arrived at the hearing around noon and the hearing commenced.

[11] The CAC did not call Rosalind Larsen and Terence Mortensen by consent.

Charge No. 1 - Was there a written appraisal of the complainant's property?

Response to Charge:

[12] Ms Foster's evidence was that she had not received any appraisal of the value of her property. The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 require an appraisal of the land to be provided in writing to the client. This must realistically reflect current market conditions and must be supported by a comparable information on sales of similar land in similar location of businesses. It is necessary to set out a little more information about the process by which Ms Foster's home became listed. In early 2010 Ms Foster decided to put the property on the market. She received a detailed written appraisal from Harcourts which was contained in the bundle of documents at pages 5 to 13. This set out an assessment of the current market value of \$299,000 with an expected sale price of between \$290,000 and \$299,000. This appraisal provided some comparable sales and quite a bit of information to Ms Foster. Ms Foster then contacted Mr Hume from Re-Max and arranged to see him at the property on 19 February 2010.

[13] She says that when she met with Mr Hume on the 19th it was for him to carry out an inspection and an appraisal of the property. She said that he brought with him some Property Guru notes of recent sales and properties still for sale in the area and a booklet from the New Zealand Real Estate Agents Authority headed "New Zealand Residential Property, Agency Agreements" guide and "Residential Property and Sales Purchase Agreement" guide. She said she did not receive the document that appears at page 89 which is a document headed "Prepared by Re-Max, Results - Anne Foster, 37 Brassey Road" which is a single sheet showing various recent sales and at the top it says "Indicative Marketing Range \$325,751 to \$330,000". Re-Max describe this as an appraisal. Re-Max sent this to the REAA during the course of their investigation with a note saying that they could not find a copy of the original on their file but that Mr Hume had advised that he had handed her a copy of this document on 19 February 2010. Ms Foster says that she told Mr Hume the property was worth about \$350,000 but Mr Hume disagreed but did not put on a price range or figure on the property until later in the day but never "provided anything in writing and there was no agreement as to the market value". Mr Hume gave evidence that he did tell Ms Foster that he thought the property was worth \$250,000 and that he was of the view that the document 89 was a current market appraisal as it contained market information and was the basis for a discussion about price to commence once Mr Hume had had a chance to see the property.

- [14] There is nothing else in writing other than the figure which appears on the Schedule to the Agency form. This shows an appraisal figure of \$340,000 with an estimated commission of \$14,100. It is Re-Max's position (and Mr Hume's) that this form with the commission and the appraisal value filled in was provided to Ms Foster and was contained on the document that she signed on or about 1 April 2010. Ms Foster denies that she signed the document on page 104 and says that she signed a document which had a blank appraisal and commission details. Mr Hume is clear that he would never have said that the property had an appraised value of \$340,000 and that he did not see the appraisal figure which was filled in on the agency agreement. Mr Steven Price, Mr Hume's PA at that time confirmed that he had filled this appraisal figure in on or about 19 February 2010.
- [15] For the purposes of considering whether or not we consider that this charge has been made out we need to determine whether:
 - (i) There was any written appraisal given to Ms Foster.
 - (ii) If the document at page 89 was given to her and whether that constituted a proper written appraisal.
- [16] An appraisal is a term which means an assessment or an estimation of a property's worth or value. On this basis we find it must be a figure which accurately represents what the agent believes a property could or should sell for in the current market. We find on a balance of probabilities that it is likely that a document at page 89 was given to Ms Foster on or about 19 February when Mr Hume went around to see the property. However while this document is headed "Indicative Marketing Value" it was provided before Mr Hume had had a chance to see the property and contains figures which are significantly in excess of what Mr Hume told the Tribunal he believed that the property was worth. Mr Hume's evidence was that he believed that the property would have a value of somewhere in the mid \$200,000s.
- [17] We do not find that this is a proper market appraisal. We also need to determine whether on the balance of probabilities we find that Ms Foster signed a listing agreement at page 40 as a blank form or whether she signed the correctly filled in document on page 104. It is clear that there were two different schedule pages, as the document on page 40 has a different writing to the document on page 104.
- [18] Ms Palmer-Holmes, the office manager of Re-Max gave evidence that it was her writing on both documents and that she recalls having sent out the agency pack to Ms Foster. However the form of her handwriting is different on each form. Mr Price was also adamant that he completed the appraised value and estimated commission on the agency agreement. He was uncertain of whether he prepared it for the 19 February meeting or for the written material that was mailed to Ms Foster for signature on or about 23 February. He was adamant that he filled it in when the document was blank. Ms Palmer-Holmes said that she put Ms Foster's name and address on the form. She said that once the form had been signed she put in the date of commencement of the agency period and the date of expiry of the agency. She acknowledged that she did this after it was signed.

- [19] It is difficult to explain why Ms Foster has no recollection of having seen the commission and expenses on the form but there was no suggestion of fraud or that this was deliberately done after the event to have made the paperwork complete. Ms Palmer-Holmes in particular impressed as someone determined to tell the truth despite her views on Mr Hume. We accept her evidence. We therefore find on the balance of probabilities that the agreement with the appraisal figure and the estimated commission was contained in the document that Ms Foster signed. However the appraised price and the estimated commission on the agreement were not in any way an accurate reflection of the estimated (appraised) price. Indeed as the property sold for \$265,000 this price was significantly in excess of what its true market value was. We therefore find that there was no written appraisal of the property in terms required by the Rules.
- [20] We now need to determine whether this failure amounts to a breach of s 73 of the Real Estate Agents Act (misconduct). The charge alleges misconduct being a wilful or reckless contravention of the rules or regulations made under this Act.
- [21] The Tribunal has power in determining a charge to also find that a licensee although not guilty of misconduct is engaged in unsatisfactory conduct (see s110(4)). "Unsatisfactory conduct" is defined in s 72 as:
 - (a) Conduct that 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.
- [22] Having considered this matter carefully we consider that the breach of rule 9.5 by Mr Hume amounts to unsatisfactory conduct. We do not find that it reaches the level of seriousness required by s 73(c) for two reasons. First some material was provided to Ms Foster, even if it did not reach the standards required of an appraisal. Secondly Mr Hume seems to have advised her orally of what he believes the property was worth and there is no doubt that Ms Foster received information about comparable sales in the area. She was therefore reasonably well informed about the property's market value. She was entitled to a proper written appraisal but Mr Hume's failure does not reach the level of seriousness prescribed by s 73. We find that Mr Hume was really indifferent to or unaware of the Client Care Rules which had been in force for three months by this time. He is dyslexic and he therefore does not make any attempt to deal with any of the paperwork side of the agency but instead relies upon others to do this for him. The Tribunal do not have any difficulty with Mr Hume arranging to contract out that part of the real estate agent's work that he finds difficult but it is his responsibility as an agent to make sure that he complies with the rules. It is not enough for him to simply to say that he believed that everything that he would need to comply with the Rules had been given to him by his team at Re-Max. Every agent is responsible for their own practice and Mr Hume needed to be aware that he had to provide a vendor with more information. We therefore find Mr Hume guilty of unsatisfactory conduct under s 72(a), (b) and (c).

Charge No. 2 - Explanation for Commission in writing

Discussion:

[23] This is a reference to the schedule to the agency agreement. We have found that an appraised price of \$340,000 was contained in the agency agreement signed by Ms Foster together with the estimated commission. However the "appraised" price of the property was not in fact an accurate price. Further Mr Hume disclaimed any knowledge of the schedule to be completed in an agency agreement and acknowledged that \$340,000 was not a reasonable price. The Rule is designed to ensure that a licensee explains to the client in writing that there will be a commission, how it will be paid, how it will be calculated and what the estimated cost to the client will be. We find that Ms Foster was given a copy of Re-Max's sliding scale of charges. We also find that Ms Foster was aware that the commission was \$500 plus 4% as she took issue with this amount and wished to renegotiate this rate. We have already found that an estimated commission rate was contained on the agency agreement but find that because the amount of commission and the appraised price in fact were not realistic reflections of the appraised price of the property, Ms Foster did not receive correct information about the estimated cost of the commission. Accordingly we consider that there has been a breach of this Rule, but at the level of unsatisfactory conduct under s 72, because some general information was given to Ms Foster, even though it was an inflated figure. We find here that Mr Hume is in breach of s 72(b) and (c).

Charge No. 3 - Failure to explain to the complainant in writing how the property would be marketed.

Discussion:

[24] All parties agree that there was no marketing plan prepared for the property. The expert evidence given by Rosalind Larsen, a lecturer in the National Certificate for Real Estate Agents advises the Tribunal that a proper marketing campaign should include an agency sign on the property, a window display in the agency window, an internet listing on the agency website, an advertisement in the local newspaper, 25 to 50 flyers delivered to surrounding properties, Open Home advertisements and advertisements in the Property Press. This evidence was not challenged. However Ms Foster acknowledged that she did not want any signage on the property or any Open Homes. The bundle of evidence contains an exchange of texts between Mr Hume and Ms Foster in which they attempt to reach an agreement on an amount that Ms Foster is prepared to pay for marketing. This exchange of texts begins on 27 February when Ms Foster texted Mr Hume and asks "can you please send me your advertising costs?". Mr Hume responds on the same day saying "how much do you want to spend?" and that he would work out the best pack for her. He texted her the prices for photographs and told her that a photograph would cost \$200 for a good sized ad for Wanganui Property and that The Press was \$180. About 20 minutes after the first text Ms Foster texted Mr Hume back saying \$550 on adverts, Mr Hume then says he will ring her to discuss. The next text is a text on 1 March from Ms Foster saying "catch da next fortnite lot of adds plse not this weeknds". This appears to be the last discussion through a text about the marketing

plan. Mr Hume's evidence was that Ms Foster was still clearing out the property and did not want any active marketing until this was done. He said that she was happy for him to try to market the property to those people on his list of prospective buyers but did not want any signage, Open Homes, advertising and was not prepared to pay for any photographs. Ms Foster's evidence was that this was not further discussed. The property sold at the end of April without there being any form of marketing, including listing the property on the Re-Max website.

[25] Ms Foster wrote on 17 March 2010 to Mr Hume enclosing a copy of the agency agreement and asking Mr Foster to send her a copy of the marketing plan. She also asked to negotiate the commission with him even though she had signed the papers. In an e-mail dated 5/5/2010 to Mr Hughes Ms Foster says:

There was no advertising done on the property as I'd been trying to clear it out. We had a few people through who had expressed interest when we spoke of it coming on the market soon.

[26] This e-mail would tend to support Mr Hume's evidence that Ms Foster was content for there to be no marketing campaign done on the property while she was tidying it up. We find that while there was no marketing plan as required by the Rules but that this was by agreement between Mr Hume and Ms Foster. Ms Foster had made no firm commitment to pay for the marketing and also wanted to clear the property up before the marketing campaign began. We therefore find that this charge is not sufficiently serious to warrant disciplinary sanction (see McKenzie v The MPDT (HC Auckland, CIV 2002-404-153-02;12/06/03, Venning J for a discussion on the criteria for the imposition of a disciplinary sanction) and therefore do not find this charge established.

Charge No. 4 - Submitting the agency agreement to the complainant for signature without all material particulars inserted into or attached to the document.

Discussion:

[27] For the reasons set out above under Charge 1 we find that the agency agreement schedule did contain the information about commission and an appraised price. The only piece of information that seems to have been added by Ms Palmer-Holmes was the commencement date of the agency and its expiry date. We comment that the office procedures appear to have been somewhat haphazard at this time but do not find this charge established.

Charge No. 5 - Failing to market the property in a proper commercial fashion including failing to take a photograph for marketing purposes and/or place any photograph in the Re-Max window and failing to list the property on the agent's website or any other site.

Discussion:

[28] We have dealt with many of these issues in our discussion under Charge 3. We agree that Mr Hume made no effort to market the property but accept that this

was because Ms Foster did not at that time want any active marketing steps taken. While Mr Hume should have prepared a marketing plan for a time when she did want to actively market the property we do not find that Mr Hume's conduct amounts to misconduct or unsatisfactory conduct and we dismiss Charge 5.

Charge No. 6 - Particular 6(a). Agreeing to discuss the agency standard commission of 4% but then refusing to do so.

Discussion:

[29] Ms Foster signed the agency agreement indicating that she was aware of the commission structure - \$500 plus 4% on the sale. She sent a note to Re-Max/Mr Hume saying that she wished to negotiate the commission and she reiterated this after signing the Agreement for Sale and Purchase at \$265,000. Her text of 4 May (the agreement having been signed on 29 April 2010) was "Hi Bill, I hope we can come to an agreement regarding negotiating the commission for the sale of Brassey Road as we had discussed earlier. Please advise". About five hours later Mr Hume texted back saying "Hi, just got back into range. I will have a chat with the boss tomorrow and get back to you. Cheers, Bill". Mr Vanderof said that the issue of the commission was raised with him as the owner of the agency and he declined to discuss this after the Agreement for Sale and Purchase had been signed. Vanderof said that Ms Foster had given the agency agreement to her lawyer to check before signing and he therefore did not agree to any reduction in the commission. He said that Mr Hume offered to cancel the sale if she did not pay the commission. Mr Hume agreed with this but Ms Foster denied this offer had been made to her. On 6 May Mr Hughes wrote to Re-Max and said that Ms Foster had made it clear to Mr Hume that she would not pay the 4% commission and wanted to negotiate the commission at the time the offer was made. He proposed a commission rate of 3%. Mr Vanderof responded and said that he did not negotiate commission and insisted on the full amount of the commission payable.

[30] We accept that in a real estate agency it is the final decision of the proprietor of the business as to whether there will be a reduction in the commission. It was clear that Ms Foster was continuing to try and negotiate this commission after signing the agency agreement but Mr Hume denied he ever agreed to negotiate commission except for this one text. We do not find that there was any breach of Mr Hume's duties as an agent, nor does it amount to disgraceful conduct to discuss the reduction of commission with a manager but then refuse to actually reduce the commission. This amounts to the simple commercial reality and we therefore do not find Charge 6(a) established.

Charge 6(b) - The defendant's position, as conveyed to the investigator from the CAC, that: (a) He is too busy to do paperwork and the issues raised in the complaint are a minute matter in his life. (b) He did not have any time for legal matters or dealing with the Authority, he was too busy selling properties and he just did not want to be involved."

[31] Mr Clancy and Ms Burlace agreed that Mr Mortensen, the investigator for the REAA, would not be called. It is difficult for the Tribunal to know whether that was on the basis that his evidence (without the transcript of his notes of discussion with Mr

Hume) would be accepted without cross examination (in which case Ms Burlace would be bound to accept what Mr Mortensen said) or on the basis that he would not be needed because he had not attached and could not therefore be producing the notes of his discussion in evidence. In the circumstances we do not find Particular 6B has been established. Even if we had accepted that Mr Mortensen's words were an accurate recollection and reflection of the conversation he had with Mr Hume we do not believe this would amount to disgraceful conduct or unsatisfactory conduct. We do not find this charge to be established on the balance of probabilities..

We therefore find that Charges 1 and 2 are established under s 73 of the Real Estate Agents Act and dismiss Charges 3, 4, 5 and 6.

[32] We invite submissions from counsel on penalty. The CAC are to file their submissions within 10 days of the date of this decision and Mr Hume 10 days after receipt of the CAC's submissions. Any comments by the CAC strictly in reply may be filed 2 days after receipt of Mr Hume's response.

[33] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

DATED at WELLINGTON this 7th day of December 2011

Ms K Davenport Chairperson	
Mr G Denley Member	
Ms J Robson Member	