BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 34

READT 050/10

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10007)**
	Complainant/Prosecutor
AND	**JANINE WALLACE**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

HEARD at AUCKLAND on 27 and 28 March 2012

DATE OF DECISION: 18 June 2012

COUNSEL

Mr S Wimsett, for complainant
Mr D G Collecutt, for defendant

DECISION OF THE TRIBUNAL

The Charges

[1] The defendant faces the following three charges:

(1) Disgraceful conduct pursuant to s.73(a) of the Real Estate Agents Act 2008 ("the Act");

(2) Misconduct pursuant to s.73(c)(ii) of the Act in that her conduct was a wilful or reckless contravention of s.16 of the Real Estate Agents Act 1976; and

(3) Misconduct pursuant to s.73(b) of the Act in that her conduct constituted seriously incompetent or seriously negligent real estate agency work.

[2] Each charge relates to separate incidents, although charges (1) and (2) relate to the same complainants(Mr and Mrs Burt). We summarise the three alleged matters at issue as follows:

[a] That the defendant sold Mr and Mrs Burt a carpark which she did not own, and/or in circumstances where her ownership of the carpark was disputed, and she failed to refund the deposit paid to her by the Burts in relation to that carpark;

[b] That, while unlicensed, the defendant acted as a real estate agent on the sale of two apartments to Mr and Mrs Burt;

[c] That the defendant was seriously incompetent or negligent in entering into a written contract of agency with, and placing undue pressure on, the vendors of a vineyard property and winery/restaurant business.

The First Charge

[3] In relation to the first charge, the complainants allege disgraceful conduct by the defendant in entering into an agreement for sale and purchase as vendor to them (as purchasers) of a car park licence at Princes Wharf, Quay Street, Auckland, and obtaining $25,000 as a deposit and part payment of the settlement balance and retaining those funds, in circumstances where (it is put - taking the view most favourable to the defendant) her title to the licence was disputed and that fact was not conveyed by her to the purchasers.

[4] The response for the defendant is that she is recorded as the vendor under the agreement and she was not acting as a licensed real estate agent in relation to the sale. She has consistently maintained that the sale of the carpark was a private sale and not subject to the previous Act.

[5] Also, although it is accepted that there was a dispute in relation to the carpark, the defendant is firmly of the view that there is no reasonably arguable defence to her claim to the carpark. She paid $80,000 for it and had not sold it prior to entering into the agreement with the Burts, so that (she puts it) her rights under the carpark licence accordingly remain.

[6] The carpark licence is in writing and the carpark location could only be changed by written notice to the owner by the carpark company. It is put that no evidence has been given to show that either the defendant sold the carpark to any third party, or that written notice was ever given to her about relocating the carpark; and that even if the carpark had been relocated, she would still be entitled to a carpark.

[7] The Burts raised the issue as to the ownership of the carpark in February 2008. The defendant has consistently maintained that she owned the carpark. Civil proceedings were issued. A copy of the carpark licence was provided to the Burts' solicitor. The Burts have discontinued the civil proceeding.

[8] In May 2008 the Burts laid a complaint with the Committee in relation to this matter. The Committee has power under s.85 of the Act to obtain documentation from *"any person"*.

[9] The defendant maintains that she paid $80,000 for the carpark, that her ownership is recorded in a written agreement, and that no evidence of a reasonably arguable dispute as to her ownership of the carpark has been produced. She does not believe that she is obliged to abandon her rights just because a third party incorrectly (she maintains) alleges that she does not own the carpark.

[10] It is put by Mr Collecutt (as counsel for the defendant) that this is not a case of the defendant believing that she had a weak claim for a carpark and tricking the Burts into purchasing it from her; and that she was unaware of the filing and striking out of proceedings in her name against the carpark company. It was also put that, as the defendant had been overseas and/or not living in the complex at material times, it is understandable that she was unaware of what her lawyer had and had not done in relation to sorting out her carpark ownership issue.

[11] It is submitted that the defendant believed, and still believes, that as she paid $80,000 for the carpark, has never sold it, and has never received a notice transferring it, she owns the carpark; and that the only reason she has not pursued proceedings against the carpark company is her weak financial position.

The Second Charge

[12] With regard to the second charge, the prosecutor alleges a breach of s.16 of the Real Estate Agents Act 1976 by the defendant in carrying out unlicensed trading by acting on the sale of two apartments to the Burts, namely, Apartment 33, Shed 22, and Apartment 33, Shed 24, at Princes Wharf, Quay Street, Auckland.

[13] At the time of the sale of these two apartments to Mr and Mrs Burt, the defendant held a salesperson's certificate from the Licensing Board in accordance with the 1976 Act but, because the defendant was not at that stage employed by a real estate agent, she was therefore not permitted to so practice; i.e. the defendant was not then licensed as a real estate agent and, therefore, was prohibited from acting as such by s.16 of the 1976 Act. It is alleged that, notwithstanding, she acted as a real estate agent in the sale of the said two apartments to Mr and Mrs Burt.

The Third Charge

[14] The third charge alleges misconduct by the defendant under s.73(b) of the Act in relation to the sale of a vineyard property and winery/restaurant business. There are two separate allegations said to support this charge; firstly, a hand-written commission agreement (or so-called contract of agency) dated 30 January 2009 provided by the defendant to the vendors, which the Committee alleges was so deficient as to amount to serious incompetence or negligence; and, secondly, that the behaviour of the defendant when she presented a sale and purchase agreement to the vendors placed undue pressure on them.

A Summary Of The Evidence Heard By Us

The Evidence of Mr M Burt

[15] Detailed evidence was given by Mr Michael Burt, an airline pilot with British Airways, who now lives in Cyprus. He gave very detailed background evidence about engaging the defendant to assist him and his wife acquire two apartments on Princes Wharf, Quay Street, Auckland. We consider that we have covered the evidence as necessary in dealing with submissions made to us which we deal with in this decision.

[16] Mr Burt said that the defendant represented to him and his wife that she was a licensed real estate agent with authority to deal with the sale of the properties and at no time indicated that she had a personal connection with the occupants or owners of any of the apartments. If there had been any suggestion that she was not a licensed real estate agent they would not have dealt with her. He outlined the detail of his dealings with the defendant but most of the background is not in dispute. He was carefully cross examined by Mr Collecutt in much detail.

[17] Apparently, after the defendant had shown him and his wife two apartments, she showed him one of her own in the same block. He said he received emails from the defendant stating that she was a real estate agent; and that she did not tell him that one of the vendors was a friend of hers. Inter alia, he referred to paying a deposit for the carpark. Apparently, he suggested to her that she split the commission on the apartments which he and his wife acquired. They seemed to have become friends in that the defendant helped him purchase a car and often drove him around Auckland and stored some chattels for him and his wife. He lent the defendant a car at one stage when she had broken her foot. Accordingly as at about the end of 2006 they were on friendly terms. However, Mr Burt was in no doubt that, at all stages, the defendant was acting for him and his wife as their real estate agent, although he did not seem to understand that in New Zealand real estate agents normally act for a vendor and are paid commission through the vendor. Mr Burt expected the defendant to get a fee for selling him property but that the fee would come from the vendor. At one stage Mr Burt put it *"the whole time we thought she was our purchasing agent"*.

[18] It does not seem to be in dispute that the defendant did not tell the Burts that the carpark she sold them was the subject of a dispute between her and the carpark company and another patron. Her response is that she considered that the carpark company and the patron had no defence to her claim of title. That was put to Mr Burt and that, surely, the carpark transaction was a private sale between the defendant and Mr and Mrs Burt with the defendant being a private person and not a real estate agent at the time. Mr Burt responded that he and his wife thought they were dealing with a real estate agent. It seems that, at some stage, the defendant told an agent acting for the vendor of one of the apartments that she operated a trust account but was awaiting the formal issue of a real estate agents licence and that she had been a licensee.

The Evidence of Mr Worthington

[19] The next witness was Mr Worthington of the complainant real estate firm. Inter alia he explained how he had made a complaint to the REINZ late in 2006. He seemed to be saying that the defendant obtained her real estate licence by transfer from Australia so that the Licensing Board dropped his complaint and he seemed to think it had never been dealt with. He gave evidence of activities of the defendant as a real estate agent in New Zealand at material times.

The Evidence of Mr D Hoskins

[20] The next witness was Mr David Hoskins, winemaker and proprietor with his wife, of the vineyard business referred to. Essentially, there was land with the vineyard planted on it and a restaurant and they leased to a family company. In 2008 it was local knowledge that they were interested in selling that business and they were introduced to the defendant whom they understood to be a real estate agent. After several meetings with her, she introduced them to a potential buyer from China.

[21] Mr Hoskins described how, on 30 January 2009, the defendant had him and his wife sign a handwritten commission agreement between the defendant's company and their company and the commission payable to the defendant upon the sale was expressed as *"(a) 6% on the first $5,000,000 of the purchase price; (b) 3% of the balance of the purchase price. (GST exclusive)."* Apparently, when the parties were in the middle of a conversation, the defendant suddenly said that she had better get them to sign an agency agreement so that she tore a blank piece of paper from her notebook and wrote out the said note and slid it across the table for them to sign. He stated there was no discussion about the defendant's responsibilities as their agent or the details as to how the business and land was to be marketed. He said: *"There was no discussion regarding (his wife) and me taking legal advice before signing the agreement."* He also continued *"10. Further, there was no mention of when and in what circumstances any commission was to be paid. For example, there was no discussion about whether the commission would be due when an unconditional contract was signed, when a deposit was paid or on settlement"*. Present at that meeting of 30 January 2009 was a lawyer representing the Chinese prospective purchaser and he was the husband of a real estate agent who had some business interests with the Chinese purchaser.

[22] Mr Hoskins then described in some detail the completion of sale and purchase agreements regarding his vineyard business on 3 February 2009. Essentially, he and his wife seemed to have been told by the defendant at about Christmas 2008 that the prospective purchaser had returned to China but wanted to complete a purchase from them of their land and business and that they needed to obtain valuations and the deal needed to be moved along. It seems that the prospective purchaser must have come back to New Zealand in January 2009 to buy the land and business, and that the vendors gave instructions to their lawyer who had some concerns that one agreement was for sale and purchase of the land and the other for sale and purchase of the business but the agreements were not appropriately linked. There was a condition that the purchaser needed to be satisfied by a due diligence enquiry about the business by 4.00 pm, 12 February 2009. The vineyard business was to be sold at $1,000,000 upon the agreement becoming unconditional and the land at $3,000,000 once the agreement was unconditional. However, an agreement

of variation was signed on 11 February 2009. There seems to have been advice of fulfilment of the due diligence condition at 3.56 pm on 12 February 2009 so that both agreements would become unconditional.

[23] Apparently, on about 9 February 2009 the defendant advised the vendors that the sale and purchase agreement for the land needed to be redrafted because finance could not be arranged by the Chinese purchaser. A redrafted agreement was brought to the vendors to sign by the defendant and the said real estate agent of the purchaser with her barrister husband, but the vendors (Mr Hoskins and Ms Evans) advised they would need to run it past their lawyer. They were told that the purchaser would not accept any changes and that if it was not signed the sale would be lost. The vendors sent the agreement to their lawyer who, on 10 February 2009, advised them not to sign it and that he would draft a suitable document to protect vendor and purchaser.

[24] Mr Hoskins then narrated how the defendant arrived at his house at about 9.30 pm on 10 February 2009. He said the defendant had not called to say that she was coming and he and his wife were in bed when she arrived and his wife was very ill at the time. He stated the defendant then said that unless they signed the new agreement to sell the land, she would tear up both sale and purchase agreements but that they had a deal if they signed the amended agreement. Mr Hoskins continued:

> *"33. She also threatened that if we did not sign the amended agreement, then Ms He would 'go down the road' and buy elsewhere.*
>
> *34. When we told the defendant that our lawyer had told us not to sign the agreement, she said that we should not worry about any of that. The defendant also said that our lawyer did not understand the law as it related to overseas investment requirements."*

[25] The defendant made it clear that this was a pressure situation so they signed the agreement, as Mr Hoskins put it, *"against the advice that we had been given to us"*. Mr and Mrs Hoskins then had a drink with the defendant and by then, he said, it was 10.45 pm and he and his wife were very tired. He said that particular situation caused conflict between his wife and him in that his wife did not want to go against their lawyer's advice, and was prepared to let the deal lapse, but he persuaded his wife to go against their lawyer's advice and sign the variation of the agreement and have the deal go through. He put this type of pressure on his wife because he was concerned about their financial situation and his wife's health. He added:

> *"41. The defendant told us that the agreement was fantastic, but that unless we signed it there and then it would be destroyed and we would have no chance of selling to Ms He"*.

[26] In fact the transaction did not proceed apparently because the purchaser was not satisfied as to due diligence and the 12 March 2009 advice that the agreements were unconditional was given by a person without authority to do that.

[27] On 30 March 2009 the defendant issued a statutory demand for $67,500 in respect of commission she claimed on the sale of that vineyard and business in

terms of the handwritten commission agreement. Apparently, she relied on the purported advice of 12 March 2009 that the agreements were unconditional. There was much litigation about that in the High Court and the Court of Appeal and it seems that the vendors are not required to pay the commission amount and were awarded costs against the defendant who has failed to pay those. Mr Hoskins referred to the great distress and expense he and his wife became involved in out of that situation and estimates that so far it has cost them about $65,000 *"to fight the defendant's claims against us"*.

[28] Mr Hoskins was thoroughly cross examined by Mr Collecutt. It emerged that the commission agreement seemed to be an after-thought of the defendant in the middle of a strategy meeting between the parties. It appears that the vendors had not actually engaged the defendant but the defendant had approached them to endeavour to put the said deal together. Mr Hoskins had been very happy when a conditional sale was negotiated for him and his wife by the defendant. He emphasised that the defendant had put them under pressure by coming unannounced late in the evening wanting a variation of the agreements signed when she knew that their lawyer opposed that and that Mrs Hoskins was very ill. He stated *"surely that was high pressure"*. He thought the agreement was signed between 10.30 pm and 11.00 pm and that they were under the threat the either they sign or the Chinese purchaser went elsewhere.

[29] Inter alia, it was put to him that the defendant said she arrived that night at 8.30 pm having rung early in the afternoon to arrange that. Mr Hoskins did not seem to accept that but did accept that the defendant had been through the variation of agreement with him before he signed it and that they celebrated with a small whisky when it was signed.

The Evidence of Mrs Hoskins/Mary Evans

[30] There was brief corroborative evidence from a Ms Hope and then from Mrs Hoskins or Mary Evans. Her evidence was relatively similar to that of her husband for present purposes. She thought that when they signed the commission agreement it was merely an agreement to engage the defendant to market the vineyard and its business and restaurant. She detailed the said events and, particularly, the pressure she felt under to sign the variation of the agreements on 10 February 2009. She felt she had been subjected to harassment over that by the defendant and emphasised that she had made it clear that she had been told not to sign by her lawyer but the defendant's response was that if the variation was not signed the purchaser would buy another vineyard in the area instead of their's.

The Evidence of Ms R J Kirkwood

[31] By consent, a Ms R J Kirkwood gave evidence both by the admission of a brief and, further to that, by telephone from the United Kingdom.

[32] At material times in 2006, Ms Kirkwood was working as a sales person for the complainant Livin Realty Ltd in Auckland. She described in some detail her dealings with the defendant. Inter alia, she stated:

> *"On or about 25 October 2006, I was approached by the defendant, Janie Wallace, who asked me if I would consider a conjunctional sale on apartment 33, shed 24 as she had a buyer interested in the property. I told the defendant that I would be happy to do a conjunctional sale."*

[33] Ms Kirkwood said that she recalled asking the defendant who she was working for and the defendant telling her that the defendant worked for a company called New Zealand Properties International Ltd. Ms Kirkwood was only prepared to conjunct the work on a 60/40 basis. She then gave details of the sale transactions regarding the said apartments. She said the defendant had previously dropped New Zealand Properties International Ltd business cards around the area and she knew that the defendant had previously worked for Bayleys. Ms Kirkwood presumed that the defendant was licensed to sell real estate and that the company she was working for was also properly licensed as a real estate agent. If she had known otherwise she would never have agreed to the conjunctional sale nor to a split commission.

[34] She narrated how, on 8 November 2006, she was notified that the purchaser's finance was in place and the apartment contract was unconditional so that she emailed the defendant for a deposit of $93,000. She then said: *"I was informed by the defendant that she was in receipt of the deposit funds. I told her that the deposit should have been paid into the Livin Realty Trust account and that she would need to transfer the funds immediately. I then asked her if she had a trust account and she told me that she did not"*.

[35] Accordingly, Ms Kirkwood became very concerned but, following a conversation with her, the defendant came to the Livin Realty office with a bank cheque for $79,950 being the total deposit less the commission which the defendant believed she was entitled to. Ms Kirkwood told the defendant that she could not deduct her commission as the deposit was required to be in the listing agent's trust account for a period of 10 days. The defendant immediately rectified the problem by subsequent payments to the Livin Realty trust account which, ultimately, held the entire commission for apartment 33, shed 24.

[36] Livin Realty made a complaint to REINZ because of its concern with the conduct of the defendant and NZ Properties International Ltd.

[37] Towards the end of her evidence-in-chief, Ms Kirkwood stated:

> *"29. I recall that we subsequently received a letter from REINZ advising that the complaint was not going to be taken any further. I understand that Rex Worthington followed this up with REINZ but never received a reply from them"*.

[38] Ms Kirkwood then stated:

> *"31. I was not involved in the sale of apartment 33/shed 22, which I understand was sold by the defendant to the same purchasers as 22/24 at around the same time. I did know, however, that the vendor of 33/22 was Robert Olsen, the defendant's ex partner"*.

[39] Ms Kirkwood was also carefully cross examined by Mr Collecutt. It seems that Ms Kirkwood and the defendant had been competitors in the wharf apartments area in Auckland over the years about 2004 to 2006, and that the defendant was a very successful agent in terms of those apartments. Ms Kirkwood was concerned to make it clear that she would not have dealt with an unlicensed agent. She emphasised that she never suggested paying an introduction fee to the defendant and would never do that to a non licensee. She generally provided further detail on her quite detailed brief of evidence in chief.

The Evidence of the Defendant

[40] There was extensive evidence from the defendant but we only deal with salient aspects of it.

[41] The defendant gave evidence of her title to the particular carpark number 12 at 143 Quay Street, Auckland. She emphasised that she sold it to Mr and Mrs Burt as a private sale because they wanted a carpark of that type. It seems that in October 2007 they paid her $10,000 and then a further $15,000 towards the purchase of that carpark 12 and a storage locker. She described the carparking structure with the administering company as rather confusing and comprising leases for the apartments and licences for the carparks and storage lockers.

[42] The defendant went through the key events in some detail but the essence of the situation is that she sold Mr and Mrs Burt the carpark 12 when the defendant's title to it was in dispute and the Burts did not know that at material times.

[43] There is no dispute that, at the time she did this, the defendant was not a licensee and she puts it *"nor was I acting as a real estate agent"*.

[44] The defendant acknowledges that she did not tell the Burts that she had an issue with the carpark administrator in relation to the carpark, but she put it that at the time, she believed it was only an administrative issue which she could easily sort out due to the title documentation she held. She had paid $80,000 for carpark 12 and had never sold, signed or transferred it, nor relinquished any right at any stage, and she believed that at all material times she held a valid licence to occupy it. She had originally used it in relation to apartment 47 at shed 24, Princes Wharf. Over 2002 to 2007 she was living in both Germany and New Zealand and so had rented out apartment 47 and carpark 12, and had left it to her lawyer to sort out her dispute with the administration company which seemed to assert that she had swapped carpark 12 for carpark 5.

[45] With regard to the complaint regarding the vineyard property and business, the defendant noted that, at all material times, she was a director of NZ Properties International Ltd. She went through a fairly similar narrative about her dealings with Mr Hoskins and Ms Evans as we have stated above. She understood their complaint to be that she was incompetent or seriously negligent because the written contract of agency did not detail how the business and land was to be marketed; she did not discuss with the vendors their taking legal advice before signing the contract of agency; there was no mention of when and in what circumstances any commission was to be paid; and that she put undue pressure on them to enter into sale agreements.

[46] The defendant went through such aspects as the vendors needing to sell because they were in financial difficulties. She admitted that she did not discuss with them that they should take legal advice prior to signing the contract of agency and stated: *"As far as I am aware there is no requirement the vendors must take legal advice before signing and agency agreement"*.

[47] She emphasised the shortage of time factor in terms of retaining the prospective Chinese purchaser. She put it that the so-called agency agreement implicitly provided that commission was payable upon an unconditional agreement being obtained. She maintained that she did not put undue pressure on the vendors during the negotiations and that they were receiving their own legal advice. She narrated how it was made clear to her on behalf of the Chinese purchaser that unless the new agreement for sale of the vineyard business was signed by 10.00 pm on the evening of 12 February 2009, the purchaser would cancel the agreement pursuant to the due diligence clause. She said she was in Hamilton when she got that advice that day and immediately travelled to Auckland to collect the new form of agreement which had already been signed by the Chinese purchaser and then drove on to Warkworth to get the vendors to sign it. She said she believed they were aware that she was coming and the need for the urgency. She said that she had arranged for them to be told that afternoon that she was coming with the variation agreement and that they were not in bed when she arrived at about 8.30 pm and she simply went through the agreement with them and they signed it. She then telephoned the barrister adviser to the Chinese purchaser and advised that the agreement had been signed and then she deposed: *"131. At that time the vendors thanked me for getting the new agreement closed, and gave me a small glass of whisky to celebrate"*.

She asserts that she never said that *"unless you sign the new agreement to sell the land I will tear up both sale and purchase agreements"* or words to that effect. She denied saying that the purchaser would *"go down the road"* and buy elsewhere; but she made it clear that the purchaser was not prepared to make any further changes to the agreement and was leaving New Zealand the following day and that if they did not sign the agreement they would lose the sale.

[48] In supplementary evidence-in-chief the defendant had covered her recollection of her contact with the Real Institute under the Real Estate Agents Act 1976.

[49] Inter alia, she said that in late 2006 she was not operating as a real estate sales person but had then passed her examinations to become eligible as a licensee and had made application for her company to be licensed and had advertised the application.

[50] She said that the Real Estate Institute had lost that file so that she was *"in limbo – qualified but waiting for approval"*. She emphasised that because she was not yet licensed she was not operating as a real estate agent. She said that from 2002 to mid 2006 she was employed as a real estate salesperson in marketed apartments especially on Princes Wharf where she owned three apartments. In 2006 she was interested in selling some of her apartments and sold one of them to a Mr Chan.

[51] She then described her dealings with the Burts. She said at the time they contacted her she only had two apartments and her brother was living in one and the other was worth at least $2,000,000 which was too high a price for the Burts and she did not see them as a potential buyer from her. However, she said she empathised with them and endeavoured to help them and went out of her way to do so; and she detailed her communications with Ms Kirkwood.

[52] Of course, the defendant was thoroughly cross examined by Mr Wimsett. That clarified much of the evidence referred to above.

[53] We assess that the defendant knew that she was not entitled to an introduction fee or a commission split with Livin Realty.

[54] The defendant emphasised that by 15 October 2007, the date of the carpark agreement, she was licensed and put it that was a private sale by her. She said she did not tell the Burts about the carpark dispute *"because I didn't want them to have a negative experience"* and that she thought it would soon be resolved. She very firmly denied that she was trying to pass her problem on to them. She asserted that she had thought she could have sorted the dispute out with the carpark administrator quickly as she knew that she owned carpark 12 or, at worst, some other carpark and she was sure she held the title to carpark 12. She reiterated that the Burts, as her friends, had bought two apartments at the wharf and were living there and she did not want anything negative happening to them.

[55] It seemed to be put for the defendant that the onus is on the prosecution to prove that the defendant did not own the carpark. The onus remains with the defendant.

[56] With regard to the vineyard transaction, the defendant referred to thinking it sensible, in the course of a six to eight hour negotiation session, to write out an agreement about her commission should she achieve a sale to the Chinese purchaser. She emphasised that she knew how desperate the vendors were so that she wanted to protect the transaction and she considered that the vendors were happy to sign the agreements she provided and that she did everything she could to achieve a sale for them.

The Conduct was Prior to the Commencement of the 2008 Act

[57] All three charges relate to conduct prior to the commencement of the 2008 Act. In the case of *Complaints Assessment Committee v Dodd* [2011] NZREADT 01, the Disciplinary Tribunal set out the procedure to be followed where a charge relates to such conduct. In such a situation s 172 of the 2008 Act applies. It reads:

> **"172. Allegations about Conduct before commencement of this section**
>
> *(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that, -*

> *(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*
>
> *(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*
>
> *(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred."*

[58] In setting out the appropriate procedure, the Tribunal stated in *Dodd*:

> *"[65] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s172 creates a three-step process:*
>
> ***Step One:*** *Could the defendant have been complained about or charged under the 1976 Act in respect of that conduct?*
>
> ***Step two:*** *If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?*
>
> ***Step Three:*** *If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.*
>
> *[66] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in sections 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (step two). However, there are two requirements under s172 which limit its retrospective effect:*
>
> *(a) Complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s172 (step one);*
>
> *(b) Only orders which could be made under the 1976 Act may be made under s172 (step three)."*

[59] In relation to the first and third charges, there is no suggestion by the defendant that this conduct was *"dealt with"* under the 1976 Act in terms of s.172(1)(c) of the 2008 Act. There is such a submission in relation to the second charge. We deal with each charge in terms of the procedure set out in *Dodd*.

The First Charge: the sale of the car park

Step One: Could the defendant have been complained about or charged under the 1976 Act in respect of her conduct now in issue?

[60] Under Rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (REINZ Rules), made under s.70 of the 1976 Act, any person could complain to REINZ. The grounds on which a complaint could be made under the Rules were broad and easily apply to cover this charge (see for example rule 13.1). Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (Rule 16.13.5).

[61] Rule 13 sets out a code of ethics for REINZ members and Rule 13.1 stated: *"Members shall always act in accordance with good agency practices, and conduct themselves in a manner which reflects well on the Institute, its members, and the real estate profession."*

[62] Section 99(1)(b) of the Real Estate Agents Act 1976 stated:

> *"**99 Board may cancel certificate of approval or suspend salesman***
>
> *(1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground -*
>
> *(a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or*
>
> *(b) That the person has been, or had been shown to the satisfaction of the Board 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 cancelled or that person be suspended."*

[63] A complaint under 13.1 or an application under s.99(1)(b) could relate to conduct other than the licensee's conduct in his or her business as a real estate salesperson. It follows that the defendant's conduct in this case, namely, alleged disgraceful conduct in relation to sale of the car park, could have been the subject of a complaint, and subsequently a referral, to the Licensing Board under the 1976 Act. We consider that step one under s.172 of the 2008 Act is satisfied.

Step Two: misconduct (s73(a) of the 2008 Act)

[64] The question under step two is whether misconduct is proved under the 2008 Act. Consistent with the 1976 Act, s.73(a) is not limited to a defendant's conduct in carrying out real estate agency/salesperson work, and provides as follows:

"... A licensee is guilty of misconduct if the licensee's conduct –
(a) Would reasonably be regarded by agents of a good standing, or reasonable members of the public, as disgraceful."

[65] Having regard to evidence given by Mr and Mrs Burt, the defendant, and documentary evidence, the following matters in relation to this charge were non-contentious, namely:

[a] On 15 October 2007, the defendant and the first complainants (Mr and Mrs Burt) entered into an agreement for the sale and purchase of a licence to a car park for a purchase price of $80,000. Those complainants and the defendant had dealt with each other previously in relation to the purchase of two apartments by Mr and Mrs Burt (see charge two), and could then be regarded as friends;

[b] The defendant had previously been the lawful owner of a carpark in the block of carparks but, in then recent times, had been involved in a dispute with another person who claimed to be the lawful owner of the car park. That dispute had reached the point of both sides engaging lawyers; and the defendant had instructed her lawyer to file legal proceedings in the District Court. The defendant therefore had knowledge of the nature and extent of the dispute relating to the car park.

[c] The defendant did not inform Mr and Mrs Burt that there was a dispute in relation to the ownership of the car park prior to entering into the sale and purchase agreement of it to the Burts;

[d] The defendant accepted $25,000 (by way of an initial $10,000 deposit and, subsequently, a further $15,000) from Mr and Mrs Burt in part payment of the purchase price for the car park;

[e] Mr and Mrs Burt subsequently (and coincidentally) spoke to the third party claiming ownership to the car park and were informed of the dispute. They immediately contacted the defendant, relayed their knowledge of the dispute, and cancelled the agreement;

[f] The defendant has not refunded the $25,000 part-payment to Mr and Mrs Burt.

[66] It is submitted for the Authority that, even on review of this non-contentious evidence, the defendant's conduct was disgraceful. It is put that, in simple terms, had the transfer of the car park licence from the defendant to Mr and Mrs Burt taken place, the Burts would have immediately found themselves subject to a dispute relating to the ownership of the car park; and they would have incurred legal costs, emotional distress and practical hassle in dealing with that issue. It is also submitted that, in these circumstances, the defendant's conduct amounted to a misrepresentation by silence and, therefore, to disgraceful conduct.

[67] There is evidence demonstrating that the Burts had quite specific needs in relation to the car park. For example, they saw it as imperative that the adjoining car park (car park 11) was also available for sale to them. In these circumstances, where

the defendant had knowledge of the Burts specific requirements, it was imperative that the defendant inform them of the said dispute.

[68] It is accepted that the conduct in charge one does not involve "real estate agency work" as that term is defined as s.4 of the 2008 Act. Nevertheless, conduct not involving real estate agency work may amount to misconduct (by a real estate agent) under the Act if that conduct would reasonably be regarded as disgraceful by agents of good standing or reasonable members of the public.

[69] The Tribunal considered the ambit of the term *"disgraceful"*, as used in s.73 of the Act, in *CAC v Downtown Apartments Limited* and held:

> *"[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.*
>
> *[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC [1997 1 NZLR 71].*
>
> *[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
>
> *[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.*
>
> *[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public."* [emphasis added]

[70] Section 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

[71] In *Smith v CAC and Brankin* [2010] NZREAD 13 the Tribunal held, at paragraph [19]:

> *"... The conduct of a licensee can be properly described as "disgraceful" under s.73(a) of the Act so long as there is a sufficient nexus between the alleged*

conduct and the fitness or propriety of the licensee to carry out real estate work."

[72] It is submitted for the Authority that (as prosecutor in this case) there is an obvious nexus between the defendant's conduct and her fitness or propriety to carry out real estate work. This was a transaction involving real estate where there was a misrepresentation by the defendant directly relating to the lawful ownership of that real estate. A real estate agent must be able to be trusted to deal with the sale of real estate honestly and with the utmost integrity. It is submitted that, in this case, the defendant demonstrated a willingness to deal dishonestly and by putting her own interests ahead of the purchaser to either obtain a financial benefit or relieve herself of a difficult legal position.

[73] It is, therefore, submitted by the Authority that the defendant is guilty of misconduct pursuant to s.73(a) of the 2008 Act. We agree.

Step Three: Orders under the 1976 Act

[74] The Licensing Board had the power to make three types of orders in the event it found that the ground under s.99(1)(b) of the 1976 Act had been proved, namely, an order cancelling the salesperson's licence; an order suspending the salesperson's licence for a period not exceeding three years; and/or an order imposing a monetary penalty not exceeding $750.

[75] In relation to penalty, Mr Wimsett (counsel for the Authority) requests that submissions be made once we return verdicts in relation to each charge. Whether the defendant is found guilty on one or more of the charges may affect any penalty to be imposed upon her. For that reason, counsel seeks to reserve the right to address us on possible penalty at a later stage and we agree with that course.

The Second Charge: acting as a real estate agent while not permitted to do so

[76] It was not suggested by the defendant, that in relation to this second charge, she could not have been complained about or charged under the 1976 Act.

[77] Under s.16(1) of the 1976 Act, no person could carry on the business of a real estate agent unless he or she was the holder of an agent's licence issued in accordance with that Act. At the relevant time, the defendant was not a holder of an agent's licence and could not have practised as a real estate agent so that she could have been complained about or charged under the 1976 Act. The defendant held a salesperson's certificate but, of course, this did not permit her to carry on business as an agent on her own account.

[78] As a preliminary point, it is submitted for the defendant that we cannot consider complaint two as (it is put) the complainant has not proved that the defendant has not been dealt with under the previous legislation in respect of the conduct.

[79] Section 172 of the Real Estate Agents Act 2008 is set out above.

[80] Mr Collecutt emphasised that the wording under s.172(1)(b) refers to the licensee having been dealt with in respect of *"conduct"* and it does not refer to a

"complaint or charge" against the licensee having been dealt with in respect of the conduct. He puts it that s.172(1)(b) has been drafted widely so that if the underlying conduct has been dealt with (whether via a complaint, charge or otherwise) then the matter is not to be *"dealt with"* again. He submits that, in this case the defendant was dealt with in respect of the relevant conduct via proceedings which both the Board and the REINZ were a party to in 2007.

[81] Section 23 of the Real Estate Agents Act 1976 provides:

> ***"23 Board may grant licence***
> *If, after hearing and considering any application for a licence and all objections (if any) to its issue, the Board is satisfied –*
> *(a) That the applicant is, under the provisions of section 17 of this Act, entitled to hold and not disqualified from holding a licence; and*
>
> *(b) That, having regard to the applicant's character and financial position, and to the interests of the public, and where appropriate, to the matters specified in section 24 of this Act, the applicant is a fit and proper person to carry out the business of a real estate agent, -*
>
> *the Board shall grant the licence, which shall be issued to the applicant in the prescribed form on payment of the prescribed fee. If the Board is not so satisfied, it shall not issue a licence to the applicant unless ordered to do so by the Court."*

[82] Mr Collecutt notes that, in the case of complaint two (the allegation that the defendant acted as an unlicensed real estate agent), the only ground which could be relied upon for cancellation of the defendant's licence under the 1976 Act is s.94(1)(c) which provides: *"That a licensee or, in the case of a licensee company, any officer of the company, has been shown to the satisfaction of the Board to be of such a character that it is in the interests of the public that the licence be cancelled."*

[83] He puts it that, accordingly, the legal test to be considered by the Board under the 1976 Act in relation to granting a licence under s.23, and the legal test to be considered by the Board in relation to cancelling a licence under s.94, was substantially the same. The issue would have been whether the defendant's character is such that it is in the interest of the public that the defendant hold a licence ("the common character test").

[84] Livin Realty laid a complaint to the Real Estate Institute in relation to the matters subject of complaint two in late 2006. The defendant gained a licence to act as a real estate agent in her own right on 13 February 2007. Accordingly, by March 2007 the REINZ had a live complaint in relation to the defendant in her capacity as a licensee. The REINZ has lost its original file in relation to the complaint.

[85] Between 30 April 2007 and July 2007, the REINZ was also involved in opposing an application to the Board by the defendant to be Principal Officer of NZ Properties International Ltd, and for that company to be granted a real estate agent's licence.

[86] Accordingly between April 2007 and July 2007 the REINZ had two matters to consider, namely:

[a] Whether the Institute should apply to the Board for an order cancelling the defendant's licence pursuant to the complaint; and

[b] Whether the Institute should oppose the Wallace/NZ Properties International Ltd application to the Board.

[87] If the Board was aware of an objection as to the applicant's suitability to be licensed, then it was obliged to consider and apply the common character test. In this case, Mr Collecutt puts it, the Board considered and applied the common character test in Ms Wallace's favour in early February 2007 by granting her a licence.

[88] It is also submitted by Mr Collecutt that the underlying issue in relation to those matters was the same, namely, whether the defendant and her company satisfied the common character test; and that under the Real Estate Agents Act 1976 the Licensing Board dealt with both the granting, and the cancellation, of the relevant licences. It is put that the Institute indicated on 19 March 2007 that it wished to be heard on the Wallace/NZ Properties application; and that the Institute raised the issue whether the defendant had been involved in real estate transactions without holding a real estate agent's licence.

[89] Mr Collecutt submits that, accordingly, in its letter of 19 March 2007, the Institute specifically raised the same issue with the Board, as is now raised by the Committee with us in these proceedings under complaint two; and that the Board was given notice in writing that, in dealing with the defendant's application to be approved as a principal officer in the context of the common character test under the 1976 Act, it had to consider the conduct which is now the subject of complaint two. Accordingly, Mr Collecutt submits that, in terms of s.172 of the Real Estate Agents Act 2008, the Board was given notice that it had to deal with the defendant under the Real Estate Agents Act 1976 in relation to the defendant's conduct which is the subject of complaint two. Section 172 widely refers to a party being *"dealt with"* in relation to the relevant *"conduct"*.

[90] It is put for the defendant that it is difficult to see how the REINZ and the Board did not, in terms of s.172(1), deal with the defendant under the Real Estate Agents Act 1976 in respect of the conduct in that they were dealing with her in relation to proceedings under the Act; they had the relevant conduct before them in those proceedings; they had to *"deal with"* her in relation to the conduct in order to *"deal with"* the proceedings under the Act. Mr Collecutt submits that it would be extremely artificial to hold that they *"dealt with"* Ms Wallace in relation to the conduct when they determined that Ms Wallace was of sufficient character to be licensed; but they did not *"deal with"* Ms Wallace in relation to the conduct in terms of s.172(1).

[91] Mr Collecutt submits that if proceedings dealing with an issue between parties are determined by a Tribunal, then the doctrines of res judicata and issue estoppel prevent a party from going back to the Tribunal and re-arguing the issue which has already been determined. He puts it that the REINZ raised the complaint with the Board in the context of the common character test, and that issue was determined by the Board; and, accordingly, it would not have been open to the REINZ to subsequently go back to the Board and seek to raise the same common character

test based on the same complaint with the same Board. He submits that the issue of the defendant's character had already been resolved and could not be re-litigated under the 1976 Act.

[92] Mr Collecutt adds that from a policy perspective, if the matter had been resolved under the 1976 Act, it would be surprising if it could be re-opened under the replacement legislation of the 2008 Act. He submits that new Act was drafted widely to prevent this type of result.

[93] The evidence in relation to the charge of misconduct under s.73(c)(ii) of the 2008 Act was as follows:

[a] The defendant worked as a real estate agent for a number of years in the employment of Bayleys and Kellands real estate. She terminated her work with Kellands in May 2006;

[b] NZ Properties International Ltd was incorporated on 16 August 2006 and the defendant was its sole director and shareholder;

[c] In 2006, the defendant publicly advertised as available for sale *"outstanding waterfront apartments"* at Princes Wharf in Auckland. An advertisement from the magazine *"International Homes"*, volume 13 no. 5 2006, stated that there was *"A limited selection of 1 to 3 bedroom Princes Wharf penthouses for sale"*. The bottom of the advertisement stated *"For further details call Janine Wallace on 0064 21 555 858 any time or email janine@nzproperties.com"*;

[d] A second advertisement from the same publication also advertised apartments at Prince Wharf and concluded with the statement *"This is your chance to fulfil your dream, make it happen and invest in your future now! Call Janine Wallace for detailed information on +6421 555 858 any time or email janine@nzproperties.com"*;

[e] At around the same time, the defendant distributed business cards around the Auckland viaduct area. The business cards were for a business named *"NZ Properties International"* and listed the defendant as the managing director. The reverse side of the business card included the following: *"offering the best inspirational, home, property, lifestyle and investment opportunities throughout Australasia!"*;

[f] Mr and Mrs Burt were UK residents interested in purchasing real estate in New Zealand. The Burts came across the advertisements referred to above and looked at a website for NZ Properties International. They subsequently contacted the defendant via email. They made arrangements to visit New Zealand in October 2006 with the intention of viewing and possibly purchasing real estate;

[g] Upon their arrival, the Burts met with the defendant (as had been arranged prior to their arrival) and she began introducing them to properties in Auckland. Before long the defendant showed the Burts apartment 33 at Shed 22, Princes Wharf in Auckland. The vendor of that apartment was

an acquaintance of hers. The Burts entered into an agreement to purchase the apartment;

[h] The sale and purchase agreement between the Burts and the vendor was completed by the defendant and stipulated that the 10% deposit for the purchase of the apartment was to be paid to NZ Properties International. At page 3 of the agreement (the backing sheet) there is a space for the real estate agent/agency to include his/her/or its details. Under the pre-typed words *"Members of the Real Estate Institute of New Zealand"*, the defendant entered the postal address, facsimile and telephone numbers of NZ Properties International Ltd and, in the space pre-typed *"Manager"*, the defendant entered her own name;

[i] The deposit for the purchase was paid to the defendant. This included a cash payment of approximately $15,000 made to the defendant at the Parnell branch of the Bank of New Zealand. The defendant had accompanied Mr Burt to the bank and the deposit was handed over there;

[j] Subsequently, the Burts purchased a second apartment at Princes Wharf. This apartment had been advertised by Livin Realty. The defendant made contact with that firm and introduced the Burts as possible purchasers. Evidence from Mr Burt and from Ms Kirkwood and Mr Worthington of Livin Realty, was that this was a *"conjunctional sale"* between the defendant and Livin Realty. The defendant did not accept this and stated that she was merely paid an *"introduction fee"* for introducing the Burts to Livin Realty. Whatever the case, an amount equal to 50% of the commission on the sale was paid to the defendant for her role in the transaction;

[k] The deposit on that purchase was initially paid to the defendant and transferred by her to Livin Realty minus her commission/fee. However, Livin Realty found this unacceptable and demanded that the full amount of the deposit be transferred to their trust account where it was to be held as required. The defendant subsequently made demand for her commission/fee, but Livin Realty refused to pay it to her when they discovered that she was not a licensed agent.

Further Background and Discussion on "dealt with" Issue

[94] For the said proceedings before the Board, briefs of evidence were obtained from Mr Worthington and Ms Kirkwood referred to above. Copies of those briefs were adduced to us. The backing page indicates that they were in a form suitable for submission to the Board and those briefs are substantially the same as the briefs filed in this prosecution.

[95] The original hearing before the Board was to take place on 2 May 2007 but, on 30 April 2007 (two days before the hearing), the Institute advised that a Mr Presland had been instructed to act for the defendant and sought an adjournment. It is put that, due to the late notice of the intention to adjourn, there is an inference that Mr Worthington's and Ms Kirkwood's briefs of evidence would have already been submitted to the Board prior to the adjournment request; and that the defendant

retained counsel (Mr St John) to act for her and that counsel prepared the defendant's response including briefs of evidence.

[96] On 2 July 2007 the REINZ confirmed to the defendant's counsel that it *"undertakes to withdraw"*, and advised the Board that it withdrew its application for a request to be heard in respect of the Wallace/NZ Properties application. Accordingly, on 13 July 2007 the Board determined that the Wallace/NZ Properties application should be granted.

[97] It is further put for the present defendant that in determining that application for registration (having been put on notice as to the issue of the defendant allegedly being *"involved in real estate transactions without holding a real estate agent's licence"* and, presumably, having considered the briefs of evidence) the Board was required to discharge its obligation under s.23. It is also put that the Board must, therefore, have considered Ms Wallace's character against the background of the common character test and been satisfied that she was a fit and proper person to be licensed.

[98] On 2 July 2007 the Board was advised that the REINZ had received *"additional information and believes the request to be heard is no longer warranted"*. It is put that the Board, presumably, endorsed the REINZ's view and determined that the complaint did not show that the defendant was of such a character that she should not hold a licence so that her application for a licence was granted.

[99] On 17 July 2007 the REINZ confirmed to the complainant that it had withdrawn its request to be heard, had *"received appropriate explanations from Ms Wallace"*, and that its Legal Counsel & Compliance Manager had determined that it would be unlikely that the Real Estate Agents Licensing Board would refuse the grant of the application.

[100] Mr Collecutt puts it that the short point is that a *"complaint was made to REINZ"*, and it was *"dealt with"* pursuant to one of the pathways under the Act in that the complaint was investigated by the REINZ which referred the subject matter of the complaint to the Board by seeking to be heard on the defendant's application to be licensed; and briefs of evidence were provided; and under that *"pathway"* the defendant was *"dealt with"* in relation to the *"conduct"* which had been the subject matter of the complaint.

[101] Mr Collecutt also submits that the REINZ subsequently received an appropriate explanation and determined that the complaint should not be taken any further. However, we do not know that.

[102] We accept that both the REINZ and the Board had the issue of the defendant's character before them as a result of the complaint. Both the REINZ and the Board had to deal with the issue of her character in accordance with the Act. It is put that both of them dealt with the issue of Ms Wallace's character and the complaint by deciding in favour; but we do not know that with regard to the complaint.

[103] It is submitted by Mr Collecutt that as the issue of Ms Wallace's character in relation to the complaint had been dealt with by the REINZ and the Board in proceedings before the Board, it would not have been possible for the subject matter

of the complaint to have been raised again by either the REINZ or the Board under the 1976 Act; and the issue is res judicata and/or there is an issue estoppel. He put it that if complaint proceedings had been re-issued before the Board under the 1976 Act, Ms Wallace would have been able to apply to stay the proceedings on the basis that the REINZ and the Board had previously dealt with the issue. We very much doubt that.

[104] Mr Collecutt also submitted that it would have been a mockery of the system under the 1976 also Act if in one proceeding the REINZ and the Board determined that, having considered the complainant's evidence, they considered Ms Wallace was of suitable character to be a licensed agent and, in another proceeding, they determined that (having considered the complainant's evidence) Ms Wallace was not of suitable character to be a licensed agent. However, we observe that it does not follow from an adverse finding about an agent's conduct that she should not hold a licence.

[105] As mentioned above, the explanation given to the complainant by the REINZ on 17 July 2007 was that *"appropriate explanations"* had been received, and it had been *"determined"* that the Board would be unlikely to refuse the application for registration. It is put that the basis of the determination which resolved the complaint (as referred to in the letter) was the *"appropriate explanations"* received. This basis for the determination by the REINZ not to take the matter any further was also reflected in the letters of 2 July 2007 to the Board and counsel for the defendant. We accept that there is no reference to Trans Tasman mutual representation arrangements. The defendant's original application to the Board was based upon her obtaining the relevant qualifications in New Zealand, not on Trans Tasman arrangements. It is accepted that she did become licensed in Australia. However, the issue (and evidence) which was actually referred to the REINZ and the Board was the complaint by Livin Realty, rather than the Trans Tasman arrangements.

[106] Accordingly it is submitted for the defendant that:

[a] The conduct the subject of complaint 2 was considered and dealt with by the REINZ under the 1976 Act;

[b] Because, with regard to complaint 2, an issue about the defendant's conduct and character was before the Board, and the REINZ withdrew its objection and acquiesced in the Board making its decision in relation to her character, there was an issue estoppel is far as REINZ was concerned in relation to the conduct the subject of complaint two;

[c] The conduct which was the subject of complaint two, and the defendant's character, was considered and dealt with by the Board under the 1976 Act so that the issue of her character arising out of complaint two was res judicata as far as the Board was concerned.

[107] Section 172 of the Real Estate Agents Act 2008, of course, requires the Tribunal *"to be satisfied"* that the defendant *"has not been dealt with"* under the Real Estate Agents Act 1976 in respect of the conduct (in this case) the subject of complaint two. It is submitted by Mr Collecutt that the burden of proof is on the Committee. That must be so in a charge of this nature but, under the 2008 Act, the

standard of proof is the balance of probabilities. It is further submitted by Mr Collecutt that the Committee has not discharged the burden of proof on this point as:

[a] the above documentation indicates that the conduct and the common character test was *"dealt with"* by both the REINZ and the Board under the 1976 Act;

[b] the relevant REINZ file has been lost and, accordingly, it is possible that there was additional documentation recording how the complaint was dealt with under the Act and which (it is put) further supports the conclusion that the subject matter of the complaint was dealt with under the 1976 Act;

[c] the only witness who presented evidence as to how the complaint was dealt with under the 1976 Act, Mr Worthington, admitted at the end of his cross examination that it was possible that the complaint was dealt with under the 1976 Act.

[108] It is put for the defendant that it is difficult to see how the REINZ and the Board did not, in terms of s.172(1), deal with the defendant under the Real Estate Agents Act 1976 in respect of the conduct in issue as they were dealing with her in relation to proceedings under the 1976 Act; they had the relevant conduct before them in those proceedings; and they had to *"deal with"* her in relation to the conduct in order to *"deal with"* the proceedings under the Act. Mr Collecutt submits that it would be extremely artificial to hold that they *"dealt with"* Ms Wallace in relation to that conduct when they determined that Ms Wallace was of sufficient character to be licensed; but they did not *"deal with"* Ms Wallace in relation to that conduct in terms of s.172(1).

[109] However, it is submitted for the prosecution that, in the circumstances, s.172 applies to complaint two and that we cannot be satisfied that Ms Wallace, the defendant, has been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.

[110] Having stood back and absorbed the evidence, we are not so satisfied.

[111] In relation to this second charge, the defendant submits that she was *"dealt with"* pursuant to the 1976 Act and therefore, pursuant to s.172 of the 2008 Act, this charge ought to be struck out or dismissed. As referred to above, s.172(1)(b) of the Act, provides that the Tribunal may hear a charge against a licensee in respect of conduct alleged to have occurred before the commencement of this section, but only if the Tribunal is satisfied that the licensee was not *"dealt with"* under the Real Estate Agents Act 1976 in respect of that conduct.

[112] We agree with Mr Wimsett that the correct interpretation of a licensee having been *"dealt with"* is a complaint made to REINZ having followed the disciplinary pathway under the 1976 Act and its Rules. The pathways include those expressly set out at s.171(1) of the 2008 Act, namely:

[a] Applications made under ss.94, 95 and 99 of the 1976 Act; and

[b] An enquiry under s.97 of the 1976 Act;

[c] A complaint laid with the Disciplinary Committee under s.102 of the 1976 Act; and

[d] Matters referred to a Regional Disciplinary Sub-committee (RDSC) in accordance with the Rules.

[113] There are other possible pathways in terms of rules 16 and 17 of the Rules; and these are detailed and prescriptive.

[114] We consider that a matter has been *"dealt with"*, in terms of s.172(1)(b) of the 2008 Act, only where a complaint has been determined following a disciplinary process in accordance with the 1976 Act, and/or the Rules.

[115] At the time when the defendant had made application for a real estate agent's licence in 2007, a complaint was received from Livin Realty, in Auckland, alleging that the defendant was practising as a real estate agent while unlicensed. It is clear from relevant documentation of that time that REINZ wished to be heard by the Board in relation to the defendant's licence on the basis that the defendant had, allegedly, been involved in real estate transactions without holding a real estate agent's licence and because that was a relevant matter to be put before the licensing Board. It seems coincidental that the defendant's application for a licence was being considered at the time the complaint was received.

[116] It was initially proposed that two complainants, Mr Rex Worthington and Ms Rosemary Kirkwood, both from Livin Realty, would give evidence at the licensing hearing. Briefs of evidence were prepared for that purpose but not for the purpose of disciplinary proceedings which did not take place at that time. Similarly, the responses to those briefs of evidence, said to have been drafted by the defendant, were in preparation for the licensing hearing, not a disciplinary hearing which never took place.

[117] However, before the licensing hearing took place, REINZ withdrew its objection to the defendant's application. This was on the basis that the defendant had obtained a real estate agent's licence in Australia and, having regard to the mutual recognition arrangements between New Zealand and Australia, it was inevitable that the defendant would receive a licence in New Zealand.

[118] Disciplinary proceedings were not initiated against the defendant until May 2008, after the Burts had made a complaint. The hearing before us was the ultimate result of those proceedings being initiated.

Our Conclusion on the "dealt with" Issue

[119] We find that, on the balance of probabilities, it was the defendant's application for a real estate agent's licence which was dealt with in by the Board 2007. The complaints against her were not dealt with at all. We agree with Mr Wimsett that this charge two was not *"dealt with"* under the 1976 Act and, therefore, the principles

relating to res judicata and double jeopardy do not apply to the defendant in this case.

Further Discussions

[120] In relation to complaint two, the defendant has consistently maintained that she was not acting as a real estate sales person in relation to the apartment sales, but merely assisting the purchasers. She puts it that real estate agents act for the vendor and not for the purchaser.

[121] The defendant emphasises that she had not even met the Living Realty vendor, and she was only assisting or facilitating the transaction for the purchasers.

[122] It is common ground that the vendor of the other apartment was a friend of the defendant. She puts it that in relation to the transaction, she considered that she was only helping to facilitate a sale between people whom she considered to be friends.

[123] Ms Wallace was initially looking to sell one of her own apartments to the Burts. It is put that transaction would not have been subject to the Act. That would depend on the precise facts of any such case.

[124] Given the defendant's obvious knowledge of the market, when a sale of one of her apartments did not eventuate, the Burts looked to her for advice in relation to other properties which they were interested in buying. Rather than refuse to assist the Burts when she was unable to sell them one of her properties, the defendant gave them the benefit of her advice in relation to other properties they had become interested in. The quality of that advice is not the subject of the complaint, nor is there any complaint that the Burts have suffered any loss in relation to their apartment purchases.

[125] It is put for the defendant that although a facilitation/introduction fee was offered to her, it was not paid; the fee was not a *"conjunctional sale"* fee, and the defendant was not even aware of the term at the time; and that she clearly indicated that she was not acting for the vendor.

[126] We appreciate that she had been a competitor of Livin Realty, and there were a small number of agents selling apartments in Princes Wharf, Auckland, at material times.

[127] We note the defendant's evidence that Ms Kirkwood knew that the defendant was not working as a sales person at the time of the Burt transaction and only introducing the purchasers and facilitating a purchase. We think it unlikely that Ms Kirkwood thought that.

[128] We accept that the defendant was employed as a real estate sales person during 2006 and that, while she was so employed, she was legally able to promote Princes Wharf and act as a real estate salesperson. She also personally owned some apartments in Princes Wharf in 2006.

[129] With the passage of time it is simply unclear when the defendant arranged the advertisements seen by the Burts. They may have been arranged while she was still

employed as a real estate sales person. The advertisements are also consistent with the defendant marketing her own properties. The pictures in at least one of the advertisements are of one of her properties.

[130] The defendant did not print *"MREINZ"* or similar on her business cards or emails prior to becoming licensed. Given her past experience, and anticipated licensing, the defendant would have presented to third parties as a professional person. She did not , however, represent to the Burts that she was a licensed real estate agent; although we accept that they thought she was.

[131] In anticipation of becoming licensed the defendant had set up a trust account. She held funds on trust, and passed those funds on to the relevant parties. No party is out of pocket in relation to the relevant transactions.

[132] The defendant may have considered that she was not acting in a professional capacity and only helping parties she considered to be friends to implement an agreement they had entered into. With the benefit of hindsight the defendant realises she should have avoided any involvement in the transactions between the period when she ceased to be an employed sales person and become a licensee.

[133] It is submitted for the Authority that, at all relevant times, the defendant was quite clearly performing tasks that could only be lawfully performed by those licensed to do so. She advertised real estate for sale, introduced the Burts to real estate, received deposits for property purchases, completed sale and purchase agreements, noted on a sale and purchase agreement that NZ Properties International was the registered real estate agent on the sale, and entered into an agreement to receive commission on the sale of the second apartment.

[134] It is therefore submitted by Mr Wimsett that for all intents and purposes the defendant was acting as a real estate agent and is guilty of this charge. We agree and we find charge two to be proven beyond all reasonable doubt.

The Third Charge: the written contact of agency and alleged undue pressure

Step One: could have been complained about or charged under 1976 Act

[135] It is submitted for the Authority that this matter could have been complained about/dealt with pursuant to rule 13.13 which states: *"A member must be fair and just to all parties in negotiations and in the preparation and execution of all forms and agreements, and protect the public against unethical practices in connection with real estate transactions"*, and that the defendant could have been subject to a complaint or charge under the 1976 Act. We agree.

Step Two: misconduct (s.73(b) of the Real Estate Agents Act 2008)

[136] In early 2009, the defendant acted as agent for David Hoskins and Mary Evans ("the vendors"), the owners of the property and business trading as the Heron's Flight Vineyard. At that time Heron's Flight was under some financial pressure and Ms Evans was undergoing treatment for cancer. Those two factors may have relevance to the circumstances in which the defendant presented an offer to the vendors as referred to in the second allegation below.

The First Allegation

[137] We received in evidence a written contract of agency which is alleged by the Authority to amount to serious incompetence or serious negligence. The hand-written document contains the bare details of a commission arrangement between the vendors and the defendant but does not include an agreement as to how that commission was to be paid, whether it was to be deducted from the deposit or sale proceeds, or any other details (other than confirming that commission scales were GST exclusive).

[138] We also heard evidence as to the circumstances in which the document was signed by the vendors, namely (and allegedly), during a meeting at the Heron's Flight restaurant with potential purchasers and their legal representative, and about the minimal time given for the vendors to consider the document or take advice. In essence it is put that, during the meeting with the potential purchasers, the defendant suggested to the vendors that it was necessary for an agency agreement to be sorted and the meeting was interrupted for that to occur. The handwritten document presented in evidence was drafted by the defendant and signed by both parties. The meeting then resumed. It is uncontentious that the commission agreement was not a sole agency agreement.

[139] The evidence on this point was limited and was brief. We accept the view of counsel that it is entirely a matter for us as to whether defendant's conduct in her relation to the commission/agency agreement, including the circumstances in which it was agreed, amounted to negligence and/or incompetence.

The Second Allegation

[140] The second allegation against the defendant relates to a visit by her to the vendors' home at 9.30 pm (on the vendors' account, or 8.30 pm on the defendant's account) on 11 February 2009. Ms Evans gave evidence that it was dark outside at the time of the defendant's arrival. It is submitted by Mr Wimsett that, having regard to the date being February, daylight saving was at its peak and it was more likely to be 9.30 than 8.30 pm. Whatever the time, the vendors allege that the defendant arrived at their home for the purpose of presenting them with an offer for the purchase of their vineyard property and during the course of that visit she placed undue pressure on them to accept the offer and sign the agreement.

[141] Mr Hoskin's evidence on the point included:

> *"The defendant said that unless we signed the new agreement to sell the land, then she would tear up both sale and purchase agreements. The defendant said that we had a deal and that we needed to sign the amended agreement. She also threatened that if we did no sign the amended agreement, then Ms He (the purchaser) would 'go down the road' and buy elsewhere."*

[142] At that time the vendors received legal advice not to sign any agreement without it being considered by their lawyer. Mr Hoskins stated that this was communicated to the defendant but that she was insistent that the agreement be signed that evening. The vendors signed the agreement that evening.

[143] The defendant denies that she acted inappropriately. She states that she rang the vendors in advance of her arrival and that any sense of urgency conveyed was merely reflecting the position of the purchasers. She was unable to recall whether she was advised by the vendors that they had received legal advice not to sign an agreement that evening.

[144] It is put for the defendant that a general agency agreement does not oblige the real estate agent to market the property. A licensee who gave expert evidence for the Committee confirmed that although it is preferable for a full listing agreement to be executed, it is not so uncommon a practice for a property to be marketed by a real estate agent without a listing agreement being signed first as to constitute disgraceful conduct, nor such a character flaw or level of misconduct as to lead to the conclusion that the agent is not fit to practice.

[145] We accept that, at the time the final agreement was executed, the vendors were in receipt of legal advice; were in financial difficulties; they and/or their lawyer had been negotiating direct with the purchaser's lawyer; the purchaser was due to leave New Zealand, and the unconditional date was, the following day; and the defendant was merely passing on the purchaser's position that if the variation/new agreement was not entered into, then the purchaser would not continue with the transaction but would look at another property.

[146] It is put by Mr Collecutt that, in the circumstances, the defendant had a duty to pass details of the purchaser's position to the vendors. We do not disagree with that.

[147] Mr Collecutt also put it that the vendors' true complaint is with the position taken by the purchaser, and the defendant merely did her job in passing on the purchaser's revised offer to the vendors. Again, we do not disagree.

[148] Having heard the evidence on that point, it is a matter for us as to whether the defendant's conduct was incompetent and/or negligent.

Step Three: orders under the 1976 Act

[149] Again, the Authority seeks to address the issue of penalty once the Tribunal makes its determination on liability.

Our Overall Conclusions

[150] Simply put, we consider that it must be misconduct in terms of the 2008 Act for a person to hold herself out as a licensed agent when she was not licensed at certain material times and also in endeavouring to obtain a commission split or a fee of some type for facilitating a property transaction when so not licensed.

[151] Again, it must be misconduct on the part of a licensed real estate agent to fail to tell the purchasers (Mr and Mrs Burt) that the title to the carpark which they were purchasing from that agent was disputed. At times material to that transaction, the defendant was not only a licensed real estate agent but the vendor of the carpark.

[152] Finally, with regard to the vineyard conditional sale contract detailed above, while we are not prepared to find misconduct on the part of the defendant until the point where she claimed commission (on 30 March 2009 by statutory demand), we consider that it must be misconduct on the part of a real estate agent to claim commission when the conditions basic to the transaction proceeding had not been fulfilled. To so pursue an unjustifiable claim for commission against the would-be vendors of that transaction (as described above) caused them much stress and financial cost and seemed to virtually amount to harassment of them by the defendant.

[153] Accordingly, we find all the charges to have been proved and that the defendant is guilty of misconduct with regard to each and all of them.

[154] It is now necessary to separately address the issue of penalty. We direct the Registrar to liaise with the parties and arrange a suitable fixture date for us to receive submissions on penalty.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr G Denley
Member