BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision no: [2012] NZREADT 42

Reference no: READT 106/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**Mr X**
	Defendant/Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10026)**
	First respondent
AND	**Mr C**
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION: 30 July 2012

COUNSEL

Ms Fiona Guy Kidd, for defendant/appellant
Mr L J Clancy, for first respondent

DECISION OF THE TRIBUNAL

Introduction

[1] In August 2011, Complaints Assessment Committee 10026 (the Committee) referred three charges to us alleging misconduct by the appellant, Mr X. However, the first such charge has since been withdrawn.

[2] The appellant has appealed the Committee's decision to lay charges. By consent of the parties, the appeal is to be decided by us on the papers.

The Committee's Determination

[3] In its decision of 18 August 2011, the Committee recorded that the charges arise from two complaints made against the appellant/defendant by a Mr C now of Australia. In the usual way, the Committee investigated those complaints, conducted a hearing on the papers and, for present purposes, decided as follows: *"In respect of CA 3356769 the Committee is satisfied there is evidence, if accepted by the*

Disciplinary Tribunal, on which the Disciplinary Tribunal could reasonably find the licensee guilty of misconduct". The Committee went on to determine that the complaints should be considered by us and recorded that it would frame charges particularising matters and lay them before us, and that has been done.

The Charges

[4] The current two charges read:

> *"1.1 Following a complaint made by C (complainant), Complaints Assessment Committee 10026 (CAC 20026) charges X (defendant), with misconduct under s.73(b) of the Real Estate Agents Act 2008, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.*
>
> > ***Particulars:*** *In 2006, in advising and/or acting for the complainant on the transfer of his interest in Unit X, building X, X town in exchange for an interest in Unit Y, building Y, X town (transaction), the defendant had a conflict of interest in that he also advised and/or acted for the vendor/transferor of the interest in Unit Y building Y on the transaction and received a commission from both the complainant and the vendor/transferor of the interest in Unit Y building Y.*
>
> *1.2 CAC 10026 further charges the defendant with misconduct under s.73(b) of the Real Estate Agents Act 2008, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.*
>
> > ***Particulars:*** *In advising and/or acting for the complainant on the transaction, the defendant failed to advise the complainant that long-term returns in respect of the complainant's interest in Unit Y building Y could and/or were likely to prove significantly lower than the returns payable under an initial three-year guaranteed return structure. In particular, he failed to alert the complainant to the fact that the financial projections given ended before the structure contemplated a leasehold rent review and he failed to advise the complainant how important the post-review leasehold rental could be to the viability or otherwise of the investment."*

Our Jurisdiction

[5] The principles that apply on an appeal against a decision to lay charges were considered by the Tribunal in *Brown v Complaints Assessment Committee 10050 and Wealleans* [2011] NZREADT 42 where it held:

> *"[29] ... the decision to lay a charge is the exercise of a different power to the decision to reach a finding of unsatisfactory conduct under s.72. Once a finding to lay a charge is made the CAC then becomes the prosecuting body and prosecutes that charge before the Tribunal. It must have sufficient evidence in order to consider that there are grounds to lay a charge. Section 89 makes it clear that the CAC may make a determination after both enquiring into the*

complaint and conducting a hearing. But the section also makes clear that the CAC do not need to be satisfied on the balance of probabilities that the licensee has engaged in conduct contrary to s.73 (before laying a charge) in direct contradiction to the power given to the CAC to make a finding under s.72 (when they must be satisfied). This analysis leads us to the conclusion that an appeal [under] s.111 on a decision to lay a charge must be limited to an appeal from [the Complaints Assessment Committee's] screening role. Further support comes from the limited power on appeal as the Tribunal must put itself when conducting the appeal) in the role of the Committee under s.89. Thus the appeal can be on this point only, "is there a case to answer?" (or any of the other functions under s.89).

[30] Thus we find that the appeal by Ms Brown should be restricted to a consideration of whether or not there were sufficient grounds under s.89 to make a finding that a complaint be considered by the Disciplinary Tribunal."

[6] Also, we reiterate statements we made in *Miller v The Real Estate Agents Authority and McAtamney* [2002] NZREADT 25 at paras [32], [33], [35] and [36] as follows:

"[32] We are conscious that, under s.74 of the Act, any person may make a written complaint to the Authority about the conduct of a licensee. The Authority must refer the complaint to a Committee. The functions of such committees are set out in s.78 of the Act but, for present purposes, are to enquire into and investigate complaints and, inter alia, lay and prosecute charges before this Disciplinary Tribunal. The Act sets out the procedures to be followed by such a Committee but, in particular, under s.84(1) "A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice". By virtue of s.88 of the Act, such a Committee has wide powers to admit evidence. By virtue of s.89, among the determinations the Committee may make is "... that the complaint ... be considered by the Disciplinary Tribunal".

[33] Broadly speaking, we consider that the standard of proof for a no case to answer application from, in this case, the appellant is whether there is some evidence not inherently incredible which, if we were to accept it as accurate, would establish each essential element in the alleged offending conduct of the appellant complained about i.e. misconduct under s.73(a). On that type of test we have no hesitation in finding that there is a case to answer from the appellant. We feel that on the prosecuting evidence so far from the first respondent Authority, it would be reasonable for us to find misconduct on the part of the appellant. This means that it is necessary for the charge to proceed to a substantive hearing so that, inter alia, the appellant's defence can be properly heard in accordance with justice. ...

[35] Simply put, a complaint has been made to the Authority which, having caused to be carried out what appears to be sensible and reasonable preliminary investigation, has determined under s.89 of the Act that the allegations be considered by this Disciplinary Tribunal and has laid the said charge accordingly. It has not been demonstrated to us that there are no grounds for such a course or that there is any bad faith on the part of the prosecution. It seems to us that, so far, the process complies with natural justice.

[36] It has not been shown to us that there is no case to answer. The substantive charge will proceed. ..."

The Submissions for the Prosecution

[7] Mr Clancy submits for the Authority that there is a case to answer on charges 1.1 and 1.2 respectively (set out above) for the following reasons:

"3.2 By promoting and then acting on a "property swap" for his respective clients, the Cs and YY Ltd/ZZ Ltd (Q), the appellant placed himself in a position where he had a conflict of interest.

3.3 The appellant acted as agent to the Cs on their sale of Unit X, building X (X property) to Q and as the agent to Q on its sale of Unit Y, building Y (Y property) to the Cs. The appellant therefore owed fiduciary duties as agent to both parties on the swap transaction.

3.4 The appellant charged commission of $6,440 plus GST to the Cs on the sale of the X property and $24,680 plus GST to Q on the sale of the Y property.

3.5 Referring to the commentary on rule 13.8 of the former REINZ Rules (attached to the submissions of counsel for the appellant), the appellant was in a conflict situation because he was, in effect, "acting concurrently for both a seller and buyer".

3.6 The appellant does not appear to dispute that he acted with a conflict of interest, but asserts that his actions in so doing could not amount to seriously incompetent or seriously negligent real estate agency work on the basis that the conflict was disclosed to both clients.

3.7 The submission that the conflict was disclosed to both clients is based on the fact that each of the sale and purchase agreements relevant to the swap transaction includes notation to the effect that the sale was "by" XX Ltd and that each agreement had a contemporaneous settlement clause.

3.8 It is not suggested on behalf of the appellant – and there is no evidence to suggest – that the appellant ever explained to the Cs (or indeed to Q) the nature of the conflict or how it could impact on the parties' positions. It is submitted that this level of disclosure was required in all the circumstances, particularly in view of the evidence that the swap was suggested and promoted to the Cs by the appellant.

3.9 The submission that a greater level of disclosure as to the conflict of interest was required is, it is submitted, reinforced by the commentary to rule 13.8 of the former REINZ Rules. In discussing the example of an agent acting for a property developer on an ongoing basis and also selling a different client's property to that developer, the commentary notes that "it must be disclosed that the member [agent] acts for the developer and the intended purpose of the purchaser". The commentary goes on to note that the essential elements of disciplinary action under rule 13.8 are that a

conflict of interest has arisen and that the full nature of the conflict has not been disclosed.

3.10 The appellant has filed affidavit evidence from persons with real estate industry knowledge and experience in support of his appeal, to the effect that property swaps were standard in the industry in 2006 and did not, in their view, represent a conflict. It is submitted that his evidence must be tested at a substantive hearing but, in any event, even if the Tribunal is ultimately satisfied that the appellant's conduct was consistent with industry practice in 2006, that is not the end of the matter. It is well established that it is for the courts (in this case the Tribunal) to determine whether established industry practice is reasonable, McLaren Maycroft & Co. v Fletcher Development Co Ltd [1973] 2 NZLR 100. It is open to the Tribunal to decide that industry practice in 2006 relating to property swaps was not reasonable. Of course, this assessment can only be made after the evidence is heard at a substantive hearing.

3.11 The first respondent submits that there is a case to answer in respect of charge 1.2 [as it then was]. the appropriate forum to test the evidence as to the extent of any disclosure made by the appellant – and the degree to which similar practice was accepted within the industry at the time – is, it is submitted, the substantive hearing of the charge."

Charge 1.2 Above

"4.1 The appellant's appeal against the decision to lay this charge is limited to one issue, namely that the appellant was under no obligation to provide advice of the nature alleged in the charge.

4.2 It is submitted that in the particular circumstances of this case, the appellant was under such an obligation. The appellant owed fiduciary duties to the Blacks as their agent on the sale of the X property. It seems to be accepted that the idea of the Cs swapping their interest in the X property for an interest in the Y property was suggested and actively promoted to them by the appellant. As disused above, it is apparent that, when suggesting and promoting the swap transaction to the Cs, the appellant was concurrently acting for the vendor of the Y unit, with a view to obtaining a significant commission from that vendor should the transaction proceed.

4.3 In those circumstances, it is submitted that the appellant was under an obligation to provide the Cs with direct and fulsome advice on the nature and quality of the consideration they would receive in exchange for their interest in the X property. In the particular circumstances of the transaction, it is submitted that the appellant's duties to the Cs extended beyond simply ensuring that they were provided with the registered prospectus and investments statement for the Y development.

4.4 It is accepted that, in providing such advice, the appellant may have placed himself in a difficult position, insofar as the provision of the advice to the Cs may have run contrary to the best interests of Q in trying to bring about a sale of the Y property. However, that cannot operate as a

defence to charge [now 1.2]. Rather, it serves to highlight the conflict of interest which is the subject of charge [now 1.1].

4.5 Again, it is submitted that there is a case to answer in respect of charge 1.3 and that it should be considered by the Tribunal at a substantive hearing."

[8] Accordingly, Mr Clancy submits that the two charges outlined above should proceed to a substantive hearing.

A Summary of the Stance for the Defendant/Appellant

[9] It is submitted for the defendant/appellant that the relevant Act in 2006 was the Real Estate Agents Act 1976 with a governing set of rules as at 1999. Counsel points out, with regard to the two charges of misconduct now in issue, that the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 did not come into force until 17 November 2009 and, she submits, do not apply to the alleged conduct.

[10] With regard to the first charge (seriously incompetent or seriously negligent real estate agency work by acting for and receiving commission from both parties in an exchange of properties), Ms Kidd submits that the allegation that the swap activity constituted unsatisfactory conduct or professional misconduct was never squarely raised by the Committee with the appellant for his response before the first charge was laid; so that, she submits, there has been a lack of natural justice in relation to the laying of the charge.

[11] Ms Kidd noted that the particulars of the misconduct charge are that, in 2006, the appellant acted in an exchange of properties for the complainant as vendor of his interest in Unit X, building X, X town while also acting for the vendor of an interest in Unit Y, building Y and that he received a commission from both. She puts it that, critically, it is not alleged that the parties were unaware that the appellant was acting for each of them as vendors; nor that the actions were in breach of the applicable legislation at the time, namely, the Real Estate Agents Act 1976 or the Code of Ethics of REINZ.

[12] She submits that the behaviour alleged cannot amount to seriously incompetent or seriously negligent real estate agency work; and it was commonplace behaviour in 2006 which was considered acceptable by members of the real estate community.

[13] Ms Kidd then referred to Rule 13.8 of the Code of Ethics in place in 2006 providing:

*"**Rule 13.8***
Whenever a conflict of interest arises, it shall be the duty of the member to disclose the conflict of interest to the member's client."

[14] She submits that Rule 13.8 envisages that real estate agents can continue to act where there is a conflict of interest provided that the conflict has been disclosed, i.e. in this case the fact that the agent acted for both parties to the sales involved; and that there was no prohibition on continuing to act once the duty to disclose the conflict was complied with.

[15] Ms Kidd noted that expert evidence from experienced and respected members of the New Zealand Real Estate community has been filed on behalf of the appellant in relation to this issue. Allister Nalder, a licensee with nearly 30 years real estate experience, says: *"I consider that it is a nonsense to allege that acting for both parties in an exchange of properties and charging a commission from those vendors amounts to seriously incompetent or seriously negligent real estate work. To the contrary this was common and accepted practice."* Gus Johnson, a licensee with over 30 years real estate experience deposes: *"I do not consider that acting for and receiving a commission from both parties to a swap/trade constituted incompetent real estate practice in 2006 provided first, the parties had full disclosure that the agent was acting for both parties (which is usually obvious) and secondly, the agent held listing authorities signed by both parties. The listing authorities authorise the agent to charge a commission following completion of an unconditional sale."*

[16] Ms Kidd then submitted:

> *"20. Consistent with the evidence of Mr Allister Nalder as to his experience with solicitors reviewing swap contracts for vendors and raising no issues, is the information that the complainant specifically sought confirmation from his solicitor, Deidre Fel "that the documents from X are in order". It is not alleged that his solicitor raised any concerns with Mr X acting for each vendor or taking a commission on each sale. The documents were signed by the complainant. That supports the clear expert evidence that this was accepted practice at the time."*

[17] Accordingly, Ms Kidd submits that the particulars of charge 1 do not constitute seriously incompetent or seriously negligent real estate agency work so there is no prima facie case to answer on charge 1.

[18] With regard to the charge 2 (of seriously incompetent or seriously negligent real estate agency work and failing to advise regarding long term returns) Ms Kidd submitted that it is not disputed that the complainant received a copy of the Registered Prospectus and Investment Statement and the Report included in the Prospectus from Howarth Asia Pacific Limited for the Y building, and that the complainant's wife was already the owner of another unit in the Y building purchased in 2005.

[19] Ms Kidd emphasised that the ground advanced on appeal in relation to charge 2 is limited to one issue, namely, that the appellant was under no obligation at material times to advise the appellant in the manner alleged so that, accordingly he cannot be guilty of misconduct even if the factual allegations are correct.

[20] Ms Kidd puts it that the alleged incompetencies or negligence must arise from a corresponding duty to advise Mr C as to potential investment risks arising on entering into the purchase and would also require the appellant to predict the future economic climate, tourist numbers, and their potential impact on the investment; but that he had no such duty.

[21] Mr Kidd also referred to Mr C having engaged a solicitor, an accountant in New Zealand, and an accountant in Australia in relation to these transactions; and all those people were consulted prior to his purchase of the property. She submits that the alleged omitted advice was in the realm of those specialist legal and financial advisers and not of the real estate agent engaged.

[22] Ms Kidd submits that the extent and existence of the appellant's duty to advise Mr C be viewed in light of the 1976 Act, and its focus, as well as the content of the Industry Code of Ethics and Practice in place at the time.

[23] Accordingly, Ms Kidd also submits that no prima facie case has been made out with regard to charge 2.

[24] In response submissions, Ms Kidd emphasised that the complainant was an analytical buyer whose wife already owned a property in Y building and that he undertook his own investigations with the then B manager. With regard to first charge Ms Kidd then put it:

> *"7. It is legally possible for a person to act as agent for more than one party to a particular transaction. The REINZ rules of practice in place at the time of the transaction in 2006 permitted a real estate agent to continue to act when there was a conflict of interest provided the member disclosed the conflict of interest to his or her clients: Rule 13.8*
>
> *8. Mr C was clearly aware that the appellant acted for both the Cs and the vendor of building Y and the fact that the vendor of the Y unit was the developer. Mr C states that the appellant told them that the developers were selling out of their development as part of the "relatively common practice of risk diversification by large developers – to spread their risk by purchasing other property besides their own." The nature of the conflict was therefore disclosed. Nothing more was required or could be given. No authority is advanced by the respondent for the proposition in para 3.8 of its submissions that the appellant was obliged to explain "how" the conflict of interest "could impact on the parties' positions". Such a requirement was not part of the 1999 REINZ rules in force."*

[25] Ms Kidd then submitted that it is not sufficient, as counsel for the Authority suggests, for us to determine that *"industry practice in 2006 relating to property swaps"* was *"not reasonable"*; and that the behaviour must be a *"deliberate departure"* from accepted standards at the time or such *"serious negligence as portrays indifference and an abuse of the privileges which accompany registration"* as a real estate agent, but the behaviour alleged in charge 1 cannot amount to either.

[26] With regard to the second charge, Ms Kidd set out part of her final submissions as follows:

> *"11. The appellant was not purporting to provide investment advice to the complainant. The complainant accepts that he received from the appellant the registered prospectus prepared by Q, the developer and the appraisal report and forecast financial results completed by Howarth Asia Pacific Limited: email from C to Chris Delaney dated 11 June 2010. He also acknowledges in that same email that "banks, financiers, valuers, solicitors and accountants all checked the scheme over." These are professionals who specialise in financial and legal advice. He questions "why did none of these experts discover and expose the flaw in the scheme (i.e. the seven year land lease), and that it was originally set at a peppercorn level? Failure of those experts, cannot be brought to bear on the appellant. He had no duty to advise that "the long-term returns in respect*

of the complainant's in unit Y building Y could and/or were likely to prove significantly lower than the returns payable under an initial three year guaranteed return structure".

12. *Indeed there is no basis on which he could know and therefore be obliged to advise that returns "were likely to prove significantly lower". He could not and did have such predictive powers. Hence his own decision to buy with others in XX Ltd an apartment in building Y in mid 2008."*

[27] Ms Kidd submits that, in any event and importantly, Mr C knew that returns could be lower after the initial three year period, and the investment statement specifically records as a risk under the heading *"What are my risks?" (b) a purchaser not receiving anticipated (or any) rental returns on an apartment unit."* She notes that the Howarth Asia Pacific Ltd report, which Mr C acknowledges receiving, specifically stated:

> *"Investors should note that* ***actual returns often differ from projected results and these differences may be material****. The manager has taken due care in preparing the Prospective Financial Information but cannot and does not guarantee that the projected results will be achieved. Unit holders are therefore advised to review the assumptions and the projections and determine their own on the future of the Scheme". [Emphasis added]*

[28] Ms Kidd noted that the Howarth Asia Pacific Limited projections identified a number of assumptions on which predictions were based and said that *"To the extent that any of the above hotel and environmental assumptions are not realised, the operating performance of the hotel may be materially impaired"*. One of those factors identified was that the *"current rate of economic growth in New Zealand would not significantly change."* Ms Kidd submits that it was obvious that there were risks regarding returns after the end of the guarantee period.

[29] Ms Kidd also noted that the particulars of Charge 2 are further particularised to allege a failure *"to alert the complainant to the fact that the financial projections given ended before the structure contemplated a leasehold rent review"* and that he failed to advise the complainant *"how important the post-review leasehold rental could be to the viability or otherwise of the investment."* Her short responses are that the complainant knew that building Y was on a ground lease, and that there would be a lease review. The Investment Statement made it clear that there was a seven year rent review and that the rent would not decrease. If the complainant had read the Investment Statement, as he was advised to do, he would have read at page 9 under the heading *"Ground Lease Rental"* that:

> *"The initial rent under the Ground Lease will be $300,000.00 per annum" ...*
>
> > *"Rent will be reviewed on every seventh anniversary of the commencement date to the then current market rent of the land (excluding improvements) provided that it shall not be less than the rent on the commencement date of the Ground Lease or the relevant renewed term".*

[30] Ms Kidd stressed that Mr C could have read the Howarth Asia Pacific financial projections and seen that they only extended until the end of 31 July 2010. She submits that the appellant, as real estate agent, was not obliged to comment on

features of the predictions. The first page of the Investment Statement warned prospective purchasers:

> *"**Investment Decisions***
> *Investment decisions are very important. They often have long-term consequences. **Read all documents carefully**. Ask questions. **Seek advice before committing yourself**." [Emphasis added]*

[31] The Sale and Purchase agreements also had the following direction in bold:

> *"Professional advice should be sought regarding the effect and consequences of any agreement entered into between the parties."*

[32] With regard to the final allegation in charge 2, Ms Kidd submits that the appellant was not under any obligation to give financial advice as to the *"importance"* or otherwise *"of the post-review leasehold rental"*. She puts it that, in fact, it appears it was not the increase in rental which significantly affected the viability of the project, but the fact that Howarth Asia Pacific had considerably underestimated the running costs of the hotel and had not foreseen the reduction in customers due to the world economic recession which was to come.

[33] Mr Kidd submits that the CAC has provided no legal authority to support the advisory duties said to be required of the appellant, and that their existence cannot be made out.

[34] Ms Kidd asserts that many similar projects based on ground leases have failed, and developers became insolvent. She submits that the drop in returns cannot be blamed on Mr White who did all that was required of him as a real estate agent; and that his behaviour complied in the standards in force at the time.

Discussion and Outcome

[35] It seems to us that most of the thoughtful submissions from Ms Kidd deal with the substantive evidence and issues to be covered at a substantive hearing of the charges. At this point we are reluctant to outline much of our current thinking lest we, in some way, prejudice a full hearing of the charges at a substantive fixture in the usual way.

[36] There seems to be no dispute that the appellant acted for both parties on the said swap transactions, received commission on each such transaction, and so needed to comply with the Act and owed fiduciary duties to his principals in the usual way; and, prima facie, seemed to be in a conflict situation. The ingredients of each charge are not inherently incredible. The appellant asserts that his actions could not amount to seriously incompetent or seriously negligent real estate agency work on the basis that his conflict of interest was disclosed to both clients. He may be able to prove that on the balance of probability. It may well be that he maintained an appropriate level of disclosure to the complainant; and that he complied with apparent industry practice at material times, although that practice could have been deficient.

[37] Prima facie, it seems that the appellant owed fiduciary duties to the complainant as his agent on the sale of the X property and with regard to the purchase of the interest in the Y property.

[38] It may well have been that the appellant disclosed his conflict of interest to the complainant, but that would not necessarily mean that his conduct has not been deficient from a professional standards point of view. The evidence available from senior members of the New Zealand real estate community needs to be tested under cross examination and considered by us, as does much of the ground helpfully covered by Ms Kidd at this stage.

[39] The appellant seems to argue that he was under no obligation to provide advice of the nature alleged in the second charge. He is entitled to endeavour to prove that on the balance of probability. It may well be that the complainant either had, or received from the appellant, sufficient information about the likely performance of a unit in building Y.

[40] The onus of proof reposes in the prosecution but, under s.110 of the Act, the standard of proof is the balance of probabilities.

[41] We consider that the Committee applied the correct test in requiring to be *"satisfied the evidence discloses a prima facie case of misconduct (put another way, there is evidence, if accepted by the Real Estate Agents Disciplinary Tribunal, on which the Disciplinary Tribunal could reasonably find the licensee guilty of misconduct) and the Committee is not convinced that the licensee's explanations provide a complete answer. It will be the task of the Disciplinary Tribunal to evaluate the strength of the respective cases ..."*.

[42] As we stated in *Brown v CAC & Wealleans* (supra) the Committee must have sufficient evidence in order to consider that there are grounds to lay a charge, and the Committee may make a determination after both enquiring into the complaint and conducting a hearing; but it does not need to be satisfied on the balance of probabilities that the licensee has engaged in misconduct and need only decide *"is there a case to answer?"*. As we also said in *Miller v The Real Estate Agents Authority & McAtamney* (supra), the Committee must comply with the rules of natural justice and, broadly speaking, the standard of proof for a *"no case to answer"* application is whether there is some evidence not inherently incredible which, if we were to accept it as accurate, would establish each essential element in the alleged offending conduct of the appellant complained about.

[43] In the present case there is detailed evidence from Mr C supporting his complaints; and that evidence cannot be described as *"inherently incredible"*; and, if we were to accept it as accurate, the charges would be proven on the balance of probabilities. Accordingly, we have no hesitation in finding that there is a case for the appellant to answer in terms of the two charges we have detailed above. On the prosecution evidence so far from the first respondent Authority by its Committee, it would be reasonable for us to find misconduct on the part of the appellant. This means that it is necessary for the charges to proceed to a substantive hearing so that, inter alia, the appellant's defences can be properly heard in accordance with justice.

[44] There have been complaints made to the Authority which has had one of its committees carry out what appears to be a sensible and reasonable preliminary investigation so that it determined under s.89 of the Act that the allegations be considered by us, and charges have been laid accordingly as referred to above. There can be no suggestion of any bad faith on the part of the prosecution and it

seems to us that, certainly so far, the process of the Authority and its Committee complies with natural justice.

[45] We accept that the relevant conduct seems to have taken place before the Real Estate Agents Act 2008 came into force, and the effect of that needs to be covered at the substantive hearing. Despite the submission of Ms Kidd, it seems clear that the ramifications of the swap transactions in terms of the conduct of the appellant were appropriately considered by the Committee in accordance with natural justice.

[46] As we mentioned above, all these issues need to be analysed in the usual way at a substantive fixture at which the appellant/defendant may defend the charges. In terms of the Act, the onus of proof is upon the prosecution but the standard of proof is that of the balance of probability. We do not consider it appropriate to outline our reasoning any further as these charges and the consequential issues need full ventilation and consideration at a substantive trial in the usual way.

[47] It has not been shown to us that there is no case to answer. Accordingly, the substantive charge will proceed. We direct that, as soon as is reasonably convenient, the Registrar arrange a telephone conference for us to set a timetable towards a fixture.

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Judge P F Barber
Chairperson

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Ms J Robson
Member

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Mr G Denley
Member