

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Decision No: [2013] NZREADT 56  
Reference No: READT 033/12

**IN THE MATTER OF** charges laid under s.91 of the Real Estate Agents Act 2008

**BETWEEN** **REAL ESTATE AGENTS AUTHORITY (CAC 20006)**

**AND** **KEVIN STEVENSON**  
Defendant

**MEMBERS OF TRIBUNAL**

Ms K Davenport QC – Chairperson  
Mr G Denley – Member  
Ms N Dangen – Member

**HEARD** at CHRISTCHURCH on 24 – 25 June 2013

**DATE OF DECISION** 5 July 2013

**APPEARANCES**

Mr M Hodge for the Complaints Assessment Committee (the Real Estate Agents Authority) [Meredith Connell Solicitors]

Mr Stevenson in person

***Introduction***

[1] In 2011 Mr Nathan Beer and his wife Tracy Beer wished to sell their property at 76 Kennington-Waimatua Road, Kennington, Invercargill. The reason that the property was to be sold was because Mr and Mrs Beer were going through a separation. Mrs Beer was then a real estate agent of some nine years experience and she worked for the Professionals in Invercargill. Mr Kevin Stevenson was another licensed salesperson with the Professionals (McPherson Realty).

[2] Mrs Beer told the Tribunal that on 24 March 2011 she and Mr Beer signed a 90 day sole listing agency for the sale of their property in Invercargill. Their listing and selling agent was Mr Stevenson of MacPherson Realty. She told the Tribunal it was company policy that agents do not sell their own properties. She and her husband signed a listing agreement with Mr Stevenson but Mrs Beer herself wrote some details on the listing agreement, their contact details and that *“Two back bedrooms have not had ICC (Invercargill City Council tick), no Code of Compl.”*

[3] The reason that Mrs Beer wrote this was because the couple had converted a garage to make the fourth and fifth bedrooms at the property and did not have a Code of Compliance for this work. They proposed to work with the Council to get the Code of Acceptance for these two bedrooms which had been constructed for them by a builder. The Tribunal understands that the certificate of acceptance was subsequently issued.

[4] The couple signed a document headed "*Agent's copy*" which set out the commission payable on a sale. Written at the top of this document are the words "*company rate applies*" and Mrs and Mr Beer have signed this. Mr Stevenson has not signed this. The actual commission is not specified.

[5] On 7 April 2011, approximately two weeks after the initial listing agreement was signed, Mr and Mrs Beer signed a consent form confirming that they had been given a copy of the approved guide prepared by the Real Estate Agents Authority for vendors. It was also signed by Mr Stevenson. The couple over the next few months agreed to reduce the asking price on the property from an initial listing price to \$495,000. The sole agency expired and a Re-listing Authority was signed. There was some debate about the date on which this Re-listing Authority was signed. Mrs Beer's evidence was that she signed it and gave it to Mr Stevenson and asked him to take it to Mr Beer to be signed. She told the Tribunal that Mr Beer was reluctant to sign a re-listing agreement as the property had not sold and he was 'considering his options'. Mr Stevenson questioned her on this point suggesting to her that in fact she had produced the listing authority at the same time as the Agreement for Sale and Purchase was signed and that both documents were signed at that time (it was 25<sup>th</sup> of July). Mrs Beer agreed that Mr Beer had signed it on that date but said that she had left it with Mr Stevenson well before that time.

[6] As well as the (new) Listing Authority two other documents were apparently also signed by the couple. The first was the agent's copy of the commission. This contains the words above the parties' signatures '*com to be negotiated with Jon – my com \$6,000 plus GST*'. This appears to be signed by Mr and Mrs Beer and initialled by Mr Stevenson and dated 12 May 2011. They also apparently signed a "*Disclosure by agent – consent and acknowledgement by vendor*" which purports to be signed by the couple and Mr Stevenson on 8 July at 12.00 pm and also has been initialled by them.

[7] The couple deny signing these two documents. On 25 July Mr Stevenson brought to Mr and Mrs Beer an agreement to sell the property to a Mr Kelvin Lawson. This contained a special condition saying that the agreement was "*subject to builder's approval of house*".

[8] This clause did not contain any date by which the condition was to be satisfied and it did not directly address the issue that the two bedrooms were not code compliant. Further, there was no acknowledgement by the purchaser in the agreement or any other document that Mrs Beer was an agent. This is required by s. 136 of the Real Estate Agents Act.

[9] Mrs Beer said she was not happy with the fact that the information about the lack of Code Compliance was not specified in the agreement and asked Mr Stevenson about it. He said it was fine. The next day she took the agreement to her manager Jon Irving and raised the issue again. Mr Irving reviewed the agreement and prepared a memorandum or an addendum to the Agreement for Sale and Purchase which contained three additional clauses. This agreement was subsequently signed by

Mr Lawson. It records an acknowledgement by Mr Lawson that he was aware that one of the vendors is an agent. Secondly it acknowledged that he had been informed that bedrooms four and five were not compliant with the Territorial Authority Consent and recorded that the LIM report and the Builder's Report were to be completed and accepted within 10 working days from the date of the memorandum.

[10] The Agreement for Sale and Purchase did not proceed. The solicitor for Mr Lawson purported to cancel the agreement on 15 August saying that the Council could not guarantee a Code of Acceptance for her non-compliant bedrooms by settlement date. Mr Stevenson put to Mrs Beer that the reason for cancellation had been that after Mr Lawson had inspected the bedrooms he suggested that it would cost \$50,000 to fix the problems and offered to reduce the price by this much. Mr Stevenson said that Mrs Beer had rejected this reduction in price out of hand. Mrs Beer denied this.

[11] In any event the agreement did not proceed but on a date which appears to be prior to the cancellation of the agreement (8 August 2011) Mr Stevenson facilitated Mr Lawson entering into an Agreement for Sale and Purchase for the purchase of another property. This agreement was expressed to be subject to Clause 18 which provided "*this offer is conditional on an offer on 76 Kennington-Waimatua Road not being accepted by or on Monday 15 August*". When this agreement arrived at the Professional's office an additional memorandum was prepared by Mr Irving. This made it clear that the agreement was conditional upon the termination of the 76 Kennington-Waimatua Road agreement.

[12] Between the signed Agreement for Sale and Purchase and the cancellation of agreement there arose a commission dispute between Mrs Beer and Mr Stevenson which led to three meetings at the offices of MacPherson Realty as the parties endeavoured to resolve the commission dispute. The aspect of the commission that they were arguing about was that part of the commission to be received directly by Mr Stevenson. Mrs Beer offered to pay Mr Stevenson \$3,000 and Mr Stevenson said that he would not accept less than \$5,000 plus GST and refused to accept any offer of a cash payment. The Tribunal infer that this dispute was resolved by a subsequent meeting between the parties, however it is relevant because Mr Stevenson says that if he had been party to the forgery of the commission document (confirming his commission at \$6,500) then he said he would have produced that at the meetings. As he did not know about this document he did not mention this.

[13] Mr Beer told the Tribunal a very similar story to that outlined above. However, he confirmed that he had signed the second listing (re-listing) agreement at the time that he signed the Agreement for Sale and Purchase on 25 July.

[14] He said that he was not at all happy once the agreement with Mr Lawson collapsed and then looked at the copies of the listing documents which had been sent by MacPherson Realty. He saw that two of the documents had signatures on them which he did not think were either his wife's or his own. These were the Consent and Acknowledgement form and the Commission Rate form. He rang up his wife and subsequently complained to Mr Irving in person. He and Mrs Beer swore affidavits on 17 August 2011 confirming that they did not sign the Disclosure by Agent Consent, Acknowledgement by Agent, or the commission forms. He also complained that most of the communications were between his ex wife and Mr Stevenson and he did not know what was happening nor was he given any feedback about the property. He said that he had not been kept informed by Mr Stevenson.

[15] Jon Irving is the manager of MacPherson Realty. He told the Tribunal that MacPherson Realty had a system for the processing of listing documents and that was that documents would come into the office when a property was listed and were checked. Documents that did not comply with the requirements of the Act or Rules would be sent back to the agent to complete. He told the Tribunal that he only became aware of problems with this property when he received the initial Agreement for Sale and Purchase between Mr and Mrs Beer and Mr Lawson. Then he drew up the additional memorandum to be signed by Mr Lawson. He also facilitated a meeting between Mr Stevenson and Mrs Beer on 28 July relating to the commission dispute.

[16] On 8 August Mr Irving again prepared an additional memorandum between the vendors of 118 Mill Road South, Invercargill and Mr Lawson which confirmed that Mr Lawson would not be bound by this second Agreement for Sale and Purchase unless the agreement to the Beers was cancelled.

[17] He said that on 19 August he met Mr Beer at his home to discuss the complaint against Mr Stevenson, including the fact that the signatures had allegedly been falsified on the two documents identified above. The Professionals sent the documents, the Disclosure by Agent document and the Commission document to Linda Morrell a forensic document examiner. She confirmed that the documents had not been signed by Mr and Mrs Beer.

[18] After Ms Morrell confirmed that she could find no evidence to associate the Beers' signatures with the signatures on the disputed documents, MacPherson Realty decided to terminate Mr Stevenson's contract. Mr Irving then made a report of 'suspected misconduct' to the Real Estate Agents Authority under Rule 7.2. During the course of the hearing the Tribunal questioned Mr Irving on how the disputed documents could have got into the custody of MacPherson Realty. Mr Irving produced as Exhibit 6 a document which had been produced after the event but provided to the Real Estate Agents Authority investigator. This document showed that on 26 July 2011 the following documents were scanned into MacPherson's computer system: the Re-listing Authority, the Commission Rate document, the Disclosure by Agent and Consent by Vendor document, the CMA (which is the market analysis) and the draft market CMA. These documents were all scanned into the system on the day after the Agreement for Sale and Purchase was executed.

[19] During the course of the hearing an issue arose as to when the Re-listing Agreement was signed. As has been said Mr Stevenson asserted that it was signed. He claimed Mr Beer had possession on the date the agreement to the Lawsons was signed, i.e. 25 July. However, it is dated 8 July. Mr and Mrs Beer are showing having signed it at 12.05 p.m. and Mr Stevenson is shown having signed it at 12.00 p.m. Mrs Beer's written interview with the Real Estate Agents Authority also supports the view that she signed the Listing Agreement earlier and retained it to Mr Beer to sign. While this is not part of the Charge, the Tribunal is concerned that this appears to have been backdated. Certainly when Mr Stevenson himself prepared a Transaction Report which was subsequently scanned and put into MacPherson's system (later on 26 July 2011), he said that the listing contract and approved guide and consent were all signed on 8 July at 12.00 o'clock.

[20] Mr Stevenson did not give evidence. The Tribunal, therefore, only has the information that he provided in two interviews to the Authority. The first interview was a

call by the investigator in reply to a call made by Mr Stevenson. This occurred on 28 September 2011, when Mr Stevenson asked about a complaint by Mr Beer. Gerald Gallacher told him that as a result of the forensic analysis the conclusion is that the Beers' signatures have been falsified.

[21] Mr Stevenson said "*yeah, yeah, that document wasn't an official document though*". The following exchange occurred:

Mr Gallacher:

Q "*So it's okay to falsify that?*".

Mr Stevenson:

A "*Yeah it was just fooling around in the office yeah*".

Mr Gallacher:

Q "*Fooling around in the office? okay.*

Mr Stevenson:

A "*Wasn't even supposed to go into the files. I don't know how it got in there cause Tracy Beer works with me you see and that document which has got a commission thing on it was never used by me for commission. I didn't even know it was in the official file actually so I can only assume that Tracy Beer put it in there*".

Mr Gallacher:

Q "*Right but you agree that you falsified Nathan Beer's signature?*

Mr Stevenson:

A "*We were just having a bit of fun yeah. I was saying to her that I used to make money ... when I was at secondary school blokes used to give me their pocket money to sign the, (oh what do you call them, the teacher that's in charge of your class)?*"

Mr Gallacher:

A "*You're Form Master*" (sic).

Mr Stevenson:

Q "*Yeah the thing that was on the desk and I said 'I dunno know what this is all about cause we're only ... like, we're not charging, we're getting the full commission anyway' and I said, 'it's not even relevant'. So I just did a couple of signatures and chucked it over her desk and had a bit of a laugh about it. There was another witness there. ...*"

[22] Later in that interview he claimed that the reason that the complaint had been made was because Mr Lawson had not bought that property but had bought another property. He said:

*"And that's what the whole thing's about, it's about the fact that the guy wanted out of the Beer property and so I sold him one down the road for more money."*

[23] Mr Stevenson was subsequently interviewed formally by Mr Gallacher, but the interview was not taped. Mr Gallacher wrote notes. This meeting took place on 3 November 2011.

[24] Mr Stevenson met the investigator on 3 November 2011. In respect of the Re-listing Agreement (which is where the date is disputed but not the signatures of Mr and Mrs Beer) Mr Stevenson said that the second signature on the Re-listing Agreement was not his. He acknowledged that the agent's copy (the Commission Document) was in his handwriting. He said that the words "*com to be negotiated with Jon – my com \$6,000 plus GST*", "*looks like his writing*". When asked if it was his initials on this document he said "*it might be, mightn't be, there's an element of doubt about it being my signature*".

[25] In respect of the Consent Form he said that "*he didn't know who completed the address on the form, it didn't look like his writing*", "*that he crossed his sevens in the European fashion and because the seven in this address didn't have a cross he doubted it was his signature*". But on the Consent Form he said "*I think this is a document I was fooling around, never should have got into the system. Tracy produced this document after the second contract had been completed weeks later*". He reiterated that he had given the re-listing form to Ms Beer as he had been in a conference in Masterton from 12 to 15 July and Ms Beer said she was going to hand it in.

[26] He agreed that the listing was not put in until the offer was made.

[27] Mr Stevenson also provided a typed response dated 1 November 2011. In this document he says that he provided an exceptional service to the Beers. He said that the two falsified documents were of no advantage to him. As set out above he claimed that the Commission Document came as a complete surprise as he had no idea it was in the system and had had two clear opportunities to present it if he intended to. He said that he could not trust Mr Beer because he was on heavy medication but he did try to respond when he texted him. He claimed that he had no recollection of the Commission Document or signing it. He said that he has never denied the documents were falsified, although he has not viewed the "*declaration one*". He said that they may have been a result of his clowning around and a crude attempt at something he had been good at at Southland Boys High School and that he did it in front of Mrs Beer.

[28] The Tribunal heard also from Ms Morrell the document examiner. She told the Tribunal that she had examined the disputed two documents which contain three signatures and concluded that the documents that she was shown were definitely not signed by the Beers. She said that there was no evidence to link their signatures with the documents that she was shown. She was also asked if Mr Stevenson signed the disputed documents. She said that it was probable that they were Mr Stevenson's signatures<sup>1</sup>.

[29] As Mr Stevenson did not give evidence the Tribunal must determine therefore whether on the balance of probabilities the Authority has proved these three charges against Mr Stevenson. The charges are as follows:

---

<sup>1</sup> Ms Morrell ranked signatures authenticity in this way: A genuine signature; most likely highly probable to be genuine; probable but there were several features that cannot be matched; possible; no evidence inconclusive and no evidence to link the specimen signatures with the individuals themselves.

**Charge 1:**

Following a complaint by Nathan Beer, Complaints Assessment Committee 20006 charges Kevin Stevenson with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

**Particulars:**

- (a) Forging Tracy Beer's signature/initials on a commission rate (agent's copy) form dated 12 May 2011;
- (b) Forging Nathan Beer's signature/initials on a commission rate (agent's copy) form dated 12 May 2011;
- (c) Forging Tracy Beer's signature/initials on a 'Disclosure by Agent – Consent & Acknowledgement by Vendor' form dated 8 July 2011;
- (d) Forging Nathan Beer's signature/initials on a 'Disclosure by Agent – Consent & Acknowledgement by Vendor' form dated 8 July 2011.

**Charge 2:**

The Committee further charges the Defendant with misconduct under s 73(b) of the Act in that his conduct constituted seriously incompetent or seriously negligent real estate agency work.

**Particulars:**

Seriously incompetent or seriously negligent real estate agency work in respect of the proposed sale by Tracy and Nathan Beer of 76 Kennington-Waimatua Road to Kevin Lawson; particularly:

- (a) Facilitating a sale and purchase agreement dated 25 July 2011 in respect of the Property that:
  - (i) included a special condition to the effect that the sale was "*subject to builders approval of house*" (*sic*) without specifying a date by which a builder's report was to be obtained and accepted by the purchaser;
  - (ii) failed to record an acknowledgement by the purchaser that he had been informed that two of the bedrooms of the Property were not compliant with territorial authority consent;
- (b) Failing to disclose in writing to Kevin Lawson, prior to arranging the sale and purchase agreement dated 25 July, that the vendor Tracy Beer was a person related to the Defendant's employing agent, MacPherson Realty Ltd, namely that she was a salesperson employed by MacPherson Realty Ltd;
- (c) Facilitating a second sale and purchase agreement, for the purchase of 118 Mill Road by Kevin Lawson, dated 8 August 2011, and failing to make the second agreement conditional upon termination of the existing agreement for sale and purchase in respect of the Property dated 25 July 2011;
- (d) Failing to communicate regularly and in a timely manner with Nathan Beer, knowing that Nathan and Tracy Beer were in the process of separating;

- (e) Failing to communicate regularly and in a timely manner with either Nathan or Tracy Beer regarding open home sessions conducted at the Property;
- (f) Failing to keep adequate records in respect of real estate agency work conducted in respect of the Property, including customer and client appointment/meeting notes, feedback reports, open home registers and details of text message and phone contact.

**Charge 3:**

The Committee further charges the Defendant with misconduct under s 73(c)(iii) of the Act in that his conduct constituted a wilful or reckless contravention of the Act and/or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

**Particulars:**

- (a) Breach of s 127 of the Act by failing to obtain a signed acknowledgement from Tracy and Nathan Beer that they had been given the approved guide before entering into an agency agreement in respect of the Property dated 24 March 2011;
- (b) Breach of Rule 9.8(a) of the Rules by failing to explain to Tracy and Nathan Beer in writing the conditions under which commission was to be paid, and how commission was to be paid, and how commission was to be calculated, including an estimated cost:
  - (i) before entering into the agency agreement dated 24 March 2011;
  - (ii) before entering into a second agency agreement in respect of the Property dated 8 July 2011;
- (c) Breach of Rule 9.8(b) of the Rules by failing to explain to Tracy and Nathan Beer in writing how the Property was to be marketed and advertised, including any additional expenses that such advertising and marketing would incur and explaining that the vendors were not obliged to agree to such additional expenses.

[30] The charges really fall into two groups of facts:

- (i) The forgery (Charge 1) and
- (ii) The incompetent real estate agency work relating to the sale of the property and the steps that Mr Stevenson took in trying to sell the property.

**Charge 1:**

[31] The Tribunal must be satisfied on the balance of probabilities that Mr Stevenson forged the documents. It is also well further established that more serious charges require the Tribunal to have more evidence. Can we therefore conclude on the basis of the evidence outlined above that Mr Stevenson was the person who forged the Beer's signatures on the two documents?

[32] The evidence establishes that the Beers themselves did not sign the documents. The evidence has established that it is probable that Mr Stevenson did sign the

documents. The evidence has shown that these documents were scanned into the agency's computer system the day after the Agreement for Sale and Purchase was signed with Mr Lawson. Mr Stevenson appears to have acknowledged in his interviews with Mr Gallacher that he might have signed these agreements as a piece of tomfoolery with Ms Beer but they were never intended to be used and he did not put them forward as documents to be relied upon. The evidence shows that Mr Stevenson completed the Transaction and Representation report in which he acknowledges the consent was obtained and gave the date and time of signing the consent as 8 July 2011. He refers to the commission as being as 'per the listing contract'.

[33] The 8 July date on the listing agreement may have been the date Mrs Beer signed the listing or was added to later to ensure a listing authority prior to the property being sold. That document is not in contention, what is in contention is whether these commission and consent documents which were scanned into the Professionals' system at the same time as the listing agreement; were forged by Mr Stevenson to complete the contractual documents. Given that he prepared the transaction report recording the documents being completed and his signature being most likely genuine it seems likely that he did sign the documents to ensure that the sale could proceed.

[34] It may be that Mr Stevenson did not consider that they would be relied upon or have any significance and were only necessary to complete the paperwork. By his own admission Mr Stevenson was not much of a man for paperwork and found that the requirements imposed by the Real Estate Agents Act 2008 in form filling rather onerous. The only other persons who could have filled in this form would have been Mrs Beer, someone from MacPherson Realty or Mr Stevenson. Given that the transaction report is in Mr Stevenson's handwriting, as are the other documents we think it is unlikely that it was anyone other than Mr Stevenson who put these documents together and arranged for them to be scanned into the system. Mr Stevenson needed to have the paperwork completed before he could obtain any commission. It became clear after 26 July that there was to be a commission dispute between the parties. We therefore conclude that the Real Estate Agents Authority has established Charge 1 and that it does amount to disgraceful conduct. This Tribunal in its decision in CAC v Downtown Apartments Ltd<sup>2</sup> said:

*"These words mean a marked or serious departure from the standards of a good agent ... It is an objective test."*

[35] The Tribunal have no difficulty in concluding that forging the signatures of a vendor on documents, even for the sake of completing the paperwork and not for any fiscal advantage, does amount to disgraceful conduct. Agents need to be seen to be completely compliant with the law in order to enjoy the benefits of registration and licensing as agents.

## **Charge 2:**

[36] These relate to Mr Stevenson's actions in relation to the completion of the actual Agreement for Sale and Purchase. Charge 2(a) asserts seriously incompetent or seriously negligent real estate agency work in the following way:

---

<sup>2</sup> [2010] READT 06

- (i) Including a special condition without specifying the date on which the building report was to be obtained; and
- (ii) Failing to record an acknowledgement by the purchaser that he had been informed that the property was not compliant with Territorial Authority consent.

[37] Seriously negligent or seriously incompetent real estate agent work has been defined in a number of cases on professional misconduct. The definition of “*professional misconduct*” is in *Pillai v Messiter*<sup>3</sup> where “*misconduct*” is described as:

*“A deliberate departure from accepted standards or such serious negligence as although not deliberate to portray indifference and an abuse of the privilege which accompany registration.”*

### ***The Particulars:***

[38] It is important for an agent to understand basic contract drafting and to be able to draft a special condition. When including a special condition it is important that there is an end date provided at which time an agreement will become unconditional or be concluded. Further Mrs Beer had brought to Mr Stevenson’s attention and he in turn to the purchaser’s attention that two of the bedrooms were not compliant. This is a very important point to note in an agreement given the provisions of the Agreement for Sale and Purchase. It needed to be recorded in a suitable way in the Agreement for Sale and Purchase. Mr Stevenson failed to discharge his obligations in this respect.

(a) *Failing to disclose that Mrs Beer was a salesperson.*

[39] Section 136 of the Real Estate Agents Act 2008 requires disclosure of benefits from a transaction and this requires the fact that Mrs Beer was a licensee to be disclosed. This should have been done. The Tribunal find that this particular has been established on the balance of probabilities.

(b) *Mr Stevenson allowed Mr Lawson to enter into a second agreement which on a simple reading of the special condition was not conditional upon the cancellation of the earlier agreement.*

[40] Again we comment that an agent must know the risks that a purchaser runs if they are still liable under one agreement and then enter into a second agreement. Mr Stevenson as the agent on both should have taken steps to ensure that the second agreement contained a clause which clearly spelt out the fact that Mr Lawson’s obligations did not commence until the first agreement was cancelled. The clause that Mr Stevenson inserted did not achieve this. As we have said we consider that an agent should know how to draft a clause or to request help with the drafting. We consider that this particular has been established on the balance of probabilities.

(c) *The failure to communicate with Mr Beer when he was in the process of separating.*

[41] Mr Stevenson should have done this but Mrs Beer herself acknowledged that she was the go-between between Mr Stevenson and Mr Beer. Mr Beer no doubt felt

---

<sup>3</sup> (2 1989) 16 NSWLR 197

isolated and sidelined by this decision. We consider that Mr Stevenson should have worked harder to have included Mr Beer in the sale process but accept that the fact that Mrs Beer was an agent within his agency may have blurred Mr Stevenson's understanding of what his role was. While we consider that this is unsatisfactory conduct we do not consider that it amounts to misconduct.

(d) *Failure to communicate about open home sessions.*

[42] We make the same comment in respect of this particular, namely that it would have been much more helpful to Mr Beer had Mr Stevenson communicated directly with him. However given the circumstances of this sale there appeared to have been a blurring in Mr Stevenson's mind of his role. This also seemed to exist to a lesser extent in Mrs Beer's mind. We therefore find that this particular is established as not professional misconduct.

(e) *Failing to keep adequate records.*

[43] Mr Stevenson claimed that he had all of these records but the Tribunal have not seen them. While the burden of proof remains with the Complaints Assessment Committee there is no evidence to support Mr Stevenson's claim. There is an obligation on an agent who raises a positive defence to provide some information to support it. He has not done so. We find this particular proved, but not in itself amounting to professional misconduct in the circumstances of this case.

[44] In Preliminary Proceedings Committee of the Medical Council v Duncan [1986] 1 NZLR 513 the Court said (in summary) that the Tribunal may consider each particular and make a finding on that particular but may also consider the cumulative particulars to see whether cumulatively they amount to misconduct.

[45] The Tribunal therefore have considered the particulars in this way and have outlined above their findings to each particular. However taken cumulatively the Tribunal accept that Charge 2 has been established and does amount to seriously incompetent or seriously negligent real estate agency work as that has been defined in the cases set out above. Charge 2 is therefore established.

**Charge 3:**

[46] Charge 3 contains three particulars:

- (i) That Mr Stevenson failed to get an acknowledgement that the Beers had been given the approved guide; and
- (ii) That he failed to explain in writing the conditions under which commission was to be paid; and
- (iii) That he failed to explain in writing how the property was to be marketed.

[47] The Tribunal find that each of these particulars has been established but that individually and cumulatively do not amount to misconduct under s 73. As Mrs Beer was an agent and a more experienced agent it seems that Mr Stevenson did not consider that many of the steps that he would have taken as a matter of course were needed in this case. In particular the Tribunal have concluded that he did not consider that he needed to explain to Mr and Mrs Beer information contained in the approved

guide or how the property was to be marketed and advertised. His role and responsibilities seemed less onerous than in a normal arms length transaction. He and Mrs Beer appeared to consider that commission would be at the discounted rate approved by the agency for employees without either of them recognising until later that there had to be an agreement between about the amount that would be paid directly to Mr Stevenson. This led to the disputes about the commission which took place after the Lawson agreement was signed.

[48] The Tribunal has powers under s 110 to determine that the licensee is not guilty of misconduct but has engaged in unsatisfactory conduct under s 93 of the Act. The Tribunal conclude that the conduct set out does amount to unsatisfactory conduct given the special circumstances of this case.

[49] The three charges have been established. The Tribunal therefore invites submissions on penalty in accordance with the following timetable:

- The Complaints Assessment Committee within 21 days of the date of this order.
- Any reply by Mr Stevenson 21 days thereafter.
- Any reply by the Complaints Assessment within a further 5 days of this order.

[50] The Tribunal draws the parties' attentions to the appeal provisions contained in s 116 of the Act.

---

Ms K Davenport QC  
Chairperson

---

Mr G Denley  
Member

---

Ms N Dangen  
Member