BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 92

READT 74/12

IN THE MATTER OF	of charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**THE REAL ESTATE AGENTS AUTHORITY (per CAC 20006)**
	Prosecution
AND	**BRYAN ISAAC RICHARDSON** of Auckland Real Estate Agent
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr N Dangen - Member

HEARD at AUCKLAND on 4 September 2013

DATE OF DECISION 30 October 2013

COUNSEL

Mr L J Clancy for the prosecution
Mr J Waymouth, barrister, for defendant

DECISION OF THE TRIBUNAL ON GUILT AND PENALTY

The Charge

[1] Bryan Richardson (the defendant) faces a charge of misconduct laid by the Authority under s.73(c)(iii) of the Real Estate Agents Act 2008 (the Act). It is alleged that, in the context of a commission dispute with another licensee, the defendant threatened to use the Act's complaints and disciplinary process for an improper purpose.

[2] The charge reads:

> *"Following a complaint made by Grant Tucker, Complaints Assessment Committee 20006 charges Bryan Isaac Richardson (defendant) with misconduct under s.73(c)(iii) of the Real Estate Agents Act 2008 (Act), in that he wilfully or recklessly contravened r.7.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.*

Particular

In May and June 2011, in the context of a commission dispute with Custom Residential Ltd regarding the sale of a property at 159 Balmoral Road, Auckland, the defendant threatened to use the Act's complaints and disciplinary process for an improper purpose."

[3] The said Rule 7.3 reads:

"7.3 A licensee must not use, or threaten to use, the complaints or disciplinary process for an improper purpose."

[4] Essentially, this is a case about one real estate company obtaining a purchaser for the vendor's home during a 30 day sole agency but (for good reason) not actually signing that purchaser up during that 30 day period; so that when the property was sold to that purchaser, its agency had been cancelled (and had expired) and another agency also claimed entitlement to commission pursuant to its subsequent sole agency.

[5] It seems that the licensee of the second agency had advised the vendor, when she signed the second sole agency, that the vendor would not be liable for two commissions because the agencies would, in such a case, work out a splitting of the one commission.

[6] Hence, the dispute over commission between the two agencies on the facts set out below; and that dispute appearing to involve the said threat by the defendant.

Facts

[7] On 8 August 2011, the Authority received a complaint (detailed below) from licensee Grant Tucker (the complainant). He complained about both the defendant, who was a manager at the Ponsonby branch of L J Hooker (Ponsonby Estate Agents Ltd), and a licensed salesperson, Glenis Claydon, who worked at the same branch.

[8] At the time of the conduct complained of, the complainant was working for Custom Residential Ltd. On 25 March 2011, Custom Residential Ltd had entered into a 30 day sole agency agreement with the vendor of a property at 159 Balmoral Road, Auckland.

[9] The complaint is that Ms Claydon had interfered with Custom Residential's sole agency and had taken advantage of the elderly vendor by failing to explain that the vendor might be liable to pay two commissions by listing her property with Ponsonby Estate. Mr Tucker also complained that, after concerns were raised with the defendant, the latter threatened to make a complaint against Custom Residential Ltd to the Authority in an attempt to force a settlement of the commission dispute between the two agencies.

[10] On 24 and 26 April 2011, just prior to the expiration of Custom Residential Ltd's sole agency, the complainant showed prospective purchasers through the property, who indicated that they wished to make an offer.

[11] On the 26 April visit, the complainant found Ms Claydon's business card in the door of the property. The vendor said that Ms Claydon had been in weekly contact with her for some time. The complainant stated that he advised the vendor not to

sign anything with another agent as the prospective purchasers whom he had with him on 26 April 2011 had indicated that they wanted to make an offer.

[12] However, the vendor entered into a 30-day sole agency agreement with Ponsonby Estate on 26 April 2011. The listing salesperson was Ms Claydon. On 28 April 2011, the complainant received a notice dated 27 April 2011 cancelling Custom Residential Ltd's agency agreement. Custom Residential removed the property from its website on 29 April 2011 and removed signage once requested to do so by Ponsonby Estate Agents Ltd.

[13] On 10 May 2011 an agreement for sale and purchase of the property was concluded by the vendor with the customers whom Custom Residential Ld had introduced to the property.

[14] The commission on the sale was eventually split 55 per cent to 45 per cent in favour of Custom Residential Ltd.

[15] On 2 March 2012, Committee 20006 of the Authority decided to take no further action on the complaint from Mr Tucker. However, he appealed the Committee's decision to this Tribunal. On 3 August 2012 (in *Tucker v REAA, Claydon and Richardson* [2012] NZREADT 46) we upheld the appeal, made a finding of unsatisfactory conduct against Ms Claydon, and directed that the Authority lay a charge of misconduct against the defendant.

The Evidence for the Prosecution

[16] Mr A T Eales, as a Senior Investigator for the Real Estate Agents Authority, covered the documentation in the agreed bundle of documents. On 8 August 2011, he was delegated by the Authority to investigate complaints by Mr Grant Tucker against the defendant and against the licensed salesperson Glenis Claydon in relation to the sale of the property. Inter alia, he referred to the formal responses received by the Authority from the defendant and Ms Claydon on 13 October 2011 and generally covered necessary background including the relevant email correspondence.

The Evidence of the Defendant

[17] The defendant provided a detailed typed brief of evidence and was thoroughly cross-examined by Mr Clancy.

[18] At material times, the defendant was the branch manager of Ponsonby Estate Agents Ltd and he is a very experienced real estate agent. On 26 April 2011 his employer company had obtained a sole agency agreement for the property through its salesperson Ms Claydon. Prior to that, Custom Residential Ltd had on 25 March 2011 obtained a prior 30 day sole agency agreement on the property.

[19] The issue between the two real estate companies was, he put it, Custom Residential Ltd selling the property at a time when it had no agency because the vendor had cancelled its sole agency. He said that when the property was sold by Custom Residential Ltd, the sole agency to Ponsonby Estate Agents Ltd was in force and he felt that, rather than enforce any commission right the latter company may have had with the vendor, it was sensible for a commission share agreement to be entered into between the two real estate companies.

[20] He considered that the Custom Residential Ltd sole agency had been correctly and properly cancelled by Ponsonby Estate Agents Ltd on behalf of the owner on 27 April 2011. As manager of the latter company he was focused on dealing with the owner of Custom Residential Ltd and, latterly, its principal officer a Mr Rex Worthington. The defendant said that, initially, he was faced with silence from the owner, much intransigence from Custom Residential Ltd, and a hard-nosed approach from Mr Worthington who all *"basically refused to concede that Ponsonby Estate Agents Ltd had any right of a commission share"*.

[21] He emphasised that throughout the negotiation of commission procedure, he honestly believed that Ponsonby Estate Agents Ltd was entitled to a commission share and that a 50/50 basis was appropriate and fair.

[22] The defendant took us through the series of emails from which this charge arises. He emphasised that he regarded any complaint to the Authority as simply a correct method of proceeding to resolve the commission dispute and, at that time, he genuinely believed that the Authority had a commission mediation dispute process which would determine the commission issue. He knew that, in the past, the REINZ had such a process for mediation or arbitration of such commission disputes. Also, he was conscious that he had always been able to resolve such disputes amicably in the past with any other agency. Accordingly, he stated in his evidence in chief to us:

> *"20. Therefore the "purpose" that I was seeking to invoke and use with the REAA was a commission dispute process which was I believed a proper purpose and function of the REAA. I would certainly have not entertained making any improper, illegal or unethical "threat" to CRL as that is simply not my style as I knew that would be contrary to the Act.*
>
> *21. I was attempting to resolve the issue of a commission so that the vendor was in fact not placed in the position of potentially being liable for two commissions. It was not me who was being intransigent in the refusal to negotiate a conjunct or share commission, it was CRL who by their attitudes were refusing to even at one stage even attempt to resolve the matter in the best manner and spirit possible, and it was their failures that led me to get more and more frustrated with their attitudes."*

[23] Then the defendant took us (from his perspective) through four key communications to which we now refer.

Fax – Monday 9 May 2011

[24] The above was the defendant's first attempt to try and resolve matters with the owner of Custom Residential Ltd. He had tried previously to obtain a response from John Wills, of Custom Residential Ltd and had left two messages on Friday 6 May 2011 and Monday 9 May 2011 on his cellphone prior to that fax in an attempt to engage and start negotiations but, he said, both times Mr Wills ignored him. He therefore sent Mr Wills a fax on that date 9 May 2011 to try and open negotiations as he did not want to involve the vendor in a double commission situation and *"wanted our companies to amicably resolve the same"*. He also stated in that fax: *"It is essential that you at least talk to us as you may well place the owner in a position of having to pay two commissions, a situation the REAA has taken a very dim view of"*. He then first raised (he said) the issue of a dispute resolution process and stated: *"I trust we can resolve the matter amicably as we do not wish to make a formal complaint to the REAA."*

Email 31 May 2011

[25] On 30 May 2011, he received a response from Rex Worthington of Custom Residential Ltd. The defendant felt that, instead of trying to amicably resolve the commission issue, Custom Residential Ltd seemed *"to go on the attack over my attempts and stated "We still have serious concerns about how your purported sole agency was obtained"*. Custom Residential Ltd went on to state that, in its belief L J Hooker is not legally entitled to share any commission, but then went on to make a one-off offer of 20%.

[26] On 31 May 2011 the defendant sent a detailed response. Although the defendant was frustrated by the allegations against Ponsonby Estate Agents Ltd contained in Mr Worthington's email of 30 May 2011, he did not respond immediately. He felt his statement in paragraph 4 of his 31 May 2011 email that: *"I take exception to the inference that our salesperson acted in an unprofessional manner"* was considered, measured, and acceptable. He raised that his company's 50% of commission claim was 'working' or 'conjunct' commission and fair and reasonable. He said to us that he *"wanted to ensure that our two companies, which were in close geographical proximity, and were working in the same particular market, i.e. Ponsonby, could continue to work together in the future in the interest of future vendors and purchasers and in the interests of the real estate industry as a whole"*. He said to us that did not want a confrontational future relationship between Custom Residential Ltd and Ponsonby Real Estate Agents Ltd.

[27] Importantly in terms of Mr Tucker's complaint, the defendant also stated in that 31 May 2011 email: *"I trust you will see reason as we would prefer not to lodge a formal complaint with the Real Estate Agents Authority"*.

[28] The defendant says that was simply a re-emphasis of his belief that the REAA was the appropriate venue for commission resolution disputes and was not said to complain about Custom Residential Ltd *"in any other respect as I had no grounds for complaint about it".* He did not receive any concrete response to that email until June 2nd 2011 when Rex Worthington responded that he would get back to him within a couple of days. The defendant said to us *"at that stage I decided to play a little bit hardball and again reemphasise the 50% requirement that PEAL had"*.

Email 8 June 2011

[29] A further email follow up was sent by the defendant on 8 June 2011 as it had been over a week and he had had no concrete response from Custom Residential Ltd. In response, Rex Worthington refused to pay the 50/50, but stated he would *"be willing to look at some middle ground"* without specifying what that was.

Email 20 June 2011

[30] Being dissatisfied with the response from Custom Residential Ltd, the defendant sent an email on 20 June 2011 reading as follows: *"... Hi Rex, further to my phone call on the 10th June, I have been delayed in Sydney for a week due to cancelled Qantas flights. Rex 50/50 is the only acceptable position to us over this issue and you leave us with no alternative but to make a formal complaint to the Real Estate Agents Authority which we will make this week. It is not a question of arguing the matter through the REAA as they will conduct an investigation into your company's and respective salesperson's actions in the matter. I look forward to your*

response. He said to us that he was *"explaining why I had not followed this matter up sooner, and reinforcing that 50/50 was the acceptable situation"*. He puts it:

> *"43. Again I was still trying to resolve this matter, and honestly believed that the REAA would conduct, as I was aware, investigations into the companies and the respective documents in this matter, meaning their entitlement to commission not the way in which they had acted, as I never raised either in this email or any prior email any allegations against improper behaviour or improper practice by CRL.*
>
> *44. But at this stage it was still CRI that was alleging improper behaviour and practice by PEAL.*
>
> *45. I quite clearly was not suggesting a complaint against CRL as I had no grounds and had not raised any complaint to CRL, and therefore the use of that wording in that email was reinforcement of using REAA commission dispute resolution service, that is to say what I believed was a proper purpose and function of the REAA."*

Email 22 June 2011

[31] An email of 22 June 2011 from the defendant to Rex Worthington was in response to an email from Rex Worthington the previous afternoon and read: *"Hi Rex. Please be assured a complaint will be made to the REAA, our patience is at an end. Arbitration is not an option, Ponsonby Estate Agents Ltd is not a member of the REINZ. Our documentation in this matter is absolutely correct and your claim of serious concerns around the validity is completely unfounded. As I have pointed out in a previous email your actions on receipt of the notice cancelling Custom Residential Ltd's agency and those of your salesperson in attempting to discredit our company and salesperson are totally unacceptable. Your without prejudice offer of 30% is rejected, I will give you until 5.00 pm today to meet our very reasonable demand of 50% of the fee (without any deductions) before making a formal complaint to the REAA. Regards Bryan"*.

[32] The defendant put to us:

> *"... In that matter, CL had still only basically moved over the period of almost 6 weeks from 20% to 30% and had by no means complied with industry standards or norms, and I felt had not been taking me seriously.*
>
> *47. On 9 May 2011 I tried to open the communication doors to CRL, and on May 31st 2011 sought 50%, in response to an offer which I thought was derisory of 20%, and here we were a month later and till only at 30% from CRL which I was very frustrated with.*
>
> *48. In this email of 21 June 2011 Rex Worthington was still questioning the validity of our SA, and still questioning the legality of PEAL's salespersons and agency rather than trying to resolve the matter in an amicable manner which I was trying to undertake.*
>
> *49. When I stated therefore "our patience is at end" in my email, it was out of that sheer total frustration."*

[33] The defendant then continued his evidence-in-chief as follows:

"REINZ

50. I confirm that PEAL was not a member of the REINZ and no longer therefore received any services offered by the REINZ, but that did not affect my belief that it was the REAA that now took over commission dispute matters. I rejected again the concerns about the validity of our SA and again sought confirmation of our 50% fee, otherwise I was proposing to place this in the hands of the REAA.

51. My use of the words "formal complaint" in that email, revolved around the fact that if you looked at the REAA's website at that stage, the document that you used to initiate any process with the REAA was called a complaint form. You could not simply just write to the REAA asking them to sort matters out for you or make a determination, the process was a formal process in that you had to make a "formal complaint" to the REAA and the process was initiated by that complaint form.

52. It was quite clear from their website and from the documentation on their website and that is why my reasoning and my statement was "formal complaint" rather than anything informal etc.

52. Again therefore the "purpose" that I was seeking to invoke and use with the REAA was a commission dispute process which was I believed a proper purpose and function to the REAA. That is what I was referring to constantly in my emails with CRL."

[34] The defendant maintains that this case flows from the failure of Custom Residential Ltd to follow the vendor's cancellation instructions which required that Custom Residential Ltd provide working notification of any purchaser it was negotiating with, and it did not do that; and after the notice of cancellation took effect, to refer all enquiries to the sole agent, which Custom Residential Ltd failed or refused to do.

[35] The defendant kept emphasising that he genuinely believed that the referral of the dispute to the Authority as a *"complaint"* was merely a way of having a resolution process applied by the Authority to the commission dispute between the two agencies; and that he also genuinely believed that Ponsonby Estate Agents Ltd was entitled to a commission share and that Custom Residential Ltd was obliged to negotiate a settlement.

[36] The defendant was carefully and thoroughly cross-examined by Mr Clancy, particularly, on the theme whether the defendant's said beliefs could be regarded as credible in view of the various publications to real estate agents from time to time by REINZ and the Authority and in terms of the Act and its regulations.

[37] In particular, it was put to the defendant that he must be aware of Rules 7.2 and 7.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Rule 7.3 is set out above and Rule 7.2 reads *"7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority."*

[38] The defendant said he was well aware of both those rules but asserts that he did nothing improper. He asserts that although his email of 9 May 2011 (referred to above) may look like a threat, that was never his intention and he honestly thought

that, if he made a complaint to the Authority, he was simply following a protocol towards an available dispute resolution service at the Authority.

[39] Inter alia, it was put to him by Mr Clancy as not being credible that he could be unaware that the Authority then had no such resolution service but did investigate complaints. The defendant would not accept that his conduct was improper in any way, or that he was threatening in any way, and insisted he was simply seeking what he thought was an available methodology for settlement through the Authority.

Issues

[40] The underlying facts are not in dispute but the issue is whether the said communications between the defendant and Ponsonby Estate Agents Ltd on the commission dispute show the defendant to have threatened to use the Act's complaints and disciplinary process for an improper purpose.

[41] As indicated above, Rule 7.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 provided that a licensee must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.

[42] Under Rule 7.2, had the defendant genuinely suspected the complainant or Custom Residential Ltd of misconduct, he would have been obliged to report that to the Authority. It is submitted for the prosecution that the defendant did not have any such genuine concern about Custom Residential Ltd, but rather used the threat of a complaint to the Authority as a negotiating tool in resolving the commission dispute.

Discussion

[43] Although the commission dispute was concluded by both the companies agreeing to a 55/45 split in favour of Custom Residential Ltd, the salesperson at Custom Residential Ltd, Grant Tucker, complained to the Authority. Upon the Authority finding no liability on the part of the defendant and Ms Claydon, Mr Tucker successfully appealed to this Tribunal (refer *Tucker v REAA* [2012] NZREADT 46) in that we found Ms Claydon guilty of unsatisfactory conduct – and required the defendant to be charged with misconduct. We understand that Custom Residential Ltd then sued Ponsonby Estate Agents Ltd for the share of commission gained by Ponsonby in the settlement, even though the term of the settlement was that no further action be taken by either party, but its claim was rejected by the Disputes Tribunal.

[44] Mr Clancy noted, inter alia, that at several points in the above communications, the defendant mentions the prospect of complaining to the Authority in a manner which seems threatening. He does not, however, set out exactly what such a complaint would relate to, but rather mentions the possibility of a complaint in the context of resolving the commission dispute. For example:

[a] In the fax of 9 May 2011, the defendant wrote to Custom Residential Ltd: *"I trust we can resolve the matter amicably as we do not wish to make a formal complaint to the REAA"*;

[b] In an email of 31 May 2011, the defendant wrote: "... under the circumstances our claim for 50% of the commission is both fair and reasonable, you are fortunate that we are not claiming more, however we work in the same market place and we make our claim in a spirit of

goodwill and cooperation. I trust you will see reason as we would prefer not to lodge a formal complaint to the Real Estate Agents Authority."

[c] In the email of 20 June 2011, the defendant stated: *"... 50/50 is the only acceptable position to us over this issue and you leave us with no alternative but to make a formal complaint to the Real Estate Agent Authority which we will make this week. It is not a question of arguing the matter through the REAA as they will conduct an investigation into your company's and respective salespersons actions in the matter"*.

[d] In the email of 22 June 2011, the defendant wrote: *"Please be assured a complaint will be made to the REAA, our patience is at an end. Arbitration is not an option, [PEA] is not a member of the REINZ ... I will give you until 5.00pm today to meet our very reasonable demand of 50% of the fee (without any deductions) before making a formal complaint to the REAA"*.

[45] It would appear that the threat is to complain about Ponsonby Real Estate Agents Ltd putting the vendor at risk of double commission without proper warning but, perhaps, it would have been that the defendant thought Custom Residential Ltd had no entitlement to any commission.

Wilful or Reckless Breach of the Rules

[46] A breach of the Rules will be *"wilful or reckless"* for the purposes of s.73(c) where a licensee foresees that his or her action may be in breach of professional standards but proceeds regardless.

[47] In the Australian case of *The Victorian Bar Incorporated v Molyneux* [2006] VCAT 1417 the Victorian Civil and Administrative Tribunal approved comments by Justice Phillips, in the legal disciplinary context, in *Aaron Zaitman v Law Institute of Victoria* Justice Philips stated:

> *"It is implicit in what I have just said that, while the solicitor, who does not knowingly act in contravention, must be shown to have foreseen that what he was doing might amount to a relevant contravention, there is no need to go further and establish that the solicitor foresaw the contravention as "probable"; it is enough that he foresaw it as "possible" and then went ahead without checking ... [I]t will be enough if the solicitor ... is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was so or not."*

[48] That reckless indifference to whether or not conduct might breach rules of professional conduct can amount to misconduct is consistent with the general principle that ignorance of the law is no excuse.

[49] In *Carter v McLaren* [1871] LR 2 Sc & Div 120 at 125, the Court said:

> *"Ignorance of the law in question is not an excuse for failing to comply with a statutory duty; it is not therefore a defence to proceedings for breach of the duty, although it may be a matter of extenuation."*

[50] In criminal matters, s.25 of the Crimes Act 1961 explicitly provides that ignorance of the law is not an excuse for any offence committed.

[51] In this case, it is relevant that Rex Worthington, principal officer of Custom Residential Ltd, apparently advised the defendant that a complaint to the Authority was not an appropriate step in a commission dispute between agents. Mr Worthington wrote to the defendant on 8 June 2011 stating, *"I would urge you to look to some alternative rather than arguing this through the REAA"*. On 21 June 2011, he wrote: *"... Firstly we would suggest very strongly that this is not a matter that should be put in front of the REAA. As both companies are members of REINZ we would seriously urge you to treat the matter as a commission dispute and have it treated through arbitration ..."*.

Our Reasoning

[52] It is submitted for the prosecution that it is open to us to find that the defendant must have known that to threaten Custom Residential Ltd with a complaint to the Authority might be improper so that he breached Rule 7.3 wilfully or recklessly; but that if we find that the defendant in breaching the rule did not act wilfully or recklessly, then a finding of unsatisfactory conduct would be appropriate under s.110(4). We agree with that approach.

[53] The onus is on the Authority to prove the charge on the balance of probability. We take the view that the conduct in issue, i.e. the efforts at settling a commission dispute for a particular transaction, is real estate work even though it may not be attended to until after the settlement of the sale of the property. The transaction is not complete from the vendor's, and agents, perspective until commission has been dealt with.

[54] In this case there has been a clear breach of Rule 7.3 by the defendant. However to decide whether, in terms of s.73(c)(iii) of the Act, that breach was *"wilful"* or *"reckless"* is not easy. This is because the defendant seems honest and genuine in his evidence that he meant no more than that the dispute needed to be brought into a disputes resolution service which he thought was then available under the Authority. In fact that was not then so, but there had been such a service under REINZ.

[55] Having said that, i.e. that we cannot be sure, on the balance of probabilities, that the defendant wilfully or recklessly intended to breach Rule 7.3; the words in his emails are not easy to interpret as other than threatening or as part of a process of pressure to achieve a resolution of the commission dispute favourable to him. Also, we can only infer that the defendant's purpose was to obtain a share of the commission and avoid being complained about for having, perhaps, put the vendor in the jeopardy of a double commission situation. It is possible to find that the defendant's *"purpose"* was *"improper"* in terms of Rule 7.3.

[56] The threatening tone about laying a complaint as covered in the above emails is disturbing and persistent and is in the pursuit of commission.

[57] We are conscious that in the Tribunal's decision of 18 July 2012 [2012] NZREADT 46 dealing with whether Mrs Claydon had breached rule 9.11 (which provides that when entering into a sole agency, the agent must advise the client that if he or she enters into or has already entered into another agency agreement, she could be liable to full commission to more than one agent), the Tribunal also dealt with whether the defendant had breached Rule 7.3. Simply put, the Tribunal found Ms Claydon guilty of unsatisfactory conduct and required a charge of misconduct to

be laid against the defendant. Obviously, we have heard far more evidence of the complaint against the defendant than was adduced to the Tribunal on 18 July 2012.

[58] We reiterate the Tribunal's view then that any breach of Rule 7.3 is a very serious matter and, as the Tribunal also said, *"threatening behaviour is very serious. Agents are to be discouraged from using the complaints process for the purposes of effecting a civil resolution. ..."* We also endorse para [18] of that decision which reads:

> *"[18] Agents have a positive obligation under Rule 7.2 to report to the REAA if they have reasonable grounds to suspect that another agent has been guilty of misconduct under s 73. They may report unsatisfactory conduct (Rule 7.1). If Mr Richardson truly had believed that the actions of CRL were either unsatisfactory conduct or misconduct then he should have reported them to the REAA. He did not do so as the commission dispute was settled. This and the content and tone of the e-mails (which suggests serious misconduct – ie conduct which should be reported) leads us to the conclusion that his e-mails are in breach of Rule 7.3 as they were designed to bring about a resolution of the commission dispute rather than a proper concern about the actions of CRL. If they were in fact proper concerns about the actions of CRL then he should have reported them under either 7.1 or 7.2 and he has failed in that obligation."*

[59] Credibility is very much an issue in this case. Inter alia, Mr Clancy submitted that the defendant must have been acting wilfully or recklessly because he has admitted to being aware of Rule 7.3. However, we accept that the defendant was so obsessed with sorting out the commission dispute himself, and was rather naive and misguided in thinking that a complaint to the Authority would trigger a disputes resolution process, that he believed he was entitled to act as he did.

[60] It is concerning that the defendant did not foresee that his seeming threats were in breach of professional standards; nor did he think that to be possible. He was naive enough to think that his pressuring statements to Custom Residential Ltd were about initiating a dispute resolution process rather than a complaint to be investigated. It is unsatisfactory that he was not better informed.

[61] Also, it is concerning, and very unsatisfactory, that he thought that Custom Residential Ltd was obliged to share commission. Contractually, it was clearly entitled to full commission under its listing agreement with the vendor. On the face of it, i.e. subject to the arrangements Ponsonby Estate Agents Ltd made with the vendor about commission in its listing agreement, that company has exposed the vendor to double commission.

[62] However, on the balance of probabilities, we are not satisfied that the defendant is guilty of misconduct because it is not proven that he acted wilfully or recklessly but we find, in terms of our powers under s.110(4) of the Act, that there has been unsatisfactory conduct by the defendant as we have explained. Accordingly, we find him guilty of that.

PENALTY

[63] We would normally deal separately with penalty, but we have had the advantage of counsel dealing with the penalty concept in a general way and leaving it to us to impose should we get to the point of unsatisfactory conduct.

[64] We are conscious that the defendant has been put through much stress and expense in this case which has continued for about two years. He has been involved in two hearings before us, the Authority's investigation, and a Disputes Tribunal case. All these aspects have led to him incurring significant legal fees and experiencing much stress.

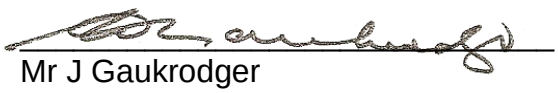
[65] We take into account the need for deterrence and denunciation, particularly, where threatening conduct seems to be involved. On the other hand, the defendant was naive and is remorseful.

[66] Inter alia, Mr Waymouth made the point that the defendant could have been found guilty of unsatisfactory by this Tribunal conduct back in July 2012. However, on the evidence then available he needed to be charged with misconduct.

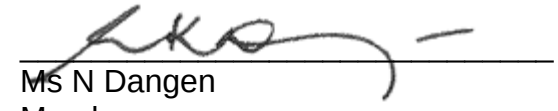
[67] Accordingly, we find the defendant guilty of unsatisfactory conduct in terms of our reasoning above and we fine him $4,000 to be paid to the Registrar of the Authority in Wellington within 15 working days of this decision.

[68] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____
Judge P F Barber
Chairperson



Mr J Gaukrodger
Member



Ms N Dangen
Member