IN THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZ READT 14
READT 32/13

In the matter	of an appeal under s 111 the Real Estate Agents Act 2008
BETWEEN	IAN MORGAN of Matamata, Real Estate Agent
	Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)
	Respondent

Members of the Tribunal: Judge P F Barber – Chairperson
Ms N Dangen – Member
Ms C Sandelin - Member

Heard: On The Papers

Date of Decision: 20 February 2014

Counsel: Mr D G Chesterman for Appellant
Ms J MacGibbon for the Authority

DECISION OF THE TRIBUNAL

Introduction

[1] Ian Morgan ("the licensee") has been charged by Complaints Assessment Committee 20003 with misconduct under s 73(a) and s 73(b) of the Real Estate Agents Act 2008 ("the Act").

[2] The licensee appeals against the Committee's decision to lay the charges under s 111 of the Act on the following three grounds:

(a) The subject matter of the charges is outside the Committee's jurisdiction;

(b) There was a breach of natural justice in the procedure followed by the Committee; and

(c) The decision of the Committee was plainly wrong, involved an error of law or principle, took into account irrelevant considerations and / or failed to take into account relevant considerations.

[3] In this decision:

(a) "PGG Wrightson" means PGG Wrightson Real Estate Ltd

(b) "WDL" means Waitoki Downs Ltd, a company controlled by Mr Shallue (referred to below)

(c) "The Property" means 771 Rotokoku Road, a rural property of approximately 600 hectares near Te Aroha, sold by WDL to Mr Denize (also referred to below)

(d) "Mr Shallue" means Jim Shallue, vendor of the Property through WDL

(e) "Mr Denize" means Matthew Denize, purchaser of the Property from WDL.

(f) "Mr McIntyre" means Kenneth McIntyre, the prospective purchaser of a large parcel of rural land from WDL, which included the Property.

(g) "2010 McIntyre Agreement" means an agreement for sale and purchase between WDL and Mr McIntyre, dated 24 December 2010, which failed to settle.

(h) "Denize Agreement" means the agreement for sale and purchase of the Property between WDL and Mr Denize signed on or about 24 February 2012.

[4] It is submitted for the Authority that a prima facie case of misconduct is made out on the material before the Committee (and now before us) and this appeal should be dismissed.

Key Facts

[5] On 13 May 2010, WDL signed an agency agreement with PGG Wrightson for the latter to market approximately 1400 hectares of rural land (which included the Property). The agreement provided for a sole agency period of 12 months, with a further 12-month period of general agency to follow the sole agency period.

[6] In December 2010, during the sole agency period of the 13 May 2010 listing agreement, WDL entered into the 2010 McIntyre Agreement for the sale of a parcel of land which included the Property. The 2010 McIntyre Agreement failed to settle as intended and correspondence between solicitors for WDL and Mr McIntyre ensued.

[7] On 24 June 2011, WDL signed a second agency agreement with PGG Wrightson in respect of the 1400 hectares. The agreement provided for a sole agency period until 28 February 2012, reverting to a 12-month general agency thereafter, with an auction date of 9 November 2011 (if not sold prior).

[8] In August 2011, following a renegotiation of the terms of the 2010 McIntyre Agreement, Mr McIntyre paid $400,000 as the "first tranche" of a deposit. PGG Wrightson took commission of $230,000 from those deposit funds and of that $230,000 Mr Morgan ("the licensee") received $126,000 via his company Diagonal Holdings Ltd.

[9] In December 2011, Messrs Denize and Shallue began discussions regarding Mr Denize purchasing the Property (being part of the parcel of land subject to the 2010 McIntyre Agreement) subject to an accommodation being reached with Mr McIntyre, as the sale to Mr McIntyre had still not settled.

[10] In early 2012, Mr Morgan became involved in negotiations between Messrs Denize and Shallue. Between 8 and 11 February 2013, Messrs Morgan and Denize exchanged emails about the proposed contents of an agreement for sale and purchase.

[11] Mr Morgan then provided what he describes as 'arbitration' services, assisting the parties to negotiate a mutually acceptable price. He then drew up the Denize Agreement.

[12] The version of the Denize Agreement provided by Mr Morgan to the parties for their signatures included, on the first page under the heading 'Sale By', the PGG Wrightson logo and the address of the PGG Wrightson Matamata office. On the final page, under the heading 'Real Estate Agent', details are recorded for PGG Wrightson, with Grant Higgins shown as manager and Mr Morgan as salesperson. The first page of the agreement also provides for the deposit of $450,000 to be paid to the PGG Wrightson trust account on the agreement becoming unconditional.

[13] The Denize Agreement contains a standard clause 12.1 which reads:

> "If the name of a licensed real estate agent is recorded on this agreement it is acknowledged that the sale evidenced by this agreement has been made through that agent whom the vendor appoints as the vendor's agent to affect the sale. The vendor shall pay the agent's charges including GST for effecting such sale."

[14] On a copy of the Denize Agreement sourced by Mr Morgan from Mr Shallue's solicitors, the real estate agent details set out above have been crossed out.

[15] The Denize Agreement was conditional on the cancellation of the previous agreement with Mr McIntyre (or nominee) and the withdrawal of a caveat lodged by Mr McIntyre.

[16] On 16 March 2012 (the day after the Denize Agreement was due to go unconditional), Mr Denize signed a document headed 'Terms of Engagement' in which he agreed to pay Mr Morgan a fee of one per cent of the sale price of the transaction plus GST for his services as 'purchaser's agent'. The fee was duly paid.

[17] The sale of the Property to Mr Denize went unconditional on 13 July 2013 (and subsequently settled on 20 July 2013). On the same date, Mr Shallue signed a new sale and purchase agreement with Mr McIntyre for the remainder of the property (i.e. excluding "the Property" which had been sold to Mr Denize) which had been subject to the 2010 McIntyre Agreement.

The Specific Charges

[18] We record that in a decision herein of 6 September 2013, *I C Morgan v REAA* [2013], NZREADT 76, we dismissed an application by the appellant for an interim order of name suppression. In that decision we set out the specific charges as follows:

> *"Charge 1*
>
> Following a report made by PGG Wrightson Real Estate Ltd, Complaints Assessment Committee 20003 (CAC 20003) charges Ian Charles Morgan (defendant) with misconduct under s. 73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.
>
> Particulars:
>
> The defendant provided services for the purpose of bringing about an agreement for sale and purchase of 771 Rotokoku Road, Te Aroha (property)" between Waitoki Downs Ltd (vendor) and Mathew John Denize (purchaser), in return for a fee or commission of $47, 5000 plus GST paid by the purchaser.
>
> The property was subject to an agency agreement between the vendor and PGG Wrightson Real Estate Ltd (PGG Wrightson) signed by the defendant on behalf of PGG Wrightson as listing agent. The vendor had previously paid commission to PGG Wrightson in respect of a separate agreement that related, in part, to the property and which failed to settle.
>
> The defendant failed to disclose the fee or commission he agreed and received from the purchaser to PGG Wrightson.

Charge 2

CAC 20003 further charges the defendant with misconduct under s. 73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars:

(a) Acting on the sale of the property from the vendor to the purchaser in return for a fee or commission from the purchaser without ensuring that any previous agency agreement between the vendor and PGG Wrightson was at an end.

(b) Failing to disclose in writing to the vendor that the defendant would benefit financially from the sale of the property, namely by receiving a commission or fee or one per cent (plus GST) of the sale price from the purchaser.

(c) Preparing an agreement for sale and purchase of the property which recorded PGG Wrightson as the real estate agent acting, acknowledged as the vendor's agent by operation of cl 12.1, creating a risk that the vendor would be exposed to liability for commission to PGG Wrightson on the transaction.

(d) Inviting the signature of the purchaser on a purchaser's agency agreement:

(i) That was not signed by the defendant;

(ii) Without settling out in writing an estimated cost (dollar amount) of the commission or fee payable;

(iii) Without settling out in writing that further information on agency agreements and contracted documents is available from the Real Estate Agents Authority."

Appeals against misconduct charges

[19] We considered the power of Complaints Assessment Committees to lay misconduct charges, and the scope of any appeal from such a decision, in *Brown v CAC and Wealleans* [2011] NZREADT 42 where we 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." (Emphasis added)."

[20] In Miller v REAA and McAtamney [2012] NZREADT 24, we reiterated the approach in Brown and stated:

> "(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 of i.e. misconduct under s 73(a)."

[21] The question in this appeal is limited to whether the Committee was correct to find that Mr Morgan has a case to answer on the charges, and that the allegations should be considered by us at a substantive hearing.

The Stance of the Prosecution

Subject matter of the present charges

[22] The appellant submits that the subject matter of the charges falls outside the jurisdiction of the Committee and, by implication, us. The appellant submits that the case involves a civil/commercial dispute between Mr Morgan and PGG Wrightson and does not involve any disciplinary issue. The appellant stresses that no consumer has complained about him.

[23] The Act does not limit Complaints Assessment Committees (or this Tribunal) to considering complaints from consumers, although the purpose of the Act is to promote and protect the interests of consumers. Under s 74, any person may complain about the conduct of a licensee. Further, a complaints assessment committee may, in addition to inquiring into complaints, investigate allegations against a licensee on its own initiative.

[24] Not only does the Act allow consideration of complaints from persons other than consumers, s 73(a) allows for findings of misconduct for actions that do not involve real estate agency work. Although misconduct under s73(a) need not involve real estate agency work, there must be a "sufficient nexus" between the alleged conduct and the fitness or propriety of the licensee to carry out real estate agency work - *S v CAC & B* [2010] NZREADT 13.

[25] The appellant refers to *E v REAA and N* [2013] NZREADT 27 in submitting that civil/commercial disputes should not form the basis of charges before the Tribunal. However, in *E* we did no more than find that, on the particular facts of that case, the Committee's decision not to refer misconduct charges should not be overturned on the limited grounds available to challenge such decisions (i.e. error of law, irrelevant considerations, overlooking relevant considerations, or a plainly wrong decision). While we made some general comments on our role regarding civil disputes, we stated explicitly, at para [19], that there might be circumstances where an employment dispute (the issue in that case) could amount to disgraceful conduct.

[26] It is submitted for the Authority that the allegations in the present case clearly go beyond a purely civil dispute between Mr Morgan and PGG Wrightson and disclose issues of concern that go directly to Mr Morgan's fitness to engage in real estate agency work. We agree.

Charge one

[27] The Committee alleges that Mr Morgan provided services for the purpose of bringing about a transaction between WDL and Mr Denize, for a fee, and failed to inform PGG Wrightson of that fee, notwithstanding that the vendor had signed an agency agreement with PGG Wrightson for land which included the Property.

[28] On 16 February 2012, Mr Morgan emailed Stuart Cooper of PGG Wrightson in the following terms:

> "Hi Stuart
>
> Just to let you know I was involved today negotiating a deal on part of Shallue's Waitoki Downs farm for a director of FarmRight The parties had stalled in their private

> negotiations however I have been able to reach suitable middle ground and a deal struck *No commission has been seeked* however it has strengthened *our* position with FarmRight You are the only party privy to this If you have a problem with this position please let me know immediately Regards Ian" (sic) [Emphasis added by Ms MacGibbon]

[29] The indication in the email that no commission was sought is at odds with the subsequent agreement that Mr Denize pay 1 per cent (plus GST) of the sale price direct to Mr Morgan (i.e. $47,500 plus GST).

[30] There appears to have been no attempt by Mr Morgan to arrange a purchaser's agency agreement between Mr Denize and PGG Wrightson, rather he had Mr Denize sign an agreement under which the fee or commission for Mr Morgan's services in facilitating the purchase went directly to Mr Morgan. The deposit (and commission) did not pass through the PGG Wrightson trust account, despite PGG Wrightson's details appearing as the agent acting on the version of the sale and purchase agreement signed by the parties.

[31] The importance of openness and honesty where agents receive payment personally for work in connection with a principal's business is illustrated by the fact that it is an offence under s 4 of the Secret Commissions Act 1910 for an agent to corruptly accept a gift or other consideration as a reward for doing any act in relation to the principal's affairs or business.

[32] Allegations involving a lack of openness and honesty in conducting a real estate transaction, and allegations that a licensee received commission from a purchaser where the land sold was subject to a vendor's agency agreement with the licensee's agency, are clearly allegations which, if proven, could go to a licensee's fitness to carry out real estate agency work. Such allegations are properly a matter for our consideration.

Charge two

[33] The subject matter of charge two also involves real estate agency work because it relates to deficiencies in a purchaser's agency agreement. Such allegations are clearly within the jurisdiction of Complaints Assessment Committees and this Tribunal.

Alleged breach of natural justice

[34] We note that the Authority does not accept that Mr Morgan was denied the chance to be heard in respect of the allegations before the Committee, or that there was any other failure to observe the rules of natural justice.

[35] Prior to the Committee's decision to lay a charge, it provided Mr Morgan with detailed information received from PGG Wrightson and obtained during its own investigation. In response, it received lengthy correspondence and submissions on behalf of Mr Morgan, including:

(a) A copy of a letter to PGG Wrightson dated 1 October 2012;

(b) A letter to the Authority dated 23 October 2012;

(c) A letter to the Authority dated 13 November 2012;

(d) A letter to the Authority dated 14 December 2012;

(e) A letter to the Authority dated 17 December 2012; and

(f) A letter to the Authority dated 24 December 2012.

[36] The appellant submits that the charges laid by the Committee go beyond the allegations as framed in the original complaint from PGG Wrightson and, particularly, as summarised in an email from the Committee's investigator to counsel for Mr Morgan on 4 October 2012.

[37] Clearly, decisions made by complaints assessment committees must relate to such matters as can fairly be said to be within the scope of the original complaint. In *Graves v REAA and Langdon*, [2012] NZREADT at [46] – [47] we confirmed that the terms of a complaint should not be construed too narrowly and should not be viewed as akin to a formal pleading in civil proceedings. What is necessary, when considering the scope of a complaint and what conduct

may be referred to us, is that a licensee is given proper notice as to what conduct, in broad terms, is under review and an opportunity to be heard in response. The key issue is fairness.

[38] In *CAC v R* (CA 282/01, 20 June 2002), our Court of Appeal considered whether a complaints assessment committee of the Medical Council could properly lay charges against a doctor that went beyond the ambit of the original complaint. While finding that, on the particular facts, the committee had gone beyond the scope of the original complaint, the Court noted that the Medical Practitioners Act contained a number of indications that the original complaint should be broadly interpreted, in line with the overriding statutory purpose of protecting the health and safety of members of the public. The Court noted at para [30]:

> We think that in cases like the present one the balance between those competing considerations [protection of the public and the practitioner's right to know the allegations he or she faces] is to be found by asking what the reasonable reader or listener would understand to be the subject-matter of the complaint when considered as a whole and in the light of its lay authorship. We agree with Durie J that the complaint is not to be interpreted in any literal or legalistic way. It is the substance that matters. Reasonable inferences are not to be frustrated by limitations in expression. The document is to be read as a whole without preoccupation with particular words.

[39] In Patel v Complaints Assessment Committee (HC Wellington CIV-2005-404-815, 20/7/06), citing CAC v R, the High Court noted that complainants (patients in that case) often do not know the precise clinical details of their treatment or the extent of a practitioner's clinical or professional failings. Matters may not emerge until an assessment committee interprets the practitioner's conduct against professional standards.

[40] For the Authority, Ms MacGibbon submits that there can be no doubt that Mr Morgan was fairly informed of the conduct under consideration by the Committee; and that the Committee was not obliged to seek comment on the precise terms of the charge to be laid before deciding to refer the matter to the Tribunal. She also submits that the investigator's 4 October 2012 email was no more than a good faith attempt to clarify the issues in correspondence with Mr Morgan's lawyer. It was, however, the Committee, not the investigator, that had the responsibility of assessing the material before it as a whole and deciding what orders under s 89 were appropriate. In doing so, the Committee was not bound by the terms of the investigator's email.

[41] The relevant 4 October 2012 emails read, in sequence:

From: Chris Delaney
Sent: Thursday, 4 October 2012 10:12 a.m.
To: 'Damian Chesterman'
Subject: RE: Ian Morgan – Interview Delay

Good morning Damian,

As per the phone message that I left for you, I will be away from the office for 2 weeks from the end of this week.

I intend to forward the complaint or information from PGGW to a complaints assessment committee (cac) unlikely that I will have the opportunity to do this before the end of this week so will attend to that when I return.

It would be helpful if when I do that I can include Ian Morgan's description of what occurred and his part in the dealings with the Waitoki Downs properties and the subsequent purchase of 771 Rotokoku Road by Mathew Denize. The cac will request this regardless.

Stuart Cooper of PGGW has provided me with a copy of the response dated 1 October 2012 that you made to PGGW on behalf of Ian Morgan.

If you do decide to provide this information then please include the following:

- Ian's description of events in dealings with Waitoki Downs properties
- How Ian became involved in the sale and purchase of 771 Rotoku Road between Jim and Kay Shallue and Mathew Denize
- Detail of the arrangement that was agreed upon between the parties in this transaction
- Detail of the arrangement between Ian and Mathew Denize
- How this arrangement came about – who initiated it
- Confirm the amount received by Ian from Mathew Denize
- What does Ian call this payment and what was it for
- Explain what Ian did differently, from what he would have done in the course of working in his capacity as a real estate salesperson, in providing this service
- Confirm the commission payment received by Ian in the failed agreement for sale and purchase where the purchaser was Kenneth McIntyre

As I see it, the complaint issues and those that the cac will deciding on are:

- Whether Ian was engaged in real estate work and therefore received what could be considered a commission from both the vendor and the purchaser
- Whether it was disclosed to the vendor that Ian was acting for the purchaser (Mathew Denize) in this matter

Please contact me with any questions that you may have.

Kind regards
Chris

Chris Delaney / Investigator / Real Estate Agents Authority

...

On 4/10/12 10:22 AM, "Chris Delaney" Chris.Delaney@REAA.GOVT.nz wrote:

Hello Damian,

Please add the following to the list of questions below:

- On how many other occasions has Ian provided the service that he describes as arbitration in property transaction?
- Please provide detail of these?

Kind Regards
Chris

...

Dear Mr Delaney

Mr Morgan will provide a written response to your questions by 19 October.

Kind regards

Damian Chesterman Barrister

[42] The appellant criticises the Committee for not interviewing or hearing directly from him. There is no dispute that a notice was sent to him inviting a written response to the complaint as required under s 83 of the Act. The Committee then had a discretion under s 83(b) to require the licensee to appear before it. The Committee was not required to ask the licensee to appear or to be interviewed. Hearings by complaints assessment committees are on the papers unless otherwise directed – s 90(1) of the Act.

[43] The appellant also submitted that the Committee erred in considering legal advice obtained by PGG Wrightson. However, s88(1) of the Act makes clear that complaints assessment committees may receive in evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with the matters before it. There is no evidence that the Committee placed improper weight on this material. The committee has conducted its own investigation, received various items of correspondence from the complainant and numerous submissions from the licensee, all of which seem to have been properly considered.

[44] The submissions made on behalf of Mr Morgan in support of this ground of appeal overlook that a decision to refer a charge to us is only a part of the disciplinary process and not the outcome. In *Orlov v New Zealand Law Society* [2013] 3 NZLR 562, the Court of Appeal considered an application for judicial review of a standards committee decision to refer charges to the Lawyers and Conveyancers Disciplinary Tribunal under the Lawyers and Conveyancers Act 2006.29 The Court noted (at [50]): ...highly relevant is the fact that a decision under s 152(2)(a) does not determine the outcome of the complaint. It only determines which body should be seized of it. The decision is procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process involving several checks and balances in what the legislature saw as a more responsive regulatory regime.

[45] It is submitted for the Authority that there is no merit in the appellant's submissions regarding a lack of disclosure or that the Committee's decision to lay charges was somehow predetermined. As is plain from the bundle of documents before us, the Committee provided to Mr Morgan all the material it was obliged to provide so as to give him fair notice of the complaint against him and allow him an opportunity to respond.

[46] As recorded in the appellant's submissions, the Authority has advised that no notes were taken at the initial meeting with representatives of PGG Wrightson. The Authority cannot disclose what does not exist. The subsequent email from Mr Sawyers (the Authority's general counsel) to the Authority's investigators has not been disclosed on the grounds of legal privilege. Mr Morgan was, however, provided with PGG Wrightson's detailed letter of complaint that followed the meeting (and referred to it) and all relevant material subsequently generated during the investigation.

Remedy for alleged breach of natural justice

[47] Ms MacGibbon firmly submits for the Authority that there has been no breach of natural justice in this case. She points out that even if we were to find merit in any of the appellant's submissions on this ground, the remedy for any breach would be for us to remit the matter back to the Committee for reconsideration allowing, for example, a further opportunity for Mr Morgan to make submissions on the particular wording of the charges. Given that Mr Morgan has now

had a full opportunity to be heard in respect of the charges in the context of his other grounds of appeal (and he will have a further opportunity at the substantive hearing should this threshold appeal be unsuccessful), it is put that we may feel that the appeal on the grounds of denial of natural justice is misconceived. We do not think there has been any breach of natural justice but, even if we err on that point, any such breach would be overcome by a de novo hearing before us.

The Committee's decision

[48] The appellant submits that the Committee's decision to lay the charges was plainly wrong, involved an error of law or principle, took account of irrelevant considerations and / or failed to take account of relevant considerations.

Re Charge one

[49] The appellant submits that the Committee erred in referring charge one to us because, inter alia, there was no active agency agreement in place between WDL and PGG Wrightson at the time Mr Morgan acted on the sale of the Property from WDL to Mr Denize.

[50] The appellant submits that the payment of the first tranche of the deposit funds by Mr McIntyre in August 2011 (and subsequent payment of commission to PGG Wrightson) extinguished any on-going agency agreement between WDL and PGG Wrightson as PGG Wrightson had arranged an unconditional sale. For the Authority, Ms MacGibbon does not accept that contention.

[51] It is apparent from the material before us that, notwithstanding the payment of the first tranche of the deposit in August 2011, the 2010 McIntyre Agreement was by no means certain to settle. Where an agreement fails to settle (as in fact transpired in this case) and another sale is effected within the period of a sole agency agreement, an agent would generally be entitled to charge commission.

[52] The PGG Wrightson agency agreement dated 24 June 2011, which applied to a parcel of land which included “the Property”, was to run as a sole agency until 28 February 2012. It would

then convert to a general agency and continue for a further period of 12 months. That agency agreement had not been cancelled at the time Mr Morgan facilitated the Denize Agreement in February 2012.

[53] When Mr Morgan's role in the sale to Mr Denize came to light, PGG Wrightson took legal advice to the effect that it would have been entitled to pursue WDL for a second commission had it chosen to. At the very least, the contractual position was unclear and Mr Morgan must have known that, in acting for Mr Denize on his purchase from WDL, there was a real risk that the vendor may also be liable to pay a commission on the transaction to PGG Wrightson.

[54] In those circumstances, it is submitted for the Authority that Mr Morgan was obliged to keep PGG Wrightson fully advised of what he was doing and the fact he was receiving a fee. The independent contractor agreement between Mr Morgan and PGG Wrightson provided that he was only to enter into agreements with clients as a salesperson of PGG Wrightson and that he was not to perform any real estate agency work other than in accordance with that agreement or with the written consent of PGG Wrightson.

[55] It is also submitted for the Authority that it was open to the Committee to infer, that Mr Morgan deliberately omitted to advise PGG Wrightson of the fee he had arranged with Mr Denize. As noted above, Mr Morgan did not ask Mr Denize to sign a purchaser's agency agreement with PGG Wrightson and the deposit (and commission) on the Denize Agreement did not pass through the PGG Wrightson trust account. Mr Morgan's email to Stuart Cooper of 16 February explicitly stated that he had not sought a commission on the sale to Denize but that the transaction would strengthen "our" (i.e. PGG Wrightson's) relationship with FarmRight, of which Mr Denize was a director.

[56] Despite the risk that the vendor might be liable to PGG Wrightson for commission on the sale to Mr Denize, Mr Morgan took no steps to confirm or ensure that the previous agency agreement was at an end before providing services to Mr Denize for a fee. In contrast, when signing the second agency agreement on 24 June 2011, Mr Morgan had completed a notice of cancellation in respect of the prior PGG Wrightson agency agreement.

[57] The appellant contends that the 24 June 2011 agency agreement was only entered into as a "strategy" to force Mr McIntyre to settle the 2010 McIntyre Agreement, and that it was only ever a "conditional agreement" which would not come into force unless the 2010 McIntyre Agreement was cancelled. Those contentions are not accepted by PGG Wrightson and are matters for evidence at any substantive hearing rather than for consideration on this threshold-type appeal.

Charge two

[58] In respect of charge two, the appellant contends that Mr Morgan's conduct in acting on the sale to Denize, as particularised in the charges, could not be found to be seriously negligent or incompetent. The appellant again relies on the contention that there was no live agency agreement between WDL and PGG Wrightson at the relevant time. For the reasons set out above, Ms MacGibbon submits that contention is incorrect.

[59] Given the risk that WDL was liable to pay commission to PGG Wrightson on the sale to Denize, it was open to the Committee to find that Mr Morgan's conduct warranted referral of a serious negligence / incompetence charge.

[60] Ms MacGibbon puts it that Mr Morgan failed to ensure that the PGG Wrightson agency agreement was at an end (by, for example, having WDL sign a notice of cancellation of agency). He also failed to provide the vendor with formal written disclosure of the benefit he was to receive from the transaction from the purchaser.

[61] Ms MacGibbon submits that while the Authority accepts there is evidence that Mr Morgan verbally advised Mr Shallue that he was being paid a fee by Mr Denize, that was insufficient in the circumstances. Ms MacGibbon notes that, in his interview with the Committee's investigator, Mr Shallue said that the declaration Mr Morgan subsequently asked him to sign was "worded a bit strongly" and that he could not recall whether Mr Morgan actually used the word "arbitrator", but he agreed that Mr Morgan had told him that he was working for Mr Denize and he understood that Mr Denize would pay him for that.

[62] Compounding the inherent risk which Mr Morgan took in acting for Mr Denize, the version of the Denize Agreement he provided to the parties for signature was a PGG Wrightson form which recorded PGG Wrightson as the real estate agent acting. By signing the agreement in that form, due to the said clause 12.1 of the standard terms and conditions, the vendor acknowledged PGG Wrightson as its agent and confirmed PGG Wrightson's entitlement to commission.

[63] While PGG Wrightson may not have intended to charge WDL a further commission on a further sale had the 2010 McIntyre Agreement fallen through (given that it had received commission on the McIntyre agreement), PGG Wrightson would arguably have been entitled to charge commission for a second sale, particularly where the sale was on significantly different terms than the 2010 McIntyre Agreement, as the sale to Mr Denize was. While WDL would have been liable to pay two commissions in such circumstances, those commissions would have been paid in respect of separate transactions and would, in each case, have been deducted from the purchasers' deposits.

[64] We have previously held that exposing a client to a risk of liability for a second commission (without disclosure of that risk and informed consent) may warrant a disciplinary response even where the employing agency has verbally disclaimed entitlement to the second commission. In *Johnston and Vining Realty Ltd v REAA39* [2013] NZREADT 67; see also *Stewart v REAA* [2013] NZREADT 58 and *Hume v REAA* [2013] NZREADT 53, we found that it was unsatisfactory for a salesperson acting in respect of a property previously subject to a sole agency with another agent to advise the vendor that he would not be put in the position of having to pay two commissions, without recording that agreement by way of an amendment to the second agency or listing agreement. That was our view notwithstanding that, when a dispute arose, the second agency honoured its verbal assurance to the vendor and did not pursue its entitlement to commission.

[65] The issue in such cases is the risk to the client of being pursued for commission in circumstances where that risk has not been adequately explained or has been verbally downplayed by the salesperson. Whatever the salesperson's view of the intentions of his

principal agent as to enforcing any right to commission, the vendor client's position must be formally protected, usually by an amendment to the agency agreement.

[66] Mr Morgan's error in the present case is underlined by the fact that the version of the Denize Agreement sourced from WDL's solicitors had been amended so as to exclude PGG Wrightson's entitlement to commission. Clearly, however, this occurred after Mr Morgan had arranged for both parties to sign the agreement.

[67] Further, the purchaser's agency agreement presented to Mr Denize for signature did not comply with certain requirements under the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. It was not signed by Mr Morgan, did not give a dollar amount estimate of the commission to be paid nor did it advise that further information on agency agreements and contractual documents is available from the Authority.

[68] In CAC *v Jenner Real Estate Limited* [2012] NZREADT 68, we considered what constitutes seriously negligent / incompetent real estate agency work under s 73(b) of the Act. In doing so, we relied on the decision of *Pillai v Messiter (No.* 2) (1989) 16 NAWLR 197 (CA) where the essential characteristics of conduct amounting to professional misconduct were defined as (at page 200): "[a] deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner".

[69] In *CAC v Miller,* [2013] NZREADT 31 a complaint was made that a licensee had failed to disclose a school development plan relating to land neighbouring a property he was selling as vendor. The plan potentially impacted the view from the property being sold. There was a further allegation that the licensee had positively advised the purchasers that nothing would be built on the neighbouring land. We stated:

> [85] We cannot be sure whether the defendant had any dishonest intentions to avoid proper disclosure to [the purchasers]. He had placed himself in a delicate position of trust by being both vendor and listing agent. In any case, we consider that his failure to disclose the development plan to the complainants, in all the circumstances of this case, was very negligent and a disturbing breach of trust. His assessment of the plan must have been coloured by self interest in that he did not want it to show a possible interference of the view from the property. He should have known

> that it was vital that the development plan be disclosed to [the purchasers] before they purchased the property. *We can only regard the defendant's failure as such a bad error of judgement as* to *be very negligent, if not deliberate.* (Emphasis added).

[70] We found misconduct proved, both on the basis of disgraceful conduct and seriously negligent real estate agency work.

[71] The Authority submits that, viewed in the round, the Committee was correct to conclude that a prima facie case of serious negligence / incompetence is made out against Mr Morgan. His conduct was such that, if proved, it might portray indifference or an abuse of the privileges which accompany holding a licence under the Act.

The stance of the appellant

The Basic Submission for the Appellant

[72] Mr Chesterman's main submission is that the subject matter of the complaint leading to the above charges is outside our jurisdiction because, in particular, the issue involves an internal civil dispute which was the subject of disagreement within PGG Wrightson prior to it filing its complaint against the appellant.

[73] In final submissions Mr Chesterman has been able to advise that, on 30 October 2013, the appellant was served with a Notice of Claim for proceeding CIV-2013-039-116 (District Court at Morrinsville). The plaintiff is a former PGG Wrightson agent, Mr Tunzelmann, who claims he is entitled to a share of the commission from the Shallue – McIntyre transaction. The first respondent is PGG Wrightson Real Estate Ltd and the appellant is second respondent and Mr Tunzelmann's alleged agency in that transaction is the same agency that PGG Wrightson relies upon in its complaint in these proceedings now before us. Mr Chesterman therefore submits that any decision on the charges against the appellant, will involve a finding on a factual issue that is simultaneously before the District Court, namely, the scope and duration of PGG Wrightson's agency with Mr Shallue. Mr Chesterman submits for the appellant that the Notice of Claim is further evidence in support of his first submission that the subject matter of the complaint is a civil dispute and not within our jurisdiction.

[74] We agree with Mr Chesterman that this is an appeal against the exercise of a discretion so that the criteria for a successful appeal are that the appellant show an error of law or principle, the taking into account of irrelevant considerations, the failing to take into account of relevant considerations, or that the decision of the Complaints Assessment Committee (to lay charges) was plainly wrong. We also accept that, in addition, an appeal may be allowed on the grounds of breach of the principles of natural justice.

[75] For the appellants Mr Chesterman has put three submissions to us. First he submits that the subject matter of the charges falls outside the committee's jurisdiction and the purpose of the Act as set out in its s 3. He notes that there is no complaint by any of the three consumers involved; and submits there is no element of public protection; and that the complaint is solely that of PGG Wrightson and that this is a civil/commercial matter for determination by the civil courts.

[76] Mr Chesterman's second submission is that the Committee's procedure leading to its decision to lay the said charges breached the principles of natural justice as codified in s 84(1) of the Act in that there was a failure to provide an opportunity for the appellant to be heard; failure to provide prior notice to him of the charges against him; predetermination of the outcome; and failure to rely upon and seek out probative evidence.

[77] Thirdly, Mr Chesterman submitted that the decision of the Committee to lay the charges was plainly wrong, erred in law or principle, took account of irrelevant considerations; and failed to take into account relevant considerations and that, in particular, there is positive evidence to disprove the charges and there is no evidence upon which we could reasonably uphold them.

Supporting Detail to Submissions for the Appellant

[78] Mr Chesterman helpfully expanded on those submissions with quite detailed argument and we generally cover some of that as follows. He submits that the complaint against Mr Morgan has transformed from protection of the consumers, to protection of PGGW. He puts it that the original complaints, which clearly focused on consumer protection, and to which Mr Morgan was asked to respond, were framed in the investigator's email of 4 October 2012.

Mr Morgan's responses were that he provided full disclosure to the vendor; and that he was not prohibited from receiving the fee or commission because the Shallue-McIntyre and the Shallue-Denize agreements were different transactions. In addition Mr Morgan provided what he considered to be "arbitration services'. Rather than dismiss the complaint at this point, the CAC reframed them. Mr Chesterman states that the contents of these new charges were never put to Mr Morgan, and make no practical sense in light of the consumers interviews with the CAC and in the light of s 3 of the Act; and that the new charges, have one purpose, which is to protect PGGW's interests.

[79] He submits that the fact the CAC had to reframe the charges with a focus on PGGW and its business, is strongly evident of this being a civil and commercial dispute which should properly be pursued in the Courts, not in this Tribunal."

[80] Mr Chesterman continues:

> "18. It appears PGGW's grievance is essentially that Mr Morgan received this fee from Mr Denize for his services without disclosing the fact to PGGW or sharing that commission with them. The level of personal affront PGGW has taken with Mr Morgan's actions is apparent from its solicitor's opinion claiming breach of the Secret Commission Act, and is also evident in its surrounding actions; hiring a private investigator to carry out a 3 week 'secret' investigation described as 'Operation Crossfire'; its preparation of a 175 page complaint file; flying two of its senior sale persons to Wellington to meet for 2 hours with the REAA's solicitor, Mr Sawyers, and two senior members of the REAA; paying solicitors for a legal opinion and providing ongoing submission to the REAA in support of charges of misconduct. PGGW's grievance may or may not have foundation, but that is not a matter for this Tribunal.
>
> 19. That this is solely a civil/commercial dispute is also evident from the fact that in order for the Tribunal to conclude upon the complaint, it would be required to interpret the nature of the contractual relationships between Mr Morgan, Diagonal Holdings Ltd ("DHL"), and PGGW ..."

[81] Mr Chesterman also submits:

> *"(d) Failure to act on or to attain probative evidence*
>
> 46. The CAC has failed to act on clear and probative evidence before it. In answer to the initial allegations the evidence overwhelmingly supported the dismissal of the complaint. This included:
>
> 46.1. The interview of the consumers and the relevant content set out in the chronology above;
>
> 46.2 The signed statement from the consumers;
>
> 46.3 The contracts and agency agreements. The legal situation was clear: any PGGW agency with the Shallues expired in August 2011 when the Shallue-McIntyre deal went unconditional and PGGW were paid their commission; PGGW had no agency with Mr Denize; the Shallue-McIntyre and Shallue-Denize deals were different transactions (accepted by PGGW in its letter to the REAA of 10.12.12); Mr Morgan through his supplementary contract was an independent contractor, and was entitled to carry out work such as this outside the terms of his relationship with PGGW; Mr Morgan was not carrying out usual real estate agent work.

Given the complexities of the transactions and long history, it is submitted that there was an onus upon the CAC to source all relevant contractual documentation, which it did not do. Mr Morgan has now sourced and attached to his affidavit documents which support dismissal of the charges. He has provided a copy of a sale and purchase agreement in the Shallue-Denize transaction from the Shallue's solicitors, which shows the PGGW logo crossed out. He has provided the contract from Shallue-McIntyre transaction and correspondence which show it went unconditional on 3 August 2011, after which point PGGW no longer had any agency; he has provided a copy of the final Shallue-McIntyre sale and purchase agreement which shows that Mr Shallue was not in an agency with PGGW.

A final matter in respect of probative evidence is that the CAC received in and considered legal and factual submission from the complainant urging a finding of misconduct. It is not appropriate for the complainant to have been urging any such finding, its role was simply to provide facts. Counsel for Mr Morgan objected to this process on repeated occasions and requested the PGGW submission, including Duncan Cotterill's legal opinion, be struck from the record, however, the CAC did not respond to this request or even acknowledge the objection. It is submitted that by

allowing this material before it, the CAC gave weight to information that was not probative and was inappropriate for it to consider. The fact charges of misconduct were laid, in light of the evidence before it, in counsel's submission indicates the PGGW material was given inappropriate weight".

[82] With regard to the specific charges, Mr Chesterman submits:

*"**(i) Charge 1:***

50. It is submitted that Charge 1 cannot possibly succeed.

51. It is premised on there being an active agency agreement between the Shallues and PGGW. However the evidence is clear that no agency agreement was in place between PGGW and the Shallues/WDL:

51.1 There are two potential agency agreements PGGW relies upon (which one is not stated in the charge). Neither contract could possibly have been in force after 3 August 2012 when the Shallue-Denize transaction went unconditional and PGGW was paid its commission. In addition, PGGW admits it would not be seeking any further commission, nor could it, because it had no agency agreement with the Shallues.

51.2 On another analysis, the first agency agreement expired after 12 months in May 2012, or was terminated, and the second agency agreement of 24/6/13 was only ever conditional upon the cancellation of the McIntyre transaction, which did not occur until July 2013. Further, the second agreement was conditional only for six months and had expired by 24 February 2013. However, the appellant's position is that the agency agreements between PGGW and Shallue terminated upon unconditionality and payment of commission in August 2011.

52. The further reasons the charge also cannot succeed are:

52.1. Mr Denize was not a client of PGGW, and PGGW had no agency with him, it was he that paid the commission and his agency that is relevant;

52.2. The Shallue-Denize transaction was a different transaction from the Shallue-McIntyre transaction, different parties, different land area, and in addition, by the time it proceeded, the PGGW agency was over from 3 August 2012 when it had been

paid its commission. PGGW has properly conceded this in its letter to the REAA of 10.12.22.

52.3. Under Mr Morgan's contract with PGGW, which was through Diagonal Holdings, he was entitled as an independent contractor to engage in work outside of his PGGW work;

52.4. The work carried out by Mr Morgan was no unusual real estate agent work, the parties had already met each other and commenced negotiations on price. Mr Morgan did not receive the deposit or introduce the parties, he assisted in final negotiations. ...

(ii) Charge 2

54. It is submitted that Charge 2 cannot possibly succeed.

55. In response to particular 'a': It is submitted that there was no need for Mr Morgan to ensure any previous agency agreement was at an end, firstly because the agency agreement of PGGWs had ended so for what purpose would Mr Morgan check that established fat? Further, it is not even clear in what way 'checking' a terminated agency agreement is an obligation under the Act or Regulations. This charge makes no sense and it is further submitted:

55.1. The Denize-Shallue transaction was a different transaction from Shallue-McIntyre, there was no need for Mr Morgan to check on anything;

55.2 Mr Morgan acted for and was paid by Mr Denize, with whom PGGW had no agency and never had an agency;

55.3. Mr Morgan was the primary agent from PGGW involved and knew the agency position, he did not need to check it;

55.4. Mr Morgan's contractual relationship with PGGW and the nature of the work he provided to Mr Denize meant that checking the situation with PGGW was not necessary. He was acting as negotiation/arbitrator for someone who was not PGGW's client in respect of a transaction in relation to which PGGW had no agency;

55.5. This allegation, even if proved (which it can't be) would not amount to a breach of the Act or Rules. It most certainly would not amount to 'serious incompetence or serious negligence'.

56. In respect of particular ‘b’: Failure to disclose in writing to the vendor that payment would be made by the purchaser:

56.1. This was a separate transaction from the Shallue-McIntyre transaction and as such there was no obligation under the Act or the Regulations to make disclosure ‘in writing’ to the vendor;

56.2. Further, full disclosure was made to the vendor, orally, at the ‘negotiation/arbitration meeting’ attended by the vendor, purchaser and Mr Morgan. He knew Mr Morgan acted for Denize and would be paid by him. The disclosure by Mr Morgan is confirmed in the interview of the Shallues and Mr Denize by the CAC investigator, and by a written statement, which they signed. There is no doubt that the vendor was fully aware that Mr Morgan acted for Mr Denize and would be paid by him, and so there has been substantial compliance with any such obligation;

56.3. In any case, the services being provided by Mr Morgan were ‘negotiation assistance’/ arbitration, to help the parties move on from their impasse, in such circumstances any disclosure in writing is not required;

56.4. In the circumstances, where there has been full disclosure and no disadvantage to the parties, and no complaint by the consumer, and harm to them or to PGGW, this is a situation, where even if there were a ‘technical breach’ (which is denied), this must properly have been approached by the CAC as being so insignificant so as not to be the subject of charges and the attendant expenditure of tax payers money. It is submitted that there is no possibility these factual circumstances could amount to serious incompetence or negligence.

57. In response to particular ‘c’: PGGW’s logo on a draft agreement creating a ‘risk’ of the Shallues being liable to PGGW for a commission;

57.1. Mr Morgan has provided an answer to this allegation by sourcing a copy of the Denize-Shallue sale and purchase agreement from the Shallue’s solicitors, which shows the PGGW logo to be crossed out [See Affidavit at Exhibit ‘H’];

57.2. Mr Morgan’s oversight in using a draft agreement with the PGGW logo did not create any risk of exposing the Shallues to liability for a commission, for the following reasons:

57.2.1. PGGW had no agency with Mr Shallue – this expired on 3 August 2012 when PGGW was paid its commission;

57.2.2. It was abundantly clear between Mr Morgan, Mr Shallue and Mr Denize that Mr Shallue was not liable for any commission – if PGGW sued for commission it could not counter the evidence of these witnesses and the lack of an agency agreement;

57.2.3. PGGW confirmed to Mr Shallue it would seek no further commission from him following the payment of the commission after 3 August 2012;

57.2.4. In these circumstances, the fact of PGGW's logo inadvertently ending up on a draft agreement, would give PGGW no legal basis for claiming a commission, and so would create no risk for the Shallues. It is further submitted that in the context of the parties shared understanding of the situation, the logo on the draft agreement was inconsequential, of no impact on any party, and a simple oversight which was cured by the Shallues solicitor crossing it out, and could not possibly amount to serious incompetencies or serious negligence.

58. In response to particular 'd': The purchaser's agency agreement:

58.1. It is submitted that the requirements relating to agency agreements do not apply, because Mr Morgan provided 'negotiation/arbitration' services in respect a deal already under way between purchaser and vendor.

58.2. However, even if they do, Mr Morgan substantively complied with the requirements such that there is no proper foundation for a complaint by PGGW.

58.3. In response to 'd(i)', the agency agreement was sent by email from Mr Morgan and that fact amounts to compliance with any requirement that the agreement be signed by Mr Morgan;

58.4. In response to 'd(ii)', the fee was accurately described as being 1% of the sale price which complies with any obligation to provide an estimate;

58.5. In respect of ‘d(iii)’, this was not standard agency work, and the purchaser was legally represented.

58.6. In respect of all allegations under ‘d’, it is highly relevant that there is no complaint from the purchaser and no disadvantage to him or to PGGW by any of the alleged breaches, in addition there was substantive compliance.

58.7. It is submitted that there is no possibility that the charges alleged at ‘d’, could on the evidence, amount to serious incompetence or serious negligence. ...”

Our conclusions

[83] The Authority submits that there is a prima facie case of misconduct against Mr Morgan on the papers and that both charges should proceed to hearing, but that whether Mr Morgan's actions are ultimately proved to amount to misconduct, unsatisfactory conduct, or neither, should be for us to determine after hearing all the evidence at the substantive hearing.

[84] Under s 110(4) of the Act, if, after hearing a charge of misconduct against a licensee, we are satisfied that the licensee, although not guilty of misconduct, is guilty of unsatisfactory conduct, we may make that finding and any order available to a Complaints Assessment Committee under s 93 of the Act.

[85] For present purposes, we broadly agree with Ms MacGibbons’ submissions for the Authority. At present we cannot be satisfied that the Committee has erred at law, has taken into account irrelevant considerations, overlooked relevant considerations, or been plainly wrong in its decision to lay charges. The subject matter of these charges was not outside the Committee’s jurisdiction and is within our jurisdiction; the conduct of the licensee appellant is in issue.

[86] We consider that there are a number of important evidential issues to be determined before there can be a decision whether, on the balance of probabilities, the charges have been proved. It seems to us that if the evidence adduced to us on behalf of the prosecution (i.e. on behalf of the present respondent) were to be accepted as accurate, then the prosecution would establish each essential item in the alleged offending conduct set out in the charges in terms of it

amounting to misconduct under s 73(a) and (b) of the Act. At this point that evidence does not seem inherently incredible and could well be true and accurate.

[87] Indeed, we feel as we concluded in the *Miller v REAA and McAtamney* (supra):

> "[35] Simply put, a complaint has been made to the Authority which, having cause to be carried out what appears to be a 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. ..."

[88] Accordingly, we find that the standard of proof for a no case to answer application as is being made by the present applicant (the substantive defendant), is not made out. The prosecution has established a prima facie case in terms of the charges against the appellant as set out above. The present appeal is dismissed and the prosecution fixture now set for 12 to 16 May 2014 at Auckland must proceed.

_____
Judge P F Barber – Chairperson

_____
Ms N Dangen – Member

_____
Ms C A Sandelin - Member