

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

**BETWEEN** **REAL ESTATE AGENTS AUTHORITY (CAC20004)**

**AND** **IVAN KOLICH**  
First Defendant

**AND** **VIJAY VITHAL**  
Second Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport QC – Chairperson  
Ms C Sandelin – Member  
Mr G Denley – Member

**HEARD** at WELLINGTON on 7 & 8 April 2014

**APPEARANCES**

Mr L Clancy for the Real Estate Agents Authority  
Ms McKeown and Mr P Gillespie for Mr Kolich  
Mr V Vithal on his own behalf

**DECISION OF THE TRIBUNAL**

[1] Mr Vithal and Mr Kolich face two charges. The charges are as follows:

**Charge 1**

Complaints Assessment Committee 20004 (CAC 20004) charges Vijay Vithal and Ivan Kolich (Defendants) with misconduct under s 73(a) of the Real Estate Agents Act 2008 (Act), that their conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

**Particulars:**

On or about 31 October 2011, Ivan Kolich, as president of the Croatian Cultural Society Wellington Incorporated (Society) signed an agreement for sale and purchase for the sale of a property owned by the Society at 259 Ohiro Road, Brooklyn (Property), to the Tai Sui Fong Trust and/or nominee (Purchaser) for \$280,000.

The Purchaser was introduced to the Property by Vijay Vithal and the agreement for sale and purchase was prepared by Mr Vithal. There was no agency agreement in place between Mr Vithal and the Society and no appraisal was provided. The agreement was expressed as being a “*private treaty*”.

Mr Vithal issued an invoice to the Society for \$10,000 for a “*consultant fee*” in respect of the transaction and Mr Kolich procured a cash cheque in that amount from the treasurer of the Society and provided it to Mr Vithal.

Without the knowledge or consent of the Society’s governing committee, the Defendants agreed that part of the \$10,000 fee paid to Mr Vithal would be returned to Mr Kolich for his own use.

### Charge 2

CAC 20004 further charges Vijay Vithal with misconduct under s 73(c) of the Act, in that his conduct consists of a wilful or reckless contravention of the Act and/or the Real Estate Agent Act (Professional Conduct and Client Care) Rules 2009.

#### **Particulars:**

- (a) Breach of Rule 9.15: offering the Property for sale without a written agency agreement; and/or,
- (b) Breach of Rule 9.5: failing to provide a written appraisal of the Property to the Society; and/or;
- (c) Breach of s 126 of the Act: claiming a fee for acting on the sale of the Property without a written agency agreement.

Charge 1 is directed to both Mr Kolich and Mr Vithal and Charge 2 to Mr Vithal alone.

#### ***Discussion***

[2] The events that are the subject of these Charges arose out of the sale of a property at 259 Ohiro Road, Brooklyn, Wellington. This property was owned by the Croatian Cultural Society Wellington Incorporated (the Society). Mr Kolich was then the President. Mr Kolich was also a licensed real estate agent and worked for Pegasus Realty in Wellington. He had been an agent for approximately six years and worked as a property manager. He did not work as a commercial or residential real estate agent.

[3] For some time the Society had been considering selling the property at Ohiro Road, Brooklyn as it was falling into disrepair. The members of the Croatian Cultural Society Committee had discussed the sale of the property. The minutes of the Committee meetings in 2011 show that on 8 June 2011 the Committee decided:

*“Ivan [Kolich] to ask around his colleagues to keep an eye open for anyone in the market for a site. Once any interest we will have to get a private valuation as part of the selling process.”*

[4] The minutes of the next meeting are dated 29 September 2011. They record as follows:

*“Further discussion regarding Brooklyn Club followed with Ivan Kolich saying he had an interest from a client [later corrected to be from an agent]. He asked the Committee their thoughts on taking it further. Milan Vegas said he preferred to get a valuation, also we thought maybe put it off until New Year in view of the market. We all then decided to let Ivan take it further and see if any interest. We all thought*

*a figure of around \$270 so Ivan could contact Vlad, Drago and as many Committee as possible if any movement. If any success we would then contact the main older members of that club and keep them informed. We do have the AGM backing to go down this road when we see fit. The tenant has indicated she will now start looking for accommodation once we increased her rent so that is a bonus. The above comments were the general consensus of the majority of the Committee."*

[5] Sometime between that date and 3 October 2011 Mr Kolich received an agreement for sale and purchase for the property from Mr Vithal. The agreement was a private treaty and was for the sum of \$280,000. The purchaser was shown as the 'Tai Sui Fong Trust or nominee'. Mr Kolich telephoned approximately six members of the Committee and asked them to consent to the sale, which they did. There was some discussion with some members about how much would be paid to the agent. Some Committee members apparently reported that they thought the price was \$270,000, however others reported that it would be \$270,000 net [of commission]. In fact the arrangement that Mr Kolich had reached was that Mr Vithal would be paid \$10,000 and the Society would receive \$270,000. Mr Vithal immediately prepared an invoice dated 1 October 2011 for \$10,000 for a 'consultant fee'. Mr Kolich took this to the Croatian Cultural Society on a Sunday night and had the Treasurer provide him with a cheque for this sum. This was subsequently paid to Mr Vithal who banked it.

[6] Problems arose when other members of the Committee began to question the nature and probity of the deal that had been done. There followed a great deal of internal dispute within the Society. Eventually the Society agreed that the price that Mr Kolich had obtained for the property was a good one (two other Committee members having subsequently obtained valuations) but the vexed question of Mr Vithal and his "*commission*" remained. The Society had instructed David Robinson, the club's usual solicitor, to assist them through these difficulties. The Committee were also concerned about the agreement being signed without the formal approval of the Committee, and about the fact that Mr Kolich had listed Mr Peter Brindsley as a solicitor rather than Mr Robinson (the Society's usual solicitor). Mr Robinson told the Tribunal he went to a meeting on 18 October where he provided an opinion on the contract to the Committee members.

[7] In November Mr Robinson went to a further Committee meeting where he was instructed that he should write to Mr Vithal seeking an explanation as to why certain sections of the Real Estate Agents Act 2008 had not been complied with. The Society's concerns were that Mr Vithal had not executed a listing agreement with the Society, nor had the cheque for the commission been paid to his agency but rather to Mr Vithal directly. Mr Vithal works as a licensed salesperson for ReMax, Wellington. Mr Vithal telephoned Mr Robinson in response to the letter he received, and Mr Robinson made a file note of this conversation. In this file note he records that Mr Vithal had said that:

*"Ivan wanted to do a private deal, wanted a backhander done, 50% a fee for it but hasn't actually paid him yet. He said he not had any money yet and it was to be done afterwards. He suggested he pay back \$5,000 to the club." ...*

[8] In early December 2011 in an e-mail exchange between him and Mr Robinson Mr Vithal claimed that he was entitled to a fee. He said that Mr Kolich told him that the sale was legitimate, Mr Vithal said that the property was sold for a good price and he convinced the new owners to proceed with the sale at the price of \$280,000. He offered to repay to the Society the sum of \$5,000 on 21 December 2011. The Tribunal understands that no money has yet been refunded by Mr Vithal. Mr Vithal has continued

to insist that he had always intended to receive only \$5,000 and the balance was to be paid to Mr Kolich.

[9] Mr Kolich denies the accusations made by Mr Vithal and says that this arrangement did not happen. He did acknowledge that the subject of a reward had been discussed and that Mr Vithal had offered “*to look after him*” but he said that he declined. He admitted that he and his colleague (a Mr Vasan) had met with Mr Vithal after the contract was signed but denied telling Mr Vithal that he did not need to reply to correspondence.

[10] It is the assertion by Mr Vithal that Mr Kolich was to receive payment that forms the basis of the charge against Mr Kolich.

[11] The Tribunal heard a great deal of evidence about the dissent at the Society and the factions which had formed, some were pro Mr Kolich and some were against him. Each party appeared to have taken the fixed position and the views of those who supported Mr Kolich were that these claims (and the complaint to the REAA) were motivated only by a desire to hurt Mr Kolich.

[12] However the case is not concerned with any issue within the Society but whether or not there is sufficient proof to establish that Mr Kolich's and Mr Vithal's behaviour was misconduct under s 73. In order to make this decision the Tribunal must examine the evidence that we have heard, both written and oral, and determine whether or not Charge 1 has been established against Mr Kolich and Mr Vithal on the balance of probabilities. We will examine this evidence in more detail in paras [21] to [28] below.

[13] We consider Charge 2 first.

### Charge 2

[14] This is a charge faced by Mr Vithal alone and it charges him with misconduct under s 73(c) in that he:

- (a) Offered the property for sale without a written agency agreement (a breach of Rule 9.15);
- (b) Failed to provide a written appraisal of the property (a breach of Rule 9.5); and
- (c) Breached s 126 he claimed a fee for acting on the sale of the property without a written agency agreement.

[15] Mr Vithal said that he had been told by Mr Kolich that the property was listed with Pegasus Realty, that therefore there was no need for an agency agreement. He said he was receiving a fee for finding the purchaser. He said that he did not complete the sale and purchase agreement and that he did not write the words “*private treaty*” on the document.

[16] Having heard Mr Vithal and having examined the agreement for sale and purchase and read his e-mails and the file note of his correspondence with Mr Robinson we conclude that Charge 2 has been established against Mr Vithal.

[17] Our reasons are there was no written agency agreement and that we find that Mr Vithal could not have had any real belief that the property was listed with Pegasus. His evidence in claiming this was that:

- (i) He had had a subsequent conversation with a Mr Vasan, (a real estate agent working with Mr Kolich) who was interested in the property which made him think that the property was listed with Pegasus Realty; and
- (ii) He claimed that Mr Kolich told him that there was an agency agreement in place.

[18] However the agreement itself (filled in by Mr Vithal) records the sale as “*private treaty*”. Mr Vithal says he did not fill in these words. We reject this evidence. The writing is exactly the same as Mr Vithal’s on the rest of the agreement. Further if, up until this point Mr Vithal had believed that there was an agency agreement entered into by the Society with Pegasus then it does seem unbelievable that Mr Vithal would not have inserted the name of that agency in the agreement and then attempted to have reached some commission-sharing arrangement with Pegasus over the transaction. The fact that he did nothing, wrote “*private treaty*” and then subsequently rendered an invoice [dated earlier than the agreement] for what he described as a consultancy fee lead us to conclude his evidence should not be accepted.

[19] Further there was no written appraisal for the property. It appears that the price was fixed (by either Mr Kolich or on the Committee’s comments in September 2011 or with Mr Vithal). No attempt was made to obtain an appraisal and nor does Mr Vithal claim that he was instructed to do so or attempted to do so.

[20] Having made these findings above it follows therefore that Mr Vithal was in breach of s 126 when he received the payment from the Croatian Cultural Society, for his role in assisting in negotiating the sale. Charge 2 has therefore been established against Mr Vithal and this conduct amounts to misconduct under s 73.

### ***Analysis of the evidence regarding Charge 1***

[21] Charge 1 charges Mr Kolich and Mr Vithal with a breach of s 73. Mr Kolich was not acting as a licensed salesperson during the transaction and so in order for the Tribunal to have jurisdiction it must reach a finding that his behaviour was disgraceful conduct as required by s 73(a). A finding of disgraceful conduct has been discussed in a number of cases and as set out in *CAC v Downtown Apartments Limited*, [2010] NZREADT 6 at [48-59] the conduct must be a marked or serious departure from accepted standards.

[22] However if the evidence showed that Mr Kolich and Mr Vithal organised that Mr Kolich would receive a cut of the commission for Mr Kolich’s introduction then the Tribunal would have no difficulty in finding that this amounted to disgraceful conduct.

[23] However there is no direct evidence other than Mr Vithal’s that Mr Kolich reached an agreement with Mr Vithal that there would be a payment. What the Tribunal have is a variety of circumstantial pieces of evidence which need to be analysed.

[24] The evidence in support of there being an agreement concerning payment is as follows:

- The unusually rapid nature of the transaction. The transaction appears to have been put together between the Committee meeting on 29 September and between 1 or 3 October (invoice dated 1 October, agreement dated 3 October). The price agreed was that discussed by the Committee at its meeting on

29 September. There was no negotiation by the Society with the purchaser at all.

- A solicitor whose name was placed in the agreement was not the usual solicitor for the Society. Mr Kolich explains that by saying this solicitor would be more handy for him and able to deal with the conveyancing law more simply than Mr Robinson.
- The very unusual nature of the invoice rendered by Mr Vithal and paid promptly as a cash cheque without apparent concern or comment from Mr Kolich.
- The fact that Mr Kolich asked Mr Krzanic to provide him with a cheque made out to “cash” on a Sunday night when they were alone.
- The payment of the commission (and how reached) was not clearly clarified by Mr Kolich with all Committee members he contacted.
- The comments made by Mr Vithal contemporaneously to Mr Robinson [claiming an agreement to pay part of the fee to Mr Kolich].
- The evidence given by Mr Vithal that Mr Kolich sought a payment.
- The comments made by Mr Vasan in evidence: he acknowledged that Mr Vithal had made a comment that Mr Kolich needed “*to be looked after*” and there should be a payment to him.
- The evidence of Mr Vithal that Mr Vasan raised a question of payment/looking after Mr Kolich.
- Mr Kolich’s own evidence that the question of a payment to him had been raised by Mr Vasan to Mr Vithal, but that he had said nothing.

[25] As R Fisher QC said in his report to the Government on the compensation claim by David Bain to the Minister dated 13 December 2012:

“While an independent assessment of each item of evidence is part of the enquiry the ultimate determination of guilty or innocent turns on an assessment of all of those items viewed in combination. The fundamental principal is that the probative value of multiple items of evidence supporting the same factual allegation is greater in combination than the sum of the parts. As each item of evidence implicating the accused is aggregated, the probability of guilt increases exponentially. ... The usual analogy is strands in the rope explanation. Each strand of the evidence gains strength from the other so that whilst an individual strength may be insufficient to support the load (in this case proof of innocence) the combination of them may be enough.”

[26] The Tribunal therefore have to consider all of the circumstantial evidence taken together to see whether it establishes Charge 1.

[27] Counsel for the Real Estate Agents Authority submitted that certain issues and questions were relevant to the Charge:

*“4.3 The Committee submits that the evidence is more consistent with an agreement to avoid a formal commission and instead split a direct fee with the accounts given by either Defendant. In particular:*

- (a) If Pelorus held the listing (as Mr Vithal claims he believed), why did the agreement say “private treaty” and why did Pelorus’ details not appear on it?*
- (b) Mr Vithal prepared the sale and purchase agreement not Mr Kolich, who Mr Vithal says he believed was the listing agent.*
- (c) The deposit was paid direct to the Society, not to the Pelorus trust account.*
- (d) The \$10,000 fee was paid directly to Mr Vithal by the Society, not Pelorus and was well in excess of the amount that might be expected on a conjunctional sale commission split on a sale of \$280,000.*
- (e) Mr Vithal accepts that Leaders would generally be entitled to 65 per cent of his listing and selling fees, however the \$10,000 was paid directly to him and banked into his personal account.*
- (f) The invoice issued by Mr Vithal referred to a “consultant fee” rather than a commission split or conjunctional sale fee. It was not on Leaders stationery and was addressed to the Society rather than Pelorus.*
- (g) Mr Kolich requested a cash cheque to pay the \$10,000 fee, not a cheque made payable to Mr Vithal or Leaders.*
- (h) If Mr Kolich did not intend to receive a benefit from paying Mr Vithal directly, why did he not sign an agency agreement and pay Leaders commission in the normal way? As a licensee, Mr Kolich would be well aware that was the normal procedure.*
- (i) Mr Vithal stated to Mr Robinson that Mr Kolich “wanted a back-hander done” when the fee was first discussed and that he knew he (Mr Vithal) was “in the shit” over what had occurred.<sup>12</sup>*
- (j) At a Society committee meeting on 17 November 2011, Mr Kolich stated that Mr Vithal had offered to “look after him”, but he had declined.”<sup>13</sup>*

[28] The Defendant’s solicitor denied that there was any evidence to support the claim that there was any agreement to pay Mr Kolich. In her closing submissions Ms McKeown said in summary:

- The complaint about Mr Kolich was motivated by ill will within the Croatian Cultural Society starting with the anonymous complaint.*
- The purchaser suffered no loss in relation to the purchase.*
- Mr Kolich arranged to sign the agreement for sale and purchase on his own but Mr Kolich told the Committee on 29 September 2011 that there was someone who was interested. Mr Kolich received the agreement to take it further from the Committee and see if anyone was interested.*

- *Mr Kolich insisted on a price of \$270,000 net which he thought that the Committee had agreed upon and organised the commission that ensured that the Committee received \$270,000 net. He obtained approval from the Committee to proceed, he signed the agreement for sale and purchase, he got the deposit cheque and banked it. He then took the agreement to Mr Brinsley and received and paid Mr Vithal's invoice.*
- *Ms McKeown suggested the Tribunal should give little weight to Mr Vithal's evidence because of a lack of independence and credibility and the way in which his evidence has changed. She listed the ways in which Mr Vithal's evidence was inconsistent [this related mainly to the question of whether or not Pelorus Real Estate had been involved or were thought to be involved in the sale and who drew up the agreement for sale and purchase].*
- *Mr Vithal's evidence about the agreement and how the commission was organised was vague.*
- *Mr Kolich has denied making any agreement with Mr Vithal to receive any kick-back.*
- *Mr Kolich's explanation that it was agreed that Mr Vithal would receive the \$10,000 is more plausible and is supported by the fact that Mr Vithal has never paid any part of the money to Mr Kolich and there is a lack of the motive on Mr Kolich's part.*
- *A lack of motive.*

[29] The Tribunal's job therefore is to examine all of this consequential evidence and counsels' submissions. We remind ourselves that serious allegations such as this while to be determined on the civil burden of proof require more evidence before the Tribunal can be satisfied that the conduct took place.

[31] Having considered carefully all the evidence the Tribunal are left with an abiding suspicion that something was not proper in this transaction. It was a hurried, non transparent deal put together by Mr Vithal and Mr Kolich. The agreement to pay Mr Vithal \$10,000 was highly unusual and it is also very difficult to understand why Mr Kolich would have agreed to have paid Mr Vithal \$10,000 for what Mr Vithal did. Mr Kolich could offer no satisfactory reason for how this sum had been agreed. Mr Vithal's evidence was unreliable on many points and changed on many matters. For this reason we have found him guilty of misconduct under Charge 2.

---

<sup>12</sup> Brief of evidence of David Robinson at [3.4] to [3.7] and hearing bundle p.179.

<sup>13</sup> Brief of evidence of David Robinson at [3.9].



However he has consistently maintained that he agreed to return part of the fee to Mr Kolich. However after having carefully analysed all of the evidence and despite our concerns we do not consider that evidence has reached the level of proof necessary for the Tribunal to make a finding that on the balance of probabilities Mr Kolich agreed to receive a back-handed payment from Mr Vithal. Mr Kolich's behaviour was unusual, unduly secretive and there was a distinct lack of clarity as to the involvement of Mr Vithal and how the commission/payment arrangement was reached which he has still not adequately explained. But however suspicious we consider the transaction there is insufficient evidence direct or consequential to enable us to make a finding of disgraceful conduct against Mr Kolich. In saying this we note that we do not consider we can rely solely on Mr Vithal's evidence. His evidence is unreliable. In these circumstances therefore we dismiss Charge 1 against Mr Kolich. We also dismiss Charge 1 against Mr Vithal as we consider that the same considerations need to apply to the charge against him. Our concerns about his conduct are adequately met by finding him guilty of Charge 2.

[30] The Tribunal seeks submissions from the Real Estate Agents Authority and Mr Vithal on penalty. The Real Estate Agents Authority to file submissions within 14 days and Mr Vithal has 14 days to reply. The Authority may file a reply three days thereafter.

[31] An interim order suppressing Mr Kolich's name and other identifying details including his ethnic background and the name and identifying details of the Croatian Cultural Society Incorporated is in place. In the circumstances of this decision, the Tribunal consider that the interim order should be discharged and no final orders made. However, as parties have not had the opportunity to make submissions on this point, counsel have the opportunity to file submissions on the issue of name suppression in accordance with the timetable set out at para [30] i.e. 14 days for REAA submissions and 14 days for Mr Kolich and Mr Vithal to reply and a final right to reply to the REAA three days later.

[32] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

**DATED** at AUCKLAND this 28<sup>th</sup> day of May 2014

---

Ms K Davenport QC  
Chairperson

---

Ms C Sandelin  
Member

---

Mr G Denley  
Member