BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 52

READT 010/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**CHRISTOPHER GOLLINS** of Wellington, Real Estate Agent
	Appellant/ Defendant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	Respondent/Prosecutor

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 10 July 2014

COUNSEL

Ms N Pender for the appellant/defendant
Mr L Clancy and Ms J Pridgeon, for the respondent/prosecutor

DECISION OF THE TRIBUNAL ON APPLICATION FOR NO CASE TO ANSWER

The Issue

[1] The appellant has been charged by the Authority with misconduct in terms of s.73 of the Real Estate Agents Act 2008 ("the Act") as particularised below but submits that there is no prima facie case to support those charges and that his relevant conduct was not serious enough to warrant charges being laid against him in our forum.

[2] The licensee appeals against the Authority's determination to lay the charges on the following grounds, namely:

[a] There was a breach of natural justice in that he was not given a proper opportunity to respond to all allegations against him nor given copies of all relevant information;

[b] There is no prima facie case to support the charges of misconduct;

[c] The defendant's conduct was not serious enough to warrant charges being laid with the Tribunal;

[d] As an additional ground, there is no prima facie case to support the charge of unsatisfactory conduct.

The Charges

[3] The charges were laid on 24 January 2014 and read as follows:

*"Following a complaint by Richard Findlay (**complainant**), Complaints Assessment Committee 20002 (**CAC 20002**) charges Christopher Gollins (**the licensee**) as follows:*

Charge 1

*CAC 20002 charges the licensee 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:

*i. When queried as to his entitlement to commission by a client, Foodstuffs Properties (Wellington) Limited (**the client**), the licensee represented to the client by email on 24 September 2012 that an agency agreement agreeing to payment of the commission had been signed on 9 February 2010.*

ii. The licensee attached a copy of the agency agreement to the email of 24 September 2012. The agency agreement had been created in 2012 but backdated to 9 February 2010 and signed on the client's behalf by a person who was no longer employed by the client.

Charge 2

CAC 20002 charges the licensee with misconduct under s 73(c)(i) of the Act in that his conduct wilfully or recklessly contravened s 126 of the Act.

Particulars:

i. The licensee claimed entitlement to commission from the client for real estate agency work performed at a time when no written agency agreement existed between the licensee (or the agency he was employed by) and the client.

Charge 3 (in the alternative to Charge 2)

CAC 20002 charges the licensee with misconduct under s 73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars:

The Committee repeats particular (i) of Charge 2.

Charge 4

If, after hearing the above charges against the licensee, the Tribunal finds that the licensee is not guilty of misconduct, the Committee alleges that the licensee has engaged in unsatisfactory conduct under s 72 of the Act. The Committee relies on the particulars set out in Charges 1, 2 and 3 above."

The Scope of this Application

[4] In *Brown v CAC and Wealleans* [2011] NZREADT 42 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."*

[5] In *Miller v REAA & McAtamney* [2012] NZ READT 25 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) ….."*

[6] In short, the question on this appeal is limited to whether the Committee was correct to find that the licensee has a case to answer on the charges so that the allegations in the charges should be considered by us at a substantive hearing.

The Alleged Background Facts

[7] At the time of the events leading to the complaint, the licensee was employed by Commercial Consultants Ltd, trading as Colliers International.

[8] The licensee had enjoyed a long-term professional working relationship with Foodstuffs Wellington Cooperative Society Ltd for over 20 years by facilitating property purchases, sales, and leasing agreements. The licensee worked closely with a Property Development Manager at Foodstuffs, Wayne O'Styke, and also with a property manager there , Mark Lash.

[9] In 2010 the licensee was involved in confidential work scouting a site in Whitby, North Wellington, for Foodstuffs, and he approached Mr O'Styke about a potential site owned by David Bradford of Whitby Coastal Estate Ltd. The licensee helped to facilitate Foodstuffs' purchase of the site through a conditional sale and purchase agreement between Foodstuffs and Mr Bradford dated 14 September 2010.

[10] Clause 33.1 of that sale and purchase agreement provided that:

> *"The Purchaser shall be responsible for the Agents fees for the Licensed Real Estate Agent set out on the front and last page of this Agreement in respect of this sale notwithstanding any provision to the contrary in the General Terms."*

[11] In other words, Foodstuffs was responsible for the licensee's agency fees.

[12] There was no separate written agency agreement under which the licensee was authorised to undertake this real estate agency work for Foodstuffs. It was verbally agreed between Mr O'Styke and the licensee that Foodstuffs would pay commission at the usual fee of 2.5 per cent of price.

[13] On 17 September 2010, Mr Lash emailed the licensee noting that Foodstuffs had concluded a conditional sale and purchase agreement with Mr Bradford and confirming that Foodstuffs would pay the licensee's agency fees, but did not state how much.

[14] On 4 September 2012, almost two years later, that sale and purchase agreement became unconditional upon receiving resource consent.

[15] On 7 September 2012, the licensee emailed Mr Lash a draft invoice for the Colliers commission fee. On 9 September 2012, Mr Lash replied that all was in order and that the invoice should be submitted for final payment.

[16] On 18 September 2012, Mr Lash told the licensee that the new Foodstuffs Property Manager (who had taken over from Mr O'Styke), Martin Price, had queried the invoice.

[17] On 20 September 2012, Mr Lash, on behalf of Mr Price, emailed the licensee expressing Mr Price's concern that Colliers had not been involved for 18 months' prior to the date of the sale and purchase agreement and that the commission sought ($114,148 plus GST) was too high.

[18] Prior to receiving the licensee's invoice, Mr Price was unaware that Foodstuffs owed any commission to the licensee. In addition, Mr Price understood that it was not Foodstuffs' normal practice to engage brokers and buyers' agents.

[19] After receiving the email from Mr Lash, the licensee contacted Mr O'Styke, who now worked for another company, and advised him that Foodstuffs was disputing the commission. The licensee explained to Mr O'Styke that no formal written agency agreement had been completed between them in 2010. Mr O'Styke replied that he recalled discussing and agreeing to a commission payment at the time. Mr O'Styke agreed to sign a written agency agreement recording this, and the licensee arranged for him to do that in September 2012 but then backdated it to 9 February 2010.

[20] On 24 September 2012, the licensee replied to Mr Lash's email outlining his role in introducing Foodstuffs to the vendor and attached the backdated agency agreement. He stated that the backdated agency agreement had been "signed on February 9th 2010 at the Whitby café" after a meeting with Mr Bradford.

[21] Following this, the licensee asked Richard Findlay, the managing director of Colliers, to contact Mr Price to discuss the fee issue. Mr Findlay noticed that the backdated agency agreement had been signed on Colliers letterhead that did not exist until months after the purported signature date. When Mr Findlay queried this with the licensee, he acknowledged that it had been backdated.

The Definition of "Misconduct"

[22] "*Misconduct*" is defined in s.73 of the Act as follows:

> ***"73 Misconduct***
>
> *For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*
>
> *(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
>
> *(b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
>
> *(c) consists of a wilful or reckless contravention of—*
>
> *(i) this Act; or*
>
> *(ii) other Acts that apply to the conduct of licensees; or*
>
> *(iii) regulations or rules made under this Act; or*
>
> *(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

[23] The charges set out above rely respectively on ss.73(a), s.73(c)(i) and s.126, and s.73(b) of the Act. *"Unsatisfactory conduct"* is defined in s.72 of the Act.

[24] We also set out s.126 of the Act:-

> ***"126 No entitlement to commission or expenses without agency agreement***
>
> *(1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—*
>
> *(a) the work is performed under a written agency agreement signed by or on behalf of—*
>
> *(i) the client; and*
>
> *(ii) the agent; and*
>
> *(b) the agency agreement complies with any applicable requirements of any regulations made under section 156;*
>
> *and*
>
> *(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.*
>
> *(2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.*
>
> *(3) A court may not make an order described in subsection (2) unless satisfied that—*
>
> *(a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and*
>
> *(b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and*
>
> *(c) failure to make the order would be unjust.*
>
> *(4) This section overrides the Illegal Contracts Act 1970."*

The Stance of the Defendant

[25] It is submitted for the appellant that there is no case for him to answer because there is insufficient evidence to establish "*misconduct*" under s.73 of the Act. It is also submitted that the conduct in issue was not concerned with the carrying out of real estate agency work so that s.72 of the Act (which defines an offence of "*unsatisfactory conduct*") does not apply. A number of affidavits have been filed in

support of the present application and provide fairly detailed evidence on behalf of the appellant/licensee/defendant.

[26] The licensee has been a prominent commercial real estate agent in Wellington for more than 25 years and, for over 20 years of those, has had a close and trusting relationship with Foodstuffs. In particular, on an unpaid basis as to time, he would scout out vacant land which might be suitable for Foodstuffs to create retail outlets. For about the past 10 years he had been assisting Foodstuffs expand its presence in Whitby.

[27] In 2008 the appellant had approached a local land owner and developer, David Bradford of Whitby Coastal Estates Ltd about the possibility of available land at the former Duck Creek golf course in Whitby. There was no land available then but, two years later, Mr Bradford contacted Mr Gollins with an opportunity. Mr Gollins arranged a meeting with Foodstuffs' property managers and facilitated negotiations. A purchase transaction was completed on 14 September 2010 when Whitby Coastal Estates and Foodstuffs signed a sale and purchase agreement.

[28] Early in the negotiations, Mr O'Styke from Foodstuffs agreed with Mr Bradford that Foodstuffs would pay Colliers' and Mr Gollins' agency fee or commission. On 9 February 2010, at Whitby café, Mr O'Styke and Mr Gollins agreed that the commission rate would be 2.5%. This was the same commission rate that Foodstuffs had paid Mr Gollins over the previous six years on other transactions which he had facilitated. The September 2010 Sale and Purchase Agreement expressly stipulated that Mr Gollins of Colliers was the agent and that Foodstuffs would pay the agency fees.

[29] However, Mr Gollins did not arrange for Foodstuffs to sign an agency agreement in February 2010 because he did not believe that such an agreement was necessary for the type of investigatory work that he undertook for Foodstuffs.

[30] The September 2010 Sale and Purchase Agreement was conditional on the obtaining of various resource consents and the agency fee was not payable until these consents were granted. This was expected to take a few years and, on 17 September 2010, Mr Lash of Foodstuffs had offered to pay the commission in full or part. Mr Gollins declined this offer and, instead, waited for the sale to become unconditional. In the meantime, during the consent process, he assisted Foodstuffs with its dealings with the local Council and community groups. He was not paid for this additional work.

[31] In August 2012, resource consent was granted but was not to be issued until the appeal period expired. As covered above, in early September 2012, Mr Lash contacted Mr Gollins and asked him to send a draft invoice to fast track the approval process. Mr Gollins did so. By this stage, Mr O'Styke had left Foodstuffs and had been replaced as Group Manager by a Mr Marty Price. Mr Price became aware of the draft invoice and challenged Mr Gollins' right to be paid. It became clear to Mr Lash that Mr Price wanted an excuse not to pay Mr Gollins. Mr Lash privately warned Mr Gollins of the difficulties he was having with Mr Price before sending Mr Gollins a formal email, dictated by Mr Price, which alleged that Mr Gollins had not earned the commission.

[32] Mr Gollins was shocked at these developments. He reviewed his file and says that he only then realised that the Sale and Purchase Agreement was not sufficient to qualify as an agency agreement under the Act. He sought the advice of Mr O'Styke

who suggested that he backdate a listing or agency agreement to the date of the verbal agreement (apparently 9 February 2010) and that he, Mr O'Styke, would sign it. The agreement was signed by Mr O'Styke on 21 September 2012.

[33] Mr Gollins responded to Messrs Lash and Price on 24 September 2012 by email addressing the issues raised about the services he had provided to Foodstuffs. However, Mr Gollins also attached a copy of the agency agreement and stated that it had been signed on 9 February 2010.

[34] The next day, Mr Gollins sought advice from Mr Findlay, who was the Managing Director of Colliers. Mr Findlay took the file away and noticed that the agency agreement was not in the same format as those used by Colliers in 2010. He asked Mr Gollins when the agreement was signed. Mr Gollins freely admitted that the agreement had been signed a few days earlier and back-dated to the date of his verbal agreement with Mr O'Styke. Mr Findlay then sought legal advice which resulted in Colliers filing a notice of concern with the REAA and terminating Mr Gollins' services agreement.

[35] An investigation by the Authority of Mr Gollins' conduct in this transaction started in October 2012 and lasted 14 months. Mr Gollins was asked for a written response to specified questions, but was never interviewed.

DISCUSSION

[36] Ms Pender submits that there is no *prima facie* case to support the charges of misconduct; that the defendant's conduct was not serious enough to warrant charges being laid with us; and there is no *prima facie* case to support any allegation of unsatisfactory conduct.

[37] Ms Pender also submitted for Mr Gollins that there was a breach of natural justice in that the defendant was not given a proper opportunity to respond to all allegations against him nor given copies of all relevant information.

Is there a Prima Facie Case of Misconduct?

[38] The question for us to determine in an appeal of this kind is whether sufficient grounds existed for the CAC to find, under s.89, that a charge could be considered by us; or in other words, whether there is a case to answer.

[39] Mr Gollins readily admits that the said agency agreement was signed by Mr O'Styke on 21 September 2012 and backdated by Mr Gollins to 9 February 2010. However, it is put that the agency agreement simply affirmed the terms of the arrangement between Colliers and Foodstuffs which had been agreed at the earlier date.

[40] Ms Pender submits that all the evidence presented to us supports Mr Gollins' position that Foodstuffs had agreed to pay Colliers a commission of 2.5% for the Whitby transaction; and that neither Mr Gollins nor Mr O'Styke believed that they were doing anything illegitimate but they were simply attending to paperwork which should have been completed two years earlier.

[41] It is put that the back-dating of written agreements to align with a verbal contract is common in the property sector and that it also made sense for the agreement to be signed by the person with the requisite authority at the time of the verbal contract.

We doubt whether that is common practice but, in any case, it is an unacceptable and misleading practice.

[42] Mr Gollins accepts that he should not have represented to Mr Lash that the agency agreement had in fact been signed on 9 February 2010 and asserts that this was an uncharacteristic lapse of judgement, which he regrets. It is put for him that account should be taken of the unusually stressful circumstances that he was facing in that, after more than 20 years of a trusted working relationship with Foodstuffs, a new manager suddenly sought to challenge his professionalism and integrity; and, assessed objectively, Mr Gollins had reasonable grounds to believe that Mr Price intended to renege on his agreement with Foodstuffs.

[43] Ms Pender has also submitted that there is no evidence that Mr Gollins ever made a claim for commission or that he wilfully set out to breach s.126; that the email correspondence shows that Mr Gollins only ever submitted a draft invoice to Mr Lash at Foodstuffs' and (it is put) at the time that Mr Gollins first sent the draft invoice, he believed that the Sale and Purchase Agreement supported any claim to a commission.

[44] Ms Pender submits that the absence of a formal agency agreement in this case was clearly due to inadvertence. Mr Gollins has explained that he did not consider an agreement was necessary for the ongoing scoping work that he carried out for Foodstuffs; and other commercial clients. He also believed that the Sale and Purchase Agreement sufficiently covered the Whitby transaction. It does seem likely that there was inadvertence by Mr Gollins.

[45] It is also submitted for Mr Gollins that the commission charged was fair and reasonable under the circumstances; it was the rate agreed to by Mr O'Styke on behalf of Foodstuffs; it was consistent with commissions paid to Mr Gollins by Foodstuffs over the previous six years; and there is a body of evidence to support the fact that Mr Gollins provided an exceptional and valuable service to Foodstuffs including sworn affidavits from the managers at Foodstuffs with the most knowledge of the transaction and from the vendor, Mr Bradford, who is a respected land developer with over 40 years experience. We can accept those submissions about the commercial fairness of the commission sought by Mr Gollins.

[46] As Ms Pender puts it, the only person who has ever suggested otherwise is Mr Price but his "*sweeping and bald allegations*" (as she puts it) have never been backed up by a single piece of evidence. It is also put that there are sufficient grounds to indicate that Mr Price was not acting in good faith and that his liberal and frequent attacks on the reputations of Messrs Gollins, O'Styke and Lash are scurrilous. However, we are concerned with the conduct of Mr Gollins.

[47] Ms Pender also submits that, importantly, Mr Gollins is supported by the complainant, i.e. Mr Findlay of Colliers. According to a file note provided to the REAA, Mr Findlay disputed Mr Price's allegations that Messrs O'Styke and Gollins had an "*unhealthy relationship*" and that "*the fee was potentially being manipulated in some way*". Mr Findlay's response was:

> *"I mentioned to Martin that Chris had openly spoken about his involvement in the transaction over the past few years and I was confident that he had truly worked on the opportunity to the benefit of Foodstuffs.*

It was agreed that both Martin and I would review our own files and get back in contact.

Jim and I requested that Kathy Gamble, Colliers financial controller, print out all of the email correspondence between Chris, Wayne O'Styke, Mark Lash, Foodstuffs and David Bradford. Kathy provided two copies of the correspondence to Jim and I who are currently independently reviewing their content.

To date, other than the Agency Agreement, we have not found any suggestion of wrongdoing. To the contrary, there is considerable detail of a difficult, protracted purchase."

[48] We can understand those views of Mr Findlay.

[49] Ms Pender submits that equity has always offered protection to a party who performs obligations in good faith, believing that an agreement exists and that, under s.126 of the Act, recovery of a commission is not always dependent on an agency agreement. She puts it that, under the circumstances of this case, it is highly probable that Colliers could, and may already, have recovered the commission even without a formal agency agreement.

[50] Ms Pender also submits that the particulars of the charges do not raise any issue of competence or negligence, and that there is no evidence before us to substantiate any such charge. She adds that s.72 of the Act (which defines *"unsatisfactory conduct"*) does not apply. However, a failure to comply with s.126 of the Act must at least be unsatisfactory conduct.

Has There Been a Breach of Natural Justice?

[51] It seems to be accepted that any breach of natural justice can be remedied by a de novo hearing before us.

[52] The Authority does not accept that the licensee was denied the chance to be heard in respect of the matters forming the basis of the charges, or that there was any other failure to observe the rules of natural justice.

[53] Prior to the Committee's decision to lay charges, the Committee provided the licensee with detailed information received from Colliers and obtained during its own investigation. The Committee received, in response, lengthy correspondence and submissions on behalf of the licensee.

[54] The Authority's investigator provided the licensee with documentation before the Committee on 4 November 2013, including:

[a] The original complaint received on 16 October 2012 together with:

[i] The email correspondence;

[ii] Agency agreement dated 9 February 2012;

[iii] Commission invoice; and

[iv] Termination notice to Mr Gollins;

[b] Colliers' summary document dated 8 October 2012 of the meeting between Colliers' management and the licensee;

[c] Colliers' salesperson agreement for the licensee dated 30 March 2012;

[d] Email from Mark Lash to the licensee, dated 1 February 2010;

[e] Sale and purchase agreement, dated 14 September 2010;

[f] Licensee response dated 30 November 2012 (including reference letter from Sir Robert Jones);

[g] Investigator file note – witness Mark Lash inquiries;

[h] Investigator file note – witness Marty Price;

[i] Further licensee response (including sale and purchase agreement examples);

[j] Wayne O'Styke witness statement; and

[k] Email chronology of various conversations regarding the transaction.

[55] The licensee was also provided with the decision to inquire letter dated 19 November 2012, which disclosed the earlier complaint documentation.

[56] There is one further document, namely, a file note of the investigator's discussion with Mr Lash dated 13 November 2013, which had a copy of the sale and purchase agreement attached to it. The Committee has been unable to locate a record of this document being forwarded to the licensee. Out of an abundance of caution, counsel for the Committee disclosed this document to counsel for the licensee by email dated 14 April 2014. The file note is uncontroversial and contained nothing that had not already been disclosed through other documentation.

[57] When a Committee is considering the scope of a complaint and what conduct may be referred to us, it is necessary 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.

[58] It is submitted for the prosecution that there can be no doubt that the licensee 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 referred before deciding to refer the matter to us. We agree.

Charge One: Disgraceful Conduct under Section 73(a) of the Act

[59] Charge one alleges that Mr Gollins has acted in a way that would be regarded by agents of good standing, or reasonable members of the public, as disgraceful. The particulars of the charge make clear that, when queried as to his entitlement to commission by Foodstuffs, the licensee represented to Foodstuffs by a 24 September 2012 email that an agency for payment of the commission had been signed on 9 February 2010. The licensee attached a copy of the backdated agency agreement to that email of 24 September 2012.

[60] The backdated agency agreement had in fact been created on 24 September 2012 but backdated to 9 February 2010. It was signed on 24 September 2012 by a person no longer employed by Foodstuffs (i.e. Mr O'Styke).

[61] The licensee admits that the agency agreement was signed by Mr O'Styke on 24 September 2012 and backdated to 9 February 2010. He also accepts that he should not have represented that the agency agreement had been signed in 2010.

[62] It is submitted for the licensee that the backdated agency agreement was an affirmation of earlier agreed terms and that back dating written agreements to align with oral agreements is common in the commercial property sector. We do not accept that latter point.

[63] In any case, the charge is directed at the licensee's misrepresentation to a client as to the licensee's authority to charge commission for real estate agency work. The licensee misrepresented to his client that an agreement had been signed about two and a half years prior to his claim for commission when, in truth, it had not.

[64] As Mr Clancy also puts it, licensees are required to act in good faith (Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 at rule 6.2) and must not mislead clients, nor provide false information, nor withhold information that should by law or fairness be provided to clients (Rule 6.4).

[65] Despite these obligations, the licensee deliberately attempted to mislead Foodstuffs as to the date on which the agency agreement was signed (and hence his entitlement to commission). He made a conscious decision to backdate an agreement with the previous manager, who no longer worked for Foodstuffs, and then to provide this to Foodstuffs with the representation that it was signed on 9 February 2010 following a meeting at the Whitby Café. We agree that was misleading and false.

Charge Two: Wilful or Reckless Contravention of Section 126 of the Act under Section 73(c)(i) of the Act

[66] Charge two alleges that the licensee wilfully or recklessly contravened s.126 of the Act and therefore engaged in misconduct. The particulars outline that he claimed entitlement to commission from the client for real estate agency work performed at a time when no written agency agreement existed between him (or the agency he was employed by) and the client.

[67] As Mr Clancy puts it, the wording of s.126 of the Act is clear: agents are entitled to commission only for real estate agency work performed under a written agency agreement that is signed by or on behalf of the client and the agent. Here, the licensee has admitted that the agency agreement was created only after the real estate agency work had been performed. Backdating an agreement does not cure the breach.

[68] Counsel for the licensee appears to rely on ss.126(2) and (3) of the Act to submit that a court has discretion to allow recovery of commission because the licensee's failure to comply with s.126(1) was inadvertent, the claimed commission is fair and reasonable, and it would be unjust not to allow recovery of commission. However, the licensee cannot seek the relief provided in s. 126(2). That provision is triggered only if a signed agency agreement is provided to the client after the 48 hour time period dictated in that same subsection. The discretion does not apply if there

was no written agency agreement at all during the time the work was performed. It is therefore irrelevant whether the commission charged was fair and reasonable and whether non-recovery of commission would be unjust.

[69] The licensee appears to also rely on a belief that clause 33.1 of the Sale and Purchase Agreement (dated 14 September 2010) supported his entitlement to commission. However, as Mr Clancy put it, clause 33.1 of the Sale and Purchase Agreement is not a substitute for a written agency agreement and compliance with s.126 and merely states that the purchaser is responsible for the fees of the licensed agent in respect of the sale. An agency agreement traditionally records much greater detail about the commercial relationship between the agent and client. It is also signed by the agent and client, not by vendor and purchaser. There was no written agency agreement at material times and, therefore, no compliance with s.126. The fact that the licensee saw the need to create and backdate a written agency agreement, as soon as his entitlement to commission was queried, demonstrates the fundamental nature of the requirement that a formal written agency agreement be in place.

[70] The prosecution submits that the circumstances surrounding the signing of the backdated agreement indicated that the licensee's actions went beyond mere inadvertence and crossed over to wilful and reckless conduct; and that these actions indicate that the licensee knew that a written agency agreement was required during the period of work in order to claim commission.

Charge Three: Serious Incompetence or Gross Negligence under Section 73(b)

[71] Mr Clancy notes that charge three is an alternative to charge two. It alleges that the licensee's conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Our Conclusions

[72] In terms of our approach set out in paras [4] and [5] above, we find that there is a case for Mr Gollins to answer. Accordingly, we direct our Registrar to arrange for counsel to confer with our Chairperson by telephone to arrange a timetable to fixture in the usual way.

[73] To represent that an agency agreement was signed on 9 February 2010, when it was signed on 24 September 2012, in order to obtain a commission is concerningly dishonest and can be regarded as disgraceful. That misrepresentation is admitted. When the listing or agency agreement document was signed, the signatory for the vendor lacked authority to sign.

[74] It is to the defendant's credit that he had freely admitted to Mr Findlay on about 25 September 2012 that the listing agreement dated 9 February 2010 was, in fact, signed on 21 September 2012.

[75] Having said all that, it may be that the defendant's admissions establish not only unsatisfactory conduct but also misconduct. Currently, we would not think that revocation, or even suspension, of licence is required or appropriate on the particular facts of this case so that the defendant might be well advised to enter a guilty plea at this stage.

[76] We observe that the skilled services for which Mr Gollins expected payment seem to have been provided by him for both vendor and purchaser *"for the purpose of bringing about a transaction"* in terms of the definition of real estate agency work in s.4 of the Act and were not merely the provision of general advice.

[77] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member