BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 82

READT 30/13

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)**
	Prosecutor
AND	**IAN CHARLES MORGAN** of Matamata, licensee
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 13, 14 and 15 May 2014

DATE OF THIS DECISION 17 October 2014

COUNSEL

Mr L J Clancy for the prosecution
Mr D Chesterman for the defendant

DECISION OF THE TRIBUNAL

The Issue

[1] Ian Morgan ("the defendant licensee") faces misconduct charges under ss.73(a) and 73(b) of the Real Estate Agents Act 2008 laid by Complaints Assessment Committee 20003 on behalf of the Real Estate Agents Authority.

[2] The charges were laid on 31 May 2013 and read 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 $47,500 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.

<u>Charge 2</u>

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 of x 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 transactions.

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

(i) That was not signed by the defendant;

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

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

Factual Background

[3] In this decision:

[a] PGG Wrightson means PGG Wrightson Real Estate Ltd.

[b] WDL means Waitoki Downs Ltd, a company controlled by a Mr Shallue.

[c] The property means 771 Rotokoku Road, a rural property of approximately 600 hectares near Te Aroha, sold by WDL to a Mr Denize.

[d] Mr Shallue means Jim Shallue, through WDL vendor of the property.

[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] The 2010 McIntyre agreement means an agreement for sale and purchase between WDL and Mr McIntyre, dated 24 December 2010, which failed to settle.

[h] The Denize Agreement means the agreement for sale and purchase of the property between WDL (as vendor) and Mr Denize (as purchaser) signed on or about 24 February 2012.

[4] WDL signed an agency agreement with PGG Wrightson in respect of approximately 1400 hectares of rural land (which included the property) on 13 May 2010. 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.

[5] 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.

[6] 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).

[7] In August 2011, following a renegotiation of the terms of the 2010 McIntyre Agreement, Mr McIntyre paid the *"first tranche"* of a deposit, namely $400,000. PGG Wrightson took commission of $230,000 plus GST from the deposit funds, of which Mr Morgan received $136,283.22 plus GST via his company Diagonal Holdings Ltd.

[8] In December 2011, Mr Denize and Mr Shallue began discussions regarding Mr Denize purchasing the property (being part of the parcel of land subject to the 2010 McIntyre Agreement), providing an accommodation could be reached with Mr McIntyre, the sale to Mr McIntyre still not having settled.

[9] In early 2012, Mr Morgan became involved in facilitating the transaction between Mr Denize and Mr Shallue.

[10] Between 8 and 11 February 2012, Mr Morgan and Mr 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. The Denize Agreement contains a standard clause 12.1 reading:

> *"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 effect the sale. The vendor shall pay the agent's charges including GST for effecting such sale."*

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

[14] 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.

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

> *"To Whom It May Concern:*
>
> *Terms of Engagement*
>
> *I Mathew Denize have agreed to engage the services of Ian Morgan as a purchaser's agent to negotiate value, terms and conditions of contract for the property purchase between Waitoki Downs and Mathew Denize.*
>
> *I Mathew Denize will pay within 5 (five) working days a fee of x% (x percent) plus GST of the sale price to Ian Morgan upon the conditional contract between the parties becoming unconditional in all respects.*
>
> *In the event of this contract not becoming unconditional there will be no fee payable or claim against either party.*
>
> _________________
>
> *M Denize*

____

Date"

[16] The sale of the property to Mr Denize went unconditional on 13 July 2012 (and subsequently settled on 20 July 2012). On the same date, Mr Shallue signed a new sale and purchase agreement with Mr McIntyre for the remainder of the property which had been subject to the 2010 McIntyre Agreement, excluding the property, which had been sold to Mr Denize.

[17] It seems that on 27 September 2012 Messrs Shallue and Denize, at the request of the defendant, signed a memorandum reading as follows:

> *"Declaration of meeting held on the 23rd of February 2012 at Jim and Kay Shallue's home Rawhiri Road, Te Aroha.*
>
> *Ian Morgan declared to Jim Shallue that he was attending the meeting as an arbitrator for Mathew Denize and was not acting as a real estate agent for PGG Wrightson real estate.*
>
> *Ian Morgan further declared that he was being paid a fee by Mathew Denize should the parties agree on price and conditions regarding their private negotiations of contract.*
>
> *Signed*
>
> *Jim Shallue   Mathew Denize"*

The Nub of the Case

[18] Very simply put, the conduct of the defendant now in issue under Charge 1 is that having negotiated (as PGG Wrightson's agent) the sale of farmland to Mr McIntyre he, prior to achieving its settlement, assisted Mr Denize purchase part of that farmland, with Mr McIntyre's approval; but received a further commission for Mr Denize (as purchaser). Charge 2 covers the particular conduct of the defendant as listed in its paras (a) to (d).

[19] There does not seem to be any dispute about the basic facts.

Prosecution Commentary on the Charges

Charge one

[20] 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 for land which included the property with PGG Wrightson.

[21] It is of note that, 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 Shallues Waitoki Downs farm for a director of FarmRight The parties had stalled on their private negotiations however I have been able to reach suitable middle ground and a deal struck. No commission has been sought. 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"*

[22] The indication in the email that no commission was sought seems at odds with the defendant's subsequent agreement with Mr Denize that Mr Denize would pay x% (plus GST) of the sale price direct to Mr Morgan (i.e. $47,500 plus GST).

[23] 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 a 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.

[24] It is submitted by the prosecution 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) did not extinguish the ongoing agency agreement between WDL and PGG Wrightson. We are informed that was not the view taken by PGG Wrightson when the Denize matter came to light, nor the legal advice it received.

[25] 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. In that situation there is no prejudice to the vendor client as the two commission payments will come from separate deposits paid by separate purchasers.

[26] The PGG Wrightson agency agreement dated 24 June 2011, which applied to a parcel of land that 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.

[27] Notwithstanding that it chose not to pursue Mr Shallue for a commission on the sale to Denize, PGG Wrightson's position is that it could have done so based on its agency relationship.

[28] At the very least, the contractual position was unclear. It is put by the prosecution that Mr Morgan must have been cognisant 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.

[29] In those circumstances, the Committee submits that Mr Morgan was obliged to keep PGG Wrightson fully advised of what he was doing and the fact he was receiving a fee.

[30] Further, the contractual relationship between Mr Morgan (and his own company) and PGG Wrightson obliged Mr Morgan to disclose the arrangement.

[31] 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.

[32] It is submitted for the prosecution that it is open to us to infer that Mr Morgan deliberately omitted to advise PGG Wrightson of the fee he had arranged with Mr Denize in order to avoid splitting that fee with PGG Wrightson. 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.

[33] Mr Morgan's 16 February email to Stuart Cooper (of PGG Wrightson's) 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 Farm Right, of which Mr Denize was a director.

Disgraceful Conduct

[34] Section 73(a) of the Act provides:

> *"**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; …"*

[35] We considered the ambit of the term 'disgraceful', as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06 and held:

> *"[55] The word 'disgraceful' is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.*
>
> *[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess – see Blake v the PCC [1997] 1 NZLR 71.*

> *[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
>
> *[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the … defendant.*
>
> *[59] So, in summary, the Tribunal must find on a balance of probabilities that the conduct of the … defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public."*

[36] It is submitted on behalf of Mr Morgan that his failure to disclose the fee he received from Mr Denize to PGG Wrightson is, if anything, simply an employment issue between him, the defendant licensee, and PGG Wrightson, and does not amount to conduct that could warrant a disciplinary finding by us.

[37] In *Miller v REAA & Robinson* [2013] NZREADT 14, we considered an appeal from a Complaints Assessment Committee decision to take no further action in respect of an allegation that a salesperson, after ending his employment relationship with an agency, removed files from that agency. The Committee initially characterised the allegation as an *"employment issue"* and decided to take no further action. On appeal, we accepted the submissions of Mr Withnall QC for the appellant, that actions on the part of a licensee undertaken with the intention of *"poaching"* from an employer (or former employer) – in terms of clients, knowledge base or goodwill – should be denounced as conduct contrary to standards of ethical, professional and commercial conduct. We also agreed that it was irrelevant that no consumer had made a complaint as our concern was the conduct of the licensee. We stated:

> *"[64] Simply put, licensees have a duty of good faith to their employer agency just as they have to the vendor or anyone else with whom they deal."*

[38] The prosecution submits that this approach is consistent with that taken in other professional disciplinary jurisdictions. We agree.

[39] In *Canterbury-Westland Standards Committee No 3 v Hemi* [2013] NZLCDT 23, the Lawyers and Conveyancers Disciplinary Tribunal suspended a practitioner who had admitted obtaining payments from clients of his employer firm which were not disclosed to the firm or paid into the firm's trust account, but rather retained for his own use. The practitioner (represented by Dr Harrison QC) accepted that his conduct was disgraceful and/or dishonourable and amounted to misconduct. The Disciplinary Tribunal imposed an 18-month suspension, notwithstanding that the practitioner could point to significant mitigating factors, including an immediate apology to his employer, impeccable conduct post-offending, and difficult personal circumstances at the time of the misconduct.

[40] While the facts of the present case are different from those in both *Miller* and *Hemi*, similar principles apply regarding the duty of *"good faith"* to an employer used in a general sense. The importance of openness and honesty, where agents receive payment personally for work in connection with a principal's business, is further

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.

Charge Two

[41] In respect of charge two, it is submitted for the prosecution that Mr Morgan's conduct in acting on the sale to Mr Denize was seriously negligent or incompetent. Below we refer further to that concept from s.73(b) of the Act.

[42] It is submitted that, given the risk that WDL may be liable to pay commission on the sale to Denize to PGG Wrightson (regardless of whether or not PGG Wrightson was likely to pursue that entitlement), Mr Morgan's actions fell seriously below the standards to be expected of a licensee.

[43] It is put that Mr Morgan failed to ensure that the PGG Wrightson agency agreement was at an end (e.g. by having WDL sign a notice of cancellation of agency); and that he also failed to provide the vendor (WDL) with formal written disclosure of the benefit he was to receive from Mr Denize as a purchaser. The prosecution accepts there is evidence that Mr Morgan verbally advised Mr Shallue that he was being paid a fee by Mr Denize, but submits that was not sufficient in the circumstances. The prosecution notes that, in his interview with the Committee's investigator Mr Delany, 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.

[44] The prosecution also put it that compounding the inherent risk Mr Morgan took in acting for Mr Denize, the version of the Denize purchase agreement he provided to the parties for signature was a PGG Wrightson form, which recorded PGG Wrightson as the real estate agent acting. Due to clause 12.1 of the standard terms and conditions, by signing the agreement in that form, the vendor acknowledged PGG Wrightson as its agent and confirmed PGG Wrightson's entitlement to commission on the sale to Mr Denize.

[45] The prosecution put it that 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 was the sale to Mr Denize. 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 respective purchasers' deposits.

[46] 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.

[47] In *Johnston and Vining Realty Ltd v REAA* [2013] NZREADT 67, 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 agreement. The CAC's disciplinary finding was upheld notwithstanding that, when a dispute arose over commission, the second agency honoured its verbal assurance to the vendor and did not pursue its entitlement to commission.

[48] 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.

[49] The prosecution submits that 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 (WDL as vendor and Mr Denize as purchaser) to sign the agreement.

[50] Further Mr Clancy observes, 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 by Mr Denize (as purchaser) to Mr Morgan, nor did it advise that further information on agency agreements and contractual documents is available from the Authority. Presumably he was referring to s.126 to 128 of the Act (dealing with Agency Agreements) and Rules 9.8 to 9.11 (also dealing with agency agreements). He may also have been referring to Rules 9.19 (conflicts of interest) and 6.4 (disclosure to vendor of a financial benefit).

Seriously Negligent/Incompetent Real Estate Agency Work

[51] Section 73(b) of the Act provides:

> *"**73 Misconduct***
>
> *For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –*
>
> *(b) constitutes seriously incompetent or seriously negligent real estate agency work;"*

[52] Previously, we have relied on the decision of *Pillai v Messiter (No 2)* [2012] NZHC 2550 in considering the type of conduct that will amount to seriously incompetent and negligent real estate agency work.

[53] In *Brown v The Real Estate Agents Authority* [2013] NZHC 3309 the High Court addressed the usefulness of *Pillai v Messiter* test in the context of the Real Estate Agents Act 2008 and stated:

> *"[58] It is very difficult, if not impossible, to consider relevant thresholds for such standards as "incompetent", "negligent", "unacceptable", "disgraceful",*

"seriously incompetent", and "seriously negligent" in a vacuum. All relate to occupational standards and practice. Care must be exercised before applying the disciplinary standards of one professional occupation to another. Such tests as departure from accepted standards, indifference, and abuse of privileges as they had relevance to New South Wales medical practitioners in Pillai might not illuminate the varying standards and contexts to which ss 72 and 73 of the Act apply.

…

[60] I consider … that care is needed before applying, in an unquestioning way, a dictum relating to New South Wales medical practitioners to New Zealand real estate agents …"

[54] The Court had also said in *Brown* at [21]:

"… it is also pertinent to observe that the types of misconduct specified in s 73 are qualitatively different. One would not expect an identical legal threshold to apply to all. Conduct which a reasonable member of the public would regard as disgraceful would obviously be qualitatively different from serious incompetence or wilful contravention of the Act."

[55] Perhaps, the previous *Pillar v Messiter* influenced approach to s.73(b) aligned the test for serious negligence or incompetence too closely with the test for disgraceful conduct under s.73(a).

[56] It is submitted by the prosecution that it is not necessary to over-refine the plain statutory language in s.73(b). Although primarily addressing s.72 of the Act (unsatisfactory conduct), rather than s.73 (misconduct), it is submitted for the prosecution that the comments of Woodhouse J in *Wyatt v Real Estate Agents Authority* [2012] NZHC 2550 are relevant, namely:

"[49] … The enquiry in this case is limited to s.72, although the provisions of s.73 assist to an extent in defining the scope of s.72. Substantially less will be required to establish unsatisfactory conduct than will be required to establish misconduct. Beyond that, the words in s.72 should not, in my judgment be over-refined by treating the words in s.72 on the basis that they have some technical meaning or by seeking synonyms for words which have natural meaning."

[57] Mr Clancy submits for the prosecution that what must be proved under s.73(b) is, simply, that the conduct in question was seriously incompetent or seriously negligent real estate agency work. He also submits that our enquiry under s.73(b) should, in line with the *Downtown Apartments* approach discussed above, focus on whether there has been a departure from relevant standards and, if so, whether that departure was serious. If the departure was serious, a finding of misconduct is appropriate. We agree with that approach.

Unsatisfactory Conduct

[58] Counsel for the prosecution acknowledges that if, after hearing the evidence (in respect of either or both charges), we consider that Mr Morgan has engaged in

unsatisfactory conduct rather than misconduct, it will be open to us to make a finding in those terms (refer s.110(4) of the Act).

A Summary of Salient Evidence

The Evidence of Mr S H Cooper – First Witness for the Prosecution

[59] Mr Cooper was the General Manager Real Estate at PGG Wrightson until April 2013. He covered the basic facts set out above and referred to various documents. Early in his evidence-in-chief he stated as follows:

> *"2.4 Commission payments due to Mr Morgan for work done for PGG WRE were made to Diagonal Holdings Ltd, after a sale was processed through the PGG WRE real estate corporate office and after a PGG WRE invoice had been issued and paid by the client.*
>
> *2.5 Under the independent contractor arrangements, Mr Morgan agreed only to enter into agreements with clients as a salesperson of PGGWE and that he was not to perform any real estate agency work other than in accordance with the agreement or with the written consent of PGGWRE (see, for example, cl 4.1(i), 4.2(a) and (b) of 8 December 2009 agreement).*
>
> *2.6 Under no circumstances was Mr Morgan permitted to invoice a client or customer directly or to receive any kind of financial recompense directly."*

[60] Mr Cooper then gave details about the McIntyre transaction and the Denize transaction with appropriate reference to relevant documents. He then dealt with the referral of the complaint by PGG Wrightson to the Real Estate Agents Authority. Inter alia, Mr Cooper stated that on 25 June 2012 he was at a meeting at the PGG Wrightson's office in Cambridge held in an attempt to resolve an internal dispute regarding sharing of commission. Mr Cooper said that the defendant was at this meeting along with other Wrightson agents Messrs G Higgins, D Pettit, and P Lissington. The Waitoki Downs and Shallue properties, and their then current status, were discussed but at no time did the defendant disclose the fee he had received on the Waitoki Downs sale to Mr Denize.

[61] Mr Cooper added further evidence-in-chief orally and was then carefully cross-examined by Mr Chesterman.

[62] Mr Cooper mentioned that PGG Wrightson's staff had regular compliance training and well knew the rules of PGG Wrightson protocols. Like other agents, Mr Morgan had his own company structure for tax and other purposes presumably.

[63] Mr Cooper said that an agency or listing agreement continues for its timeframe unless a sale is achieved and settled sooner. He emphasised that PGG Wrightson did not expect to be paid twice for the same work and observed that if a first transaction fails, then PGG Wrightson gets on with reselling the property, but does not expect to be paid twice in terms of ethics and in terms of good relationships with rural New Zealand. Mr Cooper mentioned that it is well understood and fundamental that a salesperson may not be paid direct by a party.

[64] Mr Chesterman covered with Mr Cooper that Mr Morgan had moved from Bayleys to PGG Wrightson by virtue of a very substantial inducement payment which had caused disgruntlement with other PGG Wrightson salespersons. It was clarified that Mr Morgan was a licensed agent as well as a salesperson so that he could contract on his own account and, as a senior manager at PGG Wrightson, many of the PGG Wrightson protocols did not need to be observed by him.

[65] It is covered that if parties to a sale and purchase transaction have introduced themselves privately then PGG Wrightson could not expect a sale commission. Mr Cooper also seemed to agree that such people could not be regarded as potential clients of PGG Wrightson. He also accepted that PGG Wrightson did not advertise itself as providing consultancy services for private transactions.

[66] Mr Cooper did not seem to accept that Mr Morgan's contract with PGG Wrightson did not prevent Mr Morgan from doing business with non clients of PGG Wrightson. Mr Cooper is adamant that, at material times to the transaction between WDL and Mr Denize, the relevant land was listed by PGG Wrightson so that the transaction from WDL to Mr Denize could not be regarded as private. He seemed also of the view that the work which Mr Morgan had carried out for Mr Denize was real estate agency work and that Mr Morgan had taken a fee from Mr Denize for work which PGG Wrightson did. He seemed to accept that there was no question of any fee arising out of the WDL to Denize transaction until what Mr Morgan describes as his *"arbitration work"* took place.

[67] There was reference to the said email of 16 February 2012 from Mr Morgan to Mr Cooper (set out in paragraph [21] above) advising of Mr Morgan's involvement in the transaction for Mr Shallue with Mr Denize. Mr Cooper insists that email did not constitute a disclosure of a private transaction by Mr Morgan because the land was still listed with PGG Wrightson, it was still PGG Wrightson's job to sell it, and that was still Mr Morgan's job. Mr Cooper did not seem to accept that Mr Morgan was then assisting Mr Denize only.

[68] Inter alia, Mr Chesterman pointed out to Mr Cooper that PGG Wrightson had received full commission for all the land in question and expected nothing more and that was what happened. Mr Cooper's concern seemed to be that the sum of $47,500 plus GST was paid by a client directly to Mr Morgan and that was a matter which Mr Cooper felt PGG Wrightson had an obligation to report to the Real Estate Agents Authority. There was quite some reference to a legal opinion obtained by PGG Wrightson from Duncan Cotterill Solicitors dated 21 September 2012.

The Evidence of Mr M J Shallue

[69] Mr Shallue stated that on 13 May 2010 he and his wife listed their Te Aroha farm properties for sale with PGG Wrightson and the listing agents were a Mr B Tunzelmann and the defendant. The vendor was the said company owned by Mr and Mrs Shallue, namely, Waitoki Downs Ltd.

[70] Mr Shallue then covered the facts as set out above and emphasised that the sale to Mr McIntyre became drawn out and did not proceed smoothly but that he could not speak highly enough of the defendant's efforts on his behalf to achieve a sale to Mr McIntyre. The properties were relisted with PGG Wrightson on 24 June 2011. In August 2011 Mr McIntyre paid $400,000 as part of the deposit due and from that Mr Shallue paid PGG Wrightson commission of about $230,000 on the sale of

those two farm properties to Mr McIntyre. However, Mr Shallue was then aware that Mr McIntyre had problems over raising finance so that settlement of the transaction remained uncompleted.

[71] Mr Shallue explained that, although the above listing with PGG Wrightson was never cancelled, he was open to selling the Rotokoku farm to Mr Denize if Mr McIntyre so approved. He met with Mr Denize and the defendant about that on about 22 February 2012 and during that meeting the defendant produced a sale and purchase agreement. It was agreed that Mr Denize buy that farm at $ x (plus GST) and Mr Denize signed the agreement. However, Mr Shallue referred the agreement to his lawyer to check but signed it later.

[72] Mr Shallue said he recalled saying to the defendant at that meeting that he, Mr Shallue, had already paid commission on the transaction and he would not be paying any more, and there was no suggestion from the defendant that he would need to. Mr Shallue recalled that the defendant had said he was representing Mr Denize and Mr Shallue was in no doubt the defendant was not then working for him as vendor. Mr Shallue also said he had then given no thought as to whether the defendant was working for PGG Wrightson or for himself, the defendant. Mr Shallue simply assumed that the defendant was working for Mr Denize in the defendant's capacity as a real estate agent and understood that Mr Denize was paying the defendant for those services. That agreement became unconditional in July 2012 when Mr Shallue and his wife signed a new agreement with Mr McIntyre for the remainder of the property which, of course, excluded the farm sold to Mr Denize.

[73] In his typed evidence-in-chief Mr Shallue emphasises that, despite the wording of a document he signed on 27 September 2012 at the request of the defendant and Mr Denize (and set out above), he does not recall the actual word *"arbitrator"* having been used by the defendant at material times and believes it was put to him that the defendant was *"representing"* or *"working for"* Mr Denize. Mr Shallue is very happy with the work effected and the result achieved by the defendant.

[74] Mr Shallue gave further evidence-in-chief orally. He emphasised that he was most appreciative of the work done for him by the defendant for whom he has the highest regard and complete faith. He seemed to be saying that the defendant endeavoured to put leverage on Mr McIntyre to complete his purchase from Mr and Mrs Shallue. It seems that Mr McIntyre had imposed caveats on the land which led to litigation by Mr Shallue and the defendant was most helpful and supportive of Mr Shallue over that.

[75] Mr Shallue emphasised that at the meeting of 12 February 2012 between he and Mr Denize, with the defendant present as he had been asked to sit in by Mr Denize, issues between Messrs Shallue and Denize were sorted out by the defendant within about 25 minutes. Mr Shallue had made it clear that he would not be paying any further commission to PGG Wrightson or the defendant and it was none of his concern that the defendant was sitting in at that meeting at the request of Mr Denize. Mr Shallue emphasised that at that time he thought that PGG Wrightson's sole agency had come to an end because commission had been paid in full to PGG Wrightson.

[76] Under cross-examination from Mr Chesterman, Mr Shallue added that at material times the market for the sale of farm land in his area was not good and that, but for the efforts of the defendant, he could have lost millions of dollars and also he

was able to retain confidentiality and involve the defendant in meetings with his bankers. He said that he had absolute trust in the defendant. He also observed that real estate agents do not normally help out after they have been paid their commission but that is not the attitude of the defendant who freely provided Mr Shallue with much extra dedicated and skilled work.

[77] Inter alia, Mr Shallue said that the meeting of 23 February 2012 was very amicable and led to him shaking hands on a deal with Mr Denize and both of them left it to their respective solicitors to finalise matters in writing. It did not surprise Mr Shallue that the PGG Wrightson's logos on the contract had been crossed out because (he said) it was fundamental that the transaction between Mr Shallue and Mr Denize was private and they simply overlooked that they had been using PGG Wrightson forms. He regarded it as elementary that the purchase price would be paid directly to Mr Shallue as vendor, or to his lawyers, and certainly not to PGG Wrightson which they did not regard as involved in the transaction in any way. Mr Shallue said that the reference in the initial agreement that the deposit be paid to PGG Wrightson was *"an obvious oversight"*. He emphasised that he was very happy with the work and conduct of the defendant and certainly has no complaints regarding the defendant.

The Evidence of Mr M Denize

[78] Mr Denize gave evidence consistent with what we have set out above. He became interested in possibly purchasing the Waitoki Downs properties owned by Mr Shallue in about 2009. In 2011 he learnt that Mr Shallue had entered into some type of arrangement to sell them to Mr McIntyre. In late 2011 he indicated to Mr Shallue that if an arrangement could be made regarding the previous deal Mr Shallue had entered into with Mr McIntyre he, Mr Denize, would be interested in purchasing just the Rotokoku Road farm. In early 2012 Mr Denize arranged for the defendant to assist him in that respect. When in early February 2012 an impasse developed between Messrs Shallue and Denize over price, the defendant had said that he would act as Mr Denize's agent and endeavour to resolve that at a fee of x% of the sale price. Mr Denize was happy about that and, as covered above, such a transaction was completed.

[79] In his evidence-in-chief Mr Denize states:

> *"1.11 It was my understanding that Ian Morgan was acting for me in this sale. It was either discussed at this meeting [of 23 February 2012], or I had already formed the conclusion, that Ian Morgan was working in his private capacity and not as a PGG Wrightson real estate agent. Ian Morgan told me that he had done this sort of thing before between neighbours.*
>
> *1.12 I am also pretty sure that Ian Morgan declared at the meeting that he was working for me and that Jim Shallue knew that I was paying Ian Morgan. I cannot recall if the specific word "arbitrator" was ever used."*

[80] Mr Denize then referred to receiving a document from the defendant's personal assistant on 24 February 2012 by email which was the appropriate form of agreement for sale and purchase and he said it was marked as a PGG Wrightson document.

[81] He also stated that on 15 March 2012 the defendant's assistant sent him by email a document entituled *"Agent's Fee – M Denize"* which was a form (set out above) referred to as *"Terms of Engagement"* in which he, Mr Denize, agreed to engage the defendant's services as a purchaser's agent to negotiate the purchase of Waitoki Downs from Mr Shallue. The form also formalised his agreement to pay the defendant x% plus GST of the sale price paid by Mr Shallue within five days of the agreement becoming unconditional. Mr Denize signed that form and eventually received an invoice from the defendant in the name of Diagonal Holdings Ltd for $54,625. The invoice was dated 23 August 2012 for professional fees in accordance with the work agreed between them on 16 March 2012 being that done by the defendant in negotiating the purchase of the Rotokoku Road property by Mr Denize. The latter paid the full amount of the invoice within a few days.

[82] Finally in his evidence-in-chief, Mr Denize referred to the hand-written document (set out above) which related to the meeting of 23 February 2012 when the agreement for sale and purchase was dealt with. Mr Denize continued *"despite the wording of this document, I do not recall what specific words were used at the February meeting. As I have stated, I am pretty sure that Ian Morgan stated at the meeting that he was working for me and that Jim Shallue knew that I was paying Ian Morgan. I cannot recall if the specific word "arbitrator" was used."* Mr Shallue was also very happy with the work performed on his behalf by the defendant.

[83] Mr Denize was, of course, thoroughly cross-examined by Mr Chesterman. Mr Denize made it clear that it was he who contacted the defendant (apparently in late January 2012) to assist him with a private deal he was putting together with Mr Shallue. It seems that the defendant gave him advice over that and had his personal assistant supply some relevant draft clauses for an agreement for sale and purchase to Mr Denize but that all negotiations took place between Mr Shallue and Mr Denize who had initially approached Mr Shallue and been shown over the farm. It was only later in February 2012 when those parties could not agree about the precise price that the defendant became involved in the transaction said Mr Denize.

[84] Mr Denize emphasised that the transaction between him and Mr Shallue was not a regular estate deal because those two persons had handled all negotiations and discussions until they had an impasse over price and Mr Denize had introduced himself directly to Mr Shallue regarding the transaction. Mr Denize said that when he found he needed the assistance of the defendant over price, he asked the defendant what he would need to pay him and the response was x% of the price finally agreed. Mr Denize was very happy about that and has no complaint whatsoever about the defendant. He paid the x% fee direct to the defendant as he thought it was not related to real estate work as all such work had been done direct by and between the parties, he had introduced himself to Mr Shallue at the outset, and they had their lawyers do all necessary paperwork.

The Evidence of Ms C E Hope

[85] Ms Hope, as a senior investigator at the Real Estate Agents Authority, gave fundamental evidence for the prosecution. She covered the documents contained in the agreed bundles of documents together with details of the way she carried out her investigation. She had taken it over on 1 October 2012 from Mr C Delaney, a former senior investigator with the Authority. Her further oral evidence-in-chief and cross-examination simply dealt with routine matters.

THE DEFENCE

A Summary of the Evidence of the Defendant

[86] The evidence of the defendant is very extensive but we confine ourselves to basic elements of it.

[87] The defendant has been a real estate agent for 17 years without complaint and still works as such in the Waikato area. He firmly denies any misconduct or unsatisfactory conduct and considers that PGG Wrightson wrongfully terminated his contract on 25 September 2012. He explained to us in some detail the nature of his and his company's contracts with PGG Wrightson and appropriate documents are exhibited. The defendant seems to have been an extremely energetic, efficient, and successful real estate agent. At paragraph 21 of his evidence-in-chief he states:

> *"On the basis of my contractual arrangements with PGG Wrightson, I understood that if work arose for people or entities that were not PGG Wrightson clients or potential PGG Wrightson clients, then I and Diagonal Holdings Ltd had contractual freedom to carry out that work without sharing any fee or commission earned with PGG Wrightson and without any requirement to disclose that matter to PGG Wrightson or seek its approval. I also understand that if issues arose in respect of commissions or fees, this would be dealt with through the internal process within the contract."*

[88] The defendant then detailed the facts covered above. Inter alia, he stated he believed that once the unconditional contract had been completed with Mr McIntyre and the commission paid, then the Shallue listing had come to an end. He also covered his rather extensive efforts and strategies on behalf of Mr Shallue to bring the agreement with Mr McIntyre to settlement. He also recorded that from the $230,000 paid by Mr and Mrs Shallue to PGG Wrightson on 29 August 2011 as commission on the transaction to Mr McIntyre, the defendant's share was $126,283.22 plus GST. He also noted that for various commercial reasons the Shallues were given a discount of $65,500.

[89] The defendant again asserted that, on 29 August 2011 when the Shallues paid commission to PGG Wrightson for the sale of Waitoki Downs, the agency agreement was fulfilled and came to an end. He observed that no notice of cancellation was issued but puts it one did not need to be issued to prove the agency had ended. The defendant also outlined that, after payment of that commission regarding the McIntyre transaction, he remained in contact with the Shallues endeavouring to assist them complete the sale of their farms but, as he put it, *"anything I did was for free and no entitlement to further commission arose from it"*.

[90] The defendant then outlined in detail the background and details of the sale of 242 Rotokoku Road to Mr and Mrs Denize. Essentially, he maintained that before settlement had occurred from Mr McIntyre of all the relevant farm land, a private contract arose between the Shallues and Mr Denize in relation to part of Waitoki Downs but he had no involvement with introducing the parties to that. Subsequently, he gave assistance to the parties but had no intention of charging for that and provided that assistance essentially as a favour to Mr Shallue. The defendant gave evidence to set a number of the exhibited documents into a fuller context.

[91] The defendant stated that, on 23 February 2012, Mr Denize contacted him and asked him to *"arbitrate i.e. facilitate"* the negotiations then taking place between Mr Denize and Mr Shallue referred to above. The defendant said that, at that point, those parties had reached an impasse on price and were half a million dollars apart and there were unresolved issues regarding other conditions. This request by telephone to the defendant from Mr Denize was unexpected and he regarded it as outside the assistance he had been providing to Mr Shallue. Mr Denize then suggested that Mr Denize pay the defendant a fee for his services if the impasse was settled and that fee was agreed at x% of the sale price. The defendant noted that was a far lower commission than he would normally charge had he been acting as an agent.

[92] He then assisted the parties with their negotiations at the meeting on 23 February 2012 when agreement was reached on price and there were outstanding conditions to be resolved between the solicitors of the parties. Any agreement was conditional on Mr Denize selling his existing farm and also on Mr Shallue gaining approval from Mr McIntyre to sell the Rotokoku Road farm. The parties did not sign an agreement for sale and purchase in the presence of the defendant but did shake hands before him. The defendant seems to have taken no other part in that Rotokoku Road farm transaction between the Shallues' company and Mr Denize and puts it: *"I saw my involvement as preventing a potential breakdown between the parties"*.

[93] It seems that the reason the agreement for sale and purchase between the Shallues and Mr Denize had the PGG Wrightson logo, a deposit clause specifying payment to PGG Wrightson, and the last page also referring to PGG Wrightson, was that the defendant's personal assistant gave a precedent sale and purchase document to Mr Denize which had those matters included by oversight. The defendant had asked his personal assistant to type up relevant draft clauses from precedents on her computer.

[94] The defendant maintains that no confusion was caused by that oversight and that it did not put Mr Shallue (or his company) at risk of paying a double commission to PGG Wrightson, and that it was clearly understood between the Shallues and Mr Denize and their solicitors that their transaction was private and PGG Wrightson had no involvement in it and was not entitled to any commission. The defendant said he specifically confirmed with Mr Shallue and his solicitors that this was not a PGG Wrightson listing and the PGG Wrightson was not seeking any commission on that transaction. The defendant added that he felt such confirmation was not necessary because there was no agency agreement then in place under which PGG Wrightson could seek a commission from Mr Shallue.

[95] The defendant also added to us *"The fact that PGG Wrightson was not involved as agent is also clear from the final version of the sale and purchase agreement, which, with Mr Shallue's consent, I obtained from his solicitors, Edmonds Marshall. In this final version the references to PGG Wrightson on the front page and last page of the agreement have been crossed out. The cross outs by Edmonds Marshall were carried out after the meeting on 23 February 2012."* The defendant then mentions that version of the contract contains other alterations made subsequent to the arbitration meeting of 23 February 2012.

[96] We have referred above to a meeting the defendant was required to attend with PGG Wrightson on 25 June 2012 and to Mr Cooper's evidence that the defendant did not disclose the Denize fee at that meeting. The defendant's response to that is as follows:

> *"96 …*
>
> *a. The sole purpose of this meeting was to discuss a commission dispute raised by Mr Lissington, who was seeking a 50% share of the McIntyre commission. From my perspective, Mr Lissington was not entitled to a share of the commission because he did not work for PGG Wrightson at the time the agreement was put together and he had no involvement with the sale process. The entire meeting focused around this discussion.*
>
> *b. The Denize transaction was not a topic or focus of the meeting, it was a matter that came up only very briefly and in passing. I advised PGG Wrightson at this meeting of the Denize-Shallue transaction. I said to those present that the transaction was a private deal between the parties.*
>
> *c. At the time of this meeting, and to this day, I did not consider the work I had carried out for Mr Denize was PGG Wrightson work that I was obliged to discuss with PGG Wrightson. Mr Denize was not a client or potential client of PGG Wrightson. Also, the work was not in my view real estate work because the parties had already met and commenced negotiations and my fee was for my assistance at their meeting on 23 February 2012. I believed the fee charged of only x% reflected this. My understanding of my contract was that I had contractual freedom with PGG Wrightson to do this work privately.*
>
> *d. At the date of this meeting I had not received the fee because the Denize-Shallue transaction had not settled, and it did not do so until three weeks later.*
>
> *97. For the above reasons, I do not consider I was being secretive about the Denize commission by not disclosing it at this meeting."*

[97] Most of the remainder of the detailed evidence-in-chief of the defendant comprises specific responses to the charges and is more in the nature of a submission than evidence. Those matters will be dealt with below, as necessary, when we deal with the submissions of the parties and then set out our reasoning.

[98] Of course, the defendant was carefully and extensively cross-examined by Mr Clancy mostly on matters already covered above. Also, the defendant was taken through a number of documents by Mr Clancy who put it to him that surely he, the defendant, was confined to work as a real estate agent for PGG Wrightson. The defendant's response was that he did not recognise the work he did for Mr Denize as real estate agency work.

[99] It was put that he could have been more forthcoming about his assistance to PGG Wrightson. His response was that he was obliged by Mr Shallue to keep the transaction extremely confidential.

[100] The defendant regarded it as his duty to have Mr McIntyre settle his purchase contract or to have Mr McIntyre cancel that contract to enable Mr and Mrs Shallue to sell to somebody else.

[101] Inter alia the defendant was pressed that, while he did not introduce Mr Denize to Mr Shallue, the latter was still liable for commission under the existing listing agreement; but the defendant maintained that there was no such listing agreement in existence at material times. He also explained that he did not endeavour to have completed a notice of cancellation of listing by Mr Shallue with PGG Wrightson because he considered that the listing had expired. He felt that PGG Wrightson's lawyers were not given the full detail of background facts about that when giving their opinions. The defendant asserted that he had been in no doubt that there was no longer any agency agreement between the Shallues and PGG Wrightson at material times and he thought he was being open and honest in considering that PGG Wrightson had already got full commission and could not possibly be entitled to more.

[102] He also stated that he performed his so called arbitration work as a favour to Mr Denize and to Mr and Mrs Shallue, but that he could not disclose the arrangements to PGG Wrightson because confidentiality was essential for the parties, especially for Mr and Mrs Shallue. He again emphasised strongly that he did not see that arbitration type work as real estate work and that he had not been involved in the transaction between Mr Shallue and Mr Denize nor even introduced them but only attended a 25 minute meeting to resolve an impasse over price.

[103] He said he knew nothing of the subsequent amendments to the contract between them and had left that documentation side of things to their lawyers; and the agreement which he helped put together was not meant to be a formal agreement but simply something to be taken to their respective lawyers. Inter alia, it was put to the defendant that, surely, it was a serious failing by him to have been involved in the signing of an agreement between Mr and Mrs Shallue and Mr Denize when there were clauses in the agreement which were not meant to be there. He responded that the clauses should not have been there but he was not handling that aspect of things.

[104] The defendant was pressed that he was involved in the transaction from Mr and Mrs Shallue to Mr Denize because he had been using PGG Wrightson facilities and computer and forms, but he insisted that transaction was their personal transaction negotiated by them alone until their final impasse over the precise price. He again insisted that the assistance he gave to that transaction did not comprise any real estate work and he was only helping when the parties stumbled between themselves over price.

The Agreed Bundle of Documents

[105] There are two substantial volumes of documents and a third smaller bundle but we only refer to some of those documents.

[106] There is a copy of an agreement dated 22 June 2009 between PGG Wrightson Ltd and the defendant called *"Real Estate Independent Contractor Agreement Salesperson"* to determine the terms of the defendant's engagement by PGG Wrightson as an independent commission salesperson. It is stated that engagement shall be effective from 1 July 2009. The agreement is quite detailed and

carefully worded but the defendant is to work diligently and use his best efforts as a real estate salesperson for PGG Wrightson. He is to abide by PGG Wrightson's rules, policy, procedures, and performance standards. He is to comply with all relevant legislation and, inter alia, to *"perform the salesperson's duties in a diligent, competent, careful, professional, ethical and skilful manner"*. Except as expressly authorised by the agreement, he is not to enter into agreements as the salesperson of PGG Wrightson. He must immediately give PGG Wrightson particulars of all properties which he lists for sale.

[107] It is stated at para 4.3(a) that the salesperson shall not *"perform or agree to perform any other appointment, contract, service or employment with any other person or employer whether in real estate agency or otherwise without the written consent of PGG Wrightson. Such written consent shall not be unreasonably withheld in the case of minor part time work (other than real estate agency) which would not interfere with the salesperson's performance or duties."*

[108] Also, the defendant may not offer or agree to depart from the PGG Wrightson schedule of fees without the express permission of PGG Wrightson. All files, legal documents, keys, books, plans, maps, signs, listings and other documents pertaining to any property or any transaction in the process of completion during the term of the agreement are and shall remain PGG Wrightson's exclusive property. There are many other detailed provisions.

[109] There is also a supplementary agreement between those parties dated 23 June 2009, but that deals with certain inducements being paid to the defendant to execute the said independent contractor agreement with PGG Wrightson.

[110] Dated 8 December 2009 is another independent contractor agreement as real estate salesperson made between PGG Wrightson and the defendant. It is somewhat similar to that of 22 June 2009. It is emphasised that the defendant is engaged as an independent contractor and not as a servant, employee, or joint venture partner of PGG Wrightson. This agreement is to be effective from the later of 1 February 2010 or the date on which the defendant becomes licensed under the Real Estate Agents Act 2008. There is no dispute that it continued in force at all material times.

[111] Inter alia, the defendant is to devote such time and attention to the services of a real estate salesperson for PGG Wrightson as reasonably necessary *"to ensure the services are in all respect promptly carried out with all due care and skill in accordance with the Code of Professional Conduct and Client Care Guidelines (REAA Code) produced by the Real Estate Agents Authority (REAA) and PGG Wrightson's Policy and Practice Guidelines for Independent Contractors (PGG Wrightson guidelines)."* Again the defendant as the salesperson is to work diligently and use his best efforts to strive to give satisfaction to the clients and customers of PGG Wrightson. Inter alia, he is to comply with the Act and such statutes as the Fair Trading Act 1986, and the Commerce Act 1986 and all other relevant laws and ethical rules including the REAA Code and PGG Wrightson guidelines. He is to perform his salesperson's services in a diligent, competent, careful, professional, ethical and skilful manner. He is only to enter into agreements with clients as a salesperson of PGG Wrightson as expressly authorised by the agreement.

[112] That agreement also provides, inter alia, that he may only operate as a salesperson upon the terms and conditions of the agreement and must not (para 4.2(b)) *"perform or agree to perform any other appointment, contract, service or employment with any other person or employer whether in real estate sales, leasing, training or otherwise without the written consent of the Reporting Manager. Such written consent shall not be unreasonably withheld in the case of minor part-time work (other than in real estate sales, leasing or training) which would not interfere with the salesperson's performance or duties under this agreement".* Under para 4.2(d) he must not *"offer or agree to depart from the PGG Wrightson schedule of fees … without the express permission of the Reporting Manager*. Under paragraph 4.2(g) He must not *"receive from any person, company or organisation, any form of undisclosed or secret commission, kick back or reward, whether financial or otherwise, arising directly or indirectly from the placement of any advertising"*. The last 10 words seem to abrogate the effect of para 4.2(g). Any breach of such restrictions would render the salesperson liable to account to PGG Wrightson for the relevant gain or loss.

[113] That agreement also provides that all property pertaining to any property or transaction in the process of completion during the term of the agreement remains the exclusive property of PGG Wrightson. There are provisions about payment of commission. There is also a provision headed *"conflict of interest"* which reads:

> *"15.1 The Salesperson will not, without the written consent of PGG Wrightson (which will not be unreasonably withheld) enter into any agreement for/of services that could bring the Salesperson into conflict with its obligations under this agreement. Any breach of this clause will be treated as material and may result in immediate termination of this Agreement."*

[114] The initial listing agreement from WDL, showing Mr and Mrs Shallue as vendors, is dated 13 May 2011 in relation to all the said farmland and seems to indicate that upon expiry of a sole agency it reverts to an indefinite general agency. There is a further such rural agency listing agreement dated 24 June 2011 between those parties for an auction to take place on 9 November 2011. That clearly reverts to a general agency on the expiry of the sole agency on 28 February 2012.

[115] Also adduced to us is a copy of the agreement for sale and purchase dated 24 February 2012 between WDL and Mr M J Denize or nominee regarding the farm at 771 Rotokoku Road, Tirohia, Te Aroha at a price of $x with settlement due for 1 June 2012. The agreement adduced to us shows that the deposit of $450,000 is to be payable to PGG Wrightson. Its paragraph 12 (of printed standard terms) reads:

> *"12.0 Agent – 12.1 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 effect the sale. The vendor shall pay the agent's charges including GST for affecting such sale."*

[116] That agreement contains a number of additional typed terms and conditions. The very last page of it has an initialled deletion of PGG Wrightson Real Estate Ltd as agent.

The Stance of the Defendant

[117] As already indicated, Mr Chesterman helpfully provided us with very detailed typed and later oral submissions which we now cover.

[118] Mr Chesterman emphasised that Mr Morgan is a licensed agent who, with his company Diagonal Holdings Ltd, operated as an independent contractor for PGG Wrightson and was not an employee, but there was a commercial relationship with both parties having the resources and opportunity to protect their own commercial interests. Their business relationship was governed by the terms of two contracts, one between PGG Wrightson and Mr Morgan and the other between PGG Wrightson and Diagonal Holdings Ltd. Those contracts did not restrict Mr Morgan or his company from carrying out work for people who were not clients, or potential clients of PGG Wrightson. With consent, he was even able to carry out work for potential clients of PGG Wrightson. Diagonal Holdings Ltd faced no restrictions at all.

[119] Mr Chesterman puts it that Mr Morgan faces two charges stemming from his provision of so-called 'arbitration' services to Mr Denize who was engaged in a private transaction, and for not disclosing the fee he received to PGG Wrightson. He also puts it that the entire complaint, and PGG Wrightson's issue with Mr Morgan having the x% fee, seems to all stem back to PGG Wrightson's belief that it had an active agency agreement with the Shallues over the said farmland at all material times.

[120] Mr Morgan denies Charge 1, regarding non disclosure of the fee to PGG Wrightson, for the following reasons:

[a] There was no agency agreement in place between PGG Wrightson and Mr Shallue at the time of his arbitration services but the sole reason for PGG Wrightson taking issue with the x% fee seems to be its belief that there was a breach of an agency agreement.

[b] PGG Wrightson have failed to act in good faith to Mr Morgan, and do not come to this complaint with clean hands; presumably, Mr Chesterman means that PGG Wrightson has received full commission.

[c] The conduct complained of relating to non disclosure is not real estate work and there is not a sufficient nexus between the alleged omission and Mr Morgan's fitness to be a real estate agent.

[d] PGG Wrightson carried out an unfair and biased investigation with the aim of justifying its decision to terminate his *"employment"* contract, which was an abuse of process and should not be justified by the charges against Mr Morgan being upheld.

[e] The CAC's process was unfair due to the failure to interview Mr Morgan in person in circumstances where he faced serious charges, and also in failing to offer him the opportunity to mediate.

[f] The circumstances, even if proved, fall far short of either misconduct or even unsatisfactory conduct. At worst, Mr Morgan did not interpret his

contract in the same way PGG Wrightson did, and the latter's interpretation rests on the erroneous assumption of there being an active agency in place between PGG Wrightson and the Shallues at material times.

[121] Mr Morgan denies Charge 2 for the following reasons:

[a] That the arbitration services were not real estate work because the defendant's assistance related to a private transaction brought about by Messrs Shallue and Denize as the parties to it, and Mr Morgan was not involved in the introduction of those parties and provided only minor negotiation services; he assisted Mr Denize in Mr Denize's bringing about of the transaction.

[b] No element of consumer protection is involved.

[c] Mr Morgan knew the PGG Wrightson – Shallue agency was at an end and did not need to check this fact and there was no one to check it with.

[d] Under s.136 of the Act (re disclosure of benefits by a licensee), commissions do not amount to financial benefit and are excluded; and the definition of 'commission' in s.4 of the Act includes a 'fee' so that Mr Morgan's fee is excluded.

[e] With regard to Charge 2(c) covering the defendant's use of a sale and purchase agreement with the PGG Wrightson logo on it and, by operation of clause 12.1 of that contract form, creating a risk that Shallues would be exposed to commission to PGG Wrightson, it is put for the defendant that:

[i] The final agreement had the name PGG Wrightson crossed off.

[ii] The logo in the early drafts did not reflect the intention of the parties and was ignored by them.

[iii] There was no agency in place between PGG Wrightson and the Shallues; and clause 12.1 of the contract and the Wrightson logo cannot be relied upon as a sufficient written agency contract because there is no compliance with the requirements of written agency agreements under rule 9.8 which requires that the commission conditions and amount be stated.

[iv] It was PGG Wrightson's policy never to charge a second commission.

[v] Both Messrs Morgan and Lissington informed Mr Shallue, after he paid the McIntyre commission in August 2011, that no further commissions were payable.

[f] With regard to Charge 2(d) covering the defendant inviting the signature of Mr Denize on a purchaser's agency agreement that was unsigned by Mr Morgan, without stating the actual dollar amount payable and without setting out that further information on agency agreements and contractual documents is available from the REAA, it is put for the defendant that he

substantively compiled with this allegation and that Mr Denize was represented by a solicitor and engaged in a private transaction brought about by himself.

[122] Counsel for the defendant then made the following further submissions regarding Charge 1.

[123] It is submitted for the defendant that there was no agency agreement in place between PGG Wrightson and Mr Shallue at the time of the Denize Transaction, because the 13 May 2010 Agency had expired and that was the only agency ever in force in respect of Waitoki Downs Ltd; it was the agency in place when Mr McIntyre entered into the 23 December 2010 sale and purchase agreement which, eventually, went unconditional on 4 August 2011.

[124] It is submitted that the 24 June 2011 agency agreement and the notice of cancellation were never of any legal effect and were conditional upon the McIntyre contract being cancelled; and it was agreed between Messrs Morgan and Shallue that they were so conditional. It is put they were entered into while the McIntyre contract remained over the land so that the Shallues had no legal rights to grant a new agency and PGG Wrightson could not legally accept one. Mr Chesterman puts it that the Court of Appeal has recognised such an issue as one of intention and interpretation. He submits that where parties conclude an agreement, but on terms, the agreement will not have contractual force until the occurrence of some specified event; and, while such a condition may not be written down, the Court will infer neither party intended to be bound until the happening of the condition – *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA).

[125] Mr Chesterman submits that in August 2011, when Mr McIntyre finally went unconditional and paid the deposit, the 13 May 2010 agency with PGG Wrightson terminated and no further commission was payable to PGG Wrightson by the Shallues without a new agency agreement. He adds that from a factual perspective the 13 May 2010 agency terminated. Mr Chesterman submits that from a legal perspective also the agreement came to an end. Mr Shallue's evidence was that both Messrs Morgan and Lissington told him no more commission would be sought and that was his understanding. Mr Cooper further confirmed this situation in his evidence by stating PGG Wrightson would never claim two commissions.

[126] Mr Chesterman submitted that, under his contract arrangements with PGG Wrightson, Mr Morgan had no obligation to disclose the fee because those contractual terms did not require it. He submitted that Mr Denize was not a client of PGG Wrightson; the work i.e. assistance of parties in private negotiations, was not work that PGG Wrightson was seeking or engaged in; Mr Morgan's and Diagonal Holdings' contractual arrangements did not prohibit the work being carried out for a fee; and there were no contractual restrictions upon Diagonal Holdings Ltd.

[127] Mr Chesterman also submits that the starting point regarding Mr Morgan is that the work he did was not part of PGG Wrightson's business i.e. giving assistance in private transactions and for this reason Mr Denize was not a client or a potential client; and it is also clear from the agreement itself that real estate 'sales' are what PGG Wrightson was after, not provision of assistance to private parties.

[128] Mr Chesterman submits that Mr Cooper was wrong in his evidence that clause 4.1(l) of the defendant's 8 December 2009 contract with PGG Wrightson

contained a relevant blanket prohibition. The clause states *"only enter into agreements with clients as a Salesperson of PGG Wrightson as expressly authorised by this agreement"*. Mr Chesterman submits that Mr Cooper left out the last six words of the clause in his evidence which gave the clause a different meaning. He submits that a plain reading of that clause does not support the blanket prohibition asserted by Mr Cooper; and that the clause simply seeks to ensure salespersons follow proper steps and procedures when entering into contracts.

[129] Mr Chesterman also puts it to be a further issue that Mr Morgan's independent contractor agreement was simply a standard salesperson contract which did not strictly apply to him as was clear from Mr Cooper's acceptance that various parts of clause 4.2, which state *"the sales person shall not"*, did not apply to Mr Morgan because of his managerial role. It is put this creates uncertainty as to which of its terms applied including any restrictions. Mr Chesterman submits that contract also allowed for Mr Morgan to undertake outside work as is clear from clause 4.2(b); and that clause was concerned with the type of outside work done rather than how much the salesperson was getting paid for doing it, or whether they were being paid at all. Mr Chesterman also submits it does not seem relevant to that clause, or logical, that any decision by PGG Wrightson about whether the work can be undertaken depends in any way upon the amount of money received for it, or whether no money was received.

[130] Mr Chesterman emphasised that in his said email to Mr Cooper of 16 February 2012, Mr Morgan disclosed the precise type of work he was carrying out, i.e. negotiations for Mr Denize in respect of the latter acquiring part of Rotokoku Road in a private transaction. It is put that with all of this information, which fully explains Mr Morgan's involvement, and despite Mr Morgan's request to let him know immediately if Mr Cooper had problems *"with this position"*; Mr Cooper took no issue until he learned a week after the email that Mr Morgan had earned a private fee.

[131] Mr Chesterman submits it is not logical that the sentence 'no commission will be seeked' should change anything as Mr Cooper had no problem with PGG Wrightson not receiving a commission from Mr Shallue and only took issue with the transaction upon learning from Mr Denize of the x% fee for the defendant. It is put that he took issue because of his false belief that there was an active agency agreement which, in his view, exposed Mr Shallue to a commission. Mr Chesterman maintains that once the agency issue is addressed i.e. there was not one, Mr Cooper is left with no complaint on behalf of PGG Wrightson.

[132] Mr Chesterman submits that Mr Morgan had no obligation under the Act, or its Rules to disclose the x% fee, and that it is not appropriate to broadly import to Mr Morgan an employee's duty of good faith to his employer for the following reasons. There is no specific obligation under the Act or the Rules which requires disclosure from the defendant to PGG Wrightson of private fees. It is quite clear Mr Morgan was not an employee because his contract expressly states he is an independent contractor, not an employee.

[133] Mr Chesterman also submits that the conduct complained of relating to non disclosure is not real estate work and there is not a sufficient nexus between the alleged misconduct and Mr Morgan's fitness to be a real estate agent; and that the omission to disclose the x% fee did not amount to real estate work as defined by s.4 of the Act i.e. it is not work *"for the purpose of bringing about a transaction"*. In fact,

the evidence is that the transaction had stalled until the defendant mediated the price, in particular, between Messrs Shallue and Denize.

[134] It is also submitted that the issues before us represent a contractual dispute between PGG Wrightson and Mr Morgan; that there is no element of consumer protection involved and that the complaint is outside the scope of the Act. Mr Chesterman puts it that s.3 of the Act confines its purpose to *"promote the interests of consumers in respect of transactions that relate to real estate and promote public confidence in the performance of real estate agency work".*

[135] He then submits:

> *"PGG Wrightson carried out an unfair and biased investigation with the aim of justifying its decision to terminate his contract. It was an abuse of process and should not be justified by the charges being upheld against Mr Morgan. The CAC's process was unfair due to the failure to interview Mr Morgan in person in circumstances where he faced serious charges, and also in its failure to offer him the opportunity to mediate.*
>
> *The circumstances, even if proved, fall far short of misconduct and also fall short of unsatisfactory conduct. Mr Morgan at worst, did not interpret his contract in the same way PGG Wrightson did, and PGG Wrightson's interpretation rested on the erroneous assumption of there being an active agency in place between PGG Wrightson and the Shallues."*

[136] Generally in response to charge 2, Mr Chesterman submits that the arbitration services were not real estate work because they related to a private transaction brought about by the parties; and Mr Morgan was not involved in the introduction of the parties and provided only minor negotiation services. It is submitted that the services of Mr Morgan provided must be assessed in light of the background to the transaction as follows:

[a] Mr Morgan did not introduce Mr Denize to the farm. Mr Denize knew about the farm from advertising some years prior, in particular from an advertising campaign by several agencies in 2009.

[b] In December 2011 Mr Denize introduced himself to Mr Shallue and the property. He telephoned Mr Shallue, met him at the farm shortly after that, and they spent a few hours together talking and viewing the farm. They negotiated throughout the day and by the end of the day were $500K apart on price and had agreed conditions.

[c] It was not until February 2012, that Mr Denize, with Mr Shallue's knowledge and consent, contacted Mr Morgan for some basic assistance with draft contract clauses and titles. This occurred after the parties had introduced themselves and were considerably down the path in their negotiations with each other. At this point they were both legally represented and not far from a closed deal.

[d] When Mr Morgan provided information to Mr Denize, he did so for Mr Denize to pass it on to his solicitor. He did this for free, and there was no agreement or expectation by him, or Mr Denize, that payment would flow from this work. During the period Mr Morgan gave this assistance,

Mr Denize and Mr Shallue continued in their private negotiations, without (it is also put) any involvement from Mr Morgan.

[e] The work Mr Morgan carried out for the fee was at the meeting held on 23 February 2012. Mr Denize requested Mr Morgan's assistance and at this time a fee was agreed of x% of the purchase price conditional on settlement. It was a round table discussion at Mr Shallue's house. Mr Morgan assisted the parties to come together on price at $x.

[f] At the end of the meeting, the parties shook hands. It is put they did not sign the agreement in front of Mr Morgan (there is some conflict in evidence over that aspect), but went back to their solicitors who made further changes to the agreements terms, including Mr Shallue's solicitors crossing out the PGG Wrightson reference on the draft agreement, and the solicitors completed the transaction.

[137] Mr Chesterman submits that the fundamental distinguishing feature between the work carried out by Mr Morgan and the work typically carried out by real estate agents is that Mr Morgan did not introduce the parties and was called in only at the tail-end of their negotiations. He refers to the definition of real estate work at s.4 of the Act specifying exclusions at its paragraph (c) and submits that the work carried out by Mr Morgan falls under exclusion (c)(i) *"the provision of general advice or materials to assist owners to locate and negotiate with potential buyers"*. Also, he put it that exclusion must impliedly cover the provision of general advice or materials to assist buyers to locate and negotiate with potential sellers.

[138] Mr Chesterman referred to Charge 2(a) and submitted that Mr Morgan knew the PGG Wrightson – Shallue agency was at end and did not need to check this fact and there was no one to check it with. He put it that the undisputed evidence is that Mr Morgan knew more about the McIntyre transaction than anyone else at PGG Wrightson and, in addition, was under Mr Shallue's well justified request for confidentiality; and, given also the complexity of the transaction, and Mr Morgan's roles as manager at PGG Wrightson and his autonomy with client affairs, it was reasonable for Mr Morgan to have relied upon his own judgment and complete the purchase transaction for Mr Denize at x% fee.

[139] Mr Chesterman again referred to Charge 2(b) and the defendant's alleged failure to disclose a financial benefit to the vendor in writing. He submits that under s.136 commissions do not amount to financial benefit and are excluded; that the definition of 'commission' at section 4 of the Act includes a 'fee'; so that Mr Morgan's fee is therefore excluded. He submits that Mr Morgan was not carrying out real estate work but that if we find he was, then his payment was a fee or commission excluded by s.136(4) from the definition of a financial benefit. It is also submitted that if such an exception does not apply, then there was oral disclosure of the x% by the defendant to Mr Shallue and that is not misconduct but might be unsatisfactory conduct. He referred to our decision in *REAA v Clark* [2013] NZREADT 62 at 78.

[140] Mr Chesterman again referred to Charge 2(c) about using a sale and purchase agreement with the PGG Wrightson logo on it and, by operation of clause 12.1 of the sale and purchase contract, creating a risk the Shallues would be exposed to double commission to PGG Wrightson; but submitted for the defendant that this allegation cannot be proved because:

[a] PGG Wrightson had been crossed off the final agreement between Messrs Shallue and Denize;

[b] The PGG Wrightson logo in the early drafts of the agreement did not reflect the intention of the parties and was ignored by them;

[c] There was no agency in place between PGG Wrightson and the Shallues and clause 12.1 and the logo cannot be relied upon as a sufficient written agency contract because they do not comply with the requirements of written agency agreements at rule 9.8 that the commission conditions and amount be stated;

[d] It was PGG Wrightson's policy never to charge a second commission; and

[e] Both Messrs Morgan and Lissington informed Mr Shallue, after he had paid the McIntyre commission in August 2011, that no further commissions were payable, therefore waiving any right to commission.

[141] Mr Chesterman again referred to Charge 2(d) alleging that the defendant invited the signature of Mr Denize on a purchaser's agency agreement that was unsigned by Mr Morgan, without stating the actual dollar amount payable and not setting out that further information on agency agreements and contractual documents is available from the REAA.

[142] He submitted that if the defendant's work in issue was real estate work, then Mr Morgan substantively complied with this requirement and, as Mr Denize was represented by a solicitor and engaged in a private transaction brought about by himself, there was no harm caused or even risk of harm. It is also put for the defendant as follows:

[a] In response to d(i) of the charge, the agency agreement was sent by email from Mr Morgan and that amounts to compliance with any requirement that the agreement be signed by Mr Morgan.

[b] In response to d(ii), the fee was accurately described as being x% of the sale price which complies with any obligation to provide an estimate.

[c] In respect of d(iii), this was not standard agency work, and the purchaser was legally represented.

[d] In respect of all allegations under the particulars of Charge 2(d), it is highly relevant that there is no complaint from the purchaser and no disadvantage to him or to PGG Wrightson from any of the alleged breaches and, in addition, there was substantive compliance.

[e] That there is no possibility that the particulars alleged under Charge 2(d), could on the evidence amount to serious incompetence or serious negligence.

Our Views

[143] We assess all witnesses as candid in their evidence to us; although, as we cover herein, some of the evidence of the defendant is not credible to us.

[144] We do not need to deal with some of the issues raised as our focus is on the conduct of the defendant, at times material to the charges, rather than any liability between parties referred to above.

[145] For present purposes, we consider that, at the time Messrs Shallue and Denize were negotiating with each other, PGG Wrightson still held a general agency from Mr and Mrs Shallue and their vendor company.

[146] In simple terms, with regard to Charge 1, the defendant argues that his conduct in assisting Mr Denize could not be disgraceful because it was not real estate agency work. However *"real estate agency work"* is defined in s.4(a) of the Act as: *"means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction;"*. Under exclusion (c) of that definition *"real estate agency work"* does not include, inter alia: *"(i) The provision of general advice or materials to assist owners to locate and negotiate with potential buyers;"*

[147] That would mean that providing a form of agreement for sale and purchase, or some precedent clauses, to Mr Shallue (and, probably, to Mr Denize) would not amount to real estate agency work. However, it seems to us that the defendant's involvement at the meeting of 23 February 2012 was specifically *"for the purpose of bringing about a transaction"* between Mr Shallue (through his company) and Mr Denize because negotiations between those two gentlemen had broken down. Also, there is such a linkage in the background covered above between time of listing by Mr and Mrs Shallue and that point at 23 February 2012, that it is unrealistic to find that the defendant's activities were not real estate agency work. Also, he used the PGG Wrightson facilities and systems for his dealings with Mr Denize.

[148] Also, it seems to us that at material times the property was subject to an agency or listing agreement between Mr and Mrs Shallue and PGG Wrightson.

[149] The defendant simply did not disclose to PGG Wrightson (nor, initially, to Mr Shallue) the fee or commission he had arranged from Mr Denize.

[150] It is concerning that the defendant did not disclose his x% fee to PGG Wrightson. He must have known he was not permitted to take that fee and that he was acting in breach of contract and of trust. Maybe he lacked mens rea; but it seems reckless to have not addressed the situation to PGG Wrightson.

[151] We think it a serious departure from ethical standards to act as he did over that x% fee and a breach of his agreement with PGG Wrightson Real Estate Ltd. He had every opportunity to show candour to PGG Wrightson in his dealings with Mr Cooper. Also, he was in a position of seniority and trust with PGG Wrightson and extremely well paid.

[152] We accept that the defendant worked with particular dedication and skill. He must have known PGG Wrightson would probably have expected him to split some of the x% with it and/or some of his close colleagues. We can understand that the defendant would not have expected PGG Wrightson to take any double commission and that, as a senior PGG Wrightson manager, he would have influence over that; but he could not be sure about that and was reckless in putting Mr and Mrs Shallue at such risk.

[153] Having said all that, the picture is rather elaborate and the defendant seems to have honestly thought that, at law and in reality, he was simply adding the final touch to a private transaction between Messrs Shallue and Denize and in the context we have outlined one can understand that view to some extent. Also, the defendant seems to have honestly thought that, at law and in reality, the initial listing agreement from Mr and Mrs Shallue to PGG Wrightson had expired.

[154] However while that breach outlined in Charge 1 can be regarded as technical, or misunderstood in good faith by the defendant, we consider that the defendant's overall conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and also that such conduct would reasonably be regarded by agents of good standing as being unacceptable. Accordingly, in terms of our powers under s.110(4) of the Act while we dismiss Charge 1 of misconduct we find that, in respect of the conduct outlined in Charge 1, the defendant has engaged in unsatisfactory conduct.

[155] Charge 2 is also one of misconduct, but in terms of s.73(b) of the Act, alleging seriously incompetent or seriously negligent real estate agency work. We consider that it was seriously negligent of the defendant to lay open Mr Denize to possible double commission on the basis that there still was a previous agency agreement for sale and purchase between him and PGG Wrightson and, in any case, the initial agreement signed between Messrs Shallue and Denize provided for commission to be paid to PGG Wrightson by Mr and Mrs Shallue or their vendor company. As we have covered in previous cases, it is no defence that PGG Wrightson were unlikely to charge a double commission to Mr Shallue.

[156] Also, there is a clear breach of s.136 of the Act in that the defendant failed to disclose in writing to Mr Shallue that he would benefit financially from the sale of the property by receiving the special commission, or fee of x%, referred to above; although we accept that, orally, Mr Shallue was made aware of that fairly soon and was quite unfazed by that. Nevertheless, s.136 has not been complied with and it seems that at 23 February 2012 there was a certain vagueness about the amount of fee which Mr Denize was paying the defendant from the perspective of Mr Shallue.

[157] We realise that s.136(4) reads:

> *"(4) For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction."*

We think the word *"merely"* to be significant. Despite the wide definition of *"commission"* in s.4 of the Act, the defendant was not receiving the usual type of fee from a vendor principal, but a special fee from a purchaser having already received commission from the vendor as explained above. We consider that, in the circumstances we have covered, the defendant benefited financially from the Shallue to Denize transaction.

[158] Also, there can be no doubt that the defendant invited the signature of Mr Denize to a purchaser's agency agreement which was not signed by the defendant and did not set out the precise fee nor in writing that further information on agency agreements and contractual documents is available from the Real Estate Agents Authority. As Mr Clancy put it, those mistakes were made and the level of seriousness is for us to determine.

[159] We confirm that we find the ingredients of Charge 2 proven as seriously negligent real estate agency work. Having said that, when this aspect is looked at in context we find misconduct at the lower end of the scale of misconduct. Indeed as we indicated orally to the parties at the end of the hearing *"we can safely say though whatever our final reasoning, whether we end up with misconduct or unsatisfactory conduct or neither because frankly we've got an open mind at the moment and we can see that it's all quite arguable. I think the one thing we will say to you Mr Morgan is that whatever the outcome we would not expect your licence to be revoked …".*

[160] Accordingly we direct the Registrar to arrange a directions hearing of counsel with our chairperson in the usual way to arrange a timetable towards a hearing on penalty. Our current inclination is to deal with this matter by way of a fine on the defendant and, perhaps, a contribution to costs, but we await appropriate submissions from each party.

[161] We record that, orally at the hearing, we made an order that there be no publication of any of the financial affairs of any party to this case.

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

____
Judge P F Barber
Chairperson

____
Mr J Gaukrodger
Member

____
Ms C Sandelin
Member