

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 92

READT 063/13

IN THE MATTER OF

a charge laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

**REAL ESTATE AGENTS AUTHORITY
(by Complaints Assessment
Committee 20005)**

Prosecutor

AND

PAUL McGOWAN of Christchurch,
Licensed Salesperson

Defendant

MEMBERS OF TRIBUNAL

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

HEARD at CHRISTCHURCH on 2 September 2014

DATE OF THIS DECISION 20 November 2014

COUNSEL

Mr R M A McCoubrey for the prosecution
Mr G M Brodie for the defendant

DECISION OF THE TRIBUNAL

Introduction

[1] On 24 October 2013 Complaints Assessment Committee 20005 laid a charge of misconduct against Mr P McGowan (“the licensee”), of Waimakariri Realty, Rangiora, pursuant to s.73(a) of the Real Estate Agents Act 2008.

[2] The Committee alleges that on 1 March 2013, in the course of a dispute regarding the split of commission between the licensee and a colleague (Nadine Thomas), the licensee lost his temper. It is alleged that he swore at Ms Thomas and called her derogatory names. It is further alleged that he pushed her against a door frame and closed the door on her causing her bruising.

[3] The Committee alleges that the licensee’s conduct would reasonably be regarded as disgraceful by agents of good standing, or reasonable members of the public.

The Precise Charge

[4] The full charge reads as follows:

“Charge

Complaints Assessment Committee 20005 charges Paul McGowan (defendant) with misconduct, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful (s 73(a) Real Estate Agents Act 2008).

Particulars:

1. *An issue arose between the defendant and a colleague, Nadine Thomas (complainant) regarding the split of commission.*
2. *On 1 March 2013, the complainant approached the defendant to discuss the issue. The defendant lost his temper. He swore at the complainant and called her derogatory names.*
3. *The defendant pushed the complainant against a door frame and closed the door on the complainant, which caused the complainant bruising to her knees, elbows and ribs.”*

A Summary of the Evidence Adduced to us

Ms Nadine Thomas for the Prosecution

[5] Ms Thomas is a licensed salesperson who, at material times, worked for Waimakariri Realty in Rangiora.

[6] Ms Thomas states that at about 2.30 pm on 1 March 2013 she was assaulted by the defendant at the offices of that real estate agency. She referred the matter to the local Police who subsequently informed her that the defendant was arrested, interviewed, and given a precharge warning for assault against her. She added that the assault came about as a result of a commission dispute between her and the defendant and, although the dispute was then recent, the event it evolved from went back to 2010.

[7] She said that, just prior to Christmas 2012, she tried to speak with the defendant about the matter but he went to America about that time. She next saw him in the office of that real estate agency in late January 2013. She then tried to discuss the issue with him but says that he fobbed her off then and on two other subsequent occasions.

[8] The complainant said that on 1 March 2014 she managed to catch the defendant in his office. She said that she entered his office and told him that they needed to come to a resolution about their commission issue, but he told her to get out of his office, that he did not want to discuss it and that the complainant was being greedy; and he verbally abused her. Indeed, she says that the defendant told her to “*f off*” and called her a “*slut and a slag*” among other things and then, suddenly, lunged himself at her from his seat. She said that he brought up his right arm and she thought he was going to punch her with a clenched fist. However, she felt he must have thought better of things and, instead, grabbed her shoulders and pushed her up against the door-frame. She said that he

grabbed the open door and slammed it against the left side of her body pinning her to the door-frame so that she could not move. She said to him that he was hurting her and he eased the door off her just enough for her to take a step back. She said she did not have time to get completely out of the way before he slammed the door again catching her right knee with the impact. She then opened the closed door and told him he had hurt her in the knee, but he again told her to “*f off*”.

[9] She said that as a result of being hit by the door she had sore elbows and ribs, and a sore knee. She then left the building and went to the nearby Police Station and reported the assault.

[10] Ms Thomas candidly admitted to Mr McCoubrey that she had come back to the defendant’s office about five minutes or so after their confrontation and swept files off his desk. She seemed to be saying that she did that because she was in a state of shock and had found the defendant’s assault of her to be incredulous. She said that when she came past his office five or ten minutes after the incident she could not resist coming to his desk and sweeping off a box of files with her arm. However, she maintained that she had remained very calm at all times. She admitted that it was then she accused the defendant of being a liar that he lunged at her.

[11] In cross-examination of the complainant, Mr Brodie brought out that at material times she was aged 51, had experienced long service in both the NZ Armed Forces and in the New Zealand Police, and was determined to “*sort out*” her issue with the defendant about splitting particular commissions. She put it to us that she had gone to see the defendant “*for him to honour his word*” and that was the third time she had tried to achieve that.

[12] We note that, in terms of the amount of money in issue, there was quite some discrepancy in that the defendant seemed to think that the complainant was entitled to \$1,700 but she felt entitled to \$6,800.

[13] Under the cross-examination of Ms Thomas from Mr Brodie, the detail of the incident was analysed. The complainant emphasised that the defendant had repeatedly slammed the door against her and, at the time, she was worried at the level of violence and, particularly, that her wrist or hand might be jammed in the door. She seemed to be denying to us that she gave any provocation to the defendant.

The Evidence of Ms Michelle Elizabeth Mahon for Prosecution

[14] Ms Mahon is also a licensed salesperson and, at material times and now, works for that Waimakariri Realty agency in Rangiora.

[15] On 1 March 2013 she was sitting in her office at that agency and the defendant used an office which was opposite hers. Ms Mahon said that at around 2.30 pm that day she saw Ms N Thomas, the complainant, walk into the defendant’s office to speak with him about a commission dispute matter. She said she could hear that Ms Thomas was asking the defendant when he would pay her and that he quickly became angry and told her that he was not interested in discussing it, to get out of his room, and he abused her in a raised voice. She added that she saw the defendant push Ms Thomas high up on her shoulders or chest area and it seemed that he was trying to push her out the door of his office. She went and reported that incident to her manager Mr D Taylor.

[16] She subsequently made a statement of complaint to the Police and adduced to us a copy of that dated 4 March 2013. It reads as follows:

"I am making this statement to Constable Stefan PREDDY of Rangiora Police in regards to an incident that occurred at my workplace on Friday the 1st of March 2013 at around 2.30pm.

I work in the offices of Waimakariri Real Estate on High Street in Rangiora.

I was seated in my office which is opposite to a work colleagues names Paul MCGOWAN. One of the ladies I work with, Nadine THOMAS, entered Paul's office to discuss a matter with him. From my desk I have clear view of Paul's office as we both have glass walls.

I have known Paul for about 4-5 years and Nadine about 6 years. I've never had any problems with Paul personally although he is what I would call him a bit of a ranter and raver. Other people in the office have had issues with him.

I couldn't hear their conversation but I could hear Paul when he started yelling at Nadine. He was calling her a f...ing b..., a mole and some other abuse I can't quite remember. Eventually he got up from behind his desk while still abusing her. Nadine hadn't been in his office long at all before he started abusing her.

I saw Paul push Nadine towards his office door. I could see her fall back and hit the door frame. She seemed to get caught in the door way. Paul tried to close the door on her but she was caught in the way of the door. I could hear Nadine still trying to talk to Paul. She wasn't yelling or abusing him at all. She kept herself very calm.

Nadine reached out and swept items off Paul's desk. Paul slammed the door on her again and it hit her in the arm and the knee. At that point I went to the boss's office to get him but he was on the phone at the time. By the time he came down they were both separated and back in their own offices.

Everything in this statement is true to the best of my knowledge and belief. I make this statement knowing that it might be admitted as evidence for the purposes of a standard committal or at a committal hearing and that I could be prosecuted for perjury if this statement is known by me to be false or intended by me to mislead."

Ms Vicki Juliana Driver – a further witness for the prosecution

[17] Ms Driver is also a licensed salesperson working for the said agency. She says that on 1 March 2013 she was sitting in her office at the agency which was next door to the defendant's office. She said there is no window but only a wall between her office and the defendant's so she cannot see into his office unless she leaves her own office.

[18] Ms Driver said that she knew that Ms Thomas was owed commission from the defendant for introducing a buyer to a number of properties which the defendant had sold to that buyer. Ms Thomas had been trying to get payment from the defendant who had been fobbing her off for some time.

[19] Ms Driver added that, around 2.30 pm that day, she heard Ms Thomas go into the defendant's office and say *"Paul we need to discuss this"* and that Ms Thomas was speaking professionally, calmly, and in a businesslike manner. The defendant responded that he was not interested in talking about the matter but Ms Thomas said to him *"we do need to get some resolution"*, and he then became angry and exploded. Ms Driver said that the defendant was yelling at Ms Thomas that he did not want to talk about the issue, to get out of his office, and said something along the lines of *"f off out of my office you*

f...ing whore, f...ing mole, stupid f...ing slut". The witness said that he may even have used the "c" word but she was not sure, but that the defendant did call Ms Thomas a tirade of names.

[20] Ms Driver said that she then heard a commotion and crashing sound. She heard a crash and bang, and a noise like a couple of thuds, and then heard Ms Thomas say "*stop it, you're hurting me*"; and Ms Thomas then came out of defendant's office.

[21] Ms Driver said that the defendant stayed in his office for a short time and then started pacing around the lunch room very nervously before leaving the building. She added that Ms Thomas went out the front of the office and was very visibly shaken and told Ms Driver what had happened and that her knee was sore. The next day Ms Thomas told Ms Driver that her ribs were sore and Ms Driver saw that she had a mark on her knee but can't recall which knee that was.

The Final Witness for the Prosecution – Mr David Craig Taylor

[22] Mr Taylor is the licensed agent, a shareholder, and the director of the said agency in Rangiora. Inter alia, he recorded that the defendant started employment with that agency in January 2009 and was a salesperson there until 1 March 2013 when he, Mr Taylor, terminated the defendant's employment as a result of the incident described above.

[23] Mr Taylor knew that Ms Thomas and the defendant had an issue between them about splitting sale commission. He had suggested to them that they sort out something between themselves and told them they could come to him if they needed assistance over the matter.

[24] Mr Taylor said that, at the time of the incident described above which took place on 1 March 2013, he was sitting in his office in another part of the building and separate from the offices of the said salespersons. Around 2.30 pm, Ms Mahon came to his office and told him that the defendant had assaulted Ms Thomas. He went to Ms Thomas and asked her what had happened and then, separately, asked the defendant what had happened. He found that their stories differed to quite an extent.

[25] Mr Taylor said that the defendant told him that Ms Thomas had abused him and pushed items off his desk onto the floor. He then spoke with Ms Thomas over the telephone as she had left the office, and she accused the defendant of assaulting her and slamming the door into her.

[26] Mr Taylor added that he then spoke to Ms Mahon and asked what she saw. He observed that he would never question what Ms Mahon says because he regards her as very honest and truthful. He also observed that, in his experience, the complainant Ms N Thomas "*can be direct, but she is always polite and professional*".

The Evidence for the Defence

[27] The defendant was the only witness for the defence. He acknowledged that, on 1 March at the agency, there was an unsatisfactory incident which he had detailed to us in his 5 December 2013 Notice of Response to this charge. Because he confirms it to be true and correct we set out that statement in full as follows:

- "1. I am the respondent in this complaint to the Real Estate Agents Disciplinary Tribunal. I am making this statement in response to the complaint which the Complaints Assessment Committee has laid against me.*

Background

- 2 I have been involved in owning, setting-up and operating a number of businesses since I graduated from Canterbury University with a Bachelor of Civil Engineering. Since 2004 I have been involved either on my own, or in partnership with another partner, property development in the rural, lifestyle and residential sectors. All of these developments are of course required to be sold to the market. Originally we utilised the services of an outside Real Estate company. In 2008 I joined the Ray White agency at Rangiora for the purposes of selling not only property developed by myself but also other properties that vendors wished to market and sell.*
- 3 This Ray White branch closed in December 2008 and most of the salespeople there (including myself) moved to Waimak Real Estate (owned and operated by David Taylor) who took over the business and premises. Waimak Real Estate is a local business and is still involved in selling property at this date.*
- 4 I have been involved since 2010 in a large Rural Residential development at Mandeville in the Waimakariri District with around fifty lots to be sold. I am a fifty per cent shareholder in this project.*
- 5 The complainant is one of the salespeople employed by Waimak Real Estate. When the lots at Mandeville came to the market, she introduced me to a client of hers named Scott Dunleavy. He was an existing client of Waimak Real Estate and I understand that he had been introduced to the firm some years prior by the complainant.*
- 6 Although she introduced me to Scott Dunleavy, she then had no further involvement with him in regard to negotiating on the sale of lots to him. From the initial introduction in December 2010, it took several months of discussion and negotiation to finally sign contracts firstly on three lots in March 2011 and then a further two lots at the end of June 2011. These sales were all negotiated and documented by myself without further involvement from the complainant.*
- 7 The commission arrangement at Waimak Real Estate was generous and a legacy from the Ray White carry-over and was based on a 25% split to the office and 75% to the salesperson. Of that 75%, 60% was payable to the listing salesperson and 40% to the selling salesperson. I did not believe that this arrangement applied in the circumstances of this case because the only involvement which the complainant had was to make the initial introduction. She was neither the listing agent nor the salesperson. In my experience and understanding of the real estate industry, that introduction would normally justify a finder's fee or introduction fee of around 10% of the net commission.*
- 8 When the complainant introduced me to Scott Dunleavy, nothing was said or done about the commission arrangement. She did not raise the subject with me and did not make any statement about requiring a commission. There were no negotiations and nothing was agreed whether orally or in writing.*

- 9 *Although I negotiated five sales during 2011, the sales were subject to the issue of title and these were released progressively in 2012 with settlement as per the agreements up to 12 months later.*
- 10 *There were no discussions about any commission when the introduction was made at the outset and the subject was only raised by her some time after the sections had been sold. She took the position that she should receive the selling agent's fee, something which I did not consider was at all appropriate. Apart from making the original introduction to me, she had no further part to play in the sales process and I have always taken the view that she should receive a finder's fee or introduction fee of about 10% but no more.*
- 11 *The commissions on the five lots sold were as follows (excl GST):*

<i>Lot #</i>	<i>Total Commission</i>	<i>Office Portion</i>	<i>Salesperson Portion</i>
<i>37</i>	<i>4000</i>	<i>1500</i>	<i>2500</i>
<i>39</i>	<i>4000</i>	<i>1500</i>	<i>2500</i>
<i>41</i>	<i>4000</i>	<i>1500</i>	<i>2500</i>
<i>6</i>	<i>6750</i>	<i>1687.50</i>	<i>5062.50</i>
<i>7</i>	<i>6750</i>	<i>1687.50</i>	<i>5062.50</i>
<i>Total</i>	<i>25500</i>	<i>7875</i>	<i>17625</i>

- 12 *We were unable to agree on a settlement of this dispute.*
- 13 *I agree that on 1st March 2013 an argument took place between us.*
- 14 *The brief circumstances are that I was seated at my desk in my office at Waimakariri Real Estate Limited when the complainant came into the room and raised the subject of her claim to a selling agent's fee. The discussion unfortunately became quite heated and I accept that strong language and inappropriate words were used by both parties in the course of that argument. Whilst I was on my side of the desk, the complainant was in the space between my desk and the only door out of the office. At one stage she physically swept all of the papers and documents from my desk onto the floor. I asked her to leave my room and I got up from my desk and walked towards her and tried to usher her out of the room. I acknowledge that at one stage after she had moved outside my office she then attempted to re-enter my office and I forced the door against her body to try and prevent her from re-entering my room and I acknowledge that in the course of doing that her knee was forced against the door jamb as I tried to keep the door shut. However, I did not apply any particular force and I was certainly not trying to harm her or injure her in any way. The situation had become heated and out of hand and I wanted to be left alone.*
- 15 *I acknowledge that my conduct in closing the door against her was wrong and I wish to now formally apologise for doing that. She made a complaint to the police. I fully cooperated with the police and made a written statement in which*

I admitted the fact as outlined above. The police have issued me with a formal warning but have decided that any further prosecution action is not required.

- 16 *I deeply regret my conduct in this incident and I give the Tribunal my unequivocal assurance that this will not be repeated in any shape or form.*
- 17 *I believe that I am a person of good character. I hold a professional university degree and have been a business owner and operator for over 30 years. I have been a successful property developer. I have achieved significant success both in terms of carrying out complex property developments and in terms of bringing sections to the market which have been sold.*
- 18 *I have never been the subject of any prior complaint or disciplinary proceedings. I am involved in the Clarkville Primary School for PTA and fund raising and also the Clarkville Community Hall.”*

[28] The defendant then stressed that there were some matters in the evidence for the prosecution which he did not entirely accept and wished to elaborate on. Accordingly, he continued as follows:

- “5 *It is said that I fobbed Nadine Thomas off. She and I disagreed over her entitlement to be paid in relation to this commission. I had a view that she was entitled to a referral fee. She sought more, although I do not know exactly what she did want. Unfortunately, there was no agreement between us. My view is that there is in the industry a standard referral fee of 10% which I thought was appropriate and I wanted David Taylor as manager of the branch to intervene and resolve this dispute. I thought that he would have a role to play in giving advice as to the correct fee payable. When she came into my office I did not fob her off. My intention was to ask her to raise the subject with David Taylor and get his view and guidance. That was not acceptable to her.*
- 6 *I also mention that although the exchange between us became heated, it was certainly not one sided. She used very strong language when she did not get her way. Also, she deliberately and provocatively swept everything, including the papers and calculator off my desk before I then rose to my feet and asked her to leave the office.*
- 7 *I do not recall physically pushing or man handling her but I cannot say that it did not happen.*
- 9 *I did ask her to leave me alone, to vacate my office and to take the matter up with David Taylor. However, she was not content to do so and made it clear that she was not going to leave my office. She is a former police constable and regular force soldier and she also made it clear to me that she was not going to take no for an answer. I could not walk out of my office as she was between me and the doorway. I did use the doorway in an attempt to usher her out of the office and I acknowledge that the door did come into contact with her, more or less in the way which has been described.*
- 9 *I confirm that Nadine went straight to the police. I was later asked to go to the police station. I was asked to make a statement which I did. I was given a formal warning. I now produce that warning. I do not think that I was physically arrested. I was not photographed and my finger prints were not taken although*

this document does say that I was arrested. I was not place in custody. After I made my statement I was free to go.

- 10 *Michele Mahon in her statement which she made to the police confirmed that Nadine reached out and swept items off Paul's desk and she also confirmed that Paul tried to close the door on her but she was caught in the way of the door.*
- 11 *Nadine Thomas confirmed in her statement to the police that she had been told to get out of the office."*

[29] In further evidence to us the defendant referred to the said monetary amounts in dispute. He explained that they related to referral fees to which the complainant had become entitled in 2011 because she had then referred to him a prospective purchaser who made a number of property purchases through him. The defendant said that he and the complainant simply could not agree on settling the matter so that they had referred it to the said Mr D C Taylor. When he was accosted by Ms Thomas, his attitude to her was that she needed to go back to Mr Taylor for him to sort the matter out.

[30] The defendant's emphasis about the said incident was that he was trying to steer the complainant out of his room but she refused to leave. He insisted that it was in the course of that basic incident that she swept the files off his desk rather than five minutes or so later as she now recollects. He said that he was trying to steer her from his room by using his door.

[31] The defendant seemed to admit manhandling Ms Thomas, in what he described as a minor physical way, because he grabbed the door with his right hand and tried to push or steer her out of his office with his left hand, and he then tried to close the door.

[32] The defendant agreed that he owed the complainant a sum of money. It was put to him by Mr McCoubrey, in cross-examination, whether he had "*lost his rag*" and he responded "*not particularly*". He was pressed as to whether he had used "*choice language*" and responded "*only after she wouldn't leave my office*". It was put to him whether he had "*flown off the handle*" and he answered "*no*". Mr McCoubrey also put it to the defendant that, surely, he was the aggressor and he responded "*I only asked her to leave my office but, yes, we had a technical dispute*".

Misconduct

[33] 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 ...*

[34] We considered the ambit of the term "*disgraceful*", as used in s.73, in *CAC v Downtown Apartments Limited* where we 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 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.*

[35] Section 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, even when not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful. We have found that physical aggression on the part of licensees can amount to misconduct on a number of occasions.

[36] In *CAC v Arthur Subritzky* [2012] NZREADT 19 and *CAC v Robert Subritzky* [2012] NZREADT 20 we concluded that it was disgraceful conduct for two licensees to, between them, send a racially offensive text message to a process server and behave in a verbally and physically aggressive manner towards a second process server, notwithstanding that neither licensee was engaged in real estate agency work at the time of the conduct.

[37] In the *Arthur Subritzky* case we held as follows:

“[20] We find there is a sufficient nexus between the defendant’s conduct as proved [threatening a process server and later sending racially abusive text messages to the same person] and his fitness to conduct real estate agency work.

[21] The nature of real estate work is, at times, stressful involving disputes and conflict in respect of transactions which are of great importance to the parties involved. Licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected.

[22] The issue in the present case is whether there has been disgraceful conduct i.e. a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public.

[23] In respect of the said charges against Arthur Subritzky, it is accepted that the incident took place away from the defendant’s place of business as a licensee and involved documents not directly related to real estate agency work. However, agents of good standing and reasonable members of the public would, nevertheless, consider it disgraceful for a licensee to threaten a process server in the manner

alleged and, particularly, to send racially abusive text messages to a person attempting to do his job.

[24] Licensees should be expected to conduct themselves professionally in the course of business, both while performing real estate agency work and otherwise. The recourse to personal abuse by the defendant was disgraceful.

[38] Other cases involving similar issues include:

[a] *CAC v Hume* [2013] NZREADT 91. Factual allegations found to amount to disgraceful conduct included the licensee:

- [i] Threatening to come over and “smash” a former employer (charge 1.2);
- [ii] Threatening to kill two subsequent employers on two separate occasions (charges 1.1, 1.4 and 3);
- [iii] Assaulting a former employer by pushing or throwing him backwards on two occasions (charge 1.3(b)).

[b] *CAC v Lee and Feng* [2011] NZREADT 12. We had “no hesitation” in finding misconduct proved where two licensees had engaged in a physical fight over the listing of an apartment. There was quite some reference, particularly for the defendant, to that decision issued 24 June 2011. That was a case where the two defendants, rival licensees, engaged in a physical confrontation over whether a property remained available for viewing. Their counsel had submitted that their conduct only amounted to unsatisfactory conduct rather than misconduct as charged. We found that there should be no distinction drawn between the conduct of the two defendants and that “*while the conduct of both of them was distressful, it was at the lower end of that kind of misconduct*”. We referred to it as a “*short-lived loss of control which became more serious as it was in the presence of others*”. We observed that publication was in itself a penalty, and that interference with the licences of the two defendants was not required. They were each censured and fined \$600.

[39] The licensee accepts that an argument occurred between him and Ms Thomas on 1 March 2013, that strong language and inappropriate words were used, and that, in attempting to prevent Ms Thomas re-entering his office, Ms Thomas’s knee was forced against the door jamb.

[40] There is, however, a conflict of evidence as to the extent of the argument and, particularly, the physical force involved. For example, the Committee’s witnesses describe the licensee:

- [a] “*Lunging*” at Ms Thomas from his seat;
- [b] Grabbing Ms Thomas and pushing her up against the door frame;
- [c] Slamming the door against the left side of Ms Thomas’ body;
- [d] Pushing Ms Thomas “*high on her shoulders and chest area*”.

The Case for the Respondent

[41] In typed submissions Mr G M Brodie, as counsel for the defendant, accepted that a finding of unsatisfactory conduct within the definition of that in s.72(a) of the Act would be justified by us, but submitted that the said conduct does not warrant a finding of misconduct as defined in s.73 of the Act. Indeed, Mr Brodie submitted at the outset that this matter should be dealt with by way of fine and there should be no question of a suspension or revocation of the defendant's licence. He then covered a number of our previous decisions referring to relevant aspects and continued as follows:

- “5 *Against that background these submissions are made:*
- (a) *The genesis of this incident is an absence of agreement between the complainant and the defendant over the arrangements for the payment of a fee for an introduction. There has been no agreement arrived at initially. There is no standard scale within this office. The parties have completely different perceptions of what is appropriate.*
 - (b) *Mr Taylor had specifically invited the parties to refer the matter to him if they were unable to reach agreement.*
 - (c) *The complainant entered Mr McGowan's office and confronted him over this issue.*
 - (d) *He replied that he did not agree with her view and invited her to refer the matter to Mr Taylor.*
 - (e) *She then swept his desk clear so he requested her to leave the room.*
 - (f) *She did not immediately leave the room and he accepts that in an attempt to get her out he used a minor degree of force for that purpose.*
- 6 *The parties have completely different perceptions of what may have been appropriate.*
- 7 *Both parties have to accept responsibility for failure to have a proper agreement in place. The incident is perhaps an understandable attempt by Mrs Thomas to extract what she believed was an appropriate commission. It should have been reasonably clear to her that Mr McGowan (as he was perfectly entitled to) disagreed with her and had a different perception. He proposed that the issue should be referred to Mr Taylor. That might have been a satisfactory step in the right direction. However, the situation developed into a confrontation. Whatever the rights or wrongs of that may have been, it can be submitted that Mrs Thomas could easily have retreated from the office when requested to do so. There was no need for her to attempt to remain in Mr McGowan's office after he had asked her to leave. She must accept some responsibility in that regard.*
- 8 *Nevertheless, as stated in his response to the complaint, Mr McGowan accepts that his reaction was inappropriate and for which he apologises. In dealing with the complaint the Tribunal is asked to take into account:*
- (a) *This was an extremely short momentary flair up.*
 - (b) *There was no substantial physical harm or force and of course no injury.*

- (c) *Mr McGowan has been arrested and warned by the police which is in itself a significant sanction.*
- (d) *Mr McGowan immediately lost his position at the office, itself a significant consequence.*
- (e) *No members of the public were involved.*
- (f) *There was no question of dishonesty or otherwise failing to comply with the provisions of the Act.*
- (g) *There was no previous history and Mr McGowan is of good character.”*

Discussion

[42] As Mr McCoubrey put it, there is no particular dispute about the facts other than with regard to some fairly minor details. He also put it that it is up to us to stand back and consider the defendant's conduct overall.

[43] Mr McCoubrey noted the aspect that the complainant had swept papers off the defendant's desk and thereby greatly angered him but put it that, even so, the defendant's reaction was thoroughly inexcusable and there appeared to be an assault together with a barrage of abuse by the defendant against Ms Thomas. Mr McCoubrey said that one can understand the defendant being provoked by the complainant calling him a liar, but submits there can be no place for violence in the workplace and this event happened in the course of the defendant's employment as a real estate agent.

[44] Mr Brodie emphasised that we must consider the degree of failure by the defendant in terms of his conduct as a real estate salesperson. He emphasises that the defendant has acknowledged that his conduct has been deficient and tendered a formal apology to the complainant. He submitted that we should view this event overall and keep it in proportion to the irritation between complainant and defendant in terms of their personal dispute about the sharing or splitting of commission.

[45] It is possible to regard the nucleus of this case as a semi-private dispute between the complainant and the defendant as Mr Brodie submitted. We are conscious that the defendant has been arrested, has apologised, and is very regretful of his conduct. The complainant seems self-sufficient and, possibly, a little formidable. She simply would not budge from the defendant's room at material times and annoyed him by sweeping papers or files off his desk. They both impressed us as seemingly responsible persons, but one can understand the concern of the complainant in that she had been fobbed off with regard to what could be perceived as a valid grievance which the defendant would not face up to and deal with.

[46] It is puzzling that, apparently, the complainant came back to the defendant's room about five minutes after the particular incident and swept the files off his desk; although there is a conflict in evidence about the timing of that. It is also puzzling that Mr Taylor did not take a more proactive role in attempting to resolve the dispute. We also observe that the licensee seemed to benefit financially from the said client reference to him from the complainant, although he must have put much effort into achieving the resultant sales of five sections.

[47] We gave serious thought as to whether, in all the circumstances, a finding at mid to high-level of unsatisfactory conduct might be appropriate. Nevertheless, we analyse the

conduct of the defendant as coming within the definition of misconduct rather technically; so that the charge is proved but on the basis of the misconduct being at the lower end of the scale in all the particular circumstances.

[48] In any case, subject to the right of parties to make submissions to us on penalty, we consider that an appropriate penalty would be a fine of \$2,000, plus a significant contribution from the defendant to costs, and a censure. We do not contemplate touching the defendant's licence even as to suspension and, certainly, not as to revocation.

[49] Having said all that, we do not wish the incident to be played down. There has been an assault by a male against a female in the course of their employment as real estate agents.

[50] It is unbusinesslike and unprofessional to let a commission dispute fester from early 2011 until 1 March 2013, especially when (as we have mentioned above) the purchaser's referral made from the complainant to the defendant seems to have been rather profitable to the defendant; but we can accept that much marketing work was required by the defendant to achieve the outcome of five section sales to that person referred to the defendant by the complainant.

[51] On the one hand, human relations blow-ups in the work place occur from time to time but, on the other hand, real estate salespeople are engaged in an important profession and should always act in a professional manner. We consider that the defendant failed to do that and, accordingly as set out above, there has been misconduct rather than the lower offence of unsatisfactory conduct.

[52] For the above reasons we find the charge proved.

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

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member