

Decision No: [2015] NZREADT 2

Reference No: READT 010/14

**IN THE MATTER OF**

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

**BETWEEN**

**COMPLAINTS ASSESSMENT  
COMMITTEE (CAC20002)**

Prosecutor

**AND**

**CHRISTOPHER GOLLINS**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport QC – Chairperson  
Mr G Denley – Member  
Mr J Gaukrodger – Member

**HEARD** at WELLINGTON on 8 & 9 December 2014

**APPEARANCES**

Mr L Clancy for the Complaints Assessment Committee  
Ms Pender, Counsel for the defendant (with Mr Livingston assisting)

***Introduction***

[1] Mr Gollins is a commercial real estate agent who works in Wellington. The events the subject of this charge arose in 2012. They relate to work that was done by Mr Gollins for Foodstuffs in assisting Foodstuffs to acquire the land that would ultimately become a New World supermarket in Whitby. Mr Gollins was instrumental in working with a developer and with Foodstuffs over a number of years to enable purchase of a greenfields site in Whitby to enable Foodstuffs to expand the supermarket to reflect the area's growing population and the growth in the range of products offered by Foodstuffs.

[2] Mr Gollins worked with a Mr Bradford, who was the owner of Whitby Coastal Estates Ltd, with whom Foodstuffs ultimately entered into an agreement for sale and purchase. At the time of the initial negotiations for sale and discussions Mr Gollins was employed by Colliers Real Estate in Wellington. He also had excellent relationships with the two members of the Foodstuffs staff responsible for the acquisition of property, Mr O'Styke and Mr Mark Lash. Mr O'Styke was Group

Manager, Property and Retail Development, Foodstuffs, Wellington, Cooperative Society Limited up until about early 2012. Mr Lash a property manager at Foodstuffs in 2012, was still employed by Foodstuffs in 2012.

[3] The Real Estate Agents Act 2008 came into force in November 2009. From that date real estate agents were required to enter into written agency agreements with clients if they wished to be able to obtain commission. The Tribunal have heard that commercial real estate agents found compliance more difficult than residential agents. Mr Gollins did not have a signed agency agreement with Foodstuffs for the Whitby deal. His evidence was that it would have been very difficult to have one signed as there would have been serious questions of confidentiality. His view was that if he had entered into an agency agreement, the arrangement would have become common knowledge within the Colliers office. In his view, this could have led to the information being passed to Foodstuffs' competitors as Colliers also had a relationship with Progressive Enterprises. Further, he was concerned that seeking to have an agreement signed could be seen in the wrong way and as being disrespectful of the relationship of trust that had built up between himself, Mr O'Styke and Mr Lash over a number of years of successful business. For these reasons no agency agreement was tendered to Foodstuffs to sign prior to the contract being entered into between Foodstuffs and Whitby Coastal Properties on 14 September 2010.

[4] The agreement for sale and purchase has a special clause at Clause 33 which said:

*"The purchaser shall be responsible for the agent's fees for the licensed real estate agent set out on the front and last page of this agreement in respect of the sale notwithstanding any provision to the contrary in the general terms."*

[5] Mr Gollins' name appeared on the agreement. This was supplemented by an email from Mr Lash to Mr Gollins dated 17 September 2010 which said:

*"Foodstuffs have concluded the ASP with Dave Bradford and the agreement is now conditional for a 24 month period."*

*Foodstuffs have also agreed to pay you an agency fee. Given the extended term of the agreement Wayne (O'Styke) may consider either partial or full repayment prior to the date of confirmation. Perhaps it would be best if you spoke with him direct in this regard."*

[6] There is no dispute that an agency fee of 2.5% was agreed.

[7] Mr Gollins did not make a claim for the commission in 2010 but continued to assist Foodstuffs throughout the next two years to shepherd the development through resource consent with the Porirua City Council. He appears to have been very successful at this. By September 2012 Foodstuffs was in daily expectation of receiving a resource consent for the building of the supermarket.

[8] Mr Gollins was aware of this and on 8 September 2012 Mr Gollins sent Mr Lash an email which included a draft invoice for the commission. This was for a commission of \$114,148 plus GST of \$17,122.20 making a total invoice of \$131,270.20.

[9] Mr Lash responded to this on 9 September saying:

*“Hi Chris, happy with the draft invoice. Please submit the final version for payment once the resource consent is issued.”*

[10] It appears that inadvertently the draft invoice prepared by Colliers was then mailed to Foodstuffs for payment. On 14 September 2012 Mr Marty Price, the new General Manager of Property and Retail, emailed Mr Lash saying he had a copy of the invoice and asked “*what was it for?*” Mr Lash advised it was the agency fee for the Whitby purchase and that it was not due until the resource consent was received. Mr Price responded by asking for the agreement and saying that the invoice had been issued.

[11] Mr Lash responded by giving him a copy of the agreement for sale and purchase and advising that the agent’s fee was not paid until the agreement is unconditional.

[12] Mr Price then asked for the agency commission calculation. Mr Lash gave him a copy of the invoice and advised him that the commission was 2.5%. Mr Price responded to this promptly “*that he did not agree with this (the invoice) and what did Chris (Gollins) add to the equation?*”

[13] The emails referred to in the preceding paragraph were all sent on Friday 14 September 2012. On 18 September 2012, the Tuesday, Mr Lash responded saying that the commission was based on 18 months of work to reach the point where Foodstuffs entered into the agreement. He noted that this commission reflected a discount on their standard rate and that it was documented within the agreement for sale and purchase. Mr Lash said that in his view the fee was payable.

[14] At 2.57 pm on 18 September Mr Lash sent this email train to Mr Gollins saying:

*“Hi Chris, all of this is in confidence of course. Below is an email that I sent to Marty seeking consent for the payment of the agency. With any luck I am reading too much into his response and the invoice just gets paid. He is also aware that you’ve fronted the purchase, hence you are referred to directly within the email chain. Will give you a call and let you know how you get on. The boss is in Hastings at the moment and I probably won’t get a response until tomorrow.”*

[15] In response to this email Mr Gollins did two things. First he phoned Mr O’Styke, who was then working for a Government agency, and explained the difficulties. He then, according to a screenshot provided by Colliers, asked his Secretary to find a copy of an agency agreement from 2010. He then hand-amended it and asked the Secretary to prepare the agency agreement. This was an agency agreement between Mr Colliers and Foodstuffs. The screenshot of this document shows that it was created on Tuesday 18 September 2012 at 4.08 pm. It was then modified on 19 September at 12.00 pm. It is not clear who suggested that the agreement be prepared. Mr Gollins’ evidence was that Mr O’Styke suggested that an agreement be prepared recording what they agreed in 2010. Mr Gollins said that Mr O’Styke would sign it. However Mr Gollins acknowledges that he prepared the agreement in September 2012 and took it to a meeting with Mr O’Styke who then signed it.

Mr O'Styke signed it by subscribing his name as – *“Wayne O'Styke, Group Manager, Property Retail Development, FWSCE”*. It was dated 9 February 2010. Mr Gollins also signed it and the front of the agreement was dated 9 February 2010.

[16] The evidence of Mr Lash (denied by Mr Price) was that sometime at or around this time Mr Price made a statement to Mr Lash saying that he did not like Mr Gollins and he was not going to be paying his fee.

[17] Mr Lash was adamant that he did not agree with this stance but said that he was instructed by his superior to prepare a further email to Mr Gollins dated 20 September 2012 in which he referred to the invoice and said:

*“with respect, Foodstuffs wish to contest the value of the invoice. We submit the following:*

- (i) Colliers were not involved for a period of roughly 18 months prior to the date of the agreement.*
- (ii) Any work undertaken to acquire the Whitby mall on Foodstuffs' behalf is not subject to this transaction and no fee is payable.*
- (iii) 2.5% commission does not accommodate a small discount to your standard rate to recognise the past relationship we have built on other jobs.*
- (iv) \$114,148 plus GST is too much to pay for a transaction involving bare land. Would you please be able to review this sum and re-issue an invoice to enable payment?”*

[18] Mr Gollins discussed his response with Mr Lash and sent him an email on 21 September 2012 in which he outlined the work that he had done to justify the fee. He also said:

*“Our agency was signed on 9 February 2010 at the Whitby café after another meeting with David. Copy also attached.”*

[19] Mr Lash responded to this email the following day with a suggestion for adding some additional material about the work that Mr Gollins had done to assist with getting resource consent.

[20] On 24 September at 9.51 am Mr Gollins sent Mr Lash an email which Mr Gollins and Mr Lash both acknowledged was meant to be sent onto Mr Price.

[21] Mr Gollins provided information about the work that he had done on the Whitby proposal. He again referred to and attached the agency agreement. He said that this had been signed on 9 February 2010 at the Whitby café. A copy was attached.

[22] Mr Lash told the Tribunal that he did not appreciate that there was an agency agreement attached to this email or has no recollection of it. He said that had he been aware of this he would not have thought anything of it, even if he had known it to be backdated, because he believed that Mr Gollins was entitled to the commission. He therefore sent this email onto Mr Price.

[23] On or about 24 September, Mr Gollins decided that it was important to seek some support from his management at Colliers. He went to see Mr Findlay (the manager) and asked him to do what he could to assist in getting the fee paid. Mr Findlay asked for a copy of the file. Mr Findlay and Mr Gollins disagree as to what happened next. Mr Gollins' evidence is that:

*“Richard took the file away and the next day asked me when the agency agreement had been signed. I told him straightaway what had happened. I explained that the agreement had been signed the previous Friday but back-dated to the date of the original agreement.”*

[24] Mr Findlay [who was recalled to give evidence on this point] said that his recollection was that when he saw the file he noticed that the Colliers' logo was not the logo which was in use in 2010. He was therefore concerned. He spoke to the Secretary who prepared it and she told him it had been prepared the previous week. He then asked for a screenshot of the document on 25 September 2010. He then immediately confronted Mr Gollins with this information.

[25] By 25 September it was clear that Colliers had discovered that the agency agreement said to have been signed on 9 February 2010 had in fact been signed in September 2012. Disciplinary action was taken by Colliers against Mr Gollins. His contract with them was terminated. Acting on legal advice, Colliers also referred the issue to the Real Estate Agents Authority and the Complaints Assessment Committee decided to lay a charge. This was laid on 24 January 2014.

[26] For the sake of completeness, it should be noted that Mr Gollins appealed the decision to charge him on 10 July 2014 and a differently constituted Tribunal found that there was sufficient evidence to justify the Complaints Assessment Committee's decision to lay a charge. They dismissed the appeal.

[27] The charge provides as follows:

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

Charge 1

*CAC 20002 charges the licensee with misconduct under s 73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.*

**Particulars:**

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

*backdated to 9 February 2010 and signed on the client's behalf by a person who was no longer employed by the client.*

Charge 2

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

**Particulars:**

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

Charge 3 (alternative to Charge 2)

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

**Particulars:**

- (i) *The Committee repeats particular (i) of Charge 2.*

Charge 4

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

[28] Mr Gollins acknowledges that his conduct in signing the back-dated agency agreement and sending it to Foodstuffs amounts to unsatisfactory conduct under s 72. He denies that the conduct is disgraceful.

[29] With respect to Charge 2 Mr Gollins acknowledges that he sent the agency agreement to Foodstuffs but denies that doing so is a reckless or wilful contravention of the Act. In closing submissions Ms Pender submitted that simply sending a draft invoice to a potential payee did not constitute misconduct under s 73.

The Issues:

- Charge 1

Is the described conduct disgraceful conduct or unsatisfactory conduct?

- Charge 2

Is the tendering of the invoice (or draft invoice) in itself misconduct under s 73(3)(c)(i) of the Act?

- Charge 3 – as above but can the conduct be unsatisfactory conduct or under s 73(b)
- Charge 4 – in the alternative to Charges 1 and 2 a charge of unsatisfactory conduct

Charge 1 – meaning disgraceful conduct

[30] Disgraceful conduct is described in s 73 of the Act as:

*“– Conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful;”*

[31] The meaning of disgraceful conduct was discussed in CAC v Downtown Apartments Limited [2010] NZREADT 2006. The Tribunal held at [55]:

*“The word ‘disgraceful’ is in no sense a term of art. In accordance with the usual rule 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.”*

[32] At [57] the Tribunal said:

*“The reasonable person is a legal fiction of common law representing an objective stand against which individual conduct can be measured under s 73. That reasonable person is to be qualified to be an agent of good standing or a member of the public.”*

[33] At [59] the Tribunal concluded the Tribunal must find on the balance of probabilities that the conduct of the defendant represented a marked or serious departure from the standard of an agent of good standing or a reasonable member of the public.

[34] An agent who forged his wife’s signature on a finance document in CAC V Dodd [2011] NZREADT 01 was found guilty of disgraceful conduct.

[35] In order to make a finding under this charge the Tribunal will need to find that there has been conduct which can properly be described as disgraceful.

[36] The defendant submits that the Tribunal must consider the context within which this conduct occurred. Ms Pender submits that:

- (a) The Tribunal must consider that Mr Gollins sent the agency agreement to Mr Lash in the unusual circumstances and where it was not normal in commercial real estate agency to have a signed agency agreement in 2010;
- (b) That he did not have the support of Colliers because of inter-office issues;
- (c) That Mr Gollins believed that it was a technicality that the agency agreement had not been signed and he believed that he was trying to avoid a situation where that technicality could be used against him.

[37] Ms Pender submitted that Mr Gollins' honest belief was that Foodstuffs' denial of their liability to pay forced him into a situation where he had no choice but to take these steps. Ms Pender submitted that Mr Gollins' subjective intention could be used to form the basis of the Tribunal's objective assessment of his behaviour.

[38] Ms Pender submitted that disgraceful conduct is the most serious charge that can be laid under the Act and it carries a "*high degree of opprobrium and requires proof of a marked or first departure from accepted standards*". She submitted that while what amounts to disgraceful conduct is an objective assessment, the Tribunal is entitled to take into account the subject of intentions of the licensee (see CAC 20004 v Gardener [2014] NZREADT 65 at para [7]). Ms Pender submitted that under stress Mr Gollins tried to defend his position and made some unwise decisions. She submitted that Mr Gollins did not seek to obtain a benefit that was not owed to him and that he had in fact done all the work that was necessary to be paid a commission.

[39] Mr Clancy submitted that on the facts and the law the conduct was clearly disgraceful and the Tribunal should make such a finding.

## **Discussion**

### Charge 1

[40] We consider, having heard all the evidence that the conduct of Mr Gollins does amount to disgraceful conduct. Our reasons are:

- (a) Mr Gollins had Mr O'Styke sign the agreement and back-date it. Having Mr O'Styke sign a document which recorded the terms of the agreement reached in 2010 would have been acceptable. However Mr Gollins decided that he would claim that this document prepared at the time of the deal when it had not been. He then sent this to Foodstuffs for the purpose of assisting and supporting his claim for commission – i.e. to receive the financial benefit he was prima facie not entitled to without an agency agreement.
- (b) It may well have been that Mr Lash's 2010 email and the clause in the agreement for sale and purchase may have been sufficient for Foodstuffs to have decided to pay him commission. However Mr Gollins chose not to do this. He chose to try and deceive Mr Price (or Foodstuffs) to obtain the commission. Further he made a specific statement as to where it was signed and when. This is a deliberate act of dishonesty.

[41] We have examined carefully the definition of misconduct in cases such as Pillai v Messiter [No 2] (1989) 16 NSWLR 197 which gave a definition of misconduct cited with approval in many real estate agents' cases. The Court held:

*"The words used in the statutory test [misconduct in a professional respect] plainly go beyond that negligence which would found a claim against a medical practitioner for damages ... the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Some more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner."*



[42] We consider that members of the public and agents of good standing would both consider that an agent attempting to pass off an agency agreement signed two years after the event as a document signed at the time so as to obtain commission would be regarded as disgraceful conduct. Dishonesty of any nature runs contrary to the principals of registration and privilege that go with any registration. As Tribunals and Courts have said in numerous cases, registration as a professional lawyer, doctor and real estate agent carries with it privileges but also the obligation to behave in a certain way. Dishonesty of any type is met with the highest degree of disapprobation by registration bodies and by members of the public who must retain confidence in the honesty and integrity of agents.

[43] The circumstances which surrounded Mr Gollins' intentions when executing the agreement, preparing and sending it in this way are relevant to the question of penalty and not to the objective analysis of his conduct and not to the question of whether or not his actions amounted to misconduct under s 73 or not. Mr Gollins' conduct we determine was disgraceful.

Charge 2 and alternative charges:

Did Mr Gollins breach s 126 by sending the invoice for payment to Foodstuffs when he was aware that there was no agency agreement and that s 126 prohibited receipt of a commission when no written agency agreement was signed?

[44] We have analysed this charge carefully. The facts show that what was initially sent by Mr Gollins to Mr Lash was a draft invoice. He was seeking approval from Mr Lash. When this "OK" was received that he does not appear to have resubmitted a second invoice or have taken any steps to have sent the invoice again. His evidence was uncontested that the original was posted in error by the office administrator at Colliers. Does this make any difference to the breach of s 126? On the facts of this case the Tribunal find it does. We find that Mr Gollins sent a draft invoice for payment. Section 126 provides that an agent is not entitled to any commission without an agency agreement. However we agree with Ms Pender's submission that simply sending a draft invoice does not automatically constitute misconduct. The Real Estate Agency Authority must prove that Mr Gollins wilfully or recklessly breached s 126. At the time of sending the invoice Mr Gollins either believed he had an agency agreement, or did not appreciate the import of s 126. The Tribunal conclude that on the facts, the Real Estate Agents Authority have not proved this was a wilful or reckless breach. Our reasons are that when the draft invoice was first sent Mr Gollins appeared genuinely to believe that it would be paid. Further it was a draft invoice. His belief was fostered by the actions of Mr Lash and by the previous dealings that he had had with Mr O'Styke. Further the invoice was a draft. Charge 2 is therefore not established. However s 72 provides that a contravention of any provision of the Act [without a draft] is unsatisfactory conduct. Mr Gollins certainly breached s 126 and his evidence was that it was not until the invoice was queried did it occur to him that no agency agreement existed. We therefore find Charge 4 established – being unsatisfactory conduct.

[45] The result is that Charge 1 and Charge 4 are established. Charges 2 and 3 are dismissed.

[46] The Real Estate Agents Authority is to file its penalty submissions by 30 January 2015. Mr Gollins is to reply by 14 February and the Real Estate Agents Authority may respond by 21 February.

[47] The Tribunal draw this case to the notice of the Commercial Real Estate Agents. They are bound by the provisions of s 126 just as residential agents are and the consequences of having no signed agency agreement are significant.

[48] Mr Gollins filed a memorandum on 15 December providing a letter setting out his genuine remorse. We consider this letter to be relevant to the question of penalty.

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

**DATED** at WELLINGTON this 14th day of January 2015

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Ms K Davenport QC  
Chairperson

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Mr G Denley  
Member

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Mr J Gaukrodger  
Member