

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 4

READT 92/14

IN THE MATTER OF

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

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (CAC 304)**

Prosecutor

AND

WALLACE LIONEL MORRIS

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 7 September 2015 (with subsequent written submissions)

DATE OF THIS DECISION 19 January 2016

COUNSEL

Ms C P Paterson, counsel for the prosecution
Mr R O Parmenter, for the defendant

DECISION OF THE TRIBUNAL

Charges

[1] The defendant is first charged with disgraceful conduct relating to an application for finance to the BNZ by John Massam, a trustee of the Maranatha Charitable Trust. The Committee alleges that the defendant colluded with Mr Massam to provide false or misleading information to BNZ in support of that finance application by signing a lease document on behalf of William Hughes Ltd, a company the defendant was associated with.

[2] The defendant is also charged with wilfully or recklessly breaching the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. This allegation concerns a meeting with the trustees of the Maranatha Charitable Trust on 12 June 2012 when, it is alleged, the defendant failed to disclose certain information to the other trustee of the trust, Sylvia Ruissen, in breach of the Rules.

[3] The charges are dated 20 October 2014 and read in full as follows:

“Following a complaint from Grant Stowers, Complaints Assessment Committee CAC304 (Committee) charges Wallace Morris (licensee) as follows:

Charge 1

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

Particulars:

The licensee colluded with John Massam, a trustee of the Maranatha Charitable Trust, to provide false and/or misleading information to the Bank of New Zealand in support of an application for credit, by signing a lease document in respect of 63 Great North Road, dated 16 May 2012, on behalf of William Hughes Ltd.

Charge 2

The Committee further charges the licensee with misconduct under s 73(c)(iii) of the Act in that his conduct consists of a wilful or reckless contravention of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, namely:

- (i) Rule 6.1; and/or,*
- (ii) Rule 6.2; and/or,*
- (iii) Rule 6.4*

Particulars:

Having signed a listing agreement, on behalf of Space Realty Ltd, with the Maranatha Charitable Trust, the licensee attended a meeting of the Maranatha Charitable Trust's trustees on 12 June 2012 as an advisor, and gave advice to the trustees regarding the sale and purchase of real estate, without disclosing and making clear to the trustee Frances Sylvia Ruissen that:

- (a) As the selling agent, he/Space Realty Ltd was entitled to commission on the sale of a property at 297A Church Street; and/or,*
- (b) He had, as a director of William Hughes Ltd, signed a lease document in respect of the trust's property at 63 Great North Road.*

Charge 3

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 at Charge 1 and Charge 2 above."

[4] The said Rules 6.1, 6.2 and 6.4 read as follows:

Rule 6.1: An agent must comply with the fiduciary obligations to his or her client arising as an agent;

Rule 6.2: A licensee must act in good faith and deal fairly with all parties engaged in a transaction;

Rules 6.4: A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

The Facts

[5] In mid 2012, John Massam was a trustee for Maranatha Charitable Trust (MCT), along with Sylvia Ruissen. MCT owned 63 Great North Road (known as the Battery Building), 63-71 Great North Road (known as the Maranatha Building), and 1-3 Pollen Street (together, the MCT Property).

[6] At all relevant times, Mr Morris was a shareholder in, and licensed salesperson for, Space Realty Ltd.

[7] In May/June 2012, Mr Morris, on behalf of Space Realty, approached Mr El Pinto of Cawthray Motors Ltd, who owned adjacent property, about whether he would be interested in purchasing the MCT Property. Mr Pinto was interested, and there were some preliminary discussions, but negotiations did not begin in earnest until November 2012.

[8] On 1 May 2012, a valuation was prepared for the Battery Building by Colliers International. The instructing party was MCT, but the valuation was addressed to the Bank of New Zealand. The net contract income for the building was recorded as \$11,220 per annum (from some leased car parks) and the net market income was recorded as \$54,092 per annum.

[9] On 16 May 2012, an agreement to lease the Battery Building was signed between MCT as landlord (Mr Massam was the sole signatory for MCT) and William Hughes Ltd as tenant. Mr Morris was, at the relevant time, the director and majority shareholder of William Hughes Ltd and signed the lease which provided that it was negotiated by Space Realty. The term of the lease was four years, commencing on 1 June 2012 (with four two-year rights of renewal). The annual rent was purportedly \$51,560 (plus GST), with a deposit of \$4,821.35 plus GST (as advance rent) to be paid immediately. In fact, William Hughes Ltd ultimately never paid any rent due under the lease.

[10] On 22 May 2012, Mr Massam signed a sale and purchase agreement for MCT to purchase 297A Church Street, Onehunga, at a price of \$1.5m, with a 10 per cent deposit to be paid in to the Space Realty trust account. The selling agent on the transaction was Mr Morris.

[11] The following day (23 May 2012), Mr Massam (purportedly on behalf of MCT) advised the BNZ that the Battery Building had been leased and sought to increase the MCT's borrowing on the Battery Building by a \$200,000 temporary overdraft. Mr Massam had stated that the new lease gave "*some certainty about income*".

[12] On 28 May 2012, Mr Massam provided further information to the BNZ in support of the loan application, including a copy of the William Hughes Ltd lease and a "*current tenancy schedule*" showing a rental of \$50,000 per annum for the Battery Building (i.e. the lease to William Hughes Ltd).

[13] Relying on the information provided by Mr Massam, including the information about the William Hughes Ltd lease, which it was put to us helped satisfy the bank that the Trust would be able to service the additional borrowing, the BNZ agreed to provide the \$200,000 temporary overdraft facility which, with an existing loan of \$150,000, increased the MCT's borrowing to \$350,000.

[14] On 29 May 2012, Mr Massam paid the \$150,000 deposit for 297A Church Street using the BNZ funds. Mr Morris' real estate company, Space Realty Ltd, invoiced the vendor of 297A Church Street (Wild Turtle Investments Ltd) for commission of \$46,000 on 31 May 2012.

[15] On 1 June 2012, Mr Massam signed a listing agreement with Space Realty to sell the MCT Property. The listing agreement provided for a fixed commission of \$130,000 plus GST. Despite the vendor client being MCT, only Mr Massam's signature was obtained on the listing agreement.

[16] On 12 June 2012 Mr Morris attended a MCT trustees meeting, purportedly, as an *advisor* to the trust. Sylvia Ruissen, John Massam and Ross Massam (his son) were present. Various options were discussed in respect of the MCT Property and Ms Ruissen asked Mr Morris for his advice. Accordingly, Mr Morris gave the meeting advice on the merits of selling the MCT Property, selling the Battery Building separately, and the disadvantages of refurbishment. There was also discussion about MCT "*reinvesting*" funds from a sale of the property with one of the options being an investment in the property at 297A Church Street (described in the meeting minutes as 297B Church Street, Onehunga).

[17] Ms Ruissen states that there was no disclosure by Mr Morris or John Massam at the meeting, nor do the minutes record any such disclosure, that Mr Massam had already signed a sale and purchase agreement to buy the Church Street property for MCT, or that Mr Morris was the selling agent for that Church Street property with a direct financial advantage in the MCT ratifying the purchase, nor any disclosure of the lease to William Hughes Ltd which the two (Messrs John Massam and Morris) had signed for the Battery Building, nor the BNZ finance application, nor the fact that Mr Massam had already signed a listing agreement with Mr Morris to sell the MCT Property agreeing a commission of \$130,000.

[18] Without these matters having been disclosed, MCT resolved at that 12 June meeting to try and sell the MCT property, rather than renovate, and authorised Mr Morris to "*continue negotiations to that end*". Also, those at the meeting agreed that any proceeds from the sale of the MCT property should be used to, among other things, "*provide support in the purchase of the Church Street property ... to EDC*", EDC being an Evangelism and Discipleship Centre.

[19] In late 2012, Cawthray Motors Ltd made an offer for the MCT property and that sale concluded in December 2012. Space Realty Ltd issued a 14 December 2012 tax invoice to MCT for \$130,000 plus GST in commission for selling the property.

Further evidence adduced to us

[20] For the purposes of this case, the above facts are sufficient. However, we record that further evidence was given to us on behalf of the prosecution by Ms Ruissen the co-trustee of the said John Massam, and by our accepting briefs (by consent) from Mr H Ranchhod the accountant/administrator of MCT, Mr G D Stowers as a trustee of MCT since 16 October 2012, and by Mr G M Gallacher, a senior

investigator at the Authority. We also heard evidence from Mr W Morris, the defendant, and on his behalf from the said T Pinto and Mr R D Massam (the son of the said John Massam). We now cover only salient parts of the evidence of those witnesses.

[21] Ms Ruissen's evidence particularly focussed on the trustees meeting of 12 June 2012. Her evidence is consistent with the above statement of facts. She states that prior to the meeting of 12 June 2012 she had no knowledge whatsoever of the activities of Mr J Massam, her co-trustee, and the defendant Mr Morris as covered in the above facts. Ms Ruissen had no knowledge of the agreement dated 22 May 2012 whereby Wild Turtle Investments Ltd sold Mr Massam, and/or his nominee, 297A Church Street.

[22] Also, she regarded that trustees meeting of 12 June 2012 as only an exploratory discussion about the state of the property of the Trust. She was shocked to subsequently learn of the existence of the lease to the defendant's company (William Hughes Ltd) from the Trust as she said she had always signed all leases of the Trust's property. She had no idea that the lease might not be genuine. She impressed us as an honest witness.

[23] Mr G Stowers, is Ms Ruissen's son-in-law. He covered his concerns about the Trust's state of affairs as he found them upon becoming a trustee on 16 October 2012 in the light of the above facts. He seemed to be saying that Mr J Massam pressured the trustees into selling the Battery Building to Mr Pinto's property company. He observed that, without the lease to William Hughes Ltd, the Trust could not have obtained further finance from BNZ. He regarded the defendant as "*arrogant*" in his dealings with the trustees in relation to the issues of this case.

[24] Mr Ranchhod stated that in working for Mr J Massam over 2012 as an accountant/administrator of the Trust there was daily stress about lack of money.

[25] The defendant, Mr Morris, said that he introduced Mr J Massam to 297A Church Street, Onehunga, and Mr Massam's reaction was that he hoped to convince his fellow trustee of the MCT Trust, Ms Ruissen, to have the Trust buy the building but otherwise he would buy it himself, which he did. Accordingly, the defendant asserted to us that it would have been quite wrong, and a breach of confidence, for him to have told anyone about that agreement held by Mr J Massam in his own name.

[26] The defendant asserts that William Hughes Ltd did enter into a valid lease of the Battery Building and there was nothing in the lease which allowed his company (William Hughes Ltd) to withdraw from that lease. He added that, as at June 2012, that company held three other somewhat similar leases of commercial property in the area. With regard to non-payment of rental, he said that renovation work had not been finished by the lessor so that he could not practically find a sub-tenant with the building in a run-down condition. He also said that he offered to pay some rental but Mr Massam responded there was no need to until renovations were complete.

[27] The defendant said he knew that Mr J Massam would have liked the Trust to sell the Maranatha building in Great North Road in order for the Trust to be able to buy 297A Church Street where it would set up a Christian Ministry Centre. He understood from Mr J Massam that a trustees meeting of March 2012 gave Mr J Massam authority to ascertain the market value of the Maranatha building.

[28] The defendant then referred to his presence at the trustees' meeting of 12 June 2012 and to a discussion then and there about the purchase of 297A Church Street. He said he could not then breach Mr J Massam's confidence to disclose that the latter had an agreement over that property in his own name. He also asserted that it did not matter for him to engage in discussions about the Trust selling the MCT property building when his company, William Hughes Ltd, had leased a part of it. He said he would have expected that lease to be something taken over by any new owner because it was a binding lease.

[29] In his evidence to us, Mr Morris then discussed developments between the Trust and Cawthray Motors (Mr Pinto) and observed that the purchase by Cawthray's would give it control of the whole block. He noted that Mr Pinto had said he did not want any long-term leases to get in the way of his redeveloping those sites and there were two such leases including that to William Hughes Ltd. The defendant then said to us: *"In order to make the deal work and at Mr Massam's request, we surrendered a valuable property right and agreed that our lease was at an end"*. He added that in those circumstances he did not expect the Trust to seek rental from him, particularly because Mr Massam had insisted that rent was not payable pending completion of renovations to the building.

[30] Under cross-examination the defendant was pressed on his various stances in his evidence-in-chief. It emerged that in all his work on behalf of the Trust, he took instructions from Mr J Massam only and regarded him "as the Trust".

[31] The evidence of Mr R D Massam and of Mr G E Pinto is consistent with the evidence of Mr Morris the defendant and with the general factual background set out above.

The Case for the Prosecution

[32] As Ms Paterson puts it, s 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and also to agents of good standing. It allows disciplinary findings to be made for conduct which, while 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.

[33] We have found on several occasions that s 73(a) may apply to conduct by a real estate agent that is not real estate agency work as defined in the Act, e.g. *CAC v Dodd* [2010] NZREADT 13, where the licensee forged his wife's signature on personal financial documents. We have stated, however, that in such cases, before a finding is made under s 73(a), a sufficient nexus must be demonstrated between the proven conduct and the fitness of the licensee to conduct real estate agency work.

[34] In *CAC v Maran* [2011] NZREADT 23, we stated:

"[25] ... Quite plainly any deliberate dishonesty or deception would meet the test [under s 73(a)], but in the absence of real estate agency work mere incompetence or misplaced honest belief would not ..."

[35] In *CAC v Gollins* [2015] NZREADT 2, we considered the case of an agent who had back-dated an agency agreement and attempted to pass it off as having been signed some time previously to support his claim for commission. We held:

“[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 principles of registration and privileges 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.”

Charge 1

[36] The Committee submits that there is sufficient evidence to establish, on the balance of probabilities, that the William Hughes Ltd lease was, in effect, a sham and that Mr W L Morris (the licensee) colluded with John Massam in signing it, knowing it would be used in support of a finance application.

[37] Ms Paterson (as counsel for the Committee) puts it that if we conclude that it is more likely than not that Mr Morris signed the lease knowing that it was not intended to have legal effect but would be provided in support of a finance application, it must follow that such conduct is misleading and disgraceful under s 73(a) of the Act.

[38] In particular, Ms Paterson points to the following:

- [a] The timing of the signing of the lease, the application for credit, and the sale and purchase agreement for 297A Church Street;
- [b] The fact that no rent was ever paid by William Hughes Ltd under the lease, notwithstanding representations made by Mr Massam to the BNZ as to the lease providing “*certainty of income*”.
- [c] That the application to BNZ for credit was clearly to finance payment of the deposit on the 297A Church Street transaction, with the William Hughes Ltd lease of the Battery Building key to the BNZ decision to advance further funds.
- [d] That Mr Morris had a direct financial interest in the sale and purchase of 297A Church Street and the payment of the deposit, namely, his share as selling agent of the \$46,000 commission.
- [e] The fact that neither Messrs Morris or John Massam disclosed to the other trustee of MCT, at the meeting on 12 June 2012, that Mr Massam had applied for further credit from BNZ, that Mr Massam had signed a purchase agreement for 297A Church Street, that Mr Morris was the selling agent for (and therefore financially interested in) the 297A Church Street sale, or that Mr Morris had signed a four-year lease of the Battery Building on behalf of William Hughes Ltd as lessee.

- [f] That Mr Morris's response to the statutory demand for unpaid rent that MCT ultimately made was not convincing or supported by other evidence, for example:
- [i] Mr Morris claimed that he agreed to lease the building with the intention of sub-letting it, but plans changed when Mr Pinto became interested in buying the MCT property and he (Mr Pinto) was "*adamant*" the property should not be subject to any leases of longer than 18 months. That is not consistent with Mr Pinto's account, which is that negotiations only began in earnest in November 2012 and there was no discussion about leases in May 2012.
 - [ii] Mr Morris states that Mr Massam decided "*not to accept*" a rental payment offered by William Hughes for fear of locking MCT in to a long lease that might compromise the sale. Despite that, there appears to be no documentary record of the lease being cancelled.
 - [g] Mr Morris, when challenged by Mr Stowers with the allegation that the William Hughes lease had only been signed to raise money from the bank, responded: "*I was doing it as a favour to John [Massam]*".

Charge 2

[39] Charge 2 alleges wilful or reckless contravention of the Rules, which is misconduct under s 73(c)(iii) of the Act.

[40] The Rules which the Committee alleges Mr Morris breached, at the meeting on 12 June 2012, are 6.1, 6.2 and 6.4 set out above.

[41] It is submitted for the Committee that, having attended the 12 June 2012 meeting as an "*advisor*", and then purporting to advise the trustees as to their options, Mr Morris was bound to make his personal interests in the various transactions plain but, instead, he failed to disclose to Ms Ruissen, the elderly co-trustee of Mr J Massam:

- [a] That he was selling agent for the Church Street property, which the MCT was *considering* investing in, with a direct financial interest in the sale;
- [b] That Mr J Massam had already signed an unconditional sale and purchase agreement agreeing to have MCT purchase the Church Street property for \$1.5 m;
- [c] That Mr Massam had already signed a listing agreement for the MCT properties with Mr Morris' company, giving Mr Morris a direct financial interest in, for example, the MCT deciding to sell rather than renovate;
- [d] That, at least on paper, he had an interest in any decision to sell the Battery Building through his company William Hughes Ltd which, theoretically, was the lessee of that building.

[42] Ms Paterson submits that it is open for us to conclude that these matters were deliberately withheld from Ms Ruissen and that must amount to a wilful or reckless breach of Mr Morris' obligations under Rules 6.1, 6.2 and/or 6.4; and that Mr Morris must have been aware that, or at least the possibility that, the Rules might require

that he disclose these matters but he chose to proceed in the manner he did regardless.

The Defence

[43] At the outset, Mr Parmenter emphasised (as counsel) for the defendant, Mr Morris, that it is critical for the prosecution case that the lease to William Hughes Ltd was a sham. Mr Parmenter puts it that the relevant document has the appearance of a lease; is signed by Mr J Massam seemingly on behalf of the trustees, and by William Hughes Ltd as lessee; and Mr Morris has signed as guarantor. Accordingly, he submits we cannot regard the lease as a fiction.

[44] Mr Parmenter notes that the Committee claims the lease to be a sham because no payments were made pursuant to it. He notes that Cawthray Motors Ltd had come on the scene by 23 May 2012 when, as covered above, Mr J Massam wrote to BNZ. He puts it that it seems that the subject of Mr Pinto (of Cawthray Motors Ltd) not wanting long term leases arose in late May 2012 but the commencement date of the lease was 1 June 2012. Mr Parmenter emphasised that Mr Pinto has said that renovations to the Battery Building property had not been completed when he settled the purchase so (Mr Parmenter submits) that could not have been a reason for the non-payment of rent. Mr Parmenter also suggests that there was no point in the lessor Trust completing the renovations because Cawthray Motors had purchased property and Williams Hughes Ltd had been released as the lessee. Mr Parmenter submits that the lease to Williams Hughes Ltd was brought to an end to facilitate the sale to Cawthray Motors Ltd and that sale brought a very large commission to Mr Morris.

[45] It is strongly submitted for the defence that the lease to William Hughes Ltd was bona fide from the outset so that Mr J Massam could and would deal with the bank on that basis.

[46] Mr Parmenter also submits that a lack of evidence that the lease was formally cancelled is not evidence of a sham but, simply, is a lack of evidence that the lease was cancelled. He emphasised this was in the context where Messrs J Massam and W Morris had clearly dealt with each other extensively and had trust in each other so that they did not bother to obtain, as Mr Parmenter put it, "*a solemn agreement that the lease is at an end*".

[47] With regard to the purchase document for Church Street, Mr Parmenter points out that the purchaser is unequivocally "*John Massam and/or nominee*" and he observes that the Maranatha trust did not buy that building and it was bought by a John Massam company so that it was not for Mr Morris to tell anyone of that purchase by Mr J Massam, and to do so would have been a grave ethical breach as he had clear obligations of confidentiality to Mr J Massam.

[48] Mr Parmenter adds that, similarly, with regard to the matter of Mr Morris deriving a commission on the sale of Church Street to Mr J Massam (or his nominee), that it is not the business of the trustees as the vendor would simply pay commission to Space Realty Ltd.

[49] Mr Parmenter also asked: how was the defendant, Mr Morris, to know at material times what Mr J Massam had said to his co-trustee Ms F S Ruissen? He put it that he would not know whether Mr J Massam had kept her fully informed or not.

[50] In his final submissions Mr Parmenter noted that the prosecution acknowledges that its case is “*circumstantial*”.

[51] Mr Parmenter then put it that the defendant and Mr Massam being very close friends over 2012 does not prove anything. He also put it that the fact that the defendant had a direct financial interest in the sale of the Church Street property for commission is a common situation for a real estate agent from time to time. It is put that the fact that Mr Morris knew that Mr J Massam wanted to convince MCT to purchase the Church Street building adds nothing to the prosecution case nor that on 1 May 2012 Mr Massam had provided a valuation of the Battery Building to BNZ.

[52] Inter alia, with regard to the 11 May 2012 lease agreement of of the Battery Building to William Hughes Ltd, Mr Parmenter noted that Mr Massam had told BNZ that he had then signed that lease but it did not seem to be executed by the lessee until 16 May 2012. It is emphasised for Mr Morris that the fact that Ms Ruissen did not find out about the lease for some months does not abrogate from the lease being enforceable by the lessee against the lessor, because Mr J Massam had signed for the lessor.

[53] Mr Parmenter submitted that it cannot be held against the defendant that the building owner had found a tenant, namely William Hughes Ltd, and put that to the BNZ.

[54] Mr Parmenter noted that the nub of the prosecution case seemed to be that the timing of the lease agreement of the Battery Building is consistent with its importance in the context of the Church Street finance for it is dated just six days before Mr J Massam executed the agreement for his purchase of Church Street on 22 May 2012. He puts it that leasing property is the core business of William Hughes Ltd yet the prosecution maintain that lease to have been a sham. He submits that does not show the defendant to be a fraudster nor did his knowing that Mr J Massam told BNZ that the lease gave the trust income and so Mr Massam sought to borrow additional funds from BNZ.

[55] Mr Parmenter submitted that the lease cannot be regarded as being a sham merely because the tenant did not pay the deposit provided on account of rent nor any rent ever under it, nor that the defendant received no commission to his company Space Realty Ltd for arranging the lease. Mr Parmenter referred to the defendant’s reason for the latter aspect being that he would not think of charging a commission on the lease when his agency was going to receive a large selling commission for the property and where the parties had agreed to rip up the lease to facilitate that sale.

[56] Mr Parmenter put it that the reason rent was not paid was at least twofold. It is put that Mr J Massam told Mr Morris not to pay rent until renovations to the building were complete but, seemingly and more importantly, due to Mr Pinto’s advice that he did not want to lease longer than 18 to 24 months, and the building needed to be sold by the Trust, and Mr Pinto of Cawthray was a very interested prospective purchaser. Then, Mr Parmenter submits that the evidence is that the lessor and lessee agreed to end the lease because Mr Pinto’s view was put by him to them at the end of May 2012.

[57] Mr Parmenter also submitted that the fact that Mr J Massam regarded the defendant as having been “*helpful*” in having his company enter into that lease it is

merely consistent with the licensee doing Mr Massam a favour; rather than being a party to a fraud on BNZ.

[58] Mr Parmenter emphasises that the purchaser of the Church Street property was John Massam and/or his nominee, and not the Maranatha Trust, so that it was not for Mr Morris to tell others of Mr J Massam's purchase; and also any commission on that transaction received by Mr Morris's company came from the vendor and not from Mr J Massam or the MCT.

[59] Mr Parmenter submits that all charges should be dismissed.

Final Submissions

[60] After the hearing we received a sequence of typed final submissions by arrangement.

[61] Contrary to the defendant's evidence that the lease agreement was genuine and intended to have legal effect, it is submitted for the prosecution that the evidence clearly establishes that the lease agreement was never intended to have legal effect but rather was a sham document which the defendant and Mr Massam created in order to facilitate Mr Massam's application for finance from BNZ.

[62] Ms Paterson also submits that the evidence establishing that the lease agreement was a sham is circumstantial but, taken together, it clearly establishes, on the balance of probabilities, that the lease agreement between MCT and William Hughes was a sham and was never intended to have legal effect; and Ms Paterson emphasises the following:

- [a] The defendant and Mr Massam were very close during the 2012 period, and the defendant was visiting the offices at Great North Road very regularly, at one point, almost daily.
- [b] The defendant had a direct financial interest in the sale of the Church Street property as evidenced by his issuing of an invoice for payment of fees of \$40,000 in relation to that sale on 30 May 2012.
- [c] The defendant had shown the Church Street property to Mr Massam some 5-6 months before the lease agreement was entered into. The defendant accepted in his evidence that he was aware that Mr Massam wanted to convince MCT to purchase the Church Street building.
- [d] On 1 May 2012 Mr Massam had provided to BNZ a valuation of the Battery Building which showed current income from the Battery Building at roughly 20% of its potential.
- [e] BNZ understood that the valuation was being provided in support of an application for further finance against the Battery Building.
- [f] The first reference to the lease agreement is on 11 May 2012 in an email from John Massam to Raajieve Sharma (at BNZ), to advise that "*I have just signed a lease agreement for the building*" and that Mr Sharma will be "*encouraged*" by that.

- [g] Contrary to that email, the lease agreement is signed and dated 16 May 2012, five days later. Mr Morris was unable to explain that under cross-examination.
- [h] The lease agreement was only signed on behalf of MCT by John Massam. Ms Ruissen did not find out about the lease agreement until much later. This was the only lease agreement that Ms Ruissen did not sign for tenancies at the Great North Road properties.
- [i] The lease agreement was plainly of importance to Mr Massam in the context of securing additional finance from BNZ. In his correspondence with Mr Sharma, he referred to Mr Sharma being "*encouraged*" by the execution of the lease agreement, and to the lease agreement providing "*certainty of income*".
- [j] The timing of the lease agreement is consistent with its importance in the context of the Church Street finance. It is dated just six days before Mr Massam executed the sale and purchase agreement for Church Street on 22 May 2012.
- [k] The day after the sale and purchase agreement was entered into, Mr Massam wrote to Mr Sharma at BNZ, again referring to the lease agreement giving "*certainty about income*" and seeking to borrow additional funds.
- [l] The lease has the appearance of being a genuine document, however:
 - (i) Under the heading "Special Conditions" is clause 10.2, which provides "*As the tenant has paid one month's gross rental as deposit the next rental and opex will be due for payment on the 1st July 2012*". Contrary to that provision, it is accepted that no money was ever paid under the lease.
 - (ii) The lease agreement provides for commission to be paid to Space Realty. Mr Morris accepted that no commission was ever paid in respect of the lease.
- [m] Mr Massam said to Mr Morris that he (the defendant) was "helpful" in entering into a lease. This is consistent with Mr Stowers' evidence that Mr Morris told him that he was doing Mr Massam a "favour" in entering into the lease. It is submitted for the prosecution that the defendant's denial that that phone call took place is simply not credible.

[63] The prosecution accepts that, superficially, the lease agreement has the appearance of being a lease intended to have legal effect, but it is put there are clauses of the agreement that were inaccurate and/or not intended to be complied with. Conversely, it is put that the lease agreement does not provide for what the defendant now says the true circumstances were, such as the fact that renovations were to be done and no rent would be payable before then. It is submitted for the prosecution that, if that were really the case, it would have been provided for in the lease document.

[64] The Committee also submits that the defendant's explanation for the lease not being proceeded with (namely, because Mr Pinto did not want to purchase a property subject to long-term leases) is not credible because:

- [a] Mr Morris said that he genuinely wanted the lease of the Battery Building so it does not make sense that, at the first mention of a possible purchaser for the building, he would simply offer to rip it up;
- [b] Nor does it make sense that the Trust would agree to rip up the lease agreement in the face of a preliminary expression of interest by a potential purchaser; particularly, without making Ms Ruissen aware of the issue, which did not occur and she only learned in October 2012 that the lease had not been proceeded with.
- [c] Mr Pinto was only one potential purchaser. Presumably, if the property had been marketed in the usual way, further expressions of interest might have been forthcoming.

[65] The prosecution submits that the lease agreement was plainly created by the defendant and Mr J Massam for the purpose of assisting Mr Massam to obtain additional borrowing from BNZ to use to purchase the Church Street property; and that entering into the lease agreement was a "*favour*" from the defendant to Mr J Massam, and one that was quickly undone before either party took any steps in accordance with the lease agreement.

[66] Counsel for the prosecution submits that a preparedness to create false documentation intended to influence a bank's decision on lending is plainly conduct that goes to the heart of the honesty and integrity of a licensee, and has the capacity to bring the industry into disrepute.

[67] Charge 2 focuses on the 12 June 2012 meeting of the MCT trustees at which Mr Morris was present as an "advisor" to the Trust, at Mr J Massam's invitation.

[68] The prosecution's case is that the defendant was highly conflicted at the 12 June 2012 meeting and that the defendant wilfully breached his obligations to disclose those conflicts by giving advice in accordance with Mr Massam's wishes.

[69] The prosecution submits that the defendant's conflict of interest arose out of the following matters:

- [a] The defendant was close to Mr Massam and knew him very well. He had been in close contact with him about numerous matters in relation to the Trust over the preceding weeks (indeed all the matters for discussion at the 12 June meeting). By contrast, he had only met Mrs Ruissen once or possibly twice.
- [b] The possibility of the Trust purchasing the Church Street property was a topic of discussion at the 12 June 2012 meeting. The defendant was aware that Mr Massam had already entered into an unconditional sale and purchase agreement in relation to the Church Street property and that he wanted to convince the Trust to purchase the property.

- [c] The defendant had received the deposit for the Church Street property from the Maranatha Charitable Trust (as opposed to from Mr Massam personally).
- [d] The defendant had a personal interest in the Church Street transaction, being entitled to commission from its sale.
- [e] At the 12 June 2012 meeting, the Trust was deciding whether to sell the three Great North Road properties. On 1 June 2012, the defendant had entered into an agency agreement with Mr J Massam, purportedly on behalf of the Trust, to sell those very properties for a \$130,000 commission. Ms Ruissen was unaware that the agency agreement had already been entered into. It is put that the defendant plainly had a personal interest in the properties being sold.
- [f] The defendant was also, via his company William Hughes Ltd, the tenant of the Battery Building, which was one of the buildings that the Trust was deciding whether to sell.

[70] Ms Paterson submits for the prosecution that, by virtue of those matters, the defendant was simply not able to present himself as an objective advisor to the Trust at that meeting of 12 June 2012, at least without disclosing his personal interests in the various transactions; and he did not.

[71] It is also submitted for the Committee that the fact that Ms Ruissen was not made aware of the various matters that the defendant himself knew (sale of Church Street and the listing of the three Trust properties) leads to the only reasonable inference that the defendant deliberately refrained from disclosing his personal interests at the meeting. Alternatively, at a minimum, it is put that he must have realised that he was at risk of breaching his professional obligations by advising the Trust at that meeting (at Mr J Massam's request) without disclosing his personal interests.

[72] Accordingly, the prosecution submits that, at the 12 June 2012 meeting referred to above, the defendant is guilty of wilfully or recklessly breaching the Rules

[73] For the reasons set out above, the Committee submits that the evidence establishes, on the balance of probabilities, that the defendant deliberately colluded with Mr Massam to provide a false lease agreement to BNZ, and to purport to advise the Trust on matters in accordance with Mr J Massam's personal intentions for the Trust (purchase of Church Street, sale of Great North Road buildings).

Discussion

[74] We have set out the submissions for each party in some detail because we have absorbed them, stood back, and then come to overall findings.

[75] We can understand that the defendant thought he only needed to take instructions from Mr J Massam for MCT as a prospective vendor. However, he knew that, at material times, Ms Ruissen was the other trustee and, as such, shown as a co-owner of the properties of MCT. A licensee must realise that he (or she) cannot ignore the existence of a co-vendor and it is concerningly deficient to do that.

[76] We can also accept that, because of his trust in Mr J Massam and the seemingly sound financial position of MCT, the defendant was very comfortable with his own property-leasing company, William Hughes Ltd, entering into a lease of the Battery Building at the request of Mr J Massam so that, as the defendant expected, MCT could obtain some BNZ finance to be applied as a deposit for the purchase of 297A Church Street. He seems to have so understood the overall strategy of Mr J Massam on behalf of MCT and was quite relaxed as to whether the lease to William Hughes Ltd be enforced according to its terms or be cancelled at the behest of Mr J Massam.

[77] With regard to Charge 1, we cannot be satisfied, even to the civil standard of proof only, that the defendant was colluding with Mr J Massam to provide false and/or misleading information to the BNZ in support of an MCT application for credit because the lease existed at material times, was binding at law, and was a normal part of the business of William Hughes Ltd (and of the lessor). That the defendant subsequently, and in an informal manner, acceded to Mr J Massam cancelling the lease does not show that it was "*non est factum*" from the outset. In any case, we are not satisfied that the BNZ was being misled because MCT (at least through Mr J Massam) could have enforced the lease, even if it meant that some renovation would need to be completed at the property by the MCT. There is no suggestion that MCT or Mr J Massam could not have met bank interest or repaid the bank loan. We wonder whether Mr J Massam made as full a disclosure to BNZ as should have been given, but the defendant did not seem to liaise with BNZ over the matter.

[78] With regard to Charge 2, the defendant either knew, or should have inferred, that Mr Massam had leased the Battery Building to William Hughes Ltd and intended to have 297A Church Street purchased by the trust, but the then other trustee of MCT was oblivious to these strategies. In that context he attended the MCT trustees' meeting of 12 June 2012 as if an independent advisor and gave the trustees advice regarding the sale and purchase of real estate; and, furthermore, he had conflicts of financial interest being entitled to substantial commission on the sale contract of 297A Church Street, which had already been entered into by Mr J Massam whether for himself or MCT, and any profit made by William Hughes Ltd from subletting MCT's Battery Building would belong to the defendant.

[79] The effect of RR 6.1, 6.2 and 6.4 overlaps. In terms of R 6.1, the defendant owed a duty of trust to a vendor, Ms Ruissen, to keep her informed of his activities on behalf of the Trust and he failed to do that. In terms of R 6.2, the defendant excluded Ms Ruissen from information she needed in her role as a trustee and vendor and it was unfair (and incompetent) that the defendant did not treat with her. In terms of R 6.4 there was a concerning withholding of information which "should by law or fairness" have been provided to her by him.

[80] We agree with Ms Paterson that the defendant was highly conflicted at the 12 June 2012 meeting and must have known, or should have known, that he was unable to give objective real estate agency advice to the Trust and was likely to mislead the owner (and prospective vendor) Ms Ruissen. He needed to disclose his personal interests in the meeting's agenda items and also the actions he and Mr Massam had been taking on behalf of the Trust. He breached a clear duty of trust to the Trust and to Ms Ruissen. That seems to have been wilful but it was at least reckless in terms of s 73(c)(iii) of the Act. In the circumstances, it is arguable whether the defendant risked breaching any confidence due from him to Mr J Massam but, in any case, an adequate update could have been given to Ms Ruissen

and it was misconduct to purport to be giving independent real estate advice to the Trust.

[81] We consider that to fail to deal with a co-trustee vendor was misconduct in the above context.

[82] Charge 1 is dismissed but we find Charge 2 proven.

[83] There seems no need for us to deal with the alternative Charge 3.

[84] Accordingly, there needs to be a penalty hearing, possibly, on the papers only. We direct the Registrar to now arrange a Directions Hearing by phone of counsel with our Chairperson to fix procedure to deal with penalty.

[85] 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 G Denley
Member

Ms C Sandelin
Member