

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 48**

**READT 015/19**

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MARGARET JILLIAN THOMSON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 520) First Respondent
AND	CEDRIC FOOTE Second Respondent
Hearing:	23 October 2019, at Hamilton
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Conner, Member
Appearances:	Ms Thomson, Appellant Ms Y Wang, on behalf of the Authority Mr Foote, Second Respondent
Date of Decision:	7 November 2019

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Ms Thomson has appealed against the decision of Complaints Assessment Committee 520, dated 15 May 2019, in which it decided to take no further action on her complaint that Mr Foote had trespassed on her property.

## **Background facts**

[2] Mr Foote is a licensed agent, engaged at Tall Poppy Real Estate in Cambridge (“the Agency”).

[3] Ms Thomson is the owner of a residential property in Cambridge. There is a high wooden fence at the front of the property, with a gate opening on to a path to the front door. There is a driveway leading to the rear of the property, which passes a side porch, where there are French doors and a window into the kitchen.

[4] At the back of the house, on the opposite side from the kitchen porch there is another porch, which has a door to the back of the house on one side, and a door to the laundry on the other side. The back porch is next to a concrete patio. The back porch is not visible from the side porch, as it is hidden by the bathroom of the house.

[5] There is a detached sleepout at the rear of the property, which is accessed by a path from the driveway. This path does not pass the laundry.

[6] Ms Thomson’s evidence to the Authority was that on the afternoon of 4 September 2018, she had locked up the main house after having emptied it of furniture in order for interior work to be done, and was working on her computer in the sleepout at the rear of the house. Furniture from the house had been moved into a furniture removal van, which had been parked outside the property while the furniture was being moved into it.

[7] Ms Thomson said she did not hear anyone knocking or calling at the property. However, her attention was caught by seeing (through the sleepout window) the shadow of a person moving around the back of the house. She went to the sleepout door, opened it and looked out. She walked towards the back porch and saw a leg

disappearing into the laundry. She called out, asking who the person was and what they were doing on her property, then retreated into the doorway of the sleepout. Mr Foote appeared and walked across to her.

[8] Ms Thomson said that Mr Foote told her he had seen the moving van and assumed she was ready to sell the property, then introduced himself as a real estate agent who could list the property. He gave her a card with the Agency's name on it. Ms Thomson's response was that the contents of the house had been moved out in order to do the house up, and that she had no intention of selling.

[9] Mr Foote provided a brief written response to the complaint. He said that he noticed a wastebin in the driveway, which he took to be an indication that the homeowner might be moving. He said he had noticed Ms Thomson at the property while he was on the way home with his wife (he lived in the same street), and that after dropping off his wife, he went back to the property. He said he:

... knocked on the door and there was no answer, so knowing she was at home I assumed she was out the back somewhere so I went around the back and saw what was an extended part of the house ... I knocked on the door, introduced myself, gave her my card, and asked her if she was thinking of selling as I had noticed the general cleanup going on.

[10] Mr Foote said that Ms Thomson was "quite rude to me and more or less told me to bugger off". He said that it was "definitely not true" that he was inside the laundry. He said he would not dream of going inside someone's house, because "that's home invasion and you can be jailed for that". He said that Ms Thomson had exaggerated the incident, or was mistaken or confused as to what really happened.

[11] Mr Foote also said that as far as he knew, what he did was "not illegal and is part of our free enterprise system we all work under".

### **The Committee's decision**

[12] The Committee first considered whether it had jurisdiction to consider the complaint. On the basis that the complaint alleged unsatisfactory conduct by Mr Foote, it was required to decide whether Mr Foote's "cold-calling" at the property was within the definition of "real estate agency work". This is because a finding of

unsatisfactory conduct can only be made in respect of conduct that has occurred in the course of real estate agency work.

[13] The Committee concluded that Mr Foote's presence at the property was for the purposes of seeking a property listing, and was within the definition of "real estate agency work" in s 4 of the Act.<sup>1</sup>

[14] Regarding the substance of Ms Thomson's complaint, the Committee considered that despite some dispute, the parties were "in essential agreement about the facts". That is, Mr Foote entered the property with the intention of gaining a listing. He was at the back of the property after being unable to get a response from the front door. The Committee noted the differing accounts as to whether Mr Foote entered the laundry (as Ms Thomson said), or whether Mr Foote almost immediately encountered Ms Thomson on the back porch (as Mr Foote said).

[15] The Committee did not consider that "the simple act of entering a property to engage a home owner in a sales pitch" is a breach of professional standards, or any of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. The Committee was not persuaded that Mr Foote had entered the laundry. It also said that even if he had done so, Ms Thomson's evidence was that he did not go far, which was more a situation of "poking a head around" to see if anyone was home, rather than entering a room.

[16] The Committee accepted that Ms Thomson did not welcome Mr Foote's "intrusion", but concluded, at paragraph 3.20 of its decision:

On the evidence before the Committee the complaint is not proved on the balance of probabilities. There is no evidence the Licensee was a trespasser on the property and the Committee is not persuaded that the conduct of the Licensee in entering the property in the matter that he did could amount to a breach of his professional obligations and, therefore, be considered unsatisfactory conduct.

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<sup>1</sup> "Real estate agency work" is defined in s 4 of the Act (as relevant in this case) as meaning "any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction".

## **Appeal issues**

[17] There are two issues to determine:

[a] Was the Committee wrong to find that there was no evidence that Mr Foote had trespassed at the property?

[b] Did the Committee show bias against Ms Thomson?

## **Approach on appeal**

[18] The Committee's decision was made under s 89(2) (b) of the Act, following an investigation into Ms Thomson's complaint. As such, it was a determination on the merits of the complaint.

[19] This appeal is, therefore, a general appeal, and Ms Thomson is required to persuade the Tribunal that the Committee's decision to take no further action on her complaint was wrong. The Tribunal must arrive at its own assessment of the merits of the case. If Ms Thomson satisfies us that the Committee's decision was wrong, then we may substitute our own finding for that of the Committee.<sup>2</sup>

## **Was Mr Foote doing "real estate agency work"?**

[20] There was no appeal against the Committee's finding that in going to the property to attempt to secure a listing agreement, Mr Foote was doing "real estate agency work", as defined in the Act. However, counsel for the Committee, Ms Wang, invited the Tribunal to consider whether the Committee's conclusion was correct, and where the line should be drawn as to when such preliminary work is properly considered to be real estate agency work, and thus subject to disciplinary scrutiny.

[21] As the issue has not been raised in the appeal, we have no jurisdiction to consider it. Nor would we consider it appropriate to do so in this case, as we have not received full submissions on the point.

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<sup>2</sup> See *Austin, Nichols & Co Inc v Stichtung Lodestar* [2007] NZSC 118, [2008] 2 NZLR 141, at [5] and [16]; *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112].

## **Was the Committee wrong to find that Mr Foote was not a trespasser?**

### *Submissions*

[22] Ms Thomson challenged Mr Foote's assertion that he "knew" she was "at home". She accepted that he may have seen her when he drove past, but that did not mean that he could "know" she was at home at a later stage. She submitted that she had locked the house and had been working in the sleepout for 30 minutes before she became aware of Mr Foote being at the property. She submitted that that was sufficient time for her to have left the property, and her car was not parked at the property.

[23] She submitted that the Committee was wrong to conclude that Mr Foote's entry onto the property, in particular his entry into the laundry, was not an act of trespass. She submitted that the Committee was correct in finding that Mr Foote had implied licence to be on the property when he first entered onto the property through the front gate and went to the front door. However, she submitted, the Committee was wrong to find that that he had implied licence to re-enter the property via the driveway and then to go around to the back of the house to the back porch and enter the laundry.

[24] Ms Thomson further submitted that even if Mr Foote's evidence that he did not enter the laundry were accepted, he was a trespasser by having gone beyond the front door, and side (kitchen) doors, when it was obvious that the house was locked up and empty. She submitted that the French doors to the kitchen on the side porch are generally treated by callers to the property as being the "back door" to the house. She submitted that the French doors and the kitchen window gave a view into the interior of the house, and Mr Foote would have seen that the house was empty and there was no one there. At that point, she submitted, any implied licence ended, and Mr Foote should have left the property.

[25] She submitted that in order to get to the back porch, Mr Foote had to make his way through overgrown grass and onion weed. As opposed to the path to the sleepout (which Mr Foote did not take) there was no indication that walking through the overgrown grass would enable access to the house. She submitted that in doing so, Mr

Foote could not reasonably have believed he was within the terms of any implied licence.

[26] Ms Thomson submitted that the Committee was wrong to reject her evidence that Mr Foote had gone into the laundry. She submitted that as she saw one of Mr Foote's legs disappear through the laundry door, it was a reasonable inference that the rest of his body was already in the laundry. When Mr Foote reappeared, he was on the laundry-door side of the back porch.

[27] While maintaining that submission, Ms Thomson also submitted that the Committee was wrong to find that if Mr Foote did enter the laundry, he did not go far, and was more "poking a head around to see if anyone was home" rather than entering the room. She submitted that even if all Mr Foote did was to "poke his head into" the laundry, he was trespassing, referring to the definition of trespass given in *Ellis v Loftus Iron Co*:<sup>3</sup>

If a defendant places a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.

[28] Ms Thomson further submitted that any implied licence Mr Foote may ever have had to be on the property was terminated when she spoke with him and, as Mr Foote put it "more or less told [him] to buggar off". She submitted that Mr Foote did not leave, but remained and suggested that she should consider buying a smaller property.

[29] At the hearing, Mr Foote repeated that he had seen Ms Thomson at the property while driving his wife home and that, after dropping his wife off at home he had gone back to the house in to talk to Ms Thomson about a possible listing. He also repeated that he would never step inside a home without being invited.

[30] Ms Wang referred us to authorities as to trespass and implied licence and submitted that the Committee was not wrong in concluding that no trespass had been proved on the facts.

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<sup>3</sup> *Ellis v Loftus Iron Co* (1874) LR CP 10 (Comm Pleas) at 12.

[31] Ms Wang further submitted that in the event that the Tribunal were to conclude that Mr Foote did trespass on the property, it is necessary to consider whether that constituted unsatisfactory conduct. She submitted that the primary basis on which a trespass may be considered unsatisfactory conduct is whether it is a breach of r 6.3 of the Rules; that is, whether it is conduct which, “if known by the public generally, was more likely than not to lead members of the public to think that licensees should not condone it or find it to be acceptable”.

[32] Ms Wang submitted that the Tribunal might consider that Mr Foote’s conduct, if it was a trespass, was a “brief trespass” and, while presumptive and unwelcomed, was not otherwise aggressive.

#### *Factual disputes*

[33] There were two areas of direct factual dispute: first, whether Mr Foote’s attention was drawn to the property by the presence of a moving van or a large waste bin, and secondly, whether Mr Foote entered the laundry at the property.

[34] With respect to the former, the presence of either a moving van or a large waste bin at a property may indicate to a salesperson that the occupant is possibly moving house, and prompt a cold call to inquire if the owner would like to enter into a listing agreement. It is not necessary to make a finding as to whether it was a moving van or a waste bin in the present case, in order to make a finding as to whether the Committee was wrong to find that Mr Foote had not trespassed at the property.

[35] We will refer to the second area in dispute (as to whether Mr Foote entered the laundry) later in this decision.

#### *Discussion*

[36] We take Mr Foote’s assertion that his going around to the back of the house and knocking on the door was “not illegal and is part of our free enterprise system” as meaning that he is asserting he had implied licence to do so. Having invoked an implied licence, it is for Mr Foote to establish that he acted in accordance with it.

[37] Under the common law, a person who sets foot on another person's land without that person's consent or legal justification is trespassing. However, the strict terms of the common law have been ameliorated by the doctrine of "implied licence". As his Honour Justice Tipping said in the Supreme Court in *Tararo v R*:<sup>4</sup>

[11] ... citizens generally, ... are not trespassers if all they do is enter upon, but not into, private premises for the purpose of making inquiry of, that is, communicating with an occupier. ...

[12] ... The common law modifies the absoluteness of the ordinary law of trespass by permitting entry onto private premises for the purpose of reasonable enquiry. The common law recognises, however, that a landowner is entitled to deny or terminate the licence, either in advance of its being invoked or in the course of its being invoked.

[38] The Tribunal considered whether a salesperson had trespassed on a property in its decision in *Quin v The Real Estate Agents Authority (CAC 301)*.<sup>5</sup> In that case, the salesperson went to a property, in an attempt to persuade the owners to list it for sale with him. He went to the front door and rang the doorbell and knocked on the door, but got no response. He then walked around to the back door to check whether the owners were at home, possibly out in the garden. There was a dispute as to what occurred, but the Tribunal accepted the salesperson's evidence that he went to a ranchslider door which was slightly open, and was "beckoned in" to the house by one of the owners.

[39] The Tribunal found that the salesperson's having walked from the front door to the back door was "a perfectly lawful practice in the circumstances", and on the basis of its finding that he had been "beckoned in", the Tribunal found that he was exonerated from any trespass.<sup>6</sup> However, the Tribunal went on to say:<sup>7</sup>

For all that, we respectfully warn real estate agents that they must at all times carefully respect the home privacy of those with whom they deal in their daily work as real estate agents. They are people who are more likely than others to attend the private homes of people and must particularly respect the privacy of others especially in their homes. Any unacceptable violation of that privacy would lead us to impose a firm penalty.

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<sup>4</sup> *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 (SC), at [11]–[12] (citations omitted). (On this point, the Supreme Court was unanimous: see at [3], per Elias CJ.

<sup>5</sup> *Quin v The Real Estate Agents Authority (CAC 301)* [2016] NZREADT 18.

<sup>6</sup> At [43]–[46].

<sup>7</sup> At [48].

[40] We accept Ms Thomson's submission that Mr Foote could not have "known" that she was at the property. However, even if Mr Foote's return to the property was some 30 minutes after he first saw her, we accept that it could reasonably be assumed that a person who had been noticed at the property might still be there.

[41] Ms Thomson's acknowledgement that Mr Foote had implied licence to go to the front door of the house for the purpose of communicating with her was appropriate. He did not trespass at that point. Further, as in *Quin*, Mr Foote did not trespass when he re-entered the property by walking up the driveway. At that point he passed the side porch, and the French doors to the kitchen. Under the implied licence, he would not have been trespassing had he gone onto the side porch and knocked on the French doors, although Mr Foote gave no evidence that he he did so. We accept Ms Thomson's submission that had he gone to the French doors, Mr Foote would clearly have seen that the house was empty, and that there was no one in it. Nor does Mr Foote suggest that he took the path to the sleepout, where he could have knocked on the door and spoken to Ms Thomson.

[42] Instead, Mr Foote went across overgrown grass and onion weed to make his way to the back porch of the house, which was not visible from the side porch. He does not suggest that he called out, or in any way made his presence known to anyone who might be in or around the property.

[43] We are satisfied that the Committee was wrong to find that Mr Foote's having gone around to the back of the house and onto the back porch did not constitute a trespass. At that point, Mr Foote had had two opportunities (the front door and the French doors) to establish either that there was no one at the property or (if anyone was there) no one wanted to communicate with him. Thereafter, his presence at the property could no longer be considered reasonable, for the purpose of attempting to communicate with the owner/occupier. His implied licence was at an end.

[44] Mr Foote said that he went on to the back porch. On our assessment of the case, we find that he trespassed by doing so.

[45] We turn to the disputed issue as to whether Mr Foote went into the laundry from the back porch, as Ms Thomson says, or remained on the porch, as Mr Foote says. The Tribunal has directly conflicting statements from Ms Thomson and Mr Foote, each of whom confirmed their statements at the hearing.

[46] We note that Ms Thomson wrote her complaint on the the same day of her encounter with Mr Foote. Her complaint begins “This afternoon, ... I found Mr Foote in my laundry at the very back of the house”. We would expect a witness to have good recall of an event which had occurred shortly before the statement describing it. Further, Ms Thomson gave a detailed explanation as to how it was that she saw Mr Foote’s leg disappearing into the laundry, then (after calling out) saw Mr Foote appear from the back porch.

[47] Although Mr Foote’s statement was made some three months later, we would expect a person who had been in the real estate industry for 35 years (as he had) to be very well aware that he must not go inside someone’s home without being invited. Mr Foote’s statement that he “would not dream of going inside someone’s home” is inherently plausible.

[48] As complainant, Ms Thomson has the onus of establishing the facts of her complaint, on the balance of probabilities. There is no other evidence on the point. On our assessment of the evidence, we find that it is more likely than not that, having seen the laundry door, Mr Foote went inside it then, after hearing Ms Thomson, emerged on the back porch in the manner described by her. We accept that it can be inferred from Ms Thomson’s evidence of seeing Mr Foote’s leg disappearing into the laundry, the rest of his body was already there.

[49] We therefore find that Mr Foote’s trespass extended to going inside the laundry, even if he were only partially inside.

## **Should Mr Foote be found guilty of unsatisfactory conduct?**

[50] Ms Wang submitted that a trespass should be considered as being a possible breach of r 6.3 of the Rules, which provides:

A licensee must not engage in any conduct likely to bring the industry into disrepute.

[51] Ms Wang submitted that if the Tribunal were to find that Mr Foote trespassed, then it was a “minor trespass”, because it was brief, and did not extend beyond being on the rear porch, or in the doorway of the laundry. As such, she submitted, while it should not be condoned, it falls short (by a narrow margin) of being conduct that would bring the industry into disrepute.

[52] We do not accept that submission. Licensees invoking an implied licence to go onto a person’s property must be conscious of the limits of the licence. It is not a licence to go beyond what is a reasonable attempt to communicate with the owner or occupier, and it does not give a licensee the ability to go further onto the property than is reasonable for such communication, or to ascertain either that there is no one at the property, or that any person who may be there does not wish to communicate with the licensee. As the Tribunal said in *Quin*, licensees must “at all times carefully respect the home privacy of those with who they deal in their daily work as real estate agents.”

[53] In its decision in *Jackman v Complaints Assessment Committee 10100*, the Tribunal described conduct that would justify a finding that a licensee had breached r 6.3 as conduct that:<sup>8</sup>

... if known by the public generally, would lead them to think that licensees should not condone it or find it to be acceptable. Acceptance that such conduct is acceptable would ... tend to lower the standing and reputation of the industry.

[54] We are satisfied that members of the public would think that licensees should not condone trespass by a licensee, or find it to be acceptable. We are satisfied that a licensee who has found to have trespassed on a property must be considered to have brought the industry into disrepute. Mr Foote’s conduct is therefore unsatisfactory conduct under s 72(b) of the Act. We are also satisfied that agents of good standing

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<sup>8</sup> *Jackman v Complaints Assessment Committee 10100* [2011] NZREADT 31, at [65].

would consider it unacceptable for a licensee to trespass on a property, such that Mr Foote's conduct is unsatisfactory conduct under s 72(d) of the Act.

[55] We are satisfied that the Committee was wrong not to make a finding that Mr Foote engaged in unsatisfactory conduct, under ss 72(b) and 72(d) of the Act.

[56] In the light of that finding, the Tribunal must consider what penalty orders, if any, should be made. Ms Thomson indicated in her complaint that she considered that Mr Foote should receive some form of re-training or warning about trespass, and to be reminded about where he can legally go on a property and where he cannot.

[57] We have not received any submissions on penalty from Mr Foote or the Authority. In the circumstances, it is not appropriate for us to make any orders until we have received further submissions. A timetable for such submissions is set out at the conclusion of this decision.

**Was the Committee wrong to find that the Committee did not show bias against Ms Thomson?**

*Submissions*

[58] Ms Thomson submitted that where there were two versions of events, Mr Foote's version was always favoured over hers, even when the detail "was of no consequence such as whether there was a moving van or a waste bin" at the property. She further submitted that the Committee made errors in interpretation and errors of fact. She submitted that the Investigator's report to the Committee contained several errors, and these were repeated in the Committee's decision. Ms Thomson further submitted that the Committee did not offer her an opportunity to be heard, which might have led to the errors being corrected.

[59] The Committee's errors referred to by Ms Thomson (apart from saying that there was a waste bin at the property) included saying that Mr Foote lived at "[number 138] four houses away", that it incorrectly conflated the timing between Mr Foote noticing her at the property and his return to the property, that Mr Foote knocked on the back

door, that she had admitted not seeing Mr Foote enter the laundry, and statements as to what Mr Foote said when she spoke with him.

[60] Ms Wang submitted that the Committee had not shown bias. She submitted that when dealing with disputed facts, courts and other decision-makers routinely favour one version of events over another, on the balance of probabilities. She submitted that that type of election does not show bias. She submitted that in the present case, Ms Thomson had the burden of proof, and the Committee was not satisfied that she had discharged it.

[61] Ms Wang further submitted that if the Committee made factual errors, that is a matter that can be considered by the Tribunal on appeal, without any reference to the framework of bias.

### *Discussion*

[62] We accept that the Committee made an error when it stated that Mr Foote lived at a house four doors away from the property. Mr Foote did not say that he lived there: he said “I currently have [that house] on the market and I live at [another number in the same street, further away]”. The Committee’s error was made in the Investigator’s report, and not picked up by the Committee.

[63] We accept that the Committee was in error if it reasoned that because Mr Foote came from only four doors away, it was reasonable for him to say that he “knew” Ms Thomson was at the property. But the Committee’s error does not prove that the Committee was biased; it shows that it was wrong.

[64] In other “errors” referred to by Ms Thomson, the Committee was recording Mr Foote’s evidence. That does not establish bias. We accept Ms Wang’s submission that decision-makers such as the Committee, and the Tribunal, routinely decide between competing versions of events. In the present case, the Committee was required to be satisfied that Ms Thomson had established that a finding of unsatisfactory conduct should be made against Mr Foote. The Committee was not satisfied of that.

[65] Ms Thomson exercised her right of appeal, and we have found that the Committee was wrong. Again, that does not prove that the Committee was biased.

### **Outcome**

[66] Ms Thomson's appeal against the Committee's decision not to make a finding of unsatisfactory conduct against Mr Foote is allowed. We find that he trespassed on her property, and has engaged in unsatisfactory conduct.

[67] The Tribunal will receive submissions as to penalty, as follows:

- [a] By Ms Thomson, to be filed and served within 15 working days of the date of this decision;
  
- [b] By or on behalf of Mr Foote, and by or on behalf of the Authority, to be filed and served within 15 working days after Ms Thomson's submissions have been filed and served.

[68] The Tribunal expects its timetable directions to be complied with. Any request for an extension of time in respect of a direction must be made before the date on which the direction was due to be complied with, and must be supported by an explanation as to why the direction cannot be complied with.

[69] All documents must be filed electronically. Any document over 20 pages must also be filed in hard copy, as soon as practicable after it has been filed electronically. Four copies must be provided of all documents filed in hard copy.

[70] Ms Thomson's appeal on the grounds that the Committee showed bias against her is dismissed.

[71] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Ms C Sandelin  
Member

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Mr N O'Connor  
Member