

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL DIVISION
EXPEDITED CASES LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-16-04656

ROCCO FERNANDO GAGLIARDI

Plaintiff

v

KP HICKS REAL ESTATE PTY LTD ACN 071 119 983

Defendant

JUDGE: HER HONOUR JUDGE MARKS
WHERE HELD: Melbourne
DATE OF HEARING: 5-9, 12-14 February 2018, 2 March 2018
DATE OF JUDGMENT: 29 May 2018
CASE MAY BE CITED AS: Gagliardi v KP Hicks
MEDIUM NEUTRAL CITATION: [2018] VCC 745

REASONS FOR JUDGMENT

CONTRACT – claims for unpaid commissions by real estate agent employed by real estate agency – whether breach of restraint clause – whether breaches of contract or fiduciary duty entitling agency to damages

CONFIDENTIAL INFORMATION – alleged misuse of confidential information – whether information confidential – *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the plaintiff	Mr P Wallis	Aitken Partners
For the defendant	Mr J Paterson	K & L Gates

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HER HONOUR:

INTRODUCTION

- 1 Rocco Gagliardi sues real estate agency KP Hicks Real Estate Pty Ltd for commission he says he earned over his time working for it as a commission agent. This agency counterclaims saying it is entitled to damages because he breached various agreements with it, whilst he was working there and afterwards.
- 2 Rocky began working in real estate in Shepparton in 1998. In 2003, Kevin Hicks began operating a real estate agency company in the Shepparton area, trading under the name Kevin Hicks Real Estate. Two years later, Rocky and Darren Scott began working with him.
- 3 By 2008 Rocky and Darren were directors of the agency, and their companies were shareholders in it. They were involved in managing the agency and shared the profits generated by the agency.
- 4 In 2015 when they decided they wanted to leave the agency the following year, various agreements were entered into in order to disengage them from their proprietary interests in it, and enable them to be employed by it instead.
- 5 It was agreed that they and their companies would sell their shares in the agency to Kevin Hicks, and then stop being entitled to any dividends from the agency. However, they would then be employed as commission agents, for at least 12 months.
- 6 They entered into a settlement agreement on 25 May 2015 setting out the basis on which their shares would be sold, including them resigning as directors of the agency, and not being entitled to dividends for the 2015 year. It also dealt with their entitlement to earn commission between 25 May 2015 and the 'completion date', where one of them was the agent responsible for obtaining listing, or selling a particular property.

- 7 The completion date was specified as 30 June 2015 unless one of the parties exercised an option to bring that date forward.
- 8 The settlement agreement contemplated more formal terms being entered into regarding the share sale and the ongoing employment of Rocky and Darren.
- 9 On 30 June 2015, the parties signed a share sale agreement. It provided for completion of the shares sale and purchase to occur that day, when the bulk of the price was to be paid. They were to resign as directors and employees of the agency under their current employment agreements. From then, Darren and Rocky were to be engaged as commission agents for 12 months, under the terms of a draft commission agent agreement annexed to the share sale agreement. They were not to be entitled to any commission on listings or lettings listed with or managed by the agency except as set out under the commission agent agreement. Clause 4.2 dealt with their entitlement to commission from 25 May 2015 to 30 June 2015 (the completion date).
- 10 Also on 30 June 2015, Rocky signed a new employment agreement with the agency – in the same terms as the agreement described as ‘commission agent agreement’ in the share sale agreement, and annexed to it. The employment agreement set out the terms on which Rocky was to be employed going forward, and in particular the commission he could then earn.
- 11 Subclauses 9.1(a)(i) to (v) set out Rocky’s entitlement to be paid commission set out as a proportion of the commission the agency earned for new listings from 1 July 2015 where Rocky was involved as the agent in listing, selling or leasing particular properties. What is meant by ‘new’ listings in this context is one of the issues in this case.
- 12 Subclause 9.1(a)(vi) deals with Rocky’s entitlement to 20% of the commission the agency is entitled to on the sale of an existing listing of a subdivision estate set out

in the schedule to the agreement. Another issue in this case is how this clause is to be interpreted in context.

13 Rocky worked for the agency under the new arrangements for just over 11 months. He left before the 12 month term contemplated by the share sale agreement was completed.

14 On 24 April 2016, Rocky and the agency signed an early termination of employment agreement. It provided that Rocky would resign from the agency on 1 June 2016. By clause 8, it was agreed that his entitlement to commission under the employment agreement was not affected by the early termination agreement. Clause 8 provided that Rocky would be entitled to be paid commission where he had otherwise earned it under clause 9.2 of the employment agreement, provided that on or before 1 June 2016 instructions had been given to the vendors' solicitors to prepare a contract of sale for a relevant property

15 As his resignation day approached, Rocky realised that negotiations for a sale he had been working on for months, for a property described in the trial as the SPC property, would be unlikely to reach the point where instructions were given to the vendors' solicitors to prepare a contract of sale by 1 June 2016. A variation agreement was prepared to deal with commission for that property

16 On 1 June 2016, Rocky had a staff send-off morning tea.

17 That afternoon he attended a handover meeting with Kevin, and with a solicitor there to ensure settlement went ahead. He and the agency executed the variation agreement relating to the SPC commission entitlement.

18 The variation agreement enabled him to earn commission if the SPC sale concluded within 60 days after he left, provided he complied with certain conditions.

19 Nine days after Rocky left the agency, on 10 June 2016, the SPC deal was concluded. SPC sold the SPC property to the Thompson Group, and the agency was paid \$200,000 commission on the sale.

20 In July 2016, Rocky, Darren, and another former employee of the agency, Gerard Sabri, began operating a real estate agency called Gagliardi Scott Real Estate in the Shepparton area. Some vendors and lessors who had previously listed their properties for sale or lease with the agency sold or leased properties through Gagliardi Scott, and Gagliardi Scott was paid commissions when sales occurred.

Issues

21 In this proceeding, Rocky claims commission due to him in relation to his involvement in the sale or lease of many properties.

22 The agency counterclaims for damages, alleging that Rocky had breached obligations he had under the employment agreement, and a fiduciary duty, in failing to obtain exclusive sales agreements and exclusive leasing agreements for the agency in relation to certain properties before he left. It also alleged that he had wrongly used confidential information, and had breached a restraint clause in obtaining sales through his own agency Gagliardi Scott after he left.

23 The facts in evidence were complex, canvassing five agreements and the facts relating to the listing, selling or leasing of more than 20 different properties.

24 Here is a summary of the issues, and my findings – which are set out in detail in the balance of these reasons for judgment.

SPC claim - Is Rocky entitled to commission arising from the sale of this property?

25 The agency says Rocky failed to earn his entitlement due to non-compliance with preconditions to him earning that commission set out in clause 1 of the variation agreement.

26 I find he complied with the conditions in clause 1, and is entitled to that commission.

Were particular properties new listings or lettings introduced by Rocky?

27 Rocky claims commission on six properties as new listings or lettings he introduced to the agency after 1 July 2015. Rocky and the agency disagree about what is meant by 'new' listings or lettings under the employment agreement.

28 I find that:

- Rocky did not obtain a new listing over 123 Vaughan Street or 7 McHarry Place. His claim for commission on these properties fails.
- Rocky did obtain a new listing over 67 Corio Street, 29 Waranga Drive, 194 Hayes Street, and 366-388 Wyndham Street. His claim for commission on these properties succeeds.

What commission is Rocky entitled to on sales of existing listings of subdivision lots?

29 Rocky claims 20% listing commission and 20% selling commission on four subdivision lots he was responsible for listing and selling (the lots at 7 Enterprise Drive, 509 Kialla Green, 1090 Kialla Lakes and 154 Connolly Park Estate).

30 His entitlement to commission turns on the interpretation of clause 9 of the employment agreement. The agency says he is entitled to 20% commission in total on each lot.

31 I find that he is entitled to 20% commission on each of these lots.

Did Rocky breach contractual obligations, or his fiduciary duty, by not obtaining exclusive sales or leasing agreements over particular properties when he was employed by the agency?

32 The agency says that Rocky had contractual obligations, or a fiduciary duty, to obtain exclusive sales or leasing agreements for the agency over particular properties before he left the agency, and that because he did not it suffered loss and damage when the properties were later sold by Rocky himself or by Gagliardi Scott.

33 I find that he did not have the obligations or duty alleged.

Did Rocky misuse confidential information?

34 The agency claims Rocky breached a confidentiality clause in the share sale agreement by using, when he had left, confidential information he obtained at the agency.

35 I find that the information alleged to be confidential was not confidential.

Restraint clause

Clause 14(c) of the settlement agreement contains a restraint clause which the agency says Rocky breached in relation to two properties. I am not satisfied it was breached for either.

IPad and iPhone

36 The agency claims the value of an iPad and iPhone on various bases. These claims are not made out.

Pleadings and trial

37 On 18 October 2016, Rocky initiated these proceedings against the agency, claiming he is owed unpaid commission.

38 On 25 November 2016, the agency served a defence and counterclaim in this proceeding. It admitted many of the commission claims, denied some, and otherwise sought to offset any amounts owed to Rocky against losses it says it has suffered due to Rocky's conduct during the time he was an agent employed by the agency, and due to his misuse of confidential information since.

39 There were later amendments to the claim, defence and reply, up until the close of trial. This included an amendment to the statement of claim such that Rocky brought further commission claims of approximately \$20,000. He became aware of these claims being available to him when discovery was made belatedly of some of the agency's records.

40 The pleadings were lengthy and the issues arising out of the defence and counterclaim (amplified in further and better particulars) were not easy to follow. This was made more difficult by the number of properties in question and the overlap of some legal issues for some of them. In the course of the trial, the issues Counsel for the parties agreed were in dispute were set out in an agreed claims summary. It recorded agreed facts, and set out the legal and factual issues in dispute. This was helpful, and reduced the length of the trial.

41 Some of the claims in the counterclaim which were referred to in opening, and the subject of evidence, were not pressed by close of trial. This judgment deals with the issues that remain.

Witnesses and contemporaneous documents

42 I was satisfied with the honesty of the witnesses generally. It is not surprising that there were some differences as to detail, for example of what discussions occurred at a meeting nearly two years ago. I rely principally on the contemporaneous documents.

43 Rocky was sometimes fairly broad brush in his answers. He sometimes answered a part of a question rather than listening carefully to the whole of it and responding to all of it. However, I was satisfied he was endeavouring to tell the truth. Much of his evidence was uncontradicted in any event.

ROCKY'S CLAIMS

44 I deal first with the claims Rocky makes in the proceeding.

SPC PROPERTY - COMMISSION CLAIM

45 The parties disagree as to whether Rocky is entitled to \$97,632 commission on the sale of an SPC Ardmona property. For the reasons below, I find that he is.

46 Under the employment agreement and the early termination agreement, Rocky was entitled to commission generally if, by the time he left the agency, a sale had been agreed and instructions had been given to the vendor's solicitor to prepare a contract. The SPC sale was tantalisingly close to being completed when he left – but was not yet finalised. Despite having done the work that looked at that stage

like culminating in a sale shortly after he finished up with the agency, given the terms of his agreements with the agency Rocky was not entitled to any commission if the SPC property sold after he left.

47 The agency agreed to make an exception as to payment of the SPC commission. The parties signed a variation agreement on the day he left, relating only to that property. The agency agreed to pay him the commission he would have earned on the deal – provided the property sold within 60 days of his leaving and he complied with various conditions.

48 Nine days after he left the agency, the SPC deal concluded. No-one else at the agency had to do any work on it. Kevin left it to Rory Hilton (the conjunctual agent) to finish off. Kevin was pleased the deal concluded. It was the biggest deal the agency had every done. The agency earned \$200,000 commission. The agency told Rory Hilton that Rocky would be paid. It changed its mind, according to Fiona Hicks, because it later decided Rocky had not complied with his obligations under the variation agreement.

49 The variation agreement provides at clause 1:

The Parties agree that notwithstanding the terms of the KHRE Agreements [the settlement agreement and the early termination agreement], that Gagliardi will still be paid the commission he would have otherwise have earned upon the sale of the SPC Ardmona site located at Camp & Young Streets, Mooroopna (**SPC Property**) as if the entitlement to commission arose during his time of employment as per the KHRE Commission Policy, subject to and provided the following matters occur and are strictly complied with by Gagliardi:

- (a) the ultimate purchaser or group of purchasers of the SPC Property is a purchaser or group of purchasers with whom Gagliardi was negotiating with in relation to the purchase of the SPC Property prior to the Effective Date;
- (b) KHRE's entitlement to commission on the sale of the SPC Property arises within 60 days of the Effective Date (Extended Period);
- (c) after the Effective Date, Gagliardi ceases his involvement and dealings in all further negotiations with the vendor, the joint listing

agent CBRE or any potential purchasers in relation [sic] the sale of the SPC Property;

- (d) after the Effective Date, Gagliardi will not make any representations on behalf of KHRE or seek to enter any agreements on behalf of KHRE in relation [sic] the sale of the SPC Property;
- (e) Gagliardi will refer any further enquiries, communications or documents he receives from any of the vendor, the joint listing agent CBRE or any potential purchasers in relation [sic] the sale or purchase of the SPC Property to Kevin Hicks of KHRE;
- (f) Prior to 4PM on the Effective Date Gagliardi will request the vendor and Rory Hilton of the joint listing agent CBRE and the current potential purchasers of the SPC Property who have submitted offers to purchase the SPC Property to direct future enquiries, correspondence and communications in relation to the sale and purchase of the SPC Property to Kevin Hicks of KHRE;
- (g) During the Extended Period, Gagliardi will answer the queries of and provide such information as he is aware of in relation to the sale of the SPC Property to Kevin Hicks of KHRE promptly on request from Kevin Hicks; and
- (h) prior to 2.30 pm on the Effective Date Gagliardi will provide Kevin Hicks of KHRE with all documents, notes, information, contact details and an up-to-date summary of the history of negotiations for the sale of the SPC Property to date.

50 Rocky's entitlement to commission arises if the eight subclauses of clause 1 are
complied with. It is in the nature of a precondition.

51 Where the parties differ is as to whether four of the conditions were complied with.

Law – Construction of contract

52 In deciding that Rocky complied with clause 1, I have applied the legal principles
relevant to construing a commercial contract.

53 The principles were summarised by French CJ, Nettle and Gordon JJ in *Mount
Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116–17
[46]–[51]:

The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or statutory provision

referred to in the text of the contract) and purpose.

In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That inquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. It may be necessary in determining the proper construction where there is a constructional choice.

...

Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result'. Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'.

[citations omitted]

54 As recently stated by the High Court in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12 at [16] (per Kiefel, Bell and Gordon JJ):

It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and

objects to be achieved by it.

Clause 4 is to be construed by reference to the commercial purpose sought to be achieved by the terms of the lease. It follows, as was pointed out in *Electricity Generation [Corporation v Woodside Energy Ltd [2014] HCA 7 at [35]]*, that the court is entitled to approach the task of construction of the clause on the basis that the parties intended to produce a commercial result, one which makes commercial sense. It goes without saying that this requires that the construction placed upon cl 4 be consistent with the commercial object of the agreement.

55 I construe the meaning of the variation agreement – which is a commercial contract – ‘in a practical and realistic way, not in a way which adopts an overly fine or theoretical approach that is alien to commercial agreement’: *McCann v Switzerland Insurance Australia Ltd (2000) 176 ALR 711 at 729 (per Kirby J)*.

56 If the language of the agreement is open to two constructions, the construction should be preferred that will ‘avoid consequences which appear capricious, unreasonable, inconvenient or unjust’: *Australian Broadcasting Commission v Australian Performing Right Association Ltd (1973) 129 CLR 99 at 109 (per Gibbs J)*.

57 A literal meaning should not be applied to the words of a contract where to do so would lead to an irrational or absurd result. In such cases, the contract should be construed to avoid that result by supplying, omitting or correcting words: *Westpac Banking Corporation v Tanzone Pty Ltd (2000) BPR 17,521 at [19] – [20] (New South Wales Court of Appeal per Priestley and Fitzgerald JJA and Foster AJA)*.

Purpose of variation agreement

58 Rocky and the agency had agreed by the early termination agreement in April 2016 that Rocky would cease working for the agency on 1 June 2016 and be paid for commissions earned up to that date where terms of sale had been agreed by the vendor and the purchaser by that date such that instructions had been provided to the vendor’s solicitors to prepare a contract of sale in respect of the relevant sale.

59 In the nine or so months leading up to 1 June 2016, Rocky had undertaken substantial work on the sale of the SPC property for the agency and done a good job in bringing the sale to the cusp of terms of sale being agreed.

60 He had worked closely with Rory at CBRE – the conjunctional agent – and various people at SPC and Coca Cola, and had been the primary point of contact for the bidders.

61 Shortly before he left the agency he was concerned he would miss out on the commission at a time when the sale was nearly completed, and he had done virtually all the work on it.

62 On Saturday 28 May 2016 Rocky was emailed the signed contract by Thompson Group indicating its offer. He was at his daughter's netball game when he received it.

63 Two days later, on the Monday morning, he spoke to Kevin about it and said the contract would not be able to be finalised before he left the next day. Kevin gave evidence that he told Rocky to keep managing the file well, and said:

Make sure the vendor is looked after and focus on the vendor and you will get paid for the commission.

64 Kevin then asked Fiona to get the lawyers to arrange an agreement relating to that commission.

65 Fiona gave instructions to the agency's lawyers. The next day, on Tuesday 31 May, they emailed Rocky's lawyers, stating:

We are instructed that our client is prepared to agree to the payment to Rocky on a successful sale of the SPC Ardmona Property strictly on the basis of the attached draft Variation Agreement ... We are instructed to advise that after the Effective Date of settlement tomorrow Rocky will no longer be an employee of [the agency] and as such will not be covered by its relevant professional indemnity insurances. Therefore, it is simply not acceptable or tenable to [the agency] that Rocky after tomorrow, continue to negotiate or make representations for sale for and on behalf of [the agency] as its agent or otherwise. As such, and after settlement tomorrow, other than providing reasonable information or assistance directly to the

agency if be requested [sic], Rocky must cease all further communications or negotiations with the vendor or any potential purchaser/s of the SPC Ardmona Property or with CBRE in relation to the sale.

66 By 1 June 2016, SPC had entered into final negotiations with a preferred bidder, Thompson Group, and it appeared likely that the parties would sign a contract for the sale in a matter of days.

67 Significantly, on 1 June 2016, SPC instructed Rocky that the agency was not to take any further steps in relation to the SPC sale because it was in final negotiations with Thompson Group. It told him that SPC had instructed Rory Hilton – the conjunctural agent – to undertake any remaining work on the sale.

68 By that same day, SPC had also instructed the agency and CBRE to give the remaining three bidders other than Thompson Group the ‘silent treatment’.

69 Rocky did not get the variation agreement until 31 May, and he signed it the next day. Between receiving it and signing it, he was still dealing with the SPC matter, finalising his dealings with the agency, attending a staff farewell meeting that morning and going to the local magistrates’ court to get a statutory declaration which he handed over at the afternoon meeting on 1 June.

70 The variation agreement was signed on the afternoon of 1 June 2016 in those circumstances.

71 I find that the purpose of the variation agreement was to maximise the chances of the agency earning its commission on the sale and to provide for Rocky to be paid his commission – if the sale concluded within 60 days after Rocky left – provided that Rocky did not get involved in any further negotiations and the agency had what it needed to conclude the sale, and Rocky assisted the agency where necessary in enabling the deal to conclude.

Cease involvement - 1(c)

72 The agency claims Rocky did not comply with Clause 1(c):

after the Effective Date, Rocky ceases his involvement and dealings in all further negotiations with the vendor, the joint listing agent CBRE or any potential purchasers in relation [sic] the sale of the SPC Property

73 I am satisfied that after 1 June 2016, Rocky did cease his involvement and dealings in all further negotiations with the vendor (SPC), the joint listing agent and all the potential purchasers in relation to the sale of the SPC property.

74 The agency relies on various telephone records, SMS messages and emails it says established Rocky breached this clause.

75 It claims breaches occurred beginning on 1 June 2016 and continuing to 7 September 2016.

76 However, most of these communications the agency relies on are irrelevant, as they are outside the time covered by the prohibition in this clause.

77 The prohibition does not commence until 'after the Effective Date' of 1 June 2016 – that is, it commences on 2 June 2016. There is no prohibition in this subclause on Rocky's conduct before 2 June 2016. Nothing he did on 1 June is relevant.

78 I do not accept the agency's submission that the 'Effective Date' should be read as including 1 June 2016. The timing of what is to occur on and around 1 June is dealt with in different places in the clause. Some things were to happen by 2.30pm on 1 June, others by 4.00pm on 1 June, others *after* 1 June 2016. For whatever reason, the prohibition set out in 1(c) was agreed to start the day after Rocky left the agency.

79 Nothing turns on this in any event, as I am not satisfied anything he did that day amounted to a breach of the clause even if 1 June was included within the relevant time period.

80 Clause 1(c) does not set out a specific date at which the prohibition is to end, but the reference to 'negotiations' and 'potential purchasers' establishes that the prohibition was only relevant until SPC entered into a contract with one of the potential purchasers. After that day there were no further negotiations with potential

purchasers in the hope of leading to a contract: there was a contract. There were no more *potential* purchasers: there was an actual purchaser. In other words, from 10 June 2016 when SPC entered a contract with Thompson Group, subclause 1(c) no longer applied.

81 I reject the agency's submission that Rocky's obligations continued until settlement of the SPC contract.

82 This interpretation is consistent with the purpose of the variation agreement, which included endeavouring to have the sale concluded successfully within 60 days of Rocky leaving.

83 Rocky's obligation under this subclause is defined by reference to 'his involvement' and 'dealings' in further '*negotiations*' with SPC, CBRE and potential purchasers of the SPC property after 1 June 2016. Clause 1(c) does not prohibit Rocky from having *any* further contact with the relevant parties in relation to the sale of the SPC property after 1 June 2016. It only prohibits him from having involvement and dealing in further negotiations.

84 I agree with the submissions for Rocky that no reasonable commercial purpose of the agency would have been served by the imposition of a blanket ban on Rocky having any contact at all with persons employed by the named entities in relation to the sale of the SPC property, such as by Rocky merely enquiring of such a person on the progress of the sale, or answering a question from such a person about an aspect of the sale without getting involved in negotiations, or telling a potential purchaser that he cannot negotiate with him because he has left the agency. If the parties had sought to impose such a blanket ban, they could have done so in clear words.

85 The clause does not bar Rocky from receiving some continuing, incidental contact from relevant players in which aspects of the sale of the SPC property could be discussed.

86 The words 'involvement' and 'dealings' in negotiations should be interpreted narrowly, so as to be limited to prohibiting Rocky's substantive participation in negotiations for the sale, rather than broadly, so as to extend to even incidental or peripheral contact with the principal players negotiating the sale. This interpretation is consistent with the purpose of the variation agreement.

87 The reference to 'his involvement' in clause 1(c) indicates that the obligation is limited to requiring Rocky *himself* to refrain from engaging in the specified conduct. It does not impose any obligation on Rocky to take any step to prevent others from contacting him other than the requests he agrees to make before 4.00pm on 1 June under clause 1(f). The fact that SPC or a potential purchaser sent an email or text to Rocky after 1 June 2016 does not amount to any failure on the part of Rocky to comply with clause 1(c).

88 The communications the agency relies on between 2 June 2016 and 10 June 2016 do not establish that Rocky had involvement and dealings in further negotiations.

89 Rocky admitted that some of these communications were *regarding* the sale. That is not the same as being involved in and dealing in the further negotiations. There was no evidence he was involved in further negotiation.

90 Evidence was provided of telephone calls and text messages sent and received by Rocky after 1 June 2016 to or from representatives of SPC, Rory Hilton of CBRE, and the various potential purchasers.

91 Rocky gave evidence, and produced documents in support of his claim, that there was some other reason, apart from the sale of the SPC property, for which certain texts were sent or received, or telephone conversations occurred.

92 The communications relied on for the agency between 2 June and 10 June involved emails sent to Rocky by others including email chains into which he was copied in by others (to which he did not reply).

93 They included attempts by Jimmy Kalafatis – who had been in the mix as a potential purchaser but who was one of those that by 1 June 2016, SPC had said were to be given the ‘silent treatment’ by the agency – to contact Rocky. The evidence establishes that Rocky either did not respond, told Jimmy Kalafatis he could not respond, or gave evasive answers without responding. I detail the communications about Jimmy below, as they show Rocky complied with clause 1(c) in the face of Jimmy’s persistent attempts.

94 On 2 June 2016 Jimmy Kalafatis tried to call Rocky on his mobile a number of times. There was evidence of a brief telephone call by Rocky to Jimmy on 2 June 2016 at 8.20am. Rocky said he told him he could not call him further. Rocky then sent a text advising that he could no longer negotiate re the sale ‘due to contractual situation’ with the agency and told him Rory Hilton was the person to contact (or to have Kevin contact him) and gave him Rory’s mobile number. He also gave him Kevin’s mobile number in a subsequent text message.

95 On 6 June 2016 (9:51am) Jimmy tried to call Rocky on his mobile. Rocky sent a text back advising that he was ‘away. Talk soon’. On 6 June 2016 (11.19am) Jimmy tried to call Rocky on his mobile. He sent a follow up text asking Rocky to call him and advised he had some ‘info on ACM’. Rocky sent a text back advising that he should ‘send it to Rory. In the cinema. I can’t do anything. I wish I could’. Jimmy responded requesting he call and advised that Rory ‘won’t answer’. Rocky responded ‘Kevin’.

96 On 7 June 2016 (8:25am) Jimmy tried to call Rocky on his mobile. He sent a follow up text asking Rocky to send him details of the contact at SPC. He tried to call Rocky again at 8.47am. Rocky responded ‘I don’t have it with me. Kevin will have it’. Jimmy responded ‘Can you just give me any contact. No one will answer the phone. I don’t care who, just anyone in SPC or Coca Cola. Kevin and Rory are a joke. ...’. They exchanged more text messages throughout the day without Rocky giving any substantive response.

97 On 9 June 2016 (1.47pm) Jimmy again tried to call Rocky on his mobile. Rocky did not respond.

98 The evidence relied on by the agency of Rocky's texts or emails with others, also do not show any breach of this subclause.

99 On 2 June 2016, Rory sent a text message to Rocky asking: 'Who is the best person to organise a site inspection at Mooroopna?' Rocky responded 'Brett Enders. I will send you his number when I stop driving'. Brett Enders was an employee of SPC. Giving a piece of information to a fellow agent is not 'involvement and dealings' in negotiations.

100 Rory and Rocky exchanged further text messages, where Rocky asked if Lesley Hart and Andrew Galbraith were at the same firm, and Rory said 'yes, he is aware of the conflict and keeping it away from the office'. Again, this is not a breach of the subclause.

101 On 6 June 2016 (9.44 am) Rocky called Rory. There is no evidence that this relates to involvement in the negotiations.

102 There was an exchange of text messages between Rocky and Rory where the date is not clear. Rocky advised 'Shane text me to tell me that Jimmy tried calling him today. Has settlement been pushed back 45 days?' Rory responded 'I've been on email about Jimmy....'. This appears likely to have been after 10 June, given that it is dealing with settlement. In any event, it is not involvement in negotiations.

103 On 6 June and 10 June 2016, Rocky made calls to Gerard Alampi. Rocky admits these calls were *in relation* to the sale of the SPC property and other things – but there was no evidence it constituted involvement and dealings in negotiations with SPC.

104 On 7 June 2016, Rocky sent an email from his personal 'gagorocks' email address to Shane Bisset advising of the temporary email address and requesting that he disregard his old agency address.

105 The agency says in relation to these matters that 'Rocky has not proffered or established by reference to any document and alternative reason for the communication apart from being in relation to the negotiation or sale of the SPC property'.

106 However, I accept Rocky's evidence that he was not involved in the negotiations and dealings. There is nothing to contradict it. The agency did not call anyone at the receiving end of these calls to give evidence to the contrary of what Rocky said.

107 Rory's evidence supported that given by Rocky.

108 If I am wrong about my construction of the limitation on the dates the subclause relates to, having examined the other 'dealings' relied on by the agency, I note that I am satisfied on the balance of probabilities that in any event Rocky complied with the clause on the extended dates relied on.

Refer enquiries 1(e)

109 The agency says Rocky did not comply with Clause 1(e):

Rocky will refer any further enquiries, communications or documents he receives from any of the vendor, the joint listing agent CBRE or any potential purchasers in relation [sic] the sale or purchase of the SPC Property to Kevin of KHRE;

110 I am satisfied that Rocky did comply with the subclause. The requirement in this subclause must also be limited in time to the period before the sale was agreed (as with clause 1(c)). There is otherwise no point in referring to potential purchasers.

111 I agree with the submissions for Rocky that a literal interpretation of these words would be absurd because it would require Rocky to forward to Kevin even

communications to which Kevin was already copied, or that it was plain Kevin had already received.

112 It would also require Rocky to forward to Kevin every voicemail message, text message and missed call or SMS from a potential bidder, such as Jimmy, and potentially every brief and evasive response from Rocky in which he indicated he could not respond.

113 Such a broad interpretation of clause 1(e) would impose an unreasonable burden on Rocky for no commercially justifiable advantage to the agency.

114 Clause 1(e) should be construed as being limited to 'any further *material* enquiries, communications or documents' received by Rocky in relation to the sale of the SPC property in the context of the instructions given by SPC by 1 June not to deal further with potential purchasers, and for Rory to deal with SPC. This is the how a reasonable businessperson in the position of Rocky and the agency would interpret clause 1(e), in light of the surrounding circumstances set out above.

115 In determining whether an enquiry, communication or document is 'material', relevant factors are the nature of the enquiry, communication or document, and the availability of other avenues to Kevin to obtain access to the enquiry, communication or document. SPC had instructed that Rory do all further work on the sale and that Kevin should not respond to any enquiries from the other bidders.

116 In light of these considerations, none of the enquiries, communications or documents that Rocky received after 1 June 2016 in relation to the SPC sale were material, so as to warrant referral to Kevin, pursuant to clause 1(e) as properly construed.

Request others 1(f)

117 The agency says Rocky did not comply with clause 1(f), which requires:

Prior to 4PM on the Effective Date Rocky will request the vendor and Rory Hilton of the joint listing agent CBRE and the current potential purchasers of the SPC Property who have submitted offers to purchase the SPC Property to direct future enquiries, correspondence and communications in relation to the sale and purchase of the SPC Property to Kevin of KHRE;

118 I am satisfied that Rocky complied with this clause. By 4.00pm on 1 June 2016, Rocky told Rory Hilton he could no longer be involved in selling the property. He also told the vendor, and the only relevant potential purchaser at that stage, Thompson Group.

119 I accept Rocky's evidence. I also accept Rory's evidence about what he was told by Rocky. This is supported by the documentary evidence which shows that Rocky no longer sent emails and SMSs advancing the negotiation after 1 June. He was copied into a few SPC emails but I am satisfied this was a result of others sending things to him. Those others who sent him emails likely had their minds on other things to do with completing a multi-million dollar deal, and were not turning their minds to who was still copied in a group email chain.

120 No one was called by the agency to give evidence that contradicted Rocky's claim to have told these people.

Provide docs & info 1(h)

121 The agency says Rocky did not comply with Clause 1(h):

Prior to 2.30 pm on the Effective Date Rocky will provide Kevin Hicks of KHRE with all documents, notes, information, contact details and an up-to-date summary of the history of negotiations for the sale of the SPC Property to date.

122 I am satisfied that he complied.

123 The clause does not state *how* the documents, notes, information, contact details and summary are to be provided by Rocky to Kevin. It does not state, for example, that Rocky must provide hard copies of any documents, as opposed to electronic or soft copies. It also does not specify when, where or how the documents should be provided other than that they be provided by 2.30pm.

- 124 The reference in the clause to what was required to be provided must be considered in the light of the amount of time that Rocky was given to provide the necessary information, bearing in mind he only received the proposed variation agreement the day before and had other matters to attend to in preparing to leave.
- 125 The reference to the provision of 'information' does not mean it must be in written form. The obligation to provide a 'summary of the history of negotiations for the sale of the SPC property to date' is not stated to be in writing.
- 126 The reference in the clause to the obligation deadline being 'prior to 2.30pm' on 1 June 2016 (when the settlement meeting was scheduled for 2.30pm on that day) suggests that it was intended that the information be provided before the meeting rather than being physically handed over at the meeting.
- 127 The broad nature of the obligation counts against an interpretation (not specified in the express words of the clause) that Rocky print out, from the agency email server, and hand deliver to Kevin a copy of every document he had ever dealt with relating to the sale of the SPC property. This would have been a vast body of documents covering a period of at least nine months that would have been of no use to the agency. This is particularly so when he only was given a draft of the agreement the day before he signed it and left the agency.
- 128 The appropriate construction of clause 1(h) is that it imposed an obligation on Rocky to update Kevin with an overview of the current status of the sale of the SPC property (either written or oral) and to identify for Kevin the current important documents reflecting that status, and to ensure that electronic or hard copies of all other material documents were available to Kevin within the business records of the agency, in the event that he ever needed to search for them
- 129 This interpretation is supported by the existence of the obligation imposed on Rocky to answer relevant questions after he left in any event.

130 The material documents did not need to be physically handed to Kevin, provided that they were identified for him and left where he could easily find them. This interpretation meets the reasonable commercial needs of the agency without imposing an unnecessary burden on either Rocky or Kevin in having to deal with voluminous and irrelevant documents.

131 In the context of the instructions given by SPC on 1 June about only dealing with the preferred purchaser and Rory doing the negotiation, the agency did not need to be provided with detailed information or documents relating to the sale of the SPC property.

132 The practice of the agency was to keep only important documents in relation to sales of properties on its physical and electronic files.

133 The agency had ready access to the email accounts of its estate agents, including Rocky, which could be searched for any other documents relating to the sale of property, including the sale of the SPC property.

134 I find that Rocky was not required by this clause to hand physical copies of any documents to Kevin prior to (or at) the meeting at 2.30pm on 1 June 2016. The subclause required him to update Kevin with an overview of the current status of the sale of the SPC property, and to identify the current important documents, and to otherwise ensure that electronic or hard copies of the other material documents were available to Kevin within the agency's records.

135 Rocky complied with those obligations. There is no serious dispute that all of the documents relating to the sale of the SPC property were saved in Rocky's emails that were stored on the agency email server. This included the signed offer from Thompson Group dated 28 May 2016 and section 32 statement.

136 The agency has suggested that some emails were sent from Rocky's 'gagorocks' account and therefore not available on the agency server, but Rocky's uncontested

evidence was that he always responded to such emails by switching them back to his agency account, so that copies of the chain were always available to the agency.

137 The agency argues that:

Whilst the agency had access to the emails on its server, sent and received by Rocky from his the agency email address, the plaintiff did not provide the agency with copies of the email correspondence in relation to the SPC Property sale that he had sent and received from his personal email address- gaggorocks. Since December 2015 Rocky had had communications with CBRE, the vendors and potential purchasers via his private email address - gaggorocks@gmail.com

138 The agency has not identified any such emails that were not available to it. In fact, the agency itself discovered emails between Peter Thompson and Rocky on 1 June 2016.

139 Rocky provided the agency with the documents he had kept in his file on SPC at the agency. Fiona gave evidence that the file in relation to the sale of SPC was kept in the filing cabinet in Rocky's office. In that file the only documents found after Rocky left were the sale authority, the information memorandum and a blank copy of a s32 notice. There were no emails or handwritten notes or other documents.

140 The agency argues that the sale file with regard to the SPC Property 'would have been very large' as at 1 June. Rory Hilton of CBRE the conjunctional agent gave evidence that the file at CBRE was very large by 1 June 2016 and that he would have expected the file at the agency to also have been substantial. However, it was not Rocky's practice to keep files in that form nor is there evidence that the agency generally kept detailed hard copy files. I find that Rocky's SPC file was not substantial and he left with the agency what he had kept in hard copy.

141 He also provided (in the sense required by the clause) the agency with all his archived emails dealing with the SPC negotiation.

142 Rocky also emailed a spreadsheet to the agency's office manager, Terry Lanyon, at 12.16 pm on 1 June 2016. This spreadsheet was headed 'first round offers' and

included an unconditional offer of \$10 million from Thompson Holdings, (although curiously, the email header referred to '2nd round xlxs'). Although Kevin gave evidence he had not seen this, it was clearly provided to the agency before the required time of 2.30pm. I accept Rocky's evidence that he had Terry print it off so he could give it to Kevin at the 2.30pm meeting. To the extent the agency complains Rocky did not provide enough, this shows he provided the document he had created at that stage summarising first round offers.

143 Thompson Group had increased its offer to \$10,500,000 by 28 May 2016. Rocky gave evidence that he gave Kevin a copy of the contract of sale during the meeting on 1 June 2016 at 2:30pm, referring to Thompson Group's offer of \$10.5 million and 'next steps', and a photocopy of an email. His evidence about this was:

Did you collect anything else to take to the meeting with you with Mr Hicks?
--- I had the contract of sale and a table that Terry printed off for me.

When you say contract of sale --- ? --- Contract of sale and section 32 and my stat dec declarations.

And the table that Terry printed off? --- Correct, yes.

Why did you decide to take say those things and not other things with respect to the SPC sale? --- Because everything that was there was on the server, everything I dealt with was already on the Kevin Hicks Real Estate server.

What about any gaggorocks emails, were they accessible on the server?
--- No, but they were all involved in the chain so it would have come through. There was nothing in there that wouldn't have been on the Kevin Hicks server that I'm aware of.

144 The agency argues:

Rocky's evidence of what he gave at the meeting should not be accepted. In fact Rocky did not give a copy of the contract to Kevin during the meeting or at any time thereafter. Rocky gave evidence that the contract of sale was a very big document. Ms Mayoh gave evidence that the only documents placed on the bench and present at the meeting on 1 June 2016 were the cheques, her file, the settlement checklist and the statutory declaration and that there were no other documents. Ms Mayoh gave evidence that there was no large document (of about 5cm thickness) seen by her during the meeting. Kevin gave evidence that during the meeting there were no other documents on the table and that Rocky did not bring any other documents to the meeting to provide to him (apart from the statutory declaration). Kevin gave evidence that Rocky did not give him any other documents during the

meeting and that there was no large document (5cm thick) given to him at the meeting. Kevin also gave evidence that the contract of sale was not provided to him by Rocky at any time prior to Rocky's departure from the agency.

Kevin gave evidence that Rocky did not provide any documents in relation to the negotiations of the proposed sale.
[citations omitted]

145 The agency says that when he sent the email and spreadsheet to Terry, Rocky was aware that the information with regard to the \$10 million bid from Thompson Holdings was out of date because:

- Rocky had received a signed contract and s32 containing an offer price \$10.5 million from Peter Thompson on 28 May 2016; and
- The agency/Rocky had sent an email to Peter Thompson on 1 June 2016 10:18am confirming that the offer price was \$10.5 million.

146 The only contest on the evidence is whether or not Rocky handed a bundle of documents to Kevin at the meeting which occurred at 2.30pm on 1 June 2016 which Amanda Mayoh attended. If necessary, I prefer Rocky's evidence over that of Kevin or Amanda.

147 Amanda Mayoh was a lawyer who was at the meeting on 1 June to check that required matters were finalised. I am satisfied she was endeavouring to be truthful. However, she had not looked at notes of what took place at that meeting, which occurred nearly two years ago about which she gave evidence and her memory of precisely what happened that day was shaky. She overstated what she said she remembered initially. She appropriately made concessions later clarifying that she did not recall various matters.

148 I accept that Kevin was generally truthful. He did sometimes change his mind about evidence he gave. He accepted on occasion that he did not recall things clearly and made concessions against the interests of the agency's case.

149 However, where there is a contest in the evidence about what happened at the 1
June 2016 meeting, I accept Rocky's evidence. I am satisfied that his recollection
of that meeting is the most reliable.

150 The contemporaneous documents support Rocky's evidence that he took steps to
print the CBRE summary table (at the agency's premises) and the emails with Peter
Thompson (at his wife's law firm's premises) shortly prior to the 2.30pm meeting on
1 June 2016. Given that Rocky was preparing to meet with Kevin at 2.30pm that
day, and that both Kevin and Rocky agree that Rocky provided Kevin with an update
on the status of the sale of the SPC property at (or immediately before) that meeting,
it seems likely that Rocky would have provided the documents to Kevin at the
meeting. Given that Rocky's uncontested evidence is that he did not return to the
agency's premises after about midday on 1 June 2016, it is difficult to explain how
else the emails with Peter Thompson on 1 June 2016 could have ended up in the
possession of the agency unless they were handed to Kevin at the 2.30pm meeting.
Rocky remained adamant throughout his evidence that he provided documents to
Kevin at the 2.30pm meeting whereas Kevin ultimately conceded in cross-
examination that some documents could have been provided to him at that meeting
(having initially rejected that).

151 In any event, I do not need to determine the contest between witnesses on this
aspect in order to decide this issue. Rocky complied with his obligations under
clause 1(h) regardless. He provided Kevin with an oral, up to date summary of the
history of the negotiations for the sale of the SPC property to date. He also
'provided' (in that he made available to Kevin) all documents relating to the sale,
either by handing some hardcopy documents to Kevin at the meeting, or by leaving
some hardcopy documents in the agency's offices or by leaving the electronic
documents in his emails on the agency email server.

152 Kevin agreed that this was all done to his satisfaction by the conclusion of the
2.30pm meeting.

153 Rocky was never asked for further documents or information about the property after that meeting. No one looked in the agency for further documents after that meeting – until Rocky sued in this proceeding. Asked in giving his evidence about who was responsible for the deal after Rocky left, Kevin initially answered it was Terry, before recalling it was in fact himself.

154 Rocky has not breached clause 1(h) of the variation agreement.

NEW LISTINGS – COMMISSION CLAIMS

155 Rocky sues for commission for six properties which he says were new listings or new lettings he obtained. The agency says they were not 'new' for the purposes the relevant agreements.

156 To decide what amounts to a new listing or letting, it is necessary to construe clause 9 of the employment agreement of 30 June 2015.

157 The context in which that agreement was entered into includes the parties' earlier entry – on 25 May 2015 – into the settlement agreement, and their entry the same day – 30 June 2015 – into the share sale agreement.

Settlement agreement

158 Clause 13 of the settlement agreement states:

13. The Parties agree that:

(a) from today [25 May 2015] Gagliardi or Scott will be paid commission in respect of any new listings introduced by them to KPHRE or a new letting on the terms set out in the Schedule to these Terms;

(b) save as set out in clause 13(a), Gagliardi or Scott will not be entitled to any commission on listings or lettings listed with or managed by KPHRE as at the Completion Date;

...

159 The schedule states:

- 25% commission on listing a commercial, industrial, rural or residential property (excluding a subdivision lot)
- 25% commission on sale of a commercial, industrial, rural or residential property (excluding a subdivision lot)
- 20% commission on listing of a subdivision lot
- 20% commission on sale of a subdivision lot
- 20% commission on listing of any lease of commercial or industrial property
- 20% commission on the leasing of any lease of commercial or industrial property

...

Share sale agreement

160 Clause 4.2(a)(ii) of the share sale agreement refers to the date of the settlement terms. This is a reference to the settlement agreement, which was executed on 25 May 2015. It refers to Completion, which occurred on 30 June 2015.

161 Clause 4.2 states:

4.2 Commission payments

(a) From the date of the Settlement Terms until Completion

...

(ii) Gagliardi and Scott will be paid a commission in respect of any new listings introduced by them to the Company or a new letting in accordance with the following:

- (A) 25% commission on listing a commercial, industrial, rural or residential property (excluding a subdivision lot);
- (B) 25% commission on sale of a commercial, industrial, rural or residential property (excluding a subdivision lot);
- (C) 20% commission on listing of a subdivision lot;
- (D) 20% commission on sale of a subdivision lot;
- (E) 20% commission on the leasing of any lease of commercial or industrial property;

...

- (iii) Gagliardi will be paid a 20% commission on the existing listing of the subdivision estates detailed in Schedule 3.

162 Clause 5(c) of the share sale agreement had the effect that after 30 June 2015 (from 1 July 2015), Rocky 'will not be entitled to any commission on listings or lettings listed with or managed by' the agency except as set out under the employment agreement.

Employment agreement

163 Clause 9.1 of the employment agreement states:

9.1 Commission

- (a) In addition to the commission payable under clause 4.2(a)(iii) of the Share Sale Agreement, your Commission entitlements for new listings after 1 July 2015 shall be as follows:
 - (i) 25% of the commission to which we are entitled on listing a commercial, industrial, rural or residential property (excluding a subdivision lot);
 - (ii) 25% of the commission to which we are entitled on sale of a commercial, industrial, rural or residential property (excluding a subdivision lot);
 - (iii) 20% of the commission to which we are entitled on listing of a subdivision lot;
 - (iv) 20% of the commission to which we are entitled on sale of a subdivision lot; and
 - (v) 20% of the commission to which we are entitled on the leasing of any lease of commercial or industrial property.
 - (vi) 20% of the commission to which we are entitled on the sale of an existing listing of the subdivision estates as set out in the schedule.

164 The parties agreed that nothing turned on the minor difference in wording between 4.2(a)(ii) of the share sale agreement and 9.1(a)(i) to (v) of the employment agreement in relation to new listings. These differences included that clause 4.2(ii) refers to Rocky being paid a commission in respect of 'new listings *introduced by* [him] *or a new letting*', whereas clause 9.1(a) refers only to 'new listings'. Although

9.1(a) talks only of new listings – and not lettings – subclause (v) deals with the same 20% commission for ‘leasing of any lease’.

Meaning of new listing

165 What amounts to a ‘new’ listing or letting under the employment agreement?

166 I need to construe clause 9.1 in the light of the surrounding circumstances and purpose of the agreement.

167 The surrounding circumstances were that a property was regarded as listed with the agency when the vendor or lessor made the property available for sale or lease through the agency and the agency was taking steps to offer the property for sale or lease to members of the public.

168 The evidence was that there did not need to be a signed agreement with the vendor or lessor for a property to be listed with the agency.

169 Signed sales or lease authorities are required under the relevant regulations for the agency to be entitled to commission. However, the evidence was that sometimes the agency took the risk of trying to sell or lease the property without having a written authority entitling them to do so. It was clear from the evidence of Kevin, Terry and Rocky that once an exclusive sale authority had expired, a real estate agency was at risk of the vendor either not paying commission on a sale made by the agency, or taking the property to another agency to sell.

170 The agents were encouraged to try to obtain exclusive sale authorities or leasing authorities, as vendors could otherwise easily switch between real estate agencies where they were dissatisfied with the progress of the sale or lease of their property.

171 Kevin said that the procedure within the agency was that 95% of properties the agency was trying to sell had exclusive sale authorities. He said that after they had

expired the agency would keep trying to sell them until a vendor or another agent wrote and rescinded the offer, and put it in writing that they no longer want to sell.

172 By clause 14(c) of the settlement agreement, Rocky was restrained, on ceasing his employment by the agency, from:

approaching or accepting any approach from any person or entity that is a sales listing client of [the agency] at the date of the cessation of [his] employment for a particular property seeking to obtain the sale listing for that property from that person or entity unless and until the listing agreement with [the agency] has expired.

173 This clause thus allows for there being two categories of sales listing clients of the agency.

174 There are those who are sales listing clients under a listing agreement which has not expired – which must mean that there is a signed authority for the agency to seek to sell the property either exclusively for a certain period or non-exclusively for a further period.

175 And, importantly for the construction question at hand, there are also sales listing clients whose listing agreement has expired, whom Rocky is not restrained from approaching or accepting an approach from, after he has left the agency. In other words, people can continue to be sales listing clients when there is no current signed agency agreement.

176 The purpose of clause 9 was to give Rocky an incentive to seek to have vendors and lessors agree to *list* their properties with the agency. It was also to give him incentive to try to obtain the sale or lease of those properties. On many properties he earned both commissions.

177 The reference to a 'new' listing is ambiguous, as the question is raised: does *new* mean that no previous listing of that property with the agency has ever occurred, or that the listing is new since 25 May 2015 or 30 June 2015, as the property was not listed with the agency then?

178 The agency contends that Rocky was entitled to commission only where he obtained a completely new listing of a property that had *never* been listed - for sale or lease - or managed by the agency, at any time, including years earlier.

179 Rocky contends he was entitled to commission where he obtained a listing of a property for sale where it was not listed for sale as at 25 May 2015, even if it had previously been listed but the earlier listing had lapsed.

180 In my view, the employment agreement provides that from 1 July 2015, Rocky is entitled to commission at the rates set out only where a property was not listed for sale or lease by the agency as at 30 June 2015, and he obtains a listing of it after that date.

181 The commission structure set out in clause 9.1(a) to (v) is such that once the property is sold or leased and the agency is paid its commission, Rocky will get his percentage fee for listing it. If he is the agent responsible for selling or leasing, he will also get his percentage fee for selling or leasing it. So, for example, if he only lists the property (excluding a subdivision lot) he would get 25% of the agency's commission; where he both lists and sells that property he would be entitled to 50% of the commission.

182 It is noteworthy that under the employment agreement, he is not incentivised to try to lease or sell some properties.

183 He is not entitled to any commission for selling a previously listed property after 1 July 2015 even if he does all the work involved in obtaining the sale.

184 He is not entitled to any commission for listing a lease after 1 July 2015 – he is only entitled to commission for *leasing* if it is a new listing after 1 July 2015. This is in contrast to his entitlement under the settlement agreement, which has the effect that he can earn commission for a new *listing* of a lease of a commercial or industrial property introduced by him to the agency between 25 May 2015 and 30 June 2015.

185 When Rocky sold the share of the agency that he had owned through his corporate entity to Kevin, the settlement agreement set out his entitlement to commission from 25 May 2015, when he agreed to that sale, to 30 June 2015 when he signed the employment agreement. His entitlement is only in respect of new listings introduced by him in that period to the agency, or new lettings.

186 The settlement agreement specified under clause 13(b) that he was otherwise no longer entitled to commission for any listings or lettings listed with or managed with the agency as at 30 June 2015.

187 The share sale agreement also referred to Rocky's entitlements to commission from 25 May 2015 to 30 June 2015. It gave the same entitlements as the settlement agreement, except on two points:

- It did not allow for a commission to be earned on a new listing of a lease of a commercial or industrial property.
- It provided for commission to also be paid relating to existing listings of subdivision estates detailed in schedule 3 – at clause 4.2(a)(iii) (I will return to this clause in considering an issue regarding entitlement to Rocky's commission for selling four of those existing lots after 1 July 2015).

188 I find that the purpose of the sales commission structure generally, and of the commission structure for Rocky under the employment agreement was to motivate him – by giving him a share in the agency's commission – generally to seek to obtain new listings for properties which would earn the agency commission it would not otherwise be entitled to. And also to try to sell pre-existing listings of subdivision estates (which I will return to deal with below).

189 'New' is to be understood in that context. Unless the agency had a current listing it was not entitled to any commission. Under the terms of the employment agreement,

Rocky was to be rewarded for obtaining new listings of properties for sale or lease from 1 July 2015 – new in the sense that the agency did not as at 30 June 2015 have such a listing.

190 On that basis, I now turn to each of the properties which Rocky says he obtained new listings in relation to.

191 Rocky bears the onus of proof in relation to the commissions he claims.

123 Vaughan Street

192 Rocky claims 25% listing commission of \$4,875 because he obtained an auction authority over 123 Vaughan Street on 15 July 2015, and it sold on 22 July 2015.

193 He is not entitled to this commission, as he did not obtain a new listing from 1 July 2015 as required under the employment agreement.

194 The agency – together with CBRE as conjunctual agents – already had a current exclusive sale authority dated 23 March 2015 over this property when Rocky obtained the auction authority. The property sold within the 150 day period of the exclusive sale authority.

195 I accept Rocky's evidence that the sale process had stagnated, and that the receiver of the property had 'conveyed ... they were going to employ another agent'.

196 I also accept that he then obtained the action authority and sale.

197 However, I am satisfied given that the 23 March 2015 exclusive sale authority was still current that the property was listed with the agency as at 30 June 2015 and was not a new listing.

198 The auction authority gave entitlement to the same commission as the March 2015 authority, whether the property sold before auction or at it. It was just a different way of selling it which required a new authority.

7 McHarry Place

199 Rocky claims a 25% listing commission of \$3,490 for 7 McHarry Place. I am not satisfied he is entitled to it because he did not obtain a new listing.

200 The agency had obtained an exclusive sale authority on 26 August 2014. It was for a period of 90 days, and continued for 60 days, expiring in December 2014.

201 However, I am satisfied that the agency was continuing to list the property for sale including though May and June 2015. Rocky's evidence made it clear that the price sought 'just wasn't working'. He said that as at May or June 2015, the property:

'was pretty stagnant. The owner had a higher price on it than what we thought it would sell for and he was pretty adamant he wanted that price, it just wasn't working.'

202 He said that in July or August 2015 he:

[tried] to encourage [the owner] to drop the price and meet the market and he was resisting that, ... he told me he was potentially going to engage another agent.

203 Rocky encouraged the owner to try another marketing campaign and to think about an auction. On 7 August 2015, the owner entered into an exclusive auction authority with the agency. It was for an exclusive period of 60 days, and continuing for 60 days. Rocky then obtained a new marketing campaign and extra advertising, and the property then sold.

204 Rocky is not entitled to commission on this property.

67 Corio Street

205 Rocky claims a listing commission of \$2,727 over 67 Corio Street. I am satisfied that he is entitled to the commission claimed as he obtained a new listing.

206 On 24 March 2014, the owner had entered into an exclusive sale authority with the agency for a period of 90 days, and continuing for 60 days. It had expired on 21 August 2014.

207 It appears that after that the agency continued to try to sell the property, but without having a current signed authority. Rocky fielded some enquiries about it in late October and December 2014.

208 There was an email indicating an enquiry on 25 May 2015. The day after, on 26 May 2015, Rocky emailed the agency, stating ‘...67 Corio Street off the market’. Rocky gave uncontradicted evidence that in early May 2015 the owner took it off the market because she was going through a stressful time.

209 Rocky gave evidence that a week or two before 2 July 2015, the owner ‘called me back to put the property on the market and to go forward.’

210 On 2 July 2015, the owner signed an exclusive auction authority. It stated the auction would be on 24 October 2015 and the exclusive authority period was until 60 days after the auction date, and continuing for 30 days after that.

211 An exclusive sale authority was then signed on 1 September 2015. The property sold in October 2015 and was settled in December 2015.

212 The agency’s Mac Pro records, printed 12 April 2017, show Rocky as the listing and selling agent of the property.

213 I satisfied that this property was not listed for sale with the agency as at 25 May 2015. Rocky obtained a new listing which led to the exclusive sales agreement executed on 2 July 2015.

29 Waranga Drive

214 Rocky claims a 25% listing commission of \$1,000 over 29 Waranga Drive. I am satisfied he is entitled to it, as he obtained a new listing.

215 On 19 September 2012, the owners had entered into an exclusive sale authority with the agency. It was for a period of 60 days, and continuing for 30 days.

216 In examination, when asked 'was the property still on the market as at May 2015?'
Rocky responded 'Not that I was aware of, no.'

217 Rocky said that the owners of the property called him after 25 May 2015 to get the
property going again.

218 The property sold on 31 March 2016.

219 A property sale and information document completed by the agency in October
2016, records Rocky as the listing and selling agent of the property entitled to 25%
commission for each role. The agency's Mac Pro records, dated 31 October 2017,
also lists Rocky as the listing and selling agent.

220 Contrary to the agency's claims, there was no evidence that by May 2015 the
property remained an active sales listing.

221 I accept Rocky's uncontradicted evidence that after 25 May 2015 the owners
contacted Rocky to put the property back on the market. The 19 September 2012
exclusive sale authority had expired two and a half years earlier.

222 The fact that the property had previously been listed does not mean that the listing
which occurred in May 2015 was not a new listing.

223 No exclusive sale authority was in evidence but this was not an issue.

194 Hayes Street

224 Rocky claims a 25% listing commission and 25% sale commission (\$2,598.75) over
194 Hayes Street. I am satisfied he is entitled to it.

225 On 15 September 2014, the owners of the 194 Hayes Street signed an exclusive
sale authority with the agency. It was for a period of 60 days, and continuing for 60
days. It expired in January 2015.

226 There were no other authorities for this property in the agency's files.

227 On 14 April 2016 the property was sold.

228 The agency's Mac Pro records, printed on 26 May 2015, records Rocky as the listing and selling agent for the property.

229 An agency property sale and commission information document dated 25 May 2016 notes Rocky as the listing and selling agent for the property. Rocky's uncontested evidence was that he was involved in the listing and sale of this property to the best of his recollection. His evidence is supported by the Mac Pro records and sales commission sheets maintained by the agency, which each record Rocky as the lister and seller of the property. Terry Lanyon gave uncontested evidence that these records are reliable.

230 There was no evidence that the property was listed for sale by the agency as at 25 May 2015, nor that any other agent was involved in its listing or sale.

386-388 Wyndham Street

231 Rocky claims a 20% listing fee and 20% letting fee for 386-388 Wyndham Street (\$1,250). I am satisfied that he is entitled to these.

232 Rocky said he was involved with the listing and letting of it to the best of his recollection. He said he found a tenant for it.

233 He did not submit a commission application when he was at the agency. He added this claim to the statement of claim after seeing discovery provided by the agency shortly before the trial.

234 An invoice from the agency to the owner for commission for leasing that property indicates it was leased around April 2016. The agency received commission for leasing it.

235 There is no leasing authority for this property in evidence. There is no property sale and commission information document or Mac Pro entry for this property in evidence.

236 The agency did not produce any evidence as to any other agent being involved in listing and letting this property. It says the circumstances of the alleged letting of these premises are unknown to the agency, and cannot be verified as there is no file or documentation to be found.

237 I accept Rocky's evidence of his involvement in the circumstances. I am satisfied to the requisite standard that Rocky earned commission for listing and letting this property

238 His claim was \$1,250. However, he is entitled to 40% commission earned by the agency of \$2,500, being \$1,000.

EXISTING SUBDIVISION – COMMISSION CLAIMS

239 Rocky claims commission regarding four lots which he sold which both parties agree were not new listings, but were existing listings of subdivision estates. They are the lots at 7 Enterprise Drive, 509 Kialla Green Estate, 1090 Kialla Lakes and 154 Connolly Park Estate.

240 Rocky claims to be entitled to both a 20% listing commission pursuant to clause 9.1(a)(iii) of the employment agreement, and a 20% sale commission, pursuant to clause 9.1(a)(iv).

241 However, I agree with the agency's contention that it is clause 9.1(a)(vi) which relevantly applies, so Rocky is only entitled to a 20% total commission on the sale of the lots. This amounts to \$1,998.40.

242 The relevant subclauses are:

9.1 Commission

- (a) In addition to the commission payable under clause 4.2(a)(iii) of the Share Sale Agreement, your Commission entitlements for new listings after 1 July 2015 shall be as follows:

...

- (iii) 20% of the commission to which we are entitled on listing of a subdivision lot;

- (iv) 20% of the commission to which we are entitled on sale of a subdivision lot; and

...

- (vi) 20% of the commission to which we are entitled on the sale of an existing listing of the subdivision estates as set out in the schedule.

243 The schedule records the subdivision estates referred to in clause 9.1(a)(vi) as including the four lots in question.

244 Clause 9.1(vi) does not sit neatly with the introductory part of clause 9.1(a) as that part refers to commission entitlements for new listings, where 9.1(a)(vi) deals with entitlement to commission on the sale of *existing* listings of subdivision lots. However, both parties agree that the subclause is to be construed as setting up an entitlement to Rocky to have commission where he sells existing listings of subdivision lots, unlike the other subclauses of clause 9.1(a) which deal with entitlements to commission on new listings

245 Clauses 9.1(a)(iii) entitles him to commission where he lists a new subdivision lot after 1 July 2015, and 9.1(a)(iv) where he then sells it. This is consistent with his commission entitlement to new property listings generally in 9.1(a)(i) and (ii), but at the reduced rate of 20% rather than 25% for listing and sale.

246 Rocky says that the clause is ambiguous, but should be construed such that on selling an existing subdivision lot, he gets 20% listing commission under 9.1(a)(iv) and a 20% selling commission fee under 9.1(a)(vi). He argues in written submissions that this construction is to be preferred:

...because it is more consistent with the purpose of the commission structure, namely to motivate him to achieve sales of subdivision lots. Under Hicks RE's construction of clause 9, Mr Gagliardi would be entitled to a fee of 20% (and only 20%) of a lot of an existing subdivision estate was sold, irrespective of whether he did the work to sell the lot or not. This would be an odd structure for the parties to put in place because it would not provide Mr Gagliardi with any incentive to make sales of lots of an existing subdivision estate.

Mr Gagliardi submits that it is more sensible for clause 9.1(a)(vi) to be read as providing Mr Gagliardi with an entitlement to a 20% listing commission in respect of the specified existing subdivision estates on all sales of lots in those estates and also a further 20% selling commission on those lots if he was the seller. This would reflect the fact that Mr Gagliardi was responsible for the listing of the Connolly Park and other estates referred to in the schedule to the employment agreement.

The above construction is also consistent with the approach to calculating Mr Gagliardi's commissions that Hicks RE employed throughout Mr Gagliardi's employment with Hicks RE. This is demonstrated in the sales commission forms completed by Mr Lanyon, in which Mr Gagliardi is always recorded as being entitled to a 20% listing commission and also a further 20% selling commission where he is the seller of the lot. It is also demonstrated in Mr Gagliardi's rebate statements, where he is often paid a commission of 40% in respect of lots in the specified subdivision estates.

247 However, as noted above, the employment agreement does not allow Rocky any commission for selling or leasing a property (other than one of the listed subdivision estates) which was already listed by the agency as at 30 June 2015.

248 I do not accept therefore that allowing Rocky 20% – rather than a total of 40% – for achieving a sale of a subdivided property which was already listed is an 'odd structure for the parties to put in place', or that it is less consistent with the purpose of the commission structure than the construction the agency contends for. The fact is that the parties agreed on Rocky earning commission going forward from 1 July 2015 only in certain circumstances.

249 The settlement agreement of 25 May 2015 did not refer to existing listings of subdivision lots.

250 The share sale agreement relevantly specified that, from 25 May 2015 until 30 June 2015, Rocky would earn commission on:

- New listings introduced by him as set out in clause 4.2(a)(ii); and

- A 20% commission on the existing listing of the subdivision estates detailed in schedule 3 to that agreement.

251 The employment agreement replicates – in subclauses 9.1(a)(i) to (v) – the commission rates for the same new listings, sales and leaseings as are set out in the share sale agreement – in subclause 4.2(a)(ii). In 4.2(a)(iii) it provides:

Gagliardi will be paid a 20% commission on the existing listing of the subdivision estates detailed in Schedule 3.

252 I agree with the argument put for the agency that the better construction of clause 9.1(a) of the employment agreement is that it seeks to replicate the commission agreed in in clause 4.2(a)(ii) and (iii) of the share sale agreement but for the time period after 1 July 2015. I am strengthened in this construction by the fact that the two agreements were executed on the same day. And by the fact that clause 5(c) of the share sale agreement states that from 30 June 2015, Rocky 'will not be entitled to any commission on listings or lettings listed with or managed by' the agency other than as set out under the employment agreement.

253 Clause 9.1(a) starts with the words 'in addition to the commission payable under clause 4.2(a)(iii) of the share sale agreement', in setting out the commission payable from 1 July 2015. The commission payable under the share sale agreement only applies where Rocky effected sales from 25 May 2015 to 30 June 2015. I consider that clause 9.1(a) has the effect that in addition to Rocky earning commission of 20% where he effected a sale on an existing listing of a subdivision lot between those dates, he would also earn commission from 1 July 2015 on the basis set out in clause 9.1(a)(i) to (vi).

254 In relation to existing subdivision lots that amounted to 20% commission once the property was sold, regardless of who sold it.

255 The fact that sales commission forms completed by Terry recorded Rocky as being entitled to both the 20% listing commission and a 20% selling commission for such

lots, and that some rebate statements allowed him both commissions, is irrelevant. The employment agreement sets out his agreed entitlement.

COUNTERCLAIM

256 I turn now to the agency's counterclaim.

257 It includes damages claims arising from Rocky's dealings in relation to seven properties, with similar claims made for various of them regarding allegations of breach of fiduciary duty or contract. I first make findings as to those allegations generally, and then deal with relevant evidence given in relation to each property.

258 A claim that Rocky breached an obligation to avoid conflicts between his own interests and that of the agency was raised in the course of final oral submissions. I am not satisfied that Rocky did anything whilst at the agency to create such a conflict.

259 The counterclaim also includes claims for the cost of an iPad and iPhone.

DEALINGS RE PROPERTIES – DAMAGES CLAIMS

Fiduciary duty and contractual obligations

260 The agency says that whilst Rocky was employed by it, he breached his contractual obligations under clause 6 and 12 of the employment agreement, and his fiduciary duty. This is said to be because he did not obtain exclusive sale or leasing authorities signed by owners or lessors in relation to a number of properties.

261 I am not satisfied he had any such contractual obligation, nor any such fiduciary duty.

262 Clause 6 of the employment agreement provides, relevantly:

You agree to diligently and faithfully perform all the duties and responsibilities which we give you and to abide by any policies or procedures formulated by us.

263 I am not satisfied that it was a policy of the agency as mentioned in clause 6 that exclusive sale or leasing authorities 'must be obtained'. The agency argues that there was evidence that it was a policy and procedure of the agency that a sale authority be obtained at the commencement of negotiations for the sale of a property.

264 The employment agreement in clause 11 refers to policies and procedures being 'read' and to them forming part of Rocky's contract.

265 Clause 11 of the employment agreement states:

You are directed to read and comply with the obligations imposed upon you within KHRE's policies and procedures as they relate to your employment. These policies and procedures may be varied from time to time, and you are directed to comply with such variations. Such policies and procedures form part of your Contract.

266 In other words, relevant policies were in writing. There was no evidence of any written policy or procedure to the effect alleged. Rather it seems to have been something that was broadly discussed as being a good idea. Without having an agreement signed with the vendor or lessor, neither the agency nor the agent who sold or leased the property could be sure of getting commission. The agreement says that there may be disciplinary action where policies are not complied with. It does not mention that agents will be sued.

267 Clause 12 of the employment agreement provides, relevantly:

Performance and review

In the course of your employment with KHRE you are required to do the following:

- (a) carry out all lawful and reasonable instructions given to you in relation to your employment;
- (b) perform your duties and responsibilities in a proper, ethical, diligent, professional and efficient manner; including always acting in good faith and in the best interests of KHRE;

- (c) use your best endeavours to protect, enhance and promote the interests, welfare, profitability, growth and reputation of KHRE's business;
- (d) not engage in any business or activities which may conflict with or be harmful to the business interests of KHRE, or any of its officers, employees, agents, contractors or consultants;
- (e) perform your duties in a safe manner, respecting all work health and safety laws and policies (despite the fact that these do not form part of your Contract).

Except in the cases of absence by reason of ill health, incapacity, accident or approved leave, you shall devote the whole of your time, attention and abilities during the hours you are present at work and such other hours as are necessary for you to perform your duties to a satisfactory manner, exclusively to the business of KHRE.

Your work performance will be reviewed and discussed with you annually.

268 The agency argues that in clause 12, Rocky agreed to devote the whole of his time, attention and abilities during the hours he was present at work and such other hours as are necessary to perform his duties in a satisfactory manner, exclusively to the agency's business. It says that by failing to obtain a sale authority at the commencement of negotiations for sale, Rocky breached clause 12.

269 Alternatively, there is said to be a fiduciary duty. The agency argues that due to the importance to the agency of its obtaining an authority for the sale of the property so as to ensure that the owner sold through the agency and not another agency, and to ensure that the agency could lawfully receive the commission on the sale, Rocky had a fiduciary duty to obtain the sale authority at the commencement of negotiations with the vendor when the owner told him he wanted to sell a property.

270 The breach of contract, and of fiduciary duty, that is alleged is that Rocky did not *obtain* signed authorities regarding these properties.

271 The evidence established that sometimes vendors were not prepared to sign a new exclusive sale authority just because the old one had expired.

272 It also established that other agents, including Kevin, did not always chase up
vendors to get exclusive sale authorities in a timely fashion. Kevin and Terry gave
evidence of chasing agents up sometimes when this occurred.

273 I do not accept that Rocky had a contractual obligation, or a fiduciary duty, to obtain
signed authorities.

274 At most his obligation was to try to obtain them. Kevin himself gave evidence of not
being able to obtain exclusive agreements at times, and said that this was not a
breach of his duty.

275 It was not pleaded that he did not use his best endeavours to obtain signed
authorities.

276 In any event, I am satisfied from the evidence of Rocky that he did try to have the
vendors of the relevant properties sign exclusive sale authorities whilst he was
working with the agency. They did not want to.

277 I deal with the evidence about the relevant properties below.

278 The burden is on the agency to satisfy me that Rocky breached his contractual
obligations, or fiduciary duty, in this manner. I am not satisfied.

Confidential information claims

279 The agency also seeks damages arising from its allegations that Rocky breached
the employment agreement, alternatively the duties he owed to the agency, by using
information he obtained when he was at the agency, about some of the properties
he was involved in trying to sell or lease, in order to later conduct his competing real
estate agency. Peculiarly, it also claims a declaration (but no damages) for one of
the properties.

280 I am not satisfied that any of the alleged confidential information was in fact
confidential. I am further not satisfied on the evidence that the agency was deprived

itself of the opportunity to obtain relevant sales or leases as a result of Rocky knowing any of that information.

281 Confidential information is dealt with in both the employment agreement and the share sale agreement.

Employment agreement

282 Clause 20 provides:

You must take all reasonable care in using our property.

On request by KHRE or on termination of your employment, you must return to KHRE all property belonging to KHRE in your possession, custody or control, including but not limited to Confidential Information, Intellectual Property, mobile telephones, computers, keys, data storage devices, cards, documents, diaries, records and papers, reports, working papers, training manuals, equipment, computer information and programs and all copies of such items.

You may be required to declare that you have complied with this condition.

283 Clause 21 provides:

21.1 During the term of this Agreement, KHRE may transfer to you information which is proprietary or confidential. You agree that all such information received by you shall not be disclosed to any other person and shall be kept strictly confidential during the term of this Agreement and for a period of five (5) calendar years following its expiration or termination.

21.2 For the purpose of this agreement, "Confidential Information" means all information included but not limited to:

(a) our customers;

(b) the sales methods adopted by us;

(c) our financial information;

(d) our price lists;

(e) details of disputes with our customers;

(f) our trade secrets;

(g) other information designated as confidential by us, which you receive, become aware of, develop, create or generate in the course of or in incidental to the operation of this agreement.

21.3 The Employee agrees and warrants:

- (a) subject to clause 21.4 below, you will not, either during the operation of this agreement or at any time thereafter use or disclose to any person or entity any of the Confidential Information;
- (b) you will hold the Confidential Information in trust and confidence; and
- (c) you will use its best endeavours to prevent the unauthorised use or disclosure of any of the Confidential Information by third parties.

21.4 The obligations in clause 21.3 do not apply to any Confidential Information which:

- (a) is in the public domain other than due to a breach of an obligation of confidence under this agreement;

...

You must take all reasonable precautions to prevent any unauthorised disclosure of Confidential Information, including the following precautions:

- (a) you must at all times store all Confidential Information safely and securely;
- (b) you must immediately notify the Company in writing of any actual, threatened or suspected unauthorised disclosure of any Confidential Information; and
- (c) you must take all reasonable measures to minimise any unauthorised dissemination of any Confidential Information which is in any way related to or resulting an act or failure to act by you.

Share sale agreement

284 Clause 12 provides:

12.1 Obligations of confidentiality

Without in any way derogating from the terms of the [employment agreement] the Sellers, Gagliardi and Scott must:

- (a) not disclose any Confidential Information;
- (b) use the Confidential Information solely in relation to or in the best interests of the Business and the Company;
- (c) disclose the Confidential Information only to those of its employees, contractors and advisers, who have a need to know (and only to the extent each has a need to know) and who are aware and agree that the Confidential Information must be kept

confidential;

- (d) if requested by the Company, Hicks or the Buyer, require its directors, employees, agents or representatives (as applicable) to execute a Deed of Confidentiality in relation to the Confidential information; and
- (e) be responsible and liable for any breach of confidentiality by its directors, employees, agents or representatives (as applicable).

12.2 Exceptions

The obligations of confidentiality under clause 12.1 do not apply to any information that:

- (a) is generally available to the public (other than by reason of a breach of this Agreement); or
- (b) is required to be disclosed by any applicable law...

285 Confidential information is defined in the share sale agreement to mean:

all information whether oral, graphic, written or in any other form (**Information**) regarding the current or future business interests, methodology or affairs of the Company and the Business, including:

all business and financial information, sales and supply details, marketing strategies, customer and supplier listings, landlord and tenant details, business listings, personal information, or other Information concerning the Company, the Business, its customers or its employees and officers;

all drawings, plans, sketches, production processes and procedures, computer programs, specifications, manuals, notes, diagrams, flow charts, project plans, calculations, know how or any other information concerning the Business or its products; and

all other Information relating to the Company or the Business which, by its nature, places or potentially places the Company or the Business at an advantage over its present or future business competitors;

all Information that is by its nature confidential, or is designated by the Company as confidential, or which a person knows or ought reasonably to be expected to know is confidential; and

all other Information belonging or relating to the Company or the Business.

The information claimed to be confidential

286 It was not clear from the defence and counterclaim what confidential information was alleged to have been used by Rocky. The agreed claims summary clarified that the information alleged to be confidential included information of the following type:

- A particular vendor wanted to sell their property;
- A particular purchaser was interested in buying the property;
- Negotiations had taken place between a particular vendor and a person interested in buying a property;
- There was no current exclusive sale authority or written authority in favour of the agency over a particular property;
- The expiry date of an exclusive sale authority for a particular property.

287 In written submissions, the agency said that the confidential information also included 'information set out in clause 21.2 of the Employment Agreement.' This did not advance matters, as the only confidential information which the agency complained had been used by Rocky was set out in the claims summary as above.

288 The agency said the information had been obtained by Rocky during the course of his employment with the agency and was not information which was otherwise publicly known, or which Rocky would have ascertained but for performing his duties for the agency prior to 1 June 2016.

289 It said he was allowed to disclose it to the vendors and prospective purchasers of the relevant properties, but otherwise not to use or disclose it. It said it was clear to a reasonable person on reasonable grounds that he or she was not free to deal with the information as his or her own.

290 It said that as a competing real estate agent after 1 June 2016, Rocky has used the confidential information belonging to the agency, and by using it had disclosed that information in a manner other than in accordance with the conditional disclosure, and used that information as a springboard to gain an impermissible advantage.

Law – confidential information

291 In *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 at 334, Kirby J stated the following about considerations in determining if information is confidential:

Determining what is confidential involves a decision on a question of fact in each case where that quality is asserted. Considerations which courts have found to be relevant, in particular cases, in determining this question include:

- (a) The fact that skill and effort was expended to acquire the information ...
- (b) The fact that the information is jealously guarded by the employer, is not readily made available to employees and could not, without considerable effort and/or risk, be acquired by others ...
- (c) The fact that it was plainly made known to the employee that the material was regarded by the employer as confidential ...
- (d) The fact that the usages and practices of the industry support the assertion of confidentiality ... and
- (e) The fact that the employee in question has been permitted to share the information only by reason of his or her seniority or high responsibility within the employer's organisation ...

292 I am not satisfied any of the information claimed amounts to confidential information as set out in the employment agreement or share sale agreement.

293 There is nothing to show skill and effort in acquiring the information, nothing to show it was not made readily available to employees of the agency, or that it was made plainly known to the employees of the agency as being confidential, no evidence of usages and practices in the industry supporting the assertion of confidentiality, and nothing to show Rocky only knew all of these things because of his seniority or high responsibility at the agency.

294 So far as the existence of exclusive or management authorities is concerned, any competing agent approached at any time by a vendor could ask if they were subject to such an agreement.

295 The parties had agreed to particular restraints to affect Rocky under clause 14 of the settlement agreement. Assertion that information of the nature alleged is 'confidential' is a back door way of trying to get more extensive restraints than were agreed.

296 I turn now to deal with the facts relating to each of the properties the subject of the agency's counterclaim.

2-6 Apollo Drive

297 The agency seeks damages of \$26,730 related to this property. It claims that Rocky breached his employment agreement, and his fiduciary duty, by not requesting or obtaining an exclusive sale authority from the owner of 2-6 Apollo Drive prior to 1 June 2016, and that he misused confidential information to obtain his own exclusive sale authority from the owner after he left the agency.

298 The claims are not made out.

299 At the end of 2015, Tom Garrett engaged the agency and Rocky to find a new tenant for the property, which his company, Jammjack Pty Ltd, owned. The current tenancy was coming to an end, and the tenant did not want to renew it.

300 Rocky gave evidence that in March or April 2016, when the tenant left, he went to the property with Tom Garrett and his wife. They discussed damage to the floor and how to handle the damage, and the fact the previous tenant had caused it. Tom Garrett said he would be interested in selling, and Rocky told him that would be hard to do before the floor was fixed.

301 Rocky and Tom Garrett had four or five telephone calls between 5 May and 1 June 2016. Rocky did not remember what each of them was about, but recalled that he discussed negotiating with the previous tenant and trying to get some compensation for the damaged floor.

302 Barry Rutherford gave evidence that he had initially dealt with Rocky in connection with trying to buy a commercial property. He said that 'sometime in the first half of 2016' Rocky contacted him to see if he was interested in leasing the property. Barry Rutherford said he wanted to buy, not lease, and Rocky said he would ask the owner if he would be prepared to sell.

303 Rocky gave evidence that on 1 June 2016 'or around that mark', he spoke to Tom
Garrett, and mentioned that Barry Rutherford might be interested in looking at the
property. Tom Garrett told Rocky that he could take Barry Rutherford through it.
Cross-examined as to why he did not ask for an exclusive sale authority to be signed
at that time, Rocky said, "I didn't have time".

304 Rocky then rang Barry Rutherford and said he could not take him through the shed
that day (1 June 2016) but he could the next day. He met Barry Rutherford and his
wife the next day.

305 Negotiations then took place over the next weeks, including directly between Barry
Rutherford and Tom Garrett, and finally a sale price was agreed.

306 On 21 June 2016, the owner executed an exclusive sale authority, with Rocky's new
agency, Gagliardi Scott, appointing Rocky as agent.

307 The property was sold to Barry Rutherford and his wife on 10 August 2016.

308 Tom Garrett was not called to give evidence by the agency even though it
subpoenaed him and included him on its list of witnesses.

309 I am not satisfied that the owners would have signed an exclusive sale authority
had they been asked before 1 June 2016.

310 The agency also claims Rocky used confidential information to obtain the exclusive
sale authority after 1 June 2016. It says the confidential information was that the
owner wished to sell the property, Barry Rutherford was a potential purchaser and
he wished to buy the property, negotiations had taken place between the owner and
Barry Rutherford, and the owner had not signed an exclusive sale authority with the
agency.

311 None of this was confidential information.

John Taig building

312 On 9 June 2015, the owners of 8041-8043 Goulburn Valley Highway signed an exclusive sale authority with the agency. Rocky was the selling agent. This property – called the John Taig building during the trial – then sold for \$2,000,000, and the agency earned commission of \$44,000. It paid Rocky \$20,000 commission in October 2015.

313 The agency counterclaims for the \$20,000 commission it had paid Rocky, saying that it was paid under a mistake of fact.

314 As a result of the settlement agreement, Rocky was entitled to commission on new listings he made from 25 May 2015. The agency claims that it had thought, when it paid him, that Rocky had obtained a new listing when he obtained the exclusive sale authority for this property. But it had since discovered, it said, that it was not a new listing. Alternatively, it says he breached his contractual obligations or fiduciary duty in not obtaining the exclusive sale authority before 25 May 2015.

315 I am satisfied that Rocky did obtain a new listing, and that there was no breach of contractual obligations or fiduciary duty. This element of the counterclaim is not made out.

316 The John Taig building was owned by a company whose shareholders were five members of the Taig family. John Taig was the representative dealing with the sale of the property.

317 For a period of time leading up to October 2014, the agency was the managing agent for the property in relation to a tenancy. There was no evidence this continued after October 2014.

318 In April or early May 2015, Peter Copulos, on behalf of Citywest Corp Pty Ltd and the Copulos family, approached Rocky. He asked Rocky to approach John Taig about buying the property. Rocky gave evidence that he went and saw John Taig,

who was 'pretty staunch he doesn't want to sell it'. Later, however, John Taig spoke with his family and then told Rocky they would be willing to sell for \$2,000,000.

319 Rocky conveyed that to Peter Copulos and on 19 May 2015 Citywest Corp sent Rocky a letter of offer to buy the property for \$2,000,000. Rocky sent that letter on to John Taig later that day. John Taig said he needed to discuss it with his family, and negotiations continued, involving solicitors. This included a counteroffer dated 29 May 2015, which Rocky sent on to Peter Copulos on 1 June 2015.

320 On 9 June 2015, John Taig and the other owners of the property gave the agency an exclusive sale authority.

321 The agency says that the property was not a new listing for two reasons.

322 First, because the property had been leased through the agency previously, Rocky had not introduced a new property or vendor to the agency.

323 However, there is no evidence that the property was still listed for lease with the agency as at 25 May 2015. I am satisfied a new listing was obtained by Rocky when the exclusive sale authority was given on 9 June 2015.

324 Secondly, the agency claims that the owners had engaged Rocky to sell the property prior to 25 May 2015, and so the property was not a new listing as at 25 May 2015.

325 However, the agency has not established that Rocky had been engaged by them before 9 June 2015. The fact that the owners were involved in a negotiation before that does not mean they had decided or agreed to list the property for sale with the agency.

326 Rocky's analysis of his position at that time was, 'I was just basically being used by Peter Copulos to go and approach John Taig.'

327 John Taig – subpoenaed as a witness by the agency – gave evidence that he did not engage Rocky until 9 June 2015. His evidence confirmed the evidence given by Rocky. John Taig said that Rocky approached him on behalf of the Copulos family, and that Rocky wanted to know if John Taig and his family were interested in selling the property to the Copulos family. He said that he understood Rocky was acting on behalf of Peter Copulos in making those approaches. John Taig gave evidence that prior to 9 June 2015, he had not given any instructions to Rocky to put the property on the market, nor engaged the agency to do anything.

328 The agency next submits that Rocky was effectively acting for the vendor in seeking to negotiate a sale prior to 25 May 2015, and that he should have, and could have, obtained an exclusive sale authority by 25 May 2015. It says his failure to do so was a breach of his fiduciary duty or contractual obligation.

329 As discussed above, I am not satisfied any such fiduciary duty or contractual obligation exists.

330 The agency argued that on presentation of the \$2,000,000 offer by the owners on 19 May 2015, negotiations had been substantially completed, so a sale was likely, and Rocky should have requested that the owners sign an exclusive sale authority then.

331 John Taig did not give evidence that he would have given Rocky an exclusive sale authority prior to 25 May 2015. I am not satisfied that he (or any of the owners) would have given such an authority by 25 May 2015 if asked.

Connolly Park Estate

332 The agency counterclaims for approximately \$50,760 in relation to the sale of various lots at Connolly Park Estate by Gagliardi Scott.

333 Whilst he was at the agency Rocky earned commission on the sale of various lots in a property development called Connolly Park Estate.

334 The agency had been involved in trying to sell lots there since 2008. But there were no signed authorities in favour of the agency when Rocky left.

335 The agency claims Rocky breached his fiduciary duty to the agency, and obligations under the employment agreement, by failing to obtain an exclusive sale authority for Connolly Park while he was working at the agency. It also alleges he misused confidential information that the agency did not have an exclusive sale authority in order to later obtain a sale through Gagliardi Scott.

336 None of these claims are made out.

337 As discussed above, Rocky did not have any fiduciary duty or contractual obligation to obtain a signed authority on any property. And the information alleged to be confidential did not have the requisite confidentiality.

338 In any event, the evidence establishes that Rocky tried a number of times when he was at the agency to obtain an exclusive sale authority from the owners of Connolly Park and they were reluctant to sign one. I am not satisfied that they would have signed an exclusive sale authority in favour of the agency even if pressed further by Rocky.

339 Tim Sessions, one of the two owners, had signed an exclusive sale authority with the agency in 2008 appointing Rocky as selling agent for lots 1-235 of Connolly Park. It had expired in 2009 and he had not signed another. He gave evidence that he was not in favour of signing exclusive sale authorities and that he would have said no if Rocky had asked him to sign one shortly before Rocky left the agency.

340 Rocky gave evidence that it was 'very difficult' to get Jeff Smith, the other owner, to sign exclusive sale authorities.

341 With some effort, Rocky had managed to get an exclusive sale authority regarding lots 1-250 of Connolly Park signed in March 2015. He did this by emailing Jeff Smith's wife, Joanna, and asking her to get Jeff Smith and Tim Sessions to sign the

form. In the email Rocky said it was needed in case the agency was audited or checked by Consumer Affairs. The exclusive sale authority provided was backdated to 1 July 2009. It covered the period to 1 July 2012. Rocky does not remember why it was backdated.

342 Kevin gave evidence that he spoke to Tim Sessions after Rocky left to try to get an exclusive sale authority, and Tim told him that the owners wanted to 'go with' Rocky only. As it transpired, on 5 July 2016, four days after Rocky left the agency, they decided to let the agency be involved in selling some of the Connolly Park lots – just not exclusively. They signed a general sale authority with the agency in relation to lot 83 (part of stage 4 of the development), lot 125 (part of stage 5) and the entirety of stage 6.

343 Rocky was not able to get a signed sale authority of any nature in relation to Connolly Park when he went to Gagliardi Scott, although it seemed he was able to be involved in trying to sell lots. Rocky gave evidence that he obtained what he called a 'general sale authority' for Connolly Park and that he got an 'exclusive sale authority' for stage 7 of the Estate. But neither of these 'authorities' were written so they do not establish that the developers were willing to sign an exclusive sale authority. Instead, it appears they decided informally to let him sell lots at Connolly Park.

344 A claim – about which a great deal of evidence was given – relating to a sign the agency had put up at the Connolly Park Estate, was abandoned by the close of trial.

7969 Goulburn Valley Highway

345 The agency claims damages in the sum of approximately \$27,272 related to the sale of a property at 7969 Goulburn Valley Highway by Gagliardi Scott after Rocky left the agency. It says that Rocky breached his fiduciary duty and contractual obligation in not obtaining an exclusive sale authority in favour of the agency before he left. It also says he misused confidential information because he knew, after he

left, that the agency did not have a current authority, and because of that he was able to obtain an authority in favour of Gagliardi Scott.

346 The agency has not made out these claims.

347 The agency had obtained an exclusive sale authority on 28 September 2015, but it expired in January 2016.

348 Rocky gave evidence he continued to market the property for some months after the exclusive sale authority expired, until the owners took the property off the market. An agency file note of 10 May 2016 notes, 'RG advised to take this off the market and send out advertising account'.

349 The next day, an invoice was sent by the agency to the owners for marketing expenses incurred in trying to sell the property.

350 I do not accept the agency's submission that I should make something of the fact that there was no documentary evidence of the purported request of Neville Hanson, one of the owners, to take the property off the market, or that the request 'should have' been in writing.

351 I accept Rocky's uncontradicted evidence of Neville Hanson's request, which is supported by the contemporaneous file note of 10 May 2016 and the agency sending out its marketing invoice to the owners the next day.

352 Rocky gave evidence that after he had left the agency, on 16 June 2016, Neville Hanson rang him to engage him to sell the property. He said that he called Neville Hanson back on that day and said, 'I can't talk to you now but I will ring you back' and sometime later, rang back. He said that he recalled the call on 16 June 2016 because he was at his uncle's funeral when Neville Hanson rang him and left a message.

353 The agency says that Rocky's phone records show that it was in fact Rocky who phoned Neville Hanson on 16 June 2016. But those records only show outgoing calls, so are consistent with Rocky's evidence of a call first made to him, then one from him to Neville Hanson, on 16 June 2016.

354 On 2 September 2016, the owners gave Rocky an exclusive sale authority over the property on behalf of Gagliardi Scott, which later sold it.

355 The fact that the agency did not have a current exclusive sale authority was not confidential information.

356 The agency did not call Neville Hanson to give evidence (even though it had subpoenaed him and put his name on its witness list).

24 Mitchell Street

357 The agency claims damages of approximately \$3,375 and \$641.80 in unpaid advertising expenses in relation to 24 Mitchell Street. It alleges that Rocky failed to obtain an exclusive sale authority over the property for the benefit of the agency whilst he was working there, which caused it loss. It claims that his knowledge of the fact that the agency had no current exclusive sale authority was confidential information which he misused. It also says he breached the restraint clause in clause 14 of the settlement agreement. None of these claims are made out.

358 On 11 May 2016, the agency and Cardamone Real Estate entered into a conjunctional exclusive sale authority over the property. It had a 30 day exclusive period, with a continuing authority period of another 30 days. In other words, the agency's written authority to sell it expired on 10 July 2016.

359 Five days later on 15 July 2016, Rocky obtained an exclusive sale authority on behalf of Gagliardi Scott.

360 Rocky gave evidence that in July 2016, he was called by Lou Renato, the brother-in-law of the owner, Antonio Rossi, to discuss the future sale of the property. He said that he met Lou Renato and was shown a copy of the 11 May 2016 conjunctual exclusive sale authority. He said that Lou Renato '...wanted me to sell the property and I didn't – I couldn't remember exactly what the authority period was so I asked him to show me.' Rocky said that once he had reviewed the conjunctual exclusive sale authority, he determined, 'I was free to engage'.

361 As discussed above, I am not satisfied that Rocky had any contractual obligation or fiduciary duty to obtain exclusive sale authorities. In any event, given the conjunctual exclusive sale authority was still in force as at 1 June 2016, when Rocky left, it is hard to say why the owner would have signed a new authority at that time anyway.

362 The agency did not call the owner to give evidence that he would have signed a further exclusive sale authority with the agency before 1 June 2016, had he been asked to do so by Rocky. I am not satisfied, in any event, that the owner would have signed one if requested at that stage.

363 The agency says that Rocky must have known that the 11 May 2016 conjunctual exclusive sale authority existed, because he was working for the agency at that time, and he was involved with the property. It says that Rocky also knew when the conjunctual exclusive sale authority was due to expire and that these things were confidential information. As discussed above, I am not satisfied they amount to confidential information.

364 The restraint clause in subclause 14(c) of the settlement agreement provides:

14. For the purposes of this clause a Rent Roll Property shall be a property in respect of which KPHRE had a rental management agreement in the period of 6 months prior to the Completion Date. D&K, GRE, Scott and Gagliardi undertake and agree that on ceasing their employment by KPHRE they will not and are restrained on their own behalf or in any other capacity, including assisting any third party:

...

- (c) approaching or accepting any approach from any person or entity that is a sales listing client of KPHRE at the date of the cessation of their employment for a particular property seeking to obtain the sale listing for that property from that person or entity unless and until the listing agreement with the KPHRE has expired; ...

365 I am satisfied that the owner was a sales listing client of the agency as at 1 June 2015 when Rocky stopped working at the agency. However, the restraint applied only until the listing agreement expired. The listing agreement in question was the exclusive sale authority, which had expired by the time Rocky sought and obtained a listing of the property for Gagliardi Scott.

11 Edwards Street

366 The agency claims unquantified damages for breach of fiduciary duty and contractual obligation for failing to ensure the agency had a signed managing authority for the property at 11 Edwards Street before Rocky left, or for misusing confidential information to obtain a managing authority after he left.

367 The claims are not made out.

368 On 9 February 2016, Kevin Dainton, the owner of the property, talked to Rocky about potentially leasing the property out.

369 Between 1 February 2016 and 28 April 2016, various emails were sent between the owner and Rocky, as well as emails in which the owner copied Rocky with regard to leasing the property.

370 No managing authority had been signed, and the property had not been leased, when Rocky left the agency. Rocky did not request a managing authority before leaving the agency. He said that his understanding was that the owner 'had it with Youngs & Co as well. It wasn't practiced over time.' It is not clear what he meant. Perhaps it was that the property was being dealt with by another agency, Youngs & Co., as well as the agency.

371 Rocky said he was approached by the owner about the property not long after he left the agency. Rocky had emailed him about his new temporary email address two days after he left the agency, on 3 June 2016.

372 Rocky said that he could not recall whether the owner approached him via telephone or email. In cross-examination, Rocky said that he thought that the owner called him before he sent the 3 June 2016 email.

373 The agency says that there is no documentary evidence supporting Rocky's claim that the owner phoned him. However, the owner's phone records were not in evidence, and Rocky's phone records appear to only show his outgoing calls.

374 Rocky still did not obtain an authority to manage the property once he was working at Gagliardi Scott. The owner 'wanted me to lease it along with Youngs & Co and I think Kevin Hicks also still had it for lease, that was my understanding'.

375 The agency did not call the owner to give evidence.

376 The agency did not claim to have suffered any loss or damage by reason of Rocky's conduct, a matter raised with Counsel for the agency early in the trial. It is not clear why the allegations about this property were pursued.

234-236 Maude Street

377 From August 2016 Gagliardi Scott earned \$2,800 managing a rental property at 234-236 Maude Street, Shepparton. The agency claims that figure in damages, and injunctive and declaratory relief, on the basis that in order for Gagliardi Scott to earn these fees Rocky breached a restraint clause and that he breached fiduciary duty or contractual obligation and misused confidential information.

378 The claims are not made out.

379 On 5 January 2015, Angus Mason, the owner of the property, sent an email to Rocky in which he asked him to assist with an early renewal of the lease of the property.

380 In April 2015, emails were exchanged between the owner and Rocky in which the
owner said that he wanted Rocky to manage the property, with a view to selling it.

381 In May and June 2015, the owner and Rocky exchanged emails regarding
negotiations for the proposed lease.

382 Rocky gave evidence that while he was working at the agency, the owner asked
him to find a tenant for the property. He said that at that time, the property was not
being managed by the agency and had not been managed in the months before
that.

383 The agency did not have an exclusive leasing authority over the property at the time
Rocky left. Rocky said that the property was 'still empty' when he left the agency.

384 Rocky said that after he left the agency, he was contacted by the owner in June or
July 2016 'to see what I was up to'. He told the owner that he was no longer working
at the agency.

385 By August 2016, Gagliardi Scott was managing the leasing of the property and had
found a tenant for it.

386 On 22 May 2017, the owner signed an exclusive commercial / industrial leasing and
managing authority (managing authority) with Gagliardi Scott with Rocky as the
agent. Rocky gave evidence that the managing authority 'gives us permission to go
ahead and lease the property for them, and manage it if we find a tenant.'

387 In cross-examination, Rocky agreed that at the time the managing authority was
entered into by Gagliardi Scott, he knew that the agency did not have its own
authority because of his employment with the agency up until June 2016.

388 As discussed above, I am not satisfied that the alleged contractual obligation or duty
to obtain an exclusive authority existed.

389 The agency says the owner would have been willing to provide an exclusive leasing authority for the property to Rocky prior to 1 June 2016 (when Rocky left) had he been asked, as the owner was willing to enter into one with Gagliardi Scott in May 2017. But the fact the owner gave Gagliardi Scott an exclusive leasing authority nine months later, in May 2017, does not establish that the owner would have given such an authority to the agency prior to 1 June 2016.

390 The agency did not call the owner to say that he would have given such an authority prior to 1 June 2016.

391 The agency says that the fact that the agency did not have an exclusive leasing authority as at 1 June 2016 with the agency was confidential information belonging to the agency, which Rocky acquired during his employment, and then used.

392 As discussed above, this did not constitute confidential information.

393 The agency says that Rocky breached the restraint clause in clause 14 of the settlement agreement:

For the purposes of this clause a Rent Roll Property shall be a property in respect of which KPHRE had a rental management agreement in the period of 6 months prior to the Completion Date. D&K, GRE, Scott and Gagliardi undertake and agree that on ceasing their employment by KPHRE they will not and are restrained on their own behalf or in any other capacity, including assisting any third party:

(a) for a period of 3 years after ceasing their employment by KPHRE approaching or accepting an approach from any person or entity for the purpose of or having the effect of obtaining the transfer of the rental management agreement in respect of the Rent Roll Property;

...

394 The restraint clause only applies if the property was a 'Rent Roll Property' in the six months before 30 June 2015. 'Rent Roll Property' is defined in the settlement agreement as 'a property in respect of which the agency had a rental management agreement in the period of 6 months prior to the Completion Date'. 'Completion Date' is defined as 30 June 2015.

395 There is no evidence that the agency had a rental management agreement in the six months before 30 June 2015 for the property.

396 The agency say there was no requirement in clause 14 that the rental management agreement be in writing. However, clause 14(a) refers to the transfer of the rental management agreement, which is indicative of a written agreement.

397 There is no evidence that the agency was managing the property in the six months before 30 June 2015 in any event. Terry Lanyon gave evidence that the fact that the agency may have been seeking to lease out the property did not mean that the agency would have a rental management agreement in place for the property. Rather, if a rental management agreement was entered into, it would be after the property was leased.

398 There was no breach of the restraint clause.

IPAD REPLACEMENT

399 When Rocky left the agency, he did not hand back an iPad that the agency had given him to use over a year earlier. The agency says the failure to return the iPad was a breach of the employment agreement and the early termination agreement, and it sues him for \$744 as its replacement value.

400 The agency is not entitled to damages for the failure to return the iPad.

401 Rocky's uncontested evidence is that he did not return the iPad to the agency because he had lost it when he was still a director of the agency. He had not reported it then as he did not think he needed to, as a director of the agency.

402 No evidence was provided by the agency that Rocky had not genuinely lost the iPad, and it was conceded by Counsel for the agency that he had lost it. I was not asked by Counsel for the agency to find that iPad was not lost.

403 At the final meeting on 1 June 2016, Rocky handed over a statutory declaration he had sworn which stated that he was no longer in possession of the iPad as he had misplaced it in Lorne, Victoria.

404 Kevin agreed that he saw the statutory declaration at the final meeting and he 'sighted' it but did not read it. He did not know who provided instructions about the statutory declaration, but it was listed on the settlement checklist that was worked through at the meeting, so clearly someone was expecting the statutory declaration to be given at that meeting.

405 After he left the agency, no one at the agency raised the issue of the missing iPad with Rocky until the counterclaim was filed.

406 The agency claims that Rocky breached clause 20 of the employment agreement by not returning the iPad.

407 Clause 20 states:

You must take all reasonable care in using our property.

On request by KHRE or on termination of your employment, you must return to KHRE all property belonging to KHRE in your possession, custody or control... You may be required to declare that you have complied with this condition.

408 Clause 20 was not breached.

409 No evidence was led by the agency that Rocky did not take all reasonable care in using the iPad. He was not cross-examined to that effect.

410 By 1 June 2016, the iPad was no longer in Rocky's possession, custody or control.

411 The agency claims that Rocky breached clause 11(c) of the early termination agreement by not returning the iPad.

412 Clause 11(c) states:

11. On the Effective Date Gagliardi will deliver up to Hicks or Terry

Lanyon:

...

- (c) the computer/s, iPad/s and any other electronic accessories and equipment provided to him for his use by KHRE and all current password/s to enable access to these computer/s, device/s or equipment;

413 Clause 11 was not breached.

414 Clause 11 must be interpreted to give it commercial efficacy. It means Rocky must return devices he has in his possession, custody or control on 1 June 2016 – the effective date – consistent with clause 20 of the employment agreement. The iPad was not in Rocky's possession, custody or control as at 1 June 2016.

IPHONE RESET AND APPLE ID

415 Rocky used an iPhone provided by the agency while he was working for it. He gave it back on his final day, after he had reset the phone.

416 The agency has raised various claims about the phone in its counterclaim. None of them are made out.

417 Some confusion was apparent in the relevant pleadings, issues summaries and evidence about what happens when an iPhone is reset, or what information is associated with an Apple ID.

418 Clause 20 states, relevantly:

On request by KHRE or on termination of your employment, you must return to KHRE all property belonging to KHRE in your possession, custody or control, including, but not limited to Confidential Information, Intellectual property, mobile telephones, computers, keys, data storage devices, cards, documents, diaries, records and papers, reports, working papers, training manuals, equipment, computer information and programs and all copies of such items. You may be required to declare that you have complied with this condition.

419 The agency claims that Rocky breached clause 20 of the employment agreement by failing to return 'property in the form of confidential information, intellectual property' to the agency because the phone had been reset.

420 The agency also complained that Rocky breached clause 20 by failing to provide his Apple ID and password to enable the agency to access and retrieve its confidential information.

421 The parties agreed that the issues to be decided were:

- Was Rocky obliged to provide his agency Apple ID and password to the agency to enable the agency to access and retrieve its confidential information?
- Did Rocky use the Apple ID of the agency / Kevin for business purposes or did he use a personal Apple ID?
- Has the agency waived or otherwise lost any right to seek relief in respect of the non-provision of his Apple ID details?

422 There was no evidence that any confidential information or intellectual property of the agency was on the iPhone. There was limited evidence about confidential information and intellectual property in connection with technological devices used by Rocky. The only evidence was that, in cross-examination, Rocky was asked whether a computer he used for the agency had 'the plaintiff's confidential information on it. Or information – business information of the plaintiff's on it.' Rocky said he did not think that the computer had that information on it. He denied ever plugging his iPhone into that computer.

423 Rocky and Kevin both gave evidence that Rocky used an agency Apple ID whilst working at the agency. (Initially, Kevin said that he was not aware of which Apple ID Rocky was using on the iPhone but in cross-examination he said that Rocky was using an agency Apple ID. However the email address he gave was not an Apple ID so this evidence did not advance things:

rocky.gagliardi@kevinhicksrealestate.com.au. He said that he could not access the Apple ID because Rocky had changed the passwords.

424 It was common ground that there was no discussion about Rocky's Apple ID at the 1 June 2016 meeting.

425 Kevin said that he had never asked Rocky to provide it.

426 He said that the Apple ID was needed 'to check on process of Kevin Hicks Real Estate transactions'. He said that if Rocky was using the agency Apple ID on the iPhone, then 'that's what it should all be on'. Kevin said that he needed Rocky's Apple ID password as it:

would be good for seven years to have all of the company transaction that happened in case somebody else on one of the other properties wants to enquire about dealings that Rocky had on those properties. It would be helpful to use to have that information so that he's no longer employed with us, we can be transparent about what happened.'

427 He then gave Rocky's email address at the agency.

428 However, the agency still had access to all the emails sent to Rocky at the agency email address on the agency server. Kevin's evidence about this being related to an Apple ID may have arisen from a misunderstanding.

429 In any event, the agency consented to the phone being reset. Kevin conceded in cross-examination that he had agreed, at the meeting on 1 June 2016, to Rocky taking the phone away and resetting it. He said that after the phone was taken away, reset and returned to him on 1 June 2016, he never complained to Rocky about resetting the phone. Kevin said that he did not know of anyone else at the agency who had complained to Rocky about the resetting of the phone.

430 Amanda Mayoh, the agency's solicitor, agreed in cross-examination that the question of the iPhone had been resolved to Kevin's satisfaction on 1 June 2016 or a day or so later.

431 It may be that Kevin did not appreciate the significance of him agreeing to the phone
being reset, but agree he did.

432 I note that some evidence was given by Fiona about trying to retrieve SMS
messages off the phone after Rocky left.

433 Fiona said that she wanted to restore the phone because Rocky did a lot of
company business via SMS and restoring his phone was the only way to get his
communication via SMS with clients.

434 In cross-examination, Fiona agreed that she did not give accessing the SMS
messages much more thought until the information was needed to support the
counterclaim as to the SPC sale. She said that it was not the agency's practice to
make hard copies of all SMS messages that agents send on physical files. Kevin
also gave evidence during cross-examination that SMS messages are not kept on
a hard copy file.

435 In cross-examination, Fiona agreed that she had never requested that Rocky give
her those SMS messages for her records, other than for Court proceedings.

436 Rocky says the only work-related information on his iPhone that Kevin could not
access from its server was the SMS messages. It was not the agency's practice to
retain the SMS messages of its estate agents on its files.

437 The agency also claims that Rocky breached section 20 of the employment
agreement because he did not provide 'the password/security code to
unlock/access the telephone' and 'without the security code the phone is useless'.

438 However, clause 20 does not require the password or security code to be provided.
It is relevantly directed to the return of the physical phone. In any event, the agency
agreed to the phone being reset.

439 A further issue raised by the agency in its submissions, but not in the agreed issues, was an allegation that Rocky breached clause 11 of the early termination agreement, which states:

11. On the Effective Date Gagliardi will deliver up to Hicks or Terry Lanyon:

...

- (b) the mobile phone and password/s to unlock the mobile phone provided to him for his use by KHRE;
- (c) the computer/s, iPad/s and any other electronic accessories and equipment provided to him for his use by KHRE and all current password/s to enable access to these computer/s, device/s or equipment;

440 The agency says that under clause 11(b) and (c), Rocky was required to provide the agency with passwords to enable access to the information stored on the devices which he used during his employment by his departure on 1 June 2016.

441 It says these clauses required Rocky to provide his Apple ID password for the agency's Apple ID used by Rocky during his employment. It says that the provision of the Apple ID password would allow the agency to access and retrieve its confidential information stored on the devices.

442 However, Rocky was never asked to provide his Apple ID password and, in any event, the agency agreed to the phone being reset. Whatever may have been contemplated by the clause was overtaken by the agreement to reset the phone.

443 Rocky gave evidence that the effect of resetting the iPhone was that all of the data stored on it would be permanently deleted. That being the case, there would be no utility in Rocky providing his password or Apple ID to the agency after resetting the phone because the only possible use would be to restore Rocky's iPhone, which would undermine the purpose of him having requested and received permission to reset it. By agreeing to Rocky resetting his iPhone, the agency waived its right to seek relief in respect of either the resetting of the iPhone or the failure to provide the Apple ID.

444 Given that no request for further information was made after Rocky gave the agency the phone on 1 June 2016 when he left, I do not accept that the agency needed any information on it.

445 In any event, no damages have been established. The agency claims the value of an iPhone, which clearly would not be the measure of damages for not being able to access information on it.

Conclusion

446 I direct the parties to consider the orders that should be made as a result of these reasons, and provide to me consent orders by **4pm on 12 June 2018**. If the parties cannot agree on these, a hearing will be listed.

Certificate

I certify that these 77 pages are a true copy of the reasons for decision of her Honour Judge Marks, delivered on 29 May 2018 and revised on 1 June 2018.

Dated: 1 June 2018



Samantha Marinic
Associate to Her Honour Judge Marks

