*Tolios v Rigby* [2012] NTSC 38

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| PARTIES: | TOLIOS, Michael<br><br>v<br><br>RIGBY, Kerry |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 10 of 2012 (21019459) |
| DELIVERED: | 8 June 2012 |
| HEARING DATES: | 3 May 2012 |
| JUDGMENT OF: | MILDREN J |

**CATCHWORDS:**

CRIMINAL LAW – Evidence – Forgery - Inference of guilt – s 258 Criminal Code - Whether comparison with handwriting can be made in absence of expert evidence - Witness credibility

JUSTICES APPEAL – Criminal Law - Circumstances under which such finding can be reviewed on appeal - Finding by Magistrate - Forgery and uttering – Sales Commission Agreement – Whether Magistrate made errors of fact credibility

JUSTICES APPEAL – Further evidence – *Justices Act* s 176A - Whether admissible

*Agents Licensing Act*
*Criminal Code Act*
*Workplace Relations Act* 1996-2007 (Cth)

*Perpetual Executors and Trustees Association of Australia Ltd v Wright* (1917) 23 CLR 185; *Woods v Eaton* [2009] NTSC 49; followed

*CSR Ltd and Another v Della Maddalena* (2006) 224 ALR 1; *Fox v Percy* (2003) 214 CLR 118; *M v The Queen* (1994) 181 CLR 487; *Paterson v Paterson* (1953) 89 CLR 212; *R v O'Donoghue* (1988) 34 A Crim R 397; *Piper v Trenerry* unreported, 19 November 1997; *Seears v McNulty* (1987) 89 FLR 154; *Uranez (Aust) Pty Ltd v Hale* (1981) 54 ALJR 378; referred to

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M. Thangaraj SC |
| Respondent: | M. Nathan |

*Solicitors:*

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| Appellant: | Ward Keller Lawyers |
| Respondent: | Director of Public Prosecutions |

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| Judgment category classification: | A |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Tolios v Rigby* [2012] NTSC 38
No. JA 10 of 2010 (21019459)

BETWEEN:

**MICHAEL TOLIOS**
Appellant

AND:

**KERRY RIGBY**
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 8 June 2012)

[1] Following a trial in the Court of Summary Jurisdiction, the appellant was found guilty of one count of forging a Sales Commission Agreement dated 12 December 2007 (the alleged agreement) contrary to s 258 (d) of the Criminal Code (NT) and of one count of uttering the alleged agreement, contrary to s 260 of the Code. Following these findings of guilt, the learned Magistrate convicted the appellant and imposed an aggregate sentence of 12 months imprisonment, suspended after two months, with an operational period of 18 months. The appellant was also ordered to pay the respondent's costs fixed at $2,180.00.

[2] From these findings and orders, the appellant has appealed to this Court against his convictions and sentence.

**Findings of the learned Magistrate**

[3] In 2007, the appellant was employed as a trainee sales person by the complainant, David Ley, a licensed real estate agent who traded under the name of "The Professionals." During the currency of that employment, the appellant undertook the necessary studies to qualify as a licensed agent and became so qualified on 30 August 2007. It was the usual practice of Mr Ley to enter into a written workplace agreement at the commencement of an employee's employment. However in this case, no such agreement was produced, and the learned Magistrate was unable to say whether or not the practice had been adhered to.

[4] The learned Magistrate accepted the evidence of Mr Ley that the appellant's remuneration commenced at 40% of the commission the complainant earned on any sales in which the appellant was the selling and listing agent. This rate was increased to 45.85% after the appellant had received his interim agent's licence, plus the value of the complainant's superannuation contributions, which resulted in a total rate of 50%.

[5] In or about September 2007, the appellant wrote to Mr Ley seeking an increase in the rate of his commission from "46%" to 50% (presumably plus superannuation). The appellant contended that he would be concentrating on "large-scale developments", instead of "the residential side of real estate",

and that these sales "require(s) a huge amount of time, money and running around..." In particular, the appellant wanted to reach agreement before lunch time on the following Monday, when he expected to "bring up" some properties at 31-33 Woods Street. A handwritten note dated 3/9/07, which the learned Magistrate accepted was written by the complainant, reads "No. Already getting 50% super inc."

[6] The defendant's evidence was that the alleged agreement (a document (Ext. P13) dated 12 December 2007 signed by the appellant) was given to him by Mr Ley and apparently signed by him. According to its terms, it was agreed that the appellant would receive commission at the rate of 60% of the total commission payable on the sale of two properties, one of which was the property at 31-33 Woods Street, and the other at 15 Glendower Road, Holtze. The alleged agreement also purports to authorise a firm of solicitors acting for the vendors of those properties, Messrs Halfpennys, to pay the commission allegedly due to the appellant directly out of the proceeds of sales upon settlement. A copy of the alleged agreement was given by the appellant to his own solicitor, Mr Close, according to the learned Magistrate "to deal with," by which I take him to mean that the appellant intended that Mr Close would use the document to collect the commission on his behalf from Messrs Halfpennys.

[7] The learned Magistrate found that Mr Ley's signature on Ext. P13 was a forgery, and that it was the appellant who forged Mr Ley's signature. The reasons for this finding may be summarised as follows:

- Mr Ley gave evidence that he did not sign Ext. P1, and the signature was not his signature.

- The learned Magistrate found that Mr Ley was a truthful and compelling witness and the learned Magistrate accepted his evidence that he did not sign Ext. P13, and the signature was not his signature.

- The learned Magistrate rejected the appellant's evidence that the signature was the complainant's signature.

- The learned Magistrate compared the signature on P13 with other documents containing the complainant's signature and found that "it was obvious that the signature reporting (sic) to be that of Lay (sic) bears no resemblance to Lay's (sic) signatures on other documents tendered in the proceeding."

- The learned Magistrate drew an inference from certain other documents in evidence (Exts. P6 and P8) that were created in March 2008 by the appellant, that if the signature was not a forgery those documents would not have been written.

- The appellant was the only person in a position to forge Ext. P13.

- The appellant's evidence that as the appellant "progressed in the developments his commission entitlements rose to 60%" was rejected because nowhere in Exts. P6 and P8 did the appellant claim to be so entitled.

- The defendant was well aware at the time that he presented Ext. P13 to the events (sic) [witness] close (sic) [Close] that it was a forgery.

- No-one apart from the appellant had "The motivation or knowledge of the events involved to carry out the forgery."

**Grounds of appeal against conviction**

[8] Some of the grounds of appeal in the Amended Notice of Appeal are somewhat rambling, if not opaque, but may be summarised as follows:

1. The findings of guilt were unsafe and unreasonable as the evidence was incapable of excluding rational inferences consistent with innocence.

2. The learned Magistrate erred in failing to consider whether there was a reasonable hypothesis consistent with innocence bearing in mind that the case was circumstantial.

3. The learned Magistrate made a number of erroneous factual findings particularised in the appellant's outline of written submissions.

**Further Evidence**

[9] The appellant has sought to tender further evidence in this Court, which was not tendered at the hearing in the Court of Summary Jurisdiction. The evidence is a letter addressed to Halfpennys dated 19 May 2009 signed by the appellant. It refers to the commission to be paid in respect of the property at 15 Glendowner Road, Pinelands, and in particular, the letter asserts a division of the commission between the appellant and his former employer to be 60:40 in favour of the appellant. The letter further states:

> "Should you have any queries with respect to the percentage division of commission between Mr Tolios and his former employer, *The Professionals*, please do not hesitate to contact Mr David Ley of that agency on 89489300."

[10] The appellant's explanation for seeking to now rely on this letter is simply that prior to, and at the time of hearing, he did not recall it, and that it was not until after his conviction that he searched through his files, which he had previously stored, when he located a copy of this letter.

[11] As counsel for the respondent did not consent to the letter being received in evidence, the Court could only receive it if the criteria in s 176A of the *Justices Act* were met. Of these criteria, the factors referred to in s 176A (a) and (c) have been clearly met. The other factor which must be considered is

whether there is a reasonable explanation for the failure to adduce it (s 176A (b)). There are decisions of single judges of this Court to the effect that the Court should be liberal in its interpretation of what amounts to a reasonable explanation under s 176A (b), the principle consideration being fairness to accused persons: see *Woods v* Eaton.[1] However liberal one might be inclined to be in the case of an unrepresented litigant, where an appellant is legally represented the Court will normally expect those advising him to require their client to make a thorough search of all relevant documents which may be relevant to an accused's defence. In this case, it is a reasonable inference that the appellant did not make a search of his files before the trial because, had he done so, it is very likely that this letter would have been discovered. In my opinion, the appellant has not shown that he exercised reasonable diligence in preparing his case for trial, and I am therefore not satisfied that his explanation is a reasonable one.

**The nature of the appeal**

[12] The nature of an appeal to this Court, where fresh evidence is not received, was discussed by O'Leary CJ in *Seears v McNulty*[2], where a distinction was drawn between cases where fresh evidence is received, and where it is not. In the latter case, his Honour observed that the Court "is exercising truly appellate jurisdiction, and accordingly will only interfere in accordance with well-recognised principles according to which an appellate court acts on an

[1] [2009] NTSC 49 at [25]; [41], per Reeves J.
[2] (1987) 89 FLR 154.

appeal by way of rehearing from a lower court."[3] S 163(1) of the *Justices Act* requires the appellant to satisfy the Court that there has been "an error or mistake", whether of fact, or of law, or both. Although on appeal against findings of fact by a magistrate, an appeal court has the same right to decide issues of fact as the learned Magistrate, in exercising this function the appeal court must recognise the essential advantage which the magistrate had in seeing and hearing the witness. Whether the appeal is an appeal in the strict sense or a rehearing conducted solely on written material, this Court is bound to approach this matter in accordance with the principle that, generally speaking, it would not be justified in taking a different view of the credibility of a witness from that taken by the learned Magistrate. Nevertheless, this Court can interfere if it is persuaded that the decision of the learned Magistrate was wrong on grounds that did not depend merely on credibility. In *Uranerz (Aust) Pty Ltd v Hale*[4], Gibbs J said that such grounds might for example exist, if "the evidence which was accepted was inconsistent with established facts, or was so improbable that no reasonable person could accept it, or that the judgment of the Tribunal disclosed that its conclusion was affected by some error of law or fact." Other examples which could be given are discussed by Dixon CJ and Fullager J in *Paterson v Paterson*[5] and include whether the learned Magistrate failed to take something into account which should have been taken into account, or where the Magistrate's reasons are unsatisfactory, or because it unmistakably

[3] at p 160.
[4] (1981) 54 ALJR 378 at 381 (with whom Stephen Mason and Wilson JJ agreed).
[5] (1953) 89 CLR 212 at 219-224.

appears from the evidence that an error has been made, such that the appeal court may be satisfied that the Magistrate has not taken proper advantage of having heard and seen the witness; or because the decision was vitiated by the wrongful admission of evidence. In more recent times, the role of appellate courts on appeal from a Judge sitting without a jury was discussed by the High Court in *Fox v Percy*[6], but I do not understand that case to raise anything that is new, except to emphasise that first, when it comes to the drawing of inferences from facts which are undisputed, or if disputed, are established by the findings of the trial judge, the appellate court will give respect and weight to the conclusions of the trial judge, but once having reached its own conclusion will not shrink to give effect to it (at p127); secondly that incontrovertible facts or uncontested testimony may demonstrate that the trial judge's conclusions are erroneous, even if they appear to be, or are stated to be, based on credibility findings (at p128); thirdly, that even if the facts are not incontrovertible, the court may interfere if the decision appealed from is "glaringly improbable" or "contrary to compelling inferences" (at p128); and finally to warn appellate courts against the "ritual incantation about witness credibility" (at p128); see also *CSR Ltd and Another v Della Maddalena*.[7] Although the principles discussed in these authorities are dealing with civil cases, these apply generally to all cases tried by a Judge sitting without a jury. Mr Nathan

[6] (2003) 214 CLR 118.
[7] (2006) 224 ALR 1 at 9; [23].

referred me to the well-known decision of *M v The Queen*[8] but that decision applies only to appeals from jury verdicts. The distinction between appeals from jury verdicts and from a Judge sitting along is referred to in *Fox v Percy*.[9] Mr Nathan also referred me to the decision of *Piper v Trenerry*[10] where his Honour adopted with approval a passage from the decision of Hunt J in *R v O'Donoghue*[11] to the effect that "it is only where the very narrow basis upon which this Court can intervene in relation to a trial judge's findings of fact has been established that the conviction can be set aside", but those remarks related to findings of fact from a voire dire conducted in a jury trial where the statutory right of appeal was not by way of rehearing. That is not the case here.

**The evidence**

[13] Mr Ley was the director of Medjat Pty Ltd, trading as The Professionals Agency, in Darwin. He is a licensed real estate agent and the owner of that business. The agency employed licensed agent's representatives, generally on a commission basis. The agency charges a commission to the vendors of properties which it sells, generally at a rate of 3%. This commission is split between the agency and the representatives, on the basis that a percentage would be paid to the agent who listed the property, another percentage would be paid to the agent who sold the property, and the rest would go to the agency. Commissions payable by the vendor came out of the proceeds

[8] (1994) 181 CLR 487.
[9] at 126; para [24].
[10] Unreported, 19 November 1997.
[11] (1988) 34 A Crim R 397 at 401.

of sale and were payable to the agency's trust account. Under the provisions of the *Agents Licensing Act*, a licensed agent is required to maintain a trust account (s 50). All monies received by the agent in the course of the agent's business, and all monies received as a stakeholder, must be paid into the agent's trust account (s 49). The agent must also keep proper accounting records of all monies, other than trust monies, received by the agent in the course of the agent's business (s 57). Commission cannot be shared except with another licensed agent or an employee agent's representative (s 112).

[14] Mr Ley's evidence was that when commissions were paid to the agency, they were paid into the trust account. The agent's representative would then receive what was due to him after deducting tax, superannuation and other expenses such as advertising costs and debt repayments.

[15] On 11 April 2007 the appellant commenced employment as a trainee real estate agent. According to Mr Ley, there was a written contract of employment. The appellant denied this. No employment contract was produced at the trial. Mr Ley gave evidence that the appellant's personel file went missing from his office. The learned Magistrate was unable to find whether such a contract was signed in this case, although he was satisfied that this was the usual practice. Mr Ley was able to provide to the police copies of some emails and documents and these were tendered in evidence over the objection of the appellant's counsel. It is not now contended that the learned Magistrate erred in receiving these photocopies into evidence. Mr Ley was unable to say when the personel file went missing. The other

copies of documents were apparently kept in another file or files, and no original documents were kept. Mr Ley was cross-examined about the employment contract and why no reference was made to it in the ensuing exhibits tendered, on which notations were made concerning the contractual arrangements between the appellant and Mr Ley. In the circumstances I would not have necessarily expected these notations to contain such a reference if there had been a written contract.

[16] Counsel for the appellant submitted that these documents must have been kept in the appellant's personal file. No cross-examination was directed to that contention. Further it was submitted that if there had been a written employment agreement, Mr Ley was required to lodge a copy of it with the Employment Advocate, pursuant to s 342 of the *Workplace Relations Act* 1996-2007 (Cth). I accept that this is so, but no cross-examination was directed to that issue either. Whether or not any agreement was so lodged cannot be ascertained. As that matter was not explored, I am unable to draw any inferences from a failure to produce a copy of the agreement from this source. This may have been because, for example, this source was overlooked by both counsel conducting the trial.

[17] I am not satisfied that the learned Magistrate erred in being unable to find one way or the other whether there was a written contract of employment.

[18] Mr Ley's evidence was that when the appellant commenced his employment as a trainee, he was paid a wage until he was able to earn a commission.

The rate of the commission was a maximum of 40% of the commission earned by the agency. The 40% was divided 70% for listing the property, and 30% for selling it. The appellant gave evidence that the commission rate was not 40% but he accepted that when he obtained his "interim" licence it was 45.85% plus superannuation, making a total of 50% "as a residential agent." By this, I take him to mean that this was the agreed commission for the sale of residential properties. He contended, however that "as he progressed with development the agreed rate was deferred to 60%." I presume he meant that this was the agreed rate for the sale of commercial properties. The learned Magistrate accepted the evidence of Mr Ley as to the agreed rates of commission.

[19] Evidence was given by the training manager for the Real Estate Institute of the Northern Territory, Mr McLaughlin, that in 2007 the appellant was enrolled in a certificate course. The evidence strongly suggests that this was to enable the appellant to become registered as an agent's representative. According to Mr McLaughlin, the course which the appellant did was an "interim course" enabling him to obtain "interim registration." In fact, the *Agent's Licensing Act* makes no provision for "interim" registration although it does have provision in s 41A for restricted registration of an agent's representative. Mr Ley's evidence, which was not contradicted, is that the appellant became 'licensed' (I presume he means 'registered') as an agent's representative on 31 August 2007. It is not entirely clear it this was only restricted registration or whether it was full registration, but the

appellant accepted that this was "interim" registration, and I think that the evidence supports the conclusion that it was probably restricted registration. No certificates of registration were tendered in evidence.

[20] In any event, prior to this date, the appellant had introduced to The Professionals two vendors, Stratos Melas, the owner of Lot 31 Woods Street Darwin, and Maria Giannikouris and Nestoras Pastrikos, the owners of an adjoining property, 33 Woods Street. Both vendor parties entered into a Sale and Exclusive Selling Agency Agreement which was signed by them and by Mr Ley on behalf of The Professionals. The appellant also signed those agreements. Mr Ley explained that it was his practice to have the agent who introduced a vendor to also sign the agency agreement to indicate which agent had introduced the vendor. Mr Ley's evidence was that when the appellant obtained his registration on 31 August 2007, the appellant's rate of commission increased to 45.85%, plus superannuation, making a total of 50%. No evidence was given by either Mr Ley or by the appellant as to any meeting at which the parties reached any such agreement, and whether it referred only to residential properties or included commercial properties.

[21] Evidence was led of a typed letter which the appellant sent to Mr Ley requesting an increase in the commission rate to 50%. That letter states:

> "There are some issues I would like to sit down and discuss with you now that I have been granted my license. Firstly I would like to be provided with a document that specifies exactly how much I owe you and what for. Secondly, I would like to know exactly how much commission I was entitled to for the listings that Kim and Steve have

sold for me, and be provided with a document to show how much each property sold for.

Thirdly, I would like to bring up the issue of my future commission. I am currently sitting on 40% as are all the other agents. Until now Darwin Professionals has mainly concentrated on the residential side of real estate. I however will be concentrating on large-scale developments which will introduce your business to the developing side of things (as well as residential) where you and I both know there is an enormous amount of money to be made. I plan on giving Darwin Professionals a reputation for dealing with the big projects which will see us become very successful. Securing these big deals however requires a huge amount of time, money and running around as you are well aware of. It would be satisfying to know that at the end of the road there would be a fair 50/50 cut between us. I feel as though you are confident that from here onwards I will start earning some big dollars for the business and an even split of the commission would only seem fair. I understand that this type of issue can cause problems between staff members so I trust that whatever is discussed and agreed upon between us will remain strictly confidential. Most importantly, I need to bring up the properties of 31 and 33 Woods Street as we are now looking at going to contract sometime next week. I would like to receive an even 50% of the commission from that property onwards. I have already told you how I feel about the situation with Don. I don't think he should be entitled to any commission as he had nothing to do with the listing whatsoever and I had already approached Even Lyn 3 weeks ago and he was fully aware of the properties being on the market. If Don feels as though he is entitled to any commission, I think it's a matter for you to sort it out with him and I have no problem sitting down and discussing this between the three of us first thing Monday morning. I am fully aware of how much you have done for me and the support you have given me in getting my license, this is nothing personal David, strictly business. I am here to make money for both you and I. I would like to have this all sorted out by lunch time Monday so we can get on with the contract for 31 and 33 Woods Street."

[22] There is notation written on the bottom of this letter by Mr Ley:

" 3/9/07. No. Already getting 50% super inc."

[23] According to Mr Ley, there was a meeting between him and the appellant on 3 September 2007, and he rejected the appellant's request to increase his

commission because the rate of commission of 45.85% plus superannuation resulted in 50% which the appellant was already receiving, and he was not prepared to increase it further. I note that the 3rd of September 2007 was in fact a Monday, and 31 August 2007 was the previous Friday. The text of the letter shows that it must have been written on or after 31 August 2007, and because there is a suggestion in the letter that they meet "first thing Monday morning", that there was in fact a meeting on Monday 3 September 2007. Initially the appellant denied that this letter, and the meeting he had with Mr Ley, occurred on 3 September, and he claimed that these events occurred at an earlier date, but he ultimately reluctantly accepted this. The other points to note are that at this stage the appellant was asserting that contracts were about to be exchanged on the sale of 31 and 33 Woods Street, that he wanted "an even 50% commission" from that point onwards, and that he objected to "Don" sharing any commission because he had already approached "Even Lyn (sic) 3 weeks ago."

[24] The appellant gave evidence that he introduced the properties at 31 and 33 Woods Street to Even Lynne, but because Mr Lynne did not know him, he "contacted Don Parmenter who claimed that as his sale." The appellant maintained that Mr Parmenter, who was another agent employed by The Professionals, had no right to a proportion of the commission because the appellant had introduced the buyer to the contract of sale. According to Mr Parmenter, whilst employed for The Professionals he introduced the purchaser, which entitled him to receive 30% of the representative's

commission, and the appellant 70%. Mr Ley's evidence was to the same effect. In fact contracts were exchanged in relation to both properties on 20 June 2008, the purchaser in each case being Gwelo Investments Pty Ltd as trustee for the Even Lynne Family Trust.

[25] By an agreement dated 26 November 2007, the vendor of Lot 5061 Glendower Road, Holtze, granted a sole agency to The Professionals. It is not in dispute that the appellant was responsible for introducing the vendor, and unlike the case concerning the sale of 31 and 33 Woods Street, the appellant signed the agency agreement and not Mr Ley. It is not in contention that the appellant also introduced a buyer for this property. Settlement of both this property and the properties at 31 and 33 Woods Street were long delayed and had not finalised by early October 2009.

[26] The letter relating to the meeting on 3 September 2007 refers to the appellant concentrating on "large-scale developments" and that "these big deals require a huge amount of time, money and running around." The appellant gave evidence that sales of large commercial properties took a lot longer to finalise, and involved a lot more risk that commission may not be earned, and often commissions took between 15 months and two years six months to earn, whereas residential sales were "bread and butter stuff", which "bring in turnovers on a monthly basis." None of this was put to Mr Ley, but it was put to Mr Parmenter who agreed that whilst commissions on such properties were more lucrative than residential properties, payment of the commission could take a long time, as much as a year or two. Mr

Parmenter also agreed that the appellant, because of his heritage, had a better chance than he would have of attracting buyers from the Greek community.

[27] It is with this background that I turn to the alleged agreement of 12 December 2007. There is a written document admittedly prepared by the appellant and signed by the appellant. It purports to be signed by Mr Ley, but the learned Magistrate found that Mr Ley had never seen this document, and that the appellant forged his signature on it. The document is in the following terms:

> "I write in relation to the above mentioned properties being, 15 Glendower Road, Holtze, 31 and 33 Woods Street, Darwin.
>
> The listing and selling agent for the two properties is Michael Stephen Tolios.
>
> I authorize, by way of this letter that Michael Stephen Tolios will receive direct payment by Half Penny's upon settlement.
>
> Upon settlement of the properties occurring, I direct that Half Penny's to pay the commissions that are entitled to Michael Stephen Tolios at a rate of 60% of the agreed selling price of each property.
>
> **15 Glendower Road, Holtze**
>
> - Sale price $5,250,000
> - 3% commission - $157,500 exclusive GST
> - Michael Stephen Tolios will receive 60% being $94,500
> - The Professionals will receive 40% being $63,000
>
> **31 and 33 Woods Street, Darwin**
>
> - Sale price $4,120,000

- 3% commission $120,000 exclusive GST
- Michael Stephen Tolios will receive 60% being $72,000
- The Professionals will receive 40% being $48,000

If there are any queries in relation to this matter please do not hesitate to call me."

[28] The following points are to be noted:

- The alleged agreement is dated 12 December 2007.
- Is relates only to the Holtze property and the Woods Street properties, and not to commercial properties generally, and not to residential properties.
- It identifies the vendor's solicitors as "Half Penny's" and authorises direct payment of commission to the appellant.
- It states that the appellant is the listing and selling agent for all of these properties.
- It states that the appellant's commission is 60% of the total commission. It does not mention superannuation.

[29] However, there is a document in evidence (Ext. P4) relating to an offer received by the appellant for the sale of the Holtze property which is dated 20 December 2007. This document is signed by the appellant, is directed to the vendor, and seeks her instructions as to whether the offer should be accepted. If this is so, the appellant could not have been the selling agent for the Holtze property on 12 December 2007.

[30] The appellant's evidence in chief was that he drafted this letter to get "something legal, in terms of replacing the work place agreement that I had." He said when he handed the letter to Mr Ley the appellant had already signed it. There followed a discussion of the document in detail. They had a meeting the following day when Mr Ley gave him a photocopy of the document which Mr Ley had apparently signed. In cross-examination he claimed that an oral agreement had been reached earlier in similar terms, although he was unable to provide any details. Mr Ley's evidence was that he had never seen this document until 7 October 2009, and that it was not his signature on it.

[31] Sometime prior to March 2008, Don Parmenter left The Professionals and set up his own business, Ultimate Real Estate. A few days prior to 3 March 2008, the appellant approached him seeking employment with his company. A formal employment agreement was entered into between the appellant and Ultimate Real Estate dated 3 March 2008. The agreement provided for a commission split of 60% inclusive of superannuation in favour of the appellant, with the commission being further divided between the listing and selling representatives or agents on a 50/50 basis.

[32] On 5 March 2008, the appellant sent the following email to another employee of The Professionals, which was forwarded to Mr Ley:

> "Steve,
>
> 31 and 33 Woods Street is listed in David Ley, he signed on my behalf as I was unable to sign at the time. I would like a written

> statement signed by David acknowledging that 31 and 33 Woods Street is the listing of Michael Tolios and that I would be entitled to 50% commission, and Don Parmenter's share of commission will be paid through David's share as agreed upon. Total commission $140,000.
>
> Also these properties to be agreed that I am entitled to 50% commission as agreed on settlement.
>
> Thorngate Rd $5,250,000 3% + gst, Stuart Highway (Bob Biddlecombe) $5,500,000 3% + gst, 8 property's on Park Views Estate 3% + gst. Its of importance to have this drawn up ASAP."

[33] Mr Ley's evidence was that in about March 2008 he was prepared to "restructure" the commission rates with his sales representatives by introducing an incentive program, the effect of which was that the agents representatives could earn commissions of "60% plus" "depending on the consistency of bringing in figures over a monthly period."

[34] After he received the email, Mr Ley met with the appellant during which he stated that:

- "he would not pay Don Parmenter's commission out of his own share;
- if the appellant entered into a new written contract, he would receive commission at the new rate;
- if the appellant did not enter into a new written agreement, the rates would remain the same; and
- he would not pay 55% on the Woods Street sales."

[35] Mr Ley made notes on the email which accord with his version of the conversation. The notes indicate what the rates would be if calculated at 55% on the properties listed on the email. Mr Ley's evidence was that he made these notes to highlight the difference between the old and new rates.

[36] The appellant's evidence is difficult to follow. He said he had no recollection of a discussion about new rates, and the note to that effect was written later on.

[37] Either that day or the next, the appellant prepared a new document relating to each of the properties referred to in the email which refers to a commission rate of 55%. Mr Ley refused to sign it. He responded by a letter acknowledging that the appellant was the listing agent for each property, and that the division between the listing agent and the selling agent was 30% and 15%, (totalling 45%).

[38] The appellant resigned forthwith by letter dated 10 March 2008, forwarded by email from Ultimate Real Estate. Mr Ley said that prior to receiving this letter, he had not been aware that the appellant intended to resign.

[39] In my opinion the email of 5 March 2008 was particularly revealing in that it seeks an acknowledgement of an entitlement to commission at the rate of 50%. Assuming that superannuation was not included this would have increased the rate to a maximum of 55%. The alleged agreement of the 12 December 2007 refers to 60%, which, if it included superannuation, would have resulted in a rate of 55%. But, in none of the discussions about commission rates, was the percentage figure inclusive of commission, at least from Mr Ley's point of view. It seems very unlikely that Mr Ley would have agreed to pay 60% commission without making it clear whether or not this included superannuation. If there were already a signed

agreement to pay commission on the Woods Street and Holtze properties, there was no need to have included them in the emails, and it is hard to understand why the email did not refer to this agreement specifically.

[40] Also, as previously noted, the alleged agreement of 12 December 2007 asserts that the appellant is the listing selling agent for both properties when the evidence is clear that the Holtze property had not been sold by then. Further, I consider that it is extremely unlikely that Mr Ley would agree to authorising the vendor's solicitors to make direct payments of the commissions to the appellant, as The Professionals needed to receive the total commission in order to deduct income tax, and any other monies outstanding on the appellant's account such as advance payment of wages, superannuation and advertising costs.

[41] Counsel for the appellant, Mr Thangaraj SC, submitted that the letter of 12 December 2007 was not proved to be a forgery beyond reasonable doubt. First it was put that the letter was not an original but a faxed copy. The evidence relating to its provenance was given by Mr Close, a solicitor formerly acting for the appellant. He identified the letter as one given to him by the appellant who instructed him to recover the outstanding commissions due to the appellant. Mr Close wrote to Halfpennys on 2 October 2009 enclosing a copy of the letter of 12 December 2007. In the circumstances it is not surprising that the only copy of the letter available was not the original.

[42] Mr Thangaraj SC submitted that Mr Ley did not explain why the signature was not his, and no expert handwriting evidence was called. It was put that the learned Magistrate erred in comparing the signature on the letter with other proven signatures of Mr Ley in arriving at his conclusion. The learned Magistrate was entitled to make the comparison which he did, without the assistance of an expert, provided that he also properly took into account the rest of the evidence bearing on the issue including the evidence of Mr Ley: see *Perpetual Executors and Trustees Association of Australia Ltd v Wright*.[12] A comparison of the signatures reveals that there are some obvious differences:

- The letter "y" in Mr Ley's signature has a large loop at the bottom. The alleged forgery is cramped and looks more like the letter "q".

- The letter "D" in Mr Ley's signature is large, bold and easily readable. The same letter in the alleged forgery is cramped and unreadable.

- The real signature reveals the letter "e" clearly, whereas in the alleged forgery it is not legible.

- The alleged forgery is cramped whereas the real signature is large and bolder.

[12] (1917) 23 CLR 185 at 195-196 per Isaacs, Gavan Duffy and Rich JJ.

[43] In my opinion it was open to the learned Magistrate to conclude that the alleged forgery bears no resemblance to the genuine signature of Mr Ley and to take that into account in reaching his conclusion. It was put on the appellant's behalf that Mr Ley might have deliberately tried to disguise his signature, and that he had a strong motive to sign the letter in order to keep the lucrative business which the appellant had brought to The Professionals. So far as this is concerned, the motive was even stronger for Mr Ley to agree to the appellant's demands in March 2008 because by then the appellant had apparently introduced a number of lucrative sales to The Professionals, but it is clear that Mr Ley did not accept these demands. It is not to the point, as was contended by Mr Thangaraj, that the work of concentrating on major sales warranted a higher commission. Whether it did or not was a matter for Mr Ley to determine having regard to his own business interests. Whilst Mr Ley was prepared to restructure the commissions, this depended on obtaining a new written work place agreement, and would apply only to new sales. The appellant, who had already resigned and entered into an employment contract with Ultimate Real Estate Agency, was not going to agree to those terms. His purpose was to gain a higher commission for sales he had already introduced.

[44] Mr Thangaraj submitted that there were "concerns" about some of the exhibits tendered which were not originals, but only photocopies. He submitted that notes made, or apparently made, on these documents could have been added later and re-photocopied, thereby making them difficult to

challenge. I accept that this as so, but the most significant written documents did not depend on the handwritten notes, but on the text of the documents admittedly written by the appellant.

[45] Mr Thangaraj submitted that the learned Magistrate erred in not giving weight to notations and headings in the documents prepared by the appellant, such as appeared on exhibit P8, which asserts that there had been a prior agreement, although unspecified as to its nature. There are several possibilities. First, the appellant may have genuinely, but wrongly, thought that at some prior time an agreement to increase his commission had been agreed to verbally but not reduced into writing. Secondly, the appellant might have thought that self-serving assertions of this kind might weaken Mr Ley's resolve. Thirdly, there may have been an actual oral agreement not reduced to writing. None of these possibilities assist the appellant's case, because the appellant's case was that there was a written agreement which related to the Woods Street and Holtze properties.

[46] Having considered the evidence for myself, I consider that the learned Magistrate was correct to find that the appellant forged Mr Ley's signature on the letter of 13 December 2007. There is no reason for me to doubt Mr Ley's credibility nor the learned Magistrate's finding that he was a credible witness. Whilst there is no specific finding that the appellant was not credible, the inference is that this was the conclusion he reached, and having read the transcript I would not be inclined to reach a different conclusion. In the circumstances of this case there was no reasonable hypothesis

consistent with the appellant's innocence. I do not entertain a reasonable doubt as to his innocence.

[47] Once the conclusion is reached that the signature is a forgery, it is inevitable that the appellant would be found to be the forger. As the learned Magistrate correctly observed, he was the only person with a motive and the means and knowledge to have forged the signature. In addition, it was the appellant who uttered the document through the agency of his solicitor Mr Close.

[48] The appeal against conviction must be dismissed.

**The appeal against sentence**

[49] The grounds of appeal against sentence are:

(1) The sentence is manifestly excessive;

(2) The learned Magistrate erred in finding

(i) that a conviction may not end his career as an agent;

(ii) that as an agent, he was a 'professional' which over-emphasised any breach of trust;

(iii) that the conduct 'went on for a significant period of time'; and

(iv) that the appellant's references were motivated by self-interest.

[50] The sentence imposed was a conviction on each count, with an aggregate sentence of imprisonment for 12 months, suspended after two months, with an operational period of 18 months.

[51] It is convenient to deal with ground two first. In my opinion, there is no error in finding that the conviction may not end the appellant's career as an agent. The learned Magistrate was informed that the appellant was due to appear before the Agent's Licensing Board the following day. In the course of discussion, his Honour regarded it as highly likely that the appellant would have his registration cancelled, but that was a decision for the Board. It was possible, particularly in the light of the references which were tendered on his behalf, that the Board might suspend his registration.

[52] I do not consider that his Honour erred in referring to the appellant as a 'professional'. In order to become registered under the *Agents Licensing Act*, the appellant needed to satisfy both educational and personal qualifications. At the sentencing hearing the appellant's counsel did not cavil with that characterisation. I do not consider that the learned Magistrate over-emphasised the position of trust that the appellant enjoyed.

[53] As to the finding that the conduct went on for a significant period of time, there was no finding as to when the document was forged. It may have been forged shortly before the appellant briefed Mr Close. Even so, the appellant

had the opportunity, after he had typed the letter, to consider whether or not to forge Mr Ley's signature and after deciding to do so, he had the opportunity to destroy the letter before he gave it to Mr Close. During argument, the contrast was made with a person who, on impulse, steals money from a till. I do not consider that the learned Magistrate was in error on this ground.

[54] As to the finding that the references were motivated by self interest, as the learned Magistrate pointed out, some at least of the letters of reference referred to the potential loss of income to the referees if the appellant was unable to continue as an agent's representative.

**Manifestly excessive**

[55] The learned Magistrate was aware that in fact no money was received as a result of this fraud, although had the fraud succeeded he would have gained $35,000 to which he was not entitled. His Honour correctly observed that the offending was not as serious as stealing from a trust account. No complaint is made that the appellant's motive for the crime was greed, not need. No remorse was shown. Because there was a trial, the appellant was not entitled to a discount. Further, he had a number of prior convictions, albeit mostly for traffic matters, but which also included breaches of court orders and restraining orders, so in that sense he did not come before the Court as a person of good character. The learned Magistrate also took into

account the potential to lose his career. In my opinion the sentence imposed was not manifestly excessive.

**Conclusion**

[56] The appeal is dismissed. I will hear the parties as to costs.

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