IN THE REALESTATE AGENTS DISCIPLANARY TRIBUNAL HELD AT AUCKLAND

READT no: 058/11

IN THE MATTER	**An Appeal under section 111of the Real Estate Agents ACT 2008**
BETWEEN	**WARREN ARTHUR WILSON**
	Appellant
AND	**THE COMPLAINTS ASSESSMENT COMMITTEE 10011**
	First Respondent
AND	**DONALD MCPHERSON, PHILLIP NOTTINGHAM, DERMOT NOTTINGHAM, & EARLE MCKINNEY**
	Second Respondents

SUBMISSIONS ON APPLCATION TO RECUSE TRIBUNAL
Dated of June 2012

Phillip Nottingham
Property Bank Realtor Limited
Level 1/11 Brays Rise
E-mail Phillip@realestateguys.co.nz co.nz
P.O. Box 131-94
Onehunga
Auckland

May it please the Tribunal,

1. This is an application to recuse the Tribunal following on an allegation by the Second Respondent of *apparent* or *perceived* bias rather than actual bias. The allegation is one of law and is not meant to be in anyway pejorative towards the Tribunal or it's members. It should be noted that the majority of the Second Respondents felt on the lack of any evidence provided by the Appellant that they did not need to attend the hearing and would abide the decision of the Tribunal. It was only after **Ms Davenport** stated she would not consider the independent statements in the bundle of evidence or make any findings as against the Appellant that alarm bells began ringing.

A. THE LAW

2. The Second Respondent relies on the tests established in *Ansley v Hillcrest Marketing Ltd (in liq*)[2002] DCR 513[1], at paragraph [52]. The learned Judge in that case dealing with an appeal from a decision of the Motor Vehicle Dealers Tribunal and allegations by Phillip Nottingham of perceived and actual bias. It is submitted that the Second Respondent was well aware of the indications of bias having previously researched the relevant law and had his submissions published in District Court Reports. The learned court commenting at para 52

> "*Phillip Nottingham is not a lawyer, but his exposition on the current law relating to bias is such that I need do no more than repeat his submission which was to the following effect;"*

3. Without quoting from the full submissions it is helpful to detail the comments of Lord Browne Wilkinson at page 587 in *R v Bow Street Stipendiary Magistrate and Others exparte Ugate (No 2) [1999] 1 All ER 577*[2]

> *The second application of this principle is where a Judge is not a party to the suit and does not have a financial interest in the outcome,* ***but in some other way his conduct or behavior may give rise to a suspicion he is not impartial****, for example a friendship with a party*

4. It is the Second Respondents submission that the tribunal through its barrister member and chairperson verily failed to apply law relating to further particulars, failed to enforce it's own direction orders and failed to fairly control the conduct of the hearing so as to unfairly prejudice the Second Respondents examination of the allegations made by the Appellant. This conduct has resulted in the expansion of the proceedings, the dis-satisfaction of

---

[1] Ansley v Hillcrest Marketing Ltd (in Liq) [2002] 513

[2] R v Bow Street Stipendiary Magistrate and Others exparte Ugate (No2) [1999] 1 All ER 577

the Second Respondents with the conduct of the hearing . The hearing "going off"

5. The High Court in *Moxon and Rimmington and Others v Casino Control Authority* M324, 5/99 High Court Hamilton 24/5/2000[3] Fisher J sets out the first test which is the standard of evidence required to ground a recusal and comments at para 45

> *If the test is whether there was a real possibility of bias, that still leaves a question mark over the meaning of 'Bias'. Until the decisions are taken out of the hand of humans, perfect impartiality will be unobtainable. How far a predisposition's and extraneous influences go before the resultant decision will be impugned? The answer clearly varied according to the nature of the tribunal and the decision.* ***At one extreme a quite modest level of favoritism will contaminate a criminal trial (R v Gough, Webb v Queen)***

6. It is well established that whether the case involves automatic disqualification or not , that there is no need to show actual bias on the part of the tribunal. Nor is it a defence for the tribunal to demonstrate it's actual impartiality. See comments of Lord Hope in Pinochet at page 593 para (h)

> ***It is no answer for the judge to say that he is in fact impartial*** *and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality*

7. In *Pinochet* the concerns that founded the recusal were as tenuous as the justices wife being associated with Amnesty International which had very strong views on the prosecution of the ex dictator of Chile.

8. The learned Judge Hubble in *Ansley* goes on to comment at page 528 paragraph [53]

> *To these cases must be added the kind of situation encountered by Hammond J in the case of Williams v Willems (High Court, Hamilton 62/00, 21 March 2001)[4] In that case it was found that the trial had effectively "gone off" because of the excessive intervention of the Judge and the fact that the judge had got completely offside with one of the participants.* ***The present case became argumentative and interventionist***

9. The court commenting at paragraph [54] as to the frequency of recusal in the light of disquiet being alleged;

---

[3] *Moxon and Rimmington and Others v Casino Control Authority* M324, 5/99 High Court Hamilton 24/5/2000

[4] *Williams v Willems, Hammond J, High Court, Hamilton, A62/00, 21 March 2001*

Cases must be rare indeed where a Tribunal will persist in proceeding to hear a matter against prior allegations either alleging bias or disquiet of any kind, at the Tribunal as a whole or any of it's members. Frequently allegations of bias are made by an unhappy litigant after the decision has been made. In that case for understandable reasons, it may be appropriate to resist such allegations unless they are clearly justified, provable and substantial.

10. In *Dermot Nottingham v Registered Securities Ltd,* Anderson J, B 179-IM99, High Court Auckland 23rd April 1999[5] (unreported) The learned Justice recused after allegations of bias were raised during the hearing in relation to the failure of the court to entertain allegations against an officer of the court, barrister Roderick Fee and a witness Ian McClealland of misleading statements in an affidavit. The learned Justice recused and commented at page 17 line 10

" I can not appear to have a judicially objective view on the merits"

At page 17 line 35

Mr Nottingham has applied for an order directed to my recusing myself from continuing with the hearing of the matters part heard. The form of the application sought an order that I be relieved from continuing, but it is axiomatic that no High Court Judge can make an order binding another High Court Judge in an official capacity. The procedure is for an application to a Judge to consider recusing himself or herself for cause. It was observed by the court of Appeal in Turner v Allison [1971] NZLR 833[6] at 842 line 46;

It is the third factor that Wilson J thought most weighty. I agree with him that any indication by a party that it felt that a judicial officer may not have an open mind on a matter which he is about to hear is generally accepted as sufficient reason for relinquishing the business to another.

11. It is accepted that as a general rule it is the duty of judicial officers and Tribunals to hear cases allotted to them and not accede to requests for disqualification. See Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd [1999] VSCA 35[7], Vic SC. Callaway JA observed (para 89(e)):

As a general rule, it is the duty of a judicial officer to hear and determine the cases allotted to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.

---

5 *Dermot Nottingham v Registered Securities Ltd,* Anderson J, B 179-IM99, High Court Auckland 23rd April 1999

6 Turner v Allison [1971] NZLR 833

7 Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd [1999] VSCA 35

See also *Man O'War Station v Auckland City Council*[8] at page 556 line 15

The court approved observations of the Constitutional Court of South Africa in *President of South Africa v South African Rugby Football Union* 1999 (4) SA 147 at p177

"The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotton that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that a judicial officer, for whatever reasons, was not or will not be impartial."

12. It submitted that disquiet was raised during the hearing as to the handling of the conduct of the witness, the attempts by **Ms Davenport** to restrict the examination of the witness on the truth or otherwise of his allegations. There was no delay that could found a wavering of the Second Respondents rights or to found the allegation that the recusal application was tactical. See *Man of War Station Ltd v Auckland City Council* [2001] 1NZLR 552 at 553 line 17 wherein the learned Court of Appeal quotes from Locabail (UK) Ltd v Bayfield properties limited [2000] QB 451; [2000] 1 All ER 65 (CA adopted)

The greater the passage of time between the event which allegedly gave rise to the complaint of bias and the case in which the objection is made, the weaker the objection will be, all things being equal

B. THE FIRST PREDETERMINATION, FAILURE TO ALLOW SUBMISSION

13. The First example of predetermination and failure to allow submission is found when Ms Davenport refuses to give Mr Nottingham his 10 minutes to argue the strike out. That 10 minutes advised by the Tribunal registry and repeated at the commencement of the hearing. see notes of evidence page 2 of the transcript line 24

MS DAVENPORT

"I'm not concerned with the application for strike out Mr Wilson. I just want to understand your appeal so we can deal with it. So what I am going to suggest is that you go into the witness box and you get sworn in and you go through your evidence…"

Page 7 line 18

8 Man O'War Station v Auckland City Council, [2001] 1NZLR 552

MS DAVENPORT

Just sit down Mr Nottingham (emphasize added)

Page 8 line 24

MS DAVENPORT

Well I agree Mr Wilson that the strike out has been a last minute, relatively last minute thing and that's why were not going to give it much credence today….

Page 10 line 4

MS DAVENPORT

So this is what we are going to do now. We're going to hear from you to the extent that you want to talk to about it, about the strike out. **We are going to hear from Mr Nottingham. 10 minutes each**. Then I want you to go into the witness box and be sworn in and tell the story to us… (emphasize added)

Page 10 line 16

I think we have got this time available and I think we'd really like to use it so that you have your appeal…

14. The Second Respondent was not invited to give his written submissions or speak to his verbal notes (copy supplied to Tribunal the following day).

15. In this case the notes of evidence are peppered with statements by **Ms Davenport** which disclose a predetermination not to make findings as against the Appellant despite the Tribunal being confronted with a multitude of the most serious allegations of *inter alia* fraud, theft, intimidation, burglary misappropriation of funds **all without a tittle of evidence**. It is rare indeed where a judicial officer will openly predetermine that they will not make any findings against a party to a proceedings. The Tribunal is required in considering the competing claims allegation's and evidence in support of them to make findings in relation to either party. See *Man O'War Station* at 557 line 5

Or if on any issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v Kelly (1969) 167 CLR 568[9]

16. Such findings sought being inter alia being;

9 *Vakauta v Kelly (1969) 167 CLR 568*[9]

16.1 Credibility of allegations as to evidence in support.

16.2 Inferences to be obtained from conduct of witnesses in Court.

16.3 Nature of evidence in support of competing claims.

16.4 conduct of the witness during examination.

C. THE SECOND PREDETERMINATION (NO FINDINGS AGAINST THIS MAN)

17. This case it is submitted that **Ms Davenport** actually made statements that she would specifically not make any findings against the Appellant. This is a fundamental misdirection and error of law. What is of major concern is that this misdirection occurs at page 114 of a 134 page transcript after the evidence of the false allegations had for the most part been canvassed. See Williams v Willims at page 39 line 7

But the Appellants were entitled to have the evidence tested against the other objective facts, the contemporaneous documents, the motive of those involved, or the lack of them, and the overall probabilities.

For predetermination see page 114 line 14

MR NOTTINGHAM XD BY MS DAVENPORT

Mr Wilson please only one of us at time. **Mr Nottingham regardless of what you think the Tribunal are not going to make any findings against this man.** The allegations are findings against you and your co-defendants in respect of claims that he's made. He has to prove those claims.

See also attempt by Ms Davenport to restrict cross examination page 63 line 12;

MS DAVENPORT

I don't know Mr Nottingham or Mr Wilson that it's relevant. What questions do you. Just wait. Everybody pause. Now Mr Nottingham what your task is to deal with the allegations relating to the REAA case and what we can determine today. What happened between Mr Grobler and Mr Wilson or anyone else we can't determine. So you want to keep asking him questions that relate to what we can make orders on.

NOTTINGHAM

It's part of the file Ma'am. Its part of the independent evidence of what occurred which is the background to the allegations.

18. The question as to predetermination is dealt with by Gallen J in *Loveridge v Eltham Couty Council* (1985) 5 NZAR 257[10] at 264:

"Whether or not it appears from all the evidence that all or any of the bodies or individuals involved had so conducted themselves that ***an informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the live issues before them"***

19. Despite Ms Davenports misdirection The Tribunal is required by law to make findings which may be against the Appellant to properly adjudicate on the issues in dispute See *Health Practitioners Disciplinary Tribunal v Dawson 300/Nur09/139P*[11] *to paras 19-21 There the tribunal said:*

20. what is involved in any test fro credibility was articulated by the Canadian Appellate Court (in Farynia v Chorny [1952] 2DLR 354 (BCCA) to be that the real test of the truth of the story of a witness must be at harmony with the preponderance of the probabilities which are practical and which an informed person would readily recognize as reasonable in that place in those conditions.

21. So the tribunal, were relevant, must consider such factors as:

21.1 the witnesses manner and demeanor when giving evidence.

21.2 Issues of potential bias-to what extent was evidence given from a position of self interest.

21.3 Internal consistency-in other words was the evidence of the witness consistent throughout, either during the hearing itself, or with regards to previous statements.

21.4 External consistency-in other words was the evidence of the witness consistent with that given by other witnesses.

21.5 Whether non advantage concessions were freely tendered

D. SERIOUS ALLEGATIONS NO EVIDENCE

20. The **Ms Davenport** was put on notice that the allegations that had been made by the Appellant would not have any evidence to support them in the original strikeout application. **Ms Davenport** was specifically put on notice that the failure of the Appellant to have counsel was tactical to allow him to make accusations that **could not** be made by counsel, as counsel has a duty to the

[10] *Loveridge v Eltham Couty Council* (1985) 5 NZAR 257
[11] *Health Practitioners Disciplinary Tribunal v Dawson 300/Nur09/139*

court and the administration of justice not to engage in such conduct. See paragraph 14 of the Second Respondents submissions on the first application to strikeout dated 10th February 2012. The Second Respondent submitted;

"14. The Second Respondents submit that the Appellants failure to engage counsel is motivated by:

14.1 The duty of counsel to the court/tribunal and standards of the profession not to make allegations without any evidence in support. No counsel properly instructed would accept instruction, an;

14.2 A lack of evidence in support of the allegations , and;

14.3 The likelihood of success at appeal and the cost of counsel

20.1 The germane rules of conduct of the New Zealand Law Society, specifically those that apply to the making of scandalous allegations, whether by letter, in pleadings, or indeed in any other way, against another; (emphasis that of the writers)

***"**8.05 Rule*

A practitioner must not attack a persons reputation without good cause.

Commentary

(1) This rule applies equally both in court during the course of proceedings and out of court by inclusion of statements in documents which are to be filed in court.

*(2) A practitioner should not be party to the filing of a pleading or other document containing an allegation of fraud, dishonesty, undue influence, duress or other reprehensible conduct, unless the practitioner has first satisfied himself or herself that such an allegation can be **properly justified on the facts of the case**. For a practitioner to allow such an allegation to be made **without the fullest investigation**, could be an abuse of the protection which the law affords to the practitioner in the drawing and filing of pleadings and other court documents. **Practitioners should also bear in mind that costs can be awarded against a practitioner for unfounded allegations of fraud**.*

*(3) If necessary, a practitioner **must test** the instructions which have been given**, by independent inquiry, before making such allegations.**"*

20.2 The salient authorities of New Zealand Courts such as **Gazley v Wellington District Law Society** [1976] 1 NZLR 452[12] and

[12] Gazley v Wellington District Law Society [1976] 1 NZLR 452

Mckaskell v Benseman [1989] 3 NZLR 75[13]. The writer believes that English and Australian cases and learned writings best elucidate the over riding duty of an advocate to insure that they have sufficient evidence to support the making of an allegation that is, by its mere making, damaging. In **c Mckaskell v Benseman** [1989] 3 NZLR 75 Lord Reid opined;

*"Counsel…has an overriding duty to the court, to the standards of the profession, and to the public, which may and often does lead to a conflict with his clients wishes or with what the client thinks are his personal interests. Counsel must not mislead the court**, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information….The same duty applies to drawing pleadings…as applies to counsels conduct during trial**."*

20.3 In relation to an allegation of effectively alleging fraud or dishonest or grossly inappropriate behaviour ; see **Halsburys laws of England[14]** at para 470, page 377 line 36;

*"A barrister may only suggest that a witness is guilty of fraud, misconduct or crime if such allegations go to a matter in issue which is material to the client's case. **Where the only such matter is the credibility of the witness, the barrister must be satisfied as for the reasons of such allegations being made and that they are supported by such reasonable grounds**. A barrister may regard instructions from his professional client that such allegations are well founded as reasonable grounds to support such allegations**; but he may not rely on a statement from any other person unless he has ascertained so far as is practicable that the person can give satisfactory reasons for his statements.**.*

Page 375 Para 467,468

*"He may not make any allegation unsupported by his instructions and he may not allege fraud unless **(1) he has clear instructions to plead fraud; (2) he has before him reasonably credible material which, as it stands, establishes a prima facie case of fraud. "***

20.4 The noted Australian case of **Strange v Hybinett** [1988] VR 418[15], wherein a member of the inner bar, (Queens Counsel), made accusations of collusion against a solicitor for the opposing side and others during a proceeding. In this case it was held;

[13] Mckaskell v Benseman [1989] 3 NZLR 75

[14] **Halsburys laws of England[14]** at para 470, page 377 line 36

[15] **Strange v Hybinett** [1988] VR 418

"Legal practitioners-Counsel's duties-attack on witness-allegation of corruption – ***duty of counsel to ensure evidence exists justifying allegation.***

(1) Counsel's right of audience carries with it complete immunity from liability for defamation. But, as with every substantial right, ***there is a corresponding duty on counsel to ensure that privilege is not abused****.*

(2) *Where there are grounds to doubt the evidence of a witness, counsel may be justified in submitting that the evidence of that witness ought not to be accepted. However,* ***before making allegations of corruption or otherwise suggesting that an individual has deviated from standards of personal or professional propriety, counsel must be scrupulous to ensure that sufficient evidence exists to warrant that allegation."***

20.5 In the **Strange v Hybinett** case Justice Gray quoted from various authorities, which are of relevance to the matters at hand. At page 424 line 4, Gray J quotes from a passage of **Lord MACMILLAN'S** book "**Law and Other Things**"[16], at pp 191-2:

"Written pleadings are frequently sent to counsel for revisal containing serious allegations of fraud, dishonesty, or misconduct. ***The consequence of lodging such pleadings in Court may be to cause irreparable injury to the person thus publicly accused****. For an advocate to allow such charges to be launched with his name attached to them without the fullest investigation would be to abuse the absolute protection against actions for slander which the law affords counsel. Counsel is not worthy of that protection unless he justifies it by the most scrupulous care in his written or oral attacks on character.* ***He must insist on being supplied with all information which is thought by his client to justify his attack.*** *And then he must decide for himself whether the charges made are such as can be justifiably made. In exercising his judgment in such a manner the advocate is fulfilling one of the most delicate duties to society which his profession casts upon him.* ***It is no small responsibility which the state throws upon the lawyer in thus confiding to his discretion the reputation of the citizen****.* ***No enthusiasm for his clients case, no specious assurance from his client that the insertion some strong allegations will coerce a settlement, no desire to fortify the relevance of his clients case, entitles the advocate to trespass, in matters involving reputation, a hairs breath beyond what the facts as laid before him and duly vouched and tested will justify. It will not do to say lightly that the court will decide the matter. It is for counsel to see that no mans good name is wantonly attacked****."*

20.6 The Second Respondent also brings the Tribunals attention to the sagacious thoughts of Hibery J as they relate to the ethical restrictions on counsel, and as the writer suggests any advocate

[16] **Law and Other Things**

conducting a sustained, but appropriate, attack on a persons reputation especially in the day of the internet trial per se: Published in 1946-**Duty and Art in Advocacy**[17] at p 19 the learned judge commented;

"The man who is worthy of his calling will always remember that the right of audience, which he enjoys, and the privilege which covers all he says and does in the course of a trial, ***lays upon him a heavy obligation never to abuse the occasion.*** *He must decide what he says and what he asks.* ***With him rests the selection of the language to be used and the questions to be asked."***

20.7 Later in the Courts judgment in **Strange v Hybinett** the Court qualified as to what counsel was required to do before casting an allegation into the air, be it by imputation in the nature or formulation of a question, or by a specific allegation of fact;

"No question which conveys a definite and damaging imputation on the character of a party or witness ought to be put ***unless the solicitor instructing counsel vouches the truth of the matter and can show that there is material in existence for making the allegation****."*

20.8 This extract from **Oldfield v Keogh** also appears in **Strange v Hybinett** at page 424line 43 and emphasizes the need to secure, before the making by a witness or advocate, a serious allegation of wrongdoing against another, corroborating evidence that makes the allegation seem appropriate in the circumstances;

"In Oldfield v Keogh, Jordan C.J., in dealing with the imputation in that case,said (at p210); "It is difficult to speak with becoming moderation of the charge. ***There is not a tittle of evidence to support it."***
I find myself labouring under the same difficulty in this case. I regret to say that, in my opinion, ***senior counsel did abuse the privilege conferred upon him by his right of audience. As I have said I am satisfied that a miscarriage of justice resulted****.*

20.9 The Appellants knowledge of his conduct is clarified when he is examined by Mr Gaukrodger on his allegations; page 99 line 24

MR GAUKRODGER
Is this hearsay…sorry

WILSON
Well everything to do with this case seems to be hearsay one way or another is that. I mean **I'm assuming that it's ok in this forum**

[17] **Duty and Art in Advocacy**

21. **Ms Davenport** is an experienced barrister, fully cognizant of the rules relating to making scurrilous and false allegations unsupported by any evidence, and **Ms Davenport** was put on particular notice in the strike out application, and applications for further particulars filed by the Second Respondent. The Appellants outrageously false allegations made as late as the "brief of evidence", and added to, and made afresh at the hearing, had to be addressed in cross examination to refute them, and to address the credibility of the allegations, and hence the credibility of the witnesses other allegations. The Appellant's continuation of the allegations, without any evidence, and the Tribunals failure to adequately control the Appellant have brought the processes of the REAA and Tribunal into grave disrepute, and grossly prejudiced the Second Respondent. This prejudice has been strengthened by the salting of the REAA file with these malicious false allegations. The issue of the presence of false and scurrilous allegations in proceedings, even at the stage of pleadings is conclusively dealt with by Hammond J in *Van der Kapp v Attorney General* 10 PRNZ 162[18], Page 165 line 29

> *I add here, for whatever assistance it may provide Mr Van der Kaap,* ***that the function of a statement of claim is to clarify and define the issues for the Court as well as to inform the opposing party:*** *Thompson v Westpac Banking Corp (No2) (1986) 2 PRNZ 505.* ***Rule 186 of the High Court Rules provides that the Court may strike out proceedings where a pleading is likely to cause prejudice, or delay or is otherwise and abuse of process. The words "prejudice", "embarrassment" and "delay" are to be given a liberal meaning and include proceedings which are both scandalous and irrelevant"***
>
> ***'The court has a general jurisdiction to expunge scandalous matter in any proceedings"***

22. **Ms Davenport** subsequently allowed the making of these allegations in the form of the brief of evidence without any evidence in support and in breach of the directions order of Judge Hobbs. It is submitted that "in law" the subsequent allegations had a damaging effect on the partiality of the Tribunal. The onus had shifted to the Second Respondent to negate those allegations. In any event the Second Respondent was required to cross examine the Appellant to establish there was no evidence for their making. The Second Respondent was stopped during cross examination and questioned by **Ms Davenport** as to the line of questioning. It was directly after this exchange and following the reasoning for it being the false allegations that Ms Davenport reveled her predetermination. Page 114 line 6

[18] Van der Kapp v Attorney General 10 PRNZ 162

MR NOTTINGHAM XD DAVENPORT

Well Mr Nottingham I do have some déjà vu in some of these comments So

NOTTINGHAM

Ma'am I would suggest that's only because it's quite clear that this man has a habbit of making the most outrageous allegations

For the predetermination see page 114 line 13

MR NOTTINGHAM XD BY MS DAVENPORT

Mr Wilson please only one of us at time. **Mr Nottingham regardless of what you think the Tribunal are not going to make any findings against this man.** The allegations are findings against you and your co-defendants in respect of claims that he's made. He has to prove those claims.

See Section 109 (5) of the REA Act 2008[19]

(5) A hearing before the Disciplinary Tribunal is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury)

For definition of perjury see Section 108 of the Crimes Act 1961[20]

(108) Perjury is an assertion as to a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding as part of his evidence on oath, whether the evidence is given in open court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him to mislead the tribunal holding the proceeding.

See also section Section 153 of the Real Estate Agents Act 2008[21] at (a) and (b).

153 Offence to resist, obstruct, etc

A person commits an offence who, without reasonable excuse,-

(a) resists, obstructs, deceives, or attempts to deceive any person who is exercising a power or perform a function under this Act; or

(b) gives to any person who is exercising or attempting to exercise any power or perform any function under the Act any particulars knowing those particulars are false or misleading in any material respect

22.1 For the law on the likely effect of such conduct see **Strange v Hybinett at page 424 line 43**;

[19] Section 109 (5) of the REA Act 2008
[20] Section 108 of the Crimes Act 1961
[21] Section 153 of the Real Estate Agents Act 2008

"In Oldfield v Keogh, Jordan CJ., in dealing with the imputation in that case, said (at p210);" its difficult to speak with becoming moderation of the charge. There is not a tittle of evidence to support it"

I find myself labouring under the same difficulty in this case. I regret to say that in my opinion, senior counsel did abuse that privilege conferred upon him by his right of audience. As I have said I am satisfied that a miscarriage of justice resulted. In the words of the joint judgment of Sugarman and Manning JJ in Vozza v tooth [1963]NSWR 1675, at p 1683 " ***It can not be doubted that such assertions may well have created, and probably did create, an impression upon the minds of the jury that would have been a least difficult, if not possible to erase, and that such impression was prejudicial to the plaintiffs case".*** **(emphasis added)**

E. THE APPELLANT IS NOT MAKING THOSE ALLEGATIONS. MS DAVENPORT IS WRONG

23. **Ms Davenport** alleges that the Appellant was apparently not making allegations he clearly was making at page 115 line 9

MS DAVENPORT / MR NOTTINGHAM

Alright. But Mr Nottingham. I want to say to you again, **Mr Wilson is not making any of those allegations about Remax to us.** He's making the allegations about you in respect of the emails and Dermot Nottingham in respect of the oh no sorry. Texts and Dermot Nottingham in respect of the emails. I'm not actually sure whether there's anything still standing against Mr McPherson and Mr McKinney. I can confirm that with him. So none of these other things assist us. What would assist me is you can ask him about the texts if you want to or the emails. Those things will help us.

24. Ms Davenport repeats that statement at page 131 line 1 of the notes of evidence. When in fact the Appellant had clearly made all the allegations contained in his brief of evidence and expanded them.

None of the allegations about anything other than the e-mails and texts are before us.

25. For evidence that Appellant had and continued to make false allegation's see page 105

MR WILSON XD BY MS DAVENPORT

Did you make that allegation Mr ... Well it seems to me is that allegation it's actually seems to be repeated and this one here is that my understanding is that allegation was um was, was common knowledge at the time. Is that many people have made the allegation that they, **that they stole the documents and forged the um, and forged part of it and that my understanding** is that actually became part of the case that the defence argued. I mean, look, look. **This is all public domain stuff.**

26. The notes of evidence and brief are riddled with the most serious allegations imaginable. Such conduct a mirror of the type of behavior detailed in *Van der Kaap* without being exhaustive;

See page 70

Remax was TEL's front you know the heavy tricks department in Auckland

Page 71

I'm still saying that I believe Remax was privy to it

Page 79

Do you accept now it wasn't Remax that changed the locks….Um no

Page 79

I believe on the balance of probabilities it was Remax that broke into the upstairs tenancies

Page 80

Because you have already got such a bad name is that um, like your reputation tends to follow you.

Page 80

Attempting to divert income. That's a big nice serious one isn't it.

Who was trying to get rental from the carparks…..Remax TEL

MS DAVENPORT

Sorry where does it say trying to get money

Page 82

Attempt to coerce , lock out tenant lawful…

Page83

I mean youre thugs. That's the reputation you've got. Your'e thugs, you're bullies….A pair of front man bully boys for TEL threaten just a bunch of teenage university students. You cut off their water and you locked them out of the tenancy.

Page 83

Informed by other parties having exercised similar conduct with other properties…….They had

Page 84 (Champion apartments)

Similar conduct was employed there. And also Karaka Street……Remax went in and threatened all the tenants…you people were notorious in the real estate industry

Page 84

At the time the reputation they had was as thugs and bully boys

Page 86

You say gained control over properties for own advantage whats the advantage? …. The vested interest was for RE/MAX is that they wanted to get the deal but also they intimidate and scare away other agents.

Page 90

He was the same opinion with me. As he suffered a lot of this abuse, bullying and you know bullyboy tactics from Remax

Page 121 line 1

All the allegations that everyone made that you guys were thugs and bullies

27. The Second Respondent objected to the verbal hearsay but was told the Appellant was entitled to answer. Those answers were nothing but a continuation of verbal abuse without any evidence, combined with verbal hearsay abuse as to the Second Respondents being thugs, bully boys, thieves and forgers. It is accepted that all witnesses are entitled to answer. They are not entitled to abuse, and intimidate the Second Respondent to avoid answering the questions. See page 88 line 1

MS DAVENPORT

He's entitled to answer Mr Nottingham. But **unfortunately** Mr Wilson you're not entitled to at the moment ask the questions.

28. Without going into the transcript in further detail the few examples detailed in paragraph 23 should suffice, With the addition of the comment at page 115 line 7

WILSON

He's not your learned colleague. **I would imagine he has a similar opinion to you of everyone else.** He's not your learned colleague

E. THE SYCOPHANTIC APPELLANT "THANK YOU MR WILSON"

29. **Ms Davenport** fail's to control the conduct of the Appellant to the detriment of the cross examination. **Ms Davenport** makes a comment concerning a line of cross examination being made by the Second Respondent and is congratulated by the Appellant. The relevance of the question being totally missed by **Ms Davenport** that the building subject to the caveats had been sold for a higher amount months earlier, the Appellant appearing before Judge Bell on behalf of Mr Mayer to protect the caveats designed to prevent settlement of that sale months after the contract for a sale and purchase had been signed. It was to be submitted that this was a further strand in the rope

to establish that the Appellant was acting against his statutory responsibilities in in furtherance of his instructions from Mr Mayer.

MR NOTTINGHAM XD BY MS DAVENPORT
But this judgment of Associate Judge Bell that relates to the allegation of Taharangi finance arises in August of 2010 and these texts were sent in June. So is there something.

MR WILSON
Good point.

MS DAVENPORT
Thank you Mr Wilson. (emphasis added)

30. That Ms Davenport failed to control the conduct of the Appellant, his bullying and intimidation of the Second Respondent so that the control of the proceedings vested in the Appellant. This exchange followed directly after the Appellant uncomfortable with the cross examination attempts to settle the matter by requesting the Second Respondent apologise to avoid further examination. The **Appellants ruling** on the matter being supported by Ms Davenport, without being exhaustive a number of examples should suffice;

Page 74
WILSON
Yeah look, look, look, I think look, look ,look, **the chair has made it absolutely clear that we should be moving on.**

MS DAVENPORT
I do think Mr Nottingham that this really has nothing very much to do with the complaints.

MR WILSON
It's a waste of time

Page 80 line 18
WILSON
Um well if you're finished

NOTTINGHAM
I hav'nt finished. Attempting to divert income. That's a nice big serious one isn't it.

Page 93 line 1

MS DAVENPORT
So what is the question. Mr Wilson wait. What is the question Mr Nottingham

NOTTINGHAM

Well I can't get to the question because he goes on and on

Page 102 line 9

WILSON

Ma'am if I could just briefly respond to that. It seems to me that Mr Nottingham could finish now. All this business about Denholm etc all this other stuff. I don't see it adding anything to the hearing what so ever

Page 109 line 20

WILSON

And I want it put on record. Is that if I'm not allowed to respond to me what is an overt innuendo here is that I think. But also is that what the Tribunal should be saying here to Mr Nottingham is enough is enough. You're wasting the Tribunals time

Page 110 line 10

NOTTINGHAM

The constant interruption's Ma'am are affecting my ability to cross examine this man. But I'll have another shot. I'll have another shot

Page 114 line 10

WILSON

Who cares what you think. I don't care what you think honestly.

F. MS DAVENORT ALLEGES ACKNOWLEDGEMENT BY THE APPELLANT THAT ACCUSATION OF TURNING OFF WATER WAS REBUTTED

31. The attempt by the Appellant had come on the back of the statement by **Ms Davenport** that the Appellant had "fairly acknowledged" that his allegation of Remax being responsible for turning the water off to the building was wrong. The Second Respondent had a lot more allegations to be put to the Appellant. Ms Davenport advised that the Second Respondent could put those allegations to the Appellant; See page 71 line 1

DAVENPORT

I think Mr Nottingham and Mr Wilson, Mr Wilson has fairly acknowledged that it was TEL and I think we can move on from that

NOTTINGHAM

We'll Ma'am I've got a whole lot more of these allegations that are purported to be against um um ah Remax Advantage

32. The fact was that the cross examination was stopped with the Appellant still maintaining that Remax was somehow involved. Page 71 line 6

WILSON
But I'm still saying that I believe that Remax was privy to it and that um that it may. And that it was Remax that raised the issue with the tenants

MR DENLEY
I think Mr Wilson you repeated that about 50 time

G. THE SECOND PREDETERMINATION, TRIBUNAL REFUSES TO MAKE ANY NO FINDINGS AGAINST THIS MAN, "THE DFENDANTS"

33. Ms Davenport made predeterminations and prejudicial comments on a number of issues specifically and not limited to referring to the Second Respondents as defendants. Page 13 line 26 and page 114 line 12 the transcript.

Page 13 line 26

MS DAVENPORT
I just want to know about what you say the **defendants** did wrong.

Page 114 line 12

MS DAVENPORT
Mr Wilson please only one of us at a time. Mr Nottingham regardless of what you think **the Tribunal are not going to make any findings against this man.** The allegations are findings against you and your **co-defendants**

34. The prejudicial commentary vocalized by **Ms Davenport** has disavowed the Second Respondent of a just and reasonable decision on the facts presented. The examination of the Appellant was conducted to establish that he was an aggressive, argumentative individual with a propensity to make the most outrageous of allegations without evidence.

35. Once establishing the historical conduct and allegations the Second Respondents were to direct the Tribunal to the evidence in support of the Appellants allegations that he could subsequently identify the voices of the persons alleged to have made a number of phone calls to him. The inference is that it was impossible. For these submissions to have any weight findings are required to be made as against the Appellant, the tribunal having commented forcefully that she would not be making such findings.

36. The Second Respondents would then submit that the Second Respondents conduct was not in anyway consistent with a professionally liquidator going about his lawful business but a person employed by Mr Mayer in furtherance of the inimical scheme. The cross examination sought to establish circumstantial evidence as quoted by Hansen J in *BMW v Pepi*, the learned High Court quoting *Pollock* CB in R v Excel (1866) 4 F & F 922 at p 928

It has been said that circumstantial evidence is to be considered as a chain and each piece of evidence a link in that chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain weight, but three strands together may be of quite of sufficient strength. Thus it may be circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of.

H. TELL ME AND THE WITNESS WHAT YOUR PLAN

37. The Appellant had already admitted in cross examination to a number of the strands of the rope and facts had been established that would have gone to the motivation and credibility of the Appellant. The conduct of **Ms Davenport** was such that the Second Respondent was required to disclose the direction and motivation to the Appellant. As detailed at page 75 line 13 of the notes of evidence.

MS DAVENPORT

....so perhaps you can tell me ***about what your plan is***

MR NOTTINGHAM

My plan of attack her ma'am is that I think its fairly evident that Mr Wilson relied on hearsay allegations about what Remax did. There's absolutely no evidence which has been my position from day one.....The tenants were subject to abuse. We received from. ***I mean this is submission rather than me extracting evidence and I object to that, but as you see my cross examination was achieving some results.***

38. The intervention detailed above at page 75 line 13 is telling and is a well settled matter of law indicating bias. The Second Respondent being required to disclose to the tribunal his plan in front of the witness. See *Williams v Willems at page 37 line 20*

The only way that this is going to be able to be done- for it is trite that Perry Mason-like reversals of testimony happen in our courts- would be a painstaking review of the transactions which had taken

place. And, there were some items in the evidence which left it open for Mr Langton to pursue just such a cross examination. Put shortly, that is what cross examination is all about in a case of this kind. It can be tedious, and it would certainly need to be meticulous. Here ,to my mind, the intervention, and the character of them, patently disturbed the progress of cross examination. ***As I have noted counsel was actually required to disclose to the Judge, in the presence of the witness, where he was trying to go before the question was put.*** *To my mind those unprovoked interventions substantially contributed to the unfairness of the trial*

39. The Appellant had already admitted to willful blindness as to the truth or otherwise of the alleged Gould security, to knowingly failing to make enquiry of Mr Denholm despite having a telephone conversation with Denholm. The very inclusion of the disclaimer in the liquidators report indicating that the Appellant had reason to doubt the veracity of the security and allegations of fact filed in his report. His alleged abject failure and apparent disinterest in clarifying the representation, the failure of Mr Gould to press the matter or file a proof of debt drawing the negative inference that the alleged security was fraudulent. It is submitted that the Appellant has maintained the allegations contained in his initial liquidators report. See notes of evidence at page 121 line 6

NOTTINGHAM
You never contacted Mr Gould who's a creditor for $730,000

WILSON
Not my responsibility

Page 121 line 17

WILSON
Ok Ok . But listen to this. Is that's not my position to even consider allegations that are made by third parties prior to involvement with liquidation

WILSON
To be perfectly honest it's non of my business

40. The Appellants comments that he was not interested in Mr Gould's $730,000, security and Mr Mayers misleading affidavit should be seen as against his threatening of a creditor with a criminal offence who was **subsequently paid.** And that another creditor Ross Burns (the crown Solicitor) had been threatened with a criminal offence. This point was raised by the Second Respondent at page 126 line 20

NOTTINGHAM
Did you warn him about criminal offending

WILSON
No None of my business

41. The Second Respondent was to draw the tribunals attention to the failure of the Appellant to seek disclosure of the documentation from Mr Gould and Denholm under his powers a liquidator, his failure to file accounts for the income and expenditure of the hostil run on the Levels F and G. His failure of the Appellant to make enquiries of Mr Denholm, or Mr Mayer who could have proven the truth or otherwise of the security, must draw the negative inference. See *BMW v Pepi at 102,096*[22] wherein the learned Hansen J quotes from Thomas J in *New Zealand Diary Containers v NZI Bank Ltd* (1994) 7 PRNZ 465, at 468

"In short the rule in Jones v Dunkel permits the Court in appropriate circumstances to draw an inference in a civil case, where there is an unexplained failure by a party to give evidence or call a witness or tender documents, that the uncalled evidence would not have assisted that party's case…

I. TRIBUNAL WILL NOT BE CONSIDERING EVIDENCE ON FILE

42. **Ms Davenport** makes yet another predetermination on the admissibility of the evidence contained in the Bundle of evidence.
The Second Respondent objects submitting that the evidence of the Doctor was part of the back ground contained in the bundle. One example should suffice page 63 line 12

MS DAVENPORT
What happened between Mr Grobler and Mr Wilson or anyone else we can't determine. *So you want to keep asking him questions that relate to what we can um make orders on*

MR NOTTINGHAM
It's part of the file Ma'am. It's part of independent evidence as to what occurred *which is the background to the, to the allegations.*

43. The Tribunal are referred to the section 109 (1) of the Real Estate Agents Act at Paragraph 12.1 of the Second Respondents submissions dated September 2011. Section 109 materially provides;

109 Evidence

[22] BMW New Zealand v Pepi Holdings Ltd (1997) 6 NZBLC 102,060

(1) Subject to section 105, the Disciplinary Tribunal may receive as evidence any statement, document, information, matter that may in it's opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law

44. It is submitted that the hearing was reduced to the Second Respondent being abused and intimidated and bullied by the Appellant with the assistance of the Tribunal. An objective reading of the transcript can only leave one with a strong impression that the Second Respondents were not getting a fair crack of the whip. See

[67] An objective reading of the transcript leaves the strong impression that the defendant did not "get a fair crack of the whip". While one should not be "prim" in dealing with the appearance of pre determination, the cumulative effect of the number questions, the tenor, of them and the "colour" or "flavor" of the judges intervention means that there is an appearance that the Judge viewed States case with disfavor. It is also evident that the extent of the interventions meant the Appellant could not have it's case put fairly.

J. THE THREATS, APPELLANT THREATENS SECOND RESPONDENT BEFORE THE TRIBUNAL

45. For the record, the expansion of the proceedings, and lack of settlement is not of the Second Respondents making, but is squarely due to the conduct of the Appellant and **Ms Davenport**. After wasting a full day of the Tribunals hearing time, the Appellant, realizing he had made seriously false and unsubstantiated allegations, attempts to induce the Second Respondent to settle the matter. When the Appellant is unsuccessful, the Appellant, commences to abuse, bully, intimidate and otherwise coerce the Second Respondent, **in front of the Tribunal**, without any attempt at sanction or any control, from any member of the Tribunal. See Page 74 line 21

MR WILSON
*…Is that all you have to do is be man enough to have the integrity which I believe that the Government, that the Parliament expects of real estate agents to have the integrity and the common decency to apologise for making these scurrilous text comments and this can be the end of the matter…..**are you prepared to do that**….*

NOTTINGHAM
No.

WILSON
I know, because you. ***I mean and what that says to me is that you are neither man enough nor do you have the fundamental integrity required. Is that you shouldn't be a real estate agent.***

Page 133

What say this case goes against you, it could be worse for you. It seems to me this is the better of two evils…..this could go pear shaped for you. It could be worse…

46. It is submitted that Ms Davenport showed bias in that tribunal file and the notes of evidence disclose the following;

46.1 Failure to require the filing of particulars of the Appellants case in accordance with the directions of Judge Hobbs.

46.2 Failure to require compliance with the minute of the tribunal dated 14th March 2012.

46.3 Failure to allow oral submissions on the strike out application by the Second Respondent, despite advices in writing and contained in the notes of evidence.

46.4 Failure to control the Appellant's conduct in the stand. which included inter alia,

46.3.1 abusing the Second Respondent.

46.3.2 Making allegations and submissions rather than answering questions.

46.3.3 Interrupting the Second Respondent during cross examination to put him off his game and requiring he discover his cross examination to the Appellant.

46.3.4 Allowing the Appellant to threaten the Second Respondent in front of the tribunal should he not accede to cross apologies without the withdrawal of the false criminal allegations against the Second Respondents.

46.4 Predetermination of the admissibility of the evidential statements found in the bundle. One example should suffice page 63 line 12 of the notes.

46.5 The tongue in cheek comments of Mr Hodge and the Second Respondent at page 129 of the notes of evidence is telling;

MR HODGE

> But as I say I wouldn't be asking many questions and then there's submissions and **there's been a lot of submission given in evidence I think.** Well you know.
>
> **MR NOTTINGHAM**
> Hopefully I can try and contain any interruption's from Mr Wilson when he's asking some questions Ma'am. Maybe keep my evidence to as much as possible to what's in the briefs and affidavit

K. EXTRANEOUS INFLUENCES

47. The Second Respondent is reluctant to bring to the attention of the tribunal the extraneous influences that may have had an influence over the handling of this proceeding.

48. The Second Respondent accepts that the conduct of the Appellant was at times a struggle to control, at times impossible, and this could have effected the conduct or determination of Ms Davenport to control and narrow the proceedings to be able to complete the hearing in it's allotted time.

49. The result however was that the hearing went astray. If the matter had been dealt with by Judge Hobbs or a judicial officer with perhaps more experience at the coal face of the District Courts, more capable and used to the argy bargy of combat then the result may have been different.

50. As a result of enquiries it has been established that Ms Davenport shares chambers with the following individuals which give cause for concern given the nature of the disputes. It is appropriate to say that the Second Respondent has no issue with Paterson J. The dispute before this learned Justice involved an attempt by Mr Reed QC to hand up a prejudicial secret communication to his honour during a hearing, resulting in a recusal application. That application was unsuccessful but the court found in favour of Mr Dermot Nottingham against the Police in a speeding fine appeal, " failure to give disclosure argument"

50.1 Paterson J (retired) *D. Nottingham v Police*
50.2 Mr Katz QC, *Murray Auto Sales Ltd v Collector of Customs and anor*
506.3 Christine Meechan. *RSL v Nottingham*
50.4 Fisher J(retired) *RSL v Nottingham*

51. Although ultimately successful in all the proceedings before, or involving Ms Davenports learned colleagues. The various conflagration's may have resulted

in influences explaining how the proceedings went so far astray. See *State Insurance Ltd v McLaren,* Hansen J, AP 10/1,High Court Blenheim, 7th May 2001 [23]wherein the learned Justice quotes from *Minister of Immigration and Multicultural Affairs: Exparte Epeabaka* [2001] HCA 23 at para 80:

> In 1943 Judge Frank, writing for the Second Circuit of the Court of Appeal in the United States, pointed to the obvious fact that "[t]he human mind, even in infancy, is no blank piece of paper. He went on:
>
> > " We are born with predispositions; and the process of education , formal and informal, creates attitudes which precede reasoning in particular instances and which, therefore by definition, are prejudices….Interest, point of view, preferences are the essence of living. Only death yields complete dispassionateness , for such dispassionateness signifies indifference…
> >
> > The concealment of the human element in the judicial process allows that element to operate in an exaggerated manner; the sunlight of awareness has an antiseptic effect on prejudices. Freely avowing that he is a human being, the judge can and should through self-scrutiny, prevent the operation of this class of biases.

52. The Second Respondent respectfully requests that the Tribunal recuse itself based on these submissions and the affidavits to be filed in support.

53. The Second Respondent as previously stated would be happy to have the matter transferred to another tribunal incorporating the previous members Messrs Gaukrodger and Denley and to have the matter recommenced as set down with any new chair reading the notes of evidence. It is understood that the evidence as to the demeanour of the witness when it comes to the tests set out in Farynia v Chorney [1952] 2 DLR 354 (BCCA) may be an issue but hopes a suitably experienced judicial mind could suitably assess the matter based on the notes of evidence, submission and the assistance of the remaining tribunal members.

Dated this 18th June 2012

_____

Phillip Nottingham

Second Respondent

[23] *State Insurance Ltd v McLaren,* Hansen J, AP 10/1,High Court Blenheim, 7th May 2001(unreported)