IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA164/2021
CA630/2021
CA719/2021
[2022] NZCA 353

BETWEEN	SOFT TECHNOLOGY JR LIMITED Appellant
AND	JONES LANG LASALLE LIMITED Respondent
AND	REAL ESTATE AGENTS AUTHORITY Intervener

Hearing:	27 April 2022
Court:	Clifford, Goddard and Dobson JJ
Counsel:	D R Bigio QC and A C Eager for Appellant M C Harris and A G H Bradley for Respondent S A Armstrong and G S A Morrison for Intervener
Judgment:	4 August 2022 at 3 pm

JUDGMENT OF THE COURT

A The appeals are allowed.

B The costs orders in the High Court are set aside. The respondent must pay the appellant costs on a 2B basis and usual disbursements in the High Court.

C The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements in this Court.

REASONS OF THE COURT

(Given by Dobson J)

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[1] These appeals arise from proceedings in which the respondent real estate agent, Jones Lang Lasalle Ltd (JLL), made claims for commissions from the appellant commercial property owner, Soft Technology JR Ltd (Soft Tech), in respect of two leases. The leases had been entered into after an initial lease of part of Soft Tech's property in respect of which Soft Tech accepted that it was liable to and did pay JLL a commission. In the High Court JLL succeeded on its claims for commissions for the two subsequent leases (the first High Court judgment).[1] The High Court also found in JLL's favour that its commissions could include amounts calculated on turnover rents, and that JLL was entitled to interest from the dates of demand for payment (the second High Court judgment),[2] as well as indemnity costs (the costs judgment).[3] Soft Tech appeals against all aspects of the orders against it.

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1 *Jones Lang Lasalle Ltd v Soft Technology JR Ltd* [2021] NZHC 351, (2021) 22 NZCPR 58 [First High Court judgment].

2 *Jones Lang Lasalle Ltd v Soft Technology JR Ltd* [2021] NZHC 2538 [Second High Court judgment].

3 *Jones Lang Lasalle Ltd v Soft Technology JR Ltd* [2021] NZHC 3069 [Costs judgment].

[2] Contractual dealings between property owners and real estate agents are materially influenced by the provisions of s 126 of the Real Estate Agents Act 2008 (the Act). In summary this section provides that a real estate agent is only entitled to commission for work performed under a written agency agreement, complying with applicable regulations, that has been signed by the client and agent where a copy has been given by the agent to the client within 48 hours of the client signing it.[4] The Court is, however, given a limited power to order that commission is payable despite failure by the agent to provide the client with a copy of the agency agreement within 48 hours.[5]

[3] In the High Court Downs J held that s 126 of the Act did not require completion of a signed agency agreement prior to the agent undertaking work for which commission was claimed.[6]

[4] That finding was contrary to the interpretation of the section that has been applied consistently by the Real Estate Agents Authority (the Authority), the independent body established pursuant to the Act to regulate real estate agents licensed under it.[7] Since inception, the Authority has administered its responsibilities under the Act on the basis that agency agreements are required to be signed by both parties before an agent undertakes real estate agency work on behalf of a property owner for which the agent would seek commission.

[5] The Authority sought leave to intervene in the appeals to present arguments in support of its contrary interpretation of s 126. Leave was granted for it to do so.[8] As a result, we had the considerable benefit of the Authority's submissions in hearing this appeal, an advantage not enjoyed by the High Court.

The factual background

[6] Soft Tech owns a substantial property at Access Road, Kumeu. It comprises two lots, Lot 1 of 19.96 ha and Lot 10 of 7.16 ha, making a total of 27.12 ha. The sole

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4 Real Estate Agents Act 2008, s 126(1).
5 Section 126(2) and (3). The full terms of s 126 are set out at [29] below.
6 First High Court judgment, above n 1, at [87]–[93].
7 Real Estate Agents Act, ss 10 and 12.
8 *Soft Technology JR Ltd v Jones Lang Lasalle Ltd* [2022] NZCA 115.

representative of Soft Tech involved in relevant dealings was Mr Peter Ryoo, who manages the company and is responsible for its business.

[7] In early 2015 the then buildings on Lot 1 were occupied mostly by timber-industry tenants. Lot 10, which was practically only accessible via Lot 1, was covered in bush.

[8] In August 2015 a representative of JLL sent a brochure to Mr Ryoo seeking a retainer to pursue potential leasing opportunities for the property. The brochure was accompanied by a draft agency agreement. An earlier attempt to obtain instructions from Mr Ryoo in March 2015 had not borne fruit and by August other real estate agents were contacting Mr Ryoo about leasing opportunities for the property.

[9] On 4 September 2015 two JLL representatives, Messrs David Mayhew and Connor McEvoy-Roberts, met with Mr Ryoo. Mr Ryoo signed a general agency agreement, after making some additions to its printed terms, and gave it to Messrs McEvoy-Roberts and Mayhew. As explained in more detail below, the agreement was not signed for JLL by Mr Mayhew until 21 December 2015. Even then, a copy was never provided to Mr Ryoo. He did not receive a copy of the signed agreement until it was provided on discovery in the High Court proceedings.

[10] By September 2015 there was interest in the property being used for film production purposes. A former JLL agent, Mr Martin Hudson, had by mid-2015 become a representative of another agency, Metro Commercial Ltd (Metro Commercial). Mr Hudson had a working relationship with a Mr Harry Harrison, who was responsible for attracting international film production ventures to Auckland on behalf of an Auckland City Council-controlled organisation called Auckland Tourism, Events and Economic Development Ltd (ATEED). In early May 2015 Mr Harrison asked Mr Hudson to help him identify sites that might be appropriate for film production facilities. Around the time of Messrs Mayhew and McEvoy-Roberts' meeting with Mr Ryoo in early September 2015, Mr Hudson learned from Mr Mayhew that Soft Tech's property was likely to become available and might be of interest to ATEED. Mr Hudson duly relayed the possible availability of the property to Mr Harrison, who had previous familiarity with it.

[11] Metro Commercial and JLL then agreed on some terms for a commission-sharing arrangement, which have no relevance to the present appeal. Thereafter Messrs Hudson and Mayhew joined forces in promoting the property to Mr Harrison for ATEED.

[12] Mr Harrison had two international film studios interested in the property, one of which was Warner Brothers. Towards the end of October 2015 those interests were sufficient for JLL to provide to Mr Harrison a draft agreement that contemplated Warner Brothers taking on a short-term lease. Initially the draft contemplated a lease of both Lots 1 and 10 but Warner Brothers had no requirement for the bush-covered Lot 10, so that was removed. It was Mr Harrison who forwarded the draft agreement to Mr Ryoo, who had initially been unenthusiastic about the property being used for film production undertakings because of the uncertainty about consistent ongoing use.

[13] Before making any commitment, Mr Ryoo insisted that JLL reduce the extent of the commission that it would charge from that stipulated in the agency agreement he had signed in early September. After negotiations, JLL agreed to Mr Ryoo's demand.

[14] Soft Tech then entered into a lease with a subsidiary of Warner Brothers called Manu One Ltd (Manu One) on 15 December 2015 (the Manu One lease). The lease was for a term of 10 months with two rights of renewal of one month each. JLL invoiced Soft Tech for its commission on the Manu One lease shortly thereafter. That invoice was paid in full by JLL. Mr Harrison and ATEED's involvement was that of a facilitator or further broker. It appears that ATEED neither sought compensation for its involvement, nor did it contemplate accepting any liability under the lease that its involvement had facilitated.

[15] The direct line of communication between Messrs Harrison and Ryoo that operated in October 2015 was either continued or was at least resumed some months into 2016. There is no dispute about the Judge's finding that further discussions about the property between Soft Tech and ATEED began no later than 21 March 2016.[9] The subject of the discussions was the use of the property after completion of the

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9 First High Court judgment, above n 1, at [24].

movie being produced by Manu One, including the future of facilities that were built on the property for the purposes of that project.

[16] The New Zealand Film Commission | Te Tumu Whakaata Taonga (NZFC) administers grants to incentivise production of films in New Zealand amounting to 20 per cent of production costs for qualifying projects. The NZFC also has capacity to provide an additional five per cent uplift grant for projects that create and leave available for subsequent use so-called "legacy assets". Warner Brothers sought the additional uplift grant with the help of ATEED, in negotiations with the NZFC. To optimise the opportunities for subsequent use of the property for film production, Soft Tech was drawn into discussions concerning the prospect of it committing capital to build additional facilities on the property. At some point in these discussions ATEED's role changed from being a facilitator or broker of leasing arrangements between the commercial property owner and film production companies, to a potential lessee of the property itself, in order to facilitate sequential use of the property by future film production projects.

[17] By November 2016 these discussions had progressed to the point where Soft Tech and ATEED completed a Memorandum of Understanding (MOU), which reflected Soft Tech's preparedness to commit capital to build further facilities and for ATEED to lease the property from Soft Tech. The MOU contemplated that ATEED would take two leases, each for similar periods, depending (among other things) on the extent to which proposed new facilities on the property could be constructed by Soft Tech. To this end, the MOU also contemplated Soft Tech and ATEED would enter into an agreement to design, build and lease shortly after the first lease was entered into. The MOU recognised numerous significant conditions that needed to be satisfied for the lease transactions to proceed, including certain milestones which, if not achieved by specified dates, would bring the arrangements to an end.

[18] The first of the leases between Soft Tech and ATEED duly commenced on 21 February 2017 (the first ATEED lease). It was for an initial term of four years and covered both Lots 1 and 10 except for two small areas. After its commencement ATEED made a public statement about the arrangements constituting a "fantastic

milestone for Auckland's film industry", and foreshadowing use of the property by successive film production projects.

[19] After the Manu One lease was entered into, JLL made attempts to market the property to potential new clients and, in December 2015, Mr Mayhew showed the property to a prospective tenant. Mr Mayhew took other similar initiatives in February and May 2016. He asked Mr Ryoo in June and August 2016 when the property would be available. It appears Mr Ryoo did not respond enthusiastically to any of these contacts from JLL and did not advise JLL of the ongoing dialogue he was having with Mr Harrison and ATEED.

[20] In April 2017 JLL claimed commission from Soft Tech in respect of the first ATEED lease. On 17 May Soft Tech wrote to JLL and advised that it considered their agency agreement had expired in December 2015 when the Manu One lease was completed because that amounted to the property being fully leased. Soft Tech went on to advise that, even if the agency agreement was still in force, its letter should be taken as notice of its termination.

[21] As contemplated in the MOU, an agreement to design, build and lease between ATEED and Soft Tech was entered into on 9 November 2017. This agreement was set to expire on 20 February 2021, being the same date as the expiry of the first ATEED lease. ATEED and Soft Tech entered into a second lease on 18 May 2018 after Soft Tech successfully built the new facilities (the second ATEED lease), which had the same expiry date.[10]

[22] JLL sued for commissions in relation to the first and second ATEED leases. Soft Tech denied all aspects of JLL's claims on a range of grounds.

The agency agreement

[23] The agency agreement between Soft Tech and JLL was written using a standard JLL form concerning JLL's agency to lease premises. A reference schedule on the first page included details such as the agreed commission rate, and the commencement

[10] For reasons not material for the present appeal, Soft Tech and ATEED entered into an Agreement to Amend and Restate the Second ATEED lease on 20 November 2019.

and expiry dates of the agreement. Clause 1.1 confirmed the appointment by the client of JLL as the client's agent. Clauses 2.1 to 2.4 specified the extent of the authority granted to JLL. This included the authority to incur expenses in promoting the property and to arrange inspections of it.

[24] Provision for payment of commission and fees were in the following terms:

> 1.2. If the Premises or any part of the Premises is leased:
>
> a) by Jones Lang LaSalle; or
>
> b) through the instrumentality of Jones Lang LaSalle; or
>
> c) to anyone introduced, either directly or indirectly, by Jones Lang LaSalle; or
>
> d) by the Client or any other real estate agent or person during the term of any Exclusive Agency regardless of whether or not Jones Lang LaSalle introduced the lessee,
>
> then the Client agrees to pay Jones Lang LaSalle without deduction or set off (legal or equitable) or counterclaim:
>
> e) Commission at the Agreed Commission Rate calculated on the GST exclusive rental (plus GST) as a standard fee plus any additional fees and other payments specified in the **attached** fee scale ("**Fee Scale**") plus GST; or
>
> f) if a percentage rate is not specified in the Reference Schedule, the fees and any other payments specified in the Fee Scale plus GST;
>
> g) any other moneys owed to Jones Lang LaSalle pursuant to this contract.
>
> 1.3. The minimum fee referred to in the Fee Scale will apply in any event. Jones Lang LaSalle is entitled to be paid the fees and other amounts it is owed if the Premises or any part of the Premises is leased to anyone introduced to the Client by Jones Lang LaSalle before the expiry or termination of this contract or if an agreement for lease is entered into within 6 months after the expiry or termination of this contract. Jones Lang LaSalle shall be entitled to immediate payment of monies owed to Jones Lang LaSalle upon any of the following events occurring:
>
> a) signing of an unconditional agreement to lease or agreement to assign a lease; or
>
> b) the date on which a conditional agreement becomes unconditional; or
>
> c) the lessee taking possession of the Premises; or

d) the date when rent payments are payable by the lessee.

1.4 Any monies owed by the Client to Jones Lang LaSalle shall at Jones Lang LaSalle's election attract interest at the rate of 1.5% per month from the due date of payment until the actual date of payment at Jones Lang LaSalles' election.

(Original emphasis.)

High Court judgments

[25] In the first High Court judgment the Judge first found that JLL's participation effected an introduction of ATEED to Soft Tech and the property, which was sufficient to entitle JLL to commission for the first and second ATEED leases.[11] The Judge rejected Soft Tech's argument that the agency agreement had expired on entry into the Manu One lease because that lease did not relate to the whole of the property.[12] At the same time the Judge rejected an argument for JLL that it was entitled to commission on the first and second ATEED leases by virtue of ATEED being "an associate" of Manu One.[13]

[26] The Judge then dealt with what by then had become Soft Tech's primary argument: that the agency agreement was unenforceable because it had not been completed prior to JLL undertaking the work for which it claimed a commission. The Judge rejected Soft Tech's arguments that s 126 of the Act imposed that temporal condition and instead found that an enforceable agreement could be concluded after the agent had done the relevant work.[14] That being so, the Judge went on to consider JLL's application for relief from its non-compliance with s 126(1)(c) that required it to provide Soft Tech with a copy of the agreement within 48 hours. The Judge found that JLL's failure to do so was caused by its inadvertence so that relief should be granted under s 126(2).[15]

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11 First High Court judgment, above n 1, at [47]–[48] and [65].

12 At [69]–[75].

13 At [80]–[81]. Clause 13 of the scale of fees appended to the agency agreement provided that a fee would be payable on subsequent lettings of additional space to the same lessee "(or an associate or subsidiary of the lessee)".

14 At [88]–[93].

15 At [100]. See also at [94].

[27] The Judge then found that commission was recoverable, in the amount of two months' gross rental.[16] He also recognised that further issues would need to be determined if they could not be resolved between the parties in light of the findings already made.[17]

[28] In the second High Court judgment, issued on 28 September 2021, the Judge determined further issues.[18] He held that the rent on which JLL's commission was to be calculated included turnover rent that was payable under the first ATEED lease.[19] The Judge also held that commission was payable on the second ATEED lease, including on an alternative basis, and recovery of the full extent of commission charged in accordance with the agency agreement would be fair and reasonable.[20] Further, the Judge held that JLL could claim interest pursuant to the terms of the agency agreement.[21] In the costs judgment, the Judge upheld JLL's contractual entitlement to indemnity costs.[22]

Section 126

[29] The impact of s 126 of the Act on the enforceability of the agency agreement is fundamental to Soft Tech's denial of liability for the further commissions claimed. Section 126 provides:

> **126 No entitlement to commission or expenses without agency agreement**
>
> (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
>
> (a) the work is performed under a written agency agreement signed by or on behalf of—
>
> (i) the client; and
>
> (ii) the agent; and

16 At [107].
17 At [3]–[4].
18 Second High Court judgment, above n 3.
19 At [12]–[16].
20 At [44], [49] and [56].
21 At [66] and [72].
22 Costs judgment, above n 3.

(b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and

(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.

(2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.

(3) A court may not make an order described in subsection (2) unless satisfied that—

(a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and

(b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and

(c) failure to make the order would be unjust.

(4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

Submissions

[30] On Soft Tech's interpretation of s 126(1), the agency agreement must have been completed before the work in respect of which commission was sought was performed. That temporal condition was not complied with, and moreover belated completion of the signed agreement is not a form of non-compliance for which the Court can grant relief under s 126(2).

[31] On JLL's case, the only temporal condition was that in s 126(1)(c). It had not complied with that but could seek relief from the Court under s 126(2) and (3). JLL claimed it was a deserving case for relief and the Court had correctly granted it the full extent of the commission payable.

Discussion

[32] The purpose of the Act is stipulated in s 3 as being:

> … to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

[33] Section 3 also states that purpose is to be achieved, inter alia, by regulating agents, raising industry standards and providing accountability through an independent disciplinary process.[23]

[34] Section 126 is to be interpreted with that purpose of protecting consumers in mind. It is noted that s 126, which states there can be no entitlement to commission or expenses without a written agency agreement, appears in pt 5 of the Act, which is headed "[d]uties relating to real estate agency work". Other provisions in that part include requirements to furnish accounts to clients,[24] and to have audited trust accounts.[25]

High Court's interpretation of s 126

[35] The Judge interpreted s 126 as not requiring the completion of an enforceable contract before the agent undertakes the work in respect of which it claims commission. This was first because the definition of agency agreement in s 4(1) of the Act does not specifically require all agency agreements to be concluded in writing.[26] That definition of agency agreement is:

> … an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction

[36] Because the s 4 definition does not exclude the prospect of oral contracts, the Judge found that rules on formation of an agency agreement are left to ordinary contractual principles.[27]

[37] The Judge was reinforced in this conclusion by the reasoning in *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd*, a decision of the

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23 Real Estate Agents Act, s 3(2).
24 Section 124.
25 Section 125.
26 First High Court judgment, above n 1, at [87(a)].
27 At [87(a)].

New South Wales Supreme Court on the equivalent provisions in that jurisdiction.[28] In that case the Court answered several questions before trial on the effect of those provisions. Having held that their terms precluded the agent from recovering commission where there had been non-compliance with the requirements of the relevant provisions, the Court went on to consider whether the agent might have a cause of action seeking a quantum meruit. In that context, the Court observed:[29]

> These sections do not forbid the making of any contract. Nor do they render a contract void. There is no prohibition upon the rendering of agency services where the statutory conditions are not satisfied. There is nothing to stop a client or principal making voluntary payment for agency services rendered in such circumstances …

[38] The Court went on to find that any quantum meruit or other form of restitutionary claim would also be blocked by the statutory provisions.[30] Barrett J observed:

> [86] It may be thought that such a result is harsh in a case such as this involving apparently sophisticated property development parties dealing at arm's length in a straightforward, commercial way and in circumstances not involving any apparent need for consumer protection in the generally accepted sense. It certainly seems to me to be harsh. The result is nevertheless one dictated by statutory provisions of long standing and must be accepted by both the court and the parties.

[39] We do not treat those observations as to the possibility of entry into unenforceable agency agreements (here, those that do not comply with s 126), or voluntary payment of commission, as material to determining whether enforceable agency agreements (those conforming to s 126) are required to be completed before the services to which they relate are undertaken. There is a distinction between the formation of agency agreements and their enforceability. Generally, and certainly in this case, the only type of contract that is relevant is one pursuant to which the agent can recover commission. It is artificial to consider a counterfactual in which JLL would be acting as a volunteer in providing services to Soft Tech, in reliance on some unenforceable assurance from Soft Tech that it would pay an agreed commission irrespective of JLL's lack of capacity to make a legal claim for it. Section 126

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28 At [87(b)], citing *Investmentsource Corp Pty Ltd v Knox Street Apartments Pty Ltd* [2002] NSWSC 710, (2002) 56 NSWLR 27.

29 At [66].

30 At [85].

addresses enforceability and does so by constraining what would otherwise be agents' freedom to contract on any terms they could negotiate, and in any form.

Legislative history of s 126

[40] The previous statute regulating the industry, the Real Estate Agents Act 1976, addressed the requirement for a written agreement in different terms:[31]

> **62 Real estate agent to have written contract of agency**
>
> No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him or her as a real estate agent, unless—
>
> (a) He or she was the holder of a licence as a real estate agent under this Act or the holder, or the partner of a holder, of a licence as a real estate agent under the Real Estate Agents Act 1963 at the time of the performing of the service or work; and
>
> (b) His or her appointment to act as agent or perform that service or work is in writing signed *either before or after the performance of that service or work* by the person to be charged with the commission, reward, or consideration or by some person on his or her behalf lawfully authorised to sign the appointment.
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> (Emphasis added.)

[41] The Judge considered the extent of change from that provision, which permitted the written appointment of the agent to be signed either before or after performance of the work, when compared with the current requirement for the work to be undertaken "under" a written agreement.[32] He held the changes in wording would be too subtle a way of introducing a new requirement that the agency agreement had to be completed before the work was performed.[33] JLL endorsed the Judge's view on this point and submitted that any requirement for completion of the agency agreement before performing the work would need to have been explicitly introduced into the new legislation.

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31 Section 62 of the Real Estate Agents Act 1976 adopted the terms of the previous provision in s 79 of the Real Estate Agents Act 1963.

32 First High Court judgment, above n 1, at [88]–[89].

33 At [91].

[42] The extent of the difference between s 62 of the 1976 Act and the current s 126 goes beyond the respective provisions as to timing for completion of agency agreements. Although the heading of the former s 62 was "[r]eal estate agent to have written contract of agency", the essential requirement in s 62(b) was that there be written confirmation of an agent's appointment to act as such. There was no requirement for the terms of the retainer to be agreed in writing. By contrast, the current provision does not expressly require written confirmation of the agent's appointment.[34] Instead, it requires the written agreement to comply with the requirements specified in regulations made under s 156 of the Act.[35] Those changes broaden the scope of what has to be in writing and can be seen as reflecting greater concern for consumer protection.

[43] Of more direct relevance, s 62 provided that the written appointment of the agent could be signed either before or after performance of the service or work. Permitting written evidence of an agent's appointment after performing the services contemplates that an oral retainer was deemed sufficient for the purpose of promoting the client's property, without addressing any preconditions for an agent to claim commission. Given the variety of circumstances in which there are likely to be unequal bargaining positions between agents and clients, that liberty is inconsistent with protecting the interests of consumers of agents' services, the purpose stipulated in s 3(1) of the Act. When the full terms of the former s 62 and the current s 126 are compared, the impact of the removal of the liberty for an agent to procure the written record of appointment after the provision of services is more than a subtle change.

[44] For completeness, it is noted there is nothing in Hansard or the Select Committee report addressing the reasons for changing the requirements for a written agency agreement. However, the general emphasis in the debates and report was on the protection of consumers of agents' services.[36]

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34 That requirement is now in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012: see r 9.6.

35 Real Estate Agents Act, s 126(1)(b).

36 See, for example, Real Estate Agents Bill 2007 (185–2) (select committee report) at 1 and 3; and (11 December 2007) 644 NZPD 13815.

Plain meaning of s 126 and surrounding context

[45] The terms of s 126 preclude an agent enforcing a claim for commission or expenses unless the agent has performed the work it charges for "under" a written agency agreement. If the requisite agreement does not exist in an enforceable form, then in literal terms it is not possible for the agent to perform work "under" its terms. The same proposition holds if the word "under" is replaced with "pursuant to", or "in accordance with". An agent's conduct cannot be pursuant to, or in accordance with, a contract the terms of which have not been committed to. Because it is unenforceable until completed in compliance with s 126, it is artificial to say that the agent would know how to perform "under" its terms because of earlier oral arrangements consistent with the written agreement.[37] The use of "under" in s 126(1)(a) indicates a temporal sequence requiring the agency agreement to be in place before the relevant work is undertaken.

[46] Consistently with that temporal sequence, s 126(1)(c) requires that a copy of the signed agreement "was given" to the client within 48 hours of being signed by the client. The use of the past tense requires the act of providing a copy of the completed agreement to have occurred before the essential activity addressed in the section, that is, the work to be performed. Tense is not unimportant in interpreting statutory provisions, and the assumption of deliberate use of past or present tense should be reflected in the meaning given to the provision.[38]

[47] Additionally, the definition of "agency agreement" in s 4 must be applied where it is used in s 126, to work out when an agency agreement is enforceable.[39] In combination, an enforceable agency agreement is one that operates as the source of the agent's authority to market a property and which was committed to writing and processed in accordance with the s 126 requirements.

[48] Further, the terms of the Act's provisions following s 126 confirm the requirement of the temporal condition that the agency agreement must be completed

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37 We note this is not a contention available on the facts of the present case.

38 See *Police v Bradley* [1974] 1 NZLR 113 (CA) at 116; *Gisborne Harbour Board v Spencer* [1961] NZLR 204 (CA) at 216; and *New Zealand Trotting Conference v Ryan* [1990] 1 NZLR 143 (CA) at 149.

39 The s 4 definition of "agency agreement" is set out at [35] above.

before the work for which a commission will be claimed is undertaken. First, s 127 imposes an obligation on agents intending to enter an agency agreement for the sale of a residential property to first provide the person giving instructions to them with a copy of the "approved guide" and obtain a signed acknowledgement that guide has been provided to the person.[40] The "approved guide" is one that has been approved by the Authority for that purpose.[41] The educative and consumer protection function reflected in this section reinforce the intention for all the rules of engagement between agents and clients (where they are involved in sales of residential properties) to be conveyed to the client before any commitment to the agent's services is made.

[49] Secondly, s 128 requires disclosure by the agent of the source of any rebates, discounts or commissions to which the agent may become entitled in respect of expenses incurred on behalf of the client.[42] The section also requires the agent to specify the estimated amount of such rebates, discounts or commissions. These disclosures are required by s 128 to be contained in the agency agreement.[43] That section similarly reflects a statutory purpose to have all the relevant contractual provisions conveyed to, and agreed by, the client before an entitlement to claim commission can be enforced.

[50] Thirdly, s 129 provides for regulations to be made under s 156 of the Act to specify one or more standard forms of agency agreement and the manner and form in which the disclosure about other remuneration that may be payable to the agent under s 128 is to be made.[44]

[51] Fourthly, s 130 applies to any agency agreements entered into by a client on a sole-agency basis. Where a sole agency is entered into, the client has until 5 pm on the first working day after the day on which a copy of the completed agreement was provided to them to cancel the agreement by written notice to the agent.[45] As Mr Harris, for JLL, pointed out, it would not always advantage a client to have that right of cancellation triggered from the outset of the engagement, given the potential

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40 Real Estate Agents Act, s 127(1).
41 Section 127(2)(b).
42 Section 128(1)(a).
43 Section 128(1)(b).
44 Section 129(a) and (b).
45 Section 130(1). The agreement in this case was a general, rather than a sole-agency one.

for clients to take advantage of it after an agent had promoted the sale or lease of their property. However, the timing of the right of cancellation generally works fairly in the interests of both parties if all necessary disclosures and completion of the agreement have occurred prior to the agent undertaking the work, so as to have time running under s 130 from that point.

[52] The combined effect of ss 127–130 is consistent with optimising consumer protection. The temporal condition we favour in s 126 is also consistent with that purpose.

Practical effect of the s 126 temporal condition

[53] The Judge also considered that the requirement for agency agreements to be completed before the agent undertakes the work it wants to be paid for would "often be unworkable".[46] However, Ms Armstrong, counsel for the Authority, emphasised that the requirement for completed written agreements before commencing work for which commission is claimed is a consistent expectation, and is a feature of the Authority's monitoring of agents for compliance with their regulatory obligations.

[54] Ms Belinda Moffat, the Chief Executive of the Authority, completed an affidavit in support of the Authority's intervention in the appeal. Ms Moffat annexed to her affidavit a copy of the current guidance to real estate licensees that is provided to them, including via the Authority's website. That guidance explains that agents need to meet a number of requirements that are set out in the Act and in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). The guidance stipulates that before an agent can receive a commission or expenses for real estate agency work:

> — There must be a written agency agreement in place before [the agent does] any work.
>
> — The agency agreement must be signed by or on behalf of the vendor and the agent.
>
> — [The agent] must give a copy of the agency agreement to the vendor within 48 hours of [it] being signed.

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46 First High Court judgment, above n 1, at [87(c)].

[55] The Authority cited the additional requirements in the Real Estate Agents (Duties of Licensees) Regulations 2009 (the Regulations) and the Rules to support its submission that the industry can and does work in compliance with the requirement that written agency agreements be completed before the work for which a commission will be claimed is undertaken. Ms Armstrong submitted that the High Court decision in this case is the first time a court has questioned the requirement as the Authority discerns it to be.

[56] The content of secondary legislation provided for in a statute and relevantly reflecting provisions in the statute may be a secondary aid to interpretation of the statute but cannot be used to alter its meaning.[47] That approach has been applied where the secondary legislation was introduced contemporaneously with the statute in question. That is not the case here as the relevant regulations were promulgated shortly after the statute was enacted.[48] Nonetheless, cautious regard to the relevant content of regulations may be warranted.[49] There are several indications from the Regulations and the Rules of the requirement for agents to procure written agency agreements in a timely way with content conforming to the requirements of s 126. For example, the Rules distinguish between "client[s]" and "prospective client[s]"[50] based on when an agreement is completed.[51] The Rules also provide that duties are owed only to "client[s]",[52] and prohibit the marketing of a property without an agreement.[53]

[57] Ms Armstrong submitted that the agency agreement would not be enforceable by the client until executed by the agent. Accordingly, it is important that both parties

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47 See, for example, *Campbell v Accident Compensation Corp* CA138/03, 29 March 2004 at [52] per William Young J; *Hanlon Law Society* [1981] AC 124 (HL) at 193–194, as cited in R I Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 349–350; and *Re Earthquake Commission* [2011] 3 NZLR 695 (HC) at [28].

48 The Act was enacted on 16 September 2008 whereas the Real Estate Agents Act (Professional Conduct and Client Care) Rules were enacted in 2009, following consultation in accordance with s 16 of the Act. The 2008 Rules have subsequently been replaced with the 2012 Rules to materially the same effect.

49 See, for example, *Brown v New Zealand Basing Ltd* [2017] NZSC 139, [2018] 1 NZLR 245 at [34], [38], [43]–[47], [67] and [72].

50 See, for example, Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, r 9.7.

51 Rule 4.1 definition of "prospective client".

52 See, for example, r 6.

53 Rule 9.6.

were committed to the terms that were considered and which were possibly negotiated, before the work for which JLL is seeking payment was undertaken.

[58] Mr Harris submitted that the aim of protecting consumers was not advanced by requiring agency agreements to be concluded before work is undertaken. On the present facts, once the terms were agreed and Soft Tech signed, then arguably both parties knew the terms under which the agency would operate and from that point on Soft Tech had the protection of those contractual provisions. Mr Harris argued that no greater consumer protection would be afforded if JLL was required to complete execution of the agreement and provide a signed copy to Soft Tech before undertaking the agency work.

[59] We disagree with the submissions of the respondents. There is an additional measure of protection for consumers if the standard procedure for dealing with agents requires both parties to be committed to written terms before the agent undertakes work in promoting the client's property. If those terms are only negotiated after part or all the agent's services have been performed, then in a variety of circumstances there will be an inequality of bargaining positions favouring the agent. Users of agents' services are routinely unfamiliar with market practices and are dependent on agents for advice, leading to unequal bargaining positions. Generally, where consumer protection is a reason for imposing constraints on freedom of contract, having the terms for provision of services specified at the outset is likely to improve the level of protection for consumers. Of course, in other circumstances there may be a bargaining position favouring the client.

[60] There is a further consequence that advances consumers' interests if agreements under s 126 are required to be completed before work is performed. A standard requirement for disclosure of their terms of engagement by all agents is likely to encourage competition for better standards of service where agents have to present the terms on which they would accept instructions at the outset. That enables more meaningful comparison by prospective clients of the terms offered to them by competing agents. In cases of sales of residential property, the client's understanding of the process and of the agent's role is also enhanced by the obligation under s 127 of the Act for prior provision of the guide as approved by the Authority. In this regard,

there is little sense in agents providing the terms they offer only after part or all the work has been undertaken.

[61] The submissions for the Authority tended to confirm that agents routinely undertake extensive preparatory work to promote their services to a vendor or lessor in the knowledge that they do not have authority to market the prospective client's property until an agreement is concluded and that they are not entitled to commission until an enforceable agency agreement is concluded. A statutory or regulatory requirement that the agency agreement be reduced to writing, signed by both parties and copied to the client does not, with respect to the Judge's view on this, render the activities of agents unworkable.[54]

[62] Mr Harris submitted that if the temporal condition on completion of agency agreements as contended for by the Authority and Soft Tech was upheld, an unduly punitive result would occur. This was because there would be no prospect of a court granting relief in favour of an agent that did not procure timely completion of a written agency agreement, whereas s 126(2) and (3) do provide for relief where the agent has failed to comply with timely delivery of the signed agreement to the client.

[63] That possible outcome does not produce a material inconsistency in the scheme of the Act. Completion of written agency agreements before the agent undertakes the work for which it will seek commission is more fundamental than compliance with the obligation to provide a copy to the client within 48 hours of the client signing the agreement. If there is a completed and signed agency agreement, the client will know its terms and will have approved them. Provision of a copy of the signed agreement, while important, is less significant than ensuring the terms have been provided to, and agreed by, both parties. We are not persuaded that this perceived inconsistency in the prospects for relief requires s 126(1) to be interpreted more permissively.

[64] Balancing all the influences on the interpretation of s 126, including the removal of the previous permission for a contract to be concluded after the services to

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[54] Relatedly, the Judge also considered entitlements to commission being dependent on satisfaction of conditions over which agents have no control as being undesirable/unrealistic: Second High Court judgment, above n 3, at [40]–[41]. However that is an entirely routine feature of the business of real estate agencies.

which it related had been performed, and the temporal sequence contemplated by the terms of s 126(1), when analysed in light of the statutory purpose of the Act, we are satisfied that the Act requires the prior completion of an enforceable agency agreement.

[65] There is little point in testing the outcome this interpretation produces by reference to the merits of the parties to this appeal. There were ample indications in the evidence that Mr Ryoo was not a client who required consumer protection. He is clearly an experienced and astute businessman, evidenced by his success in negotiating a reduction in the level of the commission he had agreed to pay JLL. JLL gives every appearance of being a substantial and well-organised agency, whose systems might reasonably be expected to conform with all legal requirements. It could not and did not plead unfamiliarity with the statute and the Rules and Regulations as administered by the Authority. There appears not to have been evidence of how widespread the practice is of undertaking commercial leasing assignments such as this without the agreement signed and returned to the client prior to undertaking work for which commission is claimed. The Act sets one standard for all engagements and is to be interpreted in light of the statutory purpose.

Overseas authorities

[66] Although not cited in his written submissions, Mr Bigio invited adoption of the interpretation of the equivalent New South Wales provisions in a 1988 unreported decision of the Equity Division of the Supreme Court of New South Wales in *Multo Pty Ltd v Craddock*.[55] In that case an unscrupulous client of a licensed agent provided a series of excuses for not signing an agency agreement presented to her on numerous occasions by the agency. When advised of the extent of the commission that would be charged for a sale that had been arranged by the agent, the client dissembled, purported to terminate the arrangement with the agent and concluded a contract privately with the buyer that had been introduced to the property by the agent. The agency commenced proceedings seeking a declaration that it was entitled to have its agreement with the client specifically performed plus consequential relief requiring payment by the client of the relevant commission.

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[55] *Multo Pty Ltd v Craddock* NSWSC4004/87, 11 March 1988.

[67] The relevant wording of s 42AA of the Auctioneers and Agents Act 1941 (NSW) was in the following terms:

> (1) A licensee shall not be entitled to—
>
> (a) any remuneration by way of commission, fee, gain or reward for services performed by him in his capacity as licensee; or
>
> (b) any sum or reimbursement for expenses or charges incurred in connection with services performed by him in his capacity as licensee,
>
> from the person for whom or on whose behalf those services were performed unless—
>
> (c) the agreement pursuant to which those services were performed is in writing and signed by or on behalf of—
>
> (i) the licensee; and
>
> (ii) that person;
>
> (d) the agreement contains such terms (if any) as may be prescribed; and
>
> (e) a copy of the agreement was served by the licensee on that person within 48 hours of the agreement being signed by or on behalf of that person.

[68] Bryson J found:

> In [s 42AA] the comprehensive disentitlement can be escaped only by falling within the exceptions in subparagraphs (c), (d) and (e) following the word "unless". Paragraph (c) would not be complied with unless the agreement pursuant to which the services remunerated were performed were in writing. It would not be enough that it should be confirmed in writing, or evidenced in writing; and an oral or implied agreement would not meet the prescriptions of subparagraph (e). There could be no signing and there could be no copy unless there were a written agreement. The terms of subsection (c) make it plain that the performance of the terms must be subsequent in time to the formation of the agreement in writing. If there were any room for an entitlement to arise under an oral agreement which was later to be reduced to writing, the fact that the services had been performed before it was reduced to writing would not make it less true that the services were performed pursuant to the written agreement; but that line of thought is not available in the operation of paragraph (c); if the services must be pursuant to the agreement in writing they must be later in time than the time when the agreement was either originally made in writing or was later reduced to writing.

[69] There does not appear to have been any reconsideration of this reasoning, and certainly no authorities in the same jurisdiction that disagree with the temporal

condition the Judge found to be unavoidable. His approach to interpretation is similar to our own.

Conclusion

[70] We accordingly uphold the primary ground of the appeal. The terms of s 126 required a written agency agreement to be completed prior to JLL undertaking the work for which it claims a commission from Soft Tech. It is common ground that that did not occur and accordingly the claims by JLL for commission in respect of leases for the property arising out of introductions effected by it are unenforceable.

[71] The application of s 126 is sufficient to resolve the appeals in Soft Tech's favour. Counsel for the parties (but not the Authority) provided comprehensive submissions on a series of further issues that had been determined in JLL's favour in the High Court, and we now turn to those on the alternative basis that the agency agreement was not rendered unenforceable by JLL's tardy completion of it.

The remaining issues

[72] Soft Tech advanced a series of further challenges to the High Court judgments if the agency agreement was not rendered unenforceable for non-compliance with s 126. These all challenged JLL's entitlement to commission on the first and second ATEED leases:

(a) that JLL had insufficient involvement in the formation of those leases to claim it had effected an introduction that would qualify it for commission;

(b) that even if it qualified JLL to claim commission, JLL should not be granted relief from its non-delivery of the signed copy of the agency agreement pursuant to s 126(1)(c) of the Act because that omission was not occasioned by inadvertence or other cause beyond the control of the agent, as required under s 126(3);

(c) that if JLL was entitled to relief, then its commission ought not to include amounts calculated on turnover rents;

(d) that the absence of an enforceable claim at the time means that interest ought not to be chargeable; and

(e) that JLL was not entitled to claim costs on an indemnity basis pursuant to the contractual provision that authorised it in defined circumstances.

[73] We address the arguments presented and our views on these issues in a somewhat different sequence. This is because we would uphold Soft Tech's appeal against the Judge's finding that JLL's failure to provide a copy of the signed agreement within time was occasioned by inadvertence. That provides an alternative ground on which the appeal would succeed.

Was JLL's omission inadvertent?

[74] The Judge assessed whether JLL's omission was occasioned by "inadvertence" by adopting the common meaning of the word as "not resulting from or achieved through deliberate planning".[56] He found that because Messrs Mayhew and McEvoy-Roberts did not take the opportunity to provide Mr Ryoo with a copy of the agreement when one of them could have signed it at their meeting with him on 4 September 2015 and given it to him then, that the failure to do so then and thereafter was "consistent with inadvertence".[57] Thereafter, in the sequence of events, the Judge found nothing that disentitled JLL from characterising its omission as inadvertence.

[75] When Mr Mayhew's attention was drawn to the absence of completion of the agreement at the end of October 2015, he was overseas on holiday. Mr Mayhew impressed the Judge as an honest witness in circumstances where he had made no attempt to conceal when he signed the agreement, which was on 21 December 2015

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56 First High Court judgment, above n 1, at [99], citing *Concise Oxford English Dictionary* (11th ed, Oxford University Press, Oxford, 2006).

57 At [100(a)].

at a time when the Judge considered his conduct had likely been affected by "the phenomenon of a Christmas rush".[58]

[76] JLL provided no evidence as to why the agency agreement was not signed by Messrs Mayhew or McEvoy-Roberts during the meeting at which Mr Ryoo signed it on 4 September 2015. It can be inferred that the meeting afforded them a reasonable opportunity to do so. Of the two JLL representatives at the meeting, Mr McEvoy-Roberts was the listing agent. He had left JLL before the hearing and was not called as a witness. Mr Mayhew stated that Mr McEvoy-Roberts was usually good with his paperwork but appeared to have been "sloppy" on this occasion.

[77] On 28 October 2015 Mr Hudson of Metro Commercial emailed Messrs Mayhew and McEvoy-Roberts pointing out that the agency agreement had not been signed by JLL. Mr Mayhew was overseas on holiday at the time and explained in evidence that when he returned he found himself involved in a "fee dispute" of sorts that was an apparent distraction making him assume that the agency agreement had already been signed and delivered. That is a less than satisfactory explanation as to why on his return he or another representative of JLL did not treat it as a priority to minimise the extent of non-compliance with the obligation to provide a copy of the signed agreement to the client.

[78] What appears to have triggered signature of the agreement by Mr Mayhew on 21 December 2015 was the preparation of an invoice for commission on the Manu One lease. Mr Mayhew's evidence was that internal procedures at JLL meant he could not submit the invoice in the absence of the signed agreement. Having signed it, he still did not provide a copy of it to Mr Ryoo with the invoice when that was dispatched. The agreement was provided only on discovery in the proceedings.

[79] On 2, 3 and 4 November 2015 Mr Mayhew had represented in exchanges with Mr Ryoo that the agency agreement existed, in the context of Mr Ryoo's attempts to renegotiate the extent of commission payable on the Manu One lease. Those references to the agency agreement were made by Mr Mayhew between five and seven days after Mr Hudson's reminder that JLL should sign the agreement.

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58 At [100(d)].

[80] We agree with the Judge that one aspect of the interpretation of "inadvertence" is to contrast such omissions with ones that are deliberate. However, we interpret s 126(3)(a) to require an agent seeking relief to make out somewhat more than that the omission was not deliberate. The concept of "inadvertence" is linked in the paragraph to "other cause beyond the control of the agent". That colours the nature of inadvertence intended by Parliament. It contemplates that failure to provide the written agreement to the client due to, for example, the unforeseen intervention of others, will be excusable. Certainly, if the inadvertence has to be of a type that was beyond the control of JLL, then the circumstances here clearly do not qualify.

[81] Given the importance attributed in the Act to completion of agency agreements and provision of their written terms to clients, we do not agree that relief should be available under s 126(3)(a) where, in effect, the agent seeks relief on the basis that it simply did not get around to complying with the requirement for an extended period. The concept of "inadvertence" or other cause beyond the control of the agent in this context is limited to a minor administrative slip, or unforeseen disruption caused by others. It effectively requires the omission to occur without negligence.

[82] That cannot be said of the circumstances of the non-provision of the signed agreement in this case. Mr Mayhew acknowledged awareness of the requirements of the Act in his evidence. JLL did not provide evidence of external circumstances or of an internal administrative slip that led to its failure to sign the agreement and return it to Mr Ryoo within 48 hours of his having signed it. Almost eight weeks later JLL was put explicitly on notice of its omission by Mr Hudson but did nothing. There were ample opportunities afterwards to provide Mr Ryoo with a copy of the signed agreement; instead, there was non-compliance with the obligation until discovery in the proceedings. That reflects a measure of negligence by JLL that cannot be excused as inadvertence.

[83] Accordingly, even if a written agency agreement was not required to be signed before the work for which commission is claimed was undertaken, non-compliance with the requirement for provision of a copy of the signed agreement did not occur in circumstances in which JLL was entitled to relief under s 126(2).

Did JLL introduce ATEED?

[84] JLL was entitled to a commission if any part of the property was leased, through its instrumentality, by anyone introduced to Soft Tech either directly or indirectly by JLL.[59]

[85] The Judge referred to a number of earlier High Court judgments on the application of clauses providing for the entitlement of agents to commissions. It is sufficient to repeat the observations of Tipping J in *Harcourts Group Ltd v McKenzie*:[60]

> In my judgment questions of causation, for present purposes, must be approached on the basis that the primary contractual stipulation is that commission will be payable if the property is sold to anyone introduced to the property through Harcourts' agency. If the agent can show that the ultimate purchaser was introduced to the property through his agency then prima facie as a matter of construction commission is payable. The prima facie obligation to pay commission ceases only when the agent's introduction ceases to have a material bearing on the sale. By that I mean that the agent's introduction was no longer instrumental in any material way in bringing about the sale. That, in my judgment, is the only way to harmonise the words of the contract with the proposition established by the authorities that there must be some causal connection between the introduction and the sale. In an ordinary case the connection will be self evident. In a case where the point is in dispute it will ultimately be a matter of fact and degree whether the introduction remained instrumental.

[86] The Judge dealt with numerous arguments raised for Soft Tech to the effect that JLL's involvement was outside what is required to entitle it to commission. He rejected those arguments and found that JLL had effected an introduction of ATEED to the property, and that there remained a sufficient causal connection between their introduction and the subsequent first and second ATEED leases.[61]

[87] On appeal, Mr Bigio made extensive reference to the sequence of events between Manu One committing to the initial lease, and the subsequent direct negotiations between Soft Tech and ATEED leading to the November 2016 MOU,

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59 The terms of cl 1.2 of the agency agreement are quoted at [24] above.

60 First High Court judgment, above n 1, at [45], citing *Harcourts Group Ltd v McKenzie* HC Christchurch AP129/93, 9 September 1993 at 7.

61 At [47]–[48] and [65].

the February 2017 second MOU, the first ATEED lease and the second ATEED lease. Mr Bigio distanced JLL's involvement in the subsequent leases on two grounds.

(a) First, that JLL's introduction of the property to ATEED occurred when ATEED was not itself a prospective lessee, but rather was a broker seeking to promote properties to film production entities that would enter into leases with Soft Tech. Mr Bigio's argument was that the introduction could not be an effective one if it was not in the contemplation of those involved that ATEED would take a lease of the property.

(b) Secondly, that the extensive negotiations and steps taken after entry into the Manu One lease were so far removed from the introduction of ATEED to the property that the causal connection between the introduction and commitment to the later leases was broken.

[88] As to the first ground, we do not accept that an introduction has to occur in a context where the party introduced is interested in leasing (or, in other circumstances, purchasing) the property. The agent's task is to effect an introduction of the party that subsequently contracts with the agent's client irrespective of the circumstances of the initial connection between the agent and the party with which its client contracts.

[89] Where an agent is retained to find a lessee for premises, and a prospective lessee brings an advisor such as an architect or lawyer to view the premises, and the party originally expressing interest does not pursue it but such an advisor does, then the agent has effected the introduction of that party irrespective of the different capacity in which the party was initially shown the premises.

[90] Equally, where a party is shown premises available for lease by an agent of the owner, and the party subsequently negotiates to purchase rather than lease the premises, then depending on the terms of the agency agreement, the agent would be entitled to treat that as an introduction giving rise to an entitlement to commission.

[91] Mr Bigio's second challenge was that more than enough occurred after JLL's initial introduction of ATEED to the property to break the chain of causation so that (to adopt Tipping J's characterisation in *Harcourts Group Ltd v McKenzie*[62]) the agent's introduction was no longer instrumental in any material way in bringing about those leases.

[92] As Tipping J observed, this analysis is a matter of fact and degree.[63] ATEED had been aware of the property for some years before JLL's re-introduction of ATEED to Soft Tech and the property. Mr Harrison had initially inspected the property in 2012 but nothing came of ATEED's interest at that time. Once the Manu One lease was concluded, JLL did nothing more to bring about the leases ATEED subsequently entered into. The factors contributing to subsequent entry into the first and second ATEED leases include ATEED's role in helping Warner Brothers procure the additional NZFC grant, which led to negotiations with Soft Tech to commit substantial capital to construct additional facilities on the property. There was also the change from ATEED's previous disinclination to be a lessee itself, to recognising the commercial desirability of doing so. In short, the lease agreements eventually entered into were in a very different commercial context from what was in contemplation when ATEED expressed interest in the property in the second half of 2015.

[93] However, we agree with the Judge that the sequence of events between Mr Harrison establishing a direct dialogue with Mr Ryoo in early 2016 up to the completion of the first and second ATEED leases did not move sufficiently away from the circumstances of the introduction effected by JLL to break the chain of causation. Rather, JLL brought the property to ATEED's attention as an available site appropriate for film production activities, and that introduction extended to initial fostering of the relationship between Messrs Ryoo and Harrison.

[94] Accordingly, if it were relevant, we would uphold the Judge's finding that JLL had effected an introduction that qualified it for commission on the first and second ATEED leases.

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62 *Harcourts Group Ltd v McKenzie*, above n 60.
63 At 7.

The second ATEED lease — did the MOU qualify JLL for commission?

[95] The first ATEED lease was concluded in February 2017, before Soft Tech gave notice of termination of the agency agreement with JLL on 17 May 2017. Accordingly, so long as JLL's work was sufficient to effect an introduction, then, had it been able to overcome its non-compliance with s 126 of the Act, it would have been entitled to claim commission in respect of the first ATEED lease.

[96] The second ATEED lease was signed and commenced on 18 May 2018, substantially outside the six-month sunset period after the termination of the agency agreement, which expired in November 2017.

[97] Accordingly JLL's claim for commission on the second ATEED lease depends on the MOU which was completed between Soft Tech and ATEED in November 2016 constituting a sufficient commitment to lease part of the property to bring it within the scope of JLL's entitlement to claim commission as set out in cls 1.2 and 1.3 of the agency agreement between the parties.[64]

[98] JLL's entitlement to commission on the second ATEED lease was addressed in the second High Court judgment. The Judge found that the terms of the MOU constituted a sufficient commitment to lease to entitle JLL to a commission.[65] Mr Bigio challenged this finding, submitting that the MOU was only an agreement to negotiate further agreements and had wrongly been interpreted as containing a specifically enforceable agreement for leases to be agreed and entered into.

[99] The MOU recorded the parties' intention:

> … that three lease documents will be negotiated and entered into following satisfaction of the Conditions Precedent:

The first ATEED lease was to be of the existing improvements on the land and the relevant underlying part of the land. The second agreement was to be one for the design, build and lease of the remaining land. It was to prescribe Soft Tech's obligations as lessor to develop further improvements, and to record the parties'

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64 Clauses 1.2 and 1.3 of the agency agreement are set out at [24] above.

65 Second High Court judgment, above n 3, at [29]–[30] and [44].

obligation to enter into a second lease. Once the improvements described in the agreement to design, build and lease were completed, the parties were to enter into the second ATEED lease over the entire land and all of the then improvements.

[100] Mr Bigio cited numerous conditions precedent, including timing deadlines, which, if not met by the dates specified in the MOU, would bring all the arrangements between the parties to an end. He also emphasised that the MOU did not record any lease terms, nor did it commit the parties to adopt standard terms from an identified form of lease such as the Auckland District Law Society's lease form, or to have any impasse on lease terms resolved by a third party: the terms of the leases, including rent, were at large. Consequently he submitted that the MOU did not commit the parties to leases, and was not a document that could qualify JLL for commission.

[101] We agree with the Judge that the terms of cls 1.2 and 1.3 of JLL's standard agency agreement apply to the MOU.[66] So long as JLL had effected the introduction of the lessee to the lessor resulting in a conditional commitment by the lessee during the term of the agency agreement, and the conditions were thereafter satisfied so that an unconditional lease ensued, commission would be payable (provided that regulatory obligations had been complied with).

[102] The entitlement to commission is triggered by the entry into a conditional commitment between the parties. Where the commitment is subject to conditions, then JLL is entitled to demand payment once the commitment becomes unconditional, pursuant to cl 1.3(b) of the agency agreement.

[103] JLL's scale of fees appended to the agency agreement contained a consistent provision as to when leasing fees became due and payable. Relevantly, events triggering the payment obligation included when a conditional agreement to lease became unconditional.

[104] The MOU did reflect an unusual extent of conditionality, if compared to more usual terms of conditional agreements to lease. However none of the conditions, including "drop dead" dates for milestones to be achieved, deprived the MOU of its

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66 Second High Court judgment, above n 3, at [42]–[44].

status as a conditional agreement to lease the whole property. The extent of the conditions precedent was more significant than would often be the case, but represent only differences of degree rather than kind. If they were not all satisfied then JLL could not have demanded payment under cl 1.3(b), just as with any agreement to lease that was negotiated subject to less significant conditions precedent.

[105] Accordingly, had prior issues not been determined against JLL, we would have found the MOU was sufficient to create an entitlement to claim commission on the second ATEED lease, subject to satisfaction of the conditions precedent.

[106] Given the view we adopt in relation to the status of the MOU, it is unnecessary to address an additional ground for JLL's claim to commission on the second ATEED lease. It was argued in the High Court that an additional provision in the scale of fees that applied to the agency agreement gave the agent an entitlement to a fee where there was a subsequent letting by the lessor of additional space to the lessee. The Judge accepted JLL's contention that the second ATEED lease reflected the provision of additional space for ATEED once Soft Tech completed the construction of additional facilities on parts of the property.[67] The MOU had contemplated that the second ATEED lease would apply to the whole of the lessor's property, whereas the first ATEED lease was to apply to a lesser area.

[107] We therefore need not express a view on Mr Bigio's arguments challenging that analysis.

Would commission be payable on turnover rent?

[108] The scale of fees attached to the agency agreement defined rent, on which fees would be payable, as follows:

> "rent" means the total rental reserved by the lease or agreement to lease for the whole term together with any additional charges such as outgoings, contributions, partitions or shop front rentals, naming or signage rights, car parking fees and any other payment to or on behalf of the lessor for which the lessee is responsible under the lease or agreement to lease.

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[67] Second High Court judgment, above n 3, at [48]–[49].

[109] Both the first and second ATEED leases provided for a base rent and then a turnover rent which was to be calculated as a set percentage of the income received by ATEED from licensees of the premises, after deduction of the base rent. The base rent was payable in advance and any additional payment due by way of turnover rent was to be paid within seven days of the first day of each month in arrears following receipt of the income from a licensee.

[110] The Judge held that the turnover rent should be included in the amount of rent on which JLL's commission was to be calculated.[68] Soft Tech challenged that finding, submitting that the extent of commission was intended to be calculable before the relevant lease started, and that uncertainty and administrative difficulties with the ongoing prospect of additional commission that would depend on the level of income received from licensees was neither contemplated by the terms of the agency agreement nor commercially desirable.

[111] In addition, Mr Bigio relied on evidence given by a Mr Seagar, an expert witness for Soft Tech at the hearing, to the effect that the rent on which commissions were payable generally complied with the meaning of "gross rental". In Mr Seagar's opinion, that expression as it was used in the industry did not include turnover rent.

[112] Mr Bradley, who presented this aspect of the argument for JLL, submitted that the broad definition of rent on which commission was to be calculated clearly included an additional form of rent such as that calculated on turnover received by the lessee, and that there was no adequate reason why an ongoing liability to account for additional commission ought not to be enforced.

[113] If it was otherwise entitled to commission, we would have accepted JLL's position on this issue. The definition of "rent" clearly captures payments received by the lessor from the lessee for occupation of the land, however calculated and whenever paid. The prospect of an ongoing obligation to report to JLL and to account to it for additional commission by way of turnover rent is not inconsistent with either the terms of the agency agreement or the nature of the relationship it contemplated.

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[68] Second High Court judgment, above n 3, at [16].

JLL's entitlement to interest

[114] The Judge upheld JLL's claim for interest at the rate stipulated in the agency agreement, from the dates on which JLL contended that interest would have been payable.[69] The Judge was satisfied that it would be unjust not to make that order and that the impediment to JLL claiming interest until the first High Court judgment was a matter of JLL's "modest inadvertence".[70]

[115] On appeal, Soft Tech challenged that ruling primarily on the ground that, until relief was granted under s 126(2) of the Act in the first High Court judgment, Soft Tech did not owe any monies to JLL. The parties invited analogy with various Australian and English decisions addressing entitlement to interest in similar circumstances.

[116] If the primary appeal had not succeeded, we would have determined any claim for interest simply on the basis that the liability did not arise until the issue of a judgment invoking the discretion to relieve JLL from non-compliance with the obligation under s 126(1)(c). We would accordingly have limited any award of interest to that payable under the Judicature Act 1908 from the date of the first High Court judgment.

JLL's entitlement to indemnity costs

[117] JLL claimed indemnity costs in reliance on a provision in the agency agreement that all costs of and incidental to the recovery of fees and other payments due to it "shall be payable by [Soft Tech]". Such costs included legal costs on a solicitor/client basis. The Judge found that contractual provision was enforceable, and granted JLL costs on an indemnity basis.[71]

[118] Soft Tech challenged the application of the contractual costs provision in the event its appeal was unsuccessful. Mr Bigio submitted that the costs provision ought to be read as applying only in circumstances where amounts were inarguably owed to JLL. In contrast, here JLL could not claim any amount was "due" for costs until it

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69 Second High Court judgment, above n 3, at [66]–[72].
70 At [70]–[71].
71 Costs judgment, above n 3, at [7].

could persuade the Court to exercise its discretion to relieve it of the consequences of non-compliance with s 126(1)(c). On Mr Bigio's argument, where liability is genuinely arguable, the costs provision should not apply and should be determined by the outcome of a disputed claim in the usual way.

[119] JLL supported the Judge's award of indemnity costs essentially on the ground that if the outcome of its claims was that fees or other payments were owing to it, then the indemnity applies to require Soft Tech to meet its legal costs in making out the liability.

[120] Adopting the same approach to JLL's entitlement to interest on contractual terms, we would have allowed the appeal against the order for indemnity costs. JLL was unable to pursue any claim for commission or other payments until it persuaded the Court to relieve it of the consequences of non-compliance with s 126(1)(c). Even if we are wrong in the view we have taken concerning inadvertence, JLL's conduct in failing to meet its statutory obligations takes its claims outside the circumstances in which it could pass the costs of making out its claims onto the client, whose position was not protected, as the Act contemplated it would be.

[121] Accordingly, if the primary appeal had not succeeded, we would have overturned the High Court order entitling JLL to recover costs on an indemnity basis.

Costs

[122] Soft Tech has succeeded on the essential elements of its appeals. Although certain arguments were pursued on its behalf unsuccessfully, they are not sufficient in an overall assessment to limit the appropriate costs entitlement.

[123] The costs orders made in the High Court are set aside. JLL must pay Soft Tech costs on a 2B basis and usual disbursements in the High Court.

[124] JLL must pay Soft Tech costs for a standard appeal on a band A basis and usual disbursements in this Court.

[125] There is no issue as to costs for or against the Authority.

Result

[126] The appeals are allowed. Section 126 of the Act required JLL to have a signed agency agreement in place before undertaking the work in respect of which it claimed commission. Alternatively, the circumstances in which JLL failed to provide a signed copy of its agency agreement to Soft Tech within the time required by s 126(1)(c) did not constitute inadvertence or other cause beyond JLL's control so that it is not a case in which its non-compliance can be excused under s 126(2) and (3) of the Act.

[127] On the other issues in the appeals:

(a) JLL had effected a sufficient introduction of ATEED to the property, and the November 2016 MOU would have constituted a conditional agreement to lease that was sufficient, in the absence of statutory non-compliance, to qualify it to payment of commission.

(b) JLL would otherwise have been entitled to include turnover rent in the amount on which it could calculate recoverable commission.

(c) If JLL could avoid the consequences of statutory non-compliance, then it would still not have been entitled to interest or indemnity costs pursuant to the provisions on those matters in the agency agreement.

[128] The costs orders in the High Court are set aside. JLL must pay Soft Tech costs on a 2B basis and usual disbursements in the High Court.

[129] JLL must pay Soft Tech costs for a standard appeal on a band A basis and usual disbursements in this Court.

Solicitors:
Hesketh Henry, Auckland for Appellant
Gilbert Walker, Auckland for Respondent
Real Estate Agents Authority, Wellington for Intervener