

# Recent real estate decisions highlight the importance of internal practices for agencies

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## At a glance

- The New Zealand courts have recently had their say on two significant aspects of the law relating to real estate agents.
- The Court of Appeal's decision in *Soft Technology JR Limited v Jones Lang Lasalle Limited* [2022] NZCA 353 concerned a commission dispute. It is significant because the Court held that the real estate agent was not entitled to commission for work occurring before the execution of an agency agreement – a reversal of the High Court's earlier decision.
- *Soft Technology* represents a change in the law and reinforces for real estate agents the critical importance of ensuring that they have robust processes in place to discharge their client care obligations.
- In *Weber v Hastings District Council* [2022] NZHC 1405, the High Court considered a real estate agent's application to strike out the purchasers' claims, stemming from an alleged misrepresentation. The Court struck out the purchasers' claims on the basis that the real estate agents had merely acted as a conduit for the information provided by the vendors.
- The *Weber* case serves as a useful reminder of the principles applicable to the 'mere conduit' defence often available to real estate agents in cases of alleged misrepresentation.



## *Soft Technology JR Limited v Jones Lang Lasalle Limited* [2022] NZCA 353

### Background

Soft Technology JR Limited (Soft Tech) owned a substantial property in Kumeū. Jones Lang Lasalle Limited (JLL) approached Soft Tech in September 2015 regarding potential leasing opportunities. Soft Tech signed a general agency agreement with JLL that month. The agency agreement included a clause stipulating that commission was payable to JLL if the property was leased through its instrumentality, or to anyone introduced directly or indirectly by JLL. JLL did not sign the agency agreement until 21 December 2015 (after Soft Tech entered a short-term lease). A copy was never provided to Soft Tech.

Without having signed the agency agreement, JLL worked with another agency to promote the property to Auckland Tourism, Events and Economic Development Limited (ATEED), which was looking to attract film studios to Auckland.

On 15 December 2015, Soft Tech leased the property on a short-term basis to Manu One Ltd, a Warner Brothers subsidiary. JLL received commission from Soft Tech despite not having signed the agency agreement.

Over the course of 2016, ATEED and Soft Tech negotiated directly over longer-term use of the property as a film production site. They entered into an MOU and subsequently into two separate leases over the property (the ATEED leases). JLL became aware of the ATEED leases and claimed commission from Soft Tech. Soft Tech refused to pay and JLL issued proceedings in the High Court.

### Legal issues

Soft Tech said JLL's claim for commission under the agency agreement was unenforceable under s 126 of the Real Estate Agents Act 2008 (REA Act). Section 126(1) relevantly provides that an agent is not entitled to commission unless:

- the work is “performed under a written agency agreement” signed by the agent and the client
- the agency agreement complies with the applicable regulations, and

- a copy of the completed agreement is provided to the client within 48 hours of being signed by the client.

Sections 126(2) and (3) go on to provide that, despite a failure to provide a copy of the completed agreement to the client within 48 hours, the agent may still recover commission if certain conditions are met. One of those conditions is that the failure to provide the agreement was “occasioned by the inadvertence or other cause beyond the control of the agent.”

### High Court judgment

The High Court held that JLL was entitled to commission for the ATEED leases on the basis that JLL had introduced Soft Tech to ATEED, even though JLL performed the relevant work (i.e. the introduction of ATEED) before it signed the agency agreement. This was contrary to the approach of the Real Estate Agents Authority (REAA), which consistently took the view that a concluded agency agreement was a necessary prerequisite to an agent's entitlement to commission.

Further, the High Court held JLL's omission to provide Soft Tech with a signed copy of the agency agreement within 48 hours did not disentitle it to commission because its omission was inadvertent.

### Decision on appeal

The Court of Appeal overturned the High Court's decision. It held that s 126 required an enforceable agency agreement to be in place before the commencement of work for a real estate agent could be entitled to commission.

In reaching its decision, the Court considered the legislative history of the REA Act and its purpose of protecting consumer interests, including:

- The predecessor to the REA Act allowed agents to recover commission where an agreement was signed either before or after the performance of the relevant work. The REA Act, by contrast, is drafted in more restrictive terms, stating that no commission is payable unless work is performed “under a written agency agreement”. The Court considered that work could not be performed “under a written agency agreement” unless the agreement had been concluded.
- The more restrictive drafting of the REA Act reflected an intentional change to signal its purpose of consumer protection, with the rationale being that real estate agents typically have greater bargaining power than their

clients, and that prompt disclosure of agency agreements would go some way to redress that imbalance and allow consumers to make more informed choices.

The Court also held that JLL was not entitled to relief under ss 126(2) and (3) for inadvertently omitting to provide a copy of the agreement to Soft Tech within 48 hours. It held that those provisions could only provide relief where an agreement is concluded before the relevant work, but the agent inadvertently failed to provide a copy of that concluded agreement within 48 hours of the client signing it.

The Court commented further that inadvertence in this context necessarily requires an absence of negligence by the agent. The failure to provide the agreement in time must be due to situations such as a minor administrative slip or an unforeseen disruption caused by a third party.



## ***Weber v Hastings District Council*** **[2022] NZHC 1405**

### **Background**

This case concerned the sale of a property to the plaintiffs. On the listing form, the vendors indicated that they were unaware of any weathertightness issues affecting the property. This was incorrect – the vendors had in fact undertaken repairs to remedy weathertightness issues and had engaged in a lengthy process with the Hastings District Council (the Council) to secure a code of compliance certificate.

The only written communication between the agent and the plaintiffs before the offer was made involved the agent forwarding certain information about the property from the vendors. The information included correspondence between the vendors and the Council about the repairs to the property and a copy of the code of compliance certificate. The Court described this information as containing mixed messages – on one hand, it suggested the property may have had weathertightness issues, but it could equally be interpreted as showing that the issues had been resolved.

The plaintiffs purchased the property. They became aware of significant outstanding weathertightness issues when they came to sell the property over two years later. The plaintiffs issued proceedings against several parties, including the agent and the vendors, seeking to recover the cost of repairs.

The agent applied to strike out the claims against it on the basis that, even if the information contained in the documents it had forwarded to the plaintiffs was misleading, it had been a “mere conduit” for that information. Any misrepresentation contained in that information was therefore that of the vendors’, and only the vendors could be liable.

### **Judgment**

The Court observed that the leading authority on the conduit defence was the Court of Appeal’s decision in *Goldsboro v Walker* [1993] 1 NZLR 394.

The Court in that case held that an agent who simply passes on information from a principal (i.e. their client) is not liable for

misrepresentations arising from that information unless they do something to adopt that information as their own. The rationale for the rule is that the principal should be liable for the misleading conduct – not the party through whom the principal’s misleading conduct is merely conveyed.

In *Goldsboro v Walker*, the Court of Appeal held that the real estate agent went beyond being a mere conduit by:

- positively representing that a document had been signed by their client when, in actual fact, the signature was forged by another party, and
- providing further explanatory material alongside the principal’s information.

In contrast, the High Court in this case found that the agency had acted merely as a conduit for the information provided by the vendors. It had done nothing to adopt the information as its own. The agent’s covering email to the plaintiffs attaching the information did not contain any statement as to the accuracy of the information, nor did it add anything to the information being provided.



The Court in *Weber* therefore concluded that any misrepresentation contained in the information provided to the plaintiffs was made by the vendors and not the agent. Accordingly, it granted the agent's application to strike out the claims against it.



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### Implications for real estate agents

These two cases highlight the need for robust client care and marketing practices within real estate agencies.

The REAA has consistently taken the view that a concluded agency agreement is a necessary prerequisite to an agent's entitlement to commission. In overturning the High Court's decision in *Soft Technology*, the Court of Appeal held that s 126 required an enforceable agency agreement to be in place before the commencement of work for a real estate agent could be entitled to commission. By failing to conclude the agreement in a timely way, the Court determined that JLL was not entitled to relief under ss 126(2) and (3).

In *Weber*, the agency was found to have acted merely as a conduit for the information provided by the vendors and was granted its application to strike out the claims against it. It was important that the agent's covering email to the plaintiffs attaching the information did nothing to adopt the plaintiff's information as its own.

## Need to know more?

For more information about any of these topics, please contact our authors.



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