[2011] NZREADT 42

Reference No: READT 046/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**DAPHNE BROWN**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10050)**
	First Respondent
AND	**MARY WEALLEANS**
	Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Ms J Robson - Member
Mr G Denley - Member

APPEARANCES

Mr P Spring and Ms K Shanks for the appellant
Mr M J Hodge and Ms J MacGibbon, Counsel for First Respondent
No appearance for the Second Respondent

Introduction

[1] Ms Daphne Brown is a real estate agent in practice in Auckland. She appeals against a decision of the Complaints Assessment Committee 10050 ("*the Committee*") to lay charges against her relating to the sale of an apartment to Mr and Mrs Wealleans in Zest Apartments in Nelson Street in Auckland in 2006. Mrs Brown was the licensee for L J Hooker Development Services at this time.

Summary of Complaints

[2] In November 2006 Mrs Mary Wealleans and her husband attended a seminar given by L J Hooker Development Services (trading as City Investment Services Limited) in Hamilton. This was a seminar given by Hookers about property investment. Her evidence (in an affidavit dated 8 August 2011) was that at this seminar she received a brochure promoting property investment in Auckland. At the end of this seminar she made an appointment for a property consultant called Richard Phelan to visit her and her husband at home. The second visit was on 2 December 2006. Mrs Wealleans said that Mr Phelan gave her a booklet entitled *"How Investments Grow Return"* and he completed a work sheet entitled *"Personal Goals and Objectives"*

showing how Mr and Mrs Wealleans would benefit if they purchased a rental property in the Auckland CBD. Mrs Wealleans' affidavit is silent on this point but counsel advised the Tribunal that at the end of this meeting an appointment was made by Mr Phelan for Mrs Wealleans and her husband to see Jacqui McDermott a salesperson for L J Hooker Development Services in Auckland. The third meeting took place on 16 December 2006 in Auckland. Ms McDermott showed Mr and Mrs Weallans an apartment at Zest Apartments. Another agent Mr Mika, showed them a property investment analysis for the purchase of this apartment and this is annexed to Mrs Wealleans' affidavit. The apartment was sold to the Wealleans. In 2008 they discovered that the apartment which they had purchased for $248,000 was now only worth $143,000. They made a complaint to the REINZ. The Complaints Assessment Committee considered the complaint. In a decision dated 22 March 2011 the Complaints Assessment Committee determined that a charge should be laid against Ms Brown and a charge was accordingly laid. The charge has not progressed however because Ms Brown immediately appealed the decision of the Complaints Assessment Committee by Notice of Appeal dated 20 April 2011. Her solicitor has filed on her behalf a detailed Notice of Appeal. Her grounds of appeal are:

(i) The procedure adopted by the Complaints Assessment Committee breached the rules of natural justice.

(ii) The decision reached by the Committee was plainly wrong.

(iii) The Committee failed to take into account the relevant considerations.

(iv) The Committee took into account irrelevant considerations.

(v) The Committee should have exercised its discretion to hold an oral hearing.

(vi) The decision of the Committee was inconsistent with other Committee decisions.

[3] There has been vigorous debate between counsel for the appellant and counsel for the Complaints Assessment Committee as to the way forward and the charge [READT 45/11] and the appeal [READT 46/11] have continued to run in tandem. This hearing concerns only one aspect of the case – that there is no jurisdiction for the Tribunal to hear the charge. Then the parties wish the Tribunal to consider the procedure by which an appeal from a decision to lay a charge should be dealt.

[4] The first issue for the Tribunal to consider is a strike out application. The appellant asserts that the charge cannot proceed because the subject matter of the complaint is "*investment advice"* and investment advice is expressly excluded from real estate work (and thus the Act) by s 4(c)(v) of the Real Estate Agents Act. This section gives a definition of real estate agency work and excludes some items including at (v) *"the provision of investment advice"*.

[5] The second issue for the Tribunal to consider is whether or not the charge can be amended to the amended charge filed by the CAC in November 2011. Mr Hodge seeks orders confirming that the amended charge can proceed. Mr Spring argues that the substance of the amended charge is no different from the initial charge and it must also be struck out. He has no other objections to this amendment.

[6] The third issue for the Tribunal to determine is the procedure by which the Tribunal will deal with an appeal from a decision to lay a charge when the charge has also been laid. The issue is whether it should deal with the appeal in a similar matter to a Crimes Act s 347 application or whether there should be a full right of appeal?

[7] Lastly the Tribunal will if appropriate provide directions as to whether and how this matter can proceed to a hearing and whether this should be on the appeal or the charge or both and finally whether or not the amended charge can be upheld.

Issue 1: What is the meaning of s 4(c)(v)?

(i) The Tribunal propose to look at this by examining first the principles of statutory interpretation, then looking at the principles of a strike out and then considering the issue of appeal. Under this issue we will consider the purpose of the legislation and whether the CAC's role under s 91 is simply a *prima facie* to decide that there is a *prima* facie case to answer.

(ii) Section 4 provides a definition of real estate agency work. Section 4(a) says it means *"any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and includes any work done by a branch manager or salesperson under the direction of or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a);*

but (c) does not include … (v) the provision of investment advice".

[8] The Interpretation Act 1999 sets out how legislation is to be interpreted. Section 5 says that the meaning of an enactment must be ascertained from its text and in light of its purpose. It also provides that "*matters may be considered in ascertaining the meaning of enactment include the indications provided in the enactment. Examples of those indications are preambles, the analysis, a table of contents, headings, … marginal notes, diagrams, graphics … and organisation in format of the enactment*". Counsel referred the Tribunal to extracts from Hansard relating to the debate in the House of Representatives on the second reading of the bill and also to the Select Committee Report. The principles of statutory interpretation relating to the use of legislative material are set out in Statute law in New Zealand (4th edition, Burrows & Carter at page 183):

"(e) The intention of Parliament

It is very often said that the task of an interpreter, be it a judge or anyone else, is to give effect to 'the intention of Parliament'. The notion is even mentioned in some interpretive provisions.[59] *This exhortation is valuable to the extent that it reminds us that statutory interpretation is confined by the text that Parliament has enacted. A judge or other interpreter is not entitled to legislate, or to go beyond the text and impose solutions simply because they seem fair and just. In other words, the reliance on 'intention of Parliament' is an essential corollary of sovereignty of Parliament.*

However the notion is not devoid of difficulty.

First, some say the search for the 'intention of Parliament' is futile. Our lawmaker is Parliament, there are 120 Members of Parliament, and the individual members may have no common intention

[59] For example, Education Act 1989, s 161(1), and Ngati Mutunga Claims Settlement Act 2006, s 11. In *R v M* [2003] 3 NZLR 481 (CA), Tipping J said at para [18]: *"A preferable and more realistic way of expressing the Court's task is to say that [it] is required to ascertain the meaning of what Parliament has enacted in the light of the words used and the purpose of this measure."*

or understanding. However, this objection is overstated. The majority vote in the House legitimises what those responsible for framing the statute intended. The words of a statute do not appear on pages by chance: there is a guiding mind or minds behind them, be it the Law Commission, departmental officials, ministers, or — acting under their control, and drafting the product of the resulting team — parliamentary counsel. It is not nonsense to ask, and indeed may be 'anti-democratic' not to ask, what these minds intended the provisions of the statute to convey.[60]

Secondly, it has often been said that although the object of interpretation is to discover the intention of Parliament, the subjective intention of the Members of Parliament and others involved in the lawmaking process is irrelevant.[61] *'What we must look for is the intention of Parliament … But we can only take the intention of Parliament from the words they have used in the Act'. Thus, direct evidence of what the lawmakers had in mind, or what they intended their words to mean, in the form of instructions to drafters, or debates in Parliament, have generally speaking been inadmissible to explain (as a 'second bite at the cherry', so to speak*[62]*) what they have enacted. However, as we shall see,*[63] *New Zealand courts have now moved from that position, and will now examine such materials. This perhaps gives an added dimension to this concept of 'intention'.*[64]

Thirdly, very often the lawmakers will turn out to have had no discernible intention on the precise question before the court, simply because the exact combination of facts to which the statute now has to be applied never occurred to them. It is highly unlikely that the framers of the Transport Act 1962, for instance, ever considered the question, of whether a person helping to steer a car was 'driving' it. In cases such as this, the phrase 'intention of Parliament' refers to little more than the broad purpose for which Parliament passed the legislation and, perhaps, the conclusion one draws from this as to how the lawmakers would have answered the specific question had they thought of it. 'Intention', as Greenberg suggests, can be influenced by an Act's target audience, and may be very close to the mischief at which the Act is aimed, or its purpose.[65] *Even in this situation, however, the phrase is not without value in that it limits the discretion of the interpreter; the interpreter cannot (even when he or she plays a supplementary role because the legislation is defective, ambiguous, inconsistent, or incomplete*[66]

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[60] Bennion (5th ed. 2008) p 474, citing Justice Mason "*Legislators' intent: How judges discern it and what they do if they find it",* IALS, 2 November 2006. Evans [2005] 4 NZ Law Rev 449 argues interpretation should be shaped not only by the Legislature's meaning, but also by its will; the practical judgment that led it to approve (and which, exceptionally, may override) that meaning.

[61] *Inland Revenue Commissioners v Hinchy* [1960] AC 748 at 767, [1960] 1 A11 ER 505 at 511 (HL) per Lord Reid. Useful discussions of *"intention of Parliament"* are found in Payne [1956] Curr LP 96; McCallum (1966) 75 YLJ 754; Marmor *Interpretation and Legal Theory* (1992) pp 155-184; Kirby (2003) 24 Stat Law Rev 95, 98-99 (the intention is the objective one that the interpreter ascribes to the words used); and Thomas (2005) 21(4) NZULR 685, 694-695 (*"intent"* is mostly a fiction; a provision is given the meaning reasonably and fairly attributable to the Legislature)

[62] Greenberg (2006) 27(1) Stat LR 15, 18, 23

[63] Below at pp 263 and following

[64] See *Director of Public Prosecution v Bull* [1995] QB 88 at 95, [1994] 4 A11 ER 411 at 415 (QB Div), where Mann LJ noted that the *"judicially ascertained expressed intention of Parliament"* might be at variance with the *"actual intention of the promoters"* discovered in *Hansard*. Sullivan *Sullivan and Driedger on the Construction of Statutes* (4th ed, 2002) p 7 says that *'textualist"* judges find text the best indicator of intent (but may be compared with *"intentionalists", "normativists",* and *"pragmatists"*). In *R v Little* (CA 108/07, 9 November 2007) Wilson J (para [50]) called the Sentencing Act 2002, s 104(g) *"the clearly expressed intention of Parliament"*. See also *"Lai v Chamberlains* [2007] 2 NZLR 7 (SCNZ) para [204] per Thomas J.

[65] Greenberg (2006) 271(1) Stat LR 15; (October 2007) *The Loophole 6*. Compare Glazebrook in Bigwood (ed) *The Statute: Making and Meaning* (2004) pp 157-158 and the editorial at (2008) 29 Stat LR iii about the reference to intention in *26 Cadogan Square Ltd v Earl Cadogan and another* [2008] 4 A11 ER 382 (HL).

[66] See, for example, Lord Nicholls in *R v Secretary of State for the Environment, Transport and the Regions and another, ex parte Spath Holme Ltd* [2001] 2 AC 349 at 395, [2001] 1 A11 ER 195 at 216 (HL): *"so when you say Parliament cannot reasonably have intended that, you mean the words under consideration cannot reasonably be taken as used by Parliament with that meaning"*; Allan [2004] CLJ 685; and Spiller (2007) 38 VUWLR 797, 799 citing Salmond (1900) 16 LQR 378, 390.

> *Fourthly, an approach that asks solely what the original lawmakers intended can blind one to the function the Act ought to be performing today in circumstances*[67] *that may well be very different to those which pertained at its inception. Legislation has continuing force, and its words can take on a life of their own. As we shall see later*[68] *there is sometimes real tension between what an old Act meant to the Parliament that enacted it a century ago, and what it would most naturally mean to a person reading it today".*

This long passage is set out because this is a complicated issue for the Tribunal.

[9] The Tribunal can also be assisted by similar provisions in legislation, see *Osborne v Auckland City Council* (HC Auckland, CIV 2010-404-006582, Woolford J, 30 November 2011 at [17 and following]).

[10] Counsel for the appellant submitted that the charges (however they are labelled) clearly relate to an allegation of the giving of investment advice by L J Hooker. He submitted it was apparent from the extracts he referred to from Hansard of the second reading of the Real Estate Agents Bill on 2 September 2008 that Parliament did intend for the definition of real estate agency work to exclude the provision of (any) investment advice. Mr Spring's submission was that both charges relate to investment advice outside the definition of real estate agency work and that the Tribunal has no jurisdiction to consider any issue of investment advice and should therefore be struck out. He submitted that the amended charges which refer to the advice given by L J Hooker as "*marketing"* were not actually marketing but actually allegedly misleading investment advice and therefore outside the terms of s 4. He made a similar submission in respect of Charge 2. Mr Spring developed this argument before the Tribunal by arguing that the charges do not relate to activity which could, on the wording of s 4(a) described as *"real estate agency work"* but even if they were then they would be caught by the exclusion provided by s 4(c)(v). His argument was that the seminars by L J Hooker were not given on behalf of any vendor, there was no property identified and no vendor identified and therefore they could not come within the definition of real estate agency work. He submitted that only the meeting in Auckland with the two agents could possibly come within the definition of real estate agency work and even then this activity was excluded by s 4(c)(v) as being investment advice.

[11] Mr Hodge submitted that the Tribunal should read the Select Committee report which amended the initial Real Estate Agents Bill by adding the exclusions s 4(c)(v). In that preamble the Select Committee said that the exclusions were there to *"Ensure that bodies as such as providers of financial services, businesses offering limited services to vendors selling privately, and newspapers and websites publishing real estate advertising are not captured unintentionally".* Mr Hodge submitted that the case for the CAC is that City Investment Services Limited was engaged in marketing for its client/vendor (the vendor of the Zest Apartments) when it gave investment advice to Mr and Mrs Wealleans. He argued that the charge does relate to the provision of investment advice by CISL but that the appellant's submission ignores the context in which the advice was given. He submitted that the facts deposed to by Mrs Wealleans

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[67] In *R (Wilkinson) v Inland Revenue Commissioners* [2006] 1 A11 ER 529 (HL) Lord Hoffmann said at para [18]: *"the intention of Parliament … [is] the interpretation which the reasonable reader would give to the statute read against its background including, now, as assumption that it was not intended to be incompatible with Convention rights"*.

[68] Chapter 12. But see too *R v Andersen* [2005] 1 NZLR 774 at para [59] per William Young J: *"What individual members of Parliament or officials thought in 1997 [(when enacting the Crimes Act 1961 s 150A)] cannot be properly regarded as overriding the actual intention of Parliament in 1961 when s 145 [of that Act] was introduced – an intention which we extract from the plain language of the section and from its legislative and parliamentary history."*

allow the inference to be drawn that at least part of CISL's marketing strategy was to use the seminars to locate potential purchasers and promote the sale of apartments to them through the provision of investment advice. That is, he submitted, that the seminars were designed solely as a marketing tool to enable Hookers to sell the Zest apartments to potential purchasers. He submitted that the investment advice was *"not given in a vacuum, it was given for the purposes of bringing about a sale on behalf of Conrad Nelson Street Trustee Limited"*. He then submitted that this fell clearly within the definition of real estate work, the marketing of a property by a real estate agent who has been engaged by the owner of a property to bring about its sale.

[12] The Tribunal must also consider the principles of a strike out application. In *The Attorney General v McVeagh* [1995] 1 NZLR 558 at 559 the Court of Appeal said:

> "*The Court is entitled to receive affidavit evidence on a striking out application and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading for a striking out application is dealt with on the footing that the pleaded facts can be proved; … But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further*".

[13] There is no case law to guide the Tribunal on the meaning of s 4. The Tribunal's role is to look at the wording of the Act consider the Rules of Statutory Interpretation and the Interpretation Act and to determine from there whether the section excludes the charges. The amended charge provides "*that Ms Brown as Principal Officer of CISL permitted CISL to market the property through its salesperson and/or its promotional and marketing materials in a manner which created the impression that CISL was acting in the complainant's interest in the purchase of Apartment 931, 72-78 Nelson Street when CISL's duty as agent for the vendor was to act in the interest of the Trust".*

[14] A second charge says that Ms Brown permitted CISL to provide misleading information to the complainant in the marketing of the property. It sets out statements from the promotional materials provided in the first, second and third meetings with the Wealleans.

[15] Section 4 gives a definition of real estate agency work. To be real estate agency work there must be work done or services provided, in trade, and the agent must be acting on behalf of another person for the purposes of bringing about a transaction. Therefore to bring this charge within the definition of real agency work the CAC will have to show that CISL was in trade (which is accepted) and was acting on behalf of another person, that is the owners of the Zest Apartments for the purposes of bringing about a transaction.

[16] Some guidance on statutory interpretation was provided in a recent decision of *Christchurch Ready Mix Concrete v Canterbury Regional Council* (HC Christchurch, CIV 2011-409-001501, 29 September 2011 Fogarty J. At 14 His Honour said:

> *"The starting point for analysis is Parliamentary sovereignty. Parliament makes law. The Court supply it – whether the Courts think it is sensible or not. The Courts do not evaluate whether statutory law is good policy. The political system deals with accountability for policy"*. He said also that:

And

> *"Where a statutory provision contains an ambiguity the Courts will not give effect to an interpretation which produces a result which is absurd measured against the purpose of the statute. This policy is statutory interpretation, had its home in common law but is now reflected in s 5(1) of the Interpretation Act 1999".*

[17] The purpose of the Real Estate Agents Act is set out in s 3. It is to protect the interest of the consumers in respect of transactions that relate to real estate and promote public confidence in the performance of real estate agency work. The emphasis is therefore on work done by real estate agents and the regulation of those agents. Parliament also clearly intended to exclude from real estate work the provision of investment advice. However we do not conclude that where a real estate agent in the course of their work in selling a property gives, as part of that work,advice which would be categorised as investment advice that the totality of that transaction cannot be examined by the CAC or the Tribunal. This in our opinion would give an absurd result contrary to the purposes of the legislation. We therefore conclude that mingled real estate agency work and investment advice will amount to real estate agency work. Investment advice, per se, clearly does not.

[18] As *Burrows & Carter* say at page 185:

"(f) Is interpretation a question of fact or law?

> *Generally speaking, 'the meaning to be attributed to enacted words is a question of law, being a matter of statutory interpretation".*[69] *There is some authority that while the true meaning of the words is a question of law, the application of that meaning to the facts of the case is a question of fact.*[70] *In straightforward cases this may be so, but often the facts of the case are so inseparably linked to its interpretation that that dichotomy is not possible.*[71] *Clayton's case*[72] *is an example. …* and later....
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> *Having said this, there is still sometimes validity in the dichotomy between interpretation and application drawn at the beginning of this section. Once the true interpretation of a term in a statute has been ascertained, it may be simply a question of fact whether it covers the facts of the present case. This is particularly so if a question of degree is involved. Thus, the questions of*

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[69] *Shah v Barnet London Borough Council and other appeals* [1983] AC 309 at 341, [1983] 1 A11 ER 226 at 233 (HL), per Lord Scarman, although he does say cryptically also that the meaning of ordinary words is a question of fact. See also Lord Scarman in *Lees v Secretary of State for Social Services* [1985] AC 930 at 932, [1985] 2 A11 ER 203 at 204 (HL); and Watkins LJ in *R v Spens* [1991] 1 WLR 624 at 632, [1991] 4 A11 ER 421 at 425 (EWCA).

[70] See *Walsh v Lord Advocate* [1956] 1 WLR 1002 at 1010, [1956] 3 A11 ER 129 at 135 (HL), per Lord MacDermott; compare, however, *Farmer v Cotton's Trustees* [1915] AC 922 at 932, per Lord Parker: *"[W]here all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."* See also the discussion of law and fact in *Hope v Bathurst City Council* (1980) 144 CLR 1 (HCA); and *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 31, [1955] 3 A11 ER 48 at 54 (HL), per Viscount Simonds.

[71] Even in the *Walsh* case (*Walsh v Lord Advocate* [1956] 1 WLR 1002 at 1010, [1956] 3 A11 ER 129 at 135 (HL)) Lord MacDermott says that to search for a definition of *"regular minister"* is to *"wander about between the realms of interpretation and application"*. See Montrose (1959) 1 Malaya LR 87 and de Sloovere (1933) 46 HLR 1086. In *SK v KP [Habitual Residence]* [2005] NZFLR 1064 (CA), paras [4], [7], [89] the meaning of *"habitual residence"* in the Guardianship Amendment Act 1991 was held to be a question of law even though its legal meaning (consistent with the Hague Convention) is that it is *"a factual concept"*, albeit one guided by principles whose application is supervised on appeal.

[72] *R v Clayton* [1973] 2 NZLR 211 (CA)

> *whether a certain building was a 'warehouse'[73] and whether a piece of machinery was 'dangerous'[74] were said to be questions of fact.[75]*

[19] The Tribunal conclude that in this case the meaning can be ascertained by the Tribunal and then we can determine if the facts of this case fit this interpretation. We note that each case must be determined upon its facts. We ask do the facts show that the investment advice alone was given (in which case it would be excluded from the jurisdiction of the Tribunal) or it was part of a totality of a real estate agency transaction? Mr Spring is correct when he submitted that in order to fall within the definition of real estate agency work the agent must be undertaking work on behalf of another person for the purpose of bringing about a transaction. How does this apply to the case before the Tribunal? On the facts in this case in order to come within the definition of s 4(a) Ms Brown (or CISL) must have been providing promotional work on behalf of the owner of the Zest Apartments for the purposes of bringing about a sale. If the CAC can show on the facts that both seminars were for the sole purpose of selling these apartments then it is arguable that the charge as amended will fall within the definition of real estate agency work. If the amended charge shows no link between the seminars run by L J Hooker and the sale then the charge at least insofar as it relates to the first two seminars must fail. For purposes of considering the strike out application we must assume that the CAC can prove the facts set out in the amended charge and supported by the affidavit of Mrs Wealleans. We therefore conclude that the strike out application cannot succeed. It may be that at the hearing on a proper analysis of the facts Mr Spring's arguments are proved to be correct but at this time for reasons set out above we find that the amended charge must be allowed to proceed.

Issue 2

The Appeal

[20] We then turn to determine the issue of how (and to what extent) the appeal from the CAC's decision will continue. Mr Spring has filed a detailed Notice of Appeal which raises issues of breach of natural justice, and the other detailed matters set out earlier in our decision. He submitted that all of these matters ought to be able to be considered by the Tribunal in hearing the appeal. He did not propose a full hearing on all of the facts but simply that he should be allowed to fully explore these issues.

[21] The starting point is the section in the Act which permits an appeal. Section 111 which gives the Tribunal on an appeal the right to take three steps:

(i) To confirm the decision of the CAC.

(ii) To reverse it.

(iii) To modify the determination of the Committee.

[22] It does not permit the Tribunal to refer the matter back to the Committee for reconsideration. The Tribunal is also given the power to exercise any of the powers

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[73] *LTSS Print and Supply Services Ltd v London Borough of Hackney and another* [1976] QB 663, [1976] 1 A11 ER 311 (EWCA)

[74] *Carr v Mercantile Produce Co Ltd* [1949] 2 KB 601, [1949] 2 A11 ER 531 (KB Div)

[75] See also *O'Kelly v Trusthouse Forte Plc* [1984] QB 90, [1983] 3 A11 ER 456 (EWCA Civ); and *Wellington City Council v Attorney-General* [1990] 2 NZLR 281 (CA). A useful article is *"Questions of Degree"* by W A Wilson (1969) 32 MLR 361; see the same author in (1963) 26 MLR 609.

that the Committee could have exercised. It therefore may reach an independent decision on the material before it but cannot exercise any power to make any order that the CAC could itself have made. This section is easy to understand when considering an appeal from a CAC finding of unsatisfactory conduct as it operates by way of rehearing. As many cases before a CAC do not involve an actual hearing in practice this means that an appellant can come before the Tribunal and have the case heard for the first time.

[23] This procedure seems somewhat clumsy when applied to appeals on a decision to lay a charge. This is because the hearing of a charge requires the Tribunal to consider the oral and written evidence presented to it and any defence raised to the charge and reach a decision under s 110. That is the hearing of the charge acts as a rehearing of the facts.

[24] Mr Hodge submitted that the role of the Complaints Assessment Committee is simply to act as a screening body where a charge is laid, thus that all the Tribunal can do on appeal is to determine whether or not there is a sufficient *prima facie* case made out so that a charge can be laid. He said the test was similar to that in an application to discharge the accused under s 347 of the Crimes Act 1961. He submitted that a merits based appeal would be anomalous as it would mean that the appeal would or could have a broader scope than the decision appealed from and was inconsistent with other case law. He referred the Tribunal to a decision of *T v the Preliminary Proceedings Committee of the Nursing Council* (HC Wellington AP 131-95, 19 June 2006). In this case the Court held that given the preliminary screening role of the Committee it was not necessary for the enquiry to be conducted in the presence of the nurse and it was not incumbent upon the Committee to advise the nurse of all material it had obtained.

[25] In *Gibson v the Dentist Disciplinary Committee* (HC Wellington, CIV 2004-485-12) Justice France was considering a situation where a complaint was made to the Dental Council. A Complaints Assessment Committee was set up in 2002 and then decided to refer the complaints to the Tribunal. The plaintiff applied to the Tribunal to strike out the decision on the basis that it was biased and predetermined. The Tribunal said that it had no jurisdiction to strike out the charge. Judicial review proceedings were brought in the High Court. Her Honour noted at [49] that Complaints Assessment Committee set up under the Medical Practitioners Act and the Dentists Act and the Psychologist Acts all had a preliminary screening role. Her Honour held that this should not be confused with a disciplinary hearing and the requirements of natural justice must recognise the more limited role of the CAC.

[26] While those cases are helpful, this Real Estate Agents Act give the CAC both a disciplinary function (it can made orders of unsatisfactory conduct) and a screening function when it determines to refer charges to the Tribunal. It is trite to say that every case must be assessed on its merits but equally each appeal must be assessed on its merits which naturally includes an examination of the nature of the appeal.

[27] Section 78 of the Real Estate Agents Act gives the Committee power to enquire into and investigate complaints, to promote resolution of complaints by negotiation, conciliation or mediation, to make the final determination in relation to complaints, to lay and prosecute charges before the Disciplinary Committee.

[28] Under s 79 the Committee has the power to determine that the complaint should be dismissed, or is frivolous or vexatious and may not be pursued, or if the complaint

should be enquired into or it may take no action. If it decides to enquire into the complaint then the Committee must act in a way that is consistent with the rules of natural justice, may regulate its own procedure and may direct publication of its decisions (see s 84). These are all powers consistent with a wider power than simple filtering role. Under s 89 the Committee may make three determinations: that the complaint be considered by the Disciplinary Tribunal or that it has been proved on the balance of probabilities that the licensee has engaged in unsatisfactory conduct (s 72) or a determination that the Committee take no further action. Section 90 gives the Committee the power to have a hearing on the papers. Thus s 89 clearly separates the role of the CAC into these three tasks and gives it additional powers when a finding under s 72 is made. There is a right of an appeal from each of these three tasks but the right of appeal must reflect the nature of the determination which is being appealed.

[29] The Tribunal find that the decision to lay a charge is the exercise of a different power to the decision to reach a finding of unsatisfactory conduct under s 72. Once a finding to lay a charge is made the CAC then becomes the prosecuting body and prosecutes that charge before the Tribunal. It must have sufficient evidence in order to consider that there are grounds to lay a charge. Section 89 makes it clear that the CAC may make a determination after both enquiring into the complaint and conducting a hearing. But the section also makes it clear that the CAC do not need to be satisfied on the balance of probabilities that the licensee has engaged in conduct contrary to s 73 in direct contradiction to the power given to the CAC to make a finding under s 72 (when they must be satisfied). This analysis leads us to the conclusion that an appeal from s 111 on a decision to lay a charge must be limited to an appeal from this preliminary screening role. Further support comes from the limited power on appeal as the Tribunal must put itself (when conducting the appeal) in the role of the Committee under s 89. Thus the appeal can be on this point only *"is there a case to answer?"* (or any of the other functions under s 89).

[30] Thus we find that the appeal by Ms Brown should be restricted to a consideration of whether or not there was sufficient grounds under s 89 to make a finding that a complaint be considered by the Disciplinary Tribunal. Allegations that the Committee breached the rules of natural justice will be met by the appeal process as the Tribunal will put itself in the position of the Committee and Ms Brown will have the opportunity to respond to all of the material provided by the CAC and Ms Wealleans. So too can Ms Brown advance her argument that no reasonable Committee could have reached the decision to lay a charge (except to the extent that argument involves an allegation that the charge relates to investment advice only as we have determined that this matter should be determined at a full hearing of the charge). Her argument that the CAC failed to take into account relevant considerations and took into account irrelevant considerations can also be advanced to the extent that it is an allegation that the CAC have failed to establish a *prima* facie case.

Further Directions

[31] The Tribunal considers that Ms Brown should have opportunity to consider this finding and how she wishes to proceed with this matter. Clearly there is an urgent need to press forward with the appeal and then if not successful the charge. We do not consider given the limited nature of the appeal set out that the appeal should take more than a day to argue. We allocate a day on Friday 20th April 2012 for the appeal to proceed. Can counsel please advise the Tribunal if a further conference call is needed to discuss this date and any directions which might be required.

[32] In case it is not clear from our decision the CAC can proceed with the amended charge.

[30] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 22nd day of December 2011

_____
Ms K Davenport
Chairperson

_____
Ms J Robson
Member

_____
Mr G Denley
Member