

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 22

READT 1/11

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **GREGORY JOHN WYATT**
Appellant

AND **THE REAL ESTATE AGENTS
AUTHORITY (CAC 10040)**
First respondent

AND **BARFOOT & THOMPSON LTD**
Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 25 November 2011

DATE OF OUR SUBSTANTIVE DECISION: 23 February 2012; [2012]
NZREADT 3

DATE OF THIS DECISION ON COSTS: 26 April 2012

APPEARANCES

Appellant on his own behalf
Mr L J Clancy and Ms J MacGibbon, counsel for first respondent
Messrs R Hern and J Tomlinson, counsel for second respondent

DECISION OF THE TRIBUNAL ON COSTS

[1] In our substantive decision herein of 23 February 2012 [2012] NZREADT 3, we confirmed the finding of the Committee of the first respondent that there is insufficient evidence to uphold the appellant's complaint of unsatisfactory conduct against the second respondent in its handling of a 13 April 2007 sale of rural land owned by the appellant's family trust.

[2] In dismissing the appellant's appeal on 23 February 2012, we reserved leave to apply with regard to costs. On 22 March 2012 the second respondent filed

submissions seeking costs. The appellant filed response submissions on 29 March 2012, and first respondent on 11 April 2012.

[3] Counsel for the second respondent seek the following orders, namely:

- [a] Scale costs plus disbursements for the period between 28 January 2011 (date of Notice of Appeal) and 23 February 2012; and
- [b] Increased costs for the period between 28 January 2011 and 23 February 2012.

[4] Counsel puts it that the second respondent relies on the District Courts Rules 2009 because, effectively, the hearing before us was akin to a hearing in a District Court. With regard to the said application for scale costs for the steps taken by the second respondent between 28 January 2011 and 23 February 2012, the second respondent relies on the general principles set out in the District Courts Rules 2009 4.1 to 4.12 and Schedules 2 and 3. Counsel for the second respondent then particularise those steps to conclude with 9.25 days at \$1,500 per day to total \$13,875. The second respondent also seeks an order in respect of disbursements occurred for the said period under Rule 4.12 and these total \$6,436.62.

[5] With regard to the issue of increased costs, the second respondent seeks an order for increased costs under Rule 4.63(b)(ii) on the basis that (the second respondent submits) the whole of the proceeding lacked merit; the appellant's complaints against the second respondent had absolutely no substance and (it is put) were simply the most recent of repeated attempts which have also been directed at the purchasers of the property and the IRD to recover a loss (the GST liability on the sale price) which the appellant was entirely responsible for his trust incurring; and that this appeal was nothing more than a misconceived attempt at securing a liability finding which could then be used in some concurrent District Court proceedings which the appellant has apparently issued against the second respondent. Accordingly the second respondent seeks increased costs of 50%.

[6] In summary, the second respondent seeks total costs from the appellant as follows:

Scale costs	\$13,875.00
Disbursements	\$ 6,436.62
Increased costs	\$ <u>6,937.90</u>
Total	\$ <u><u>27,249.12</u></u>

The Response of the Appellant

[7] The appellant makes the point that this Tribunal lacks jurisdiction to award costs against him as, otherwise, members of the public will be reluctant to use the complaint procedures in the Real Estate Agents Act 2008 "if exposed to costs" as the appellant puts it.

[8] The appellant also submitted that material published about this Tribunal contains no warning to members of the public concerning costs. We expect that is correct.

[9] The appellant puts it that, at telephone conferences on 13 July and 14 July 2011, the Deputy Chairperson of this Disciplinary Tribunal stated that it did not have jurisdiction to award costs against the appellant. We expect that Ms K Davenport did say that because she would be correct.

[10] In the alternative, the appellant submits that the calculations regarding costs put before us on behalf of the second respondent are incorrect in several respects.

[11] The appellant maintains that his complaint that the second respondent used an out of date form of agreement for sale and purchase meant that his complaint had substance so that there could be no justification for the concept of increased costs as put for the second respondent. The appellant adds, that having paid the second respondent over \$37,000 in commission, he was entitled to make a complaint.

[12] The appellant also puts it that the second respondent has claimed costs under the District Courts Rules 2009 as for an appeal but also under the provisions regarding general civil proceedings. He then disputes various calculations of time taken for various steps and for the inclusion of various interlocutory attendances where he was the successful party.

[13] With regard to disbursements, the appellant submits that a small part of the evidence of expert witnesses called by the second respondent was relevant but most of it was irrelevant. He referred to there being evidence called by the second respondent on whether it was reasonable for the appellant to rely on the second respondent for tax advice whereas (the appellant puts it) he had made no complaint of that nature.

Discussion

[14] The first respondent does not seek any order for costs against the appellant, essentially, because we do not have general power to award party and party costs, nor costs against a party other than a licensee, as we now explain.

[15] This seems to be the first occasion on which we have considered whether we may make orders for costs against a complainant following his unsuccessful appeal from a decision of a Complaints Assessment Committee.

[16] This Tribunal does not have an express power to award costs against a complainant, in contrast to the power granted under s.93(1)(i) of the Real Estate Agents Act 2008 (Act) to make limited orders for costs against licensees. Section 93(1)(i) provides;

“93 Power of Committee to make orders

(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:

...

(i) *Order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.*"
[Emphasis added]

[17] The powers granted to Complaints Assessment Committees under s.93 are available to us on an appeal where we reverse or modify the decision under appeal, s.111(5).

[18] The Act is therefore not silent on the issue of costs, but rather makes provision for costs orders only to the limited extent set out in s.93(1)(i). In those circumstances we cannot assume that a wider power to award costs, including costs against a lay complainant, is implicit in the legislation. In the absence of an express power to order a complainant to pay a licensee's costs, we make no orders as to costs following the dismissal of the appellant's appeal.

[19] The first respondent noted that the second respondent makes no submissions as to the basis on which this Tribunal has power to order the appellant to pay its costs.

[20] Of course, where there is power to award party and party costs, they are discretionary, and should naturally follow the event, and be awarded to the successful party.

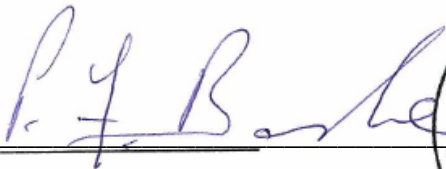
[21] Accordingly, it seems to us that we do not have power to award costs against the appellant in this case. Although there is power under s.110(2)(g) of the Act to award compensation which any person may have suffered by reason of a licensee's misconduct, that has no application in this case where costs are being sought by the licensee against the complainant appellant.


[22] The power to award costs under s.93(1)(i) is confined to such an order against the licensee in favour of the complainant.

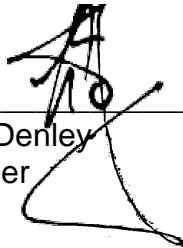
[23] We appreciate that, under s.105 of the Act, this Tribunal may regulate its procedures as it thinks fit. That could not empower us to award costs. Nor could the Chairperson's responsibility for the orderly and expeditious discharge of the functions of this Tribunal under reg.17 of the Real Estate Agents (Complaints and Discipline) Regulations 2009, nor any principle of natural justice, so empower us.

[24] In short, we agree with the submission of Mr Wyatt that we do not have power to award costs against him. Also, he is probably correct in suggesting that, otherwise, if a complainant were to be exposed to costs when unsuccessful, the public might be deterred from using the complaint procedures of the Act.

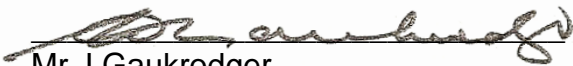
[25] We confirm the decision issued herein on 23 February 2012, but the second respondent's application for costs and disbursements is dismissed.







Mr G Denley
Member



Mr J Gaukrodger
Member