BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 33

READT 38/11 & 47/11

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

BETWEEN **IVAN SHERBURN**

Appellant/defendant

AND **REAL ESTATE AGENTS AUTHORITY (CAC 10017)**

First respondent/prosecutor

AND **ROY HARLOW AND NANCY HARLOW**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 9 May 2012

DATE OF DECISION: 15 June 2012

COUNSEL

Mr E Hudson for appellant
Mr S Wimsett for first respondent
No appearance by or on behalf of second respondent (on this threshold issue)

DECISION OF THE TRIBUNAL ON THRESHOLD ISSUE OF JURISDICTION

The Issue

[1] The appellant licensee, Ivan Sherburn, has appealed the decision of Complaints Assessment Committee 10017 to charge him with misconduct under s.73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. This appeal is confined to the threshold issue of whether a prima facie case has been established to support the charge.

[2] That charges reads:

"1. Following a complaint made by Roy and Nancy Harlow (complainants), Complaints Assessment Committee 10017 (Committee) charges Ivan

Sherburn, licensee, with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars
The defendant's deliberate non-disclosure of the registration of three covenants on the title to the property at 31 Raynes Road, Hamilton (property), after the complainants had entered into an agreement to purchase the property."

[3] We understood the three covenants to read that the landowner:

"... will not:

(a) Shoot any wildlife other than for the eradication of pests such as rabbits, possums and suchlike;

(b) Permit or allow motorcycling or go-cart recreation or other noisome activity on the land, but this covenant shall not extend to the use of motor bikes, mowers, weedeaters or suchlike for the use in farming or gardening operations;

(c) Keep or permit to be kept on the land more than two dogs of a great greater age than 3 months but this does not preclude the ownership of additional dogs for working purposes."

The Decision of the Committee

[4] The Committee's decision reads as follows:

*"**Complaints Assessment Committee***
Decision to refer matter to Disciplinary Tribunal

The Committee has received a complaint made by Roy Harlow dated 3 February 2010. The Committee has concluded an inquiry into the complaint and has held a hearing at which the Committee considered all the information gathered during the course of its inquiry, including Ivan Sherburn's response to the complaint.

After conducting its inquiry and holding a hearing the Committee has decided there is evidence, if accepted by the Disciplinary Tribunal, on which the Disciplinary Tribunal could reasonably find Ivan Sherburn guilty of misconduct.

The Committee has therefore determined that the complaint should be considered by the Disciplinary Tribunal pursuant to s.89(2)(a) of the Real Estate Agents Act 2008. A charge/charges will be laid with the Disciplinary Tribunal accordingly.

A person affected by a determination of a Complaints Assessment Committee may appeal to the Disciplinary Tribunal against a determination of the

Complaints Assessment Committee within 20 working days after the date of this notice.

Appeal is by way of written notice to the Tribunal. You should include a copy of this Notice with your Appeal.

Further information on lodging an appeal is available by referring to the Guide to Lodging an Appeal at www.justice.govt.nz/tribunals.

Signed

John Auld
Chairperson
Complaints Assessment Committee
Real Estate Agents Authority
Date: 22 March 2011"

Factual Background

[5] The complaint was made by the second respondents, Mr and Mrs Harlow, on the basis of the following background.

[6] The Sherburn Family Trust, of which the Appellant and his wife were the principal beneficiaries, owned 31 Raynes Road, Hamilton. On 3 August 2007, that trust obtained consent from Waipa District Council to subdivide into three lots some land it owned on Raynes Road. The consent was subject to various easements on the property and that aspect is pivotal to this case.

[7] On 6 November 2007, the second respondents as purchasers, entered into an agreement for sale and purchase of one of the subdivided blocks of land. The agreement was entered into by Sherman Ltd, as trustee of the Sherburn Family Trust and vendor. The Appellant was both a director and shareholder of Sherman Ltd and acted as the salesperson for the sale on behalf of the vendor's agent (Ray White Real Estate).

[8] On 7 November 2007, the Appellant executed an easement certificate creating the easements required by the Council's subdivision consent, but also creating three covenants. This was lodged with LINZ on 6 December 2007 and was registered on 7 December 2007. The sale and purchase agreement made no mention of, or provision for, these covenants and the second respondents allege that they were not made aware of them at that time.

[9] On 26 March 2008, the second respondents discovered the three covenants and that led to a protracted legal dispute (in the civil jurisdiction) between the parties.

[10] The transaction leading to the Harlows' complaint concerned that 6 November 2007 agreement entered into by them (as purchasers) with Sherman Ltd (as vendor). That agreement was preceded by an earlier agreement incorrectly dated 1 October 2007 but, in reality, occurring on 1 November 2007 which provided for a $595,000 purchase price with settlement on 14 December 2007. That agreement was replaced by the 6 November 2007 agreement because the Harlows wanted to defer settlement

until February 2008. To compensate the vendor, the purchase price was increased to $622,300.

[11] Pending settlement, the Harlows were granted a right of occupation free of rental.

[12] However, prior to settlement, issues arose between the parties. The Harlows alleged misrepresentation and the imposition of restrictive covenants without their consent. Rather than settle the purchase of the land and claim damages (if available), they sought to renegotiate the purchase price. The vendor (Sherman Ltd) declined such overtures, issued a settlement notice and, ultimately, cancelled the agreement and issued proceedings in the High Court at Hamilton seeking possession and damages. The Harlows resisted the claim and counterclaimed, alleging that the cancellation was invalid. In addition, they sought to have the contract reopened pursuant to the provisions of the Credit Contracts Act 2003 by reason of the vendor's (alleged) oppressive conduct.

[13] There was hearing in the High Court at Hamilton in August 2009 and Hansen J, in a reserved decision (*Sherman Ltd v Roy Harlow & Anors,* HC Hamilton CIV 2008-419-877, 19 November 2009), determined that cancellation was lawful as the vendor was ready, able, and willing to settle. It was in this context that Hansen J considered the issue of the restrictive covenants. He did not determine if there was agreement to them by the Harlows as he found that, on the issue of the title, the Harlows had the right of requisition which they did not pursue. He also found that the agreement was not a credit contract and, therefore, could not be reopened. In any event, he found that the vendor's conduct was not oppressive; and he considered and dismissed the Harlows' six allegations of misrepresentation.

[14] The Harlows successfully appealed to the Court of Appeal where the issue was relatively narrow, namely, whether there was a collateral agreement to permit the imposition of the covenants. That Court found there was not, so that there was no right to register the covenants and the vendor's cancellation was therefore unlawful (*Roy Harlow & Anors v Sherman Ltd* [2010] NZCA 627).

The Nature of this Appeal

[15] Mr Hudson (counsel for the appellant) emphasised that this is an appeal against the Committee's determination under s.79 of the Act and that such a determination is both an evaluative judgment and the exercise of a discretion. He noted that the Supreme Court in *Austin Nichols & Co Ltd v Stichting Lodestar* [2008] 2NZLR 141 decided that in a general appeal against the exercise of an evaluative judgment involving issues of fact and degree, undue deference need not be paid to the Court of first instance. If the appellate Court would have come to a different conclusion from that reached by the Judge, it must follow that the original decision was wrong and the appellate Court should then intervene subject to weight being given to the lower Court Judge's conclusions of credibility.

[16] In *Kasem v Bashir* [2011] 2 NZLR 1 the Supreme Court confirmed that appeals from the exercise of a discretion are not affected by the principles in *Austin Nichols* and that the principles of an appeal from the exercise of a discretion continue to apply, such that the appellant must establish an error of law or principle, irrelevant

considerations, failure to take account of relevant considerations, or that the decision is plainly wrong.

[17] The second respondents/the Harlows complained to the Authority in early February 2010. We are satisfied that the Authority, through its Committee, received extensive documentation about the background to this complaint and dispute.

[18] We have referred above to the precise decision of the Committee. Subsequently, it has laid against the appellant a charge of misconduct as defined in s.73(a) of the Act upon the grounds of deliberate non-disclosure of the registration of the three covenants against the title to the property after the complainants had entered into an agreement to purchase it.

[19] The hearing before us was confined to the threshold issue of whether there is a case to answer. If so, the matter must proceed to a substantive hearing as to the merits or otherwise of the charge.

Relevant Provisions in the Act

[20] Under the Real Estate Agents Act 2008, Complaints Assessment Committee, or Committee, means a Complaints Assessment Committee established under s.75 of the Act. Under that section the Authority must appoint as many Complaints Assessment Committees as, in its opinion, *"are required to deal effectively with complaints and allegations about licensees"*.

[21] The functions of a Committee are set out in s.78 and, in particular, it is to enquire into and investigate complaints made by any person under s.74 of the Act about the conduct of a licensee. Another function is (s.78(d)) *"to make final determinations in relation to complaints, enquiries, or investigations"* and (e) *"to lay, and prosecute, charges before the Disciplinary Tribunal"*.

[22] Section 79(1) provides that *"As soon as practicable after receiving a complaint concerning a licensee, a Committee must consider the complaint and determine whether to inquire into it"*. Under s.82(1): *"If a Committee decides to enquire into a complaint or into matters raised by allegations about a licensee, it must enquire into the complaint or those matters as soon as practicable"*.

[23] Section 84(1) reads: *"A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice"*.

[24] Under s.84(3), it may regulate its procedure in any manner that it thinks fit as long as it is consistent with this Act and any regulations made under it.

[25] Section 88 gives a Committee wide powers to receive evidence. Section 89(1) and (2) read:

> *"(1) A Committee may make 1 or more of the determinations described in subsection (2) after both enquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.*
>
> *(2) The determinations that the Committee may make are as follows:*

(a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:

(b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct:

(c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation."

[26] Section 90 provides:

"1) A hearing conducted under s.89(1) by a Committee is to be a hearing on the papers, unless the Committee otherwise directs.

(2) If the Committee conducts the hearing on the papers, the Committee must make its determination on the basis of the written material before it.

(3) Consideration of the written material may be undertaken in whatever manner the Committee thinks fit."

[27] Section 91 of the Act reads:

*"**91 Reference of complaint to Disciplinary Tribunal***
If a Committee makes a determination that the complaint or allegation be determined by the Disciplinary Tribunal, the Committee must –

(a) frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the Tribunal; and

(b) give written notice of that determination and a copy of the charge to the person to whom the charge relates and to the complainant."

[28] Under s.94 the Committee must promptly give written notice of a determination to the complainant and to the licensee and that notice must (s.94(2)(a)): *"(a) state the determination and the reasons for it ..."*

[29] Inter alia, it is set out in s.111 of the Act that an appeal to this Tribunal is *"by way of rehearing"* (s.111(3)) and that *"After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee"* (s.111(4)); and (s.111(5)) *"if the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised"*.

The Stance of the Appellant

[30] The major concern of the appellant is that, in his view, the Committee gave no reasons for its finding of misconduct. In fact, it has not found misconduct but, merely, that there is a prima facie case of misconduct by the appellant so that a charge should be laid, and has been laid.

[31] As Mr Hudson put it, the importance of a Tribunal expressing reasons for its decision is clear from the decision of the Court of Appeal in *Lewis v Wilson Horton Limited* [2000] 3 NZLR 546. That decision concerned an appeal from an Order made upon judicial review. In the course of giving its judgment, a full bench of our Court of Appeal considered the need for giving reasons for a decision. In delivering the judgment of the Court, Elias J said:

> *"[79] The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirements that justice be administered in public, is undermined.*
>
> *[80] The second main reason why it said Judges must give reasons is that failure to do so means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction. Those who exercise power must keep within the limits imposed by law. They must address the right questions and they must correctly apply the law. The assurance that they will do so is provided by the supervisory and appellate Court. It is fundamental to the rule of law. The supervisory jurisdiction is the means by which those affected by judicial orders, but who are not parties to the determination and who have no rights of appeal or rehearing, obtain redress. Their right to seek such review is affirmed by s 27 of the New Zealand Bill of Rights 1990. It is important that sufficient reasons are given to enable someone affected to know why the decision was made and to be able to be satisfied that it was lawful. Without such obligation, the right to seek judicial review of a determination will in many cases be undermined ...*
>
> *[82] The third main basis for giving reasons is that they provide a discipline for the Judge which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice. In the present case it is hard to believe that the Judge would have granted the order if he had formally marshalled his reasons for doing so."*

[32] Elias CJ concluded that the failure to give reasons was an error of law which could not be corrected on appeal and that the High Court decision was required to be set aside. Of course, we accept that is now settled and elementary law.

[33] Mr Hudson submits that, as no reasons were given by the Committee, this Tribunal cannot embark upon its own evaluation of the evidence to determine if the Committee made the correct determination; and that the only appropriate outcome is that the Tribunal should reverse the Committee's determination.

[34] We observe that the Committee did reason that *"... there is evidence, if accepted by the Disciplinary Tribunal, on which the Disciplinary Tribunal could reasonably find Ivan Sherburn guilty of misconduct".* The Committee had earlier recorded that it had concluded an enquiry and considered all the information gathered including Mr Sherburn's response to the complaint.

[35] Mr Hudson then submitted in some detail that, due to the lack of reasons in the Committee's said decision, it is not possible to determine if it applied the three step

process flowing from s.172 with regard to an agent's conduct occurring prior to the commencement of the 2008 Act on 17 November 2009. Further, Mr Hudson submitted that, had the Committee done so, it must have concluded that the appellant could not have been charged under the 1976 Act. He made quite detailed submissions in support of that proposition.

[36] Mr Hudson then put it that the nature of the charge now framed against the appellant as *"deliberate non-disclosure"* was not the subject of the initial complaint from the Harlows and was not the subject of enquiry at the High Court. He seemed to also put it that the reason for the High Court proceedings was that the Harlows maintained that they had a right of requisition once title was issued; so that the question determined by the Court of Appeal was not the subject of detailed evidence or cross-examination in the High Court. Mr Hudson then referred to various extracts of the High Court judgment particularly Hansen J's finding at [17] of his judgment that:

> *"[17] The Harlows accept that the proposal to register a covenant prohibiting shooting was discussed before they signed the agreement. They also acknowledge that in the course of the discussion the issue of noisy vehicles and dogs on the land was mentioned. They are adamant that there was no proposal to control noise by covenant.*
>
> *[18] I am satisfied the proposal to create the three new covenants was raised by Mr Sherburn, although I acknowledge the possibility that the Harlows may not have fully understood the implications of what was being proposed. However, the extent of their understanding is academic. Clause 5.2(2) of the agreement provides:*
>
> > *"If a plan has been or is to be submitted to the LINZ for deposit in respect of the property, then in respect of objections or requisitions arising out of the pain, the purchaser is deemed to have accepted the title except as to such objections or requisitions which the purchase is entitled to make and notice of which the purchaser serves on the vendor on or before the fifth working day following the date the vendor has given the purchaser:*
> >
> > *(a) notice that the plan has been deposited; or*
> >
> > *(b) notice that (where a new title is to issue for the property) the title has issued and a search copy of it as defined in section 172A of the Land Transfer Act is obtainable."*
> >
> > *[19] The title issued on 7 December 2007. A copy was sent to the Harlows' solicitor on 20 December. No objections or requisitions were notified in accordance with cl 5.2(2). The Harlows are deemed to have accepted the title, including the new covenants."*

[37] We note that the appellant and his solicitor, Mr Cochrane, have provided affidavit evidence on substantive facts and in terms of the issue of the credibility of the appellant; but it does not seem necessary for us to deal with that evidence in this threshold decision. Nevertheless, we note the submission of Mr Hudson that when the evidence is considered in the totality of the events, no reasonable Committee could have concluded that the conduct of the appellant went beyond an error of judgment or ignorance of legal requirements, or that it amounted to wrongful or evil intention. He then referred to Hansen J, the trial Judge in the High Court, having made findings of credibility in favour of the appellant and, in particular, that the appellant had acted in good faith and without any intention to mislead; that the

appellant's disclosure of the roading was appropriate; and that there was nothing oppressive in his conduct; and that, in respect of the airport flyover, the appellant answered questions *"honestly and accurately"*.

[38] Mr Hudson then submitted that, when considering s.94(1) which deals with notice to the licensee of a Committee's determination under s.89, the Committee was precluded from reaching such a determination because the misconduct complained of must be *"in the course of Mr Sherburn's business as a real estate agent"*. Mr Hudson submitted that it was in the course of the appellant's business to advertise the property for sale through the agency of Ray White and to show the property to the second respondents as prospective purchasers, but that it was the appellant as vendor of the property who was responsible for instigating the creation and registration of the restrictive covenants. Mr Hudson submitted that the steps taken by the appellant were those of a vendor and could not be regarded as being conduct in the course of his business as a real estate agent.

[39] We think otherwise and that the appellant as real estate agent had a clear duty to be open and forthright about the nature of the restrictive covenants and the procedures involved in their registration. In that respect Mr Hudson referred to the purpose of the Act as the protection of the public and the need to maintain appropriate standards within the industry. He submitted that the conduct of the vendor, in imposing restrictive covenants and how that was achieved, has no relevance to the purposes behind the Act and that it was only coincidental that the appellant happened to be both a trustee on the title of the property and also the real estate agent marketing the property. We think that the conduct of the vendor with regard to the restrictive covenants is very relevant to the purposes of the Act.

[40] Essentially, Mr Hudson submits that had the Committee carried out its functions correctly, it could not have reasonably concluded that charges could have been laid under the 1976 Act.

[41] Mr Hudson also strongly submitted that the issue of the appellant's conduct is now res judicata because of the favourable findings in the High Court by Hansen J as to the conduct of the appellant. Mr Hudson submits that we are bound by those determinations of Hansen J as to the character and credibility of the appellant and that, accordingly, no reasonable Committee could have determined that the appellant's conduct was deliberate.

Further Discussion

[42] The nature, content, and credibility of the evidence about the communications between the appellant and the second respondents concerning the registering of restrictive covenants is pivotal to the issue of the appellant's conduct as a licensee under the 2008 Act. We could not be bound by findings in another jurisdiction regarding different claims and issues. With the lapse of time, there may be further evidence available for us at this stage. It seems to us that, at this point, there is evidence which, if we were to accept it, would amount to misconduct on the part of the appellant; so that there is a prima facie case against the appellant.

[43] The Committee did not go into the criteria and application of s.172 of the 2008 Act, presumably, as it has already set out clear guidelines in a number of previous decisions as to its method of applying that section. Mr Wimsett put it that it would be

cumbersome for the Committee and unnecessary to detail its approach to the application of s.172 in each case. However, we think it would be prudent for the Committee to note that it has taken into account the process under s.172.

Res Judicata

[44] The appellant referred to the civil proceeding between the parties and raised the issue of res judicata.

[45] Mr Wimsett referred to s.155(1) of the Act stating: *"that nothing in this Act affects any civil remedy that a person may have against an agent, branch manager or salesperson."* It is put by Mr Wimsett that, logically, the reverse must also be true: i.e. that no civil remedy shall affect any disciplinary proceedings against an agent as, otherwise, the Authority would be unable to discipline its members whenever civil litigation existed in relation to the same matter. He also referred to s.110(3) of the Act reading:

> *(3) The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same Joss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages"*

[46] We accept that the disciplinary provisions of the Act are completely separate from, and have no impact upon, any civil remedies available to the parties. Those two types of proceedings may comfortably co-exist.

[47] Mr Wimsett submitted that it would be absurd for res judicata to apply *"because the Committee couldn't discipline real estate agents in any situation where there was civil litigation"*. The civil proceedings dealt with issues which, although relevant to us, were not dealt with in the context of a disciplinary hearing. We consider that we cannot be bound by credibility findings of the High Court and Court of Appeal with regard to our focus on the appellant's conduct as a real estate agent. We must decide that issue of the appellant's conduct on the evidence to be adduced to us. That would have an entirely different focus from the evidence heard by Hansen J in the High Court on the civil claim.

[48] While a substantive hearing about the appellant's conduct under the Act will turn on credibility, at this point we are only concerned with whether there is a prima facie case against the defendant. It was not the Committee's role to make credibility findings but merely to decide whether there is a prima facie case to support its charge to be heard by us.

[49] Mr Hudson (for the appellant) seemed to accept that the Committee is a gatekeeper and has a screening role as to whether charges should be laid for us to hear regarding the conduct of a licensee. Of course, he referred to the requirement of compliance with natural justice as referred to in s.84(1) of the Act noted above. It seems to us that the requirement for compliance by the Committee with natural justice is in terms of the fairness of the process rather than the setting out of substantive reasoning at the screening role level. Proceedings before us are a full rehearing.

[50] We are conscious of the submission made by Mr Hudson that the licensee has a right of appeal at this stage against the determination of the Committee to lay a charge, but he asks: how can that be properly done if the Committee has given no reasons? We see no prejudice to the appellant in his appeal about the laying of the charge. The Committee has not made a substantive decision to assess the lawfulness of the appellant's conduct which has been complained of and is basically set out in the charge, but only that there is a prima facie case to answer.

Jurisdiction on appeal from a decision to lay a charge

[51] This is an appeal under s.111 of the Act from a determination under s.89(2)(a) by the Committee that the complaint be considered by the Disciplinary Tribunal.

[52] The approach to an appeal from a decision to lay a charge was addressed by the Disciplinary Tribunal decision in *Brown v Complaints Assessment Committee* 10050 and *Wealleans* [2011] NZREADT 42, where the Tribunal held:

> *[29] ... 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 the 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 clear that the CAC do not need to be satisfied on the balance of probabilities that the licensee has engaged in conduct contrary s 73 [before laying a charge] 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 [under] s 111 on a decision to lay a charge must be limited to an appeal from [the complaints assessment committee's] 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]*.

[53] The scope of the Appellant's appeal is limited to the following question: did sufficient grounds exist for the Committee to find, under s.89, that a charge could be considered by the Tribunal? We considered this proposition again in *Miller v CAC* 10017& *McAtamney* [2012] NZREADT 25 where *Brown* was reiterated and we stated:

> *"[33] Broadly speaking, we consider that the standard of proof for a no case to answer application from, in this case, the appellant is whether there is some evidence not inherently incredible which, if we were to accept it as accurate, would establish each essential element in the alleged offending conduct of the appellant complained of i.e. misconduct under s 73(a)."*

[54] In this case, we consider that were we to accept the allegations of the second respondents that the Appellant registered covenants on the title of the property without their knowledge and consent, we could well determine that a charge of misconduct had been made out. It is accepted that there is competing evidence on

the issue of whether the second respondents were aware of the covenants, and it will be for us to properly assess that evidence at a substantive hearing.

No Substantive Grounds Given

[55] As covered above to quite some extent, the Appellant submits that the charges should be set aside because no substantive ground was given by the Committee for its issuing the charge. It is submitted for the Authority that this is not a requirement from its Committee. We have explained above our reasons for concurring with that view.

[56] It was emphasised for the appellant that, under s.91 of the Act, the Committee is required to frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the Tribunal; and give written notice of that determination and a copy of the charge to the person whom the charge relates and to the complainant. That was done.

[57] Counsel for the Appellant also referred to the principle of *Lewis v Wilson Horton Limited* [2000] 3 NZLR 546 which we have cited above, but that is not a precise authority in relation to a decision by a committee to lay a charge. The principle in *Lewis* is relevant to judicial decision making and would be pertinent to a determination made by us at a substantive hearing on the charge. It is in accordance with the principles espoused in *Lewis* that we give full reasons for our decisions.

[58] We are inclined to agree with Mr Wimsett that, in deciding to lay a charge, the Committee is not acting as a judicial body and is not required to give substantive reasons. He put it that, by analogy, in a criminal matter there is no requirement on the Police to give reasons when a charge is laid, although a Court gives reasons in determining the charge; and, similarly, there is no requirement on the Committee to substantively explain their decision to lay a charge. We note that when Justices of the Peace hear depositions to ascertain whether there is a prima facie case, they do not give reasons for such a finding; presumably, lest that influence a subsequent jury.

Conduct prior to the Act

[59] The Appellant submits that the Committee did not demonstrably consider the transitional provisions at s.172 of the Act. These provisions are regarded as straightforward and their effect has been ruled upon by the Tribunal in previous cases. We have set out our view on that issue above.

[60] Section 172 of Act states:

> ***172 Allegations about conduct before commencement of this section***
>
> *(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that, -*
>
> *(a) At the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*

> (c) *The licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*
>
> (2) *If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1) the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred."*

[61] In cases in which a complained-about licensee was licensed or approved under the Real Estate Agents Act 1976 at the time of the conduct alleged, and where that licensee has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates a three step process (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67].

Step 1: Could the licensee have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 2: If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[62] At the time of the conduct alleged, the appellant was licensed under the 1976 Act as a salesperson. The appellant has not been *dealt with* under the 1976 Act in respect of the complaint. We now discuss the three steps identified in *Dodd,* as they apply in the present case.

Step 1

[63] Under Rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (REINZ Rules), made under s.70 of the 1976 Act, any person could complain to REINZ. The grounds on which a complaint could be made under the Rules were broad and easily apply to cover this charge (see for example rule B.1). Furthermore, following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (Rule 16.13.5).

[64] Rule 13 set out a code of ethics for REINZ members. Rule 13.1 stated: *"Members shall always act in accordance with good agency practices, and conduct themselves in a manner which reflects well on the Institute, its members, and the real estate profession."*

[65] Section 99(1)(b) of the Real Estate Agents Act 1976 stated:

> *“**99 Board may cancel certificate of approval or suspend salesman***
>
> *(1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground -*
>
> *(a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or*
>
> *(b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspend.”*

[66] A complaint under 13.1 or an application under s.99(1)(b) could relate to conduct other than the licensee's conduct in his or her business as a real estate salesperson.

[67] Accordingly, we consider that that the appellant's alleged conduct in this case could have been the subject of a complaint and/or disciplinary action under the 1976 Act.

Step 2

[68] It is for us to consider the evidence and determine whether a finding of disgraceful conduct is appropriate, but as stated above, were the complainant’s evidence accepted, such a finding would be open to us.

[69] The Tribunal considered the ambit of the term *disgraceful,* as used in s.73, in *CAC v Downtown Apartments Limited* and held:

> *“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.”*
>
> *[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC* [1997 1 NZLR 71).
>
> *[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s 73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
>
> *[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire*

to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public."

[70] Section 73(a) allows the Tribunal to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

[71] In *Smith v CAC and Brankin* [2010] NZREAD 13 the Tribunal held, at paragraph [19]:

"... The conduct of a licensee can be properly described as "disgraceful" under s73(a) of the Act so long as there is a sufficient nexus between the alleged conduct and the fitness or propriety of the licensee to carry out real estate work."

[72] As we have also covered above, in this case, there is an obvious nexus between the appellant's conduct and his fitness or propriety to carry out real estate work. This was an act involving real estate where, allegedly, there was a misrepresentation by the appellant directly relating to the real estate and involving legal documents. A real estate agent must be able to be trusted to deal with the sale of real estate honestly and with the utmost integrity. Prima facie, there could be misconduct by the appellant on the basis of a subterfuge.

Step 3

[73] Only orders which could have been made against the appellant under the 1976 Act are available to us by way of penalty should the charge be proved. The Licensing Board had the power to make three types of orders in the event it found that the ground under s.99(1)(b) of the 1976 Act had been proved: namely, an order cancelling the salesperson's licence; an order suspending the salesperson's licence for a period not exceeding three years; and/or an order imposing a monetary penalty not exceeding $750.

[74] We consider that there is a clear statutory basis for the charge to proceed despite the alleged conduct having occurred prior to the enactment of the 2008 Act.

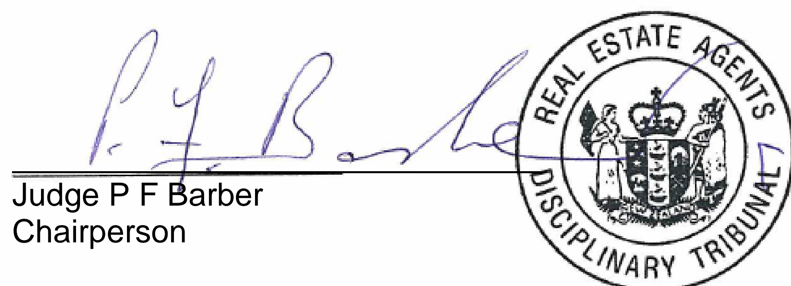
Outcome

[75] Simply put, we consider that the Committee properly carried out its inquiry or screening role prior to laying the said charge. Its reasoning is obvious enough and sufficient to establish a prima facie case. Credibility findings about other issues in civil litigation are not binding on us but we shall take them into account. Neither the process under s.172 of the Act, nor the doctrine of res judicata prevent us considering the said substantive charge against the appellant.

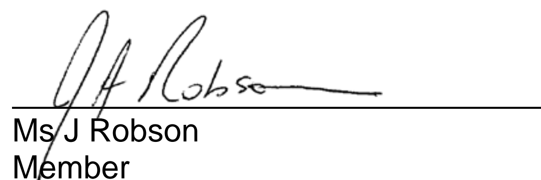
[76] All in all, we consider that the charge has been properly laid and that we have jurisdiction to proceed and must diligently move on to a timetable and fixture to deal with the substance of the charge.

[77] Accordingly, the present appeal on the threshold issue of our jurisdiction is dismissed and we direct the Registrar to arrange a Directions Hearing by teleconference in the usual way.

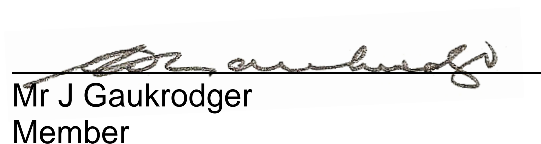
[78] As required, by s.113 of the Act, we draw the parties attention to the right of appeal to the High Court contained in s.116 of the Act.



Judge P F Barber
Chairperson



Ms J Robson
Member



Mr J Gaukrodger
Member