BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 80

READT 20/12 and 49/12

IN THE MATTER OF	appeals under s.111 of the Real Estate Agents Act 2008
BETWEEN	**DERMOT G NOTTINGHAM and PROPERTY BANK REALTOR LTD**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10057)**
	First respondent
AND	**MARTIN HONEY**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 11 and 12 December 2013 and 11 and 12 March 2014 (with subsequent series of typewritten submissions)

DATE OF THIS DECISION 13 October 2014

REPRESENTATION

Messrs D G and P R Nottingham for the appellants
Mr L J Clancy, counsel for the Authority
Mr G W Halse, counsel for the second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Dermot G Nottingham and Property Bank Realtor Ltd ("the appellants") appeal against two decisions of Complaints Assessment Committee 10057 to take no further action on their complaints against the second respondent licensed agent Martin Honey ("the licensee").

The Complaints

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[2] In late September 2009, Property Bank Realtor Ltd purchased a RE/Max franchise and, in October 2009, began operating as RE/Max Advantage Onehunga. The licensee, through his company Pure Realty Ltd, is the former owner of a RE/Max franchise operating in Royal Oak.

[3] The appellants' complaint is that the licensee continued to operate live webpages with RE/Max branding after February 2010, and those webpages displayed listings held by his company under his then new Ray White franchise.

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[4] The licensee made a complaint to the Authority about the appellants' conduct in the course of challenging him about the RE/Max pages. The appellants responded by submitting a further complaint that the allegations made about Property Bank Realtor Ltd and its officers by the licensee were false and made with dishonest intent.

Scope of the Appeals

[5] The appellants contend that the Committee erred in not recognising the gravity of the licensee's conduct in respect of the RE/Max Pages and the allegedly false complaint, and submit that the Committee should have laid charges of misconduct against the licensee for us to hear.

[6] The appellants allege that the Authority and the Committee *"set out to constructively exculpate Mr Honey from his serious offending"*. Mr D G Nottingham also accuses the Committee's Chairperson of criminal malfeasance in public office and alleges that, in finding that the licensees had no case to answer, that Chairperson engaged in a fraudulent conspiracy with others including, it is suggested, certain politicians.

[7] In its decision of 18 July 2012 the Committee stated, inter alia, *"… the licensee took considerable steps to remove his connection from RE/Max when he left the franchise and later when he found out that his name was still coming up in searching the website. These steps included relying on the advice of his web designer in changing his website, and at considerable expense rebranding his office, removal truck, car, stationery, business cards and sending over 1,000 letters to clients advising of his non-association with RE/Max to ensure his association with that brand was removed".*

[8] The Committee had earlier said that, in its view, making a complaint or allegation about an agent is not *"real estate agency work"* so that the appellants' complaint No. READT 49/12 cannot fall within s.72 of the Real Estate Agents Act 2008 (which defines *"unsatisfactory conduct*" by a licensee as distinct from *"misconduct"* which is defined in s.73 of the Act). It also opined that the licensee was entitled to make complaints against the appellants and that the concerns raised by the licensee in his complaints about the conduct of the appellants were genuine. It considered that the conduct of the licensee did not amount to disgraceful conduct (which is a form of misconduct) and decided to take no further action on the complaints by the appellants against the licensee.

Relevant Law

[9] Decisions by Committees to not lay misconduct charges against licensees are discretionary under s.89(2)(c) of the Real Estate Agents Act 2008.

[10] In *Dunn v Real Estate Agents Authority* [2012] NZREADT 56, we stated as follows regarding the scope of the right of appeal from such decisions:

> *"[15] In Kacem v Bashir [2010] NZSC 112 the Supreme Court has clarified that the principles in Austin, Nichols apply to Courts exercising jurisdiction over general appeals from lower courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:*
>
> > *[32] But for the present purposes, the important point arising from 'Austin, Nichols' is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. …"*
>
> *…*
>
> *[18] Considering all of these matters and the important function of protection of the public contained in the purposes of the Act (s.3) we consider there is no general rule preventing an appeal [from a decision not to refer misconduct charges] being considered by this Tribunal, however we consider that the Tribunal's role on an appeal from the exercise of a discretion not to prosecute will be limited to the consideration of the four grounds set out above, i.e. treated as an appeal from a decision in exercise of a discretion.*
>
> *[19] Thus in this appeal the Tribunal would only consider the appeal if it could be said the decision was an error of law, took into account irrelevant considerations, or failed to take into account relevant considerations, or is plainly wrong."*

[11] In line with the approach in *Dunn*, Mr Clancy submits that the scope of these appeals is limited in so far as the Committee's decisions not to lay misconduct charges are challenged. In both the present appeals, the only criteria for a successful appeal would be that the Committee erred in law, took into account irrelevant considerations, failed to take into account relevant considerations, or was plainly wrong to conclude that charges of misconduct should not be laid and prosecuted before us. We accept that submission of Mr Clancy.

[12] In the case of *Brown v CAC 10050*, [2011] NZREDT 42 we considered the scope of the right of appeal against Complaints Assessment Committee decisions to lay charges and we stated:

> *"[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 the complaint be considered by the Disciplinary Tribunal."*

[13] The nub of the appellants' case on both present appeals must be that the Committee was plainly wrong to conclude that the evidence did not disclose a case to answer of misconduct against the licensee and, consequently, that the Committee erred in law and was plainly wrong in exercising its discretion not to lay charges.

[14] It is for the appellants to establish on the balance of probabilities that the Committee's decisions not to lay misconduct charges were flawed within the parameters set out in *Dunn*.

Unsatisfactory Conduct

[15] The appeals are by way of rehearing and we may confirm, reverse, or modify the determinations of the Committee. Notwithstanding the appellants' contention that the licensee's conduct was so serious that charges of misconduct should have been laid, it is open to us, should we consider it appropriate, to make a finding of unsatisfactory conduct against the licensee under s.72 of the Act in respect of the READT 20/12 complaint (which relates to real estate agency work as defined under s.4 of the Act).

[16] Generally, we have treated appeals from Committee decisions not to find unsatisfactory conduct (as distinct from decisions not to lay misconduct charges) as general appeals in terms of *Austin Nichols* referred to above. That means that the question of whether or not to make a finding of unsatisfactory conduct is simply a matter for judgment in accordance with our opinion on the evidence; refer *Jones v CAC 10028 and Shekell* [2011] NZREADT 15.

[17] The question of unsatisfactory conduct does not arise in respect of the READT 49/12 appeal because that appeal does not relate to real estate agency work (rather it relates to an allegedly false complaint having been made by the licensee to the Authority); so that a finding of unsatisfactory conduct under s.72 is not available regarding that complaint/appeal.

[18] Whether or not a finding of unsatisfactory conduct is warranted in respect of the READT 20/12 complaint appeal, i.e. concerning the RE/Max pages issue, will turn entirely on our view of the evidence which we discuss below.

The Evidence

[19] In general, the evidence, cross-examination, and submissions from the appellants were over-elaborate and can be covered by us fairly succinctly.

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[20] The case for the appellants is that Mr Honey deliberately conspired with his web designer, Mr Hemi Taka, to leave live RE/Max branded web pages on the internet, accessible via search engines, displaying properties listed with the licensee's then new Ray White franchise. The contention is that this was done intentionally and dishonestly to mislead consumers and drive web traffic away from RE/Max and towards the appellant's Ray White franchise.

[21] The technical evidence as to the RE/Max pages was not ultimately in dispute at the hearing. The evidence of expert IT witness Messrs Taka, Spence, and Chappell established the following facts:

[a] The RE/Max pages were live and accessible on the internet as at 18 April 2010 and included:

[i] http://www.martinhoney.co.nz/remlistings.php;

[ii] http://www.martinhoney.co.nz/remcontactus.php.

[iii] The RE/Max pages featured RE/Max branding as shown on the print-outs included in the bundle of documents.

[iv] The RE/Max pages were pages within the www.martinhoney.co.nz website, but were not accessible via links from the www.martinhoney.co.nz home page.

[v] The martinhoney.co.nz home page featured Ray White branding.

[vi] The RE/Max pages were not *"cached"* web pages.

[vii] The RE/Max pages could be located and accessed via the internet by using the specific URL or by a Google search of the terms *"RE/Max Onehunga"*.

[viii] Hyperlinks from the RE/Max pages, including links for particular properties, took the reader to other pages within the www.martinhoney.co.nz website, particularly specific property pages, and those pages featured Ray White branding.

[ix] Listings information (property details) on both the RE/Max pages and similar Ray White branded listing pages accessible via the www.martinhoney.co.nz home page were populated automatically from one database by an employee of Pure Realty Ltd copying one

text file to one particular folder location and one image file to one other folder location on the Pure Realty Ltd system.

[22] As a result of the process described at [ix] above, it seems that the RE/Max pages were *"updated"* automatically with information on new properties when the Ray White branded property pages were updated by someone at Pure Realty Ltd.

[23] What is in dispute in these proceedings is not the technical status of the RE/Max pages, but rather the licensee's disciplinary culpability (if any) in respect of the facts listed at [i] to [ix] above.

[24] The evidence at the hearing was that the licensee *"outsourced"* the technical design and maintenance of his website to his web designer, Mr Taka.

[25] The licensee points to emails sent to Mr Taka in February and April 2009 requesting changes to his website, including the deletion of references to RE/Max. Also in evidence before us is a letter dated 9 March 2009, from the licensee to Mr Taka, containing instructions for further changes to the licensee's website around the time of the changeover from RE/Max to Ray White.

[26] In viva voce evidence before us, Mr Taka confirmed that the general tenor of the instructions he received from the licensee at the time of the changeover was that any references to RE/Max should be changed to references to Ray White.

[27] Mr Taka explicitly denied receiving any instruction from the licensee to leave the RE/Max pages live on the internet as a marketing ploy:

> *"Q (Clancy)* *Were you ever instructed by Martin Honey to leave these pages live as some kind of mechanism for directing Google traffic to his Ray White branded website where [the] searcher may be looking for a* RE/Max website?
>
> *A (Taka)* *No. There was no instruction to do that."*

[28] Mr Taka's evidence was that the pages were left live on the internet and not deleted or removed from the server, but with no links from the website's homepage, as time and effort had been invested in the pages.

[29] When the expert witness, Mr Spence, gave evidence, the following exchange occurred between the witness and counsel for the Authority:

> *"Q (Clancy)* *Now it does appear doesn't it, from the email from Mr Taka that these pages have been left as live on the internet albeit without links from the home page. Now is that something within your experience that does happen sometimes when websites are updated and pages are changed, that pages aren't taken off the server but they're left live but just without the link from the home page?*
>
> *A (Spence)* *It is quite common. Web designers like to leave pages around in case they wish to reuse them at some point in the future."*

[30] As an expert witness for the appellants, Mr Chappell had stated that, when updating or rebranding a website, old webpages should be removed from active directories and saved to an 'Archive' directory.

[31] The appellants contend that the reason given by Mr Taka for leaving the RE/Max pages live on the internet (supported to some extent by Mr Spence) is so incredible that it cannot be truthful. The appellants contend that the only explanation for leaving the pages live can be that Mr Taka was instructed to do so by Mr Honey and that references to *"cached"* pages in Mr Honey's original response to the complaint are indicative of an intention to mislead the Committee and us.

[32] Of course, the credibility of witnesses, and the weight to be attached to any witness's evidence (including that referred to above from Messrs Taka and Spence), is entirely a matter for us. In particular, it is for us to assess Mr Taka's evidence that he was not instructed to leave the RE/Max pages live by Mr Honey, but did so as time and effort had been invested in the pages.

[33] For the appellants' argument to succeed we would, in effect, need to make clear adverse credibility findings against both Messrs Honey and Taka, who both denied any intention or conspiracy to use the RE/Max pages to attract customers searching for RE/Max Onehunga to the Ray White website.

[34] The Committee summarised the issue in this way:

> *"[4.6]… the question is not whether an error was made [in leaving the RE/Max pages live on the internet], but whether the conduct of the licensee was an acceptable discharge of his professional obligations".*

[35] After considering the evidence, the Committee concluded:

> *"[4.6]… The Committee can find no intention by the licensee to remain connected to RE/Max. In the Committee's view the licensee took considerable steps to change his website and although there might have been some extra steps available to him, agree that it was reasonable for the licensee to rely on the technical expertise of his web designer to ensure that his association with the brand was removed."*

[36] In addressing this issue, the Committee took into account evidence of the wider steps taken by the licensee to rebrand his business and sever any apparent connection to RE/Max at the time of the changeover to Ray White.

[37] The licensee confirmed to us that a number of steps were taken, as outlined in a 31 January 2011 letter to the Committee from his counsel, including:

[a] Re-branding his office, deleting any reference to RE/Max;

[b] Changing sign-writing on his removal truck and car from RE/Max to Ray White;

[c] Sending out over 1,000 letters to clients advising that the licensee was no longer associated with RE/Max and was now a Ray White franchisee;

[d] Re-branding all letterheads, pens, stationery, note-pads, business cards and flyers.

[38] We must assess the credibility of the licensee's evidence on this issue and consider whether the licensee took reasonable steps, when rebranding from RE/Max to Ray White, to make clear to the public the brand he was now operating under.

[39] Counsel for the Authority notes that the witness Chris Chapman, manager of RE/Max New Zealand head office (who gave evidence to us in March 2013 at the appellant's request and we refer to him further below), expressed no concerns as to any misuse of RE/Max New Zealand's intellectual property by the licensee. Mr Chapman was satisfied to let matters rest once the RE/Max pages were brought to the licensee's attention and taken down in April 2010. He confirmed that the appellants' complaints to the licensee and the Authority were lodged on their own behalf and not on behalf of RE/Max New Zealand.

[40] Mr Clancy, as counsel for the Authority, also notes that there is no evidence before us that any consumer was actually misled as to whether the licensee was operating a RE/Max or a Ray White franchise. As set out above, a person browsing the RE/Max pages property listings who clicked on a particular property would be taken through to a webpage for that particular property featuring Ray White branding. Mr Clancy submits that it is highly unlikely that any consumer making more than the most preliminary enquiry could have ultimately been misled as to whether any of the properties displayed on the RE/Max pages were listed with RE/Max or Ray White. We observe, at this point, that the situation must have become confusing for the consumer.

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[41] The Committee determined that laying a complaint against another licensee is not real estate agency work and therefore could only attract disciplinary attention if it reached the threshold for misconduct under s.73 of the Act. The Committee found that the conduct of the licensee in this particular case, in complaining about the conduct of the appellants, could not reasonably amount to misconduct and declined to lay such a charge to be heard by us.

[42] The licensee was closely cross-examined by the appellants as to his motives in complaining about them. At page 76 of Mr Dermot Nottingham's submissions of January 2014 for Property Bank Realtor Ltd, Mr Honey's evidence as to his motivation for preparing what appeared to be a letter to the police is recorded for the appellants as follows:

> *"… I took [the letter] down to the police thinking that – I didn't know you could write all this stuff about someone and say that you were going to break them and that REMAX was going to cripple me and all those words whatever is in there … I thought there would be laws against it …*
>
> *… [the police] said there wasn't anything they could do …*
>
> *… I'm not used to this in my 20 years, I sell houses, I don't go to Court, I don't have people confront me so aggressively I'm not used to it …*

> *… I just thought something was going to happen in that would be some law but there wasn't and that was out of frustration and that is why I saw Jackie Blue because I couldn't believe it I didn't know who to turn to …"*

[43] In his brief of evidence, the licensee sets out his reasons for bringing the conduct of the appellants to the attention of the Authority. He also confirmed in evidence to us that he had viewed material regarding the appellants on the internet, similar to the material in the hearing bundle, which caused him genuine concern; but he accepted that he was unable to confirm the accuracy of that information on the internet.

[44] We need to assess all the evidence and form our own view as to the licensee's motivations and beliefs and whether he was entitled to raise his concerns with the Authority.

[45] It is for the appellants to show that, in respect of Mr Honey's complaint to the Authority, the Committee's decision not to lay a misconduct charge should be interfered with by us on the grounds set out in *Dunn*.

[46] Through Mr Clancy, the Authority submits that the decision reached by the Committee was entirely open to it on the evidence.

Expert Evidence

[47] We heard technical or expert computer evidence at the hearing from Messrs Taka, Spence, and Chappell. Messrs Spence and Chappell have also provided written reports. The appellants also invite us to consider the report from former detective sergeant Peter Hikaka that was provided to the Committee.

[48] While we have been assisted by the expert evidence, particularly as to the technical status of the webpages, the various expert reports are of less assistance on the key issue of intention. Both Messrs Chappell and Hikaka give their views on the likelihood that the RE/Max pages were left live on the internet deliberately.

[49] We may receive as evidence any statement, document, information, or matter that may, in our opinion, assist us to deal effectively with the matters before us, whether or not that information would be admissible in a Court of law. However, drawing inferences from proven facts is ultimately a matter for us rather than expert witnesses. We must reach our own conclusions as to the licensee's knowledge and intent in respect of the RE/Max pages and his disciplinary culpability (if any).

Further Salient Evidence

<u>Evidence from Licensee</u>

[50] In his evidence-in-chief, Mr Honey categorically denied that he intentionally and fraudulently sought to trade off the RE/Max brand. He said that his instructions to his website consultant were clear that he wanted to be rebranded *"Ray White"* and had no interest in being regarded as a RE/Max agent. Also, in some detail, he explained that he was extremely disturbed and frightened by the reaction of the Messrs Nottingham to the website problem covered above and for that reason approached the Onehunga Police.

[51] In the course of his evidence, Mr Honey said that, if we find that the RE/Max web pages were "*live*" at material times as alleged by the appellants, then he was certainly not aware of that until 18 April 2010 when his wife referred the matter to him after being rung that day by Mr D G Nottingham about the issue.

[52] He further noted that in any event there were no listings on the page which were not Ray White listings and he fails to see how he could have benefitted from a RE/Max nexus. He said that the pages could only be accessed from a Google search of RE/Max Onehunga which would show a number of property entries and it was then necessary to click onto those entries to reach a website. He added that if the Martin Honey listing was clicked and a listing was clicked on, then his Ray White website would appear. He had earlier asked us to accept that he had taken all necessary steps to rebrand and had instructed his website consultant (Mr Taka) to remove all traces of RE/Max at the time of the transition of his business from RE/Max to Ray White.

[53] The rebranding had taken place in late February 2009 and was rather involved, but Mr Honey left on good terms with RE/Max. He said that he had excellent administrative staff who had served his business for a long time so that he could focus on selling property. His staff covered most administrative work for his business, including maintaining his personal website which covered his property listings, and if they had any technical problems they went direct to Mr Hemi Taka whom he retained as an IT consultant to his business.

[54] Mr Honey had understood from Mr Taka that the website link of Mr Honey in relation to RE/Max *"would disappear over time"* and it did not occur to Mr Honey that there could still be a live web page relating to RE/Max.

[55] It seemed to us that Mr Honey did not understand the technicalities of operating a website and, certainly, not of transferring it or closing it down and left all that to his staff and, in particular, to Mr Taka as his IT consultant. He did not know what the word *"cached"* meant.

[56] Mr Honey asserted to us that he did not want to retain any website connection whatsoever with RE/Max and thought that all his business affairs had been transferred over to a Ray White website. He also seemed to be saying that he regarded his own brand as bigger than the RE/Max brand so that he certainly did not want to maintain a RE/Max connection.

[57] Mr Honey also gave considerable evidence as to how he felt intimidated by the Messrs Nottingham.

<u>Evidence of Mrs H L West</u>

[58] The first witness for the appellants had been Mrs H L West appearing under subpoena. Together with her husband, she had been a real estate salesperson under the RE/Max banner working for Mr Honey and continuing on for a time after he moved to Ray White Real Estate. She and her husband soon purchased a Harcourts real estate franchise which they still operate. When she heard about the 18 April 2010 complaint from Mr Nottingham she asked to meet Mr Honey to enquire how it could be that his latest Ray White listings were appearing on the old RE/Max site. It concerned her that someone was still loading them on to the RE/Max site. She said: *"I asked because I had heard from a client that if you searched RE/Max Onehunga*

on the web you were directed to Mr Honey's RE/Max website which showed his current listings. I tested the assertion and found it happened as suggested". She met with Mr Honey who said that he would take care of the problem. From her oral evidence to us it was clear she did not think it right that anyone looking at a RE/Max site could be referred to Mr Honey.

Evidence of Mr M A Chappell

[59] The next witness for the appellants was Mr Chappell, a Forensic Consultant and Managing Director of NZ Forensics. His evidence was helpful on technical matters but we are unanimously of the view that he was not a credible witness in terms of his assessment of Mr Honey's intentions so that we only refer to his evidence fairly succinctly.

[60] He produced his detailed report of 4 April 2013 headed *"Website/page Examination Remax Onehunga/Marten Honey"*. We were interested that in it he defined *"web cache"* as a mechanism for the temporary storage (i.e. caching) of web documents such as HTML pages and images. He said that these caches are stored normally within the search engine's environs such as Google servers, Yahoo servers, and any other search engine or client that internet users use. He developed that topic in some detail and dealt with other terms such as web crawler, web sites and web pages, hyperlinks, HTML code, URL meaning a uniform resource locator also known as a web address, temporary internet files (web browser internet cache), and web search engines. He then gave his views on the interaction between the RE/Max website and the Ray White website and in general. He also covered the topic of deleting a website and then concluded:

> *"[83] I am of the opinion that Martin Honey has intentionally run the RE/Max website so that he was still able to have the resulting searchers visiting his Ray White website and his current listing. As his contact listing was exactly the same as for the Ray White contacts he would not miss anyone who is directed to his RE/Max pages. My opinion is based on the evidence previously discussed."*

[61] He concluded his report as follows:

> "***Conclusion***
>
> *102. As I have previously discussed in this report I consider that from all the evidence that I have found and all the documents that I have read, I am of the opinion that the webpages complained of, had been left up and live intentionally. While Mr Honey and Mr Taka have attempted to state that this was not the case and the webpages were present because of web caching, I find this to be totally incorrect.*
>
> *103. Intention in leaving the webpage live has been inferred from the fact the webpage headers have changed and also has other content of the webpages. This would not have occurred or have needed to occur if the webpages were not live.*
>
> *104. Mr Honey, in attempting to portray that the Realestateguys website was still using the REMAX Advantage logo, is also attempting to mislead the*

tribunal as he has with his explanation that the webpages were only visible because they had been cached by Google." "

[62] Mr Chappell was carefully cross-examined.

Evidence of Mr H Taka

[63] Initially, we understood Mr Taka to be saying that the links on Mr Honey's website to RE/Max would naturally fall off search engines, although the Google engine has a crawler which picks up URLs and feeds them back, but he felt that Mr Honey's links were *"dead links going nowhere"*. He made it clear that he was entirely responsible for not having annihilated the links now of such concern to the appellants.

[64] Mr Taka also agreed, early in his evidence to us, that the appellants are correct that if one entered the RE/Max web site for Onehunga, one could connect to Mr Honey at Ray White. When Mr Nottingham complained, Mr Taka immediately set to and *"removed all the dynamic pages"*. Inter alia, he made contact with Google about the situation. He explained in some detail to us the steps he took to remove Mr Honey's file and folders from Websaver and elsewhere.

[65] Mr Taka was cross-examined on the technicalities raised by Messrs Chappell and by Mr Spence. Inter alia, Mr Spence had referred to *"cache"* as the storing of data away from a link for the purpose of improving computer performance. He said such data tends to be dated information and is kept on another server to speed access to the original site. Mr Taka seemed to be agreeing that *"caching"* meant storing an image from a web site in another server so that the image is no longer live on the original website and is simply not there anymore.

[66] Mr Taka stated that his definition of "*live*" pages are pages one can click to from a website and not need to click through Google to obtain.

[67] When Mr Nottingham made his complaint to Mrs Honey, Mr Taka as the person responsible for Mr Honey's website was very surprised that there could still be a link to Mr Honey at Ray White on the RE/Max website. He had thought that all the links now in issue had become *"dead"*. However, it emerged under cross-examination that Mr Taka had not actually annihilated Mr Honey's RE/Max pages because he did not think he needed to and that they would just drop off the system.

[68] Under cross-examination, Mr Taka also made it clear that Mr Honey's original website, with its branding as RE/Max, was built and designed by Mr Taka and his staff. We understood that, when Mr Honey moved to Ray White, Mr Taka did not obliterate the former RE/Max site of Mr Honey's in case material on it was ever needed again. Generally, he had worked on Mr Honey's website on a monthly basis, but sometimes more often, and it surprised him that after 14 months of his having arranged the changeover to Ray White for Mr Honey there was a complaint that some links were not dead. It seems that the original pages on Mr Honey's RE/Max website were alive in the sense that a URL could find them.

[69] Mr Taka was adamant that Mr Honey had never directed him to keep a link from the old RE/Max site pages of Mr Honey to his business with Ray White. Mr Taka added that, in a perfect world, that old site should have been absolutely deleted and with hindsight he should have done that.

[70] Under cross-examination from Mr Clancy, Mr Taka repeated what he had said to Mr P Nottingham that he was never instructed by Mr Honey to leave any pages live in order to get web-traffic from RE/Max to Mr Honey's Ray White website. It seems that the latter site is maintained by an expert at Ray White.

[71] We record that we assess Mr Taka as an honest and credible witness.

Evidence from Mr C M Chapman

[72] We referred above to Mr Chapman, manager of RE/Max, accepting Mr Honey's explanation. He also gave evidence and confirmed that he accepted there had been a mistake and that, at material times, Mr Honey was not aware that links still existed from the RE/Max site at Onehunga to Mr Honey's business with Ray White. Mr Chapman thought it unlikely that people would find their way through to Mr Honey from that RE/Max site, apparently, because one needed to pass through Google to do that.

[73] Mr Chapman said that from knowing Mr Honey as he did, he could not believe that the linkage retention had been deliberate on Mr Honey's part so that RE/Max took no action against Mr Honey over the issue raised by the appellants.

Mr M Spence

[74] Mr Spence gave evidence under subpoena from Mr D Nottingham. He adduced his report and was examined and cross-examined on the detail of it.

[75] Under cross-examination from Mr Clancy, Mr Spence seemed to say it is likely that the pages in issue should be regarded as *"live in the Google sense"* but not in the sense of being linked to the Martin Honey home page at Ray White. He also put it that Mr Taka must have left Mr Honey's RE/Max web pages left live, but without being linked to a home page. He said that was a common practice because web designers like to leave in cyberspace pages they have created in case they ever wish to reuse them.

Other Witnesses

[76] There was further evidence from such persons as Ms Lee-Ann Earlan, who was Mr Honey's personal assistant at Pure Realty Ltd from February to August 2009, and from Ms Colleen Muller who was receptionist for that company from February 2009 to mid 2011 but there is no need to detail that evidence. There was specialist IT evidence from Mr Cronje (referred to below), and evidence from Mr Hikaki.

[77] Also, the evidence from Messrs Nottingham is dealt with in our reference to the stance of the various parties to this case and in our reasoning below.

Hearing Bundle

[78] The appellants' have alleged that the paginated hearing bundle was deliberately withheld from them by counsel for the Authority with the intention of hiding key documents. That contention is denied by Mr Clancy. An examination of his file confirms that a hard copy of the hearing bundle was sent to the appellants on 10 July 2012, and electronic copies sent to them by email and on disk on 10 and 17 July 2012, which was the same time that the bundle was filed and served with our

Registry and on counsel for the licensee. A second copy was provided on 16 December 2013, after Mr Nottingham stated at the hearing on 11 December 2013 that the appellants did not have the bundle.

The Submissions for the Second Respondent Licensee

[79] Generally speaking, on behalf of the licensee Mr Halse adopts the stance of counsel for the Authority including Mr Clancy's submissions on legal aspects.

[80] Simply put, Mr Halse submits that there is no evidence of misconduct on the part of the licensee and, in particular, the question of unsatisfactory conduct does not arise in respect of appeal no. READT 49/12 as that appeal does not relate to real estate agency work so that a finding of unsatisfactory conduct under s.72 is not available; and that, with regard to appeal no. READT 20/12, a finding of unsatisfactory conduct is not warranted in respect of the complaint i.e. the issue about the RE/Max webpages. However, he accepts that the latter issue is entirely for us in terms of our assessment of the evidence.

[81] It is accepted that if we thought there was a prima facie case of misconduct, we would refer matters back to the Authority to lay charges accordingly.

[82] With regard to complaint no. READT 20/12, Mr Halse understands the complaint to be that the licensee deliberately conspired with his web designer, Mr H Taka, to leave as live on the internet RE/Max branded web pages, accessible through search engines, displaying properties which listed with the licensee's Ray White franchise. The assertion of the appellants is that this was done intentionally and dishonestly in order to mislead consumers and to drive web traffic away from RE/Max and towards Ray White.

[83] Mr Halse submits that the dispute is not about the technical status of the RE/Max pages but whether the licensee has any disciplinary culpability about what was left by Mr Honey to be displayed on the internet as covered above. In terms of that Mr Halse submits as follows:

1 Mr Honey outsourced the technical design and maintenance of his website to web designer, Mr Taka.

2 Emails were sent to Mr Taka in February and April 2009 requesting changes to his website, including the deletion of all references to RE/Max. We have in evidence the letter dated 9 March 2009 from Mr Honey to Mr Taka containing instructions to make further changes to Mr Honey's website around the time of the changeover from RE/Max to Ray White.

3 Mr Taka confirmed in his evidence to us that his instructions from Mr Honey at the time of changeover were to remove any references to RE/Max and change them to Ray White.

4. Mr Taka confirmed that he had received no instruction from the licensee to leave the RE/Max pages live on the internet as a marketing ploy.

5. Mr Taka confirmed in his evidence that the web pages were left live on the internet and not deleted or removed from the server (although there were no links from the website's home page) as time and effort had been

invested in those pages. Mr Spence, the expert witness, confirmed that this was quite common as web designers like to leave pages around in case they wish to reuse them at some point in the future.

6. The appellants' main contention is that the reason given by Mr Taka for leaving the RE/Max pages live on the internet (supported to some extent by Mr Spence) is so incredible that it cannot be truthful. They contend that the only explanation for leaving the pages live was because Mr Taka was instructed to do so by Mr Honey and that references to "cached" pages in Mr Honey's original response to the complaint are indicative of an intention to mislead the Committee and us.

7. That it is for us to assess the credibility of witnesses and the weight to be attached to any witnesses' evidence; and it is entirely credible for us to find upon Mr Taka's evidence that he was not instructed to leave the RE/Max pages live by Mr Honey but did so as time and effort had been invested in the pages.

8 For the appellants argument to succeed we would need to make clear adverse credibility findings against both Messrs Honey and Taka who, despite extensive cross examination, denied any intention or conspiracy to use the RE/Max pages to attract customers searching for RE/Max Onehunga to the Ray White website.

9 The issue is whether Mr Honey's conduct was an acceptable discharge of his professional obligations as found in the Committee's summary at 4.6 of its decision. The Committee formed the view that it could find no intention by Mr Honey to remain connected to RE/Max and in fact took considerable steps to change his website and relied upon the technical expertise of his web designer to ensure that his association with the brand was removed.

10 Mr Honey gave lengthy evidence about the wider steps that he took to rebrand his business and sever any apparent connection to RE/Max at the time of the changeover. It is submitted that we should also consider that evidence to be relevant. It is noted that Mr Honey:

(a) Rebranded his office deleting any reference to RE/Max;

(b) Changed signwriting on his removal truck and car from RE/Max to Ray White;

(c) Sent out over a thousand letters to clients advising he was no longer associated with RE/Max and was now a Ray White franchisee;

(d) Rebranded all letterheads, pens, stationery, note pads, business cards and flyers.

11 Mr Honey's evidence under cross examination was consistent and that he took reasonable steps to make clear to the public the brand he was operating under.

12 The manager of RE/Max New Zealand (Mr Chapman) who gave evidence to us in March 2013, at the appellants' request, expressed no concerns as

to any misuse of RE/Max New Zealand's intellectual property by Mr Honey. He stated that he and Mr Honey left on good terms.

13 That there is no evidence before us that any consumer was actually misled as to whether Mr Honey was operating a RE/Max or Ray White franchise; and it is highly unlikely that any consumer could have been so misled.

[84] With regard to complaint no. READT 49/12, Mr Halse submits that the Committee correctly determined that laying a complaint against another licensee is not real estate agency work and could only attract disciplinary attention if it reaches the threshold for misconduct under s.73 of the Act. He referred to the Committee having found that the conduct of Mr Honey in complaining about the conduct of the appellants could not reasonably amount to misconduct and declined to lay a charge against him.

[85] Mr Halse noted that Mr Honey and his wife were closely cross-examined before us by the appellants as to Mr Honey's motives in complaining about the appellants, and that in his evidence Mr Honey covered his reasons for bringing the conduct of the appellants to the attention of the Authority.

[86] Mr Halse submits that the decision of the Committee to not lay a misconduct charge in respect of Mr Honey's complaint about the appellants to the Authority was correct.

[87] While Mr Halse supports Mr Clancy's submissions to us in respect of the expert evidence, as we have covered above, he submits that Mr Chappell's evidence should be disregarded as he has a clear association with the appellants and has been a contributor to a website (Lauda Finem) with which they are associated. He submits that, in any case, it is for us to reach our own conclusions as to Mr Honey's knowledge and intent at material times.

[88] Mr Halse referred to the extremely lengthy submissions filed by and for the appellants. He expressed concern that they contain personal attacks against not only Mr Clancy but also against Mr Halse and against some of us. We agree with Mr Halse that those attacks are somewhat irrelevant and do not assist us. Indeed, we consider it concerning and disturbing that the Messrs Nottingham generated an atmosphere of intimidation in our courtroom.

[89] Mr Halse submits that Messrs Honey, Taka, and Mrs Honey have given us credible evidence and it is for us to assess that and the credibility of witnesses. He submits there is no evidence to establish misconduct, or even unsatisfactory conduct, on the part of Mr Honey in respect of the RE/Max pages as covered above. He submits that the appellants have been unable to show that the Committee erred in law, took into account irrelevant considerations, or failed to take into account relevant considerations, or was plainly wrong in respect of the appellants' contention that misconduct charges should have been laid against Mr Honey in respect of the RE/Max pages issue and also in respect of Mr Honey's complaint to the Authority about the appellants.

The Stance of the Appellants

[90] The stance of the appellants is covered above. We received extremely detailed submissions on behalf of the appellants comprising not only five typed volumes but further typed and oral submissions as well. It is not clear to us why the appellants have been so over elaborate.

[91] Essentially, their stance is that Mr Honey has been *"caught red handed operating fraudulently marketed RE/Max web pages secreted inside the database of his Pure Realty Ltd Ray White site"*.

[92] It is put for the appellants that, unaware of the Spence report, they made their own enquiries of a forensic computer specialist and accordingly obtained a report from Mr Cronje. They put it, inter alia, *"that report made similar if not exactly the same findings with the inclusion of another damning piece of inculpatory evidence that establishes and supports both the Spence and his own findings. That evidence was the generic personal email address on the Martin Honey email pages which clearly show a designed and altered website".* They emphasise that Mr Cronje described the Google "*cached*" system, but then rejected that Mr Honey's RE/Max web pages were "*cached"* and asserts that they were live at all material times.

DISCUSSION

[93] It is entirely for us to assess the evidence before us and the credibility of the witnesses. It is for us to determine whether or not, in our judgment, there is evidence establishing unsatisfactory conduct on the part of the licensee in respect of the RE/Max pages. Indeed, the appellants submit there has been misconduct by the licensee.

[94] With regard to the appellants' argument that misconduct charges should have been laid, both in respect of the RE/Max pages and the licensee's complaint to the Authority about the appellants, it is for the appellants to establish that the Committee erred in law, took into account irrelevant considerations, failed to take into account relevant considerations, or was plainly wrong.

[95] For the Authority, Mr Clancy submits that the Committee's decisions were open to it and that both appeals should be dismissed.

[96] We note that, after Mr Taka's evidence, Mr Halse pointed out that Mr Honey accepts there has been a mistake in that his original website was not annihilated.

[97] With regard to the allegations for the appellants that there was bias on the part of the Committee, inadequate procedures and, generally, a lack of natural justice; we do not find any of those allegations proven in any respect but, in any case, the hearing before us has been de novo and very full.

[98] We can understand the concern of the Messrs Nottingham that when Mr Honey transferred his real estate business from RE/Max Onehunga area to Ray White, there was an inadequate disconnection of Mr Honey's website and it remained possible to become connected to Mr Honey's business at Ray White through a RE/Max website. However, we cannot be satisfied that this was in any respect whatsoever deliberate

on Mr Honey's part. We accept him as an honest witness and we accept his denial of knowledge of what we have described.

[99] In our view, it follows that Mr Honey's lack of mens rea or guilty mind, or knowledge or intent, means he cannot be guilty of misconduct in terms of the complaints of the appellants. His conduct cannot be regarded be regarded as disgraceful, seriously incompetent or seriously negligent. He has not been or in any way wilful or reckless in terms of s.73 of the Act.

[100] Having said that, it is certainly unsatisfactory that his new business website still remained linked to a RE/Max website. We find that Mr Honey's IT Consultant, Mr Taka, is entirely responsible for that unsatisfactoriness. We do not think that Mr Honey can be blamed in any way for the IT failures. We accept that this website area is rather technical and confusing and that even experienced and expert IT consultants seem to have different views and follow different procedures in the type of situation leading to this case. Accordingly, one hesitates to blame Mr Taka.

[101] However, we are only concerned with the conduct of Mr Honey himself; and we do not think that his conduct falls under any of the categories of unsatisfactory conduct as that offence is defined in s.72 of the Act which reads:

> ***"72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
>
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
>
> *(c) is incompetent or negligent; or*
>
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[102] We find that Mr Honey did not intend that his Ray White business be internet connected to RE/Max and that he took all reasonable steps to achieve that. We find nothing untoward in conduct of Mr Honey regarding his complaints to the Authority against the appellants. We agree with Mr Halse's submissions except that the situation concerning the Messrs Nottingham would have been confusing to the consumer.

[103] Accordingly, we do not find any unsatisfactory conduct on the part of Mr Honey. We accept that there can, of course, be circumstances where, although the conduct in issue is effected on behalf of the licensee rather than by the licensee, that licensee could be guilty of unsatisfactory conduct, himself, herself, or itself. However, this is not such a case.

[104] In any event, we take the view that no further action is warranted on the complaints by the appellants. Accordingly the appeals are hereby dismissed.

[105] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member