

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 86

READT 66/14 and
READT 63/14

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

BETWEEN **JACE INVESTMENTS LIMITED**
(READT 66/14)
MAKETU ESTATES LIMITED
(READT 63/14)

Appellants

AND **REAL ESTATE AGENTS**
AUTHORITY

First respondent

AND **STANLEY ROBB**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 8 December 2015

COUNSEL

Mr G Brittain for the appellants
Ms K Lawson-Bradshaw for the Authority
Ms H R Smith and Mr S Caradus for the second respondent

DECISION OF THE TRIBUNAL

The Present Applications for Costs

[1] On 23 September 2015 Mr Brittain as counsel filed a memorandum for Maketu Estates Ltd seeking costs against the Authority and/ or the licensee broadly on the basis that these proceedings have been delayed due to the alleged inability of the Authority to obtain instructions from its Committee 304 “*on various matters*” as he put it. Accordingly, Maketu Estates Ltd seeks a contribution to its costs which it has outlined to total \$5,076.

[2] Counsel for the licensee opposes that application for costs by memorandum dated 13 October 2015 and submits that costs should lie where they fall as Maketu Estates Ltd has, it is submitted, substantially contributed to its own costs and those of the other parties by its conduct. Counsel then proffered detail in support of that submission.

[3] By typed submissions filed with us on 14 October 2015 Ms Lawson-Bradshaw as counsel for the Authority, submits that no costs award can, or should, be made against the Authority. She notes that Maketu Estates Ltd, as one of the appellants has sought an order from us against the Authority and/or the licensee to contribute towards its legal costs. On behalf of the Authority, Ms Lawson-Bradshaw opposes that on the following bases, namely:

- [a] There is no jurisdiction to award costs against the Authority under the Real Estate Agents Act 2008; and
- [b] Even if it were permitted by the Act, a costs order against the Authority is not justified in the circumstances.

Background

[4] The appellant Maketu Estates Ltd complained to the Real Estate Agents Authority about the conduct of the second respondent licensee alleging that he deliberately withheld information from it (as a vendor) regarding a potential purchaser of that complainant's property.

[5] The appellant Jace Investments Ltd complains and alleges the licensee prevented it from having the opportunity to make an offer for the particular property by not bringing its interest to the attention of the vendor; that the licensee misled Jace Investments Ltd as to whether or not the property was for sale; and also withheld information from that complainant as to whether or not the vendor would entertain other offers; and that the licensee made no attempt to obtain an offer from Jace Investments Ltd before completing another offer with the vendor.

[6] By a 3 July 2014 decision, the Committee determined to take no further action with regard to the complaints or any issue involved in them and full reasoning was given for that determination.

[7] The complainants appealed that decision to us and sought and achieved that the appeal be allowed by consent and, instead, that charges be laid by the Committee on the basis that contrary findings had been made in other High Court litigation on the same facts.

[8] That novel situation came about because the licensee not only consented to the appellants' appeal against the no further action decision of the Committee, but did so on the specific basis that a misconduct charge should be laid by a Committee of the Authority.

[9] That led to much negotiation and discussion between the parties but, ultimately, charges were laid by CAC 403 on 3 November 2015 with quite detailed particulars relating to a charge of misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 for wilfully or recklessly contravening clauses 6.2 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, and with an alternative charge of unsatisfactory conduct.

Discussion and Outcome

[10] This Tribunal is created by the Real Estate Agents Act 2008 and its powers are limited to those provided in the Act.

[11] An appeal to us against a determination by a Committee is governed by s 111 of the Act. If we find unsatisfactory conduct we have the power to make any of the orders that a Committee could have made pursuant to s 93 of the Act. The orders listed in s 93 are exhaustive.

[12] While s 93(1)(i) allows for the payment of costs or expenses incurred by the complainant during the investigation or the hearing, it only allows for that order to be made against a licensee. It does not allow for a costs order against the Authority. Section 93(1)(i) reads:

“93 Power of Committee to make orders

- (1) *If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
- (i) *Order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.”*

[13] We emphasise that s 93 has not been engaged yet because no finding of unsatisfactory conduct has been made against the licensee. Rather, we have allowed the appeal by consent against the Committee’s decision to take no further action and have remitted the complaints back to a new Committee for charges to be laid.

[14] Also there is no provision in the Act for us to award costs against the Authority or the Committee should we make a misconduct finding (or even a finding of unsatisfactory conduct) against the licensee. Costs might only be ordered against the licensee in favour of the complainant.

[15] Ms Lawson-Bradshaw also submitted that even if we did have the power to award costs against the Authority (which we do not), the circumstances of this case would not make such an award against the Authority appropriate. She traversed the history of negotiations between the parties which led to the current charge as covered above and submitted that there is nothing in the way the Authority has conducted itself that should result in a costs award against it. She puts it that the primary cause of cost in this appeal is the fact that the appellants and the licensee presented a proposal for disposal on the basis of an agreed form of charges when, once issues of culpability were properly addressed, it became clear there was no such agreement. She further submitted that it is a matter for the appellants if they wished to insist on a particular form of charges, but the cost of that should not be visited on the Authority.

[16] As referred to above, the only power in the Act dealing with costs is s 93(1)(i) which is set out above. In this case the Committee had not made any determination under s 89(2)(b) which relates to the Committee determining that the licensee has engaged in unsatisfactory conduct. The determination of the Committee was made under s 89(2)(c) that the Committee take no further action. Of course, as explained above, since then another Committee of the Authority has made a determination under s 89(2)(a) that a charge be considered by us.

[17] Should the Authority succeed in prosecuting Charge 1 before us against the licensee then, as we have explained above, we are given various powers to make orders in terms of s 110 of the Act. In that case, in the usual way we would consider the issue of costs although, under s 93(1)(i), that would only be in terms of whether the licensee be ordered to pay costs to a complainant and not to the Authority unless that type of latter issue could be dealt with under s 110(2)(g) as a matter of compensation to the Authority upon a finding of misconduct. Certainly, costs cannot be awarded by us against the Authority; we have no such power.

[18] In any case, as matters currently stand there seems nothing in the manner in which either the Authority or the licensee have respectively conducted themselves that should result in a costs award against either of them.

[19] We observe that, should the said charge of misconduct be proved against the licensee, we shall be expected to consider our powers to award costs and/or compensation under the head of misconduct as distinct to unsatisfactory conduct. We stress that at this point there is no finding of guilt against the licensee so that the question of costs does not arise and is academic.

[20] Accordingly the applications for costs are hereby dismissed.

[21] 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

Ms C Sandelin
Member