BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 11

READT 048/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	MICHAEL EDWIN KOOIMAN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 519) First respondent
AND	MURRAY RODGERS, MATTHEW CLARKE, and PAUL CUDBY Second, third, and fourth respondents
Hearing:	14 March 2019, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr Kooiman Ms E Mok, on behalf of the Authority Mr G Dewar, on behalf of the second, third, and fourth respondents
Date of Decision:	8 April 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Kooiman has appealed against the decision of Complaints Assessment Committee 519 ("the Committee"), dated 19 September 2018, in which it decided not to inquire into his complaint against the second, third, and fourth respondents, Mr Clarke, Mr Rodgers, and Mr Cudby ("the licensees").

Background

[2] Mr Kooiman is a director of Luxe One Limited ("Luxe"), which owns a unit in a property at Lower Hutt. The property is managed by Body Corporate 68792 ("the Body Corporate").

[3] On 28 July 2015, his Honour Justice Brown made an order in the High Court at Wellington, under s 141 of the Unit Titles Act 2010, for an administrator to be appointed to the Body Corporate.[1] In making the order, his Honour referred to a "long and troubled history of conflict between the members" of the Body Corporate.[2] That order was continued, and further orders made, by her Honour Justice Clark on 21 September 2017.[3]

[4] On 19 December 2017, Synergy Enterprises and three other owners of units at the property applied to the High Court for orders dissolving the Body Corporate, cancelling the unit plan, and for the sale and division of the underlying title ("the dissolution proceeding").[4] The dissolution proceeding has yet to be determined.

[5] The licensees are all licensed salespersons. On the instructions of the solicitors for the applicants in the dissolution proceeding, the licensees have each sworn affidavits in relation to the property (Mr Cudby on 6 December 2017, Mr Rodgers on 7 December 2017, and Mr Clarke on 19 December 2017). These affidavits have been filed in the dissolution proceeding.

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1 *Body Corporate 68792 v Synergy Enterprises Ltd & Ors* [2015] NZHC 1731.
2 At paragraph [1].
3 *Body Corporate 68792 v Synergy Enterprises Ltd & Ors* [2017] NZHC 2296 (Orders); *Body Corporate 68792 v Synergy Enterprises Ltd & Ors* [2018] NZHC 1735 (Reasons).
4 *Synergy Enterprises Ltd & Ors v Harry Memelink & Ors* CIV 2017-485-1048.

[6] Each of the licensees states his experience in commercial real estate. Each also expresses an opinion as to the effect of any involvement by one of the unit owners, Mr Memelink, in the sale process. Those comments are not relevant to the appeal.

[a] Mr Cudby states that he is familiar with the property and has knowledge of some of its owners. Following a brief description of the property, he expresses his opinion that the highest and best use for the site is for redevelopment, and that as such it is most likely to achieve a better return for its owners if it is sold as a redevelopment site. He says that he believes that this will achieve a better return than sale of the individual unit titles.

[b] Mr Rodgers states that he is familiar with the property, and that his knowledge includes having acted on prior sales and leases. He expresses his opinion that the property would be best sold as a redevelopment site as one title.

[c] Mr Clarke states that he is familiar with the property. He states that he has been asked to comment on whether, in his professional capacity, the property would be better offered to the market as a collection of individual units, as they exist, or on the open market as a redevelopment site. He "unhesitatingly" confirms that the property would yield a better return for the owners if it were sold as one title for redevelopment. Mr Clarke then refers to prior direct dealings with the property (having conducted a mortgagee sale of a unit).

[7] On 6 April 2018, Mr Kooiman lodged complaints with the Authority against each of the licensees.

The Committee's decision

[8] Mr Kooiman's complaint (as summarised by the Committee) was that the licensees "swore unsubstantiated affidavits opining the property would be best sold as

a whole for redevelopment, rather than as individual units, and those affidavits have the potential to adversely affect the value of [Mr Kooiman's] units at the property."[5]

[9] The Committee recorded that Mr Kooiman sought remedies by way of compensation of $100,000 for the detriment he would suffer due to the licensees' affidavits, and an order that the licensees make statements that the units are not better sold as a redevelopment opportunity.[6]

[10] The Committee decided not to inquire into the complaint, pursuant to s 79(2)(a) of the Real Estate Agents Act 2008; that is, on the grounds that the licensees' alleged conduct was neither unsatisfactory conduct nor misconduct, as defined in the Act.

[11] The Committee recorded that it could only make a finding of unsatisfactory conduct against the licensees under s 72 of the Act, if the alleged conduct was real estate agency work. It therefore considered whether preparing and swearing affidavits to be filed in a Court proceeding was within the definition of "real estate agency work" in the Act, and concluded that it was not.[7]

[12] The Committee referred to the definition of "real estate agency work" in s 4 of the Act: "any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction". It concluded that the purpose of the affidavits was to provide the licensees' professional opinions to the Court, and not for the purpose of "bringing about a transaction". It noted that the Court process would determine the relevance or use of the affidavits in the overall dissolution application.[8]

[13] The Committee then considered whether the licensees' affidavits could be considered to be appraisals of the property, as was contended by Mr Kooiman. It noted that if the affidavits were appraisals, they could be "real estate agency work". It concluded that the affidavits were not appraisals, because none of them gave a price for the property, and there was no evidence that any of the licensees was asked to

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5 Committee's decision, at paragraph 1.4.
6 At paragraph 1.6.
7 At paragraph 3.10.
8 At paragraph 3.6.

provide an appraisal, or that any of them had entered, or was going to enter, into an agency agreement with the Body Corporate.[9]

[14] The Committee then considered whether the licensees might have breached rr 6.4 and 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, as contended by Mr Kooiman, by providing potentially misleading evidence and/or failing to act in their clients' best interests. It rejected this contention, on the grounds that both rules related to conduct of a licensee "in relation to their client", and in the present case there was no "client" defined in the Act.[10]

[15] The Committee then considered s 73(a) of the Act, under which a licensee may be found guilty of misconduct, in respect of conduct that is not real estate agency work, if the conduct "would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful". The Committee found that the licensees' alleged conduct was not disgraceful conduct or misconduct under s 73(a) of the Act.

A. Mr Kooiman's appeal

[16] Mr Kooiman listed ten grounds of appeal against the Committee's decision. We summarise them:

[a] Error of fact in stating that Mr Clarke owns a unit;

[b] Error of fact in deciding not to inquire into the complaint;

[c] Error of law in deciding that the licensees' conduct was neither unsatisfactory conduct nor misconduct as defined by the Act;

[d] Error fact and law in deciding that the licensees' conduct was not real estate agency work as defined in the Act;

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9 At paragraphs 3.7–3.8.
10 At paragraph 3.9.

[e] Error of fact and law in deciding that the licensees' conduct was not disgraceful conduct;

[f] Error of fact in deciding that the licensees did not provide services for the purpose of bringing about a transaction as defined in the Act;

[g] Error of fact and law in deciding that the licensees did not give an appraisal because an essential element of an appraisal is an appraised price and none of the licensees' affidavits provided a price for the property;

[h] Error of fact and law in deciding that the licensees were asked for an opinion as to the sale of the property as a redevelopment and were not asked to provide an appraisal;

[i] Error of fact and law in stating that r 10.1 applies only to agents who are entering into, or have entered into, an agency agreement;

[j] Error or fact and law in deciding that the licensees did not provide the affidavits on behalf of a client as defined by the Act.

Submissions

[17] At the hearing, Mr Kooiman's submissions focussed on the effect of the licensees' affidavits on Luxe as the owner of a unit, the issue of whether the licensees were carrying out "real estate agency work" in preparing and swearing the affidavits, whether the affidavits amount to appraisals of the property, and the process by which the Committee reached its conclusion that the licensees were not carrying out real estate agency work.

[18] Mr Kooiman submitted that the affidavits are an assessment of Luxe's unit (among others) and, because they express the licensees' opinion as to the best method for marketing the property, set out a strategy for sale of the property, including Luxe's unit. He submitted that the assessment and advice as to a sale strategy are "work done or services provided, in trade, on behalf of another person for the purpose of bringing

about a transaction", and are therefore real estate agency work as defined in s 4 of the Act.

[19] In the present case, he submitted, the applicants in the dissolution proceeding, who want the property sold, had their solicitors instruct the licensees to provide an opinion as to how the property should be sold. He submitted that "we would not be here" if the licensees had undertaken assessments of the *applicants'* properties, and given opinions as to those properties. However, he submitted, the licensees have also expressed their opinion as to the appropriate sale strategy of *Luxe's* unit. He submitted that the licensees' opinions are "out in the market", and they are prejudicial to him.

[20] Mr Kooiman submitted that before preparing and swearing their affidavits, the licensees must have gone through a process of considering the property, assessing the likely returns from various sale options, analysing the market, then comparing the results of those analyses in order to arrive at their opinion in favour of a sale of the property as a redevelopment site. He submitted that the work just described is real estate agency work, and is the work required for an appraisal. Accordingly, he submitted, the affidavits must be seen as appraisals, albeit defective in that they do not comply with rr 10.2 to 10.4 (as to the form and content of appraisals).

[21] Mr Kooiman further submitted that the Committee reached its conclusion that the licensees were not carrying out real estate agency work without having any evidence of what preliminary work the licensees did before expressing their opinions. He submitted that the Committee was required to inquire into what work the licensees did before it could properly conclude that they were not carrying out real estate agency work.

[22] Mr Dewar submitted for the licensees that the Committee was right to find that they were not carrying out real estate agency work. He submitted that the licensees were not doing work for the purpose of bringing about a real estate transaction; their opinions were for the purpose of providing the Court with information in order to consider the dissolution application.

[23] Mr Dewar submitted that the licensees' instructions were limited: they were not instructed to provide an appraisal, and they were not instructed to provide a valuation. He submitted that they were asked to give a general opinion, and did so. He referred to a letter sent to Mr Memelink's solicitors prior to the dissolution application being filed. In that letter the applicants' solicitor said (as relevant to the appeal) that "we are in the process of obtaining evidence from third parties experienced in commercial property who will confirm that the property is better sold as a redevelopment site than in its existing state…".

[24] Mr Dewar submitted that Mr Kooiman's complaint and appeal are a mischievous and collateral attack by him as one of the respondents to the dissolution application, on the witnesses for the applicants.

[25] Ms Mok submitted for the Authority that the Committee had not made any error of fact or law, had not taken irrelevant considerations into account or failed to take relevant considerations into account, and was not plainly wrong, in deciding not to inquire into Mr Kooiman's complaint.

[26] Ms Mok submitted that "real estate agency work" must be given an expansive, purposive interpretation, but the Committee was correct to find that in preparing and swearing their affidavits, the licensees were not doing real estate agency work. She submitted that the affidavits were provided for the purpose of giving the licensees' expert opinions in the dissolution proceeding, they had not been engaged to sell the property, and were not otherwise engaged in any work for the purpose of bringing about a transaction.

[27] She further submitted that while the licensees were commenting on a specific property, based on the personal knowledge and experience of the property, that was not sufficient to bring their work within the definition of real estate agency work.

[28] Ms Mok submitted that the Committee was correct to conclude that the licensees were not providing an appraisal. She submitted that the requirements relating to appraisals in rr 10.2 to 10.4 are not triggered until a licensee has been engaged by a

client to carry out real estate agency work, which had not occurred in respect of any of the licensees. She submitted that Mr Kooiman had misinterpreted r 10.

[29] Ms Mok also made submissions on Mr Kooiman's appeal ground that the Committee was wrong to decide that the licensees' alleged conduct in placing "unsubstantiated" opinions before the High Court was not "disgraceful conduct" under s 73(a) of the Act. She submitted that it was open to the Committee to make that finding, as there was no evidential foundation provided to support Mr Kooiman's assertion that the licensees had misled the Court, or otherwise been dishonest or deceptive in providing the affidavits to the Court.

Discussion

[30] The Committee made its decision not to inquire into Mr Kooiman's complaint under s 79(2)(a) of the Act, which provides that:

> The Committee may–
>
> (a) determine that the complaint alleges neither unsatisfactory conduct nor misconduct and dismiss it accordingly: …

[31] The Committee's decision that the complaint did not allege conduct that was either unsatisfactory conduct or misconduct was made on the grounds that in preparing and swearing the affidavits, the licensees were not carrying out real estate agency work. The Committee also found that the the licensees' alleged conduct could not be the subject of a finding of misconduct under s 73(a) of the Act (disgraceful conduct).

[32] Mr Kooiman's appeal against the Committee's determination could only be allowed if the Tribunal is satisfied that the Committee made an error of law or principle, failed to take relevant considerations into account, took irrelevant considerations into account, or was plainly wrong in making that decision.

The Committee's decision that Mr Kooiman's complaint did not allege conduct that was unsatisfactory conduct

[33] It is clear from the opening words of s 72 that carrying out real estate agency work is a necessary condition for a finding of unsatisfactory conduct:

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.

[34] "Real estate agency work" is defined in s 4(1) of the Act. The relevant part of the definition, for the purposes of this appeal, is subparagraph (a) of the definition:

real estate agency work or **agency work**

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

…

[35] "Transaction" is also defined in s 4(1). As relevant to this case, "transaction" is defined in sub-paragraphs (a) and (b) of the definition as:

transaction mans any 1 or more of the following:

(a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:

(b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land …

[36] The affidavits were prepared and filed in support of an application to the High Court seeking orders "dissolving Body Corporate 68792, cancellation of the unit plan and sale and division of the underlying title". There is nothing on the face of the affidavits that supports a finding that the Committee was wrong to conclude that the licensees' actions in preparing and filing them was not "work done or services provided, on behalf of another person, for the purposes of bringing about a transaction".

[37] Mr Kooiman's submission that the licensees were carrying out real estate agency work was based on his contention that in order to prepare the affidavits the licensees must have carried out preliminary work by considering the property, assessing the likely returns from various sale options, analysing the market, then comparing the

results of those analyses in order to arrive at their opinion in favour of sale of the property as a redevelopment site. He submitted that such work was real estate agency work. Accordingly, he submitted, the preparation of the affidavits must be seen as real estate agency work.

[38] We do not accept this submission. The licensees stated that their opinions were based on their general experience in commercial real estate in and around Lower Hutt, their general familiarity with the property, and (in the case of Mr Clarke and Mr Rodgers) their experience in having acted on sales or leases of units at the property.

[39] Achieving such experience and familiarity is likely to be the result of many years of real estate agency work. However, we do not accept that the application of that experience and familiarity can be said to be, itself, "real estate agency work", when it was, in this case, for the purpose of assisting the High Court in considering the dissolution application, and not for the purpose of bringing about a transaction.

[40] We note Mr Kooiman's submission that without evidence of the preliminary work substantiating the licensees' opinions, those opinions are worthless. However, that submission is not relevant to our consideration of the Committee's decision. The licensees have set out the basis on which they reached their opinions. The licensees' opinions have been set out in affidavits filed in the High Court. As such, they are open to challenge in the course of the dissolution proceeding. Any alleged deficiency in the opinions, and the weight to be given to them, are matters for the High Court.

[41] While one of the orders sought by the applicants in filing the dissolution proceeding was an order for "sale and division of the proceeds of the underlying titles of the parties", any sale or division is dependent on the High Court making the orders sought. In the circumstances, "bringing about a transaction" by way of "sale or division of the proceeds of the underlying title" is too remote to be considered to be the purpose of the affidavits.

[42] Discussion of whether the licensees' affidavits constitute appraisals of the property is not relevant our consideration of the Committee's decision that the licensees were not carrying out real estate agency work, as we are not persuaded that

the purpose of preparing and swearing the affidavits was for the purpose of bringing about a transaction.

[43] We are not persuaded that the Committee was wrong to conclude that in preparing and swearing the affidavits the licensees were not carrying out real estate agency work. Accordingly, we are not persuaded that the Committee erred in finding that Mr Kooiman's complaint did not allege unsatisfactory conduct.

The Committee's finding that Mr Kooiman's complaint did not allege conduct that was misconduct

[44] A finding that a licensee was carrying out real estate agency work is not a necessary condition for a finding of misconduct under s 73 of the Act, which provides:

> **73 Misconduct**
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> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct–
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> (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
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> (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
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> (c) consists of a wilful or reckless contravention of–
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> (i) this Act; or
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> (ii) other Acts that apply to the conduct of licensees; or
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> (iii) regulations or rules made under this Act; or
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> (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[45] The Committee considered s 73 in the context of determining whether Mr Kooiman had alleged that the licensees had engaged in conduct that was misconduct under s 73(a) (disgraceful conduct). We note the Committee's reference to a number of the Tribunal's decisions in relation to s 73(a).[11] Each of those decisions pre-dated the consideration of s 73(a) by his Honour Justice Woodhouse in *Morton-Jones v Real*

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[11] *Smith v Complaints Assessment Committee 10027* [2010] NZREADT 13; *Complaints Assessment Committee 10026 v Dodd* [2011] NZREADT 1; *Complaints Assessment Committee 10037 v Walker* [2011] NZREADT 4; and *Complaints Assessment Committee 10031 v Maran* [2011] NZREADT 23.

Estate Agents Authority, and subsequent decisions of the Tribunal in relation to findings of disgraceful conduct. In *Morton-Jones*, his Honour said:[12]

> [29] … If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

His Honour went on to say that:[13]

> [30] If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s.73(a).

[46] In its decision in *Complaints Assessment Committee 304 v Chapman*, the Tribunal said:[14]

> [108] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful". That is, whether the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.
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> [109] When assessing whether conduct would reasonably be regarded by agents of good standing as disgraceful, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including any special knowledge, skill, training or experience such person may have. In the present case, the "standards that an agent of good standing should aspire to" are the relevant industry standards, discussed earlier. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.
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> [110] It is clear from *Morton-Jones* that it is important not to conflate the two separate issues of culpability (whether the conduct was disgraceful) and penalty (the consequences of a finding that conduct was disgraceful), which must be considered in dealing with a charge under s 73(a). Penalty is a matter for separate determination.

[47] It is not necessary, in order to make a finding of disgraceful conduct, to find a nexus between the alleged conduct and a licensee's fitness to carry out real estate agency work. Notwithstanding that observation, we are not persuaded that the

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12 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

13 At [30].

14 *Complaints Assessment Committee 304 v Chapman* [2018] NZREADT 6, at paragraphs [108]–[110].

Committee erred in concluding that Mr Kooiman's complaint did not allege misconduct under s 73(a) of the Act.

[48] Mr Kooiman submitted that putting forward to the High Court "unsubstantiated" opinions (that is, without setting out their consideration of the property, assessment of the likely returns from various sale options, analysis of the market, and comparison of the results of those analyses), was disgraceful conduct. However, the licensees did not purport to put forward their opinions as anything other than based on their experience in commercial real estate in the general locality, and familiarity with the property.

[49] There was no evidence before the Committee that would suggest that the licensees sought to mislead the High Court, or had in any way been dishonest or deceptive in preparing and filing their affidavits. As noted earlier, any alleged error or inadequacy in the licensees' affidavits, and the weight the Court should give to them, are matters for the High Court. We accept Ms Mok's submission that Mr Kooiman's assertions are not sufficient to support an allegation of disgraceful conduct.

[50] The Committee also referred to Mr Kooiman's contention that the affidavits were appraisals (and therefore real estate agency work), and did not comply with the relevant Rules as to appraisals: rr 10.2 to 10.4.

[51] Part 10 of the Rules is headed "Client and customer care for sellers' agents". Rule 10.1 sets out the premise for the rules that follow (rr 10.2 to 10.12):

> This rule applies to an agent (and any licensee employed or engaged by the agent) who is entering, or has entered, into an agency agreement with a client for the grant, sale, or other disposal of land or a business.

[52] We accept Ms Mok's submission that there was no evidence before the Committee that the licensees had been engaged to sell the property (which would have required them to enter into an agency agreement), or had otherwise entered into an agency agreement. The evidence before the Committee was that the licensees were engaged solely to provide their opinions to the High Court.

[53] We also accept Ms Mok's submission that each of rr 10.1 to 10.4 refers to licensees' obligations to "a client". "Client" is defined in s 4(1) of the Act as:

> **Client** means the person on whose behalf an agent carries out real estate agency work

[54] It is clear that the requirements as to appraisals are not triggered until a licensee has been engaged to carry out real estate agency work.

Conclusion as to Mr Kooiman's complaint

[55] We are not persuaded that we should interfere with the Committee's decision not to inquire into Mr Kooiman's complaint. His appeal is dismissed.

B. Licensees' application for costs.

[56] Mr Dewar submitted that the Tribunal should make an order for Mr Kooiman to pay indemnity costs (that is, full solicitor/client costs) to the licensees.

[57] He submitted that Mr Kooiman is "no stranger to the Courts and to litigation", had been adjudicated bankrupt twice and currently faces bankruptcy proceedings, has been convicted on charges brought by Inland Revenue, in relation to payment of PAYE and GST, and had issued an "equally unmeritorious" claim against the Crown and Hutt City Council (recently discontinued by Mr Kooiman, with costs yet to be fixed). He further submitted that Mr Kooiman habitually brings hopeless cases that put people to costs. He submitted that Mr Kooiman's appeal was vexatious, and a collateral attack on the licensees' evidence.

[58] Ms Mok submitted that the Tribunal now has a broad discretionary power to award costs, in any proceedings under the Act. She referred us to the judgment of her Honour Justice Mallon in the High Court in *Commissioner of Police v Andrews*, in which her Honour set out principles applicable to awards of costs under the Human Rights Act 1993.[15]

[59] Mr Kooiman submitted that he is not a vexatious litigant, and has not instigated multiple proceedings. In response to Mr Dewar's statements, he submitted that:

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15 *Commissioner of Police v Andrews* [2015] NZHC 745.

[a] he had not contested the Inland Revenue charges;

[b] recent bankruptcy proceedings against him had been withdrawn, the District Court judgment on which they were founded having been set aside;

[c] he had withdrawn the proceeding against the Crown and Hutt City Council as soon as he was provided with information not on the Council's website;

[d] there had been no issue as to costs in proceedings withdrawn by him.

[60] He submitted that it is easy to say that a person is a vexatious litigant. However, to be properly characterised as such, the person will have issued multiple unmeritorious proceedings. He agreed that he had issued the proceeding referred to by Mr Dewar, and subsequently withdrew it, and said that he had issued one further proceeding, which he had won. With regard to another proceeding referred to by Mr Dewar, he submitted that he was not aware that he was a party to it.[16]

Discussion

[61] As part of amendments to the Act enacted on 14 November 2018 by the Tribunals Powers and Procedures Legislation Act 2018, ("the TPPL Act") a new s 110A was inserted, as to costs:

> **110A Costs**
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> (1) In any proceeding under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
>
> (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings–
>
> (a) has participated in good faith in the proceedings:
>
> (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
>
> (c) has acted in a matter that facilitated the resolution of the issues that were the subject matter of the proceedings.

[16] Luxe is named as a plaintiff in a schedule to the statement of claim, but not in the intituling of the proceeding.

….

[62] We accept Ms Mok's submission that the Tribunal can be guided by her Honour Justice Mallon's judgment in *Commissioner of Police v Andrews*. We note Ms Mok's submission that s 110A of the Act is almost identical in wording to s 92L of the Human Rights Act (considered by her Honour), which gives the Human Rights Review Tribunal to award costs in proceedings under the Human Rights Act.

[63] We accept that:

[a] The Tribunal should be cautious in applying the conventional costs regime for civil litigation to its jurisdiction.[17] While some proceedings in the Tribunal should have costs consequences, it does not follow that the costs consequences in respect of all proceedings should be those applying in civil litigation in the courts.[18]

[b] Statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts. The imposition of adverse costs orders should not undermine the cheapness and accessibility long recognised as important advantages of tribunals over courts.[19]

[c] Because of the consumer-protection focus of the Act, access to the Tribunal should not be unduly deterred, and there is a need for a flexible approach.

[d] Costs orders should not have the effect of deterring proceedings before the Tribunal.

[64] To the best of the Tribunal's knowledge (and no evidence was given to the contrary), this appeal is Mr Kooiman's first appearance in the Tribunal, and arises out of his first complaint to the Authority. He cannot be said to be a "vexatious litigant" (to use the wording of the civil courts) in this jurisdiction. We observe that the

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17 *Commissioner of Police v Andrews*, above n 16, at paragraph [61].
18 At paragraph [65].
19 See H R W Wade and C F Forsuth (eds) *Administrative Law* (11the ed. Oxford University Press, Oxford, 2014), at 763 and 783.

Committee did not base its decision not to inquire into Mr Kooiman's complaint on a finding that it was "frivolous or vexatious and not made in good faith", under s 79(2)(c) of the Act.[20]

[65] Further, although the TPPL Act inserted a new s 109A into the Act, which gives the Tribunal the power to strike out a proceeding if satisfied that it discloses no reasonable cause of action, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of process, no application was made to the Tribunal to strike out the appeal.

[66] With regard to the matters set out in s 110A(2) of the Act, we are not persuaded that Mr Kooiman has not participated in good faith in the appeal proceeding, or that he has obstructed the appeal process. Mr Kooiman's appeal was filed on 17 October 2018. The hearing date was set at a directions conference on 9 November 2018. Mr Kooiman's submissions were filed in accordance with timetable directions made at the conference. There was no delay or obstruction.

[67] Mr Kooiman has provided responses to, and explanations of, the matters raised by Mr Dewar.

Conclusion as to the licensees' application for costs

[68] We have concluded that it would not be appropriate in this case to make any order for costs.

Outcome

[69] Mr Kooiman's appeal is dismissed.

[70] The licensees' application for costs is dismissed.

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[20] Section 79(2)(c) was also amended by the TPPL Act (after the Committee's decision not to inquire was issued) to replace "and not made in good faith" to "or not made in good faith".

[71] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member