**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 45**

**READT 003/19**

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| IN THE MATTER OF | An appeal under s 111 of the Real Estate Agents Act 2008 |
| BETWEEN | BARRY BUSTER BEATSON<br>Appellant |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC 416)<br>First respondent |
| AND | JAMES CRISPIN, TIM MORDAUNT & PROPERTY BROKERS LTD<br>Second respondents |
| Hearing: | 15 May 2019 |
| Tribunal: | Mr J Doogue, Deputy Chairperson<br>Ms C Sandelin, Member<br>Mr N O'Connor, Member |
| Appearances: | Mr M Lawson for the Appellant<br>Mr M Mortimer, on behalf of the Authority<br>Mr D Sheppard, on behalf of the second respondents |
| Date of Decision: | 26 November 2019 |

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**DECISION OF THE TRIBUNAL**

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[1] The Appellant made a number of complaints about the quality of service provided by the Second Respondents in relation to matters such as whether the licensee, who was actually marketing the property on behalf of the Appellant, had complied with the Real Estate Agents Act 2008 (the Act). It was said that no signed agency agreement had been obtained as required. It was also said that the licensee failed to follow instructions with regard to the publicity material which the Appellant considered should have been the basis of the advertising campaign for the property and other matters. There were conflicts in the evidence between the parties.

[2] However, between the date when the Complaints Assessment Committee (CAC) dealt with the matter and when it came before the Tribunal, Mr Lawson for the Appellant said a number of documents, which had relevance to the dispute and which the second respondents had put forward as the basis for their defence to the charges, had turned out to have been fabricated. This was a key contention which the Appellant put forward because it went to the heart of the credibility of the licensee. If he had engaged in fabricating documents, then obviously that would have a significant impact upon his credibility generally. The Appellant contended that this could lead the Tribunal to conclude that the complaint, instead of being dismissed by the CAC, should have been accepted as proved.

[3] There were a number of problems with this approach which the Appellant took, one of which was that the case which the Appellant put forward before the Tribunal was different from that advanced before the CAC. In any event, the conclusion of the Tribunal was that there were possibly answers to the fabrication claims.

[4] The question of whether there had been an agency agreement in place, and what date that came about, was of critical importance to a background dispute between the parties. The parties are in dispute as to whether the Second Respondents have an enforceable claim for commission arising out of the Appellant's property. That claim is being progressed through the District Court.

[5] In summary, the Tribunal decided that, notwithstanding the contentions that Mr Lawson put forward about the evidence being fabricated, no basis existed for allowing the appeal. The second respondents now seek costs.

**The basis for the claim for costs which the second respondents put forward**

[6] The application of the second respondents was based upon s 110A of the Act which provides as follows:

> **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–
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> (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.
>
> ….

[7] The particular grounds relating to the case which the second respondents put forward in their submissions were as follows:

> 3. The Second Respondents' reasons for seeking a costs award against the Appellant, in a nutshell, are:
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> a. The grounds of the Appellant's appeal were without merit.
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> b. Responding to the appeal was a significant legal expense for the second respondents.
>
> c. The appeal was brought by the Appellant for an ulterior motive, being an attempt to avoid having to pay commission to the second respondents.
>
> d. This is an appropriate case for an order for costs to follow the event.

[8] The preliminary comment which we make on those grounds is as follows. In the first place, we do not accept that the Appellant's appeal was factually without merit. That is not, however, because of a complete lack of substance to the matters that the Appellant put forward. Rather, it is a case of a deadlock in the evidence coupled with

the added difficulty that the aspects of the evidence which the Appellant called into question were not matters which had been raised before the CAC. If the assertion that the grounds were "without merit" is intended to suggest that there was no substance at all to the Appellant's appeal, then we would disagree.

[9] Further, the fact that the second respondents incurred substantial costs, which is no doubt the case, does not establish an entitlement to an order for costs. Whether they are entitled to such an order has to be considered in the light of the principles to be discussed shortly. The extent of the expenditure by the Appellant on legal services incidental to the appeal may have some relevance, if and when the Tribunal decides that an order for costs should be made. This is because we would conclude that the conventional approach to fixing costs requires that the amount of a costs order cannot exceed what the party has spent on costs. As to the point concerning the "ulterior motive being an attempt to avoid having to pay commission", the Tribunal has no jurisdiction, of course, to decide questions of whether or not the licensee is entitled to judgment for unpaid commission.

[10] We have mentioned that one of the disputes between the parties that the appeal raised was the question of whether the licensee had obtained a valid and effectual agency agreement from the Appellant. We accept that a licensee cannot enforce a right to commission without such an agency agreement because of the provisions of s 126 of the Act. Therefore, the question of whether the licensee had complied with the obligation under pt. 5 of the Act was part of the background to the dispute. However, the licensee's entitlement to commission was not something that was directly gone into at the hearing. Whether the Second Respondents are entitled to commission is a matter that will have to be decided by the District Court if the parties are unable to compromise their dispute.

[11] The final ground which the second respondents put forward was that costs ought to follow the event. In expanded form, it is understood that submission is to the effect that it is conventional in civil litigation for the party who has success to obtain an order for the payment of costs. Whether such an approach is applicable to proceedings in the Tribunal is a matter that will need to be considered in this decision.

**Submissions of parties**

[12] In his submissions made on behalf of the Authority, Mr Mortimer referred to the Tribunal decision in *Kooiman v Real Estate Agents Authority (CAC 519)*[1] and referred to the earlier decision in *Commissioner of Police v Andrews*[2] which it followed. The Authority submitted that the *Kooiman* approach ought to be followed in this case.

[13] Mr Lawson for the Appellant noted the reservations which the Tribunal had stated in *Kooiman* about applying the principles that were adopted in general civil litigation to costs orders in the Tribunal. Mr Lawson generally relied upon the factors that were identified in *Andrews* and *Kooiman*. His submission also went into the merits of the decision of the Tribunal in this case.

[14] In the submissions that he made on behalf of the Second Respondents, Mr Sheppard argued that the approach that had been adopted in *Andrews* was not applicable to costs awards in the Tribunal. He contended:

> 22. It is acknowledged that in some cases before some Tribunals, in particular the Human Rights Review Tribunal, there needs to be caution exercised not to deter access to justice by making costs awards. However, that is not the case here. This case does not involve any public law or constitutional matter (as in the case of breach of privacy complaint before the HRRT). This is not a case of an individual versus the State. Nor is this a case of the individual being self-represented, powerless or vulnerable. All of which have been factors that have at times swayed the Human Rights Review Tribunal against the "costs follow the event" regime.
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> 23. To the contrary, the nature of the proceedings is a dispute over the performance of a private contract for the sale of a $6.6M rural property. The parties are private entities. The Appellant could in no way be considered vulnerable or powerless. He is instead an experienced farmer and horse trainer that is literate, gives attention to matters of detail, is not slow to criticise, and has little tolerance for careless work. He also privately retained adept and senior counsel to represent him to advance his complaints and represent him in the appeal.
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> (footnotes omitted)

[1] *Kooiman v Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11.
[2] *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515.

*Commissioner of Police v Andrews*

[15] In *Andrews*[3] the High Court was required to consider the correct interpretation of the costs provision applicable in the Human Rights Review Tribunal (HRRT) legislation. It determined that, notwithstanding the grant of a discretion which was similarly expressed in wide terms to that which s 110A confers, in the generality of cases the discretion to make costs orders should not be exercised against unsuccessful applicants for relief.

[16] The Court in *Andrews* noted that the HRRT had in earlier cases adopted a general approach based on the principle that costs should follow the event and should represent a reasonable contribution to the costs of the successful party. In *Heather v IDEA Services Ltd*, the HRRT had rejected that approach.[4]

[17] The Court in *Andrews* noted that the Tribunal in *Heather* had taken the view that:[5]

> Individuals, who may be vulnerable and powerless, should not be discouraged from bringing claims before the Tribunal or "human rights protection in New Zealand might be weakened."

[18] The decision of Mallon J in *Andrews* included the following passage:[6]

> … The Director of Human Rights Proceedings points out that in this area it is often difficult for claimants to understand the merits of their claim in any legal sense. There is a wider interest in allowing them access to a determination before the Tribunal even if the claim is without merit in a legal sense. The legislation recognises the importance of this access by enabling them to bring a claim regardless of whether the Privacy Commissioner or the Director of Human Rights Proceedings considers the matter should proceed to the Tribunal. It might be said that the point at which the usual civil litigation costs regime should apply is when the claims are before the Courts. Even at that stage, the human rights dimension they entail may lead to a different approach to costs.

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[3] *Commissioner of Police v Andrews*, above n 2.
[4] *Heather v IDEA Services Ltd* [2012] NZHRRT 11.
[5] *Commissioner of Police v Andrews*, above n 2, at [53]. See also *Heather v IDEA Services Ltd* [2012] NZHRRT 11 at [14].
[6] *Commissioner of Police v Andrews*, above n 2, at [65].

[19] Further, the Court noted a number of High Court decisions which had considered the correctness of the way in which the HRRT exercised its discretion to order costs. The Court observed that:[7]

> … None of the cases involved a person in a comparable position to that of Mr Andrews bringing a claim against a government agency. The only mention of a person in that position noted that a different approach to costs may be appropriate.

[20] The Court agreed that it was open to the HRRT to revisit the criteria for ordering costs. The effect of the judgment was that it did not consider that any of the matters which the HRRT took into account in its decision in the *Andrews* case was in error.[8]

*Kooiman v Real Estate Agents Authority (CAC 519)*

[21] The decision of the Tribunal in *Kooiman*[9] concerned a complaint which was made against licensees of both unsatisfactory conduct and misconduct. The CAC determined that it would not enquire into the conduct of the licensees. Mr Kooiman appealed against that decision. The appeal failed. The licensees applied for costs. The decision of the High Court in *Andrews* was cited to the Tribunal. In effect, the Tribunal adopted part of the reasoning in *Andrews*.

[22] In *Kooiman* the Tribunal stated:[10]

> [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.

[23] A key passage in the decision was to the following effect:[11]

> [63] We accept that:

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[7] *Commissioner of Police v Andrews*, above n 2, at [50]. See also *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512.
[8] *Andrews v Commissioner of Police* [2013] NZHRRT 6.
[9] *Kooiman v Real Estate Agents Authority (CAC 519)*, above n 1.
[10] *Kooiman v Real Estate Agents Authority (CAC 519)*, above n 1.
[11] *Kooiman v Real Estate Agents Authority (CAC 519)*, above n 1.

> [a] The Tribunal should be cautious in applying the conventional costs regime for civil litigation to its jurisdiction. 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.
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> [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.
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> [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.
>
> (footnotes omitted)

**Discussion**

[24] No authorities were cited concerning costs awards that may have been made in pre- *Kooiman* cases or the principles that were applied in such cases. That may have come about because the express statutory power to award costs in the Tribunal is relatively new. The costs order that was made in *Kooiman* was made pursuant to the new statutory power. It may have been the parties' view that that past decisions had little relevance to costs decisions which are now to be made pursuant to the express statutory power.

[25] As noted, the decision in *Kooiman* referred to a High Court decision in *Anderson v Police* and it is that latter decision that we will consider first.

[26] In *Andrews*, the High Court appeared to accept that one factor that militated against making orders was that when claimants were challenging the exercise of state power, they ought not to be deterred by the making of cost orders that brought with them "potentially ruinous financial consequences".

[27] It may be that the HRRT considered that because claimants before the Tribunal were frequently of poor financial circumstances that it was appropriate to adopt as a starting point the presumption that no costs orders should be made where the claimant failed.

[28] We do not consider that parties before the Tribunal have the same financial characteristics as those who are parties in the HRRT. Frequently those who come before the Tribunal have purchased residential properties. Describing the effect of a costs order made by the Tribunal as being as being "potentially ruinous" in its financial effect would not seem to be justified in those circumstances.

[29] One important consideration which was present in the *Andrews* case, and which was mentioned, was that the party seeking the costs was the state. It was considered that the inherent importance of not stifling challenges to alleged abuses of state power may mean that litigants bringing such challenges should not be penalised by adverse costs orders. Further discussion does not appear to have occurred concerning this point, but it may be that because the case was concerned with a claim for breach of human rights against the state, it could be assumed that the state was better placed to meet an order for costs. Whatever the case, this element is not present in cases which come before the Tribunal.

[30] The third element which the judgment in *Andrews* identified as giving a special character to the proceedings before that Tribunal was that: [12]

> [I]t is often difficult for claimants to understand the merits of their claim in any legal sense. There is a wider interest in allowing them access to a determination before the Tribunal even if the claim is without merit in a legal sense.

[31] Without questioning the applicability of this factor to proceedings in the HRRT, we do not regard it as a factor that is generally present in cases before the Tribunal. While it may be a legitimate factor to be taken into account by the HRRT when exercising its discretion, it does not follow that such an approach can be extrapolated to other tribunals, including the Real Estate Agents Disciplinary Tribunal. The parties to the present appeal would not seem to have had any difficulty in understanding the merits of their claims. They were both represented by counsel. The present case is essentially one where two persons in business are in dispute with each other. Their dispute concerns whether the licensee, in carrying out what were essentially contractual obligations subject to an overlay of statutory duties, complied with the Act.

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[12] *Commissioner of Police v Andrews*, above n 2, at [65].

[32] We consider in this case that there ought to be an order of costs made against Mr Beatson in favour of the second and third respondents. We are of the view that some of the factors which were referred to in the passage which we set out above at [23] from *Kooiman* are applicable in the circumstances of this case. We agree that in each case the decision is a discretionary one and we also agree that in not every case should the outcome be that costs follow the event. It is our view though that having regard to the commercial flavour of the present dispute between the parties about payment of commission, this proceeding has close parallels to conventional civil litigation and that it seems reasonable to apply the same approach to costs which is taken in that type of litigation. That principle is that the successful party should be entitled to a contribution to its actual costs.

[33] For those reasons we make an order that the Appellant is to pay costs of the respondents pursuant to section 110A of the Act.

[34] The approach that we intend to take is to fix costs in an amount which represents a contribution to, but not indemnity for, the actual costs which were incurred by the respondents on the appeal. While we would agree that potentially the Tribunal could make a decision for indemnity costs, there has not been the type of egregious behaviour on the part of Mr Beatson which would typically justify such an award. We do not accept that the appeal was brought in bad faith, for example. Nor do we accept that the way in which the appeal was conducted was reckless and indifferent to the cost consequences to the opposing parties. In order to come to a final view on the amount of any costs, the following subsidiary directions are now given:

[35] The second respondents are to provide this information, together with any memorandum concerning the quantum of costs, within 10 working days of the date of this decision. Any submission is not to exceed four pages. The appellant will have 10 working days within which to file any memorandum on the matter of costs arising from the material which the second respondents have provided, with such submission again not exceeding four pages. The Authority will be permitted to file submissions on costs (subject to the same page restrictions) within a further 10 working days.

Finally, the second respondents will have a further period of five working days to file brief submissions in response.

[36] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunals' decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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J Doogue
Deputy Chairperson

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C Sandelin
Member

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N O'Connor
Member