NON-PUBLICATION ORDERS MADE BY THE HIGH COURT IN [2014] NZHC 550 AND BY THE DISTRICT COURT IN [2018] NZDC 15368 REMAIN IN FORCE

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 53

READT 020/12 and 049/12

IN THE MATTER OF	Appeals under s 111 of the Real Estate Agents Act 2008
BETWEEN	DERMOT NOTTINGHAM, PHILIP NOTTINGHAM, ROBERT McKINNEY and PROPERTY BANK REALTOR LIMITED Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 10057) First Respondent
AND	MARTIN HONEY Second Respondent

On the papers

Tribunal:	Hon P J Andrews (Chairperson) Mr J Doogue (Member) Ms C Sandelin (Member)
Submissions filed by:	D Nottingham, P Nottingham and E McKinney, Appellants M Mortimer, on behalf of the Authority D Grove, on behalf of Mr Honey
Date of Ruling:	26 November 2019

RULING OF THE TRIBUNAL
(Second respondent's application to strike out appeals)

Introduction and procedural history

[1] On 25 February 2011, Mr Dermot Nottingham ("Mr Nottingham") and Property Bank Realtor Ltd (which had owned a RE/MAX franchise in Onehunga since 2009) (together, "the appellants") lodged a complaint with the Real Estate Agents Authority ("the Authority") against Mr Honey. The complaint alleged that Mr Honey had operated a website with RE/MAX branding, for which he no longer had a franchise, and that he had misled the public into believing that he was operating as RE/MAX, when he was operating as a Ray White franchise. Mr Honey subsequently lodged a complaint against Mr Nottingham, alleging that he had pursued the complaint in an aggressive manner. On 29 June 2011, the appellants lodged a second complaint in which they alleged that Mr Honey's complaint included intentionally false and dishonest accusations.

[2] Complaints Assessment Committee 10057 ("the Committee") considered the appellants' complaints and in decisions issued on 28 March 2012 and 18 July 2012, decided to take no further action on either of them. The appellants appealed to the Tribunal against the Committee's decision. The Tribunal dismissed the appeals in a decision issued on 13 October 2014.[1]

[3] The appellants then appealed to the High Court. Her Honour Justice Thomas found that the Tribunal had failed to take relevant considerations into account: namely, it appeared to have misunderstood the evidence given by Mrs West (a salesperson formerly employed by Mr Honey), and had failed to consider the evidence of Mrs Earlam[2] and Mrs Muller (both former employees of Mr Honey) whose statements were provided to the Tribunal after the hearing of evidence was completed, but before final submissions were completed.[3] In a further judgment delivered on 21 August 2015, Justice Thomas directed that:[4]

> … the matter should be remitted back to the Tribunal to consider the impact of [evidence given to the Tribunal by Mrs West] and the fresh evidence [of Mrs Earlam and Mrs Muller].

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1 *Nottingham v Real Estate Agents Authority (CAC 10057)* [2014] NZREADT 80.

2 The Tribunal notes that the Court of Appeal and the High Court, and the Tribunal, referred to evidence by "Ms L Earlan". Her correct name is "Earlam".

3 *Nottingham v The Real Estate Agents Authority* [2015] NZHC 1616.

4 *Nottingham v The Real Estate Agents Authority* [2015] NZHC 1998, at [18].

[4] The appellants appealed to the Court of Appeal. That Court upheld the High Court judgment, but supplemented the High Court direction by adding a further direction, that:[5]

> … such rehearing before the Tribunal is to be determined by a Tribunal constituted by persons other than those who determined the first appeal.

[5] The re-hearing of the appellants' appeals were scheduled to begin on 4 December 2017.

[6] On 11 October 2017, the Tribunal issued a ruling in relation to an application by the appellants for further evidence to be admitted at the hearing. The Tribunal gave leave for unsigned statements of evidence of Mr Honey and his wife to be admitted, but declined leave for an affidavit sworn by Mrs Honey and filed in relation to an application for name suppression, to be admitted.

[7] On 7 November 2017, the appellants appealed against the Tribunal's refusal to give leave for Mrs Honey's affidavit to be admitted. On 20 November 2017, the appellants filed an application seeking (among other things) an adjournment of the re-hearing of their appeals, pending determination of their appeal to the High Court. The Tribunal allowed the adjournment in a ruling issued on 27 November 2017.[6]

[8] In a judgment issued on 7 December 2017, her Honour Justice Duffy held that the appellants' notice of appeal and accompanying documents were plainly an abuse of process, and ordered that the appeal be struck out under r 5.35A(3) of the High Court Rules.[7]

Application to strike out the appellants' appeals to the Tribunal

[9] The appellants did not file an amended notice of appeal in the High Court, and took no steps to progress the re-hearing of their appeal to the Tribunal.

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5 *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [88].
6 *Nottingham v The Real Estate Agents Authority (CAC 10057)* [2017] NZREADT 69.
7 *Nottingham v Real Estate Agents Disciplinary Tribunal* [2017] NZHC 3018.

[10] By way of a memorandum dated 20 July 2019, counsel for Mr Honey (Mr Grove) sought an order striking out the appellants' appeals. He submitted that continuation of the appeals is an abuse of process.

[11] Counsel for the Authority, Mr Mortimer, advised in a memorandum dated 25 July 2019 that it abided the decision of the Tribunal as to the strike-out application. In a memorandum dated 26 July 2019, the appellants submitted that the Tribunal should set the appeals down for hearing.

Direction for further submissions

[12] The Tribunal's power to strike out a proceeding is contained in s 109A of the Real Estate Agents Act 2008 (inserted into the Act as from 14 November 2018, by s 242 of the Tribunals Powers and Procedures Legislation Act 2018), which provides (as relevant to the present application):

> **109A Disciplinary Tribunal may strike out, determine, or adjourn proceeding**
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> (1) The Disciplinary Tribunal may strike out, in whole or in part, a proceeding if satisfied that it–
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> (a) discloses no reasonable cause of action; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of process.

[13] None of the submissions filed by or on behalf of the parties referred to s 109A. On 4 September 2019, the Tribunal directed that submissions addressing s 109A be filed and served by or on behalf of all parties. Submissions addressing s 109A were filed by Mr Grove on 16 September 2019. Submissions were filed by the appellants on 27 September 2019, but these did not refer to s 109A. The appellants filed further submissions on 2 October 2019. Again, these did not refer to s 109A. Submissions by Mr Mortimer on behalf of the Authority were filed on 16 October 2019. While addressing the power given under s 109A in general terms, Mr Mortimer repeated that the Authority abides the decision of the Tribunal as to Mr Honey's strike-out application.

Relevant proceedings in the District Court and High Court

Mr Dermot Nottingham's private prosecution of Mr Honey, Mrs Honey, and Mr Taka

[14] In April 2014, the District Court at Auckland accepted for filing charges laid by Mr Dermot Nottingham against Mr Honey's wife, Mrs Stephanie Honey, and Mr Hemi Taka, a web designer contracted to Mr Honey. On 1 October 2015, the District Court accepted for filing four charges brought by Mr Nottingham against Mr Honey. The charges against the three accused were heard in the District Court at Auckland in a Judge-alone trial before District Court Judge E Paul, over 17 hearing days from 4 April 2016.

[15] In his reserved judgment delivered on 20 June 2016, Judge Paul recorded that the charges arose out of the same facts as had led to the appellants' complaint to the Authority against Mr Honey. The Judge recorded that all of the charges alleged a conspiracy, and summarised the case against Mr and Mrs Honey and Mr Taka, as follows:[8]

> In essence, the prosecutor's case against all accused is that they conspired to set up and maintain a fraudulent RE/MAX website deliberately and dishonestly so that Mr Honey was able to "poach business" which might otherwise have gone to the prosecutor's company.

[16] In respect of the charges against Mrs Honey and Mr Taka (charges under s 240 of the Crimes Act 1961 of obtaining by deception or causing loss by deception) the Judge found that the prosecution had not proved any benefit or loss, and dismissed the charges.[9]

[17] Judge Paul also dismissed each of the four charges against Mr Honey. Charging document CRN 15004503829 alleged perjury in furtherance of a conspiracy to defeat the course of justice, in Mr Honey's evidence to the Tribunal as to a screenshot of a web page for The Real Estate Guys (an agency operated by the appellants after having terminated their RE/MAX franchise), which he said was a "loaded" web page. The Judge recorded that it was common ground during the trial, accepted by Mr Honey,

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8 *Nottingham v Honey* [2016] NZDC 9272, at [9].
9 At [25] and [31].

that the screenshot was not a "fully loaded" web page. The Judge found that it was not established beyond reasonable doubt that when he gave the evidence as to the screenshot Mr Honey knew that the screenshot was not of a "fully loaded" webpage, or that in giving the evidence he intended to mislead the Tribunal.[10]

[18] Charging document CRN 15004503838 alleged that in furtherance of a conspiracy pursuant to s 116 of the Crimes Act 1961, Mr Honey directed Mrs Honey to have Mr Taka produce an email dated 19 April 2010, in order to deceive the Authority and any of its investigators when aware that the content of the email was false and designed to deceive. The prosecution alleged that the email set out a false, invented, excuse that the RE/MAX web pages were the result of "Google caching". The Judge recorded that it was accepted by Mr and Mrs Honey and their expert witness, Mrs Payne, that the RE/MAX pages were not "cached", but had been "left behind" when Mr Taka created Mr Honey's Ray White website.

[19] Judge Paul found that there was no evidence establishing a conspiracy: that is, an agreement between two or more people, who intend to commit an offence. The Judge held that Mr Honey's instruction to Mrs Honey to get Mr Taka to get rid of the RE/MAX links and provide an explanation did not give rise to an available inference of such an agreement.[11]

[20] Charging document CRN 15004503839 alleged that in furtherance of a conspiracy pursuant to s 116 of the Crimes Act 1961, Mr Honey authored a letter dated 28 February 2011, addressed to the New Zealand Police, making false accusations of blackmail and harassment against Mr Dermot Nottingham, Mr McKinney, and Mr D A McPherson, falsely asserting that he was unaware of the fraudulent RE/MAX website being live with his Ray White listings, and forwarded this letter to the Authority.

[21] In considering this charge, Judge Paul recorded that the allegation of blackmail and harassment appeared to have some foundation, referring to evidence that Mr McKinney and Mr Nottingham were demanding money to resolve the issue of the

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10 At [34]-[43].
11 At [49]-[53].

RE/MAX pages being live, and evidence given by a (then) Member of Parliament being consistent with Mr Nottingham making false allegations and harassment.[12]

[22] Judge Paul also referred to evidence given by Mrs West and Mrs Earlam, which showed that Mr Honey was aware that RE/MAX pages were live and not cached.[13]

[23] The Judge found that the "conspiracy element" was again determinative of the charge. He referred to Mrs Honey's evidence as being "at its highest" of having accepted that she typed part of the letter to the Police, while saying that the allegations set out in the letter were not hers, but Mr Honey's. The Judge found that the evidence was equivocal. An inference could be drawn that Mrs Honey agreed to make a false allegation against Mr Nottingham and an inference could equally be drawn (which the evidence tended to support) that Mrs Honey was acting on her husband's instructions. He held that to choose between the two inferences would be wrong, so was unable to find that the necessary agreement had been established. Accordingly, the charge was dismissed.[14]

[24] Charging document CRN15004503831 alleged that Mr Honey, in furtherance of a conspiracy pursuant to s 116 of the Crimes Act, authored a letter dated 10 June 2011 to the Authority's Complaints Assessment Committee, knowing that relevant material parts of the letter were intentionally false, in an attempt to mislead the Authority, the Committee, and the Tribunal. The letter annexed Mr Taka's email of 19 April 2010, and the letter to the Police of 28 February 2011.

[25] Judge Paul referred to his earlier finding that Mr Nottingham had failed to establish that Mr Honey knew that the contents of Mr Taka's email (in particular) were false or misleading. However, the Judge found that the determining factor was the complete absence of any evidence establishing a conspiracy. The Judge referred to Mr Nottingham's submissions as to the evidence establishing a conspiracy. Of these, the only relevant submission appeared to be that Mr Honey had instructed Mrs Honey to obtain an explanation from Mr Taka. The Judge held that that could not amount to a

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12 At [61].
13 At [62]–[63].
14 At [64]–[67].

conspiracy. No agreement was disclosed, and none could be inferred. Accordingly, the charge was dismissed.[15]

[26] In a judgment delivered on 13 July 2016, Judge Paul continued non-publication orders, and made orders that Mr Nottingham pay costs to Mr Honey and Mr Taka, totalling $117,000.

Mr Nottingham's appeal to the High Court

[27] Mr Nottingham applied for leave to appeal against Judge Paul's decision under s 296 of the Criminal Procedure Act 2011, pursuant to which an appeal can be brought, with leave, on a question of law arising from a ruling arising in proceedings relating to or following the determination of a charge, or in the determination of the charge. The application for leave was dismissed in a judgment delivered by his Honour Justice Davison on 24 July 2017.[16]

[28] Justice Davison set out the grounds of the application pursued by Mr Nottingham as follows:[17]

> … that there was no evidence to support the factual findings made by the District Court Judge, or alternatively that the Judge had failed to draw an inference of fact which was the only one reasonably possible on the evidence, namely that the accessible RE/MAX pages linked to Mr Honey's Ray White branded website, were not accessible by reason of an inadvertent error, but were a deliberate and intentional means by which Mr Honey sought to benefit his Ray White agency business by means of his former association with RE/MAX.

[29] He summarised Mr Nottingham's submissions as follows:[18]

> [Mr Nottingham] presented extensive written and oral submission in which he focussed on the trial evidence, in support of a submission that the defendants' claim that unintentional accessible RE/MAX branded pages remained on Mr Honey's website following the change to the Ray White franchise in February 2009 was implausible. He submitted, by reference to this evidence, that the prosecution had established that Mr Honey knew about the presence of the RE/MAX pages well prior to [Mr Nottingham's] phone call to Mrs Honey on 19 April 2010. That being the case, says [Mr Nottingham], the exculpatory explanations and evidence given by the defendants to the [Authority],

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15 At [68]–[75].
16 *Nottingham v The District Court at Auckland* [2017] NZHC 1715.
17 At [27].
18 At [28].

> [Complaints Assessment Committee] and [the Tribunal] were false and were made by the defendants in concert and with intent to mislead and to pervert the course of justice. …

[30] With respect to the charges against Mrs Honey and Mr Taka, Justice Davison held that Judge Paul had correctly held that Mr Nottingham was required to establish what benefits they respectively obtained, and failed to do so. He recorded that Mr Nottingham had submitted that the loss caused by the actions of Mr and Mrs Honey and Mr Taka was established by the evidence of Mrs West, of a client seeking to contact her by means of a RE/MAX search being redirected to Mr Honey's Ray White website, and that he had alleged that Mr Honey had sought to increase his Google ranking without paying for it, and that there was a loss to RE/MAX of advertising, franchise fees, and lost inquiries for listings. He said that:[19]

> Mrs West's evidence did not prove that any RE/MAX franchise, including the RE/MAX franchise operated by [Mr Nottingham] and his business associates, suffered any loss as a result of the events she described in her evidence. In fact her client was looking to make contact with her personally and did so. As regards Google rankings, there was no evidence that any such benefit was obtained.

[31] Justice Davison concluded that Mr Nottingham had not identified a question of law that would justify leave being granted to appeal in relation to s 240 of the Crimes Act, or its application in the case before him.[20]

[32] In respect of each of the four charges against Mr Honey, Justice Davison found that there was evidence before Judge Paul which provided a foundation for his findings.

[33] Regarding the charge set out in charging document CRN 15004503829 (referred to in paragraph [17], above), based on Mr Honey's evidence to the Tribunal of seeing RE/MAX material on a Real Estate Guys website, his Honour referred to evidence given in the District Court by Mrs Payne, an IT expert called by counsel for Mr Honey, as to testing carried out on the Real Estate Guys website, and her conclusion that old or earlier RE/MAX information had been left behind when the RE/MAX website was changed or upgraded to become the real Estate Guys website. He concluded:[21]

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19 At [61].
20 At [70].
21 At [84].

> Having regard to Mrs Payne's evidence, it is clear that there was evidence before the Judge that provided a foundation for his finding that the prosecution had failed to prove that Mr Honey's evidence about the screen-shot photograph showing the RE/MAX logo on the real Estate Guys website was intended by Mr Honey to mislead the Tribunal.

[34] Regarding the charge set out in charging document CRN 15004503838 (referred to in paragraphs [18] and [19], above), based on Mr Taka's email of 19 April 2010, Justice Davison found:[22]

> [89] In relation to this charge the Judge found that there was simply no evidence of a conspiracy between Mr Honey and his wife pursuant to which he arranged for her to obtain a false explanation for the accessible RE/MAX pages from Mr Taka. In the absence of any direct evidence to the contrary, the obvious inference to be drawn from Mr Taka's email is that it is entirely consistent with there being an innocent explanation for the presence of the accessible RE/MAX webpages, and that the whole process of creating the new Ray White website had been undertaken in good faith with the intention of removing all live and accessible references to RE/MAX.
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> [90] Accordingly, the prosecution has failed to show that the Judge's finding in relation to this charge was clearly untenable and not supported by the evidence. …

[35] In relation to charging document CRN 15004503839 (referred to in paragraphs [20]–[23], above), concerning the letter to the NZ Police dated 28 February 2011, Justice Davison said:[23]

> [94] The Judge then noted that while there was evidence that Mr Honey was aware that the RE/MAX pages were live and not cached, it was the conspiracy element that was determinative of the charge. The Judge concluded that the evidence in that regard was equivocal. …
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> [95] It is clear from the Judge's statement that the conspiracy element was determinative and that the evidence presented by the prosecution had failed to prove that Mr and Mrs Honey were parties to a conspiracy to make false accusations against [Mr Nottingham] and his business associates Mr McKinney and Mr McPherson. In his letter addressed to the Police, Mr Honey referred to the telephone call to Mrs Honey in April 2010. Mr Honey also said that [Mr Nottingham] had recently, in February 2011, sent him text messages and correspondence which he described as being threatening. He explained that he and his wife were upset and concerned for the safety of himself and their young family. Mr Honey further detailed his transfer from RE/MAX to a Ray White franchise, and repeated the explanation that he had obtained from Mr Taka regarding the accessible RE/MAX branded webpages.
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> [96] It is appropriate to note that in his letter addressed to the New Zealand Police dated 28 February 2011, Mr Honey attached the email containing Mr Taka's explanation. This charge alleged that Mr Honey had stated in the 28 February 2011 letter that he was unaware of the fraudulent RE/MAX webpage

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22 At [89]–[90].

23 At [94]–[96] and [98] (quotations from the District Court judgment have been omitted).

> being live with Ray White listings however the letter contains no such statement.
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> …
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> [98] It is clear that if leave were granted, [Mr Nottingham] would be unable to show that the Judge had reached an untenable conclusion on the evidence before him. there was certainly credible evidence before the Judge that provided a foundation for the conclusion he reached. …

[36] Similarly, in relation to the dismissal of the charge set out in charging document CRN 15004503831 (referred to in paragraphs [24]–[25], above), concerning Mr Honey's letter of 10 June 2011 to the Complaints Assessment Committee, Justice Davison recorded that Judge Paul had found that the allegation of conspiracy had not been proved, and that there was a complete absence of any evidence that would establish a conspiracy. He said:[24]

> [102] … By that finding the Judge effectively although not expressly, accepted the presence of the RE/MAX branded and accessible webpages on the martinhoney.co.nz site was the result of a mistake and not due to a deliberate plan to deceive the public. Mr Chappell, the expert witness called by the prosecution, did not substantially disagree with Mrs Payne, and accepted under cross-examination that the internet accessibility of the "left behind' RE/MAX branded pages could have been a mistake on the part of Mr Taka when he was designing the new Ray White branded website. The charges brought against [Mr Honey, Mrs Honey, and Mr Taka] are all based on the proposition that Mr Honey, aided and assisted by his wife and Mr Taka, had set up and was operating a fraudulent website. On that premise, the prosecution case against Mr Honey was that he knowingly provided false and misleading information to the [Authority, Complaints Assessment Committee and Tribunal] in an attempt to conceal his illegal actions and in order to make a false complaint against [Mr Nottingham]. However, once the Judge determined that there was no evidence whatsoever of a conspiracy between the defendants, the basis for the charges of attempting to pervert the course of justice fell away.
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> [103] it is clear that there was credible evidence which provided a foundation for the Judge's conclusion that Mr Honey was not acting to deceive the [Authority, Complaints Assessment Committee and Tribunal] pursuant to a conspiracy to present a false complaint against [Mr Nottingham]. Accordingly, if leave were granted, [Mr Nottingham] would not be able to show that the Judge reached an unsupportable and clearly untenable conclusion on the evidence before him. …

[37] His Honour then considered "Other issues – Mrs West and the former staff witnesses". He referred to "evidence called by the prosecution from three former staff members who gave evidence of accessing the RE/MAX branded webpages following

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[24] At paragraphs [102]–[103].

the conversion to the Ray White franchise on 13 February 2009". He recorded that the RE/MAX and Ray White sites had both remained live for one month following the changeover "in accordance with arrangements made by Mr Honey and RE/MAX". He referred to Mrs West's evidence of having typed in "RE/MAX Martin Honey" in around July 2009, and being taken to a RE/MAX page with Mr Honey's current Ray White listings shown. Mrs West said she told Mr Honey about this and he had said he "must do something about it". He said that on the basis of that evidence, Mr Nottingham said that Mr Honey's subsequent complaint to the Authority and the content of his letter to the Police could be shown to be untrue, and submitted that the evidence contradicted the District Court Judge's determinations in relation to the charges, and was of such significance that the Judge's failure to make a finding on that basis amounted to an error of law upon which leave to appeal should be granted.[25]

[38] Justice Davison did not accept this submission. He said:[26]

> [105] In considering this issue, it is important to note that whether or not Mr Honey was told about the accessible RE/MAX branded webpages in July 2009, his knowledge of it from that time does not mean that it must have been the result of any deliberate measures employed at the time of his agency's transition from a RE/MAX franchise to the Ray White franchise. Moreover, as explained by Mr Honey in the letters he wrote to the Police and to the [Authority], he was not aware of any business coming to him at Ray White that was misdirected and diverted away from any RE/MAX branded real estate agents. Mr Taka's explanation to Mr Honey as to why this was happening, set out in his email of 19 April 2010, was that it was likely to be due to the Google process of "caching". Mr Taka said in his email that "The site changeover to Ray White has been managed in good faith and all branding and references removed from the www.martinhoney.co.nz website. Mr Taka went on to say "We will delete these pages from the server and Google will remove them from web searches over time. We would usually keep the pages in this non-available mode as you have invested time and effort in these pages."
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> [106] While [Mr Nottingham] says that this initial Google caching explanation is at odds with the explanation provided by Mrs Payne, any inconsistency does not mean that the "Google cache" explanation was deliberately false, and therefore evidence of an intention to deceive being in operation from the time of the conversion of the RE/MAX site into a Ray White branded site. In my view Mr Taka's initial explanation as contained in his 19 April email is entirely consistent with him advancing what he honestly and genuinely believed to be the reason for the accessible RE/MAX branded pages. Mr Honey had obviously relied on Mr Taka's computer expertise to undertake the conversion of the RE/MAX branded website to the Ray White branded site that would replace it. It cannot be expected that a person without expertise in the field of computers and the internet would have sufficient knowledge to understand the computer

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25 At [104].

26 At [105]–[106].

> and internet based mechanisms which would lead to and explain this occurrence.

[39] His Honour then considered 15 questions of law set out by Mr Nottingham in a memorandum headed "Focused Questions of Law for Appeal". He found that these related to matters of evidence (1, 3, 4, 5, 7, and 14), did not arise in relation to the determination of the charges, or in determination of the charges, or outside the scope of an appeal on a question of law pursuant to s 296 of the Criminal Procedure Act 2011 (2, 8, 9, 10, 11, 12, 13, and 15), or related to the District Court Judge's refusal to re-open a matter he had already determined on the merits (6).

Appeals by Mr Nottingham

[40] Mr Nottingham filed an application for leave to appeal to the Court of Appeal against the judgment of Justice Davison. In a judgment delivered on 7 August 2018, the Court of Appeal held that under the relevant provisions of the Criminal Procedure Act (ss 213, 300, and 303) the decision of the High Court declining leave to appeal was final, there could be no appeal to the Court of Appeal against that decision.[27]

[41] The Supreme Court refused leave for Mr Nottingham to appeal to that Court.[28]

Mr Nottingham's conviction for criminal harassment

[42] On 18 May 2018, Mr Nottingham was convicted after a jury trial in the Auckland District Court on five charges of criminal harassment. [redacted]. He was sentenced to nine months' home detention (with six months' post-detention conditions) and ordered to complete 100 hours of community work.[29]

[43] In a judgment delivered on 20 July 2019, the Court of Appeal dismissed Mr Nottingham's appeal against conviction and sentence, and allowed the Crown's appeal

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27 *Nottingham v District Court at Auckland* [2018] NZCA 345, at [9]–[21].

28 *Nottingham v Taka* [2018] NZSC 102.

29 *R v Nottingham* [2018] NZDC 15373 (Mr Nottingham was also found guilty on two charges of breaching non-publication orders, in respect of which he was sentenced to three months' home detention (cumulative)).

against sentence. The Court of Appeal quashed the District Court sentences of home detention and replaced them with new sentences of 12 months' home detention.[30]

Submissions on application to strike out the appellants' appeals

Submissions for Mr Honey

[44] Mr Grove submitted that s 109A of the Act is for all intents and purposes the same as Rule 15.1 of the High Court Rules, and that the Tribunal can derive assistance from authorities on those Rules.

[45] Mr Grove submitted that the appellants had chosen to delay prosecuting their appeals whilst pursuing the prosecution of Mr Honey, Mrs Honey, and Mr Taka. He submitted that "importantly", Mrs West, Mrs Earlam, and Mrs Muller had given evidence, and been cross-examined, in the District Court, and the appellants' prosecution had failed, despite their evidence. He submitted that the appellants' delay was extraordinary, and clearly prejudiced Mr Honey. He submitted that given the passage of time, the appeals serve no purpose whatsoever.

[46] Mr Grove also submitted that the appeals are vexatious. He submitted that Mr Nottingham had been adjudicated bankrupt following his failure to pay the costs awarded against him in the District Court (and further costs awards thereafter).

[47] Mr Grove further submitted that the appeals are an abuse of process. He submitted that the appellants maintain in the appeals their allegation that Mr Honey has acted fraudulently. He submitted that they had failed in that allegation following a full trial in the Auckland District Court, and numerous appeals thereafter. He submitted that the pursuit of claims by the appellants have clearly vexed Mr Honey and his family. He referred to Mr Nottingham's conviction on charges of criminal harassment ([redacted]). Mr Grove submitted that to allow the appeals to continue would, indeed, provide an avenue for continued harassment.

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30 *Nottingham v R* [2019] NZCA 344.

[48] Mr Grove also submitted that the appeals are likely to cause prejudice. He submitted that the categories of "prejudice" are potentially very wide, and have been interpreted to include prolix pleadings, and scandalous and irrelevant proceedings. He submitted that such criticisms have been made of pleadings filed by Mr Nottingham in various Courts, in particular arising out of his private prosecution.

Appellants

[49] As recorded in paragraph [13], above, neither the appellants' submissions filed on 27 September 2019 nor those filed on 2 October 2019 made any reference to s 109A of the Act. In each case, the submissions appear to set out submissions in support of their appeals. The following summary is drawn from the opening paragraphs of the appellants' submissions filed on 2 October 2019.

[a] No Judge or lawyer has stated one single (even minor) accusation against the reliability of the evidence of Mrs Earlam (characterised as a "smoking gun").

[b] The matter to be decided is whether there is a sufficiency of evidence to establish a prima facie case that Mr Honey should face a misconduct charge or charges (disgraceful conduct) relating to not only the original operation of the fraudulent RE/MAX website, but also his subsequent denial that he did so.

[c] Mr Honey invented a Google caching excuse to explain what he knew to be a fully operational RE/MAX website.

[d] Mrs Honey told Mr Honey she had seen RE/MAX website.

[e] Mr Honey admitted at the hearing before the Tribunal that Mrs Honey had told him she had seen a live website, and he did not bother to check it.

[f] Mr Honey's letters to the appellants, the Tribunal, and a Member of Parliament, were false and misleading, and alleged that the allegations against him were designed as part of a conspiracy to blackmail him.

[g] The content of letters from Mr Honey's lawyer was misleading and false, known by Mr Honey to have been false and intended to mislead. It is now accepted that Mr Honey was operating two sets of branded pages between 13.2.2009 and 18/19.4.2010. The only issue is whether this was intentional, or egregiously negligent or wilful blindness.

[h] The Tribunal must also consider whether Mr Honey purposefully misled the Tribunal by promoting denials that have never had any foundation whatsoever, and whether those denials were designed to defeat the course of justice.

The Authority

[50] On behalf of the Authority, Mr Mortimer submitted that the wording of s 109A appears to have been deliberately modelled on the strike-out power contained in r 15.1 of the High Court Rules. He submitted that while s 109A refers to "proceedings", and r 15.1 refers to "pleadings", that difference is simply a reflection of the different features and terminologies of the respective jurisdictions. He further noted that the Tribunal does not have the power (contained in r 15.1) to stay all or part of a proceeding on such conditions as are considered just. He submitted that these differences are minor, and the case law under r 15.1 can be used to interpret s 109A.

[51] Mr Mortimer further submitted that the Tribunal's power to strike out a proceeding must be interpreted in the light of the "consumer-protection" focus of the Act, as expressed in s 3(1) of the Act. He submitted that the Tribunal should not use its strike-out power to unduly limit a party's right to appeal a decision (particularly the appeal right of a consumer), but that must be balanced against Parliament's decision to grant an express power to strike out proceedings. He referred to Parliamentary debate at the time the Tribunals Powers and Procedures Legislation Bill was being read in the House, and submitted that it demonstrated Parliament's intention that the power was to equip tribunals "with the tools they need to resolve cases faster and more effectively" so that "more tribunals will be able to strike out meritless cases".[31]

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[31] Citing <https://www.parliament.nz/en/pb/hansard-debates/rhr/combined/HansDeb-_20181107_20181107_24>

Discussion

[52] The power given to the High Court under r 15.1 of the High Court Rules is in very similar terms to that given to the Tribunal in s 109A of the Act. As relevant, r 15.1 provides:

> **15.1 Dismissing or staying all or part of a proceeding**
>
> (1) The court may strike out all or part of a pleading if it–
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
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> …

[53] We accept Mr Mortimer's submission that case law under r 15.1 may be used to interpret s 109A. We also accept that s 109A should be interpreted in the light of the purpose of the Act, as set out in s 3:

> **3 Purpose of Act**
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> (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
>
> (2) The Act achieves its purpose by–
>
> (a) regulating agents, branch managers, and salespersons:
>
> (b) raising industry standards:
>
> (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[54] Mr Grove based his application on sub-paragraphs (b) to (d) of s 109A. That is, he submitted that the appeals are likely to cause prejudice or delay (subparagraph (a)), are frivolous or vexatious (subparagraph (b)), and/or otherwise an abuse of process (subparagraph (c)). In its judgment in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal said in respect of subparagraphs (b) to (d):[32]

> The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the

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[32] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679, at [89]

court's processes. Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety. Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit. An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

(Citations omitted)

[55] In their discussion of r 15.1 the authors of *McGechan on Procedure* commented as to what is "otherwise an abuse of process", as follows:[33]

(1) Scope – what constitutes abuse

(a) This category extends beyond other grounds and captures all other instances of misuse of the court's processes, such as a proceeding that has been brought with an improper motive or is an attempt to obtain a collateral advantage, beyond that legitimately gained from a court proceeding: …

(2) Types of abuse of process

Abuse of process may take several forms, including:

(a) attempts to relitigate matters already determined: …

(b) suing with an improper motive or the aim of obtaining a collateral advantage beyond that legitimately obtained from a court proceeding: …

(c) duplication of proceedings: …

(d) commencement or pursuing a proceeding in relation to a claim so stale that a fair trial is now impossible – justice could no longer be done: …

(Citations omitted)

[56] In *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock said:[34]

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

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33 *McGechan on Procedure* ThomsonReuters (online ed), at HR15.1.05.

34 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 543.

[57] In its decision in 2014 the Tribunal summarised the appellants' complaint as follows:[35]

> 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 [Mr Honey'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 [Mr Honey's] Ray White franchise.

[58] Judge Paul's summary of the appellants' case against Mr Honey, Mrs Honey, and Mr Taka in the District Court is set out at paragraph [15], above:

> … they conspired to set up and maintain a fraudulent RE/MAX website deliberately and dishonestly so that Mr Honey was able to "poach business" which might otherwise have gone to the prosecutor's company.

[59] Justice Davison summarised the charges (in paragraph [102] of his judgment, set out in paragraph [36]), as follows:

> … The charges brought against [Mr Honey, Mrs Honey, and Mr Taka] are all based on the proposition that Mr Honey, aided and assisted by his wife and Mr Taka, had set up and was operating a fraudulent website.

[60] Plainly, the issues are the same in the appellants' complaint, and in the charges brought in the District Court. Therefore, the factual findings by Judge Paul in the District Court (which his Honour Justice Davison found formed a proper basis for the Judge's decision to dismiss all of the charges) cannot be ignored by the Tribunal now.

[61] The appellants' complaint was remitted back to the (differently constituted) Tribunal to give further consideration to Mrs West's evidence, and to consider the evidence of Mrs Earlam and Mrs Muller in relation to the complaint made against Mr Honey. That is the limit of our jurisdiction.

[62] Mrs West, Mrs Earlam, and Mrs Muller all gave evidence before Judge Paul. As recorded in paragraph [22], above, having referred to their evidence, the Judge noted that there was evidence that Mr Honey was aware that the RE/MAX pages were live and not cached. However, the Judge found that:

> [a] The allegation of conspiracy was not proved, and

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35 Tribunal decision, above fn 1, at [20].

[b] Mr Taka honestly and genuinely believed that the RE/MAX web pages had been cached, and Mr Honey relied on Mr Taka's advice.

[63] In particular, Judge Paul found that Mr Nottingham had not proved that Mr Honey conspired with Mrs Honey and Mr Taka to "invent a Google caching excuse", or to make a false allegation against the appellants, or that he intended to mislead the Tribunal, the Authority, or the Police.

[64] His Honour Justice Davison found that Mr Taka's explanation of cached pages was consistent with it being a genuine and honest explanation; Mr and Mrs Honey's subsequent repetition of it was reasonable – they could be expected to rely on Mr Taka; Mrs Payne's subsequent (different) explanation does not detract from that; there was credible evidence for Judge Paul's conclusion that Mr Honey was not acting to deceive the Tribunal, the Authority; and that the presence of RE/MAX branded accessible webpages was a the result of a mistake and not a deliberate plan to deceive.

[65] The appellants submitted that Justice Davison "completely ignored" Mrs Earlam's evidence. That submission is not sustainable. As recorded in paragraph [37], above, his Honour discussed evidence given by "Mrs West and the former staff members". His Honour's discussion, at paragraphs [104] and [105] of his judgment is clearly of the evidence given by Mrs West, Mrs Earlam, and Mrs Muller.

[66] Her Honour Justice Thomas directed the Tribunal to re-consider Mrs West's evidence, and to consider the evidence of Mrs Earlam and Mrs Muller. That re-consideration and consideration has been undertaken by Judge Paul in the District Court, as a result of the prosecution brought by Mr Nottingham. His findings were reviewed by his Honour Justice Davison. Both Judges accepted the evidence, but found that it did not establish the appellants' fundamental claim, which is that Mr Honey operated a fraudulent RE/MAX website, and invented a "google caching excuse" to mislead the Tribunal.

[67] We are conscious that charges in the Tribunal are determined on the balance of probabilities.[36] The criminal standard of "beyond reasonable doubt" applied in the

[36] Section 110(1) of the Act.

District Court charges. However, given the serious nature of the allegations made by the appellants in their complaint against Mr Honey, we do not consider that the application of a different standard of proof causes us to reach a different conclusion on the application before us.

[68] The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

[69] By pursuing their appeals to the Tribunal and seeking charges against Mr Honey, the appellants are attempting to do what the House of Lords in *Hunter v Chief Constable of the West Midlands Police* and the Court of Appeal in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* held cannot be done: to relitigate issues which have been explored in considerable detail in the proceedings they brought in the District Court, and in respect of which they had the full opportunity (which they took) to contest the District Court's decision on appeal to the High Court and Court of Appeal.

[70] We find that it would be frivolous, vexatious, and an abuse of the Tribunal's processes to repeat the re-consideration and consideration directed by Justice Thomas, and already undertaken by Judge Paul, whose findings were upheld in the High Court. As a result of that process, the appellants' appeals can properly be described as "meritless".

Outcome

[71] The application to strike out is granted. The appellants' appeals are struck out

[72] 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.

_____
Hon P J Andrews
Chairperson

_____
Mr J Doogue
Member

_____
Ms C Sandelin
Member