

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 42**

**READT 033/18**

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

GARY STONE  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 412)  
First Respondent

AND

SUSAN LIM  
Second Respondent  
(Not participating in the appeal)

Hearing:

31 July 2020

Tribunal:

Mr J Doogue, Deputy Chairperson  
Ms C Sandelin, Member  
Mr N O'Connor, Member

Submissions filed by:

Mr G Stone, appellant  
Ms C Paterson on behalf of the Authority

Date of Decision:

14 September 2020

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**DECISION OF THE TRIBUNAL**

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## Overview

[1] The dispute which gave rise to the appellant, Mr Stone, (**Mr Stone**) making a complaint about the conduct of Ms Lim (**Ms Lim**) was as follows. Mr Stone was a tutor at the Open Polytechnic and then later at the TAFE institute. As well he was a licensee under the Act. At the material time of 2008 in the course of his employment by the Open Polytechnic Mr Stone was required to carry out an assessment of Ms Lim who was a student at that institution. His assessment was that she had failed part of the course. Prior to carrying out this assessment, he had not known Ms Lim.

[2] Subsequently, Ms Lim made a complaint to the open Polytechnic that Mr Stone had offered to provide tuition to her at her residence. She alleged that Mr Stone had sexually abused her and demanded cash, that he had interfered with her obtaining her diploma and accused him of other unspecified sexual abuse, theft and corruption.

[3] In 2015 Mr Stone was employed by the TAFE Institute as Head Tutor. Ms Lim had by then enrolled at TAFE as well. She became involved in a dispute with TAFE arising out of her allegation that TAFE and a Ms Ngaere Johns had failed to account for a \$300 enrolment fee which Ms Lim had paid and further alleged that some of the course materials to which she was entitled had not been provided. She also raised the alleged conduct of the complainant while at the Open Polytechnic. She said Mr Stone had sexually abused her and demanded extra cash; that she had given him some cash but Open Polytechnic had not received it; that the complainant had interfered in her obtaining her real estate diploma and that he was in control of “the situation at TAFE” (this apparently being a reference to the difficulties she had had with TAFE including the failure to provide course materials et cetera).

[4] In December 2015 Ms Lim also made a complaint to the New Zealand Qualifications Authority (NZQA) and to the Authority. In the course of doing so, she repeated the allegations that she had made against the appellant at the open Polytechnic saying:

Gary Stone of TAFE did sexual abuse and demanding cash when I studied at Auckland City Branch of Open Polytechnic. So, I gave him some cash, but Open Polytechnic

did not receive the money. Gary Stone interfered a lot for my obtaining the National Diploma in Real Estate. I believe that this TAFE situation is controlled by Gary Stone.

[5] In 2015, Ms Lim also complained to the Real Estate Authority (**the Authority**). In a subsequent discussion with an employee of the Authority<sup>1</sup> in 2016 Ms Lim told her that Mr Stone had sexually abused her when she was studying at the Open Polytechnic. He asked to come to her house (which she did not want). On one occasion he asked her to come down to an underground car park with him. She followed him. She said that he touched her back when they were in a car park and that he did not let her leave the car park which he had the access key to. She said that Mr Stone failed her in one of the course requirements that she had to pass and then sought payment of an additional \$69 by way of resitting fee; that she paid the \$69 apparently to the receptionist who confirmed that payment had received but it was never “registered through the school”. The complainant said that she believed Mr Stone never gave the payment to the school and took the money for himself.

[6] The Authority suggested to Ms Lim that she make a complaint to the police. Ms Lim apparently did so at the end of 2017.

[7] In 2016 Mr Stone in turn made a complaint to the Authority that Ms Lim, who was by then a licensee under the Act, had made a false complaint against him to the Authority.

[8] The matter was considered by the Committee. In due course that Committee determined pursuant to section 80(2) not to take any further action on Mr Stone’s complaint. Section 80(2) provides that the Committee in its discretion may decide not to take any further action on complaint if, in the course of investigation of the complaint, it appears to the Committee that having regard to the circumstances of the case, any further action is unnecessary or inappropriate.

[9] The Committee also determined that no action should be taken on the complaint that Ms Lim had raised against Mr Stone.

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<sup>1</sup> BOD 12

[10] Mr Stone appealed against that determination and the Tribunal in a 2019 decision set aside the determination of the Committee.

### **The Committee decision**

[11] The Committee approached the matter on the basis that it was required to consider whether there was evidence proving Mr Stone's allegation that Ms Lim had used the complaints process to make a false complaint against him. The Committee saw its task as enquiring into the adequacy of the evidence to support the complaint and cross-complaint. It said that:

[3.37] None of these pieces of evidence directly go to the substantive complaint or disprove [Ms Lim's] original allegations against [Mr Stone]. The Committee considers this new evidence is weak circumstantial evidence in that it neither goes to the truth of Ms Lim's complaint nor how she views her complaint. This evidence could also be considered either contradictory or evidence of distress and uncertainty on the Licensee's behalf with the exception of the Complainant's evidence as to his character.

[12] The way in which the Committee approached its task is further indicated in subsequent passages of its decision:

[3.43] Even if the Committee was to find there was sufficient evidence before it to determine that the Licensee's original complaint against the Complainant was fabricated, and on the evidence before it the Committee is far from making this determination, the evidence would need to establish further that the Licensee had no genuine reason at all for making her complaint.

### **The Tribunal decision**

[13] The Tribunal in its decision on the appeal determined that what the Committee had been required to decide was whether there was *prima facie* case against Ms Lim. As well, it decided that to go beyond that issue and to draw conclusions as the Committee did about the veracity of the complaints, internal consistency of Ms Lim's

evidence and its inherent credibility, level of particularisation and other issues went “well beyond” the role which the Committee was required to discharge. The Tribunal concluded as well that the key question that the Committee was required to determine was whether there was a reasonable prospect of establishing the charges.

[14] The Tribunal instanced examples of cases where there was a high level of certainty that a prosecution would, if brought, fail.

[15] The REA appealed to the High Court.

### **The High Court Decision**

[16] The judgement of the High Court on appeal stated:

[47] I agree with the Tribunal that the threshold test for sufficiency is a prima facie case or, as the Guidelines put it, a reasonable prospect of proving the charge; but the CAC is required to assess the weight and worth of the evidence before it when making any of the determinations it must make. That does not usurp the Tribunal’s final adjudicative function. Rather, it simply discharges the obligation of the CAC to inquire into and then make determinations about how the complaint should be dealt with, including as to the necessity and appropriateness of the decision to take further action on a complaint.

[48] I accept that there are considerations that must moderate the nature and scale of the evaluation undertaken by the CAC when deciding to lay a charge. As the Court of Appeal stated in relation to the lawyers and conveyancers’ complaint process, the decision whether to lay charges procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process. But as Ms Paterson aptly put it, the dividing line here is one of role-a CAC is not determining the charge, but it should be able to scrutinise the evidence in a meaningful way, and consider the public interest in a charge.

[49] I therefore consider that the Tribunal erred in so far as it confined the CAC's assessment function to an assessment of the complainant's evidence only. Rather, like all prosecutors, the CAC had to evaluate all of the evidence before coming to a conclusion as to whether it should lay and then prosecute a charge. Contrary to the observation made by the Tribunal, this involved in assessment of the credibility and reliability of the evidence, albeit only for the purpose of assessing whether there is a prima facie case. (emphasis added)

[17] In the part of the judgment, where it summarised its conclusions<sup>2</sup>, the Court said (in part):

- (a) The threshold test for a decision to lay misconduct charges is threefold:
  - (i) there must be sufficient evidence to provide a reasonable prospect of proving the charge – that is a prima facie case;
  - (ii) the CAC must analyse and evaluate all of the evidence and information in a thorough and critical manner;
  - (iii) the CAC must exercise its discretion as to whether charges are required in the public interest.

[18] The High Court also considered the question of whether the Tribunal had properly dealt with the second criteria in the Solicitor-General's Guidelines (that a prosecution should only be brought where the public interest justifies it). The Court considered that the Tribunal had in fact dealt correctly with that point.

[19] In allowing the appeal, the High Court did so on the basis that the Tribunal had erred in finding that the Committee when considering whether there was a prima facie case, was required to confine itself to an assessment of Mr Stone's evidence only.

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<sup>2</sup> At paragraph [53]

[20] The Court also concluded that the Tribunal had applied an incorrect basis for determining the appeal. It had not enquired whether the Committee had made an error of law or principle, or taken into account irrelevant considerations; failed to take into account a relevant consideration; or that its decision was plainly wrong.<sup>3</sup>

[21] The effect of the judgement was that the Tribunal's decision was set aside and the matter was referred back to it to re- consider whether the Committee decision not to proceed with charges against Ms Lim was a correct discretionary decision. The judge said:<sup>4</sup>

Given the significance of the decision, I refer the matter back to the Tribunal to reconsider in the light of my judgement.

[22] A further aspect of the judgement which we note is the role of counsel who was appointed to assist the court on the appeal by taking the role of contradictor. The High Court appeal judgment noted that some of the matters that had been raised by counsel, Mr Upton, at the hearing of that appeal had not been put before the Tribunal at the hearing of the first appeal. He said that he therefore did not have the views of the Tribunal on those matters. Nor had the court heard from Ms Lim about them. As well, the court said that <sup>5</sup> some of the matters that were raised in submissions had not been included in a notice of cross-appeal. The High Court was of the view that in the light of the issues raised by Mr Upton a "cautious approach" was required and for that reason the appropriate course was to refer matters back to the Tribunal for reconsideration rather than to simply reinstate the CAC's decision.

[23] The judgement continued that<sup>6</sup>:

In these circumstances I am not prepared to finally resolve the appeal by reference to them

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<sup>3</sup> *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

<sup>4</sup> At [54]

<sup>5</sup> At [51]

<sup>6</sup> Paragraph [51]

[24] The High Court considered that referring the matter back to the Tribunal was the preferable course rather than to “simply reinstate the CAC’s decision”.

[25] As we understand it, it was the Judge’s intention that we should deal with those issues and that was one of the reasons why the proceeding was referred back to the Tribunal following the setting aside of its first decision.

### **The Tribunal hearing following remittal**

[26] Prior to the hearing that was convened pursuant to the requirements of the High Court judgement, Mr Stone who attended the hearing, advised that because his resources were exhausted, he would not be able to instruct counsel to appear on his behalf at the hearing. He said that he, personally, would be out of his depth in making submissions on the questions that arose from the Committee consideration of his complaint. Ms Lim did not appear and she was not represented by counsel.

[27] In the light of these developments, we therefore called for and obtained a copy of the submissions that Mr Upton had made at the High Court hearing.

### *Counsel for the authority submissions*

[28] Counsel for the Authority’s contention was that the Committee had been right to make assessment of the quality of the evidence that Ms Lim put forward and to determine whether, based on all the evidence, a prima facie case had not been established.

[29] She also argued that public interest considerations in this case weighed against the bringing of charges against Ms Lim. She noted that the purpose of the disciplinary scheme established under The Real Estate Agents Act 2008 was not to vindicate the reputations of individual complainants. Its purpose was to serve the objectives such as promoting public confidence in the performance of real estate agency work. As we have already noted, this was not a matter that was taken up by the High Court judge on appeal.



[30] She submitted that a charge of disgraceful conduct which was under consideration in this case was dependent upon either establishing a fabricated complaint or a complaint made for improper purposes. She emphasised to us the role that the prosecution in a case of this kind was expected to fulfil as it had been described in the High Court appeal decision.

*Submissions of counsel for the respondent (the contradictor) for the High Court hearing*

[31] Counsel, Mr Upton submitted to the High Court that the Committee did actually carry out an assessment of the veracity of Ms Lim's evidence. He referred to the Committee analysis to the effect that in resolving the direct collision of accounts which the two protagonists gave, it would be relevant to consider possible criticisms that could be made of the evidence of Ms Lim because it was purportedly inconsistent.

[32] Mr Upton submitted that the Committee was not entitled to draw conclusions about the credibility and veracity of Ms Lim and Mr Stone. They had in fact done so for example by taking a particular view of certain matters raised in respect of Ms Lim's credibility. As he put it:

51. The Committee did assess the credibility of Ms Lim's evidence, even if it did not use that word. At [3.48], the Committee noted the inconsistencies in Ms Lim's complaints and then considered possible explanations for those variations. It then concluded that the variations in Ms Lim's complaint did not support Mr Stone's position that her complaint was "false, malicious and a blatant lie". An assessment of whether Ms Lim could have plausible explanations for variances in her evidence is, by its nature, an assessment of Ms Lim's credibility.

[33] Counsel, Mr Upton, dealt with that issue in the following terms:

53. This Court should therefore support the Tribunal's finding that there was evidential sufficiency to proceed with laying a charge, and that the Committee made an error in law in relation to its role by essentially determining that charge rather than referring it to the Tribunal. Mr Stone's allegation was that Ms Lim had made damaging false accusations about him. On the evidence available, Ms Lim had made

those accusations and there was no clear evidence to show either that the accusations were true or that Ms Lim had acted in good faith in making them. There was therefore a “case to answer”, and discussions about the credibility of Ms Lim’s accusations and Mr Stone’s denials or about Ms Lim’s motivations for making the complaint were properly dealt with at a substantive hearing and by the Tribunal.

[34] The point just mentioned is an important one that we will return to when carrying out our assessment of the test which the committee was required to apply.

### **Assessment of sufficiency of evidence**

#### *The appeal judgment*

[35] At the outset it is necessary to be clear about what we are required to do in terms of the High Court judgement. In the first place, the High Court did not express any view about what appropriate outcome we should have come to concerning the appeal. The judgement was concerned with the matters that we were required to take into account when deciding what that outcome should be.

#### *The decision of the Committee*

[36] Part of the discussion of the sufficiency of evidence, the decision of the Committee was as follows:

3.63. The Committee considers it important to take a generous and understanding assessment of the motivation for making complaints of this nature. The Committee is and should be hesitant to conclude that any complaint of sexual harassment is baseless, or improper, or malicious. The alternative is to create a not unjustified perception in the industry that they should be sure before alleging misconduct and come armed with conclusive proof, lest they face charges themselves.

3.64. This is likely to be a different approach than has often been taken in such areas as commission disputes where misuse of the complaints process is more easily assessed, and charges or unsatisfactory conduct can be considered more easily. For an area as difficult to prove as sexual harassment, however, the risk of an overly zealous approach to charging complainants risks long term damage to the complaints

and discipline process. This would not be consistent with the goal of promoting public confidence in the performance of real estate agency work.

[37] It is correct that in another passage of the decision, the Committee said that:

3.65 Having said that the guiding principle for the Committee is not the nature of the allegations the complainant and licensee have made against each other but rather our focus has been on whether there is sufficient evidence to lay a charge and refer the matter to the Tribunal

[38] Notwithstanding the disclaimer in the passage just quoted, some of the general remarks that the Committee made about sexual abuse allegations seem to have carried over into what it said was the central area for decision which was the sufficiency of evidence. Indeed, when it referred again to the question of the sufficiency of evidence the Committee returned to the issue of what it saw as being the specific difficulties that it considered where it is inherent in trying to prove allegations of the kind made in this case. They said<sup>7</sup> that:

For the many reasons outlined above the Committee considers it has insufficient evidence to prove the licensee had improper motives when she made the complaint or otherwise completely fabricated the allegations. Without that evidential foundation it is unlikely the Tribunal could find disgraceful conduct on the part of the licensee. (Emphasis added)

[39] We will return to a consideration of these matters subsequently. Before we do so we need to deal with the question of motive. As it happens, we depart from the Committee on the question of whether Ms Lim may have had a motive. The Committee said that she had nothing to gain by untruthfully stating that Mr Stone had been guilty of impropriety including sexual abuse and financial irregularities. However, the obvious response is that Ms Lim may have been motivated by considerations of revenge or she may have wished to ensure that Mr Stone did not take part in any further assessments of her work because she had concerns that it would be unfavourable. We are not saying that was necessarily her motive. But it is a possible explanation.

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<sup>7</sup> At paragraph 3.66

Therefore, it was mistaken to base for the decision to prosecute or not to be based on an affirmative conclusion that Ms Lim had no motive to make a false complaint.

[40] The Committee considered some factors that would rebut potential criticisms of Ms Lim's evidence. Those are questions about the expansion of the complaints as time went by, delays in making a complaint and apparent untruths about a collateral matter<sup>8</sup>.

[41] While the Committee was able to suggest reasons why these potential defects in the evidence of Ms Lim would be explained satisfactorily, we do not accept that it can be taken as an accomplished fact that Ms Lim would be viewed by the Tribunal as an honest witness.

[42] We accept that there is a direct conflict of evidence between the positions taken by Mr Stone on the one hand and Ms Lim on the other. In proceeding on the assumption that Ms Lim would be seen as an honest witness (and that therefore the charge against her was likely to fail) the Committee was plainly in error. We regard the credibility of the potential witnesses as being an open question.

[43] There is nothing in the other evidential material which Ms Lim has put forward or which the investigator has uncovered which seems to bear upon the question of whether there is a prima facie case. To take an example, had Ms Lim been able to produce text messages which were contemporaneous with the alleged events which plainly incriminated Mr Stone because, for example, he apologised for his actions, then we would have been required to take these into account. That is because they could be inconsistent with the evidence of Mr Stone and therefore cast doubt on the credibility of his evidence.

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<sup>8</sup> That is the assertion that Ms Lim stated that she had made a complaint to the police at a point where she had not actually done so

*A prima facie case*

[44] In the judgement on appeal in this matter the High Court confirmed that in relation to the question of sufficiency of evidence to justify a prosecution, the question was whether there was a prima facie case.

[45] The Court was apparently using the term “prima facie case” in the usual way that the courts have interpreted that expression.

[46] In a decision of the Tribunal in *Miller v Complaints Assessment Committee and McAtamney*<sup>9</sup>, that there had to be:

...some evidence not inherently incredible which, if we were to accept it as accurate, would establish each essential element in the alleged offending conduct

[47] The test of whether there was a prima facie case would seem to be similar to that which is applicable to that which the court applies when considering if there is a case to answer. In that context, *Adams on Criminal Law* describes the position as follows:

The test to be applied by a judge on a submission of no case to answer was considered by the House of Lords in *Haw Tua Tau v Public Prosecutor* [1982] AC 136, [1981] 3 All ER 14, (PC) at 151–152; 19–20:

“At the conclusion of the prosecution’s case what has to be decided remains a question of law only. As decider of law, the Judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and then only, is he justified in finding that ‘no case against the accused has been made out’...

[48] The Solicitor General’s prosecution guidelines in relation to sufficiency of evidence before starting a prosecution, reflect the requirement for a prima facie test as so understood.

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<sup>9</sup> *Miller v Complaints Assessment Committee and McAtamney* [2012] NZREADT 25

[49] Whata J in the High Court decision on the appeal in this case confirmed that the enquiry to be made before charges should be brought is analogous to the one that is made in criminal courts where the Solicitor General's guidelines are applicable.

[50] The relevant Solicitor General's guideline in relation to sufficiency of evidence required in order to establish a prima facie case says the requirements are met in the following circumstances:

5.3 A reasonable prospect of conviction exists if, in relation to an identifiable person (whether natural or legal), there is credible evidence which the prosecution can adduce before a court and upon which evidence an impartial jury (or Judge), properly directed in accordance with the law, could reasonably be expected to be satisfied beyond reasonable doubt that the individual who is prosecuted has committed a criminal offence.

[51] The Solicitor General's guidelines consider the question of "credible" evidence in the following sub- part of the document relating to sufficiency of evidence:

This means evidence which is capable of belief. It may be necessary to question a witness before coming to a decision as to whether the evidence of that witness could be accepted as credible. It may be that a witness is plainly at risk of being so discredited that no Court could safely rely on his/her evidence. In such a case it may be concluded that there is, having regard to all the evidence, no reasonable prospect of obtaining a conviction. If, however, it is judged that a Court in all the circumstances of the case could reasonably rely on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and should be taken into account.

Prosecutors may be required to make an assessment of the quality of the evidence. Where there are substantial concerns as to the creditability of essential evidence, criminal proceedings may not be appropriate as the evidential test may not be capable of being met.

Where there are credibility issues, prosecutors must look closely at the evidence when deciding if there is a reasonable prospect of conviction.

[52] We consider that this approach, substituting for "beyond reasonable doubt" the expression "on the balance of probabilities", is the correct one to adopt in this case.

[53] Before commencing our discussion about a prima facie case, we record that while we accept that there is apparently a direct conflict of evidence between Mr Stone and Ms Lim, we do not consider that feature is conclusive when it comes to considering

the existence of a prima facie case. Courts and tribunals do not routinely rule that there is no prima facie case on the ground only that there is a direct clash between the accounts that the complainant and the defendant give about an event. Instead what happens is that if the evidence is not inherently incredible and public interest factors favour a prosecution, the case may proceed.

[54] The second part of the Solicitor General's guidelines above referred to evidence which "could be accepted as credible". This is plainly a reference to evidence which could, but will not necessarily be, accepted by a court. We further note that the requirement that a prosecutor should make an assessment of the "quality of the evidence" is not applicable to every case. But there are cases where the prosecutor may be required to make such an assessment. This would seem to link to the following paragraph which is concerned of cases where there are "credibility" issues. Common sense will suggest that if there are obvious problems with a complainant's evidence, for example because the account that they give strains credulity or because it strikes the listener as being improbable, then caution will be called for.

[55] The Tribunal cannot ignore that the High Court on appeal stated that the committee should not restrict itself to evaluating the evidence of the complainant only. That is apparent from the following passage:

[49] I therefore consider that the Tribunal erred insofar as it confined the CAC's assessment function to an assessment of the complainant's evidence only. Rather, like all prosecutors, the CAC had to evaluate all of the evidence before coming to a conclusion as to whether it should lay and then prosecute a charge. Contrary to the observation made by the Tribunal, this involved an assessment of the credibility and reliability of the evidence, albeit only for the purpose of assessing whether there is a prima facie case.

[56] In conformity with the High Court judgement, the Tribunal has carried out a wider evaluation of the evidence than that which we put forward in our earlier appeal decision.

[57] It is necessary to remember that, although the High Court said that it was important to carry out a review of all of the evidence and material, including the credibility issue, the Judge also said<sup>10</sup> that this involved an assessment of the credibility and reliability of the evidence, “albeit only for the purpose of assessing whether there is a prima facie case”. This reflects the fact that at the prima facie case stage, some evidence can be dismissed as unreliable or questionable in the light of the known circumstances. We consider that there would be no real problem in coming to the type of assessment of which Whata J was speaking in such circumstances. But we do not consider that the Judge meant that in every case, consideration of credibility issues would enable the CAC to reach the point where it could conclude that one party or the other was telling the truth. We consider that the High Court was therefore stating matters in terms of broad principle rather than with reference to the particular facts of this case. The Judge spoke in terms of what the process was that the CAC had to undertake. He did not state that in every case it was the duty of the CAC, regardless of the paucity of material available to it, to come to a conclusion about credibility<sup>11</sup>.

[58] The outcome of the assessment of the sufficiency of evidence in this case reflected the view that the CAC came to that there were reasons to treat Ms Lim as a reliable witness. For that reason, presumably, a prima facie case was not made out. The High Court on appeal did not state its concordance with that view.

[59] The judgement corrected the statement of principle which the Tribunal had made in the first appeal but did not descend into the specifics of how far an assessment of credibility could be taken in a case like this. That is why it referred the matter back to the Tribunal to reconsider the question of whether the Committee had erred.

[60] Assessment of credibility will be all-important in this case. As we have said, it will not be an easy matter to decide because there is a complete contradiction between the two witnesses and little or nothing in the way of evidence taken from the surrounding circumstances which might tilt the credibility scales one way or the other.

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<sup>10</sup> At [49]

<sup>11</sup> We noted above at [42] that there was no one piece of evidence in the possession of either the protagonists that was independently verifiable and which would have a critical influence on resolving the central factual dispute.



[61] If there is no rational basis upon which we can choose between one or the other, the result must be that the evidence of Mr Stone has not been meaningfully impugned. It would seem to be therefore that the evidence satisfies a prima facie case which the High Court confirmed is the appropriate standard.

[62] While not making a ruling on the point at this stage, it would seem likely that the choice between the account that the two protagonists in this matter give will have to be resolved following an oral hearing at which they are each examined. This is the standard way that conflicts of evidence are resolved in the courts. The Supreme Court when deciding a criminal appeal in its judgement in *Taniwha v R*<sup>12</sup> stated:

[1] In New Zealand, as in other jurisdictions from the common law tradition, criminal trials are conducted orally, in open court. The principle of orality, enshrined in s 83 of the Evidence Act 2006, recognises the fundamental importance of transparency in the administration of justice through the courts. The principle also rests upon the assumption that a fact-finder, whether a judge sitting alone or a jury, is likely to benefit from seeing and hearing witnesses give their evidence.

[63] The same approach is followed in civil cases<sup>13</sup>.

#### *The burden of proof*

[64] There is an additional matter to be considered, though. As the High Court pointed out, the role of the Tribunal on an appeal against a discretionary decision not to prosecute was restricted to intervening only where the circumstances outlined in *Kacem v Bashir* applied. It follows that the fact that the Committee might have exercised its discretion in a different way from which the Tribunal would have, is not decisive. The Tribunal can only intervene in the circumstances described in *Kacem v Bashir*.

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<sup>12</sup> *Taniwha v R* [2016] NZSC 123 at [1]. While section 83 of the Evidence Act is not applicable to proceedings in the Tribunal, the principle that hearing should be conducted orally is not restricted to cases where it does apply.

<sup>13</sup> For a discussion about the cross-examination of witnesses on briefs of evidence in civil cases see “Show Me the Evidence”, a paper presented at a litigation skills masterclass Stamford Plaza, Auckland, 25 November 2015 by Gillian Coumbe QC

[65] We consider, though, that the requirements of the judgement in *Kacem v Bashir* have been met. We consider that the comments of the committee to the effect that they should be reluctant to conclude that a complaint of a sexual abuse nature was baseless reflected a wrong approach to the applicable burden of proof and standard of proof in cases where sexual abuse allegations were involved <sup>14</sup>. The Committee was starting from the position that it was more likely that the complainant was making a valid or true complaint which must have involved the converse assumption that the denials by the complainant, Mr Stone, were unlikely to be correct. In deciding whether there was sufficient evidence to justify bringing a charge against Ms Lim, the Committee was required to direct itself on what needed to be proved and then consider whether the evidence which the complainant put forward was sufficient for that purpose. The Committee needed to correctly appreciate that the evidence of the complainant that a false complaint had been made would be sufficient for a prima facie case. It could not answer that question accurately if it started with the assumption that the respondent, Ms Lim, was likely to be telling the truth.

[66] It is correct that the Committee went on to say:

6.65 Having said that, the guiding principle for the Committee is not the nature of the allegations of the complainant and licensee have made each other but rather our focus has been on whether there is sufficient evidence to lay a charge and refer the matter to the Tribunal

[67] It does not appear from an overall reading of the sections of the decision in question that the Committee recanted the remarks it had earlier made in paragraph 3.63<sup>15</sup>. Had they wished to do so they would have simply deleted them from their written decision. As well, the comments at the two places in the decision are not mutually exclusive. In the light of the fact that the committee had earlier in its decision referred to the unlikelihood that a complaint in a sexual abuse case would make a baseless complaint, then that very consideration informed their approach to the question of the sufficiency of evidence. While at paragraph 6.65. they said that the fact that the complaint was one involving sexual abuse, that was not the “guiding

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<sup>14</sup> In paragraphs 3.62, 3.63

<sup>15</sup> Refer paragraph [28] above

principle”, they did not say that the nature of the charges was a matter that was irrelevant to the question of whether the complainant was more or less likely to be telling the truth. On an overall reading of the Committee’s decision, we consider that when making its decision, it did not resile from what it had said at paragraph 3.63. It seems to have been influenced by the view that it was unlikely that a complainant would make up a complaint of this kind.

[68] Our overall conclusion on the question of the sufficiency of evidence is that the Committee is required to consider whether there is a prima facie case. That means, that the allegations which are made against Ms Lim would be sufficient to establish a prima facie case unless that evidence was not creditable. In assessing that question the Committee is entitled to look at other aspects of the background evidence including matters put forward by Ms Lim which might throw light on the question of whether Mr Stone's evidence is creditable. It is not, though, a matter of the Committee comparing the evidence of one side with the other and making a choice about which it prefers. Nor is it correct for the Committee to start out with any supposition because the case concerns a particular type of misconduct, sexual abuse, the starting point is that it is unlikely that the complainant will not be telling the truth.

[69] We therefore respectfully conclude that the Committee took into account wrong factors and that on this ground we are required to set aside the decision of the Committee.

### **The Committee’s conclusions concerning public interest matters**

[70] The second limb of the criteria which the Committee, like all prosecutors, was required to take into account is whether it would be against the public interest for charges to be brought.

[71] The High Court said the following on the topic of public interest:

[50] For completeness, the Tribunal did not fail to have regard to public interest considerations. As noted by Mr Upton, it specifically weighed the importance of transparency. In this regard, I am prepared to find the Tribunal when referring to transparency was directing itself to the matters highlighted by Mander J in *Edinburgh Reality Limited*, namely, the regulation of agents, the raising of industry standards and accountability through disciplinary process that is independent, transparent and effective. But I think it is necessary to record that the Tribunal needed to remind itself it was exercising jurisdiction on appeal against the exercise of discretion. It was not enough for the Tribunal to disagree with the Committee's assessment of the public interest. It had to identify error (for example failure to have regard to relevant considerations) or that the assessment of the public interest was plainly wrong. Having said that, as also highlighted by Mander J, the degree of deference in the present context is not the same as the deference afforded to the police or Crown prosecutors in a criminal prosecution.<sup>16</sup> Furthermore, the Tribunal is well placed to assess the public interest considerations in light of the legislative purpose and the objects just mentioned.

[72] The High Court judgment makes it clear that the question that we have to resolve is whether the Committee's assessment of the requirements of public interest was based upon an error of the kind referred to in *Kacem v Bashir*. To answer that question requires us to consider some additional aspects of the Committee decision.

[73] We have already referred to paragraph 3.63 of the decision but will repeat a portion which we view as relating to the public interest aspect of the decision to prosecute.

3.63. ....The alternative is to create a not unjustified perception in the industry that they should be sure before alleging misconduct and come armed with conclusive proof, lest they face charges themselves. (emphasis added)

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<sup>16</sup> At [117].

[74] The question is whether these remarks are an accurate foundation upon which to construct an approach to exercise of the prosecutorial discretion. To answer that question involves anticipating what would happen if charges were preferred in the case came before the Tribunal. The starting point is that the burden of proving the complaint was false would rest with the prosecution. It would propose to meet this requirement by putting forward the evidence of Mr Stone that he did not engage in the conduct that Ms Lim alleged. If that evidence was put forward and not challenged, then there would be no answer to the prima facie case and it is likely that the complaint would be considered to be proved.

[75] If, however Ms Lim put forward evidence that the events that were complained of actually occurred, she would not actually have to prove that her version of events was correct. It would be enough if her evidence left the Tribunal in a position where it was unable to conclude on the overall evidence that it was more likely than not that Ms Lim had concocted the complaints. If that point were reached, the charges would be dismissed because Mr Stone had not proved that Ms Lim had made false complaints. Of course, an alternative possible outcome is that the Tribunal having heard all the evidence could actually be convinced that Ms Lim's evidence was to be preferred so that it would be required to affirmatively conclude that the acts which she complained of actually did occur and that her complaints were true. However, it is not necessary for the evidence to reach this latter point before the charges would be dismissed.

[76] We do not consider that complainants such as Ms Lim put themselves in a hazardous position by making a complaint. If the complaint is dismissed because the Tribunal finds itself unpersuaded of its truth, it does not follow that the complainant will thereby be exposed to a charge of making a false complaint. Such a consequence would possibly flow from the rare cases where the Tribunal found that the complainant had clearly given false evidence. That such a consequence might result from exceptional cases, would not seem to justify a generalised reluctance to prosecute.

[77] The Committee also apparently considered that, as a matter of policy, complaints to the authority was not an appropriate procedure to be used where the complaint involved sexual abuse.

[78] Such a conclusion would mean that someone who was employed in the real estate industry and who had been sexually abused would find that their complaint was in a special category. As a result, even though it is quite likely that in an appropriate case such conduct would amount to misconduct, the complainant would be met with the advice that because the matter involved sexual abuse allegations, the Committee would not prosecute. The consequence would be that such a person would probably be limited to bringing a complaint that would result in criminal charges (if any) which would be dealt with on the basis that the complaint would fail unless it could be proved beyond reasonable doubt. That compares with the position that would be applicable if proceedings could be brought under the Act where the standard of proof is on the balance of probabilities.

[79] We have no reason to doubt that making a false complaint to the Authority can potentially amount to disgraceful conduct. It depends on all the circumstances. We do not consider that the prosecutorial discretion can be viewed as extending to the point where the prosecutor is able to decide that because it is undesirable for such cases to be brought in the Tribunal, in every case where one arises, the Committee should exercise its discretion against prosecuting.

[80] As well, adopting a policy of generally declining to pursue sexual abuse complaints in proceedings under the Act, would have an adverse impact on the complainant's access to justice.

[81] Finally, an approach of the kind suggested would cut across the requirements of transparency et cetera which the High Court agreed were objectives of bringing proceedings under the Act<sup>17</sup>.

[82] Next, we note that it is not completely unknown for the Committee or the Tribunal to enquire into matters of sexual abuse<sup>18</sup>. We accept that that argument is of lesser force given that questions about the desirability of prosecuting such cases before

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<sup>17</sup> Paragraph 50 of judgment

<sup>18</sup> A previous case which the Tribunal has dealt with is *CAC 403 v Licensee B* [2017] NZREADT 001, READT 78/15

the Tribunal was not apparently the subject of express argument in *CAC v Licensee B*. Also, we understand, the proceeding was not a defended one.

[83] In any case, the Tribunal panel which would ultimately deal with this matter were charges to be brought, would be quite capable of dealing with some of the concerns which the Committee has raised. There is no need for concern whether the Tribunal would be unlikely to deal appropriately and fairly with them.

[84] As a footnote we observe that the Authority in its website discussion about the obligations of licensees to report misconduct specifically instances cases of sexual abuse. Such advice would not have been forthcoming from the Authority if there was any perceived difficulty with the Committee or Tribunal, as appropriate, dealing with questions of this kind in a disciplinary context

[85] The net result is that that the Committee's remarks reflect an approach to initiating prosecutions which takes into account considerations which are based upon incorrect propositions about what is a desirable prosecution policy in regard to sexual abuse claims.

[86] For these reasons, we also consider that in regard to the second element of the discretion to prosecute, the public interest, the Committee has erred by taking into account irrelevant matters. The approach that ought to be taken on the public interest considerations is that which the High Court on appeal summarised in its decision<sup>19</sup>

### **Outcome of the appeal**

[87] The Tribunal considers that the Committee erred in its decision. It wrongly exercised its discretion both in the areas of deciding whether there was a *prima facie* case and on the question of whether it would be in the public interest to prosecute Ms Lim. In regard to the former, it took into account matters that it ought not to have when it considered questions such as whether the account that Ms Lim gave was to be preferred to that of Mr Stone. It also erred in dealing with the complaint on the basis

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<sup>19</sup> At paragraph 50

that there should be a reluctance to accept that complainants of sexual abuse would be likely to make false complaints.

[88] In regard to the public interest considerations, the Committee was wrong to take into account matters such as whether there should be a reluctance to initiate charges in cases where the subject matter included sexual abuse complaints because such charges are hard to prove and that if a complaint failed, it could create a “not unjustified perception in the industry that they should be sure before alleging misconduct and come armed with conclusive proof, lest they face charges themselves”.

[89] It also erred by allowing its decision to be influenced by an assumption that because these types of cases were difficult to prove and, that being so, harm would result to the disciplinary process, unless a conservative approach should be taken to decisions to prosecute them.

[90] We view this as amounting to a gloss or addition to the usual principles that inform the decision of prosecutorial agencies to bring charges. We do not agree that there is any need for such a change and that therefore the committee was in error when it took such matters into account.

[91] We accordingly conclude that this is a case where in accordance with the authority of *Kacem v Bashir* the appeal should be allowed.

[92] We consider that the preferable option for progressing the matter from this point is for the Committee itself to consider afresh the question of whether charges ought to be laid against the licensee and, if so, the content of such charges. There will be an order accordingly.

[93] Finally, in case this matter does come back before the Tribunal, we note that the discussion in this decision about the complaint which Mr Stone has made does not amount to even a provisional determination of the truth or otherwise of his complaint or the truth of the matters which Ms Lim would apparently put forward if the charges were to be contested.



[94] Leave is reserved for either party to seek further directions for the implementation of the orders we have made.

[95] Pursuant to s 113 of the Act, the Tribunal draws 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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Mr J Doogue  
Deputy Chairperson

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Ms C Sandelin  
Member

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Mr N O'Connor  
Member