

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 54**

**READT 004/20**

IN THE MATTER OF Charges laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 409

AGAINST WAYNE KEMP and MARINA SCOBLE  
Defendants

**READT 025/20**

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

BETWEEN STEPHEN GEORGE WILLIAM BEATH  
Appellant

AND THE REAL ESTATE AGENTS AUTHORITY (CAC 409)  
First Respondent

AND MIKE PERO REAL ESTATE LIMITED  
Second Respondent

On the papers

Tribunal: Hon P J Andrews (Chairperson)  
Ms C Sandelin (Member)  
Mr N O'Connor (Member)

Submissions filed by: Ms E Mok, on behalf of Complaints Assessment Committee 409  
Ms L Lim, on behalf of the Authority  
Ms B Sinclair, on behalf of Mr Kemp, Ms Scoble, and Mike Pero Real Estate Limited  
Mr Beath

Date of Ruling: 29 October 2020

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**RULING OF THE TRIBUNAL**  
**(Hearing of proceedings: Tribunal panel)**

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## **Introduction**

[1] This Ruling relates to the proceeding READT 004/20 (“the charges proceeding”), concerning charges of misconduct laid by Complaints Assessment Committee 409 (“the Committee”) against Mr Kemp and Ms Scoble (“the licensees”), and the proceeding READT 025/20 (“the appeal proceeding”), concerning Mr Beath’s appeal against the Committee’s decision to take no further action on his complaint against Mike Pero Real Estate Limited (“the Agency”).

[2] The Tribunal has considered submissions as to whether the charges and appeal proceedings should be heard together, and as to the constitution of the Tribunal panel hearing the proceedings.

## **Background**

[3] It is appropriate to record the following background to the two proceedings:

- [a] In December 2015, Mr Beath complained to the Authority about the conduct of the Licensees, who were licensed salespersons engaged by the Agency when marketing a property in Wellington (“the property”).
- [b] In a decision dated 3 October 2017, the Committee found the licensees guilty of unsatisfactory conduct, for failing to disclose that a party wall between the property and a neighbouring property was at risk of collapsing in an earthquake (“the party wall issue”). The Committee determined to take no further action on Mr Beath’s complaints that the licensees failed to disclose issues concerning “Dux Quest” plumbing at the property, (“the Dux Quest issue”) and the presence of asbestos in the roof and a leak in the roof (“the roof issues”).
- [c] In that decision, the Committee found the Agency guilty of unsatisfactory conduct for failing to properly supervise the licensees, and determined to take no further action on Mr Beath’s complaint that the Agency was obstructive when responding to the complaint.

- [d] Mr Beath appealed to the Tribunal in respect of the Committee's determinations in respect of the licensees. He did not appeal against the determinations in respect of the Agency. In a decision issued on 31 August 2018, the Tribunal allowed the appeal and referred the matter back to the Committee for further investigation and consideration.<sup>1</sup>
- [e] Neither the licensees nor the Agency appealed against the findings against them.
- [f] In a decision dated 26 November 2019, the Committee determined to take no further action on what it described as a new complaint made by Mr Beath against the Agency during the Committee's reconsideration directed by the Tribunal, that it colluded in the licensees' non-disclosure relating to the party wall. Mr Beath appealed to the Tribunal against this decision.
- [g] The charges proceeding follows the Committee's decision dated 11 February 2020, to lay charges of misconduct against each of the licensees. The charges allege that Mr Kemp is guilty of misconduct under s 73(a) of the Act (disgraceful conduct) by failing to disclose the party wall issue, and in respect of his responses to emails from Mr Beath, and that Ms Scoble wilfully or recklessly breached rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") by failing to disclose the party wall issue. In the alternative, the Committee charge Ms Scoble with misconduct under s 73(b) of the Act, in that her conduct constituted seriously incompetent or seriously negligent real estate agency work.
- [h] A hearing of the charges proceeding is being scheduled for late November 2020. The panel assigned to hear the charges comprises the Chairperson and members Ms Sandelin and Mr O'Connor.
- [i] In a decision issued on 20 April 2020, the Tribunal (by consent) allowed Mr Beath's appeal against the Committee's decision of 26 November

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<sup>1</sup> *Beath v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 45.

2019, and referred the matter back to the Committee for reconsideration.<sup>2</sup> This was on the grounds that the transcript of an interview with the person who was at the relevant time a compliance officer at the Agency had not been provided to the parties for comment, or provided to the Committee.

- [j] In a decision dated 21 August 2020, the Committee determined to take no further action on Mr Beath's complaints that the Agency colluded with the licensees, misled him in relation to the existence of an engineer's report on the property, deliberately withheld key evidence from him and had constantly been evasive and misleading. Mr Beath has appealed to the Tribunal against that decision. This is the appeal proceeding currently before the Tribunal.
- [k] In its decision of 21 August 2020, the Committee recorded that it had reinvestigated and reconsidered Mr Beath's complaints of non-disclosure in relation to the roof issues and the "Dux Quest" issue ("the separate issues"), and would issue a separate decision dealing with those issues.
- [l] The Tribunal has been advised that the Committee made findings of unsatisfactory conduct in respect of some of the separate issues, in a further decision issued on 21 August 2020, and its decision on penalty orders is now awaited. Mr Beath has advised that he intends to appeal against this decision.
- [m] The Tribunal has not been provided with a copy of the Committee's substantive decision on the separate issues, although it appears (from submissions filed by Mr Beath) that the Committee made a finding of unsatisfactory conduct in respect of non-disclosure of the Dux Quest issue, and determined to take no further action in respect of non-disclosure of the roof issue.

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<sup>2</sup> *Beath v Real Estate Agents Authority (CAC 409)* [2020] NZREADT 16.

[4] In a Minute dated following a telephone conference in the appeal proceeding, the Tribunal Chairperson recorded:<sup>3</sup>

[3] It appears to the Tribunal that the charges proceeding, the appeal proceeding, and any appeal that may be made in respect of the separate issues, may overlap to quite a large extent: the parties are the same, the property is the same, and all issues arise out of complaints made by Mr Beath. The evidence of the licensees, the Agency, and Mr Beath will be considered in each proceeding, and the conduct of the licensees and the Agency will be under scrutiny under each proceeding – albeit with a different focus in each. In the charges proceeding the issue will be whether the Committee has proved the charges, and in the appeal proceedings the issue will be whether Mr Beath has established that the Committee erred.

[4] Notwithstanding that different focus, the Tribunal considers that it may be in the interests of justice that both proceedings be heard together. The transaction at the root of Mr Beath's complaints occurred more than five years ago. In the period since then, Mr Beath's complaints have been the subject of five Committee decisions (with a further decision awaited) and two Tribunal decisions. Hearing both matters together would avoid a piecemeal approach, and achieve a determination of both proceedings more conveniently and at less expense.

[5] I consider it appropriate that pursuant to its power under s 105 of the Act to regulate its own procedures, the Tribunal should direct that the charges and appeal proceedings be heard together. To do so is also consistent with the provisions of r 10.12 of the District Court Rules and r 10.18 of the High Court Rules as to consolidation of proceedings.

[6] Following discussion at this telephone conference, Mr Beath, Ms Sinclair, and Ms Davies indicated (subject to counsel taking instructions) that the parties may agree to a consolidation of the hearings. The parties (including the licensees) are asked to confirm as soon as possible whether consolidation is agreed to.

[5] Submissions were subsequently filed on behalf of the Committee, the Authority, the agency, and the licensees, opposing the two proceedings being heard together. Counsel for the Agency and the licensees further submitted that the Tribunal panel hearing the charges should be different from the panel that heard Mr Beath's original appeal. Mr Beath submitted that the charges and the appeal proceedings should be heard together, by the same panel.

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<sup>3</sup> *Beath v Real Estate Agents Authority (CAC 409)* READT 025/20, Chairperson's Minute, 28 September 2020.

## **Should the charges and the appeal proceeding be heard together?<sup>4</sup>**

### *Submissions*

[6] Ms Lim acknowledged on behalf of the Authority that pursuant to s 105 of the Act, the Tribunal has the flexibility to regulate its own procedure, and that this would extend to ordering consolidation of proceedings on the same basis as is contemplated by the High Court Rules and District Court Rules. She also acknowledged that both proceedings relate to disclosure of the party wall issue.

[7] However, she submitted, it is unlikely that the evidence considered for the purposes of each proceeding will overlap to any significant degree. She submitted that the charges proceeding is focussed on the licensees' culpability and state of mind, whereas the appeal proceeding (currently) focusses on the conduct of the Agency, its awareness of the issues with the property, and its subsequent actions.

[8] Ms Lim further referred to the different procedures applying to appeals and charges proceedings, where the former proceed on the basis of the material before the Committee unless leave is given for further evidence to be given,<sup>5</sup> whereas the latter are *de novo* hearings, and generally involve oral evidence relating to the alleged conduct.

[9] Ms Lim also submitted that the status of each proceeding is relevant to consideration of whether the two proceedings should be consolidated, and the two proceedings are at different stages. She submitted that the charges proceeding is ready to proceed without further delay, as the licensees have admitted that their actions amounted to unsatisfactory conduct, the hearing is on the basis of an agreed bundle of documents, and the only step yet to be taken is the exchange of written submissions. She submitted that by contrast, the appeal hearing is still at a preliminary stage, as a bundle of documents was yet to be filed (as at the date of her submissions). She

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<sup>4</sup> In this ruling we will refer to "consolidation" of the charges and appeal proceedings as a short form reference to the various forms of "consolidation" referred to in the High Court and District Court Rules, including hearing proceedings concurrently or sequentially.

<sup>5</sup> See *Eichelbaum v Real Estate Agents Authority* (CAC 303) [2016] NZREADT 3.

submitted that it is not yet known whether the appeal will proceed solely on the basis of the material before the Committee.

[10] Finally, Ms Lim pointed at the different role of Mr Beath in each proceeding: his is a (self-represented) party in the appeal proceeding and has the ability to make submissions in support of his appeal. In the charges proceeding he is the complainant, and a witness for the Committee, but has no standing to make submissions. She submitted that consolidation may lead to procedural and practical difficulties in managing these difficulties.

[11] Ms Mok, counsel for the Committee in the charges proceeding advised that the Committee agrees that the charges proceeding should be dealt with at a separate hearing from the appeal proceeding, and had nothing to add to Ms Lim's submissions. On behalf of the Agency, Ms Sinclair also accepted Ms Lim's approach.

[12] Mr Beath submitted that there are at present "at least" four proceedings resulting from his complaint: the charges proceeding against the licensees, his appeal against the Committee's determination to take no further action against the Agency on his complaint of collusion and obstruction, and his intended appeals against the Committee's findings of unsatisfactory conduct and its determination to take no further action in relation to the separate issues. He submitted that all four matters are inextricably linked, and concern a single transaction where he, the Agency, and the licensees were involved. He submitted that any procedural challenges, with several proceedings at different stages, have only arisen as a result of the Committee's decision to "split" its decision following its reconsideration, and to issue separate decisions.

[13] Mr Beath submitted that regardless of the focus of the matters under consideration, the evidence bundle is the same, as it completes the story of the Agency's and the licensees' conduct from the point of sale through to the Committee's decision. He submitted that as the Agency's and licensees' conduct both pre- and post-sale must be considered across all eventual charges, the evidence overlaps in each proceeding.

[14] Mr Beath further submitted that having separate hearings is a piecemeal approach and expensive for all parties, and serves only to dilute the conduct which relates to a single transaction. He submitted that it will be extremely difficult for the Tribunal not to look at all aspects of his complaint before reaching its decisions. He submitted that if consolidation were considered impracticable, any hearing should be deferred until all matters have reached the same stage, but submitted that this would not be in the interests of justice, given that the complaint was made almost five years ago. He confirmed that he would be appealing the Committee's finding of unsatisfactory conduct in relation to the non-disclosure of the Dux Quest issue, and its determination to take no further action in relation to the roof issues.

### *Discussion*

[15] Section 110 of the Act sets out the Tribunal's powers as to the determination of charges against licensees. Section 111 deals with appeals to the Tribunal against determinations of Complaints Assessment Committees. There is no provision in the Act as to consolidation of proceedings. Section 105 gives the Tribunal a wide discretion as to its procedures:

#### **105 Proceeding before Tribunal**

- (1) The Tribunal may regulate its procedures as it thinks fit.
- (2) Subsection (1) is subject to the rules of natural justice and to this Act and any regulations made under this Act, and any practice notes issued under s 115A.

There are no regulations made under the Act, or practice notes, that deal with consolidation of proceedings.

[16] The Tribunal can be guided by the provisions of the High Court Rules and the District Court Rules as to consolidation of proceedings. Rule 10.12 of the High Court Rules provides (r 10.18 of the District Court Rules is identical):

#### **10.12 When order may be made**

The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determination of any other of them, if the court is satisfied—

- (a) that some common question of law or fact arises in both or all of them;
- or



- (b) that the rights to relief claimed therein are in respect of or arise out of–
  - (i) the same event; or
  - (ii) the same transaction; or
  - (iii) the same event and the same transaction; or
  - (iv) the same series of events; or
  - (v) the same series of transactions; or
  - (vi) the same series of events and the same series of transactions; or
- (c) that for some other reason it is desirable to make an order under this rule.

[17] The discretion given to consolidate proceedings is wide, and is to be exercised in the interests of justice. In its judgment in *Regan v Gill*, the Court of Appeal observed that “it is difficult to conceive of a wider procedural discretion”.<sup>6</sup>

[18] There is no dispute that both the charges proceeding and the appeal proceeding arise out of the same event and transaction: Mr Beath’s purchase of the property which was marketed by the licensees, who were engaged by the Agency. Against that, we accept that the issues of law differ in the charges and appeal proceedings.

[19] We were not referred to any previous decisions of the Tribunal, or any other disciplinary Tribunal, on consolidation. It is apparent from High Court authorities that considerations that the Tribunal may take into account in exercising its discretion whether to order consolidation will include:

- [a] Whether time and cost for the parties, and the Tribunal, will be saved if consolidation is ordered. This was noted as a factor in favour of consolidation in *Medlab Hamilton Ltd v Waikato District Health Board*.<sup>7</sup>
- [b] Whether judicial resources will be used more efficiently if consolidation is ordered. In *Amalgamated Finance Ltd v Wyness*, it was held that it would be convenient, desirable and expeditious for four proceedings to be tried at the same time, given that there was a common thread running

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<sup>6</sup> *Regan v Gill* [2011] NZCA 607, at [10].

<sup>7</sup> This was noted as a factor in favour of consolidation in *Medlab Hamilton Ltd v Waikato District Health Board* (2007) 18 PRNZ 517.

through all four proceedings and it was likely that major witnesses would have to give evidence in all four proceedings.<sup>8</sup>

[c] Whether confusion, prejudice, or oppression might result to one or more of the parties from the size and complexity of a consolidated proceeding. In *Amalgamated Finance v Wyness*, the Court cautioned that convenience should not come at the expense of justice.

[d] Whether delay might result if one proceeding is ready and the other is not. In *Lawrence Riverside Ltd v Colliers International NZ Ltd*, an application to hear two proceedings together was declined. The grounds for doing so included that one proceeding had a trial fixture allocated for some four months after the date the application was heard, whereas the proceeding sought to be heard with it was at the stage of a “detailed and amended statement of claim” which had been filed the same day.<sup>9</sup>

[20] We have concluded that it is significant that the charges proceeding is scheduled for hearing. The appeal proceedings are at a far less advanced stage: in fact, signalled appeals by Mr Beath have not as yet been filed. While it may be that the proceedings could be consolidated if the appeal proceedings were ready for hearing, we have concluded that it is not in the interests of justice that the charges hearing be delayed further. Accordingly, we decline to order consolidation of the charges and appeal proceedings.

### **Should a different Tribunal panel be assigned to hear the charges?**

#### *Submissions*

[21] Ms Sinclair noted that the panel assigned to hear the charges is that which heard Mr Beath’s original appeal, and remitted his complaint back to the Committee for further consideration. Her submissions in support of the application for the charges to be heard by a differently-constituted panel were brief, and we set them out in full:

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<sup>8</sup> *Amalgamated Finance Ltd v Wyness* HC Wellington, CP 156/86, 19 February 1987

<sup>9</sup> *Lawrence Riverside Ltd v Colliers International NZ Ltd* HC Auckland, CIV-2011-404-1486, 30 June 2011.

The reason for this approach is that the original Tribunal panel has already considered some but not all of the evidence relating to charge when it upheld the first appeal and directed the [Committee] to reconsider the issues.

It is appropriate that a new Tribunal panel considers the charges to ensure that they are approached afresh and without any suggestion that a decision might be influenced by the earlier hearing.

[22] Both Ms Mok (on behalf of the Committee) and Ms Lim (on behalf of the Authority) advised that they abide the decision of the Tribunal as to the makeup of the panel for the appeal hearing.

[23] Mr Beath made brief submissions in support of retaining the assigned panel. In summary, he submitted that a fair decision will be reached by those who are familiar with the significant amount of information related to the case.

#### *Discussion*

[24] Ms Sinclair did not refer us to any authorities in support of her application which is, in essence, an application for the assigned panel to recuse itself from hearing the charges against the licensees.

[25] The relevant principles were set out by the Court of Appeal in its judgment in *Muir v Commissioner of Inland Revenue*,<sup>10</sup> and by the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company*.<sup>11</sup> Applying those principles to the present case, the assigned Tribunal panel should hear the charges unless grounds for recusal exist. Such grounds will exist if a fair-minded, fully informed observer would have a reasonable apprehension that the panel might not bring an impartial mind to the determination of the charges. The standard for recusal is one of a “real and not remote possibility, but not probability”.

[26] In applying the test, we must first consider what the circumstances are that might possibly lead to a reasonable apprehension that the assigned panel might determine the

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<sup>10</sup> *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 (CA).

<sup>11</sup> *Saxmere Company Ltd v Wool Board Disestablishment Company* [2009] NZSC 72, [2010] 1 NZLR 35, and *Saxmere Company Ltd v Wool Board Disestablishment Company (No 2)* [2009] NZSC 122, [2010] NZLR 1 NZLR 76. See also the High Court Recusal Guidelines, published on the Courts of New Zealand Website.

charges other than on the merits, and then consider whether there is a logical and sufficient connection between those circumstances and the apprehension. The decision as to recusal is to be made by the assigned panel.

[27] We know of no circumstances other than that the assigned panel heard Mr Beath's original appeal that might possibly lead to an apprehension that it might not bring an impartial mind to the determination of the charges against the licensees. None was put forward in the submissions for the licensees.

[28] Ms Sinclair submitted that the assigned panel had considered "some but not all of the evidence relating to [the] charge". We reject that submission.

[29] The Tribunal set out the Committee's findings in the course of its decision. then went on to say:<sup>12</sup>

[24] We note that insofar as counsel's submissions were as to whether the licensees' conduct actually amounted to misconduct, they were not relevant to the Tribunal's consideration of the appeal. If the Tribunal were to find that the Committee erred in the exercise of its discretion, then (if on reconsideration the Committee were to refer the complaint to the Tribunal for determination), it would then be for the Tribunal to hear evidence and determine whether the charges have been proved.

...

[34] In this case, the Committee found, with respect to the non-disclosure issue, that the conduct of both licensees:<sup>13</sup>

... demonstrates a wilful blindness. It is high level unsatisfactory conduct and very close to misconduct. It is a fine margin short of being seriously incompetent or seriously negligent real estate agency work. The risk to the party wall in an earthquake was a hidden defect and it was also information that in all fairness should been disclosed to a prospective purchaser.

[30] The Tribunal referred to its earlier decision in *Maketu Estates Ltd v The Real Estate Agents Authority* (CAC 403),<sup>14</sup> and concluded that:

[35] [The Committee's] findings are inconsistent with the Tribunal's decision in *Maketu*. The Committee has deprived the Tribunal of its proper role in considering whether the licensees' conduct constituted misconduct or unsatisfactory conduct. We are satisfied that the Committee made an error of law.

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<sup>12</sup> *Beath v The Real Estate Agents Authority* (CAC 409) fn 1, above.

<sup>13</sup> Committee's decision, at paragraph 3.33.

<sup>14</sup> *Maketu Estates Ltd v the Real Estate Agents Authority* (CAC 403) [2016] NZREADT 48.

[31] The Tribunal did not consider the evidence in relation to the charges. It referred only to the Committee's assessment of the evidence and on the basis of that assessment, directed it to reconsider the matter. The Tribunal made it clear that if the matter were referred to the Tribunal to hear charges, it would be for the Tribunal to hear the evidence and determine whether the charges are proved.

[32] We do not consider there to be any real possibility of the assigned panel not bringing an impartial mind to determination of the charges. Accordingly, we decline to direct that the charges be heard by a differently-constituted Tribunal panel.

### **Outcome**

[33] The charges proceeding will be heard separately from the appeal proceedings.

[34] The application that the charges be heard by a differently-constituted Tribunal panel is declined.

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

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Hon P J Andrews  
Chairperson

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Ms C Sandelin  
Member

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Mr N O'Connor  
Member