BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 40

IN THE MATTER OF	Appeals under section 111 of the Real Estate Agents Act 2008
	READT 025/2020
BETWEEN	STEPHEN GEORGE WILLIAM BEATH Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	MIKE PERO REAL ESTATE LTD Second Respondent
	READT 033/2020
BETWEEN	STEPHEN GEORGE WILLIAM BEATH Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	WAYNE KEMP and MARINA SCOBLE Second Respondents
Hearing:	21 June 2021, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr S Beath, Appellant Ms E Mok, on behalf of the Authority Mr A Darroch, on behalf of the Second Respondents
Date of Decision:	29 July 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Beath has appealed under s 111 of the Real Estate Agents Act 2008 ("the Act") against three decisions of Complaints Assessment Committee 409: two substantive decisions dated 21 August 2020, and a penalty decision dated 24 November 2020.

Background

[2] Mr Kemp and Ms Scoble ("the licensees")[1] are licensed salespersons, engaged by Mike Pero Real Estate ("the Agency"). In 2012, while working at another agency ("the previous agency"), they marketed and sold a property in Mt Victoria, Wellington ("the property"). A prospective purchaser expressed concerns about the party wall between the property and an adjoining property to Mr Kemp, and told him that an engineer had advised that it would cost about $50,000 to fix the party wall if it required strengthening. Mr Kemp made enquiries with the vendor at the time, who advised that he was not aware of any issues with the wall. Mr Kemp did not make any further enquiries. The property was bought in March 2012 by the trustees of a trust ("the vendor") who engaged the defendants in February 2015 to market the property for sale.

[3] Prospective purchasers (Mr and Mrs H) submitted an offer to purchase the property on 23 March 2015, conditional on a satisfactory builder's inspection report ("the conditional offer"). Mr and Mrs H arranged for a building inspection report by CheckHome. The CheckHome report noted the presence of Dux Quest plumbing piping and a potential safety risk posed by the party wall, and recommended further inspection by a plumber and engineer.

[4] On 27 March 2015 the solicitors for Mr and Mrs H wrote to the vendor's solicitors (copied to the Agency) seeking an extension to the confirmation date of the conditional offer, noting the need to undertake further enquiries regarding "the safety of the party wall", as well as in respect of the Dux Quest piping.

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[1] Except where it is appropriate to refer to them individually, Mr Kemp and Ms Scoble will be referred to as "the licensees".

[5] The same day, Mr and Mrs H received preliminary advice from an engineer (Mr Thomson) that the party wall appeared to lack seismic strengthening, and would potentially pose a risk to life due to the wall potentially collapsing in an earthquake ("the party wall issue"). Mr Thomson confirmed this advice in a letter dated 28 March ("the Thomson report"), and Mrs H communicated the advice in a telephone call to Ms Scoble, who in turn communicated it to Mr Kemp. Mrs H included the comment that the party wall was a "risk to life" when speaking with Ms Scoble.[2]

[6] Mr and Mrs H's solicitors wrote to the vendor's solicitors (copied to the Agency) on 30 March 2015 cancelling the conditional offer on the grounds that the building report was not satisfactory. Copies of the CheckHome and Thomson report were not included with the solicitors' letter. The solicitors' letter was received by the Agency's head office and was uploaded to the Agency's Central Relationship Management ("CRM") system.

[7] The licensees told the vendor of the cancellation and the reason for it. The vendor said they were not aware of any issues with the party wall. In an email dated 1 April 2015 the licensees asked one of the trustees of the vendor trust, Ms D, if she had talked to her family about getting an engineer to look at the party wall, so that the licensees would have the answers if they had any further questions from buyers. Ms D responded that a report would not be obtained.

[8] The licensees did not make any further enquiries regarding the party wall issue, and did not take any steps to enquire into the existence of any written report by the engineer engaged by Mr and Mrs H, or to obtain a copy of the CheckHome report. Further, at no stage did either of the licensees check the Agency's CRM system in order to obtain any further information regarding the cancellation of the conditional offer.

[9] In April and May 2015, Mr Beath and his then partner were shown through the property by Mr Kemp.[3] Mr Kemp did not make any disclosure regarding the party

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2 The Tribunal notes that Ms Scoble acknowledged that this comment was made by Mrs H during a hearing before the Tribunal in December 2020.

3 Mr Beath is the sole appellant in this proceeding.

wall issue or Dux Quest piping during these visits. On 11 May 2015, Mr Beath emailed the licensees, advising that they would be putting an offer to the vendors, and asking for information as to re-piling, re-wiring, re-plumbing and roofing work on the property. He also asked if there were any "other important disclosures we should know of as a buyer".

[10] Mr Kemp's response provided information as to re-piling, re-wiring, plumbing and roofing work, and included a statement that "the partition wall between properties is of brick construction as per the era of the home". Mr Kemp recommended that Mr Beath obtain a builder's report on the property which would "give you a good overview" as to the condition of the property and work done on it. Mr Kemp did not disclose the concerns expressed as to the party wall, or that a conditional offer had earlier been cancelled following advice from an engineer and a building inspection report.

[11] An agreement for sale and purchase submitted by Mr Beath on 19 June 2015 was accepted. The sale was settled in June 2015.

[12] After he moved into the property, one of Mr Beath's neighbours told him about the party wall issue. He sent an email to the licensees, asking if they were aware of any issue with the party wall. They responded that they were "certainly not aware of any issues with the [party] wall as it is a standard for a home of this era" and that "our owners also were not aware of any issues – so not sure what the neighbour is on about".

[13] Mr Beath sent the licensees a further email on 30 September 2016 in which he said that he had been advised that a "buyer [in 2012] had an engineer's report done on the party wall" of the property, which found that there were significant structural issues with it which would cost an estimated $50,000 to remedy, and that they had also been advised that the licensees were "aware of the issue, despite you denying any knowledge when we asked you specifically about it". The licensees responded that this was "news to us".

[14] Mr Beath wrote to the Agency on 6 October 2016, enclosing copies of the emails between himself and Mr Kemp concerning disclosure of the party wall issue and Dux

Quest piping. Ms Cannon (the Agency's then Compliance Officer and Legal Executive) responded on behalf of the Agency on 16 October 2016. Ms Cannon said she understood that the Dux Quest piping had been discovered during Mr Beath's due diligence process and no further issues had been raised regarding it.

[15] With respect to the party wall issue, Ms Cannon said that the previous agency's file for the 2012 sale had been obtained and the Agency's understanding was that no sale had collapsed as a result of unsatisfied conditions, and that the licensees had denied any knowledge of an engineer's report and did not believe a report had been done in 2012. She said that the licensees had advised the Agency that there were no known defects to disclose to him regarding the party wall.

[16] In a further response dated 1 November 2016 Ms Cannon said "for the avoidance of doubt I confirm [the Agency] has never been provided with an engineer's report or advised of the outcome of any engineering inspection or investigation".

[17] In December 2016, Mr Beath complained to the Authority about the conduct of the Agency and the licensees, in relation to their marketing of the property. Following an investigation by the Committee ("the Committee's initial investigation"), the complaint has resulted in the Committee and Tribunal decisions set out below.

Procedural history

[18] In a decision dated 3 October 2017 ("the Committee's first substantive decision"), the Committee found the licensees guilty of unsatisfactory conduct, for failing to disclose to Mr Beath that a party wall between the property and a neighbouring property was at risk of collapsing in an earthquake. The Committee determined to take no further action on complaints that the licensees failed to disclose issues concerning Dux Quest piping at the property, asbestos in the roof, and a leak in the roof.

[19] The Committee found the Agency guilty of unsatisfactory conduct for failing to properly supervise the licensees,[4] and determined to take no further action on Mr Beath's complaint that the Agency was obstructive when responding to the complaint.

[20] In a decision dated 10 April 2018 ("the Committee's first penalty decision"), the Committee made orders for censure against each of the licensees and the Agency. Mr Kemp was ordered to pay a fine of $7,000, and Ms Scoble was ordered to pay a fine of $6,000. The Agency was ordered to pay a fine of $9,000. Mr Beath had submitted copies of invoices for his legal costs incurred in relation to the Committee's investigation and hearing, totalling $14,777.50. The Committee considered that some of the work referred to in the narrations in the invoices referred to a possible civil claim. It ordered the licensees to reimburse Mr Beath's costs in the sum of $5,865, to be shared equally.

[21] 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 ("the Tribunal's first decision").[5]

[22] The Committee investigated the complaint further ("the Committee's second investigation"). In a decision dated 26 November 2019 ("the Committee's second substantive decision"), 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 second investigation, that it colluded in the licensees' non-disclosure of the party wall issue. Mr Beath appealed to the Tribunal against this decision.

[23] In a decision dated 11 February 2020, the Committee determined to lay charges of misconduct against each of the licensees, relating to the non-disclosure of the party wall issue. The charges were heard by the Tribunal on 8 December 2020.

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4 Following an "own motion" investigation pursuant to s 78(b) of the Act.
5 *Beath v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 45.

[24] In a decision issued on 20 April 2020, the Tribunal allowed Mr Beath's appeal against the Committee's second substantive decision of 26 November 2019, by consent, and referred the matter back to the Committee for reconsideration ("the Tribunal's second decision").[6]

[25] During its reconsideration, Mr Beath asked the Committee to consider whether the Agency had misled him by advising him on 1 November 2016 that the Agency had never been provided with an engineer's report, or advised of the outcome of an engineering investigation, and withheld key evidence, being the 1 April 2015 email to the vendors referred to in paragraph [7], above.

[26] In a decision dated 21 August 2020, the Committee issued its third substantive decision, in which it 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 ("the collusion decision"). Mr Beath has appealed to the Tribunal against that decision. This is the appeal registered by the Tribunal as READT 025/2020 ("the collusion appeal")

[27] In a further decision dated 21 August 2020, the Committee issued its fourth substantive decision, in which it found the licensees guilty of unsatisfactory conduct in relation to their failure to disclose to Mr Beath that the property had Dux Quest piping, and to take no further action on Mr Beath's complaints that they failed to disclose the presence of asbestos in the roof of the property or that the roof leaked ("the disclosure decision"). Mr Beath has appealed to the Tribunal against that decision. This is the appeal registered by the Tribunal as READT 033/2020 ("the disclosure appeal").

[28] In a decision dated 24 November 2020, the Committee made penalty orders against the licensees ("the Committee's second penalty decision"). Mr Beath has appealed to the Tribunal against that decision. This appeal is also registered by the Tribunal as READT 033/2020 ("the penalty appeal").

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6 *Beath v Real Estate Agents Authority (CAC 409)* [2020] NZREADT 16.

[29] In a decision issued on 22 January 2021 the Tribunal found Mr Kemp and Ms Scoble guilty on charges of misconduct under s 73(b) of the Act (that their conduct constituted seriously incompetent or seriously negligent real estate agency work) in relation to their failure to disclose the party wall issue to Mr Beath ("the Tribunal's third decision").[7]

[30] During the hearing of the charges Ms Scoble acknowledged that Mrs H had told her that she had received engineering advice that the party wall was a "risk to life". Both of the licensees accepted that they failed to make adequate disclosure and/or to make further inquiries about the party wall issue, and that their conduct fell below the accepted standard, by a considerable margin, but submitted that their approach was based on an erroneous understanding that the concerns about the party wall related to a "potential or possible risk" because it had not been assessed directly by an engineer, and therefore did not need to be disclosed, and prospective purchasers would be protected by a recommendation that they seek their own building report. They accepted that this was a fundamental error.

[31] The Tribunal found that the licensees failed to comply with their obligations in two key respects: they relied on the vendor's assertion that she was not aware of any issues with the wall, without any evidence or expert advice in support of the assertion, and they failed to disclose the party wall issue and the circumstances leading to the cancelled conditional offer to Mr Beath. The licensees failed to take any steps to investigate the party wall issue beyond asking the vendors, notwithstanding that they could have checked the Agency's CRM system for information about the cancelled conditional offer, or asking for a copy of the report obtained by Mr and Mrs H.

[32] In a decision issued on 5 May 2021, the Tribunal made penalty orders against the licensees ("the Tribunal's fourth decision").[8] Each of the licensees was censured and ordered to pay a fine of $10,000.

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7 *Complaints Assessment Committee 409 v Kemp & Scoble* [2021] NZREADT 4.
8 *Complaints Assessment Committee 409 v Kemp & Scoble* [2021] NZREADT 21.

[33] The Tribunal has been advised that Mr Beath issued proceedings in the High Court in 2017 in relation to the matters raised in their complaint against the licensees and the Agency, and that a confidential settlement was reached in 2019.

Appeal against the Committee's collusion decision

The Committee's decision

[34] The Committee first considered whether the licensees or the Agency had misled Mr Beath concerning the party wall. The Committee found that the licensees were aware that the party wall was at risk of collapse in an earthquake and, as such, a risk to life. It also found that the licensees were aware that Mr and Mrs H had taken advice from an engineer about the party wall. However, it found that the evidence before it did not establish that the licensees were aware of the Thomson report, or that they had seen the CheckHome report.[9]

[35] With respect to the Agency, the Committee found that the person at the Agency office who entered the solicitors' letters of 27 and 30 March 2015 into the Agency's CRM system would have known of the concern about the party wall, that engineering advice was being taken, and then that Mr and Mrs H's conditional offer was cancelled. However, the Committee did not consider there was evidence which established that the Agency was aware of the Thomson report. Accordingly,

[36] It found that the allegation that the Agency misled Mr Beath by advising that it had not been provided with an engineer's report or advised of the outcome of an engineering investigation was not proved.[10]

[37] With respect to the allegation of collusion, the Committee found that there was no evidence that an engineer's report had been prepared at the time of the 2012 sale of the property, and no evidence from which it could find or infer that the licensees had any knowledge of a 2012 engineering report (even if there were one).

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9 Committee's collusion decision at paragraphs 6.19–6.21.
10 At paragraphs 6.27–6.29.

[38] The Committee further found that there was no evidence from which it could find or infer that the Agency had knowledge of the licensees' response to Mr Beath's emails enquiring about the party wall, and no knowledge of a 2012 engineer's report.[11]

[39] While the Committee accepted that Mr Thomson's letter of 28 March 2015 was an "engineering report",[12] as it provided advice about an engineering issue, the Committee noted that Mr and Mrs H's solicitor did not provide a copy of it to the Agency. It found there was no evidence that it was otherwise provided to the licensees. The Committee found that the licensees knew that Mr and Mrs H had taken engineering advice and that Mr Kemp was aware that a prospective purchaser of the property in 2012 had "spoken to an engineer".[13]

[40] The Committee found that the evidence went no further than proving that anyone in the Agency who had knowledge of the solicitors' correspondence would have known that Mr and Mrs H had had a building inspection report, were concerned about the party wall, had taken advice from an engineer, and cancelled the conditional offer because they were dissatisfied with the condition of the property. The Committee found that there was no evidence from which it could infer that at the time of Mr Beath's transaction (prior to the complaint to the Agency), the licensees and the Agency colluded to hide their knowledge of an engineering report.[14]

[41] With respect to the email exchange between the licensees and Ms D on 1 April 2015, the Committee expressed concern that it had not received any evidence as to why the email exchange was not disclosed at the time of its initial investigation, or when it was disclosed. However, it found that the email exchange did not support Mr Beath's allegation that the licensees or the Agency were aware of the Thomson report: the licensees asked if Ms D had discussed getting a report and she replied that she was not getting a report.

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11 At paragraphs 6.34–6.36.
12 The Committee noted that the licensees and the Agency had asserted that the Thomson report was a "letter", not a "report".
13 At paragraphs 6.37–6.40.
14 At paragraphs 6.41–6.44.

[42] The Committee concluded that there was no evidence from which it could infer that the email exchange was captured in the Agency's CRM, or that anyone in the Agency had any knowledge of it. Accordingly, the Committee found that there was no evidence from which the Committee could infer that the failure to disclose the email exchange was deliberate conduct on the part of the Agency or the licensees, no evidence from which it could infer that there was any deliberate attempt by the licensees and the Agency to obstruct justice, and no evidence from which it could infer that that the Agency was consistently misleading or evasive.[15]

Submissions

[43] Mr Beath submitted that his complaint that the Agency and the licensees were deliberately obstructive, misleading and colluded against him was established by the following:

[a] The Agency's letters to him (responding to his complaint) on 12 October 2016 and 1 November 2016, were drafted by Ms Cannon with input from Ms Kinsella (the then General Manager of the Agency), Mr Kemp and Ms Scoble. Mr Beath submitted that the letter was "drafted together" and was clearly misleading in that it focussed on denials of an engineer's report and deliberately chose not to mention the issues raised with Mr Kemp in 2012, the issues surrounding the cancelled sale to Mr and Mrs H (including Mr Thomson's report) or the exchange with Ms D regarding getting an engineer's report.

[b] Ms Kinsella's admission in an interview with the Authority's investigator in June 2019 that she had seen the solicitors' faxes cancelling Mr and Mrs H's conditional offer. Mr Beath submitted that Ms Kinsella had chosen wilful blindness in not obtaining Mr Thomson's report and/or the CheckHome report. He submitted that Ms Kinsella had misled him by saying that Mr Kemp had no idea why Mr and Mrs H's conditional contract was cancelled.

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15 At paragraphs 6.45–6.51.

[c] Ms Cannon's admission in her interview in July 2019 that she had drafted the letter of 12 October 2016 and her admission in a statement to the Committee in April 2017 that (having been made aware that Mr Kemp had recalled a prospective purchaser in 2012 saying that he had "spoken to an engineer about the party wall"), it would have been more accurate to set out Mr Kemp's words in the letter. He also referred to her statements in her interview in July 2019 that the Agency's administrator sends an email to the relevant licensees when a contract is cancelled, and that it would then be up to the licensees to investigate the matter, and that she believed that the licensees had spoken with Mr and Mrs H regarding the cancellation of their conditional offer.

[d] Ms Scoble's admission in her statement to the Authority in 2017 that she had been told by Mrs H that an engineer was being engaged to investigate the party wall, and that having spoken to the engineer they had decided to cancel the conditional offer, and her admission in her interview in July 2019 that she had seen the solicitors' letter cancelling Mr and Mrs H's conditional offer and that she knew of the cancellation from the vendor and Mr H.

[e] Mr Kemp's admissions in his statement to the Authority in 2017 that he knew that Mrs H had told Ms Scoble that an engineer had given preliminary advice that the party wall could be at risk in a serious earthquake, and he received confirmation from the Agency that Mr and Mrs H's conditional offer had been cancelled. Mr Beath submitted that Mr Kemp's response recorded in the Agency's letter of 16 October 2016 was clearly misleading and hid the concerns raised by Mr and Mrs H.

[f] The exchange of emails with Ms D on 1 April 2015. Mr Beath submitted that this was further evidence of collusion in that the Agency did not reveal the exchange to him, or to the Committee during either the Committee's initial or second investigation, and did not reveal it until March 2019.

[44] Mr Beath submitted that the Committee had failed to consider that both Ms Kinsella and Ms Cannon had read the solicitors' letters which plainly outlined the concerns raised by a builder and the request for an engineering inspection, and the subsequently cancelled conditional offer. He submitted that the Committee had also failed to consider that they had information that issues as to the party wall had been raised in 2012, or its earlier finding (in its decision dated 3 October 2017) that the Thomson report was available had it been asked for. He submitted that on the balance of probabilities Ms Kinsella would have discussed Mr and Mrs H's cancelled conditional offer with the licensees either in September or October 2016.

[45] He submitted that the Agency's actions when responding to the appellants was consistent with collusion, having regard to the evidence demonstrating a pattern of deceit.

[46] Mr Darroch submitted on behalf of the licensees and the Agency that Mr Beath had made a serious allegation of collusion which is not supported by the evidence.

[47] He submitted that the fact of co-ordination between the Agency and the licensees in responding to Mr Beath's complaint is commonplace and unremarkable. He submitted that the Agency needed to discuss the complaint with the licensees so that it could provide a substantive response to the complaint.

[48] Mr Darroch further submitted that the content of the Agency's letter of 14 October 2016 was correct as at the time it was written. It reflected the fact that no engineer's report was held on its system: Mr and Mrs H's solicitors had referred to an intention to seek engineering advice and had not provided a copy of the Thomson report, and the previous agency's file relating to the 2012 sale did not contain an engineer's report or anything to suggest there had been a failed sale during that marketing period (for any reason). He submitted that to sustain an allegation of collusion there had to be proof of knowledge and of a deliberate decision to withhold information.

[49] Mr Darroch accepted that there had been a delay in providing the email exchange of 1 April 2015 and submitted that the delay had been the result of an oversight by the

licensees. He submitted that the emails were not held on the Agency's system, the licensees did not include them when asked to provide the relevant documents concerning or relating to Mr Beath's complaint, and they were not identified until formal discovery was completed during the High Court proceeding. He submitted that the licensees' oversight and the resulting delay was not the result of a deliberate decision to withhold the emails, and not evidence of dishonesty or improper conduct. He noted that the email exchange showed that the licensees had taken some action (albeit inadequate) when Mr and Mrs H's conditional offer was cancelled.

[50] Mr Darroch submitted that the Committee's conclusion that there was no evidence that the Agency had colluded with the licensees was appropriate.

[51] Ms Mok submitted on behalf of the Authority that the allegation of collusion was an accusation of dishonesty and that strong evidence is required to prove such an allegation on the balance of probabilities. She referred to the Tribunal's finding of misconduct against the licensees in relation to their failure to disclose the party wall issue and submitted that the scope of the collusion complaint is whether the licensees were misleading in their responses to Mr Beath and whether they colluded with the Agency in relation to non-disclosure of the party wall issues.

[52] Ms Mok submitted that the Committee had reviewed the evidence of Mr Beath, the licensees, and the Agency, and the statement by Mrs H (in which she did not say that she had a written report from Mr Thomson), and was not satisfied on the evidence that the licensees had knowledge of the Thomson report or that they were given a copy by Mr and Mrs H. Further, the Committee was not satisfied that the Agency had any knowledge of the report. She submitted that an allegation of collusion requires substantive evidence of dishonesty between the parties and the Committee was correct to decide to take no further action on the complaint.

[53] With respect to the 1 April 2015 exchange of emails, Ms Mok submitted there was insufficient evidence to support a finding that the late disclosure of the emails was deliberate conduct on the part of the Agency or the licensees. She submitted that the Committee was correct to find that there was insufficient evidence to support Mr Beath's contention that the delay in disclosing the email exchange supported his claim

that the Agency and the licensees were misleading and evasive in their responses to him.

[54] In reply, Mr Beath submitted that the statements in the Agency's letters of 14 October 2016 and 1 November 2016 contained half-truths that could have been corrected had the Agency not been "wilfully blind" and taken steps to obtain a copy of the Thomson report. He further submitted that the licensees' denial of any knowledge of defects in the party wall (recorded in the letter of 14 October 2016) was incorrect and misleading at that time, as Mrs H had told them about the engineer's findings as to the party wall issue.

[55] Regarding the 1 April 2015 exchange of emails, Mr Beath submitted that the Committee should have acted on its concern that the emails had not been produced earlier. He submitted that multiple requests had been made for disclosure of the emails after they were disclosed during the High Court proceeding, and the fact that they were not provided until after the Committee's second investigation indicated that the non-disclosure was deliberate.

Discussion

[56] *The New Shorter Oxford Dictionary* gives the following meanings of the words "collude" and "collusion":[16]

> **collude** have a secret agreement
>
> **collusion** **1** secret agreement or understanding for nefarious purposes; conspiracy; fraud, trickery. … **2** *Law* An agreement between two or more people, esp. ostensible opponents in a suit, to act to the prejudice of a third party or for an improper purpose.

[57] The allegations of collusion between the Agency and the licensees, and that the Agency and the licensees were dishonest, misleading and obstructive are serious. While the allegations are required to be proved on the balance of probabilities, it is recognised that stronger evidence will be required to prove more serious allegations.[17]

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16 *The New Shorter Oxford Dictionary* Clarendon Press Oxford, 1993, at p 441.
17 See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR at [102].

[58] It is also relevant that Mr Beath's complaint was with regard to the manner in which the Agency and the licensees responded to his complaint to the Agency, and the complaint was made in October 2016, more than one year after Mr Beath's purchase of the property was settled in June 2015. His complaint as to the licensees' failure to disclose the party wall issue, and their responses to his queries about the issue, ultimately led to charges of misconduct being laid against the licensees and the findings of misconduct under s 73(b) of the Act against both licensees. In respect of the collusion appeal we are concerned solely with the responses to Mr Beath's complaint.

[59] In his judgment in *House v Real Estate Agents Authority (CAC 2003)*, his Honour Justice Cooper held that work done by a licensee (in that case, an agency's customer relations manager who had had no involvement in the transaction) in response to a complaint after a transaction was completed did not come within the definition of "real estate agency work" in s 4 of the Act.[18]

[60] The effect of that judgment is that a licensee or an Agency responding to a complaint after a transaction has ended (and who has had no involvement with the matter when the transaction was ongoing) could not be found guilty of unsatisfactory conduct under s 72 of the Act (which deals only with real estate agency work), and could only be found guilty of misconduct under s 73(a) of the Act (disgraceful conduct): that is, if the Tribunal were satisfied that a charge had been proved that the licensee's conduct "would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful".

[61] In the present case, Ms Cannon and Ms Kinsella were dealing with Mr Beath's complaint on behalf of the Agency. Neither had any involvement with the matters that were the subject of Mr Beath's complaint prior to the complaint being made. Therefore, a disciplinary finding could only be made against the Agency if their conduct could properly regarded as disgraceful, as that term is used in s 73(a) of the Act.

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18 *House v Real Estate Agents Authority (CAC 2003)* [2013] NZHC 1619, at [51] to [53].

[62] The focus must be on the state of the Agency's knowledge at the time the complaint was made and responded to: October/November 2016. Ms Cannon and Ms Kinsella had spoken with the licensees and had obtained the previous agency's file for the 2012 transaction, which did not contain, or refer to, any engineering report or concern as to the safety of the party wall. They were aware of the solicitors' letters relating to Mr and Mrs H's cancelled conditional offer, but the Thomson report was not provided to them, and there is no evidence that they were aware of matters (such as Mrs H's statement to Ms Scoble that an engineer had described the party wall as a risk to life in an earthquake) that were disclosed later in the Committee's two investigations, or at the Tribunal hearings.

[63] We are not persuaded that the Committee was wrong to find that there was no evidence that an engineer's report had been prepared at the time of the 2012 sale of the property, and no evidence from which it could infer that the Agency had any knowledge of a 2012 engineering report (even if there were one).

[64] Nor are we persuaded that the Committee was wrong to find that the evidence went no further than proving that the Agency would have known that Mr and Mrs H had had a building inspection report, were concerned about the party wall, had taken advice from an engineer, and cancelled the conditional offer because they were dissatisfied with the condition of the property, and that there was no evidence that Mr Thomson's advice to Mr and Mrs H was passed on to the Agency.

[65] We are not persuaded that the Committee was wrong to find that the Agency did not collude with the licensees to mislead Mr Beath or to obstruct his complaint. We accept that it is commonplace for an agency to seek comment from the relevant licensees when responding to a complaint – indeed, it is necessary for them to do so in order to respond. We are not persuaded that the evidence before the Committee was sufficient to establish the high threshold for an allegation of collusion.

[66] Further, while it can be said that the Agency could have made more enquiries before responding to Mr Beath's complaint (such as asking for a copy of the CheckHome report and Mr Thomson's report), we are not persuaded that Ms Kinsella's and Ms Cannon's failure to make those enquiries reaches the threshold of

being conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[67] With respect to the 1 April 2015 email exchange, the Tribunal notes that r 8.30 of the High Court Rules would have governed disclosure once the email exchange was disclosed in the course of the discovery process in the High Court proceeding. In his report to the Committee dated 18 July 2019, the Authority's investigator said that the email exchange was not disclosed by the licensees in either the Committee's initial or second investigations, and it was disclosed to the Authority at the request of Mr Beath's solicitors. The Tribunal shares the Committee's concern that the exchange was not disclosed to the Agency or the Committee at a much earlier stage, and that neither Mr Kemp nor Ms Scoble has offered an explanation as to why it was not disclosed (other than to say it "somehow got lost in the system"[19]).

[68] There was no evidence before the Committee that the email exchange was captured in the Agency's CRM, or that the Agency was made aware of it when responding to Mr Beath's complaint. We are not persuaded that the Committee was wrong to conclude that it could not infer that the Agency and the licensees colluded to withhold it in order to mislead Mr Beath or to obstruct his complaint.

[69] Accordingly, Mr Beath's appeal against the Committee's determination to take no further action on his complaint of collusion is dismissed.

Appeal against the Committee's disclosure decision

(a) Unsatisfactory conduct finding as to failure to disclose Dux Quest piping

The Committee's decision

[70] As noted earlier, the Committee made a finding of unsatisfactory conduct against the licensees in relation to their failure to disclose the presence of Dux Quest piping at the property. In making this finding the Committee referred to a conflict between Mrs H's statement to the Authority that she told Ms Scoble that the CheckHome report had

19 Noted in paragraph 6.46 of the Committee's collusion decision.

disclosed the presence of Dux Quest piping (which she understood would need to be replaced as did not comply with the building code), and Ms Scoble's statement to the Authority that Mrs H did not raise any issue as to Dux Quest. The Committee considered that the surrounding circumstantial evidence did not take it any further, but referred to Mr Beath's statement that Mr Kemp reacted with surprise when being told of the Dux Quest piping.[20]

[71] The Committee did not consider that, as part of knowing the property they were marketing, the licensees were required to look under the house and ascertain the nature of the plumbing fittings. However, it concluded that the licensees should have been aware of the presence of Dux Quest piping when marketing the property to Mr Beath as they should have further investigated the reason why Mr and Mrs H's conditional offer was cancelled, should have checked the Agency's CRM (when they would have noted that the solicitors' first letter specifically referred to the presence of Dux Quest piping), and they should have requested a copy of the CheckHome report.[21]

[72] The Committee found that if the licensees had exercised appropriate skill, care, competence, and diligence they would have discovered the existence of Dux Quest piping at the property and disclosed it to Mr Beath before Mr Beath discovered it himself. It found the licensees were in breach of rr 5.1 (which requires licenses to exercise skill, care, competence, and diligence when carrying out real estate agency work) and r 10.7 (which requires licensees to disclose known defects, and to take certain steps where it would appear likely that land is subject to hidden or underlying defects) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").[22]

Submissions

[73] Mr Beath submitted that the Committee's conclusion that the licensees were not aware of the Dux Quest piping appeared to be based solely on the licensees' statements that they did not know about it. He submitted that the Committee had ignored

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20 Committee's disclosure decision at paragraphs 4.15 to 4.23.
21 At paragraphs 4.24 and 4.25.
22 At paragraph 4.26.

statements and photographs taken by the Authority's investigator showing the Dux Quest piping in plain view from the door giving access to the underfloor of the property. He submitted that "anyone in the industry for any length of time would be able to spot Dux Quest".

[74] Mr Beath further submitted that the licensees' failure to disclose the Dux Quest piping was part of a pattern conduct by the licensees, and should have been regarded much more seriously than by way of an unsatisfactory conduct finding. He submitted that as a result of dealing with his complaint by splitting it into the issues of failing to disclose the party wall, the failure to disclose the Dux Quest piping, the failure to disclose the asbestos in the roof and the failure to disclose the roof leak, the Committee had failed to deal with the complaint adequately. He submitted that the Tribunal should direct that charges of misconduct should be laid.

[75] Mr Darroch submitted that the licensees accepted that they should have investigated why Mr and Mrs H's conditional offer was cancelled, and that the presence of Dux Quest piping was referred to in the solicitors' letters. He submitted that the licensees did not know of the presence of Dux Quest piping until it was disclosed during an inspection when the property was marketed to Mr Beath. They had not undertaken an inspection of the underfloor area prior to marketing the property. He submitted that the Committee's decision to censure each of the licensees and to order each of them to pay a fine of $2,500 was appropriate.

[76] Ms Mok submitted that the Authority accepts that generally, it would be preferable to deal with all matters together, but that had not been possible in the present case. She submitted that while the licensees' failure to disclose the Dux Quest piping and the party wall issue stemmed from the same conduct, they differed in seriousness (as reflected by the charges of misconduct in relation to the party wall issue).

[77] Ms Mok further submitted that if the Tribunal finds that the Committee erred in not laying misconduct charges in relation to the nondisclosure of the Dux Quest piping, the appropriate course would be to quash the Committee's decision and refer it back to the Committee for further consideration. She submitted that the Tribunal does not

have jurisdiction to make a finding of misconduct directly, as it cannot make a finding that was not available to the Committee.

Discussion

[78] Rule 5.1 of the Rules provides that:

> A licensee must exercise skill, care, competence, and diligence at all times when carrying our real estate agency work.

[79] Rule 10.7 provides that:

> A licensee is not required to discover hidden or underlying defects in land must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either–
>
> (a) Obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to that defect; or
>
> (b) Ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

[80] As the Tribunal has stated on previous occasions, licensees must make every effort to know the property they are selling.[23] This is underscored by the provisions of rr 5.1 and 10.7.

[81] In the CheckHome report the presence of Dux Quest piping was described as a "major defect". The inspector reported:

> Dux Quest pipe was sighted in the subfloor. I recommend replacement of this pipe work to prevent leaks and deterioration as this style pipework is condemned and prone to leaking, some insurance companies charge higher premiums and sometimes don't insure this style pipe work. Further investigation is required in this area by a licensed plumber to determine replacement costs.

[82] Each of the licensees said in their interviews with the Authority's investigator in 2019 that they were generally aware of the issues as to Dux Quest piping. They said access to the underfloor area was through a door to the left of the steps to the front door of the house. Mr Kemp agreed with the investigator's statement that because the property is on a steep slope the access space was quite large. Both licensees said that

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[23] See *Bellis v The Real Estate Agents Authority* [2020] NZREADT 41, at [40] and the decisions referred to.

they had opened the door and looked under the house but had not seen the Dux Quest piping. It is recorded in Mr Kemp's interview that the investigator showed him a photograph he had taken of the underfloor area (which clearly showed a pipe) and Mr Kemp responded that if it had been like that he would have seen it. Yet when Mr Beath inspected the property with a friend in May 2015, in Mr Kemp's presence, the friend immediately identified the Dux Quest piping, as did Mr Kemp.

[83] The Committee accepted Mr Kemp's statement that he had not seen the Dux Quest piping before it was pointed out during Mr Beath's inspection. The Committee considered that this conclusion was supported by Mr Beath's comment that Mr Kemp "acted very surprised", and telephoned Ms Scoble to let her know of the discovery,

[84] We are not persuaded that the Committee was wrong to conclude that the licensees had not seen the Dux Quest piping before it was pointed out to Mr Beath, but it erred in finding the licensees were not required, as part of knowing the property, to look under the house and ascertain the nature of the plumbing fittings. To the contrary, where there is reasonable access to the underfloor area of a property, reasonably competent licensees should take the opportunity of looking into area, to satisfy themselves that there are no issues of concern – whether these be plumbing, piling, or any indicia of other possible issues. In this case, there was no impediment to an inspection of the underfloor area, as there was a door which opened onto an area that the investigator described as "quite large".

[85] It is apparent that once the underfloor area was looked into (as Mr Beath's friend did) the Dux Quest piping was visible. We therefore find that it would have been visible to the licensees, and they failed to exercise skill, care, competence, and diligence in not noticing it, then disclosing it to Mr Beath.

[86] However, while that finding adds a further element to the licensees' breaches of rr 5.1 and 10.7, we are not persuaded that it should lead the Tribunal to remit the matter back to the Committee for further consideration. Rather, it affects the assessment of the seriousness of the licensees' unsatisfactory conduct, which must be taken into account in Mr Beath's appeal against the Committee's penalty orders.

(b) Decision to take no further action on complaints as to failure to disclose asbestos and leak in roof

The Committee's decision

[87] The Committee determined to take no further action on Mr Beath's complaints that the licensees failed to disclose the presence of asbestos in the roof of the property or that the roof leaked. In respect of both matters the previous agency's file for the property included references to the issues: the Committee recorded that the transaction report for the sale included a handwritten note "reroofed over asbestos" and the property description sheet included a hand-written note "leak above dining room window in gale southerly – couple of times a year. Fixed to the best of our knowledge".[24]

[88] The Committee accepted that the licensees would have known of both defects at the time of the 2012 sale, but accepted their statements that they no longer had that knowledge when they marketed the property in 2015. The Committee considered that it was not reasonable to expect licensees to review, or indeed have access to, property files in respect of previous transactions for a property when such files are held by another agency.[25]

[89] The Committee further considered that there was no other evidence from which the Committee could infer that the licensees knew or should had known that the property had been reroofed over asbestos, thus no red flag to investigate the possibility. Accordingly, it found nor beach of the licensees' obligations.[26]

[90] The Committee noted that the CheckHome report did not specifically identify a roof leak but did identify a high moisture reading in the "front right corner of the living room", but observed that it was not known if the defect identified in 2012 in the dining room related to a leaking roof. The Committee found that it was not proved that the licensees had knowledge of a leak in the roof, or that if they had read the CheckHome report they would have been alerted to such a leak. Accordingly, the Committee

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24 Committee's disclosure decision, at paragraphs 4.30 and 4.39.
25 At paragraphs 4.35 and 4.43.
26 At paragraph 4.34.

concluded that the licensees had not misled Mr Beath or withheld information from him.[27]

Submissions

[91] Mr Beath submitted that the property was memorable for many reasons, being in a desirable area in Mt Victoria and being a true representation of a house from the early 1900's. He submitted that given that the 2012 listing documents recorded asbestos and a leak, and the unique nature of the property it was highly unlikely that the licensees could recall the memorable features of the property, but none of its defects, when they marketed it in 2015. He submitted that the Committee had failed to take all relevant matters into account.

[92] Mr Darroch submitted that the Committee's findings that it was not reasonable to expect licensees to review previous sale files, when those files are held by other agencies, and that it was not reasonable to expect licensees to remember specific details of transactions some years in the past were appropriate.

[93] Ms Mok submitted that it was open to the Committee to determine to take no further action on these complaints, in the light of the licensees evidence that they did not recall either issue from the 2012 sale and they did not have the previous agency's file, there were no visual indicators of the property having been reroofed over asbestos or of a roof leak, and the absence of any evidence from Mr Beath that he saw evidence of a roof leak when he inspected the property.

Discussion

[94] The Committee recorded that the transaction report for the sale included a handwritten note "reroofed over asbestos" and the property description sheet included a hand-written note "leak above dining room window in gale southerly – couple of times a year. Fixed to the best of our knowledge".[28]

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27 At paragraph 4.44 and 4.45.
28 Committee's disclosure decision, at paragraphs 4.30 and 4.39.

[95] We are not persuaded that the Committee was wrong to conclude that while the licensees would have known of both defects at the time of the 2012 sale, they no longer had that knowledge when they marketed the property in 2015. We agree with the Committee that it was not reasonable to expect licensees to review, or indeed have access to, property files in respect of previous transactions for a property when such files are held by another agency.[29]

[96] Nor do we consider that the Committee was wrong to conclude that there was no other evidence from which it could infer that the licensees knew or should had known that the property had been reroofed over asbestos, and that there was no "red flag" to investigate the possibility. We note that the CheckHome report recorded that the inspector had not inspected the roof space, due to "insufficient and reasonable clearance". Similarly, the Tribunal would not consider that a reasonable licensee would inspect the roof space where there is insufficient or unreasonable clearance.

[97] Further, we are not persuaded that the Committee was wrong to conclude that the licensees had knowledge of a leak in the roof, or that if they had read the CheckHome report they would have been alerted to such a leak.

[98] We note that the 2012 listing documents referred to a "leak above dining room window" which was said to be "fixed to the best of our knowledge" and the CheckHome report recorded a moisture reading as "front right corner of the living room at high level". Neither of these are identified as relating to a leak in the roof.

[99] In the absence of any evidence of indicators of the presence of asbestos, or a leak in the roof, we are not persuaded that the Committee was wrong to determine to take no further action on these elements of Mr Beath's complaint.

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[29] At paragraphs 4.35 and 4.43.

Appeal against the Committee's penalty decision

The Committee's decision

[100] In its second penalty decision dated 24 November 2020, following the finding of unsatisfactory conduct against the licensees for their failure to disclose the Dux Quest piping, the Committee stated that there was no evidence from which it could be concluded or inferred that that failure was part of a pattern of intentional repeated non-disclosure, or that there was a pattern of deceit.

[101] The Committee placed the licensees' conduct in the range of low to moderate-level unsatisfactory conduct. It also noted that the heart of the licensees' conduct (failing to follow up on the reasons for the cancellations of Mr and Mrs H's conditional offer) was also relevant to the disciplinary charges which were to be heard in the Tribunal and recorded that it expected that the penalty imposed by the Committee in the present matter would be taken into account by the Tribunal, if the licensees were found guilty of misconduct.

[102] The Committee accepted that neither of the licensees had any previous disciplinary findings against them, and that they had shown remorse for the conduct and the consequences of that conduct for Mr Beath. The Committee censured the licensees and ordered each of them to pay a fine of $2,500.

Submissions

[103] Mr Beath's submissions focussed on his contention that the Committee failed to address the cumulative nature of the licensees' conduct. He submitted that the Tribunal should revisit the Committee's decision, considering all matters pertinent to non-disclosure including the party wall issue, and lay charges of misconduct.

[104] Mr Darroch submitted that the licensees had accepted the Committee's penalty orders, given their failure to investigate the reason for the cancellation of Mr and Mrs H's conditional offer and, in particular, not to view the two solicitors' letters. He submitted that in the circumstances, the penalty orders were appropriate.

[105] Ms Mok submitted that it was open to the Committee to assess the licensees' conduct (in relation to the non-disclosure of the Dux Quest piping) in isolation in determining the appropriate penalty given that, at the time of that determination, the charges of misconduct against the licensees had not been heard and determined.

[106] Ms Mok also submitted that the Authority accepts that it is appropriate for the Tribunal to consider the totality of the licensees' conduct in its assessment of the appeal against the Committee's penalty orders. She submitted that having regard to the penalty imposed by the Tribunal in relation to the party wall issue, the penalty imposed by the Committee in relation to the Dux Quest non-disclosure issue is appropriate, and taken together, the two penalties reflect the totality of the established misconduct and unsatisfactory conduct by the licensees.

Discussion

[107] The Tribunal's penalty decision against the licensees was issued on 5 May 2021.[30] In assessing the seriousness of their misconduct, the Tribunal said:[31]

> [47] We assess the [licensees'] conduct as being in the upper end of the range of misconduct under s 73(b). They failed to disclose a potential structural defect, of which they were aware, which posed a significant safety risk. They were told that the party wall was "a risk to life". Given their experience in the industry, they should have taken particular care to ensure that they complied with their obligations relating to disclosure. Their decision that they need only disclose the party wall issue if asked a direct question about the party wall demonstrates a fundamental misunderstanding of their professional obligations. That may have been, as Mr Darroch submitted, an error of approach, but their approach was one for which there was no reasonable basis in the Act or Rules.
>
> [48] The [licensees] failed to disclose the risk even when Mr Beath asked a direct question as to whether there were any other important disclosures he should be aware of as a buyer. Further, they did not take any proper steps to obtain further information. They did not take steps to review the correspondence for the cancelled conditional sale, and they accepted the vendors' assertion that they were not aware of any issue at face value, with no supporting evidence. Their recommendation that Mr Beath obtain a building report to "get a good overview" of the property, without informing him of the risk, fell well short of what was required.
>
> [49] We accept Ms Mok's submission that the [licensees] significantly compounded their fundamental error as to disclosure, and the breaches of their professional obligations, in their responses to Mr Beath's later questions concerning the party wall, when they told Mr Beath that they were "certainly

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30 *Complaints Assessment Committee 409 v Kemp & Scoble* fn 8, above.
31 At [47]–[50].

> not aware of any issues with the [party] wall … " and that the party wall issue was "news to [them]".
>
> [50] The [licensees'] failure to disclose the party wall issue was a serious breach of acceptable standards, and it undermined the consumer-protection purposes of the Act. The importance of those purposes, and the need for compliance with the provisions of the Rules, has to be made clear to the real estate industry. We accept Ms Mok's submission that there is a need for both specific and general deterrence.

[108] In reaching its penalty decision the Tribunal took into account that neither of the licensees had any previous disciplinary action against them and had acknowledged their fundamental error and competed further training, and the fact that their misconduct had occurred more than five years before the charges were heard and the lengthy disciplinary process had had a significant emotional impact on and caused stress to the licensees. As recorded earlier, the Tribunal ordered censure of each of the licensees and that they each pay a fine of $10,000.

[109] The Tribunal has no power to lay charges of misconduct: under the Act, charges are laid by Complaints Assessment Committees, not the Tribunal. Further, the "party wall issue" has already been considered by the Tribunal, disciplinary findings of misconduct made, and penalty orders made.

[110] We made a finding earlier in this decision that while the Committee erred in finding that the licensees were not required to look into the underfloor area of the property to satisfy themselves that there were no areas of concern, it did not err in making a finding of unsatisfactory conduct against the licensees in respect of their non-disclosure of the Dux Quest piping, as a result of not enquiring into the reasons for the cancellation of Mr and Mrs H's cancelled conditional offer. We do not accept Mr Beath's submission that the Dux Quest issue should be referred back to the Committee for further consideration.

[111] As the two issues on which disciplinary findings have been made arose out of a single transaction, it is appropriate for the resultant penalty to be considered on a "totality" basis: what is the appropriate penalty for the totality of the licensees' conduct. Accordingly, the Tribunal's consideration of Mr Beath's appeal against the penalty orders made by the Committee addresses only whether the Committee's and

the Tribunal's penalty orders, taken together, are appropriate for the totality of the licensees' misconduct and unsatisfactory conduct.

[112] The effect of the two penalties is that each of the licensees has been fined $12,500 and censured. Bearing in mind that the maximum fine that may be imposed on an individual licensee following a finding of misconduct is $15,000, and that mitigating factors are properly taken into account, that is a significant penalty.

[113] We have considered whether, in the light of our finding that the licensees should have looked into the underfloor area, there should be an increase in the total fine. We have concluded that it is not appropriate to do so. The totality of the fines imposed adequately addresses the licensees' conduct. Mr Beath's appeal against the Committee's second penalty decision is therefore dismissed.

Mr Beath's application for costs

The Committee's decision

[114] In its first penalty decision issued on 10 April 2018, the Committee ordered the licensees to contribute $5,865 (in equal shares) towards Mr Beath's legal costs in relation to the investigation and hearing by the Committee, pursuant to its power under s 93(1)(i) of the Act.

[115] In its second penalty decision issued on 20 November 2020 the Committee said:, in relation to Mr Beath's request for an order that the licensees contribute to his legal costs:[32]

> The Committee has a discretion to order a licensee to pay a complaint "… any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
>
> The Complainants seek legal costs of $42,411.18. That is a significant sum. They have provided no evidence of such legal costs. Such costs can only relate to this inquiry, investigation, and hearing.
>
> In an appropriate case and with relevant evidence the Committee would consider a modest contribution by a licensee to relevant costs incurred by a Complainant.

[32] Committee's decision as to penalty, at paragraphs 5.20–5.24.

> In the absence of any evidence of legal costs/fees incurred by the Complainants relating to this inquiry, investigation and hearing, the Committee is not in a position to assess the request.
>
> The Committee declines to make any award.

[116] When he filed his notice of appeal against the Committee's non-disclosure decision Mr Beath attached a number of solicitors' invoices dated from 31 December 2016 to 27 March 2019. Those between 31 December 2016 and 31 October 2017 (totalling $14,777.50 (GST incl)) were from Mr Michael Leggatt, and those from 26 June 2018 to 27 March 2019 (totalling $27,633.68) were from Minter Ellison Rudd Watts. Mr Beath said in his notice of appeal:

> Please find attached invoices [totalling] $35,292.68 [sic] (including GST) as evidence of legal costs incurred during the course of the REA/CAC investigation. (Other costs relating to the civil proceedings were invoiced separately and have not been included in this figure).

[117] Mr Darroch submitted that the licensees do not oppose an order being made to mirror the Committee's 10 April 2018 order, but submitted that there were "a number of procedural issues". He submitted that the Committee's order had been made in relation to the Committee's initial investigation, and its first decision, when Mr Beath was represented by counsel, but not in relation to the Committee's second investigation and its subsequent decisions. He submitted that it is uncertain whether there is jurisdiction for the Tribunal to make an order, but acknowledged that it would be appropriate in this situation to take a broader approach.

[118] Mr Darroch submitted that the legal fees incurred by Mr Beath in relation to the Tribunal's first appeal decision dated 31 August 2018 are not recoverable, as there was no power for such costs to be awarded at the time. He submitted that s 110A of the Act (which introduced a costs provision) came into effect in November 2018, so post-dates the original costs award and the Tribunal's first decision.

[119] In reply Mr Beath submitted that legal costs of $35,403.68 had been incurred leading up to and during the first hearing before the Tribunal in August 2018, and for a period thereafter in relation to his solicitor's efforts to obtain disclosure of the 1 April 2015 email exchange. He submitted that the costs of $5,865 ordered in the Committee's first penalty decision on 10 April 2018 (in respect of his representation by Mr Leggatt) should be payable, together with "the balance of legal costs".

[120] He submitted that he had clearly expressed his intention to appeal against the Committee's collusion and disclosure decisions, and it had not been impressed on him that he was required to produce evidence as to costs at the time the Committee considered penalty orders before the Committee's second penalty decision. He noted that all of the invoices submitted with his Notice of Appeal had previously been provided to the Authority's investigator.

[121] With respect to his claim for costs in his appeal to the Tribunal, Mr Beath submitted that the claim relates to matters considered in the collusion and disclosure appeals. He referred to correspondence from his solicitor (Mr Bremer) concerning disclosure of the 1 April 2015 email exchange, and submitted that those costs are clearly relevant, as the email exchange was not disclosed until March 2019.

[122] Mr Beath further submitted that whilst he has not been able to have legal representation since May 2019, he could not have appealed against the Committee's decisions without the aid of an experienced lawyer, including the challenges created by the licensees and the Agency who, he submitted, were intent on withholding information from the Committee. He submitted that ss 93(1)(i), 110(4) and 110A(1) and (2) of the Act allow him to apply for orders that the licensees and the Agency pay costs.

[123] Ms Mok submitted that the Authority acknowledges that when the matter was remitted to the Committee following the Tribunal's first decision on 31 August 2018 the Committee was required to consider the evidence from its initial investigation afresh, together with the further evidence provided in the course of its second investigation, and to arrive at a fresh determination of the complaint.

[124] It was also accepted that in order to address the unfairness that might otherwise arise, it was open to the Committee, and the Tribunal on appeal, to interpret s 93(1)(i) of the Act as providing jurisdiction to make an order for payment of costs incurred at any stage of the Committee process. She submitted that this interpretation has the benefit of preserving the Committee's discretion at each stage of its process, and the Tribunal on appeal, to make a complete assessment of the matter and to order costs to be paid in respect of the Committee process as it sees fit.

Discussion

[125] We accept that the invoices submitted with Mr Beath's Notice of Appeal had all previously been provided to the Authority's investigator. We allow them to be submitted in support of Mr Beath's application.

[126] As both the Authority and the licensees appropriately accepted that the Tribunal could take a broad approach to the issue whether it has jurisdiction to make an award of costs which reflects the order originally made by the Committee in its first penalty decision, we agree that the Tribunal can, in effect, "re-make" that order.

[127] We also accept Ms Mok's submission that the Committee had jurisdiction under s 93(1)(i) of the Act, and the Tribunal has jurisdiction on appeal, to make an order for costs in relation to the second investigation and the Committee's hearing of Mr Beath's complaints.

[128] We accept that the invoices rendered by Minter Ellison Rudd Watts (totalling $27,633.68) are for work done in relation to Mr Beath's first appeal to the Tribunal and the Committee's second investigation. We note that Mr Bremer from that firm appeared on behalf of Mr Beath at the first hearing before the Tribunal. We also note that the invoice dated 27 March 2019 post-dates the introduction of s 110A into the Act. We have concluded that an order should be made that the licensees contribute towards Mr Beath's legal costs.

[129] We do not make an order for costs to be paid by the Agency. There was no appeal (either from Mr Beath or the Agency) against Committee's finding of unsatisfactory conduct (following its "own motion" investigation of the Agency's supervision of the licensees) in the Committee's first decision. Further, Mr Beath's appeals against the Committee's decisions to take no further action against the Agency in sit subsequent decisions have not succeeded.

Application for compensation

[130] Mr Beath referred in his submissions on costs to an application for an order as to compensation. He stated that he had not had an opportunity to comment on the Tribunal's penalty decision, and that he has experienced financial hardship and significant stress. He also submitted that the High Court proceeding did not finally determine compensation, and it was recognised in the settlement agreement that proceeding before the Authority remained extant until it was resolved.

[131] We record that Mr Beath was a witness in the charges proceeding against the licensees. He was not a party to the proceeding (notwithstanding that his complaint had resulted in the charges), and it was therefore not appropriate for the Tribunal to seek submissions from him prior to the Tribunal's decision as to penalty. It was for the Committee to seek and pass on any information relevant to issues of penalty.

[132] Mr Beath has not filed an application, or detailed any claim for compensation. None of the other parties have had an opportunity to respond. The Committee has not considered any claim for compensation. Accordingly, the Tribunal cannot deal with the issue in this decision.

Outcome

[133] Mr Beath's appeals against the Committee's decision to take no further action on his complaint of collusion is dismissed, the Committee's finding that the licensees were guilty of unsatisfactory conduct in relation to their non-disclosure of the presence of Dux Quest piping, and the Committee's decision to take no further action on his complaint that the licensees failed to disclose the presence of asbestos in the roof and a leak in the roof are all dismissed.

[134] Mr Beath's appeal against the penalty orders made in the Committee's second penalty decision is also dismissed.

[135] We allow Mr Beath's application for costs. We order the licensees to contribute to his legal costs as follows:

[a] $5,865 in respect of the Committee's initial investigation and hearing (to be paid by each licensee in equal shares); and

[b] $7,000 in respect of the Committee's second investigation and hearing (to be paid in equal shares).

[136] 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 G Denley
Member

_____
Ms C Sandelin
Member