BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 47

READT 003/2020

IN THE MATTER OF	An application for review of a Registrar's determination under s 112 of the Real Estate Agents Act 2008
BETWEEN	PHILLIP JULIAN CAVANAGH Applicant
AND	THE REGISTRAR OF THE REAL ESTATE AUTHORITY Respondent

On the papers

Tribunal:	Hon P J Andrews (Chairperson) Ms C Sandelin (Member) Ms F Mathieson (Member)
Submissions filed by:	Ms S Judd on behalf of Mr Cavanagh Ms V Casey QC, on behalf of the Registrar
Date of Decision:	25 August 2021

DECISION (2) OF THE TRIBUNAL
(Costs)

Introduction

[1] On 17 January 2020 the Registrar declined Mr Cavanagh's application for a salesperson's licence under the Real Estate Agents Act 2008 ("the Act"), on the grounds that he was not satisfied that Mr Cavanagh was a "fit and proper person to hold a licence".[1] The Registrar's assessment was founded on Mr Cavanagh's conviction on 22 October 2009 on charges of obtaining by deception, fraud, and using a document for pecuniary advantage, and sentence of imprisonment for two years and five months.

[2] On 23 July 2020 the Tribunal issued a decision in which it allowed Mr Cavanagh's application for review of the Registrar's determination and, having found Mr Cavanagh to be a fit an proper person to hold a licence, directed that a salesperson's licence could be issued to him.[2]

[3] The Registrar appealed to the High Court against the Tribunal's decision. In a judgment delivered on 31 March 2021 her Honour Justice Fitzgerald, although finding that the Tribunal had erred in one respect, found that Mr Cavanagh was a fit and proper person to hold a licence and dismissed the Registrar's appeal ("the High Court substantive judgment").[3] In a further judgment delivered on 7 July 2021 her Honour made an award of costs in Mr Cavanagh's favour, against the Registrar, in the sum of $13,623 ("the High Court costs judgment").[4]

[4] Mr Cavanagh has now submitted an application for an award of costs in his favour against the Registrar in respect of the hearing in the Tribunal. This application was first made on 20 August 2020 but consideration of it was deferred by the Tribunal while the matter was before the High Court.

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1 See s 36(2)(c) of the Act.
2 *Cavanagh v the Registrar of The Real Estate Authority* [2020] NZREADT 30.
3 *Registrar of the Real Estate Agents Authority v Cavanagh* [2021] NZHC 680.
4 *Registrar of the Real Estate Agents Authority v Cavanagh* [2021] NZHC 1692.

Jurisdiction as to costs

[5] Section 110A of the Act provides, as relevant to the present application:[5]

> **110A Costs**
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> (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
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> (2) Without limiting the matters the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether and to what extent, any party to the proceedings –
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> (a) Has participated in good faith in the proceedings:
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> (b) Has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:
>
> (c) Has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.
>
> …

Submissions

[6] On behalf of Mr Cavanagh, Mr Judd submitted that the Tribunal has previously accepted that the scale of costs under Part 14 of the High Court Rules provides a useful reference point. He submitted that Mr Cavanagh's application for review, involving filing an application, filing memoranda and attending at case management conference, briefing and calling four witnesses, and preparing written and oral submissions and appearing at the hearing (which lasted 1.5 days), was the equivalent of a first instance hearing in the Court.

[7] He submitted that the review proceeding would be regarded as category 2 under the High Court Rules, being proceedings of "average complexity requiring counsel of skill and experience considered average in the High Court"[6] with a time allowance in band B (where "a normal amount of time is considered reasonable").[7] He submitted that the proceeding was very important for Mr Cavanagh, and required careful and thorough analysis of the law, marshalling of relevant evidence from witnesses and preparing detailed submissions. Mr Judd set out a schedule of costs, leading to a claim

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5 Section 110A of the Act was inserted, as from 14 November 2018, by s 244 of the Tribunals Powers and Procedures Legislation Act 2018.

6 High Court Rules, r 14.3.

7 High Court Rules, r 14.5.

at the 2B rate for a total of 8.5 days of $2390 per day, of $20,315. He noted that Mr Cavanagh's actual costs were $30,877.50.

[8] Mr Judd noted that Mr Cavanagh does not allege that there was any conduct on the part of the Registrar that would justify a claim for increased costs, but submitted that as Mr Cavanagh had incurred costs and been successful, it was reasonable that the Registrar be ordered to pay a contribution towards those costs in the usual way.

[9] On behalf of the registrar, Ms Casey QC accepted that the Tribunal has a broad discretion in deciding whether to make an order for costs, and if so the quantum of such order, but submitted that costs should lie where they fell. She further submitted that if the Tribunal were minded to award costs, a lower category should be adopted as a starting point, with a reduction applied from that point.

[10] Ms Casey submitted that in considering whether Mr Cavanagh was a fit and proper person to hold a licence, the Registrar was exercising a regulatory function rather than a disciplinary function, and that the approach of costs following the event is not necessarily appropriate in that context.

[11] She submitted that the Registrar was acting in the public interest in dealing with Mr Cavanagh's application for a licence and should not be faced with an award of costs for fulfilling his proper role. She submitted that Mr Cavanagh had provided "relatively light information" in support of his application for a licence and it was appropriate for the Registrar to decline the application, Mr Cavanagh was then entitled to bring his application for review, supported by additional evidence which could then be tested by cross-examination. She submitted that this is how the regime is intended to operate where there is real uncertainty as to fitness, and it is in the public interest that it operate in this way.

[12] Ms Casey submitted that the Courts recognise that public bodies must be able to exercise their functions without fear of exposure to undue financial pressure of an adverse costs award. She submitted that in exercising their discretion in this context, the Courts tend to look to whether there is something other than that a party has succeeded, such as unreasonable conduct, before ordering costs against a regulator

properly exercising its functions in the public interest. She referred to discussions of costs orders in the context of the provisions of the Lawyers and Conveyancers Act 2006 and Health and Disability Commissioner Act 1994. She submitted that the usual approach of the Human Rights Review Tribunal is that costs are not routinely awarded to the successful party.

[13] Ms Casey also submitted that in the present case, the Registrar was successful on a "key issue" in the appeal, namely that the Tribunal had erred in relying on a supervision scheme submitted by Mr Cavanagh when assessing him as being a fit and proper person. She submitted that that finding meant that the Tribunal had not correctly exercised its judgment in assessing Mr Cavanagh's fitness, but Mr Cavanagh was able to separately persuade the High Court that he was a fit and proper person. She submitted that the implication for costs is that while the outcome for Mr Cavanagh was the same, the Tribunal's decision was not upheld. She submitted that a fair reflection of the outcome would be that costs lie where they fell.

[14] Finally, Ms Casey submitted that if the Tribunal were to consider than an order for costs should be made, the amount claimed was too high. She submitted that the case before the Tribunal was a single issue of whether Mr Cavanagh could persuade it that he was of good character. She submitted that this is significantly less complex than an ordinary proceeding in the High Court. Ms Casey submitted that the proceeding should be regarded as category 1 ("proceedings of a straightforward nature able to be conducted by counsel considered junior in the High Court")[8] rather than category 2, and the time allowance as band A (where "a comparatively small amount of time is considered reasonable")[9] rather than B.

[15] Ms Casey submitted that the calculation of costs on a 1A basis leads to a starting point of $10,971 and on a 2A basis, $16,491. She submitted that a reduction should then be applied on the "public interest" grounds along with the "partial success" of the Registrar's appeal.

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8 High Court Rules, r 14.3.
9 High Court Rules, r 14.5.

[16] Mr Judd filed reply submissions for Mr Cavanagh. He submitted that no basis had been given for the submission that the hearing before the Tribunal was legally and factually straightforward, or for the submission that the proceeding would have involved only a comparatively small amount of time.

[17] He submitted that the issue before the Tribunal was of critical importance to Mr Cavanagh and of high importance to the Registrar, given the opposition mounted in the Tribunal and then the attempt to overturn the Tribunal's decision on appeal. He submitted, based on his experience, that the work involved in preparing the evidence and submissions and appearing before the Tribunal in this matter was equivalent to the work required for an average or normal High Court matter.

[18] Mr Judd submitted that the Registrar's distinction between a regulatory and disciplinary function is irrelevant. He submitted that it was the Registrar's choice to decline Mr Cavanagh's application for a licence, to oppose the application to the Tribunal, and then to appeal to the High Court. He submitted that the Registrar's decisions have caused Mr Cavanagh to incur significant legal costs and emotional stress and it is reasonable for the Registrar to make a contribution towards his costs.

[19] Mr Judd also submitted that the Registrar's submission that Mr Cavanagh provided "relatively light information" to the Registrar was incorrect. He submitted that the witnesses who provided statements to the Tribunal had provided letters to the Registrar and there were no new witnesses. He noted that the Registrar continued to oppose Mr Cavanagh's application even after receiving the affidavits filed in the Tribunal then appealed the High Court.

[20] Mr Judd submitted that there was no evidence that Mr Cavanagh was not a fit and proper person when he made the application yet the Registrar continued to rely on the historical offending as the sole basis for refusing the licence then opposing the application to the Tribunal.

[21] Mr Judd noted that both the Tribunal and the High Court found that the Registrar was wrong, and had erred in focussing on the historical offending rather than accepting

the "overwhelming and undisputed" evidence that Mr Cavanagh is a fit and proper person today.

[22] Mr Judd submitted that the Registrar had made the same "public policy" argument as to orders for costs against regulatory bodies in his submissions on costs to the High Court, and the argument was rejected there. He submitted that given the power the Registrar has it is important, as a matter of public policy, that costs are ordered against the Registrar when a wrong decision is made. He submitted that it would not be fair to penalise Mr Cavanagh for the costs incurred as a result of the Registrar's initial determination and subsequent defence of that determination.

Discussion

[23] The Tribunal has a broad discretion to make orders as to costs. Section 110A does not restrict the Tribunal's jurisdiction in any way as to the type of proceeding in which an order maybe made, or as to the party against whom an order may be made. Since the introduction of s 110A into the Act the Tribunal has considered applications for costs in the context of charges of misconduct, and in the context of appeals against decisions of Complaints Assessment Committees.

[24] This is the first occasion on which the Tribunal has been asked to make an order for costs against the Registrar following a successful application for review of a determination.

[25] The Tribunal has accepted that a licensee against whom disciplinary findings are made following charges laid by a Complaints Assessment Committee should generally (although not invariably) be ordered to pay a contribution towards the Committee's costs.[10] This reflects the purposes of the Act, in particular accountability through the disciplinary process, and recognises that the costs associated with charges proceedings are borne by members of the industry.

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[10] See, for example, *Complaints Assessment Committee v Wright* [2019] NZREADT 56, *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21, *Complaints Assessment Committee 1901 v New Zealand LJ International Ltd & Zeng* [2021] NZREADT 28 and *Complaints Assessment Committee 1901 v Lowndes* [2021] NZREADT 43.

[26] With respect to costs following appeal decisions, the Tribunal in *Kooiman v the Real Estate Agents Authority (CAC 519)* considered an application for costs against an appellant who had unsuccessfully appealed against a Complaints Assessment Committee's decision not to inquire into his complaint against three licensees.[11] The Tribunal accepted that it could be guided by the principles set out in the judgment of her Honour Justice Mallon in *Commissioner of Police v Andrews*, which had considered an application for costs following a proceeding in the Human Rights Review Tribunal under the Human Rights Act 1993.[12]

[27] In *Kooiman*, the Tribunal said:[13]

> [16] We accept that:
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> [a] The Tribunal should be cautious in applying the conventional costs regime for civil litigation to its jurisdiction. While some proceedings in the Tribunal should have costs consequences, it does not follow that the costs consequences in respect of all proceedings should be those applying in civil litigation in the courts.
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> [b] Statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts. The imposition of adverse costs orders should not undermine the cheapness and accessibility long recognised as important advantages of tribunals over courts.
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> [c] Because of the consumer-protection focus of the Act, access to the Tribunal should not be unduly deterred, and there is a need for a flexible approach.
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> [d] Costs orders should not have the effect of deterring proceedings before the Tribunal.

[28] In its decision in *Beatson v the Real Estate Agents Authority (CAC 416)*, the Tribunal considered an application for costs against an unsuccessful appellant.[14] With regard to the principles for determination of applications for costs under s 110A of the Act, the Tribunal said:[15]

> [3] We accept that it is correct in principle that costs orders represent a contribution only to the party and party costs that the successful party has incurred. Such an approach applies generally other than where some exceptional factor is present that justifies departure from it. That is the long-standing principle that has been adopted in the New Zealand courts. We can

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11 *Kooiman v the Real Estate Agents Authority* [2019] NZREADT 11.
12 *Commissioner of Police v Andrews* [2015] NZHC 745.
13 *Kooiman*, above n 10, at [63].
14 *Beatson v The Real Estate Agents Authority (CAC 416)* [2020] NZREADT 13.
15 *Beatson*, at [3] and [20].

> discern no reason why the legislature should have intended, when implementing section 110A of the Act, that a different approach should be taken.

and

> [20] In our view the High Court costs arrangement reflects a pragmatic view of fixing costs. There is an approximation which has been adopted as part of a suite of rules which avoid the court having to consider the specific facts of the case before it [including] the actual amounts charged. The approach in the [High Court Rules] is adopted on the grounds of expediency and efficiency. … it is part of a wider system of cost fixing that it was decided was appropriate in the High Court regime and does not necessarily provide wider guidance to other tribunals which are, of course, not operating in that environment when they make costs determinations.

[29] As to applications for review of a Registrar's determination, we have concluded that while it deals with an order for costs following a successful appeal to the High Court rather than in a Tribunal, we can be guided by the costs judgment of his Honour Clifford J in *Lagolago v Wellington Standards Committee 2*, following a law practitioner's successful appeal against adverse findings made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.[16]

[30] In respect of a submission that because of its "public interest" role an order for costs should not be made against the Standards Committee unless there was some compelling reason to do so, Clifford J said:[17]

> [33] In my view, therefore, the correct approach in New Zealand in disciplinary proceedings where the relevant Tribunal does have a broad jurisdiction to award costs is that costs do not simply follow the event. The fact that a regulatory function is being discharged in the public interest is a relevant consideration, but it is not determinative. Moreover, it sets the bar too high to … approach the matter on the basis that "something extraordinary" (for example, a finding of dishonesty, a lack of good faith, or that proceedings were improperly brought or were a shambles from start to finish) must have occurred before a costs order may properly be made against a Standards Committee. What is required is an evaluative exercise of the discretion provided by the Act.

[31] As noted earlier, s 110A provides the Tribunal with a broad discretion as to costs. It was not suggested that any of the matters set out in s 110A(2) of the Act are applicable to the present case, and we note Mr Judd's submission that it was not alleged that there was any conduct on the part of the Registrar to justify increased costs.

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16 *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038.
17 At [33].

[32] We accept that in the present case it is appropriate that, as the successful party in the Tribunal, an order for costs should be made in Mr Cavanagh's favour.

[33] We do not accept Ms Casey's submission that any significant reduction should be made for the Registrar's "partial success" in the High Court, relating to the supervision scheme suggested by the Tribunal in the course of the hearing. Ms Casey's submission followed her earlier submission that the implication of her Honour's finding on the supervision scheme was that "while the outcome for Mr Cavanagh remained the same, the Tribunal's decision was not upheld". However, as her Honour Justice Fitzgerald said in the High Court costs judgment:[18]

> [2] While I dismissed the Registrar's appeal I did accept the Registrar's submission that the Tribunal had erred in its assessment of whether Mr Cavanagh was a fit and proper person by directly relying on a Scheme of Supervision in relation to him. On the basis of the remainder of the evidence that had been put before the Tribunal, however, I agreed with the Tribunal that Mr Cavanagh is now a fit and proper person to hold a salespersons' licence.

[34] As her Honour recorded in the High Court costs judgment, the Registrar's appeal was founded on five alleged errors by the Tribunal, only one of which (the Tribunal's reference to a supervision scheme) was upheld.[19] Her Honour found that the Tribunal had not erred in finding that Mr Cavanagh was a fit and proper person to hold a licence on the evidence before it. The Tribunal's assessment that Mr Cavanagh was a fit and proper person to hold a licence was upheld by the High Court.

[35] We accept that the High Court Rules categorisation for determinations is a useful yardstick for determining costs in the Tribunal. We accept Mr Judd's submission that the review proceeding is appropriately considered analogous to a category 2, band B civil proceeding. The work required in making the application, preparing evidence, then preparing and presenting submissions to the Tribunal was similar to that which would be required for a 2B civil proceeding: that is, it was of average complexity requiring average skill and experience, requiring a normal amount of time. We accept that the starting point for determining costs is the 2B calculation.

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18 *Registrar of the Real Estate Agents Authority v Cavanagh* fin4, above, at [2].
19 At [20].

[36] However, we do not accept Mr Judd's submission that it is irrelevant that the Registrar was undertaking a regulatory, rather than disciplinary, function when determining Mr Cavanagh's application for a licence. We accept that the fact that the Registrar's determination was made in the course of his "public interest" role, as part of achieving the Act's purpose of promoting and protecting the interests of consumers in relation to real estate transactions, and promoting public confidence in the performance of real estate agency work[20] is a factor to be taken into account as part of the "evaluative exercise" of the Tribunal's discretion.

[37] Further, it is appropriate to bear in mind that the Registrar is funded by way of industry contribution. We accept Ms Casey's submission that Mr Cavanagh's criminal convictions were always going to require a careful review of his fitness to hold a licence. As a result of those convictions, pursuant to s 37 of the Act he was not eligible to hold a licence for the following ten years. It would not serve the purpose of the Act if the issue of a licence were to be automatic upon expiry of the mandatory ten years. While the Registrar was found by the Tribunal and the High Court to have reached the wrong conclusion as to Mr Cavanagh's fitness, we do not consider that the industry as a whole should bear the full burden of the order for costs in Mr Cavanagh's favour.

[38] We take as our starting point the calculation of costs on a 2B basis ($20,315) (noting Mr Judd's submission that Mr Cavanagh's actual costs amounted to $30,877.50). Applying a reduction to the starting point in recognition of the Registrar's public interest role and the fact that the full burden of costs should not fall on the industry as a whole, we have concluded that the appropriate order is for the Registrar to be ordered to pay $15,000 as contribution to Mr Cavanagh's costs; that is, approximately three quarters of the 2B assessment.

Ruling

[39] The Tribunal's ruling is that the Registrar is to pay $15,000 as contribution towards Mr Cavanagh's costs.

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[20] See s 3(1) of the Act.

[40] 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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Ms F Mathieson
Member