BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 54

Reference No: READT 017/2021

IN THE MATTER OF	Charges laid under s 73(a) of the Real Estate Agents Act 2008
BROUGHT BY	**COMPLAINTS ASSESSMENT COMMITTEE 2106**
AGAINST	**JANE ELIZABETH MATHER** Defendant
Tribunal:	D J Plunkett (Chair) N O'Connor (Member) F Mathieson (Member)
Representation:	
Counsel for the Committee:	T Wheeler
Counsel for the Defendant:	R Hern

DECISION (COSTS)
Dated 6 December 2021

Introduction

[1] Complaints Assessment Committee 2106 (the Committee) charged the defendant, Jane Elizabeth Mather, with misconduct under s 73(a) of the Real Estate Agents Act 2008 (the Act). After the charges were filed in the Tribunal and certain steps undertaken, they were withdrawn. Ms Mather now seeks a contribution towards her costs from the Committee.

Background

[2] Ms Mather is a licensed salesperson, who was previously engaged by Andco Realty 1, trading as Clark & Co (the agency).

[3] It was alleged that, while exploring alternative agency engagement, Ms Mather sent confidential information from her agency database to her personal email address. A colleague also sent client information to Ms Mather's personal computer. Ms Mather additionally exported a list of client contacts to her personal email address. This all occurred immediately before she left the agency to join another real estate firm.

[4] Ms Mather's defence was that she reasonably believed the information to belong to her and she was entitled to transfer it. Once advised she was not able to use it, she took reasonable steps to delete it.

[5] On 30 June 2021, the Committee charged the defendant with misconduct under s 73(a) of the Act, in that her conduct would be regarded as disgraceful. In the alternative, the defendant was charged with misconduct under s 73(c)(iii), in that she wilfully or recklessly contravened r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the rules). Rule 6.3 requires an agent not to engage in conduct likely to bring the industry into disrepute.

[6] The charges were filed in the Tribunal on 30 June 2021.

[7] Ms Mather filed a response on 9 July 2021.

[8] On 21 July 2021, a timetable was set by the Tribunal for an agreed statement of facts, evidence and opening submissions. The agreed facts and the defendant's evidence were duly filed in the Tribunal.

[9] On 28 September 2021, the Committee sought leave to withdraw the charges. The defendant consented and leave was given by the Tribunal on 30 September 2021, with the question of costs reserved.

[10] The defendant made an application for costs against the Committee on 8 October 2021.

Tribunal's jurisdiction to award costs

[11] The Tribunal's jurisdiction to award costs is set out in s 110A of the Act:

> **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 that 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.
>
> ...

[12] In *Commissioner of Police v Andrews*, the High Court was concerned with the almost identical costs provision for proceedings before the Human Rights Review Tribunal (the HRRT).[1] The HRRT had declined to award costs in favour of the Commissioner of Police against the unsuccessful claimant. It had rejected the traditional civil litigation approach of 'costs follow the event', which had been the previous practice of the HRRT. It considered that was not fair and reasonable, given the nature of human rights claims.[2] Nor should the vulnerable and impecunious persons who were parties be deterred from accessing the HRRT.

[13] The High Court in *Andrews* considered that the HRRT was right to express caution about applying the conventional civil costs regime.[3] Statutory tribunals existed to provide simpler, cheaper and more accessible justice than ordinary courts and the imposition of adverse costs orders undermined the cheapness and accessibility of tribunals. The HRRT provided a forum through which potentially vulnerable individuals could challenge the exercise of state power.

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[1] *Commissioner of Police v Andrews* [2015] NZHC 745.
[2] At [49].
[3] At [61] & [63].

[14] The High Court considered that the HRRT was the appropriate body to develop its approach to costs.[4] It was accepted by the Court that some claims should have cost consequences, but it did not follow that the cost consequences for all claims should be those that applied in civil litigation in the courts.[5] The past approach to costs had been the same regardless of the type of proceeding, but the High Court considered the cost consequences were not the same for each kind of proceeding.[6]

[15] The Court declined to interfere with the HRRT's decision, despite the HRRT not following its earlier approach (costs follow the event) and the High Court's earlier endorsement of that approach.[7]

[16] The High Court judgment in *McCaig v A Professional Conduct Committee* concerned costs imposed by the Health Practitioners Disciplinary Tribunal (HPDT).[8] A complaint had been upheld. The practitioner had been ordered to make a contribution towards the costs of the prosecuting Professional Conduct Committee. The Court identified the relevant considerations as:[9]

1. Professional groups should not be expected to bear all the costs of the disciplinary regime;

2. Members who appeared on charges should make a proper contribution towards costs;

3. Costs are not punitive;

4. The practitioner's means, if known, are to be considered;

5. A practitioner's defence should not be deterred by the risks of a costs order; and

6. In a general way 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

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[4] At [71].
[5] At [65].
[6] At [67]–[68].
[7] At [71].
[8] *McCaig v A Professional Conduct Committee* [2015] NZHC 3063. Also reported as *TSM v A Professional Conduct Committee*.
[9] At [21].

[17] The approach to costs in the Lawyers and Conveyancers Disciplinary Tribunal (LCDT) was reviewed by the High Court in *Lagolago v Wellington Standards Committee 2*.[10] The Court had overturned the LCDT's adverse findings against the practitioner. One of the issues was whether the successful practitioner was entitled to costs before that tribunal. The Court noted that the power of the LCDT to award costs was not restricted to an award as part of a penalty against a practitioner. Furthermore, it could require the Standards Committee to pay costs to a practitioner.

[18] The High Court had this to say about the LCDT's ability to award costs:

> [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 is not determinative. Moreover, it sets the bar too high to (as the Tribunal would appear to have done to date) 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.
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> [34] In weighing the disincentive that an award of costs might be considered to give rise to, the Tribunal should also bear in mind that the Law Society, and hence Standards Committees, are funded by practitioners themselves through the levies the Law Society as regulator imposes on the profession. Where an award of costs is properly made against a Standards Committee, it falls to be paid by the profession. Over time, the acceptance or otherwise of the profession of the appropriateness of those compulsory levies will, in my view, act as a proper check on the way the Law Society discharges its regulatory functions.

[19] Despite the practitioner's success, the High Court decided that there was no call for an award of costs against the Law Society.[11]

[20] The matter of costs in the LCDT in *Lagolago* returned to the High Court when the practitioner sought leave to appeal to the Court of Appeal from the judgment of the High Court.[12] It considered the correct approach to costs at the LCDT:[13]

> It is discretionary and the fact that costs will not necessarily reflect the standard principle for civil proceedings of costs following the event reflects the public function that the standards committee is fulfilling. … There is no obligation on the LCDT to apply the High Court regime to matters before it.

[21] The decision of the High Court in *Registrar of the Real Estate Agents Authority v Cavanagh* concerned costs for real estate disciplinary proceedings.[14] The appeal of the Registrar of the Real Estate Agents Authority against the decision of this Tribunal had

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[10] *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038.
[11] At [37].
[12] *Lagolago v Wellington Standards Committee 2* [2018] NZHC 1102.
[13] At [22], see also [34].
[14] *Registrar of the Real Estate Agents Authority v Cavanagh* [2021] NZHC 1692.

been dismissed. The licensee (practitioner) sought costs for the proceedings in the High Court, not costs before the Tribunal.[15] The Court considered the starting point to be that costs follow the event, in which case they would be awarded to the successful party.[16] It rejected the principle that because the regulator exercised functions in the public interest, the courts tended to look for "something else" other than the success of the party. Costs for the proceedings before the High Court were awarded to the practitioner.

[22] The Tribunal considered its approach to costs in *Kooiman v Real Estate Agents Authority*.[17] It concerned an unsuccessful appeal in the Tribunal by a property owner (the complainant to the Authority). The successful licensees sought costs against the owner appellant.

[23] The Tribunal was guided by *Andrews*, given the almost identical statutory provision.[18] It was accepted that it should be cautious in applying the conventional costs regime for civil litigation.[19] While some proceedings should have costs consequences, it did not follow that all should. Tribunals existed to provide simpler, speedier, cheaper and more accessible justice than the ordinary courts. It found that the imposition of adverse costs orders should not undermine the important advantages of tribunals over courts. Furthermore, because of the consumer protection focus of the Act, access to the Tribunal should not be unduly deterred. There was a need for a flexible approach.

[24] In *Kooiman*, the Tribunal found that the unsuccessful appellant had participated in good faith and had not delayed or obstructed the proceeding.[20] No costs were awarded.

[25] This was followed by the Tribunal in *Beatson*, another case where the successful licensees sought costs against the appellant.[21] The Tribunal relied on its earlier decision in *Kooiman*. In a reference to the High Court decision in *Andrews*, it observed that the parties before the Tribunal in *Beatson* did not have the same poor financial characteristics as those before the HRRT and were not challenging alleged abuse of state power.[22] It further noted that the decision on costs in each case is discretionary and that it is not in every case that costs should follow the event.[23]

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[15] *Cavanagh* at n 3.
[16] At [14], [18], [23] & [25].
[17] *Kooiman v Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11.
[18] At [62].
[19] At [63].
[20] At [66].
[21] *Beatson v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 45.
[22] At [28]–[29].
[23] At [32].

[26] In the *Beatson* case, the Tribunal had regard to what it described as the commercial flavour of the dispute (whether a commission should be paid, which had led to an action in the District Court).[24] The proceeding in the Tribunal was considered to have close parallels to conventional civil litigation. It was therefore reasonable to apply the same approach to costs, on the basis that the successful party should be awarded a contribution towards its actual cost. It ordered a contribution to, but not indemnity for, the actual costs incurred.[25]

[27] The quantum of costs in *Beatson* returned to the Tribunal.[26] In the second *Beatson* decision, the Tribunal said that the traditional approach that costs follow the event had been adopted. A successful party would be awarded a contribution towards party and party costs, unless an exceptional factor justified a departure from it. The Tribunal had to be assured that the costs charged were reasonable.[27] However, it was understandable that the costs in *Beatson* were high, as the allegations were serious and reputations were at stake.

[28] The Tribunal in *Beatson* considered that the High Court's arrangement for costs (category 2B) reflected a pragmatic view of fixing costs. It represented two-thirds of the rates charged by practitioners in the relevant category. While the actual costs were $27,000, the Tribunal found that costs of $12,500 would have been justified. It awarded $8,250, being two-thirds of that figure. In addition, actual and reasonable disbursements were allowed.

[29] Following the decision of the High Court in *Cavanagh*, the issue of costs in the Tribunal in the *Cavanagh* matter returned to the Tribunal.[28] Mr Cavanagh was awarded costs on the basis that it was an appropriate case for costs to follow the event.[29] The Tribunal did not accept that it was irrelevant that the Registrar was undertaking a regulatory, rather than disciplinary, function.[30] The Tribunal took into account that the Registrar's determination being challenged was made in the course of its public interest role. It further noted that the Registrar was funded by way of industry contribution.[31] In determining the appropriate amount, the Tribunal's starting point was the High Court costs regime (category 2B) with a reduction for the Registrar's public interest role.

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[24] At [32].
[25] At [34].
[26] *Beatson v Real Estate Agents Authority (CAC 416)* [2020] NZREADT 13.
[27] At [9] & [11].
[28] *Cavanagh v Registrar of the Real Estate Authority* [2021] NZREADT 47.
[29] At [32].
[30] At [36].
[31] At [37].

Submissions

Application from the defendant

[30] In the application (8 October 2021), the defendant states that her actual costs were $52,813.19. She seeks:

1. $36,969.23, being 70 percent of her actual costs; or

2. An uplift on scale costs of $9,550 (District Court Rules 2014, 2B costs); or

3. Any other amount that the Tribunal sees fit.

[31] On behalf of Ms Mather, Mr Hern contends that the starting point is that costs follow the event and she should therefore be awarded two-thirds of her costs. This should be adjusted upwards to 70 per cent as a result of a number of aggravating factors:

1. Before the misconduct charges were laid, the defendant provided the Committee with a detailed response to the allegations. There had been no changes in material facts or new legal developments since then. The charges should never have been laid;

2. This was not a matter where the Committee failed to prove any charge, but it sought to withdraw them less than a month before the scheduled hearing. There was no prior indication;

3. The Committee's actions in laying misconduct charges and then withdrawing those charges at a late stage had caused the defendant to incur considerable cost;

4. The charges were serious, involving the honesty of the defendant and significant potential reputational damage; and

5. There were complex jurisdiction and agency issues involved.

[32] The defendant points out that, as at 28 September 2021, the final preparation was well underway, so she had:

1. Responded substantively to the initial complaint;

2. Responded substantively to the Committee when the complaint was made;

3. Provided a written response to the misconduct charge;

4. Drafted an agreed statement of facts;

5. Reviewed the Committee's evidence;

6. Drafted and filed her own evidence, including four detailed briefs;

7. Instructed an expert; and

8. Prepared a substantial portion of the opening submissions, involving extensive research into the legal and other issues.

[33] Mr Hern relies on the High Court decision in *Cavanagh* which found the starting point to be the principle that costs follow the event, rejecting the public interest dimension to the Committee's role as requiring a different approach. In *Beatson*, the Tribunal had accepted the long-standing principle of the courts that a contribution be made to the costs of the successful party, with costs following the event. The Tribunal awarded the successful licensees two-thirds of their reasonable cost, adjusting it upwards due to the substantial defence arising from the potential effect of the charges on their reputation.

[34] There are submissions (10 November 2021) from Mr Hern in reply to those of the Committee.

[35] Counsel says that Ms Mather has not shifted her position, as contended by the Committee. As early as 15 September 2020, her solicitor had said to the Authority that there was no misconduct as it is normal practice for agents to take their client lists with them when they change companies.

[36] It is noted by counsel that the Committee argues that it acted reasonably because it reassessed its understanding of real estate practices and inquired into standard practices upon the defendant presenting Mr Crews' evidence.

[37] Mr Hern describes that as an admission by the Committee that it laid the misconduct charges based on a misunderstanding of real estate practices and without making proper inquiries into the practices. Where dishonesty is alleged, as it was here, a responsible regulator would make diligent inquiries as to the accepted industry position. The Committee's failure to inquire into the industry position before laying the charges was reckless, or at best a failure to act reasonably.

[38] Mr Hern notes the Committee's submission that public bodies must be able to exercise their function without fear of exposure to adverse costs awards and that the courts tend to look for something else other than success. Counsel submits that this was rejected by the Court of Appeal in *Roberts v A Professional Conduct Committee of the*

Nursing Council of New Zealand and by the High Court in *Cavanagh*.[32] A public interest role does not give the Authority immunity from a costs award.

[39] However, even if the Tribunal accepts that something else is required to make a costs award, Mr Hern contends that such a requirement is satisfied here. The decision to lay charges was a grave error of judgement and a failure to exercise its function responsibly.

[40] As to the reasonableness of the costs claimed, Mr Hern says that the costs put forward are Ms Mather's actual costs and are reasonable. The charge was serious and effectively alleged dishonesty. The costs would therefore be expected to be high. Additionally, this was a complex disciplinary matter since there were:

1. Numerous allegations spanning more than a year.

2. Contractual issues, including unsigned contracts and implied terms.

3. Intellectual property, employment and jurisdictional issues.

[41] It is submitted that the cases show a pattern of scaled High Court costs being awarded for appeals and a percentage of actual costs being awarded where charges are laid. In the alternative, if the Tribunal determines that a court costs scheme is appropriate, the defendant accepts the Committee's submission that it should be based on the costs available under the High Court rules, with a starting point of $14,340. To this may be added the considerable aggravating factors that justify an uplift.

Submissions of the Committee

[42] In his submissions (26 October 2021) on behalf of the Committee, Mr Wheeler states that he is not aware of a previous matter where the Tribunal awarded costs against the Committee in a disciplinary proceeding. Nor has the defendant expressly asserted that any of the criteria listed in s 110A(2) of the Act has been made out against the Committee.

[43] Mr Wheeler accepts the general proposition that in civil proceedings costs follow the event and are typically awarded to the successful party. The Tribunal in *Beatson*, however, had noted that the decision in each case is discretionary and that it is not in every case that costs should follow the event.

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[32] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2014] NZCA 141.

[44] It is submitted by the Committee that the courts recognise that public bodies must be able to exercise their functions without fear of exposure to undue financial prejudice. In exercising their discretion as to whether costs should be ordered against a regulator properly exercising its functions in the public interest, the courts look to whether there is something else other than the party's success.

[45] The Committee submits that it acted reasonably and in good faith. It regarded Ms Mather's conduct as serious. It was appropriate for it to refer the matter to the Tribunal.

[46] The decision to lay charges did not reflect any error of principle or judgement by the Committee, rather it demonstrated a genuine view that disciplinary intervention should be considered by the Tribunal. The way the matter was conducted was not reckless or indifferent to the impact on the defendant, including the cost consequences for her.

[47] The subsequent decision to withdraw the charges was made at the earliest opportunity in light of fresh evidence in the form of an expert witness. This required reassessment of the Committee's understanding of the established position within the industry in relation to salespersons taking an agency's database contrary to contractual obligations. The Committee then took immediate steps to test and review the evidence, making inquiries of reputable industry members. Based on those inquiries, it made the decision to immediately withdraw the charges.

[48] Throughout the complaint process, the defendant's position was that she was unaware of the terms of her engagement and was entitled to take the database. The evidence filed presented a shift in her position. She now appeared to be asserting that taking the agency's client information, in breach of contract, was accepted practice in the industry. This was a development in the case requiring careful assessment.

[49] In *Beatson*, the Tribunal indicated the need to be assured the actual costs were reasonable. Most of the details on the invoices in the instant case have been redacted and not all of them include reference to the matter. The Committee submits the costs claimed are far in excess of what is reasonable. It is the responsibility of the party claiming costs to establish they are reasonable.

[50] As to the reasonableness, it is accepted by Mr Wheeler that the level of costs should be comparable to the seriousness of the alleged offence. It was a serious charge and effectively dishonesty. Reference is made by counsel to a number of awards of costs by the Tribunal. He submits that a comparison with those matters shows the

defendant's costs to be in excess of even the highest amount previously claimed or awarded after a full hearing, yet there was no hearing here.

[51] It is submitted by Mr Wheeler that a useful yardstick for the assessment of reasonable costs is the High Court costs scheme. That was the starting point in the Tribunal's *Beatson* and *Cavanagh* decisions. If the High Court's 2B scale is applied, the appropriate starting point would be $14,340. In *Cavanagh*, the Tribunal had applied a reduction recognising the Registrar's public interest role and the fact that the full burden of costs should not fall on the industry as a whole.

Discussion

[52] The Tribunal has a broad discretion to award costs.[33] Section 110A of the Act permits the Tribunal in "any" proceedings to make "any" award of costs, that "it thinks fit". The Tribunal may take into account the factors listed at s 110A(2). They are not exhaustive.

[53] On behalf of the defendant, Mr Hern submits, relying on the second *Beatson* decision, that the Tribunal has confirmed that costs awards are generally made to the successful party, the conventional approach in civil litigation.

[54] The Tribunal does not accept that there is any such invariable or presumptive rule. Both *Kooiman* and the first *Beatson* decision reject that approach. The second *Beatson* decision adopting the traditional costs following the event approach, must be seen in the context of the earlier *Beatson* decision confirming that the Tribunal has a discretion and that it is not in every case that costs follow the event. There will be certain cases, and *Beatson* is an example, where it is appropriate.

[55] There is another reason why *Beatson* has limited applicability in the context of the current application before the Tribunal, being that it is an example of a successful party obtaining costs against a losing appellant. Unlike the current case, it did not concern charges and the costs were not awarded against the Authority or Committee (which was itself a respondent).

[56] So, what are the applicable principles where costs are sought against the Committee where the charges are unproven, or in this case withdrawn?

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[33] *Beatson*, above n 21 at [32], *[Appellant] v Real Estate Agents Authority (CAC 1904)* [2021] NZREADT 2 at [43].

Costs where charges unsuccessful – the principles

[57] Mr Wheeler points out that the Tribunal has never awarded costs against the Committee. Relying on *Lagolago*, he submits that the courts recognise that public bodies must be able to exercise their functions without fear of exposure to an adverse costs award. It is said that the courts tend to look at the presence of something other than just success on the part of the other party.

[58] Mr Hern says the High Court rejected this approach in *Cavanagh*, following the Court of Appeal in *Roberts*. However, both those cases concerned costs in the higher courts, not in the relevant tribunal. The Court in *Cavanagh* made that expressly clear.[34] Even in *Roberts*, the Court of Appeal regarded the public function of the conduct committees as a factor, though it was a question of degree or emphasis.[35]

[59] The Tribunal has already noted that the financial characteristics of those who appear before it are usually different from those who appear before the HRRT and that it does not deal with abuses of state power.[36] That does not, however, make *Andrews* irrelevant. The importance of *Andrews* is the recognition that tribunals are different from the ordinary courts and this should be reflected in the approach to costs. There is a broader discretion. The costs outcomes are more dependant on the kind of proceeding and the circumstances of the particular case. There is no 'costs follow the event' rule, though there will be cases where that is appropriate.

[60] The rejection of a presumptive costs follow the event rule for disciplinary proceedings in tribunals with a broad jurisdiction, was reinforced in both *Lagolago* decisions.[37] It was accepted by the High Court that it is a relevant consideration that a regulatory function is being discharged in the public interest, but that would not be determinative.

[61] It is therefore relevant in the present case that the Committee was exercising a public function and that the costs will be borne by the profession. This does not give the Committee an immunity from a costs order. It would be setting the bar too high to require "something extraordinary" – such as dishonesty, a lack of good faith or proceedings a shambles from start to finish – before awarding costs.[38] We do though accept Mr Wheeler's submission that something else has to be present, beyond the failed

[34] *Cavanagh*, above n 14 at [13].
[35] *Roberts*, above n 32 at [28]–[29].
[36] *Beatson*, above n 21 at [28]–[29].
[37] *Lagolago*, above n 10 at [33]–[34], *Lagolago*, above n 12 at [22].
[38] *Lagolago*, above n 10 at [33].

charges, if costs are to be awarded against the Committee. It is not every case of unsuccessful or withdrawn charges that justify costs against the Committee.

[62] Mr Hern contends there is something else. He notes that the Committee has said it withdrew the charges because of new evidence adduced before the Tribunal that it is an accepted practice in the industry for licensees to take an agency's database with them, inconsistent with their contractual obligations, when leaving the agency. Mr Hern points out that Ms Mather has always said this. It was not new evidence. He submits that the Committee therefore filed the charges, which are serious, without making the diligent inquiries that a responsible regulator should undertake.

[63] The new evidence relied on by Mr Wheeler was the statement of Mr Crews (13 September 2021), an experienced licensed salesperson and trainer of such people. Mr Crews said it was not uncommon for salespeople to retain or download their listing and marketing records when moving from one agency to another, even if it is a technical breach of their employment contract. The practice has a long history. Many salespeople would not consider it a departure from standard real estate practice nor would they regard it as underhand. When it happens, the former agency will ask for the information to be returned or deleted, which almost always occurred.

[64] Mr Crews noted that when Ms Mather was engaged by the agency, the agreement with that company provided that she would be paid for relistings that came from her former agency.

[65] Mr Hern says Ms Mather has always relied on such a practice within the industry. He notes her statement to the Committee (15 September 2020) where she said:[39]

> … it is common industry knowledge and normal practice that agents take their client lists with them when they change companies.

[66] The Tribunal notes that in her statement Ms Mather makes the same point expressed by Mr Crews that the agency (Clark & Co) accepted and utilised her client base when she joined the agency.[40]

[67] Ms Mather's formal response to the charges, filed in the Tribunal on 9 July 2021 and therefore two months before Mr Crews' evidence, also relies on the common industry practice to upload contacts when leaving an agency.[41]

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[39] Bundle at 226–228.
[40] Bundle at 226–228.
[41] Response of Jane Mather to Charges (9 July 2021) at [6](d).

[68] We accept Mr Hern's submission that there has been no change of position by Ms Mather, though it was not her principal defence. Nonetheless, it was one of her defences and it was advanced early in the complaint process.

[69] That being the case, it is correct to contend that there was a lack of diligence by the Committee. It is incumbent on the regulator to make reasonable inquiries in investigating the defences put forward. The inquiries of reputable industry members made on receipt of Mr Crews' evidence should have been made before much of the work was undertaken in the Tribunal's process. Indeed, the defence should have been investigated before the charges were laid.

[70] We have decided that this is an appropriate case for costs to follow the event. This is not just because the complaint referred to the Tribunal was unsuccessful. It is because the failure of the charges came about due to a lack of diligence in investigating the defence put forward early in the investigation process.

Level of costs to be awarded

[71] This brings the Tribunal to assessing the level of costs to be awarded. It is plainly not actual or indemnity costs. Ms Mather is entitled to a contribution towards her actual costs, with the actual costs taken into account to be no more than is reasonable.

[72] The actual costs were $52,813.19. We agree with Mr Wheeler that this is high for a proceeding that ended before the hearing. Mr Hern explains the factors leading to the high costs. Mr Hern identifies multiple issues, but we do not consider the charges to be unduly complex.

[73] Previous decisions of the Tribunal as to the costs awarded in particular cases are not helpful. They are dependent on the specific circumstances of each case.

[74] However, we do not need to undertake an analysis of what tasks were necessary and the time each should reasonably take. This is because Mr Wheeler submits that, if costs are to be awarded, the High Court costs scale (category 2B) would be a useful yardstick in assessing what is reasonable. The starting point would therefore be $14,340. Mr Hern accepts this is one of the options. We agree it is reasonable.

[75] Mr Wheeler submits there should be a reduction to reflect the public interest regulatory nature of the proceedings. Mr Hern seeks an uplift, based on what he describes as the aggravating factors, such as the gravity of the charges, the risk to reputation and the complexity of the proceedings.

[76] We find that the Committee should make a contribution of $14,340 towards Ms Mather's costs. There will be neither a reduction nor an uplift.

[77] We do not believe that a reduction or an uplift are warranted in this case. The figure of $14,340 is already a significant reduction on Ms Mather's actual costs. As for Mr Hern's aggravating factors, they justify the uplift from the District Court scale to that of the High Court, but no further.

OUTCOME

[78] The Committee is to pay Ms Mather costs of $14,340 within 21 days of this decision.

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D J Plunkett
Chair

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N O'Connor
Member

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F Mathieson
Member