

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 12

Reference No: READT 028/2021

IN THE MATTER OF

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

BETWEEN

DC
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2106)**
First Respondent

AND

NC
Second Respondent

Hearing on the papers

Tribunal:

Ms C Sandelin (Deputy Chairperson)
Mr G Denley (Member)
Mr N O'Connor (Member)

Submissions received from:

The Appellant, DC
T Wheeler, on behalf of the Authority
The Second Respondent, NC

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 7 June 2022

INTRODUCTION

[1] DC (the Appellant) has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (the Act) from a decision of Complaints Committee 2106 (the Committee) to take no further action on the complaint in respect of NC (the Licensee).

[2] The complaint (the Complaint) relates to 2 transactions involving two adjoining properties in [region], which we will refer to as (property 1) and (property 2) (the properties). The Appellant was one of the purchasers of property 1 and the Licensee was the salesperson acting on the transactions relating to the properties.

[3] The Licensee is a licensed salesperson under the Act. The Licensee was employed by [Agency 1] (Agency 1) at the relevant time and is currently employed by another agency that is not a party to the Complaint.

BACKGROUND

[4] On 23 September 2003 the Appellant, along with his wife and his in-laws, entered into two agreements for sale and purchase (the ASPs). The properties were sold through Agency 1.

[5] The Appellant says he paid a total of \$85,000.00 as a deposit for the properties with \$75,000 securing property 1 and \$10,000 securing property 2.

[6] A dispute arose between the Appellant, his wife and his in-laws during the purchase of the properties.

[7] The Appellant alleges that Agency 1 was aware that the ASPs were inter-dependent and that he would only proceed if he could purchase both properties. We understand that the sale of Property 2 did not proceed.

[8] The Appellant alleges that Agency 1 followed verbal instructions from a solicitor acting for his mother-in-law (who was not listed on the ASPs for the properties) with the result that a sum of \$29,500.00 was refunded to his mother-in-law being the deposit for property 2. The Appellant submits he was not asked and did not give permission for the funds to be paid to his mother-in-law.

[9] The Appellant claims that the Licensee managed the sale of the properties and received commission from the transaction.

[10] The Licensee does not hold any records that relate to the matter complained about.

[11] Agency 1 is no longer an active company. Another company, [Agency 2] (Agency 2) was initially named as a party to the Complaint. However, Agency 2 was not licensed under the Act until 2009 and did not exist as an entity at the time of the alleged conduct.

[12] Another Licensee, HQ, was also named as a party to the Complaint but has since been removed.

The Complaint

[13] On 8 April 2021 the Appellant complained to the Real Estate Agents Authority CAC 2106 (the Authority) that the Licensee, Agency 2 and the other licensee HQ, released the deposit monies to the incorrect party without his permission.

[14] The Appellant requested a remedy being:

- (a) A refund of \$29,500.00
- (b) A determination as to whether Agency 2 acted correctly when releasing the deposit money.

[15] The Committee decided to inquire into the Complaint.

Committee Decision

[16] In a decision dated 23 September 2021 the Committee exercised its discretion under s 80(1)(a) of the Act and determined to take no further action on the Complaint. It found that:

- (a) The conduct complained of took place in 2003. Under s 80(1)(a) of the Act the Committee may decide to take no action on the complaint if, in the opinion of the Committee, the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable.
- (b) Agency 2 is named as a party to the Complaint. However, Agency 2 was not licensed until 2009 and was not involved in the transactions for the properties. For this reason, no action could be taken against Agency 2.
- (c) Agency 1 no longer holds an Agency licence and was liquidated and removed from the New Zealand Companies register on 11 January 2011. Accordingly, no action could be taken against Agency 1.

- (d) The Licensee and Agency 2 do not hold any records relating to the matter complained about.
- (e) Given the length of time that has elapsed between the date of the alleged conduct and the date of the Complaint, the Committee decided that an investigation of the Complaint was no longer practicable.

APPEAL

[17] In respect of the findings on his complaint against the Licensee, the Appellant has appealed on the grounds that (in summary) the Committee erred by:

- (a) not inquiring into the Complaint;
- (b) making mistakes in coming to its decision (which are set out in his Notice of Appeal).

[18] The determination of the Committee under s 80(1)(a) is a discretionary one. Section 80(1)(a) provides:

A Committee may, in its discretion, decide to take no action or, as the case may require, no further action on any complaint if, in the opinion of the Committee,—

- (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
- (b) the subject matter of the complaint is inconsequential.

[19] In *Hammond v Real Estate Agents Authority and Tafilipepe*,¹ the Tribunal accepted the approach to appeals concerning a Committee's decision in exercising a discretion in the stricter manner set out by the Supreme Court in *Kacem v Bashir*² as follows:

[32] But, for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

¹ *Hammond v Real Estate Agents Authority and Tafilipepe* [2020] NZREADT 34 at [43].

² *Kacem v Bashir* [2010] NZSC112, [2011] 2 NZLR 1 at [32].

[20] In order to interfere with the Committee's decision, we must be satisfied that the Committee's exercise of its discretion under s 80(1)(a) of the Act was deficient via one of the criteria set out in *Kacem*. That is, an error of law or principle, taking into account irrelevant considerations, failing to take into account a relevant consideration or that the decision is plainly wrong.

[21] As noted by the Tribunal in *Moseley v Real Estate Agents Authority*,³ a decision that is "plainly wrong" is one that was not open to the Committee to make on the evidence before it.

[22] In *Reid v Complaints Assessment Committee and Cottle*,⁴ the Tribunal also dealt with an appeal against the decision of the Committee not to enquire into a complaint against a licensee pursuant to s 80(1)(a) of the Act. The Tribunal referred to the criteria in *Kacem* and found that the Committee was not wrong to take no further action as the lapse between the conduct complained of and the complaint being made was of such a long period of time that it made further investigation impractical.

[23] An appeal is by way of a rehearing.⁵ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁶ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁷

[24] The burden of proof lies with the Appellant to establish that the appeal has been made out. That is, the Appellant is required to establish that the Committee made an error of law or principle, took irrelevant considerations into account or failed to take relevant considerations into account, or that its decision was "plainly wrong".

SUBMISSIONS

(a) Appellant's Submissions

[25] The crux of the Appellant's submissions is that the Licensee and/or Agency 1 released deposit money to the incorrect party without his permission. He submits the following:

- (a) that the Licensee has not substantively responded to the Complaint;

³ *Moseley v Real Estate Agents Authority* (CAC 1907) [2021] NZREADT 19 at [55].

⁴ *Reid v Complaints Assessment Committee and Cottle* [2011] NZREADT 10.

⁵ Real Estate Agents Act 2008 s 111(3).

⁶ Section 111(4).

⁷ Section 111(5).

- (b) that the Committee made no effort to obtain possible further relevant information directly from him before coming to its decision to take no further action;
- (c) that the solicitor who instructed that the money be released to his mother-in-law has provided him with evidence that a theft took place and that the Licensee has a responsibility to explain what happened.

(b) Licensee's submissions

[26] The Licensee submits that she has no records relating to the transactions. Agency 1 was the only legal party able to release the deposit from the trust account. The Licensee had no authority, control or access to the trust account.

(c) The Authority's submissions

[27] The Authority submits that there is nothing to suggest that the Committee has made an error of law or principle in the exercise of its discretion. It submits that s 80(1)(a) appears to anticipate the scenario the Committee faced in this case, where a complaint is made many years after the alleged conduct. It submits that s 80(1)(a) of the Act acts as a gateway to prevent the Committee from attempting to engage in potentially futile or unnecessary inquiries.

[28] It further submits that there would be a real risk of prejudice to the Licensee if the Complaint were to proceed any further, as she is unable to respond substantively to the Complaint due to the passing of time. A licensee should not be expected to maintain records of transactions from 18 years ago in anticipation of a complaint.

[29] The Authority submits that there is no indication that the Committee failed to take into account an irrelevant consideration and that the Committee:

- (a) considered that Agency 2 was not licensed at the time of the alleged conduct and therefore no action could be taken against them;
- (b) considered that Agency 1, who received and disbursed the deposit money the Complaint relates to is no longer a Licensee or active company, and therefore no action could be taken against them;
- (c) considered that the Licensee was the salesperson of record for the transaction but possessed no records relating to the matter due to the long period of time between the transaction and the Complaint.

[30] It further submits that all relevant information was before the Committee and on 23 July 2021 the Committee wrote to the Appellant to check whether any documentation was missing. It submitted that the Appellant declined to add any further documentation and approved the documents that were considered.

[31] The Authority submits that the information provided to the Authority by the Appellant confirms the concerns raised by the Committee about the practicalities of proceeding with an investigation. The documents provided by the Appellant were not complete and the Licensee has no documentation at all. Given the length of time that has elapsed no entity would be expected to have a complete record of the transaction.

[32] The Authority further submits that no information was provided by the Appellant as to why the transaction for property 2 did not progress, nor that the deposit money paid out was from money supplied by the Appellant. There are also no supporting documents to establish that there were insufficient deposit funds for the sale of Property 1. The Authority submits that the fact that it did proceed would suggest otherwise.

DISCUSSION

[33] The Committee confirmed in its decision that it considered all relevant information before it in coming to its decision.⁸ Neither the Committee nor the Tribunal is able to deal with the merits of the Complaint due to the lapse of time between the alleged conduct and the date of the Complaint, and consequently the lack of documentation.

[34] We agree with the submissions by the Authority. The Appellant has not persuaded us that the Committee has:

- (a) made an error of law or principle;
- (b) taken account of irrelevant considerations;
- (c) failed to take into account relevant considerations;
- (d) reached a decision which is plainly wrong.

[35] On the evidence before it, the Committee was correct to rely on the provisions of s 80(1)(a) of the Act to take no further action against the Licensee. Given the effluxion of time, the Licensee has no documentation whatsoever relating to the deposit monies for the transactions and is therefore unable to provide a defence to the Complaint.

⁸ Committee's decision (23 September 2021) at [2.1].

OUTCOME

[36] The Appellant's appeal is dismissed. The decision of the Committee is confirmed.

[37] 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.

PUBLICATION

[38] The Committee directed publication of its decision without the names or identifying details of the Appellant (including the addresses of the Properties), the Licensee and any third parties.

[39] In light of the outcome of this appeal, and the interest of the parties and the public, it is appropriate to order publication without identifying the Appellant, the Properties, the Licensee or any third parties.

Ms C Sandelin
Deputy Chairperson

Mr G Denley
Member

Mr N O'Connor
Member