

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 6

Reference No: READT 012/2021

IN THE MATTER OF

An application for review of a Registrar's decision under s 112 of the Real Estate Agents Act 2008

BETWEEN

PETER LAWRENCE
Applicant

AND

THE REGISTRAR OF THE REAL ESTATE AUTHORITY
Respondent

Tribunal:

D J Plunkett (Chair)
C Sandelin (Deputy Chair)
N O'Connor (Member)

Representation:

The applicant:

B Walker

The Registrar:

M Hodge

The licensees:

K Perry, A Wainstein

SUBJECT TO NON-PUBLICATION ORDER

RULING OF THE TRIBUNAL
(Application of licensees to be heard)
Dated 11 April 2022

INTRODUCTION

[1] On 10 November 2020, the Real Estate Authority (“the Authority”) received a complaint from Mr Lawrence against three licensees engaged by [the agency]. The complaint was in respect of the licensees’ marketing of Mr Lawrence’s property in Christchurch. He complained that the licensees had not acted in his best interests by failing to present him with all offers on the property, resulting in a loss of \$98,000.

[2] On 19 April 2021 Ms Ramsay, the regulatory services manager of the Authority (acting under delegated authority from the Registrar of the Authority) wrote to Mr Lawrence advising him of her determination that the complaint would not be referred to a Complaints Assessment Committee (“the Committee”) for determination, but would be dealt with under s 74(3)(a) of the Real Estate Agents Act 2008 Act (“the Act”). The ground for her determination was that the complaint disclosed only an inconsequential matter and did not need to be pursued.

[3] On [redacted], the Tribunal ruled that the right of review under s 112 of the Act is not restricted to the Registrar’s licensing decisions.¹ The Tribunal had jurisdiction to hear and determine Mr Lawrence’s application for review of the Registrar’s determination under s 74(3) that his complaint was an inconsequential matter and need not be pursued.

Licensees seek to be heard

[4] On 9 February 2022, the licensees filed a Memorandum requesting the opportunity to be heard at the hearing of the review application, whether as respondents or otherwise.

[5] Mr Perry, on behalf of the licensees, contends that the right to be heard is a substantive right to ensure justice during a hearing.² It is in the interests of justice that the licensees be allowed to make submissions on a decision which will inevitably affect them.

[6] The applicant for review might have the opportunity to file further evidence. If the licensees are not a party, they will not have the opportunity to speak to the new evidence, an opportunity which was previously afforded to them in the first instance.

¹ [Redacted].

² New Zealand Bill of Rights Act 1990, s 27(1) (right to natural justice).

[7] A review hearing may be seen to operate akin to an appeal, as it will give the Tribunal the power to confirm, reverse or modify the decision. If there was an appeal, the licensees would be a party to the appeal on the basis that the decision affected them.

[8] The Tribunal can regulate its procedures as it thinks fit and allow the licensees to be heard.³ If the Tribunal is not minded to accept that the licensees ought to be heard as of right, they request to be allowed to appear if the applicant brings any new evidence. If they have the right to be heard, they would be content with filing written submissions only.

[9] A Minute (No. 3) was issued by the Tribunal on 17 February 2022 setting out a timetable for submissions on the licensees' application.

[10] There are no submissions from Mr Lawrence.

Registrar opposes hearing licensees

[11] In submissions (4 March 2022), the Registrar submits that the licensees' request should be declined.

[12] Mr Hodge, on behalf of the Authority, relies on s 106(1) of the Act which sets out who may be represented before the Tribunal. It states that any person whose rights may be affected by a proceeding is entitled to be heard, other than on a review under s 112. He submits that it is clear that a person has no entitlement to appear even though their rights may be affected by the review.

[13] This review is of a determination of the Registrar under s 74(3) made in relation to a complaint. It is a decision at the outset of the complaint and disciplinary process, prior to an inquiry being carried out. The Registrar may consider information from persons other than the complainant, including the licensee, but is not required to hear from the licensee or any other person.

[14] It is submitted that the Registrar's task is to determine whether the complaint comes within any of the categories set out in s 74(3). The licensee, the subject of the complaint, does not have the right to be heard by the Registrar. Consistent with this, the licensee does not have the right to be heard by the Tribunal on a review of the Registrar's determination.

³ Real Estate Agents Act 2008, s 105.

[15] The relevant parties to a review are the complainant and the Registrar. The licensee has an interest in the outcome but is not regarded as a party. Section 106(1) is directly on point.

[16] The statutory position is reflected in cl 10(3) of the Regulations, which can be contrasted with cl 9(3) of the Regulations concerning an appeal.⁴

[17] The Registrar's power of determination in s 74(3) was inserted into the Act to make the complaints and disciplinary process more efficient and effective. Prior to 14 November 2018, all complaints received by the Authority had to be referred to a Committee. According to Mr Hodge, experience showed this resulted in a disproportionately high number of complaints resulting in no further action. The 2018 amendments allowed for some of them to be triaged out by the Registrar.

[18] It is submitted that licensees have no rights to be heard because they are fully protected by the subsequent Committee process under the Act. If the Registrar refers a complaint to a Committee, the licensee is able to make their case to the Committee as to why no further action should be taken and may appeal to the Tribunal against an adverse decision. This may be contrasted with a complainant's right to pursue a complaint which can be ended by a s 74(3) determination.

[19] The procedure adopted by the Tribunal should be the one which best minimises the impact on the efficiency of the triage power created by the 2018 amendments. In addition to requiring further procedural steps, the participation of affected licensees in the review process risks dragging the Tribunal into a consideration of the merits of a complaint before the complaint has been referred to a Committee.

[20] As for admitting new evidence, it is submitted that it should be permitted on a review of a decision under s 74(3) only with the leave of the Tribunal in accordance with the usual appellate principles.

Licensees reply to Registrar's opposition

[21] In the licensees' reply submissions (14 March 2022), it is submitted that the licensees' right to be heard is a matter of justice. The matter to be determined concerns the interests of the licensees, who are the subject of the complaint and the ones affected by the decision. It is necessary they be heard in order to reach a fully informed, fair and just decision. That would be especially so where the complainant proposes to bring in new evidence.

⁴ Real Estate Agents (Complaints and Discipline) Regulations 2009.

[22] While the Registrar is not required to hear from the licensees, the fact is that here the Registrar afforded that opportunity to the licensees. This was appropriate.

[23] The objectives of the 2018 amendments will not be undermined by allowing the licensees to be heard. On the contrary, they will be met.

[24] The question before the Tribunal is whether the Registrar's determination should be confirmed, reversed or modified. In answering that question, the Tribunal will consider the same information that was provided to the Registrar, including the licensees' response. Any submissions or evidence that the licensees give will be necessary to answering that question.

[25] For this reason, the licensees reject the Registrar's submission that their rights will be protected by the Committee's subsequent process. These rights will have been denied if the review proceeds without the licensees being heard. The licensees will otherwise be potentially prejudiced in time and cost, by having to participate in a process which may be avoided if they were heard at the review stage.

[26] As for new evidence, it would be incongruous in the context of a review hearing if the Tribunal considers information that was not before the Registrar when the decision was made.

Discussion

[27] On receipt of a complaint, the Authority must refer it to the Registrar who makes a decision (determination) in accordance with s 74:

74 Complaints about licensees

...

- (2) When the Authority receives a complaint under this section, the Authority must—
 - (a) refer the complaint to the Registrar of the register of licensees, who must consider whether to deal with the complaint under subsection (3); and
 - (b) if the Registrar decides not to deal with the complaint under that subsection, refer the complaint to a Committee for determination and notify the person complained about of the reference.
- (3) The Registrar may determine that—
 - (a) the complaint discloses only an inconsequential matter, and for that reason need not be pursued:

- (b) the complaint is frivolous or vexatious or not made in good faith, and for that reason need not be pursued:
- (c) the complaint should be referred to another agency, and refer it accordingly:
- (d) the complaint has been resolved to the complainant's satisfaction and no further action is needed.

[28] In accordance with the Tribunal's decision in *[Redacted]*,⁵ the decision of the Registrar under s 74(3)(a), if not any decision under s 74(3), may be the subject of review in the Tribunal under s 112:

112 Application to Tribunal to review determination by Registrar

- (1) An applicant may apply to the Tribunal against a determination of the Registrar that adversely affects the applicant within 20 working days after the date the applicant is notified of the determination.
- ...
- (4) After conducting the review, the Tribunal may confirm, reverse, or modify the decision of the Registrar.
- (5) If the Tribunal reverses or modifies a determination of the Registrar, it may exercise any of the powers that the Registrar could have exercised.

[29] In this case, Mr Lawrence, the complainant before the Authority, seeks review of a decision by the Registrar not to pursue his complaint because it discloses only an inconsequential matter.

[30] The licensees say they should be heard on the review application, but the Registrar opposes.

[31] The fundamental argument of the licensees is that they are a party whose rights are affected by the decision of the Tribunal and it is a matter of natural justice that they be heard. It is said that the Tribunal will also be better informed.

[32] We note in this regard the statutory imperative as to the Tribunal's duty to comply with the rules of natural justice.⁶

[33] The Registrar submits that s 106(1) makes it clear that a person whose rights may be affected by a review under s 112 does not have an entitlement to appear and be heard:

⁵ *[Redacted]*.

⁶ Real Estate Agents Act 2008, s 105(2).

106 Representation before Disciplinary Tribunal

- (1) Every person whose rights may be affected by a proceeding of the Disciplinary Tribunal (other than a review under section 112) is entitled to appear and be heard at the hearing of that proceeding and to be represented by counsel or otherwise.

...

[34] This is reinforced by the regulation relating to service by the Tribunal of a review application under s 112 (reg 10(3)):

A copy of the application must be given, without delay, by the Disciplinary Tribunal to the Registrar.

[35] This may be contrasted with service of an appeal filed with the Tribunal under s 111 (reg 9(3)):

A copy of the notice of appeal must be given, without delay, by the Disciplinary Tribunal to—

- (a) the Complaints Assessment Committee that made the determination; and
- (b) any other person who has been notified under section 81 or 94 of the Act of the determination appealed against.

[36] Sections 81(1) and 94(1), as referred to in reg 9(3), both refer to the licensee, the subject of the complaint.

[37] Section 106(1) does not bar the licensees from being heard, since the Tribunal could still lawfully hear them if the interests of justice required this. It is, however, compelling evidence of Parliament's intention as to who should be heard on the application. The intention, it seems to us, is to create an efficient and effective process before the Tribunal, reflecting the stage in the complaint process at which a s 74(3)(a) decision is made and the Registrar's response (which is favourable to the licensee). The contrast with the appeal process under s 111 against decisions of a Committee (at the conclusion of the process and where a decision could be adverse to a licensee) could not be clearer.

[38] Mr Hodge emphasises that the Registrar's decision under s 74(3) is made at the outset of the process, prior to any inquiry (or, at least, prior to any formal inquiry by a Committee since the Registrar can inquire by seeking information from others including the licensee). Both counsel agree that at that point in the process, the licensee has no *right* to be heard, though the licensee *may* be heard, as occurred here. The absence of any right to be heard by the Registrar is also apparent from s 74(2)(a), as contrasted with s 74(2)(b) if the Registrar refers the complaint to a Committee.

[39] Consistent with having no right to be heard by the Registrar, Mr Hodge says the licensee has no right to be heard by the Tribunal on a review of that decision. This is because the process at this stage is intended to be efficient and effective. It is submitted that the licensees are fully protected by the subsequent process. Mr Perry disputes the existence of protection, since the licensees' rights will be denied if the review proceeds without the licensees.

[40] Mr Hodge is correct as to licensees being fully protected by the later process in the event of a decision by the Registrar under s 74(2)(b) to send the complaint to a Committee, or a decision by the Tribunal on review to reverse the Registrar's decision and send the complaint to a Committee. On the other hand, a decision of the Registrar under s 74(3), or its confirmation by the Tribunal on review, ends the complaint process under the Act. There is no later process and no need to protect the licensees.

[41] We find the express exclusion in s 106(1) of those whose rights are affected by a review decision, aside self-evidently from the party seeking review and the responding Registrar, to be an important factor in the issue before us. Contrasting that with appeals under s 111, the difference appears to us to be deliberate.

[42] It is relevant to have regard to the nature of the Registrar's decision. It is not about the merits of the complaint, except at a low threshold level. The review before the Tribunal will not involve debate about the merits, beyond whether the threshold to send the complaint to a Committee is met. We agree with Mr Hodge that hearing from the licensees risks dragging the Tribunal into a debate about the merits of a complaint and an investigation into those merits before the Committee does so (if it is found to be an appropriate case to send to a Committee). The statutory process is for the Committee to conduct the investigation, if so warranted, not the Tribunal.

[43] We have yet to consider and rule on our power to allow new evidence not before the Registrar on a s 112 review of a s 74(3) decision, but make the observation that we would be reluctant to grant such leave, lest the Tribunal stray into what is the proper role of the Committee (if the threshold is met). If we permit licensees to be heard, we are concerned about the risk of them seeking to adduce new evidence, particularly if the Registrar did not give them that opportunity, as is the Registrar's right.

Conclusion

[44] The licensees have no right to be heard on the review under s 112 of a decision of the Registrar under s 74(3)(a). It is not required in the interests of justice. Section 106(1) points against any such right. In the event of an adverse decision by the Tribunal,

they are protected by the Committee's investigation process. There is no right to be heard whether or not new evidence is permitted by the Tribunal.

OUTCOME

[45] The application by the licensees to be heard is dismissed.

[46] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, which sets out the right of appeal to the High Court of any determination of the Tribunal.

Further directions

[47] The application for review is to be set down for a hearing by AVL.

PUBLICATION

[48] At this stage, no complaint against the licensees has been upheld. Having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying the licensees or their agency.

D J Plunkett
Chair

C Sandelin
Deputy Chair

N O'Connor
Member