BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 62

READT 019/17

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	NILE MOSLEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First Respondent
AND	COOPER & CO REAL ESTATE LIMITED t/a HARCOURTS COOPER & CO Second Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Submissions received from:	Mr N Mosley, Appellant Mr M Mortimer, on behalf of the First Respondent Mr J Skinner, on behalf of the Second Respondent
Date of Decision:	11 October 2017

DECISION OF THE TRIBUNAL

Introduction

[1] The appellant, Mr Mosley, has appealed against the decision of Complaints Assessment Committee 409 ("the Committee"), dated 18 May 2017, ("the decision") in which the Committee decided to take no further action in relation to his complaint against the second respondent, Cooper & Co Real Estate Limited, trading as Harcourts Cooper & Co ("the Agency").[1]

Background

[2] Mr Mosley is the owner of a property at Ostend, Waiheke Island ("the property"). He lives in Thailand. On 23 January 2016, he entered into a Residential Property Management Authority" agreement with the Agency, pursuant to which he appointed the Agency as property manager of the property ("the property management agreement"). The parties to the property management agreement were named as follows:

AGENT:	Cooper & Co Real Estate Ltd T/A Harcourts, Licensed Agent Real Estate Agents Authority 2008 Trading as HARCOURTS Cooper & Co
OWNER:	Nile Mosley

[3] On 27 January 2016 the Agency entered into a tenancy agreement pursuant to which the property was let to tenants for a fixed term from 6 February 2016 until 12 February 2017 ("the tenancy agreement"). The tenancy agreement named the parties as follows:

LANDLORD:	Cooper & Co Real Estate Ltd T/A Harcourts, Licensed Agent Real Estate Agents Authority 2008 Trading as HARCOURTS Cooper & Co
AS AGENT FOR THE PREMISES OWNER:	Nile Mosley

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1 *Re Cooper & Co Real Estate Limited*, Complaint No C15252 "Decision to Take no Further Action", 18 May 2017.

LANDLORD OCCUPATION:	Property Manager
TENANT(S):	Jennifer & Levi Stewart; Krystle & James

[4] Early on 8 April 2016, the Agency advised Mr Mosley by email:

> There is a rat infestation at your property and the tenants are having to be re-housed temporarily.
>
> …
>
> Have discussed everything with my HOD and have taken their advice for managing the situation.

[5] In several emails between Mr Mosley and the Agency during the period from 8 April to 15 April, Mr Mosley challenged the truth of the assertion of a rat infestation, and its cause, and the Agency continued to maintain the existence of a rat infestation. While noting Mr Mosley's challenge to both the existence of a rat infestation and (if there were an infestation) its extent, we will as a matter of convenience refer to this issue as "the rat infestation".

[6] The Agency also asserted that there were issues as to the safety of the electrical wiring in the property, and that the hot water cylinder to be replaced. This was also challenged by Mr Mosley. Again, noting Mr Mosley's challenge to there being no issue as to the safety of the electrical wiring, we will as a matter of convenience refer to this issue as "the unsafe wiring".

[7] Another issue raised by the Agency was the tenants' assertion that there were rats in the roof of the property. Mr Mosley responded to the Agency that the noise heard by the tenants came from birds nesting on the roof.

[8] The Agency engaged a contractor to deal with the rat infestation, and an electrician to deal with the unsafe wiring. The Agency advised Mr Mosley on 8 April that the electrician had disconnected lights and that the contractor was attending to the rat infestation.

[9] Of particular relevance to this appeal are the following:

[a] On 9 April, Mr Mosley emailed the Agency:

> Actually, if the cylinder has been rewired and is working, and if the rat problem in the shed is being attended to, and the noise in the top bedroom is coming from birds, then really there is no reason why the tenants cannot move back in today. There is no health risk, and the lighting circuit will be fixed Monday.
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> …
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> … If the wiring is safe (but needs attention), and animal control have the rats under control, then it would be reasonable for the tenants to be able to return tomorrow.

[b] On 10 April, after Mr Mosley had noted that the electrician had said the property had been "made safe", the Agency emailed Mr Mosley:

> … we would be breaking the law by allowing tenants back into the property, we must protect the safety of our tenants, if this is not acceptable then we would be unable to manage the property for you …

[c] Later, on 10 April, Mr Mosley emailed the New Zealand Operations Manager of the Harcourts Group setting out his concern as to the Agency's management of the property, including that the Agency had taken the unilateral view that his property was unsafe and rehoused the tenants.

[d] On 11 April Mr Mosley emailed the Agency:

> … Now I'm instructing you to manage my property and get the tenants back into that house ASAP.
>
> …
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> … As a matter of urgency and by the end of today, I would like a progress report on how near my tenants are to being moved back into my property, what delays there are and what problems have still to be resolved.

[e] The Agency responded the same day, setting out a chronology of actions taken. The Agency said:

> On Friday we had to find alternative accommodation for your tenants because of the health and safety issues at the property. The tenants were understandably very stressed at having to share their home with some very large rats. … Because of the health and safety issues stated above we had no option but to find alternative accommodation for the tenants.

[f] Mr Mosley responded:

> There is a process for dealing with rats, and that process does not include rehousing the tenant at the landlord's expense. … The reason for the tenants being continually rehoused because of an electrically unsafe

> house, was and is also not true. … I am finding a replacement agent. … Until you have stopped providing the management service I have been paying for, I would like my tenants back into the house as soon as possible, with lights in the lounge working and availability to hot water. I will not pay for time in the temporary accommodation for the reasons already stated.

[g] The Agency emailed Mr Mosley on 12 April:

> … We have come to the conclusion that it is in the best interest of the property owner/landlord/tenant that the tenants be released from the tenancy without penalty to allow for the infestation to be brought under control, the water tanks checked and any other issue(s) be rectified. …The tenants have been relocated to a temporary dwelling until such time as a suitable property can be secured, we will advise when the tenants have removed all their belongings from the property. … once the tenants have fully vacated the property, we will advise you. This will then bring to a close the Management Agreement between Harcourts Cooper and yourself in regards to [the property].

[10] While there appears to have been no evidence of any formal termination of the fixed term tenancy agreement before the Committee, the tenants did not return to the property, and they stopped paying rent.

[11] There is no evidence of any formal termination of the property management agreement, but the Agency's intention to do so was made clear in the Agency's email of 12 April, set out above. The property management agreement did not allow for termination prior the end of the term of the agreement, except where there had been a default and written notice of the default was given. There is no evidence of any such notice being given. The Agency's intention to terminate the agreement was repeated in an email from the Chief Executive Officer of the Harcourts Group on 13 April, in which he noted that "[the Agency has] released you from the Management agreement".

[12] New agents appointed by Mr Mosley emailed the Agency on 14 April asking for confirmation that the Agency's management was cancelled as from that day. There is no evidence of a response from the Agency, but the Chief Executive Officer of the Harcourts Group said in a letter to Mr Mosley on 17 May that the management agreement was terminated on 19 April, "when the keys were handed to your new property manager".

[13] The tenants had paid rent up to 16 April 2016 (one week after they vacated the property). The Agency paid them $550 as "relocation expenses".[2]

[14] Mr Mosley applied to the Tenancy Tribunal for an order that the tenants pay arrears of rent. The tenants cross-applied for compensation. Mr Mosley's application was dismissed, and he was ordered to pay the tenants $2,495.44, being 50 percent of the rent they paid during the nine weeks they occupied the property plus reimbursement of the filing fee. Mr Mosley also applied for orders against the Agency; that application was struck out.

[15] Mr Mosley appealed to the District Court against the Tenancy Tribunal decision. His appeal was dismissed in a judgment issued on 6 July 2017.[3]

The complaint

[16] A complaint may be made about the conduct of a licensee pursuant to s 74 of the Real Estate Agents Act 2008 ("the Act"). Mr Mosley complained to the Real Estate Agents Authority ("the Authority") on 13 June 2016. His complaint was that:

[a] The Agency, while acting as landlord, unlawfully assisted the tenants to unlawfully terminate their tenancy agreement;

[b] The Agency stole $412.00 from him; and

[c] The Agency was in breach of the tenancy agreement and the property management agreement by failing to collect rent or keep records of rent or accommodation paid for, and allowing the tenants to terminate their tenancy agreement without conforming to any of the prescribed reasons allowing for termination set out in s 50 of the Residential Tenancies Act 1986.

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2 The Agency made a number of errors in accounting for the deduction from Mr Mosley's rental account. The Authority's investigator set out the relevant book entries in her report to the Committee.

3 *Mosley v Stewart and Huston* [2017] NZDC 14694.

[17] In particular, Mr Mosley said that the allegation of rat infestation was untrue (and any problem as to rats on the property was dealt with by way of an eradication programme), as was the allegation of unsafe wiring. Mr Mosley noted several instances where any alleged problem could have been remedied if the Agency had taken steps to do so, and said that such steps as the Agency did take, were not taken soon enough.

[18] The Committee inquired into the complaint (assisted by the Authority's investigator ("the investigator")) then conducted a hearing on the papers,[4] before issuing its decision.

The Committee's decision

[19] The Committee referred to the two types of conduct covered by the Act: unsatisfactory conduct and misconduct.[5] A Complaints Assessment Committee may only make a finding of unsatisfactory conduct, if it is satisfied that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct.

[20] The Committee noted that unsatisfactory conduct can only be considered in the context of a licensee carrying out "real estate agency work", which is defined in s 3(1) of the Act, and that property management work is not included in the definition of real estate agency work.

[21] With respect to misconduct, the Committee noted that only the Tribunal has the power to make a finding of misconduct, if an appropriate charge is referred to it by the Committee.[6] It also noted that the Agency's conduct could only be misconduct if it came within s 73(a) of the Act, that is, if it would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful[7].

[22] The Committee said that in order for the Committee to refer a charge of misconduct to the Tribunal, it must be satisfied that there is a prima facie case to do

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4 Pursuant to s 90 of the Act.
5 Decision, at paragraph 3.1.
6 At paragraphs 3.4 and 3.5.
7 At paragraph 3.7.

so.[8] The Committee also said that a failure by a licensee to meet their ordinary contractual obligations would not alone amount to misconduct, unless those failures were "so gross and perverse as to amount to disgraceful conduct".[9]

[23] The Committee found that "there is no doubt that there was a problem with rats at the Property",[10] and that "there is no doubt that there was a problem with the electrics at the Property".[11] The Committee considered that the Agency was not justified in terminating the tenancy agreement, contrary to Mr Mosley's instructions, but concluded that any breach could not amount to disgraceful conduct:[12]

> Despite finding the Agency should not have terminated the tenancy agreement when it did and accepting it acted contrary to the specific instructions of [Mr Mosley], the Committee is not satisfied there is a prima facie case for an allegation of misconduct to proceed to the [Tribunal]. It is unable to conclude that what happened here is a gross and perverse failure on the part of the Agency or its employees. The evidence does not establish bad faith or dishonesty by the Agency employees engaged in this transaction. The [Tribunal] is not an appropriate venue to address breaches of contract which do not amount to disgraceful conduct.

[24] With respect to Mr Mosley's allegation of theft, the Committee found no evidence of any dishonest appropriation of funds belonging to Mr Mosley. He had been told that the Agency was going to re-house the tenants at his cost, and funds held to his credit (that is, one week's rent) were paid to the tenants.[13]

[25] The Committee found no breach of the property management agreement that was so gross and perverse that it could amount to disgraceful conduct in the circumstances.[14]

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8 At paragraphs 3.11 and 3.12.
9 At paragraph 3.9, referring to the Tribunal's decision in *Eden v Complaints Assessment Committee 10059* [2011] NZREADT 6, at [38].
10 At paragraph 3.21.
11 At paragraph 3.23.
12 At paragraph 3.55.
13 At paragraph 3.66.
14 At paragraphs 3.71 and 3.72.

Relevant legal principles

Disgraceful conduct

[26] In its decision in *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* the Tribunal said:[15]

> The word disgraceful is in no sense a term of Art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.
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> The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to make. …

[27] In his judgment in *Morton-Jones v Real Estate Agents Authority*, his Honour Justice Woodhouse said[16]

> If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards …

[28] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful". Where a licensee carries out property management work, the disciplinary provisions of the Act have no application unless (as relevant in the present case) the licensee has engaged in conduct which would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[29] When determining whether conduct would reasonably be regarded as disgraceful, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, in order to promote and protect the interest of consumers in

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15 *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* [2010] NZREADT 6, at [55] and [56].

16 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

respect of transactions relating to real estate, and of promoting public confidence in the performance of real estate agency work.

The nature of this appeal

[30] Section 89(1) of the Act provides that after inquiring into a complaint, the Committee "may" make one or more of the determinations set out in s 89(2). In the present case, the Committee exercised its power under s 89(2)(c) of the Act pursuant to which the Committee may make a determination:

> … take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.

[31] We note that s 80(2) of the Act is in similar terms. It provides that:

> … The Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[32] The use of the word "may" indicates that the Committee was exercising a discretionary power. As this appeal is against the exercise of a discretion, the Tribunal is required to determine whether Mr Mosley has established that in determining to take no further action with regard to his complaint the Committee made an error of law or principle, took irrelevant considerations into account or failed to take relevant considerations into account, or was plainly wrong.[17]

[33] It is important to note that if the Tribunal is satisfied that the Committee erred in one or more of those respects, it can only exercise such powers as the Committee could have exercised.[18] In the present case, as Mr Mosley's complaint was as to property management work carried out by the Agency, the only outcome, if the Tribunal allows his appeal, would be that the complaint is referred back to the Committee to consider whether a charge of misconduct under s 73(a) of the Act should be laid.[19]

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17 See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 2011; *Edinburgh Realty Limited v Real Estate Agents Authority* [2016] NZHC 2898, at [111].

18 Section 111(5) of the Act.

19 *Edinburgh Realty Limited v Real Estate Agents Authority*, above n 16, at [131](c).

[34] On this appeal, the Tribunal cannot determine whether or not the Agency should be found guilty of misconduct. Nor could the Committee, if Mr Mosley's complaint were to be referred back to it. All the Committee could do is determine whether a charge should be laid against the Agency, so that the Tribunal could then determine, after hearing evidence and submissions, whether the Agency is guilty of disgraceful conduct.

Appeal submissions

Mr Mosley

[35] Mr Mosley advised the Tribunal that his submissions on appeal were set out in his Notice of Appeal. The Tribunal summarises those submissions as follows:

[a] The Agency acted in bad faith in that while the property management agreement provided for the Agency to "act on his behalf," the Agency created the tenancy agreement, that allowed them to "act as landlord". Then, he submitted, the Agency had terminated the tenancy agreement while impersonating the landlord. He submitted that the Agency's actions met the requirements of "disgraceful conduct" and the Committee should have recognised it as such.

[b] The Committee made a "deeply flawed" assumption as to the Tenancy Tribunal Adjudicator's Order; that is, that the adjudicator had "already considered the [tenancy agreement to be in bad faith]". He submitted that it was "not recorded in [the adjudicator's] minutes that she was aware that [the Agency] did not have the required authority from the Owner to act as landlord". He submitted that the Committee's assumption had prejudiced him greatly.

[c] On receiving his complaint, the Committee decided it would only investigate the misappropriation of funds. He submitted that at no time did the investigator, the Committee, or the Authority tell him it was comprehensively investigating the legality of the tenancy agreement.

[d] The Committee cited the outcome of the Tenancy Tribunal adjudication, with the assumption that she knew that the tenancy agreement was in bad faith, when the investigator had told Mr Mosley that his appeal to the Tenancy Tribunal bore no relevance to the Committee's investigation. He submitted that the tenancy agreement could not "start out as bad faith, and miraculously become good faith contract". He submitted that this must have been clear to the Committee before it decided what to investigate.

[e] At no time did the investigator, the Committee, or the Authority, tell him that it was investigating unlawful termination of the tenancy agreement. He submitted that "removing the outcome of the adjudicator after his complaint was made left the Committee with the only possible outcome that the tenancy agreement was unlawfully terminated as the Agency was never authorised to act as landlord".

[f] The Committee did not mention in its investigation that the tenants reported at the Tenancy Tribunal hearing that the rats were so bad that one of the tenants had to move out, on 22 February 2016. Mr Mosley submitted that this was a sizeable omission which prejudiced him, as it clearly linked the Agency and the tenants to their bad faith contract.

[g] As the Agency had acknowledged (by not denying the tenants' evidence at the Tenancy Tribunal hearing) that it was told of each problem as it arose, it was therefore aware of the rats as early as February 2016, but waited for six weeks before "calling animal control". He submitted that this showed that the only reason for the delay was a malicious intent to increase the rat numbers.

[h] The Committee did not mention that issues with the electrical wiring were raised by the Agency after the tenants had left the property (which he said was wrongly stated by the Committee to be on 8 April 2016, when in fact they left on 7 April). Thus, he submitted, the Committee could not find that the tenants had to be re-housed on 7 April because of an electrical fault discovered on 8 April. Mr Mosley submitted that the Committee did not

investigate this matter further, and in particular did not obtain evidence form him.

[i] A Certificate of Verification provided by an electrical inspector on 15 January 2016 showed the property to be electrically sound. He submitted that it could not be known what the tenants did to the electrical wiring after moving in to the property, and their obvious intent to cause damage with a rat infestation must cast serious doubts as to the Agency's claim that the property was electrically unsafe.

[j] The Committee wrongly found that he had terminated the property management agreement, when it had an email from the Chief Executive of the Harcourts Group (Mr Kennedy) which, he submitted clearly stated that the agreement was terminated by the Agency on 19 April 2016. He further submitted that even if he had terminated the property management agreement, the Agency terminated the tenancy agreement, "impersonating the landlord", after the property management agreement had been terminated.

[k] The conclusion that the tenancy agreement was unlawfully terminated, and that he "could never have been landlord", was "inescapable".

[l] The Committee wrongly failed to include Mr Kennedy in its investigation.[20]

[m] The Committee was wrong to find that there was no dishonesty on the part of the Agency when it rehoused the tenants at his expense. He submitted that, as he was not listed as the landlord on the tenancy agreement, he was not liable to the tenants.

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[20] In the light of Mr Mosley's consent to Mr Kennedy being removed from the appeal proceeding, this submission does not need to be considered further.

The Agency

[36] The submissions for the Agency assert that it is for the Authority to respond to Mr Mosley's challenges to the Committee's reasoning and findings. As is normal in appeals against the decisions of judicial bodies, the Authority usually takes a neutral view as to the appeal, and its submissions are made in order to assist the Tribunal to determine the issues raised in the appeal. The normal course is for the actual protagonists (in this case, Mr Mosley and the Agency) to make submissions challenging or supporting the Committee's decision.

[37] The submissions for the Agency do not provide a response to Mr Mosley's challenges to the Committee's reasoning and findings, so are of little assistance to the Tribunal. The Tribunal acknowledges the assistance provided in the detailed submissions for the Authority, which were filed after those for the Agency.

The Authority

[38] Mr Mortimer submitted for the Authority that Mr Mosley's points on appeal could be grouped under three broad headings:

[a] the alleged rat infestation at the property, the Agency's response, and the Committee's findings on the point;

[b] the alleged unsafe electrical wiring, the Agency's response, and the Committee's findings on the point; and

[c] the property management agreement and the tenancy agreement, and the Agency's authority to cancel the tenancy agreement.

[39] Mr Mortimer submitted that in deciding to take no further action on Mr Mosley's complaint, the Committee had not erred by making any error of law, taking irrelevant considerations into account, failing to take relevant considerations into account, or had been "plainly wrong".

(a) The rat infestation

[40] Mr Mortimer submitted that there was evidence before the Committee on which it could properly find that there was a rat infestation. He referred to emails to Mr Mosley relaying the existence and extent of the infestation, photographs of dead rats, reports, and an invoice from the contractor engaged to deal with the rats. He also referred to the Tenancy Tribunal determination that the rat infestation was sufficient for a finding that the landlord had not complied with obligations under the Residential Tenancies Act 1986.

[41] Mr Mortimer further submitted that there was no evidence before the Committee that supported Mr Mosley's contention that the Committee had failed to address an apparent delay between the time the rats first appeared on the property and the Agency's first mention of the problem to him, and that the tenants intended to exacerbate the problem by means of that delay.[21]

[42] Mr Mortimer submitted, with respect to one tenant's submission to the Tenancy Tribunal that she had moved out of the property on 22 February 2016 because of the rats, that there was no evidence that the Agency was told of the problem at that time. He submitted that there was, therefore, no evidence that the Agency did in fact intentionally delay in dealing with the rat infestation.

[43] Mr Mortimer also submitted that it was unclear why either the tenants or the Agency would want to exacerbate a rat problem in a property in which the tenants were living, and over which the Agency had management responsibilities.

[44] Mr Mortimer submitted that the Committee considered all relevant matters in respect of the rat infestation, and did not bring any irrelevant matters into account in its consideration, and was not plainly wrong to find that there was a rat infestation at the property.

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21 See Mr Mosley's submissions at paragraph [32] (f) and (g) above.

(b) Unsafe wiring

[45] Mr Mortimer submitted that in this respect also, the Committee had before it relevant evidence from which it could reasonably find that there was a problem with unsafe wiring. He referred to emails advising Mr Mosley of the issue, an invoice from the electrician who attended the property, and his report as to the work done, and needing to be done, and an email from the electrician to Mr Mosley advising that, once disconnected, the unsafe wiring had become safe, but a thorough examination had not been undertaken. He also referred to the Tenancy Tribunal adjudicator's finding that the electrical problems at the property were sufficient to find that obligations under the Residential Tenancies Act had not been complied with.

[46] He also submitted that there was no evidence before the Committee to support Mr Mosley's submission that references to unsafe wiring were a post hoc justification for terminating the tenancy agreement, or that the Certificate of Verification produced by Mr Mosley established that the property was electrically sound before the tenants moved into the property.[22]

[47] Mr Mortimer submitted that the issue of unsafe wiring was brought to the Agency's attention by the tenants when matters came to a head early in April, and the electrician's report was forwarded to Mr Mosley the morning after it was received. With respect to the Certificate of Verification, he submitted that it was only evidence that the property as a whole had been reconnected to the electricity mains,[23] and was not an electrical certificate of compliance or electrical safety certificate, as provided for in the Electricity (Safety) Regulations 2010.

[48] Accordingly, Mr Mortimer submitted, the Committee took into account all relevant considerations relating to the issue of unsafe wiring, and did not take irrelevant considerations into account, and its conclusion that there was an issue with unsafe wiring at the property was not plainly wrong.

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22 See Mr Mosley's submissions at paragraph [2](h) and (i), above.

23 Mr Mortimer noted that the word "reconnection" was circled on the Certificate.

(c) Termination of the Tenancy Agreement

[49] Mr Mortimer first submitted that any issue as to whether the tenancy agreement was validly cancelled is a matter of residential tenancy law and, given the definition of real estate agency work in the Act, is outside the scope of real estate disciplinary law. He also noted that the Tenancy Tribunal had ruled that the Agency had the authority under the Residential Tenancies Act to cancel the tenancy. He further noted that the District Court had upheld the Tenancy Tribunal decision, on all points.[24]

[50] Mr Mortimer submitted that it is clear from the email communications between Mr Mosley and the Agency that he did not agree that the rat infestation and unsafe wiring issues either existed or were insurmountable, and that Mr Mosley had clearly instructed the Agency to have the tenants return to the property. Mr Mortimer submitted that there is, therefore, only one live issue, which is whether the Agency acted without authority in releasing the tenants from the tenancy agreement.

[51] He submitted that it was plain, on the basis of the Tenancy Tribunal decision (subsequently upheld by the District Court) that the agency had legal power (as landlord under the tenancy agreement) to do so. He submitted that as agent for the owner of the property (Mr Mosley), the Agency could not act against his instructions. He referred to the Committee's finding that it appeared on the face of it that the Agency had breached the terms of the property management agreement when it acted contrary to Mr Mosley's instructions.

The allegation of theft

[52] Mr Mortimer submitted that the Committee had not erred in finding that the Agency had not stolen $412 from him. He submitted that, at most, the Agency had given Mr Mosley an incorrect financial statement, which had been corrected later. He further submitted that all funds had in fact been put to proper purposes.

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[24] The District Court judgement on appeal from the Tenancy Tribunal was not of course before the Committee, as it was delivered on 6 July 2017.

The Committee's decision to take no further action

[53] Mr Mortimer submitted that the key issue for determination is whether the agency's termination of the tenancy agreement contrary to Mr Mosley's instructions disclosed a prima facie case for a charge of misconduct. He noted the Committee's statement that conduct underlying a breach of contract must be "gross and perverse", and undermine a licensee's fitness to carry out real estate agency work."[25]

[54] Mr Mortimer acknowledged that people in Mr Mosley's position had considerable justification for feeling badly let down by property managers who act contrary to their instructions, but noted that residential property management was excluded from the ambit of the Act, which generally restricted Committees' power to take disciplinary action.

[55] In response to Mr Mosley's submissions concerning the Agency's termination of the tenancy agreement,[26] Mr Mortimer submitted that in this case, in finding that there was no prima facie case for referring the complaint to the Tribunal on a charge against the agency of misconduct,[27] the Committee did not commit any error of law or principle. He referred to the following:

[a] the Committee had found there to be a rat infestation at the property, and that there was unsafe wiring, both of which related to the health and safety of the tenants;

[b] the tenants no longer wanted to live at the property and had been re-housed;

[c] the Agency owed duties to the tenants as landlord under the terms of the tenancy agreement; and

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25 See paragraph [21], above.
26 See Mr Mosley's submissions at paragraph [32] (a), (b), (d), (e), and (k), above.
27 At paragraph 3.55 of the Committee's decision, set out at paragraph [22], above.

[d] Mr Mosley, the Agency's principal under the property management agreement, was instructing the Agency to deal with the problems and to ensure that the tenants returned to the property.

[56] Mr Mortimer submitted that the Committee was rightly critical of the Agency having terminated the tenancy agreement in apparent contravention of the terms of the property management agreement, and in acting swiftly in doing so, but submitted that it had made no error of law or principle in concluding that the agency's failure to follow instructions did not present a prima facie case for a charge of disgraceful conduct. He referred to decisions of the Tribunal in which it was made clear that a very high threshold must be reached before residential property management work can be considered to be "disgraceful".[28] He submitted that the Committee's decision in this case was consistent with the relevant authorities as to disgraceful conduct, and that it made no error.

[57] He submitted that the Agency's communications with Mr Mosley showed that in declining to follow his instructions it was motivated by an honest belief in the lawfulness of its conduct. He referred to the Agency's statements that "we would be breaking the law by allowing the tenants back into the property, we must protect the safety of our tenants, if this is not acceptable to you then we would be unable to manage the property for you".[29]

[58] Mr Mortimer further submitted that the motivations for actions will have a bearing on whether conduct was "disgraceful", and noted that the Agency has "had some vindication" from the Tenancy Tribunal decision (upheld by the District Court) that the Agency "had responsibility to comply with all of the rights and obligations of a landlord".

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28 See *Complaints Assessment Committee (CAC 20003) v Wright* [2015] NZREADT 25; *Complaints Assessment Committee (CAC 406) v Scheirlinck and El-Ghalayini* [2015] NZREADT 92; *Real Estate Agents Authority (CAC 302) v Kahukura* [2016] NZREADT 70.

29 See paragraph [9](b), above.

Discussion

The Committee's findings concerning rat infestation and unsafe wiring

[59] We accept Mr Mortimer's submissions that in concluding that there was "no doubt that there was a problem with rats on the property", and that there was "no doubt that there was a problem with the electrics with the property". In each case, the Committee made those findings on the evidence before it. It referred to the statements by and on behalf of the Agency, and Mr Mosley's statements. We are not persuaded that in either case the Committee made any error of law or principle, failed to take relevant considerations into account, took irrelevant considerations into account, or was plainly wrong.

The Committee's finding that the Agency terminated the tenancy agreement contrary to Mr Mosley's instructions

[60] We also accept Mr Mortimer's submission that the Committee did not make any error of law or principle, or as to the considerations taken into account, in finding that the Agency was legally able to terminate the tenancy agreement. We further accept his submission that the Committee made no error in concluding that the Agency terminated the tenancy agreement contrary to Mr Mosley's instructions as its principal under the property management agreement.

The Committee's finding that the Agency did not steal $412 from Mr Mosley

[61] We accept Mr Mortimer's submission that the Committee made no error of law or principle, or as to considerations taken into account, in dismissing Mr Mosley's complaint that the Agency stole $412. The Committee was provided with a full explanation of the Agency's accounting for the disbursement of the tenants' final rent payments (including as to the Agency's accounting errors). We are not persuaded that it was wrong to find that Mr Mosley's allegation of theft had not been established.

Does the Agency's breach of the property management agreement constitute a prima facie case for a charge of disgraceful conduct?

[62] This is, as Mr Mortimer submitted, the key issue to be determined on this appeal.

[63] We have referred, at paragraphs [25] to [28] above, to the general principles relating to determining what is "disgraceful conduct", with reference to the Tribunal's decision in *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in liq),*[30] and the judgment of the High Court in *Morton-Jones v Real Estate Agents Authority*.[31]

[64] We turn to consider the circumstances of Tribunal decisions as to allegations of disgraceful conduct in the context of property management.

[65] In *Morton-Jones*, the licensee property manager short-paid property management rental money to three clients (totalling $42,854.23) over the period from 2009 to 2013. He eventually repaid $26,114.76, but failed to provide any reasonable explanation for the short payments. The Tribunal found that the licensee had knowingly used rent owing to clients for his own benefit, and found him guilty of misconduct (disgraceful conduct). That finding was upheld by the High Court on appeal.

[66] In *Complaints Assessment Committee (CAC 20003) v Wright*,[32] a licensee property manager did not advise his owner clients the identity of the tenant, and did not provide them with a copy of the tenancy agreement. He put himself in a conflict of interest by himself leasing the garage on the property, he failed to supply full rental statements to the landlords, and he failed to provide the Authority with full records. The Tribunal found that the licensee's conduct, although unsatisfactory, was not at the level of disgracefulness.

[67] The Tribunal took into account that the licensee thought that his conduct was permitted by the Residential Tenancies Act, and by the terms of his management contract.

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30 *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* [2010] NZREADT 6, at [55] and [56].

31 *Morton Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

32 *Complaints Assessment Committee (CAC 20003) v Wright* [2015] NZREADT 25.

[68] In *Complaints Assessment Committee (CAC 406) v Scheirlinck and El-Ghalayini*,[33] two licensee property managers collected tenant bond money that should have been lodged with the Department of Building and Housing, and used the money to pay a debt to the Inland Revenue Department. The Tribunal found that the licensees' conduct was not at the level of being disgraceful. The Tribunal said:[34]

> … The Act does not require property managers to be regulated as agents, nor does it require property managers to operate a trust account. … for a property manager to overdraw their trading account, or inadvertently to pay their own personal debts before accounting to the Department of Building and Housing could amount to unsatisfactory conduct were this real estate agency work. However, it is not. … The facts simply do not support any evidence of [a disgraceful] level of misconduct.

[69] In *Complaints Assessment Committee (CAC 302) v Kahukura*,[35] the licensee property manager collected rents from tenants but did not pay them over to the owner. She used the rent payments for her own purposes. The Tribunal accepted that the licensee did not intend to deprive the owner permanently, and intended to pay the owner when she had funds to do so. The Tribunal accepted a submission for the Committee that the licensee's conduct "fell well short of being beyond reproach" but (as property management work is not within the definition of real estate agency work) did not reach the level of disgraceful conduct under s 73(a) of the Act. The Tribunal noted that it was not able to consider the licensee's conduct under any other disciplinary provision of the Act.[36]

[70] We are not persuaded that the Agency's conduct in this case should be regarded any differently from the cases referred to above. The Agency's conduct in terminating the tenancy agreement contrary to Mr Mosley's instructions, and in terminating the property management agreement contrary to the terms of that agreement, can only be regarded as less serious than that in *Morton-Jones*, and no more or less serious than that in *Wright, Scheirlinck and El-Ghalayini*, and *Kahukura*.

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33 *Complaints Assessment Committee (CAC 406) v Scheirlinck and El-Ghalayini* [2015] NZREADT 92.
34 At [24].
35 *Complaints Assessment Committee (CAC 302) v Kahukura* [2016] NZREADT 70.
36 At [37]–[39].

[71] As was the case in the three cases referred to in which property management conduct was not found to be disgraceful conduct, we observe that if property management work were able to be considered as real estate agency work under the disciplinary provisions of the Act, the Committee may well have been justified in finding a prima facie case for a charge of misconduct against the Agency under a different subsection of s 73, or finding that the Agency had engaged in unsatisfactory conduct. However, as the Tribunal has stated in those cases, property management work does not come within the scope of the disciplinary provisions of the Act, unless it constitutes disgraceful conduct.

Outcome

[72] In the circumstances, the Tribunal dismisses Mr Mosley's appeal. The Committee's decision to take no further action stands.

[73] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. 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 N Dangen
Member

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Ms C Sandelin
Member