

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 20

READT 033/18

IN THE MATTER OF

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

BETWEEN

GARY STONE
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 412)
First Respondent

AND

SUSAN LIM
Second Respondent
(Not participating in the appeal)

Hearing:

17 April 2019

Tribunal:

Mr J Doogue, Deputy Chairperson
Ms C Sandelin, Member
Mr N O'Connor, Member

Appearances:

Mr G Stone, appellant
Ms C Paterson on behalf of the Authority

Date of Decision:

22 May 2019

DECISION OF THE TRIBUNAL

[1] The appeal which the appellant, Mr. Stone, [“Mr. Stone”] has brought involves revisiting the decision of a Complaints Assessment Committee 412 [“CAC”] issued in May 2018 in which it decided not to bring proceedings against the second respondent who we will refer to as “Ms. Lim.”

[2] The charges which could have been brought against Ms. Lim would be under section 73 of the Real Estate Agents Act (“the Act”). The nature of the statements which Ms. Lim made about Mr. Stone and which were the subject of his complaint to the Real Estate Authority (“the Authority”) will appear from the discussion that follows in this decision.

[3] There is no elaboration in section 73 of the Act which establishes the offence of misconduct as to what is involved in conduct which is disgraceful. In the High Court Judgment of Morton-Jones.¹, Woodhouse J stated that in the case where disgraceful conduct is alleged under section 73 (a) the conduct in question was of the following kind:

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.

[4] The underlying proposition which Mr. Stone puts forward is that in making what are alleged to be false complaints about him to the Real Estate Agents Authority which had the potential to damage his reputation and standing, Ms. Lim behaved disgracefully.

[5] Mr. Stone has the burden of proof in establishing on the balance of probabilities that the statements were made and that they were false. If Mr. Stone provides evidence which is acceptable and which carries the factfinder to the point where, in the absence of any evidence to the contrary, that it is satisfied that it is more likely than not that the claims were false, then the charge will be proved. If however, at that point evidence is provided by the licensee which causes the factfinder doubt whether the charges are

¹ Committee decision at [3.34].

proved on the balance of probabilities that the complaints were false, then the charge must be dismissed

[6] We will start by considering the issues raised in the current appeal.

Issues

[7] Analysis of the question of whether the Tribunal should set aside the decision of the CAC and, if so, on what grounds, must be preceded by a consideration of the legal nature of the determination which the CAC made.

[8] The decision which the CAC made was one which it was made pursuant to section 80 of the Act which states that the Committee “may” decide to take no action. It gives rise to the question of what limits are there to the choices that they can make and the grounds upon which they make them.

[9] The first matter to be considered is the nature of the discretion which is vested in the Committee. The Committee must be guided by principle when making a decision not to bring charges. To decide what the principles are, it is necessary to understand the role of the Committee at the stage of the proceeding where it is considering whether or not to bring charges. This discussion will involve consideration of the CAC as a prosecutor and wider statements of principle governing the discretion of prosecutors generally when deciding to prosecute.

[10] Next, we will briefly consider the approach that the CAC adopted to determine if the discretion to prosecute was correctly exercised. After that, we will consider whether there has been an error and if it is possible for the Tribunal to modify the decision of the CAC

[11] The next question concerns what orders the Tribunal should make if it intervenes.

Principles governing the discretion to prosecute an appeal from the exercise of the discretion

[12] In the helpful submissions which Ms. Paterson made, she described the role of the CAC in the following terms:

- [a] [The CAC] must be satisfied there is a prima facie case of misconduct or evidence that provides a reasonable prospect of a finding of misconduct. An example of this can be seen in *Sherburn v Real Estate Agents Authority* where the Tribunal held when reviewing a decision not to refer a matter that:²

[48] While a substantive hearing about the appellant's conduct under the Act will turn on credibility, at this point, [the Tribunal were] only concerned with whether there is a prima facie case against the defendant. It was not the Committee's role to make credibility findings but merely to decide whether there is a prima facie case to support its charge to be heard by us.

- [b] The Tribunal further stated:

*[49] ... the Committee is a **gatekeeper and has a screening** role as to whether charges should be laid for us to hear regarding the conduct of a licensee...*

...

*[52] The approach to an appeal from a decision to lay a charge was addressed by the Disciplinary Tribunal decision in *Brown v Complaints Assessment Committee 10050* and *Wealleans [2011] NZREADT 42*, where the Tribunal held:*

*[29] ... the decision to lay a charge is the **exercise of a different power** to the decision to reach a finding of unsatisfactory conduct under s 72. Once the finding to lay a charge is made the CAC then becomes the prosecuting body and prosecutes that charge before the Tribunal. **It must have sufficient evidence in order to consider that there are grounds to lay a charge.** Section 89 makes it clear that the CAC **may** make a determination after both enquiring into the complaint and conducting a hearing. But the section also makes*

² *Sherburn v Real Estate Agents Authority* [2012] NZREADT 33 at [48].

*clear that the CAC **do not** need to be satisfied on the balance of probabilities that the licensee has engaged in conduct contrary s 73 [before laying a charge] in direct contradiction to the power given to the CAC to make a finding under s 72 (when they must be satisfied). This analysis leads us to the conclusion that an appeal [under] s 111 on a decision to lay a charge must be limited to an appeal from [the complaints assessment Committee's] **screening role**. Further support comes from the limited power on appeal as the Tribunal must put itself (when conducting the appeal) in the role of the Committee under s 89. Thus the appeal can be on this point only, "**is there a case to answer?**" (or any of the other functions under s 89).*

[13] The Authority submitted that:

[a] "The Committee's discretion to refer matters to the Tribunal is akin to prosecutorial discretion. *Edinburgh Realty Ltd v Scandrett* again provides a short summary:

[113] ... Whether to refer a charge to the Tribunal for its consideration involves the exercise of its discretion. The Tribunal itself has recognised that such a decision involves the exercise of prosecutorial discretion and that any appeal from a Complaints Assessment Committee's decision not to lay a misconduct charge is to be treated accordingly.

*[114] The Tribunal, in *Dunn v Real Estate Agents Authority*, observed that it would only consider such an appeal if it could be said the decision was an error of law, took into account irrelevant considerations, or failed to take into account relevant considerations, or was plainly wrong. It was noted that such an approach permitted an appeal under s 111, but recognised many of the policy reasons applicable to the **cautious approach to the review of decisions not to lay criminal charges**.*

*[115] This Court tacitly approved that approach in *Nottingham v Real Estate Agents Authority*. Thomas J observed that "**the Court may be slower to interfere in a decision of a prosecutorial nature given the policy considerations which arise**". The Judge noted that notwithstanding the statutory right of appeal, it would be necessary for the Court to be persuaded that the prosecutorial decision the subject of the appeal was not one reasonably open to the decision maker.*

(footnotes omitted, emphasis added)

- [b] The Authority acknowledges that the discretion the Committee's exercises is akin to a prosecutorial discretion. Although Committees do in fact "prosecute" charges,³ plainly they do so within the context of the Act and for the purposes of regulating the real estate industry. They are not criminal prosecutions. That affects the degree of respect the Tribunal affords them in scrutinising Committees' referral decisions. It remains high, because it is still a discretion. But it is not necessarily the same as courts of superior jurisdiction reviewing criminal charging decisions. Again, *Edinburgh Realty Ltd v Scandrett* describes the difference:⁴

*[116] ... The jurisdiction to prosecute under the Real Estate Agents Act is obviously exercised within **relatively confined parameters in comparison to prosecutorial decisions under the general criminal law**. The context in which such prosecutorial decisions are made will affect the factors which may bear on the exercise of the discretion. This may be particularly acute in assessing the **public interest in pursuing a disciplinary prosecution**, having regard to such considerations as delay, the health of the licensee, or whether that person is any longer in practice.*

*[117] An important competing consideration in the exercise of prosecutorial discretion in this context will be the consumer protection focus of the legislation. I have already noted the purpose of the legislation, which is to protect the interests of consumers in respect of transactions that relate to real estate, and to promote public confidence in the performance of real estate agency work. This purpose is sought to be achieved by the regulation of agents, the raising of industry standards, and by providing accountability through a disciplinary process that is independent, transparent and effective. Accordingly, while a decision to prosecute necessarily involves the exercise of a discretion as was recognised by the Supreme Court in *Kacem v Bashir*, **the context may be such that the same level of deference may not need to be afforded to the responsible charging body as would be the case when the police or Crown make such charging decisions.***

- [c] Having established that Committees exercise a discretion, it is necessary to identify the factors that are relevant to the exercise of that discretion.

- [d] The Authority submits that these fall into two broad categories:

³ Real Estate Agents Act 2008, s 78(e).

⁴ *Edinburgh Realty v Scandrett* [2016] NZHC 2898 at [116]-[117].

- [i] whether there is sufficient evidence; and
- [ii] whether there is sufficient public interest in referring a matter.”

[14] In another passage from the submissions, counsel for the authority stated:

1.1 “Such an approach is consistent with the Solicitor-General’s Prosecution Guidelines which state:⁵

5.1 Prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

*5.1.1 The evidence which can be adduced in Court is sufficient to provide a **reasonable prospect of conviction** – the Evidential Test; and*

5.1.2 Prosecution is required in the public interest – the Public Interest Test.

*5.2 Each aspect of the test must be separately considered and satisfied before a decision to prosecute can be taken. The Evidential Test must be satisfied before the Public Interest Test is considered. The prosecutor **must analyse and evaluate all of the evidence and information in a thorough and critical manner.***

...

5.5 Once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of conviction, the next consideration is whether the public interest requires a prosecution. It is not the rule that all offences for which there is sufficient evidence must be prosecuted. Prosecutors must exercise their discretion as to whether a prosecution is required in the public interest.

[15] We agree that the above submissions correctly state the basis upon which the Tribunal ought to approach the present appeal.

⁵ Solicitor-General’s Prosecution Guidelines 2015.

The approach that the CAC took to exercising the discretion to prosecute

[16] The CAC correctly identified that it had had before it a complaint by Mr. Stone that Ms. Lim had made accusations against Mr. Stone when he was a tutor at the Open Polytechnic in 2008, and she was an enrolled student, he was asked to conduct a face-to-face assessment with Ms. Lim on which he failed her. She says that around the time when this occurred:

- [a] Mr. Stone invited her out to dinner which she declined;
- [b] he told his manager that Ms Lim had accused him of;
 - [i] sexually abusing her and demanding extra cash;
 - [ii] interfering in her obtaining a diploma;
 - [iii] accused him of further unspecified sexual abuse, theft and corruption

[17] Further, the CAC noted that in 2015 when Mr. Stone was the Head Tutor at Tafe College, Ms. Lim enrolled in verifiable training and that she lodged a complaint with the Authority about the 2008 matters and made allegations additionally that:

- [a] TAFE College failed to receipt a \$300 course fee;
- [b] failed to provide her with course materials;
- [c] that in 2008 he committed sexual abuse in regard to her and demanded extra cash; the complaint apparently was also that she gave money to Mr. Stone which was intended for Open Polytechnic which did not receive the money; that he interfered a lot in her obtaining her real estate diploma and the TAFE College “situation” was controlled by Gary Stone.

[18] The CAC also noted that in December 2015 Ms. Lim made a similar complaint to the New Zealand Qualifications Authority (NZQA).

[19] They noted that in February 2016 Ms. Lim told an employee of the authority that Mr. Stone said that he wanted to come back to her house; that he took her to a car park where he touched her back and did not let her leave the car park⁶.

[20] Mr. Stone strongly disputed the allegations which he described as:

comprising theft, corruption, assault, sexual abuse and abduction

[21] Subsequently, Ms. Lim served a trespass notice on Mr. Stone which stated that the reasons why it was being served were because of “sexual assaults, theft, false statements, forged identity, and threatening for canceling my licence (sic).”

[22] That matter was not an issue which the CAC was required to deal with, but it could be relevant as a means of checking the consistency of the specifics of the complaint that Ms. Lim has made about Mr. Stone. That evidence has potential relevance in determining the truthfulness of Ms. Lim if that is required to be undertaken. This information was received at the authority after it had reported on its investigations to the CAC at the end of 2017 and the information was not passed on to the CAC. It was therefore not taken into account by the CAC when making its decision

[23] In the part of its decision headed “Available Evidence,” the CAC concluded that because of the passage of time any further enquiries were unlikely to elicit further evidence. It said that there was a “high threshold to meet in determining a preliminary finding of disgraceful conduct.”

[24] The CAC reviewed earlier decisions of the Tribunal where disgraceful conduct charges arising from alleged improper complaints had been considered. Some of those cases involved consideration of circumstances where it was difficult to establish a case of a breach of the rules for making an improper complaint where there were multiple purposes underlying the making of a complaint and where one of those purposes was legitimate.⁷

⁶ BD 14

⁷ CAC decision, paragraph 3.42

[25] The CAC said:

Even if the Committee was to find that there was sufficient evidence before to determine that the Licensee's original complaint against the Complainant was fabricated, and on the evidence before it the Committee is far from making this determination, the evidence would need to establish further that the Licensee had no genuine reason at all for making her complaint.⁸

[26] The CAC noted the absence of contemporaneous documentary evidence. It is not clear what the significance of this point was as there does not seem to be any substantial dispute on the part of Ms. Lim that the various statements attributed to her were actually made, rather, she appears to take the position that they were true.

[27] The Committee recorded that it had –

“no direct or written evidence before it that supports that the Complainant fabricated her complaint. The Licensee has over time made complaints of reasonable detail and specificity. She has identified times and places, and the substance of what was said. The complaint is, on its face, not completely fanciful, cannot be dismissed as inherently implausible.”

[28] In addition to deciding the question of whether charges are to be made on the basis of the quality of the evidence available, the CAC also made some comments about the public interest aspect of the matter. Specifically, it observed:

3.67. Further, the Committee accepts there are public interest grounds that favour only proceeding with charges like these where there is a strong case to be made that the allegations were intentionally false.

Assessment of the decision of the CAC

[29] We consider that the key question that needed to be determined was whether there was a prima facie case which Ms. Lim was required to answer.

⁸ CAC decision, paragraph 3.43

[30] In our view, the decision of the CAC taken overall has gone beyond the point of determining whether there was a prima facie case which would support charges against Ms Lim.

[31] Mr. Stone has given evidence that Ms. Lim made the statements and that they are false. If the evidence that he has given on this point was uncontradicted, then it is likely that a Tribunal would take the view that Ms. Lim had made the allegations attributed to her against him and that they were false.

[32] In our view, the CAC was not required to go further and examine possible defence evidence and come to a view about whether having weighed the evidence of Mr. Stone against that of Ms. Lim, the charges would not be established to the required standard. We consider that the description of the role of the CAC which is set out in *Sherburn v Complaints Assessment Committee*⁹ and to which counsel for the authority referred us makes that clear.

[33] Considerations of the kind which the CAC went into such as the level of particularisation of the complaint of sexual abuse, the consistency of the assertions made by the complainant over time in matters of that sort are not required to be gone into at this stage. The task of the CAC was to exercise its powers under section 89 which include making:

- (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal

[34] In our view, s 89(a) makes it clear that it is for the Disciplinary Tribunal, rather than the CAC, to enquire into the questions that are necessary to an order that a determination can be made of the case and these include issues of credibility.

[35] We do not accept that it is the role of the Committee to engage in an assessment of the strength of the case in the way suggested. It is necessary to keep in mind that what is being considered at this stage of the hearing as the question of whether, assuming that the evidence of Mr. Stone was accepted, the acts and conduct generally of Ms. Lim which that evidence describes, amounted to a breach of section 72 of the

⁹ [2012] NZREADT 33

Act. If that question is answered in the affirmative, and charges consequently issue, it will then be for the Tribunal, after hearing all the evidence, to determine whether the charge is proved on the balance of probabilities.

[36] In anticipating defences of the kind which the Committee considered Ms. Lim would be able to put before the adjudicating body, the Committee went beyond what was permissible. It would seem to be correct in principle that in deciding whether there is a prima facie case or not there may be circumstances not disclosed by the evidence of the complainant which the Tribunal is required to take into account because they may have the effect of defeating a prosecution. It may be instructive to take a simple example borrowed from criminal jurisdiction. In such an example, if there was evidence that a person accused of an act was actually serving a term of imprisonment at the time or, to take another example, if DNA evidence established that it could not have been him who was responsible, then the prosecution would be entitled to take these into account even though they might strictly be viewed as defence contentions. The prosecution would be able to take those circumstances into account in deciding that there was no substantial prospect of a conviction.

[37] It is a question of fact and degree. If establishing such propositions was a relatively straightforward matter, then the prosecution could well take the view that there was no point in bringing a prosecution because there was no realistic prospect of a conviction.

[38] But to go beyond that issue and to draw conclusions, as the Committee did, about how the adjudicating tribunal might view the veracity of the complaints which Ms. Lim had made, the internal consistency of her evidence and its inherent credibility, the level of particularisation and other issues went well beyond the filtering role which the Committee was required to discharge. The same remark can be made regarding the matter of whether because in making the complaints Ms. Lim was possibly acting in good faith her conduct did not amount to misconduct for the purposes of the Act. Those are all matters which have traditionally been reserved as substantive issues in the case which the trial or hearing process is best equipped to resolve.

[39] We agree that a reasonably lengthy period has elapsed, particularly since the 2008 sexual abuse complaints were first made. However, Mr. Stone's complaint to the authority was made in 2016. The fact that the events which are the subject of the complaint which was made in 2016 occurred some years previously does not on its own justify the exercise of the prosecutor's discretion not to proceed. There is, after all, no limitation period prescribed for the bringing of proceedings under the Act. If there is any other aspect of the matter which needs to be considered such as abuse of process-type arguments arising out of delay, the appropriate place for them to be dealt with is before the Tribunal.

[40] The disciplinary functions vested in the Committee and the Tribunal are designed to support the purpose of the Act which includes providing accountability through a disciplinary process: s3. Misconduct on the part of a licensed agent, even if it occurred some years previously, is no less relevant for the purposes of the Act in our view.

[41] In its decision, the Committee said:

The Committee wants to be clear. The Committee's determination to take no further action is not the same as saying that the original allegations against [Mr. Stone] have any merit. If that were to be determined, then the time for that was during [Ms. Lim's] initial complaint to the authority. That was dealt with by way of the letter and without referral to a Committee

[42] The making of damaging assertions to the authority should not be left unresolved in the manner in which the Committee proposes. The fact that the authority decided not to take any action at one of two points of time at which the allegations were made the subject of complaints, one by Ms. Lim and the other by Mr. Stone, is not a compelling reason to decide against bringing a prosecution.

[43] There are good reasons why allegations of this kind should be disposed of following the hearing of the Tribunal because, again referring to s 3, it is an objective of the Act to provide a "transparent" disciplinary process which will serve the purpose of encouraging public confidence that complaints against licensees will be dealt with in a transparent way. The bringing of a halt to a complaint by way of a discretionary

decision not to enquire into what are serious allegations, would not constitute a resolution of the complaint against a licensee in a way that could be described as transparent. It certainly did not provide an opportunity for an open hearing at which the allegations which Ms. Lim made could either be upheld or dismissed.

Conclusion

[44] For the reasons set out in this section, we are of the view that the decision of the CAC to embark upon an evaluation of the evidence of the protagonists' respective evidence amounted to an error of law or principle of the kind to which the Supreme Court referred its judgment in *Kacem v Bashir*¹⁰. In our assessment, the decision of the Committee should be set aside, and there will be an order accordingly.

[45] In our view, the grounds for reviewing the exercise of the discretion have been made out because the Committee in exercising its discretion took into account an irrelevant matter in that they considered the credibility of the respective parties. Their decision was in error because they did not restrict themselves to exercising a filtering role when deciding if charges ought to be brought.

What should happen next?

[46] Having concluded that the CAC decision not to bring charges against Ms. Lim ought to be reviewed, the next issue is what the procedure thereafter should be. Broadly, the choice is between the Tribunal referring the matter back to the Committee to reconsider or making its own decision as to whether or not charges should proceed against Ms. Lim.

[47] The events with which this appeal are concerned to go back as far as 2008. The complaint which the appellant made was received on 7 April 2016 at the authority. Because of the procedural course which the proceedings have followed, there were lengthy delays up until the point where the Committee made its decision on 25 May 2018.

¹⁰ Citation above

[48] Referring this matter back to the Committee would have the consequence of adding to the already considerable delays in dealing with the matter. To the extent possible, the Tribunal wishes to avoid further delays.

[49] In its decision in *Nottingham v Real Estate Agents Authority*,¹¹ the Court of Appeal determined that in appropriate cases the Tribunal having heard on appeal, could make an order referring a case to itself for consideration. In that particular case, the alternative course of referring the matter back to the Committee would have aggravated already considerable delays. The position was similar to this case.

[50] It is also apparent from the *Nottingham* decision that the appropriate course is for a separately constituted Tribunal to consider the question of whether charges ought to be laid and the form that they should take. It would also be the responsibility of that Tribunal to consider whether the statements which Ms. Lim made in the trespass notice ought to be included in the charge to be brought against her before the Tribunal. Apart from that, and while it would be a matter for the newly constituted Tribunal to consider, the charge would seem to be the same as the one which CAC considered and which was the subject of its decision of May 2018.

Conclusion

[51] There will be an order pursuant to section 111 (4) of the Act reversing the determination of the Committee and determining pursuant to section 89 that the complaint be considered by the Disciplinary Tribunal.

[52] Two additional miscellaneous matters need to be considered as well. The first is concerned with the emergence of the trespass notice. While the statements made in that document would not themselves support a complaint under section 73, the tenor of the notice may have some relevance to the assessment of the credibility of Ms. Lim. If it is the intention of the Authority to rely on that document, it should seek directions from the Tribunal either in advance of the hearing or at the hearing itself determining whether that document is to be considered as part of the prosecution case.

¹¹ [2017] NZCA 1 at [79]

[53] The second point concerns the Constitution of the Tribunal which would hear the charges. While the Tribunal which has dealt with the appeal has refrained from expressing a view about whether Mr. Stone's complaint is justified, we consider that in the interests of neutrality, a differently constituted Tribunal ought to hear the charges against Ms. Lim.

[54] A third matter on which we intend to comment concerns the procedure which is to be followed at the hearing. We observe that questions of credibility will be at the heart of resolving whether or not the Authority is able to persuade the Tribunal that the allegations which Ms Lim made were baseless. Cross-examination by each party is likely to be unavoidable. As well, the Tribunal may have questions that it wishes to put to one or other of the key witnesses, Mr Stone and Ms Lim.

[55] We could leave this matter to the hearing committee to make decisions on but by the time the hearing date arrives, it is likely to be too late to make directions of the kind which we consider could help resolve this case.

[56] The directions which we have in mind would be made pursuant to the entitlement of the Tribunal to determine its own procedure.¹²

[57] In the absence of any direction from the Tribunal, the evidential material which the Tribunal will take into account in deciding the facts in a particular case is usually contained in the report of the investigator/s and documents which were created at the time, amongst other evidence. The Tribunal has wide powers pursuant to S 109 of the Act to permit it to take account of statements et cetera whether or not they would be "admissible in a court of law".

[58] The Act does however, though, contemplate that, when appropriate, oral evidence will be given and it has the power to administer oaths. It has power to issue witness summonses which is again consistent with reception of oral evidence at Tribunal hearings.

¹² S 106

[59] In this case, it seems to us that it would be important for oral evidence to be available and for both the principal protagonists to attend at the hearing to give such evidence.

[60] In order to ensure that that outcome can be achieved, thought needs to be given to the exact mechanism which might be adopted.

[61] In addition to possibly issuing witness summonses, we have in mind that the Tribunal could regulate its procedure by way of analogy with High Court Rule 9.74 which deals with the case where a party has given evidence by affidavit but is required to attend to be cross-examined on that document. If the opposing party wishes the deponent to attend in order to be cross-examined, a notice to that effect can be served on the deponent ahead of the commencement of the hearing. In the event that the person does not attend for cross-examination the presumption is that their affidavit will not be read, although the court has the power to make an order that in a particular case that consequence should not follow.¹³

[62] But in any case, as we have already mentioned, the Tribunal may wish to ask some questions itself of either party. One reason that it might wish to do so in this case could arise from the almost entire absence of particulars which have been put forward about some of the allegations that Ms Lim has made and in the absence of which, it will be very difficult to come to decisions about which party is to be believed.

[63] For these reasons, the Tribunal may best be assisted by a direction that evidence by the principal protagonists in this case, Mr Stone and Ms Lim is to be given orally. Naturally, we also contemplate that both sides would have the right to cross examine on such evidence as the opposing witness gives orally on oath..

[64] However, we consider that such decisions will be best made by the Tribunal actually hearing the matter and that it would be useful, before actually making a direction, to hear from the parties. For these reasons, we consider that the parties should make any submissions they wish to make concerning the possibility of orders

¹³ HCR 9.74(3)

of the kind which have been discussed in this section of our decision so that further directions can if necessary be given.

[65] It will then be for the Tribunal which is actually to hear the matter to make a determination on the point of the form in which the evidence is to be given. The conference which is to be convened for this purpose is to be held before the Chair of the Tribunal which is to hear the substantive charges.

[66] Submissions are therefore sought from both the parties within 10 working days concerning the procedure to be followed.

[67] Additionally the parties are at liberty to put forward submissions on aspects of the procedure to be followed, other than those which the Tribunal itself has raised. If a directions conference is sought by telephone, the parties should advise the Tribunal in their memoranda.

[68] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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.

Mr. J Doogue
Deputy Chairperson

Ms C Sandelin
Member

Mr N O'Connor
Member