

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 12

Reference No: READT 028/2022

**IN THE MATTER OF**

A referral for a compensation order under  
s 110(5) of the Real Estate Agents Act 2008

**REFERRED BY**

**COMPLAINTS ASSESSMENT COMMITTEE  
2104**

**BETWEEN**

**KD and DX**  
Complainants

**AND**

**LEWIS DONALDSON**  
Respondent

Tribunal:

D J Plunkett (Chair)  
C A Sandelin (Deputy Chairperson)  
G J Denley (Member)

Appearances:

Counsel for the Committee:

S Waalkens

The complainants:

Self-represented

Counsel for the respondent:

K Harkess, J Neville-Smith

**SUBJECT TO NON-PUBLICATION ORDER**

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**RULING ON WHETHER AMICUS CURIAE SHOULD BE APPOINTED  
AND ON THE ROLE OF THE AUTHORITY AND OBSERVATIONS ON  
THE NATURE OF THE REFERRAL/POWERS OF THE TRIBUNAL**

**Dated 31 May 2023**

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## INTRODUCTION

[1] Complaints Assessment Committee 2104 (the Committee) upheld a complaint against Mr Donaldson, the respondent licensee, and made an order referring the issue of compensation to the Tribunal.

[2] This is the first such reference to the Tribunal. It therefore raises novel issues concerning the interpretation of the relevant provisions of the Real Estate Agents Act 2008 (the Act) and the Tribunal's jurisdiction and powers. The Real Estate Agents Authority (the Authority), which is not a party in the proceedings before the Tribunal, seeks a role in assisting the Tribunal in this first reference concerning statutory interpretation and the Tribunal's jurisdiction and powers. The Authority also seeks the appointment of an *amicus curiae* to contradict the Authority on its contentions as to the role the Authority might play.

## BACKGROUND

[3] The complainants, KD and DX, were the purchasers of a residential property in [City].

[4] The respondent, Lewis Donaldson, is a licensed salesperson under the Act.

[5] The property was listed with the agency on 1 September 2020. Mr Donaldson was verbally told by the vendor that there had been cracks and that an assessment by an engineer had concluded that the retaining wall was in order and there were no concerns. Mr Donaldson relied on this information, the vendor being an experienced building inspector. The LIM report contained no adverse comment.

[6] The complainants attended an open home on 27 September 2020 (together with Mr R, their agent, who entered a conjunctural fee arrangement with Mr Donaldson). They conducted a further inspection with Mr Donaldson on 13 October and attended another open home on 15 October without Mr Donaldson.

[7] On 16 October 2020, the complainants made an unconditional offer, which was accepted that day by the vendor. The purchase price was \$1,260,000.

[8] A pre-settlement inspection was carried out by the complainants on 25 November 2020.

[9] Settlement of the property occurred on 27 November 2020.

[10] After purchase, the complainants discovered two engineering reports among property information left by the vendor on the kitchen bench:

1. A handwritten site report (14 April 2011) by engineers, [Engineering company 1], noted ground and cladding cracking.<sup>1</sup> The most likely solution was said to be a more substantial retaining wall, subject to geotechnical advice. The engineers recommended ongoing monitoring of the cracks.
2. A later report (21 May 2020) on the structure of the retaining wall by [Engineering company 2], which concluded that the “structural integrity of the retaining wall had not been considerably compromised”.<sup>2</sup> The proposal of the owner (vendor) to backfill was an acceptable methodology to control erosion and stop further undermining.

[11] By 5 December 2020, the complainants had discovered ground cracking and the retaining wall was compromised with vertical posts leaning the wrong way. They raised the issue with Mr Donaldson that day.

[12] On about 2 February 2021, the complainants made a complaint to the Authority against Mr Donaldson. It was alleged there had been non-disclosure of two engineering reports. There has been misrepresentation as to the retaining wall damage. They sought compensation for repairs to the land and retaining wall. It was said that compensation was sought as the value of the property was affected by the non-disclosure.

[13] The complainants obtained a geotechnical report (5 March 2021) from [Geotechnical company].<sup>3</sup> The report stated that a failed retaining wall had resulted in settlement and tension cracking upslope. The retaining wall supported imported fill used to level the site. The engineers suspected that soils upslope had been shunted into the wall during the [event suppressed]. It suggested a new retaining wall was required, subject to a detailed subsoil investigation.

[14] In an unrelated matter, the complainants made a claim against the vendor in the Disputes Tribunal for repairs to a leaking roof. That tribunal awarded the complainants \$2,259.75.

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<sup>1</sup> Committee’s bundle at 037.

<sup>2</sup> Committee’s bundle at 039 (p 2 of the report).

<sup>3</sup> Committee’s bundle at 138–159.

*Decisions of the Committee*

[15] Following the investigation of the complaint by the Authority, the Committee issued its substantive decision on 14 December 2021. It found under s 89(2)(b) of the Act that Mr Donaldson had engaged in unsatisfactory conduct as defined in s 72. He had breached rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Rules) 2012 (the Rules):

**6 Standards of professional conduct**

...

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

**10 Client and customer care for sellers' agents**

...

*Disclosure of defects*

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects<sup>4</sup>, a licensee must either—

- (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
- (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

...

<sup>4</sup> For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.

[16] The Committee found that Mr Donaldson did not, as required, inform prospective buyers of a potential risk concerning the retaining wall, in breach of r 10.7.<sup>4</sup> He was required to follow the steps in r 10.7 and either obtain from the vendor's expert advice confirming there was no defect or inform prospective buyers of a potential risk.<sup>5</sup> Since there was no such expert advice, he was required to inform prospective buyers of a potential risk concerning the retaining wall.

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<sup>4</sup> Complaint No C40265 (14 December 2021) at [3.1(a)].

<sup>5</sup> At [3.28].

[17] In respect of r 6.4, fairness required Mr Donaldson to inform the complainants of a potential risk concerning the retaining wall or that the vendor had had concerns around the retaining wall which the vendor considered had been addressed by an engineer's report.<sup>6</sup> But Mr Donaldson had not seen the report or assessed the area. He was required to go beyond the vendor's verbal statement that the report was favourable and make further enquiries.<sup>7</sup> This was a breach of r 6.4.

[18] On 1 December 2022, the Committee made its decision on the penalty orders. Mr Donaldson was:

1. Censured.
2. Ordered to undergo training on "Disclosure: obligations to your client and customer" within three months.
3. Pay a fine of \$4,000.

[19] In addition, the Committee referred to the Tribunal consideration of a compensation order.

[20] The Committee noted the complainants' submission that the failure to disclose a potential risk concerning the retaining wall affected their decision, greatly affected the value of the property and had caused considerable distress.<sup>8</sup> They sought compensation to repair and replace the retaining wall at an estimated cost of \$84,061.58.<sup>9</sup>

[21] The Committee considered that the failure to disclose a potential risk with the retaining wall deprived the complainants of the ability to assess the risk for themselves and make a fully informed decision.<sup>10</sup> The Committee acknowledged that it could not say Mr Donaldson's failure to disclose the potential risk concerning the retaining wall equated exactly to the remediation costs sought. However, it considered that the failure meant the complainants were not properly informed of the true nature of the property. Remedying a defect had an obvious cost to the complainants which could be attributed to Mr Donaldson's unsatisfactory conduct. Had the potential risk been appreciated, the Committee regarded it as reasonable to surmise that the complainants would have factored such risk or any associated impact on value into their purchasing decision.<sup>11</sup>

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<sup>6</sup> At [3.1(b)].

<sup>7</sup> At [3.34].

<sup>8</sup> Complaint No C40265 (1 December 2022) at [4.1].

<sup>9</sup> See landscaper's estimate (20 May 2021) at 217–220 of the Committee's bundle.

<sup>10</sup> Complaint No C40265 (1 December 2022) at [4.14].

<sup>11</sup> At [4.14(d)].

[22] The Committee decided that the issue of whether and to what extent the conduct caused financial loss to the complainants was a matter for the Tribunal.

[23] In a separate referral to the Tribunal (1 December 2022), the Committee noted the complainants' claim that the failure to disclose affected their purchasing decision and the actual value of the property. It further noted their claim for the cost to replace the retaining wall. The Committee considered that such a claim effectively sought compensation to restore them to a position of owning a property without a defective retaining wall.<sup>12</sup> Such a claim was premised on there being an actual defect with the retaining wall. The Committee observed there might be an element of betterment in such a claim.

#### *Referral to Tribunal*

[24] The Tribunal received the Committee's referral on about 1 December 2022.

[25] A Minute was issued by the Tribunal on 25 January 2023, following a telephone conference on 18 January 2023. Certain directions were made as to the next steps. The Committee has since filed a bundle of documents.

[26] On 15 March 2023, the complainants filed certain documents in the Tribunal, along with a brief outline of their claim for compensation. A bundle of documents was filed by Mr Donaldson on 23 February 2023.

[27] A number of memoranda have been filed by the Authority and Mr Donaldson, which are addressed below (with the exception of a memorandum of 9 March 2023 from Ms Harkess concerning the adequacy of the complainants' disclosure which will be addressed at a later stage of the process).

### **THE APPOINTMENT OF AMICUS CURIAE**

[28] The Tribunal will deal shortly with the Authority's request to be heard on this first referral seeking compensation. Given the significance of the issues raised, particularly the role of the Authority on referrals, it seeks the appointment of an *amicus curiae* (also known as standby counsel) to represent the complainants' interests in the proceeding.

[29] In Ms Farnell's memorandum (5 April 2023), the former counsel for the Authority notes this is the first referral made under s 93(1)(ha) and the Tribunal has not issued a practice note, so there is no clear guidance on the process or the Authority's role.

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<sup>12</sup> Complaint No C40265 Referral (1 December 2022) at (l).

Ms Farnell observes that the complainants have not instructed counsel and Mr Donaldson has largely agreed with the Authority's position.

[30] According to Ms Farnell, the Authority accepts that it should generally be neutral and not take an active part in the substantive dispute. The Tribunal is therefore left without a contradictor to the position taken by the Authority. There is an argument in support of the Authority presenting compensation referrals on behalf of the Committee.<sup>13</sup> The Authority considers it may be beneficial for the Tribunal to receive full argument on the role of the Authority. It is in the wider interests of consumers and licensees that careful consideration is given on the appropriate procedure and the role of the Authority.

[31] Ms Farnell relies on a decision of the High Court as authority for the power of the Tribunal to appoint an *amicus*.<sup>14</sup> While that case concerned the appointment of counsel under s 95(5)(b) of the Evidence Act 2006 specifically to cross-examine a party, the Court found that the Ministry of Justice could fund the cost of counsel where required for a proceeding to continue in a way that is just to all the parties.

[32] In his memorandum (19 April 2023), Mr Neville-Smith on behalf of Mr Donaldson, opposes the appointment. The substantive dispute is between the complainants and Mr Donaldson. There is no requirement for the Tribunal to make a determinative decision on the role of the Authority, in the course of determining the referral. The role of the Authority is not an issue in this referral. The appointment of an *amicus* would not assist the Tribunal to determine what compensation, if any, should be awarded.

[33] It is contended by Mr Neville-Smith that the Tribunal's process is intended to be a more streamlined way for complainants to seek compensation, compared with bringing civil proceedings. A decision about the Authority's role is peripheral to the referral and will most likely delay the resolution of the referral. It is possible for the complainants to receive a fair hearing of their compensation claim in any event. The Authority's ongoing desire to investigate its role is incurring costs for Mr Donaldson and if an *amicus* is appointed, he will incur further unnecessary costs.

[34] Mr Neville-Smith also points out that the appointment of an *amicus* to represent a party is rare and that the right to self-representation must be respected.<sup>15</sup>

[35] There are no submissions from the complainants.

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<sup>13</sup> An argument later dismissed by the Tribunal.

<sup>14</sup> *Complaints Assessment Committee 1904 v Bright* [2021] NZHC 1019, [2021] 3 NZLR 848 at [22].

<sup>15</sup> *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [55] & [85(a)].

*Discussion*

[36] As Mr Neville-Smith says, the appointment of an *amicus* to make submissions on the Authority's role is not a critical issue in determining this claim for compensation. It is a peripheral procedural issue. The Tribunal is capable of determining the Authority's role for this specific referral, with the benefit of any submissions from the parties and the Authority itself. A contradictor to the Authority's position is not needed. The Tribunal is equally capable of ensuring the process is fair for the complainants. Counsel's argument that the appointment would lead to delay and greater costs to Mr Donaldson, contrary to the expected streamlined process of any tribunal, is accepted. The appointment of an *amicus curiae*, whether to represent the complainants or to assist the Tribunal, is not required for the proceeding to be just. It is declined.

**THE ROLE OF THE AUTHORITY**

[37] This is a referral pursuant to s 93(1)(ha) of the Act by a Committee appointed by the Authority under the Act. The Authority is the licensing and regulatory body for licensed real estate agents. Neither the Committee nor the Authority are parties to the proceedings in the Tribunal, which are a contest between the complainants and the licensee, Mr Donaldson.

[38] In a memorandum (22 February 2023), Ms Farnell addresses the role of the Authority on a compensation referral and sets out preliminary views on the procedure to be followed. There is a memorandum (1 March 2023) from Ms Harkess on behalf of Mr Donaldson. There are no submissions from the complainants.

*Discussion*

[39] Having made a finding of unsatisfactory conduct, the Committee referred the matter of compensation to the Tribunal under s 93(1)(ha):

**93 Power of Committee to make orders**

(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:

...

(ha) if the Committee is satisfied that the unsatisfactory conduct involves more than a minor or technical breach of this Act or of any regulations or rules made under this Act, make an order referring the matter to the Disciplinary Tribunal for the Tribunal to consider whether to make a compensation order under section 110(5):

...



[40] The Tribunal's power to order compensation is set out in s 110(3)–(6) of the Act:

**110 Determination of charges and orders that may be made if charge proved**

...

- (3) The making of an order under this section for the payment of compensation to any person does not affect the right (if any) of that person to recover damages in respect of the same loss, but any sum ordered to be paid under this section, and the effect of any order made under this section for the reduction, cancellation, or refund of fees, must be taken into account in assessing any such damages.
- (4) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that, although not guilty of misconduct, he or she has engaged in unsatisfactory conduct, it may do either or both of the following:
  - (a) make any of the orders that a Complaints Assessment Committee may make under section 93 (except under section 93(1)(ha)):
  - (b) if it appears to the Tribunal that any person has suffered loss by reason of the licensee's unsatisfactory conduct, make an order that the licensee pay to that person a sum not exceeding \$100,000 by way of compensation, but only if—
    - (i) the unsatisfactory conduct is more than a minor or technical contravention of this Act or of any regulations or rules made under this Act; and
    - (ii) the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law.
- (5) If a Complaints Assessment Committee refers a matter to the Tribunal under section 93(1)(ha), the Tribunal may, if satisfied that the requirements of subsection (4)(b) (except paragraph (b)(i)) are met, make a compensation order under that subsection.
- (6) For the purposes of subsection (5), the Disciplinary Tribunal—
  - (a) must apply, and may not overturn, a Complaints Assessment Committee determination that there was unsatisfactory conduct involving more than a minor or technical contravention of this Act or of any regulations or rules made under this Act; and
  - (b) must apply, and must not overturn, a Complaints Assessment Committee determination of any substantive matter in the case; and
  - (c) has no jurisdiction to inquire into a determination described in paragraph (a) or (b).

[41] The Authority submits:

1. It is appropriate for the Authority (on behalf of the Committee) to “generally” be neutral and not to take an active part in the substantive dispute for compensation.<sup>16</sup>
2. The Authority could though routinely assist the Tribunal on matters such as jurisdiction, evidential issues, power and procedure and/or the proper interpretation of s 110(4)(b), including the scope or measure of loss.
3. In certain circumstances, but not in this case, it may be appropriate for the Authority to take a more active role in the proceedings. For example, the Authority might assist the complainant to present their case, having proper regard to the Authority’s role as a consumer protection agency and its obligation to assist complainants to prepare their complaints. This will depend on factors such as the position of the parties, their ability to present their case (including whether the complainant is legally represented or disadvantaged) and whether the case is of potential regulatory significance.

[42] The Authority quotes the Ministry of Justice’s views on the Tribunals Powers and Procedures Legislation Bill which inserted into the Act the Tribunal’s power to award compensation.<sup>17</sup> The Ministry stated that the burden for seeking compensation fell on the Authority. According to the Ministry, the Authority would present the case to the Tribunal on behalf of the Committee. The complainant could be called as a witness.

[43] Ms Harkess agrees that the Authority can play a role. It should generally be neutral and not take an active part in the substantive dispute for compensation. It is appropriate for the Authority to make submissions on issues relating to jurisdiction, the interpretation of the Act (including as to the measure of the loss) and the “RCCC” (presumably the Rules), evidential issues, and the powers and procedures of the Committee or the Tribunal. It is contended that it would not be appropriate for the Authority to play an active or non-neutral role in relation to the loss (if any) suffered by the complainants by reason of Mr Donaldson’s conduct. The interpretation issue should be determined within the substantive hearing when the Tribunal has the benefit of the evidence and full submissions.

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<sup>16</sup> Memorandum (22 February 2023) at [8] & [26(a)].

<sup>17</sup> Ministry of Justice Departmental Report on the Tribunals Powers and Procedures Legislation Bill (7 June 2018) at [40]. The Bill subsequently became the Tribunals Powers and Procedures Legislation Act 2018.

[44] There is broad agreement between the Authority and Mr Donaldson as to the former's role in this reference. It accords with the preliminary observation of the Tribunal's chair set out in Minute 1 (25 January 2023).

[45] The first point is that the Authority (whether on behalf of the Committee or in its own right as the regulatory body) is not a party to these proceedings. The Committee, having referred the possibility of compensation to the Tribunal, has no formal role in what becomes a dispute between the complainants and the licensee. The Ministry's views expressed in the Departmental Report are wrong. The burden of proving entitlement to compensation rests with the complainants (on the balance of probabilities) and not the Committee or the Authority. The complainants are a party in this proceeding and not merely witnesses (though patently they may be witnesses on their own behalf).

[46] While not a party, the Tribunal welcomes submissions from the Authority on the Tribunal's jurisdiction, its powers and procedures, as well as the interpretation of the Act and the Rules, to the extent they relate to compensation. This could include the proper measure of any loss or damage. That assistance to the Tribunal will be helpful on this reference, as it is the first such reference to the Tribunal. However, the invitation to the Authority to participate on the limited basis set out extends to all referrals.

[47] In welcoming the Authority's assistance on referrals in the way prescribed above, the Tribunal records its expectation that the Authority be neutral in all cases, not just "generally". In no case would it be proper for the Authority to become an advocate for a complainant. It is not accepted that the Authority's consumer protection role permits it to adopt any more active role in compensation proceedings. Its role is not enlarged where complainants are unrepresented or disadvantaged.

[48] The Authority apparently sees itself as having an obligation to assist complainants in preparing their complaints. It is acknowledged that it is for the Authority and not the Tribunal as to how the former carries out its statutory functions and powers.<sup>18</sup> However, the Authority respectfully needs to separate what it sees as its broad consumer protection role from its role before the Tribunal on a referral. It is no business of the Tribunal what the Authority does to assist a complainant 'behind the scenes' to compile a complaint or compensation claim, but appearing before the Tribunal in a direct role on behalf of a complainant would be inappropriate. It would be a significant departure from a neutral stance.

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<sup>18</sup> Real Estate Agents Act 2008, ss 12 & 106(2).

[49] Ms Farnell refers to the established practice and intituling in relation to appeals before the Tribunal.<sup>19</sup> On an appeal, the Authority is typically intituled as the first respondent with the complainant and the licensee being the other parties (the appellant and the second respondent depending on who brings the appeal). The role of the Authority is to assist the Tribunal by supporting the decision of the Committee.<sup>20</sup> It is not an advocate for the complainant or the licensee. In respect of a compensation referral, there is no decision on compensation by the Committee to support. The Tribunal does not see an analogy between an appeal and a compensation referral. The Authority (on its own behalf or that of the Committee) is not a party and will not be intituled as a respondent.

[50] As offered by Ms Farnell, the Tribunal would also welcome in all referrals the Authority's compilation of a bundle of the documents that were before the Committee, as it does for appeals.

#### **THE NATURE OF THE REFERRAL/POWERS OF THE TRIBUNAL**

[51] Both Ms Farnell (memorandum 22 February 2023) and Ms Harkess (memorandum 1 March 2023) have expressed preliminary views on the nature of the referral and/or powers of the Tribunal. The complainants have yet to do so.

[52] The Tribunal will accordingly itself express preliminary views on such matters. It will revisit these views later once the parties have had an opportunity to make formal submissions.

#### *Tribunal's power of inquiry*

[53] The Authority submits that the Tribunal has no power to inquire into the unsatisfactory conduct finding, with the only matter for determination being whether an order for compensation should be made. The complainants should not be afforded an opportunity to reformulate the basis on which they advance their claim before the Tribunal. Mr Donaldson agrees. He says that the Tribunal's procedure should not be an opportunity for the complainants to run a *de novo* hearing as a second bite at the cherry and/or to reformulate the basis on which they advanced their complaint before the Committee. It is contended that the Tribunal's jurisdiction is confined by the scope of the Committee's decision.

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<sup>19</sup> Section 111.

<sup>20</sup> The same might be said for reviews under s 112 of the Act where the Registrar is the respondent in order to support his or her own decision.

[54] In respect of the Committee's finding of unsatisfactory conduct and any "substantive matter", the Authority and Mr Donaldson are right.<sup>21</sup> There was no appeal to the Tribunal against the Committee's decisions. The Tribunal will not revisit the finding of unsatisfactory conduct or the basis on which it was reached. To be clear, the Committee found unsatisfactory conduct on the basis that Mr Donaldson was required by rr 6.4 and 10.7 to inform the complainants of:<sup>22</sup>

a potential risk concerning the retaining wall or that the vendor had had concerns around the retaining wall which the vendor considered had been addressed by an engineer's report, but [Mr Donaldson] had not seen the report or assessed the area.

[55] That conclusion of the Committee will ground our assessment of compensation (if any). Our jurisdiction under s 110(4)(b) to determine whether the complainants "suffered loss by reason of [Mr Donaldson's] unsatisfactory conduct" will be confined to loss arising from the unsatisfactory conduct precisely in the terms found by the Committee.

[56] The complainants will not have an opportunity to reformulate their complaint concerning Mr Donaldson's wrongdoing. However, in terms of the complainants' compensation claim, they are not restricted to their claim advanced before the Committee. The Committee did not assess any claim for compensation nor make factual findings concerning it, except to the extent that it noted the existence of such a claim and determined to refer it to the Tribunal.

[57] It is the Tribunal's preliminary view that the complainants may reformulate their claim for compensation. The measure of the loss and the sum claimed may be changed. Additional documents may be produced. The Tribunal's restrictive rules concerning fresh evidence on appeals do not apply. The hearing of compensation is *de novo*. The only restriction is that it must be grounded in the Committee's findings as to the precise conduct which was unsatisfactory and from which any loss must arise.

#### *General civil claim criteria / interlocutory procedures*

[58] The Tribunal agrees with Ms Farnell's observation that the claim for compensation is not a general civil claim and that the complainants are not prevented from commencing a civil claim for damages for the same loss. Section 110(3) makes that clear. The complainants could commence a general civil claim (presumably in tort) in the District Court for the same loss, though the District Court would have to take into account any loss awarded by the Tribunal (and the Tribunal would equally be bound to

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<sup>21</sup> Real Estate Agents Act, s 110(6).

<sup>22</sup> Complaint No C40265 (14 December 2021) at [3.1(b)].

take into account any damages awarded by the Court should a referral occur after any District Court decision).

[59] While the complainants need not prove in the Tribunal an orthodox general civil claim, they will have to explain or show that a Court could make an order for compensation/damages in accordance with the principles of law.<sup>23</sup> Essentially, the claim for compensation in the Tribunal will have to meet the criteria for a general civil claim, such as damages arising from any lack of reasonable care on the part of Mr Donaldson.

[60] Ms Farnell states that compensation claims in the courts are often complex and involve considerations of causation, quantification of loss, identification of type of loss, and a full hearing (with witnesses). That would not improve consumer protection and access to justice, which is the role of a tribunal. Such a process would not provide a simpler, cheaper and faster alternative to a court case. The principles and procedures applicable to civil claims in the courts, such as formal discovery, will only add to the delay, complexity and cost of proceeding before the Tribunal. There should be an expedient and proportionate process.

[61] Ms Harkess submits that issues relating to pleadings (if any), discovery, evidence and the mode of hearing of the substantive claim are appropriately addressed at a further directions conference.

[62] The Tribunal agrees with Ms Farnell that the full arsenal of civil claim procedures is not appropriate in a tribunal. On the other hand, Mr Donaldson is facing a claim for substantial damages (almost \$85,000 on building costs two years old). Whether or not it is called a pleading, a clear articulation of the legal and factual basis of the claim is required, along with document disclosure (to a degree which can be determined later) and the provision of witness statements (including any expert reports). This can be discussed at the next telephone conference.

## **OUTCOME**

[63] The appointment of an *amicus curiae* is declined.

[64] Neither the Committee nor the Authority (on behalf of the Committee or otherwise) is a party to the reference. The Tribunal would welcome the submissions of the Authority concerning its jurisdiction, powers and procedure, and the interpretation of the Act on this specific reference.

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<sup>23</sup> Real Estate Agents Act, s 110(4)(b)(ii).

[65] A telephone conference will be arranged to discuss the next steps in the procedure, including when the Authority and the parties should make submissions on the Tribunal's jurisdiction and the like and whether this should occur before or after the complainants file their full claim in the Tribunal. At the same conference, the timing of requests for further disclosure may be discussed.

[66] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

## **PUBLICATION**

[67] The Committee directed publication of its decision on the orders without the names or identifying details of the complainants and third parties, but stating the name of the licensee.

[68] Having regard to the interests of the parties and the public, it is appropriate to order publication of this Ruling without identifying the complainants or the engineers who wrote the various reports, but naming the licensee.

D J Plunkett  
Chair

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C A Sandelin  
Deputy Chairperson

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G J Denley  
Member