

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 29

Reference No: READT 021/2021

IN THE MATTER OF

Charges laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 1901**

AGAINST

KC
Defendant

Hearing in Rotorua on 22 June 2023

Tribunal:

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

Appearances:

Counsel for the Committee:

E Mok, A Stuart

Counsel for the Defendant:

J Waymouth

DECISION ON COSTS
Application by Defendant for Costs
Dated 11 October 2023

INTRODUCTION

[1] On 3 July 2023, the Tribunal dismissed charges of misconduct against the defendant, KC, a licensed real estate salesperson under the Real Estate Agents Act 2008 (the Act).¹ The defendant now seeks costs against the prosecuting Complaints Assessment Committee 1901 (the Committee).

BACKGROUND

[2] The charges relate to the sale of a property in [City] owned by the defendant and her husband. In August 2018, less than six months before the sale, there were two burglaries at the property. The property was placed on the market some months later with colleagues of the defendant at the agency engaging her.

[3] The purchasers (who would later make the complaint) viewed the property with the defendant on 19 January 2019 and entered into a conditional sale and purchase agreement on 25 January 2019. There was a second viewing on 6 February 2019 also with the defendant. On 12 or 18 February 2019, the agreement became unconditional and settlement occurred on 29 March 2019. There was an attempted break-in at the property on 12 May 2019.

[4] On 14 May 2019, the purchasers made a complaint to the Real Estate Agents Authority (the Authority). In essence, it was alleged the defendant had informed the purchasers when they viewed the property that it was safe. She had said nothing about the earlier burglaries. The defendant accepted she had not informed the purchasers of the burglaries, but denied she was ever asked whether the property was safe.

[5] There is an extensive procedural history to the complaint.

[6] The complaint was originally upheld by the Committee on 2 December 2019. It found the defendant's conduct unsatisfactory in two respects:

1. Breach of r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules), in failing to disclose the burglaries.
2. Breach of s 136 of the Act, in not disclosing her ownership of the property to the purchasers in writing.

[7] On 19 March 2020, the Committee issued its decision on the penalty orders. The breaches were considered to be at the lower end of unsatisfactory conduct. The

¹ *Complaints Assessment Committee 1901 v KC* [2023] NZREADT 16.

defendant was censured, fined \$2,000 and ordered to pay \$1,395 in legal costs to the purchasers.

[8] The purchasers then appealed to this Tribunal, effectively against both decisions of the Committee. The defendant also appealed both decisions.

[9] The Tribunal issued its decision on 12 February 2021.² In respect of the appeals of the purchasers and the defendant against the liability decision, it upheld the Committee's finding of unsatisfactory conduct for both breaches. However, it found there was credible evidence on which misconduct could have been charged in regard to the omission to mention the burglaries. The proceedings were referred back to the Committee to consider whether misconduct charges should be laid in the Tribunal. In respect of the appeals against the penalty decision, the Tribunal deferred finalisation of the penalty for unsatisfactory conduct pending the outcome of any misconduct charges.

[10] The possibility of misconduct charges was duly considered by the Committee and it referred such charges to the Tribunal on 26 August 2021. They were heard by the Tribunal and, as noted above, were dismissed on 3 July 2023.

[11] The Tribunal records that the defendant recently withdrew her appeal against the penalty decision. The purchasers' appeal against the penalty decision was recently dismissed.³

COSTS SOUGHT

[12] The defendant has sought costs against the Committee for the failed misconduct charges, pursuant to s 110A of the Act.

Submissions of the defendant

[13] In his submissions (22 August 2023), Mr Waymouth acknowledges the Tribunal's precedents establishing that costs do not automatically follow the event. It is submitted, however, that in misconduct cases costs generally do follow the event. It would therefore seem, according to counsel, that in all probability the Committee would have been awarded costs had it been successful.

[14] Counsel accepts there were no aggravating factors under s 110A. It is contended that the evidence on its face prior to the hearing did not support the prosecution.

² *Sharma v Real Estate Agents Authority* (CAC 1901) [2021] NZREADT 7.

³ *Sharma v Real Estate Agents Authority* (CAC 1901) [2023] NZREADT 27.

[15] Counsel points out this matter has had a long history and the prosecution had failed. Given his prior involvement, counsel was able to heavily discount his fee. He charged \$11,194.45, including disbursements and GST (invoice attached to his submissions). This is the amount sought. If this amount is not accepted by the Tribunal, it is submitted that an appropriate order would be for 70 per cent of the costs, being \$7,836.11.

Submissions of the Committee

[16] In her submissions (28 September 2023), Ms Mok states that the Committee opposes an award of costs.

[17] It is accepted that the Tribunal has the power under s 110A of the Act to make a costs award against the Committee following an unsuccessful prosecution. It is submitted that for costs to be awarded against a Committee, it is not enough that the prosecution failed. There must be some fault or deficiency in the prosecution or another factor warranting the imposition of costs.

[18] That is not the position here. The Tribunal's decision to dismiss the charges hinged on its assessment of the competing accounts of the purchasers and the defendant. It preferred the defendant's evidence because of inconsistencies in the purchasers' accounts. Their written briefs were not, though, inherently unreliable or so lacking in credibility that there was an insufficient basis for proceeding.

TRIBUNAL'S JURISDICTION TO AWARD COSTS

[19] The Tribunal's jurisdiction to award costs is set out in s 110A of the Act:

110A Costs

- (1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs that it thinks fit, whether or not it grants any other remedy.
- (2) Without limiting the matters that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings—
 - (a) has participated in good faith in the proceedings;
 - (b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal;
 - (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

...

[20] In respect of charges, the High Court has identified the relevant considerations concerning the award of costs in professional disciplinary cases, as Mr Waymouth has noted:⁴

1. Professional groups should not be expected to bear all the costs of the disciplinary regime.
2. Members who appeared on charges should make a proper contribution towards costs.
3. Costs are not punitive.
4. The practitioner's means, if known, are to be considered.
5. A practitioner's defence should not be deterred by the risks of a costs order.
6. In a general way, 50 per cent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

[21] These are, however, the factors applicable to costs being awarded against a practitioner where the prosecution is successful.

[22] In respect of an unsuccessful prosecution, the Tribunal awarded costs to the victorious defendant licensee in *Mather*, following a review of the authorities in the higher courts and the Tribunal.⁵ It found that costs do not follow the event, but they could be awarded against a Committee where something else was present, beyond the failure of the charges.⁶ In *Mather*, there was a lack of diligence by the Committee in its investigation.⁷

[23] In respect of appeals, the Tribunal's approach to costs has been guided by the High Court decision in *Commissioner of Police v Andrews*.⁸ The Court accepted that a tribunal could be cautious in applying the conventional costs regime for civil litigation.⁹ Tribunals existed to provide simpler, speedier, cheaper and more accessible justice than the ordinary courts. While some claims in tribunals should have costs consequences, it

⁴ *TSM v Professional Conduct Committee* [2015] NZHC 3063 at [21], citing *Vatsyayann v Professional Conduct Committee of the New Zealand Medical Council* [2012] NZHC 1138 at [34]. Relied on by the Tribunal in numerous cases. See, for example, *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [128].

⁵ *Complaints Assessment Committee 2106 v Mather* [2021] NZREADT 54.

⁶ At [61].

⁷ At [69]–[70].

⁸ *Commissioner of Police v Andrews* [2015] NZHC 745, [2015] 3 NZLR 515.

⁹ At [61].

did not follow that the costs consequences of all claims in tribunals should be those applying in civil litigation in the courts.¹⁰

[24] The principles for appeals were summarised by the Tribunal in QQ, where the unsuccessful appellant was directed to pay the respondent licensee's costs.¹¹ It was found there was no principle that costs follow the event. A party was not entitled to costs merely because of success. The Tribunal had a discretion. It noted that the factors set out in s 110A were not present in QQ. There was no lack of good faith nor obstruction of the Tribunal's process. Nonetheless costs were awarded because there was no reasonable basis for the appeal. There was no proper basis for the allegations against the licensee or for the appellant's continued belief in them. The licensee was found to be entitled to a reasonable contribution towards his costs, being two thirds of his actual costs.

[25] For the sake of completeness, the Tribunal further notes it has awarded costs against the Registrar of the Authority in respect of a successful application to review the Registrar's decline of a licence.¹²

DISCUSSION

[26] The defendant has sought reimbursement by the Committee of her costs, or at least a 70 per cent contribution, incurred in respect of its failed prosecution of misconduct charges. It is acknowledged that the Tribunal has a discretion and that the statutory factors that might justify an award (bad faith or obstruction) are not present, with which we agree.

[27] Mr Waymouth further accepts that the Tribunal's precedent cases establish the principle that costs do not automatically follow the event, though the two cases cited concern appeals, not charges. In respect of misconduct prosecutions, it is contended that costs generally do follow the event. Counsel cites a number of High Court and Tribunal decisions. The *Andrews* decision does not concern charges.¹³ While the other decisions were in respect of charges, they all concerned whether costs should be awarded in favour of the successful prosecuting Committee.¹⁴ They do not assist the defendant. The factors establishing the principle that a licensee against whom charges are upheld should contribute to the prosecution's costs, are of no relevance to

¹⁰ At [65].

¹¹ *QQ v Real Estate Agents Authority (CAC 1902)* [2022] NZREADT 22 at [69]–[71].

¹² *Cavanagh v Registrar of the Real Estate Authority* [2021] NZREADT 47 at [32].

¹³ *Commissioner of Police v Andrews*, above n 8.

¹⁴ *TSM v Professional Conduct Committee*, above n 4; *Complaints Assessment Committee 521 v Wright* [2019] NZREADT 49; and *Complaints Assessment Committee 1907 v Lindsay* [2021] NZREADT 36.

determining whether the Committee should pay a successful licensee's costs where a prosecution fails.

[28] Counsel may well be correct in stating that costs would likely have been awarded to the Committee had it been successful against the defendant, but that is not material to our decision as to whether the defendant should be awarded costs. There is no principle of reciprocity in relation to costs. A factor favouring costs for a successful prosecutor is that it is performing a public regulatory duty, a factor which does not favour a successful licensee.¹⁵

[29] It is submitted by Mr Waymouth that the prosecution evidence did not, on its face, support the charges. This is not correct. The Committee's briefs of evidence did support the charges, but we did not find the prosecution witnesses (the purchasers) to be credible as to critical aspects of their narrative. We agree with Ms Mok that their briefs were not inherently unreliable or so lacking in credibility that there was an insufficient basis to proceed with the charges.

[30] We note also that in laying the misconduct charges in the Tribunal, the Committee was responding to a direction from the Tribunal to give consideration to doing so. While the independent Committee could have declined to lay charges, there was no fault on its part in giving weight to the Tribunal's view as to the existence of credible evidence of misconduct.¹⁶

Conclusion

[31] The defendant's successful defence of the charges is not, of itself, a sufficient factor warranting costs being awarded to her. Counsel has not identified any other factor, beyond his view of the prosecution evidence which we do not accept. The long history of the proceedings does not justify costs in the defendant's favour, bearing in mind that the Tribunal dismissed her appeal against the Committee's liability decision and upheld the finding of unsatisfactory conduct.

[32] In the exercise of our discretion under s 110A, we decline to award costs to the defendant.

OUTCOME

[33] The application for costs is dismissed.

¹⁵ *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038 at [31]–[33]; and *Cavanagh v Registrar of the Real Estate Authority*, above n 12, at [36].

¹⁶ *Sharma v Real Estate Agents Authority (CAC 1901)*, above n 2, at [40].

[34] 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

[35] Having regard to the privacy of the parties and the interests of the public in the transparency of the Tribunal and knowledge of wrongdoing by licensees, it is appropriate to order publication of the decision without identifying the defendant.

D J Plunkett
Chair

C A Sandelin
Deputy Chairperson

G J Denley
Member