

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 03

Reference No: READT 018/2023

IN THE MATTER OF

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

BETWEEN

KN
Applicant

AND

**THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY**
Respondent

Hearing on the papers

Tribunal:

C Sandelin (Deputy Chairperson)
G Denley (Member)
N O'Connor (Member)

Representation:

The applicant:

Self-represented

The respondent:

T Bain and G Maslin

DECISION
Dated 21 February 2024

INTRODUCTION

[1] KN (the applicant) has filed an application for review under s 112 of the Real Estate Agents Act 2008 (the Act) against the determination of the Registrar of the Real Estate Agents Authority (the Registrar) on 30 August 2023 not to pursue a complaint the applicant made to the Real Estate Agents Authority (the Authority) on the ground that it was inconsequential.

[2] The complaint is against MB (the licensee), a licensed salesperson. It is alleged she breached the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and s 136 of the Act.

BACKGROUND

[3] On 8 December 2022, the licensee and her husband, NE, purchased a property in Hobsonville, Auckland (the property), built in 2016 by Universal Homes Ltd (Universal Homes).

[4] Barfoot and Thompson Ltd (Barfoots) had listed the property for sale with the licensee as listing agent.

[5] On or about 4 December 2022, the applicant and her husband attended an open home for the property.

[6] On or about 8 December 2022, the applicant and her husband entered into a sale and purchase agreement for the property.

[7] Prior to the agreement for sale and purchase being declared unconditional, as a part of their due diligence, the applicant and her husband obtained two building reports, one being a standard building report and the other an invasive report.

[8] Settlement was completed on or around 20 January 2023.

[9] Between around 26 January 2023 and 9 February 2023, the extreme rainfall in Auckland revealed leaks in the property. A further building inspection was undertaken, and, as the property was still under warranty, the applicant and her husband contacted Universal Homes, which inspected the property, identified issues and agreed to repair them.

[10] On 26 March 2023, the applicant sent a letter of complaint to Barfoots alleging breaches of rr 6.4 and 10.7 of the Rules. Barfoots' compliance officer responded to the complaint on 4 April 2023.

COMPLAINT TO AUTHORITY

[11] On 5 May 2023, the applicant and her husband made a complaint to the Authority about the conduct of the licensee.

[12] In summary, the details of the complaint to the Authority were as follows:

- (a) The licensee breached r 6.4 of the Rules. During the open home, the applicant's husband asked the licensee if the property was a plaster house to which the licensee replied that it was not and that the paint was painted straight onto the concrete. The applicant's husband remarked that this was good as he did not wish to purchase a plaster house.
- (b) The licensee breached r 10.7 of the Rules. The property has no eaves and has direct-fixed plaster relied on for weathertightness. Despite this, the licensee indicated on the buyer acknowledgement form that the property was not of a cladding type that may be at risk of weathertightness problems. Furthermore, if the licensee had asked the vendor about the property's cladding, this would have revealed historical and current defects causing leaks.
- (c) The licensee had a relationship with the vendor that was not disclosed to the applicant and her husband. Specifically, the licensee was listed as a supporter of the vendor's racing company.

[13] On 30 August 2023, the Registrar wrote to the applicant and her husband notifying them of the decision not to pursue the complaint under s 74(3)(a) of the Act. The complaint did not raise any issues warranting the intervention of the Authority's disciplinary process because:

- (a) In relation to the r 6.4 allegation:
 - (i) The licensee and her husband have different recollections of their conversation about plaster, and the licensee disputes the applicant's husband's version.
 - (ii) In any case, the applicant and her husband were in receipt of a building report that mentioned the exterior material of the property before settlement. They therefore had the opportunity to raise this issue if they were concerned about the presence of plaster.
 - (iii) There is no evidence that the licensee breached r 6.4 of the Rules.

- (b) In relation to the r 10.7 allegation:
 - (i) Licensees are not required to discover hidden defects and a property built in 2016 would not fit the usual definition of a “leaky building”.
 - (ii) The building reports prepared for the applicant and her husband as part of their due diligence also failed to identify any issues with leaks.
 - (iii) There is no evidence that the licensee breached r 10.7 of the Rules.
- (c) The licensee’s relationship with the vendor does not appear to have been a conflict of interest, and the licensee does not appear to have breached s 136 of the Act.

JURISDICTION AND PRINCIPLES

[14] The Registrar’s options in determining complaints, other than to refer them to a committee, are set out in s 74 of the Act:

74 Complaints about licensees

- (1) Any person may, in accordance with regulations made under this Act, complain in writing to the Authority about the conduct of a licensee.
- (2) When the Authority receives a complaint under this section, the Authority must—
 - (a) refer the complaint to the Registrar of the register of licensees, who must consider whether to deal with the complaint under subsection (3); and
 - (b) if the Registrar decides not to deal with the complaint under that subsection, refer the complaint to a Committee for determination and notify the person complained about of the reference.
- (3) The Registrar may determine that—
 - (a) the complaint discloses only an inconsequential matter, and for that reason need not be pursued:
 - (b) the complaint is frivolous or vexatious or not made in good faith, and for that reason need not be pursued:
 - (c) the complaint should be referred to another agency, and refer it accordingly:
 - (d) the complaint has been resolved to the complainant’s satisfaction and no further action is needed.

[15] A person adversely affected by the Registrar’s determination may apply to the Tribunal for review under s 112.

[16] The review must be conducted on the papers unless the applicant for review requests to be heard.¹ After conducting the review, the Tribunal may confirm, reverse or modify a decision.² If the Tribunal reverses or modifies a decision, it may exercise any of the powers that the Registrar could have exercised.³

Test for a review

[17] Counsel for the Registrar submitted that a review under s 112 of the Act of a determination of the Registrar under s 74(3)(a) is a review against the exercise of a discretion by the Registrar. The grounds for review are therefore limited to those identified by the Supreme Court in *Kacem v Bashir*, being whether the decision:⁴

- (a) was based on an error of law or principle;
- (b) took account of irrelevant considerations;
- (c) failed to take account of a relevant consideration; or
- (d) was plainly wrong.

[18] It was submitted by the Registrar that, subject to these limitations, the Registrar's decision must be confirmed, even if the Tribunal might come to a different decision on the merits if it was a general appeal.

[19] We accept the Registrar's submissions as to the nature of this review. We will, in deciding whether these limited grounds of review have been made out, need to make some assessment of the merits, without reaching any conclusion on the merits.

ADDUCING NEW EVIDENCE ON REVIEW

[20] The applicant seeks to adduce the following new evidence in respect of the review which was not before the Registrar:

- (a) A page from the Universal Homes material (property build folder) stating that the exterior cladding was "rendered plaster, concrete".
- (b) An email dated 4 September 2023 from the building inspector.

¹ Real Estate Agents Act 2008, s 112(3).

² Section 112(4).

³ Section 112(5).

⁴ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

- (c) Correspondence with the Maintenance Administrator for Universal Homes, between 5 September 2023 and 18 September 2023.

[21] The Tribunal has not yet made a finding on the question of its jurisdiction to accept new evidence during a review proceeding. However, the Tribunal has observed previously that it would be “reluctant” to allow fresh evidence to be adduced, lest it stray into what is the proper role of a Complaints Assessment Committee.⁵

[22] It is now well established across appellate jurisdictions that the test for adducing new evidence on appeal is that the further evidence must be fresh, credible, and cogent.⁶

[23] The Tribunal has previously summarised relevant facts that may be taken into account when considering if evidence is fresh, credible and cogent:⁷

- (a) whether the evidence could have been obtained with reasonable diligence for use at the initial hearing;
- (b) whether the evidence would have had an important influence on the outcome;
- (c) whether the evidence is apparently credible; and
- (d) whether admitting the evidence would require further evidence from other parties and cross-examination.

[24] The Registrar submitted that the fresh, credible, and cogent test is also appropriate for reviews under s 112 of the Act. However, it was submitted that the test should be applied in the context of the limited grounds of review referred to at [17] above. Specifically, it was submitted that evidence should be considered “cogent” only if it is capable of showing that the Registrar erred in one of the fundamental ways that would justify upholding the application for a review. Evidence that strengthens the complainant’s case will therefore not necessarily be cogent. The threshold is higher than in a full merits appeal.

[25] We agree with this analysis. As submitted by the Registrar, there is a concern that if fresh information is too readily allowed to be submitted during the Tribunal’s review process, this could undermine the purpose of the Registrar’s powers under s 74 of the

⁵ *Lawrence v Registrar of the Real Estate Agents Authority* [2022] NZREADT 6 at [43].

⁶ *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

⁷ *Lam v Real Estate Agents Authority (CAC 413)* [2018] NZREADT 15 at [25].

Act to filter complaints, and occupy more time and resource at the Tribunal level dealing with complaints at a lower level of seriousness.

[26] Furthermore, licensees are not a party to a review of a Registrar's decision, and so will not have an opportunity to respond to any fresh evidence.

[27] The applicant has provided the following reasons for why the new evidence she seeks to adduce was not provided to the Registrar:

- (a) She was not given the opportunity to produce the page from the property build folder, nor the email from the building inspector.
- (b) She had provided the Authority with the contact information for Universal Homes, and the Authority should have obtained this information itself.

[28] It was submitted by the Registrar that the applicant was given sufficient opportunity to produce any further evidence she wanted to provide to the Registrar. There was a two-way communication process between the applicant and the Authority's facilitator and every opportunity for her to produce the extra evidence throughout that time period up until the Registrar's decision.

[29] The Registrar submitted that the Authority's complaint form specifically sets out that the complainant should provide "any documents that support your complaint" and that it is ultimately for the complainant to ensure any evidence they believe proves the allegations is put forward. Counsel referred to the Tribunal's decision in *Wilson*,⁸ where the Tribunal stated as follows:

[69] We would add that the Registrar is entitled to consider such evidence as is before him or her, in determining whether unsatisfactory conduct or misconduct could be proved. The Registrar is not bound to send a complaint making serious allegations to a committee merely because such allegations are made. It is incumbent on a complainant to put before the Registrar some credible evidence supporting the allegations made.

[70] The Registrar is not required to conduct an investigation, which would be for a committee to undertake if the Registrar refers it to a committee. The Registrar is not bound to make any enquiries at all and may simply rely on what has been provided with the complaint. It is understood that a facilitator usually contacts the complainant and the agent in order to better understand the complaint and obtain the agent's explanation. This further information will also be put before the Registrar.

[30] Counsel for the Registrar submitted that evidence cannot be regarded as fresh if it would, with reasonable diligence, have been produced at the original hearing. It was submitted that all of the evidence the applicant wishes to produce was in the applicant's

⁸ *Wilson v Registrar of the Real Estate Agents Authority* [2023] NZREADT 2.

possession at the time the complaint was made, or regarding the building inspector's correspondence, could have been obtained and provided to the Registrar for consideration.

[31] On that basis, the Registrar submitted that the high threshold has not been met and the application to adduce new evidence should be dismissed.

[32] We agree. The evidence before us shows that there was plenty of opportunity for the applicant to provide the evidence she now wishes to adduce to the Registrar. Whilst the evidence she wishes to adduce may be credible, it is not sufficiently cogent to prove that the Registrar's decision was plainly wrong.

[33] We decline to grant leave for the further evidence of the applicant to be adduced.

SUBMISSIONS ON SUBSTANTIVE APPLICATION

The applicant

[34] In summary the applicant's submissions are as follows:

- (a) The licensee did not describe the cladding correctly when advertising the property. She described the cladding as "masonry and weatherboard", when it should correctly have been described as "textured concrete and weatherboard". The applicant submitted that the licensee mistook a reference to "masonry walls" in an exterior colour scheme chart as the house walls when they were in fact retaining walls.
- (b) The Registrar's decision in regard to a breach of r 6.4 was wrong in that he conflated the issue of breach and loss, and did not sufficiently address the issue as to whether the licensee misled the applicant and her husband.
- (c) The applicant's complaint was not inconsequential because:
 - (i) The "role of plaster" was missed by the Registrar as plaster plays a very important role in the weathertightness of the property. The plaster had defects which caused leaks and months of repairs.
 - (ii) The Registrar inaccurately stated in his decision that the applicant had not provided any evidence that the leaks she referred to were linked to the plaster. With regard to this submission, the applicant said that she provided contact details for Universal Homes and the

Authority should have obtained further evidence from Universal Homes as to the leaks and repairs to the plaster.

- (iii) The alleged misrepresentation by the licensee influenced the decision by the applicant and her husband to enter into a sale and purchase agreement for the property.
- (iv) The licensee acted “solely in her own interests to gain a sale and demonstrated a lack of care in ensuring that both the advertisements and her statements were accurate”.

The Registrar

(1) Property information and advertising

[35] With regard to the advertising of the property, the Registrar submitted that there was insufficient evidence to prove that the way in which the property was advertised was in breach of rr 6.4 or 10.7 of the Rules. It was submitted that even if the advertising was incorrect, it would not justify a disciplinary response.

[36] The Registrar referred to the Tribunal’s decision in *Vosper*, where it was established that when a breach of a rule is sufficiently minor, disciplinary sanctions may be inappropriate.⁹ The Registrar submits that this situation fits firmly into that category.

[37] It was submitted that the fact a misrepresentation was unintentional has been a consideration in deciding whether a complaint justifies a disciplinary response.¹⁰

[38] Counsel submitted that no evidence was provided to the Registrar that indicated that the licensee attempted to mislead the applicant and her husband. It was submitted that the appropriate thing for the licensee to do was to advise the applicant and her husband to obtain a building report rather than rely on her recollection of what the construction of the property was, and that this is what she did.

[39] The Registrar submitted that whilst it is possible that the licensee misunderstood the reference in the exterior colour scheme chart to “masonry walls”, this does not mean the Registrar’s decision was plainly wrong or took into account an irrelevant consideration. None of the building reports obtained by the applicant or the information from Universal Homes referred to plaster cladding.

⁹ *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [74].

¹⁰ *Bellis v Real Estate Agents Authority (CAC 1907)* [2020] NZREADT 41 at [51].

(2) *Denial of misrepresentation by licensee*

[40] It was submitted by the Registrar that, had the licensee in fact told the applicant's husband that the house was not a plaster house, then this may have been in breach of r 6.4 of the Rules.

[41] It was submitted that whilst the licensee denied saying it was not a "plaster house", and that the applicant submitted that it was more likely than not that the agent did make a statement confirming that that cladding did not contain plaster, the Registrar considered both versions of events. The Registrar concluded that there was insufficient evidence to support the applicant's version of the events or that the licensee had breached r 6.4 of the Rules.

[42] The Registrar submitted that the applicant has not pointed to any evidence that the Registrar should have considered, or failed to consider, and has failed to show that the Registrar was plainly wrong.

(3) *Finding by Registrar that complaint is "inconsequential"*

[43] It was submitted by the Registrar that he considered the evidence provided as part of the complaint and came to the correct conclusion that the applicant disclosed an inconsequential matter.

[44] The Registrar, in his letter to the applicant on 30 August 2023, explained that the property does not fit into the usual accepted definition of a "leaky building" due to it having been built in 2016. It submitted that this was a fair assessment as, knowing that the property had plaster in its construction, would not necessarily be enough to trigger the obligation to undertake further enquiries.

[45] The Registrar submitted that the level of any harm suffered by the applicant and her husband due to their entering into a sale and purchase agreement for a type of house they did not want, or due to any defects in the plaster at the property, is irrelevant to whether the licensee breached her professional obligations. It was submitted that harm itself does not prove that obligations were breached.

[46] It was submitted that the applicant has not raised anything to suggest that this conclusion was based on an error of law or principle, nor that it has met any of the other grounds identified in *Kacem*.

DISCUSSION

[47] The Tribunal has previously considered the meaning of “inconsequential” pursuant to s 74(3)(a) of the Act in *Wilson*.¹¹ The Registrar, with reference to the Tribunal’s decision, submitted that a complaint may disclose an inconsequential matter if it:

- (a) does not “disclose conduct which could, if proved, meet the definition of ‘unsatisfactory conduct’ (s 72 of the Act) or ‘misconduct’ (s 73)”,
- (b) discloses a matter that could, if proved, meet the definitions of unsatisfactory conduct or misconduct but which does not justify disciplinary action; or
- (c) discloses a matter that could meet the definitions of unsatisfactory conduct or misconduct but the allegations are not supported by “some credible evidence supporting the allegations made”.

[48] Counsel for the Registrar submitted that the Registrar is not required to send a complaint to a Complaints Assessment Committee merely because serious allegations are made. It is for the Registrar to decide if the complainant has provided sufficient evidence and whether a complaint would justify a disciplinary response.

[49] We agree.

[50] Furthermore, despite the applicant’s submission that the Registrar should have contacted Universal Homes to obtain more evidence, the Registrar is not required to conduct an investigation, which would be for a Committee to undertake if the matter had been referred to a Committee by the Registrar.

[51] The Authority’s facilitator had contacted the applicant and there is plenty of evidence before us to show that the applicant had ample opportunity to produce evidence supporting her allegations.

[52] It is for the Registrar to decide whether there is enough evidence before it to make a decision under s 74(3). It is not necessary for the Registrar to speculate what a Complaints Assessment Committee might do as a Committee has its own discretion as to whether a complaint justifies disciplinary action.

¹¹ *Wilson*, above n 8, at [66]–[76].

[53] The crux of the complaint, as identified by the applicant, is that:

- (a) The licensee made a verbal misrepresentation about the exterior cladding of the property and that was a breach of r 6.4 of the Rules.
- (b) The property had no eaves and had direct-fixed plaster relied on for weathertightness. Despite this, the licensee indicated on the buyer acknowledgment form that the property was not of a cladding type that may be at risk of weathertightness problems. Consequently, the licensee was in breach of r 10.7.
- (c) The licensee had a relationship with the vendor that was not disclosed to the applicant and her husband, in breach of s 136 of the Act.

[54] There is no evidence that the licensee breached r 6.4 of the Rules. The information provided by Barfoots and Universal Homes did not mention plaster. There was a reference in the invasive report that “The exterior consists of plaster/render finished ‘tilt slab’”. The applicant was in possession of this report prior to the agreement being declared unconditional and had the opportunity to raise this issue if she or her husband were concerned. There was no evidence provided to the Registrar that the leaks fixed by Universal Homes were linked to plaster.

[55] There is no evidence that the licensee breached r 10.7 of the Rules. Rule 10.7 states that a licensee is not required to discover hidden defects. A property built in 2016 would not fit the definition of a “leaky building” and therefore the licensee would not be expected to seek evidence or expert advice to the contrary. The applicant, as part of her due diligence, had obtained a building inspection report and an invasive inspection report, neither of which identified issues relating to leaks.

[56] The fact that the licensee advertised as a supporter on the vendor’s racing company was not a conflict of interest and not a breach of s 136 of the Act. Section 137 of the Act clarifies the meaning of a “related person” to a licensee as referred to in ss 134–136 of the Act. The advertising by the licensee on the vendor’s racing company does not fall within the category of disclosure required by a licensee under s 136 of the Act.

[57] The Registrar, in reaching its decision to not pursue the applicant’s complaint, considered the allegations and evidence provided by all parties and concluded that there was nothing to suggest that the complaint disclosed any conduct on the part of the licensee that could fall within the definition of unsatisfactory conduct or misconduct.

[58] The applicant has not shown that the Registrar's findings were wrong (in the sense of an error of law or principle, an irrelevant consideration, a failure to take into account a relevant consideration or a decision that was plainly wrong).

[59] We conclude that the Registrar's decision that the complaint disclosed an inconsequential matter was appropriate.

OUTCOME

[60] The applicant's application for leave to adduce further evidence is declined.

[61] The application for review of the Registrar's decision is dismissed and the Registrar's decision is confirmed.

[62] Having regard to the privacy of the parties and the interests of the public, it is appropriate to order publication of this decision without identifying the applicant, her husband and the licensee.

C Sandelin
Deputy Chairperson

G Denley
Member

N O'Connor
Member