

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 07

Reference No: READT 018/2022

IN THE MATTER OF

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

BETWEEN

NF
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2108)**
First Respondent

AND

HAO CHO
Second Respondent

Tribunal:

D J Plunkett (Chair)
C A Sandelin (Deputy Chair)
P N O'Connor (Member)

Appearances:

The appellant:

Self-represented

Counsel for the first respondent:

M Mortimer-Wang

Counsel for the second respondent:

C Walker KC, M S R Lucas, N Cannon

SUBJECT TO NON-PUBLICATION ORDER

RULING ON PRELIMINARY ISSUE
Whether Committee correct not to refer compensation
Dated 21 March 2024

INTRODUCTION

[1] NF (the appellant) made a complaint to the first respondent, the Real Estate Agents Authority (the Authority) on 7 May 2021 (letter of complaint dated 30 April 2021). It was against the second respondent, Mr Cho (the licensee) and the agency which engaged the licensee. The complaint is not being pursued against the agency.

[2] The complaint concerned a sale and purchase agreement dated 3 November 2020 (the agreement) for a residential property. The appellant's primary complaint was that the licensee had altered the agreement after he had signed it by completing the GST statements in schedule 1. The answer "Yes" had been circled to the following statements:¹

- 2(a) The purchaser is registered under the GST Act and/or will be so registered at settlement.
- 2(b) The purchaser intends at settlement to use the property for making taxable supplies.

[3] The appellant alleged these statements effectively forced him to register a company for GST purposes, which was not his intention on purchasing the property.

[4] The complaint was referred to Complaints Assessment Committee 2108 (the Committee).

[5] On 22 June 2022, the Committee partially upheld the complaint.² It found there was insufficient evidence to establish that the licensee had altered the agreement after it was signed by the appellant.³ It accepted the licensee's evidence that he had completed the schedule in front of the appellant without the latter's knowledge or taking proper instructions from him or explaining it to him. He had not required the appellant to initial that page of the agreement. The Committee found that the licensee did this upon an erroneous and incorrect assumption.

[6] The Committee therefore found the licensee had failed to properly discharge his duty to exercise skill, care, competence and diligence when presenting the agreement for execution.⁴ He had not taken the appellant through the agreement, explained it to him and obtained his informed consent. He had displayed a lack of knowledge of the Real Estate Agents Act 2008 (the Act) and of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). The licensee had also failed to deal fairly with the appellant.

¹ Sale and purchase agreement (3 November 2020), sch 1, at 61 of the Authority's bundle.

² Complaint No: C42202 (22 June 2022), Tab 5 of the Authority's bundle.

³ At [3.9]–[3.10].

⁴ At [3.11]–[3.14].

[7] The Committee found the licensee to be in breach of rr 5.1, 5.2 and 6.2 of the Rules. This was found to be unsatisfactory conduct under s 89(2)(b) of the Act. The Committee relied on the definition of unsatisfactory conduct in s 72(b) and (d).

[8] On 21 February 2023, the Committee issued its decision on the penalty orders.⁵ It censured the licensee and fined him \$3,500.

[9] In its decision on the orders, the Committee noted the appellant's claim for compensation of \$100,000, as to which it said:

- 4.7. In his short penalty submissions, he has submitted the conduct has had substantial consequences in terms of monetary loss to him. The Committee notes that there has not been sufficient evidence submitted quantifying or setting out and supporting that claimed substantial monetary loss. He has requested the issue of penalty be referred to the Disciplinary Tribunal under s93(1)(ha) of the Act for it to consider making a compensation order under s110(5) of the Act.
- 4.8. The Committee considers that such a referral is unwarranted. Such referrals are rare and made in limited circumstances. Something more than mid-level unsatisfactory conduct is required [C34717-Craig Freear & Catherine Freear], conduct that approaches a high level of unsatisfactory conduct, which is not present here.
- 4.9. The Committee has also considered whether an order of rectification under s 93(1)(f) is appropriate. It concludes no such order is justified because it is not satisfied that any proven loss has been caused by the Licensee's conduct. The GST error was discovered a week before the complainant declared the agreement unconditional and a month before settlement was due. The Complainant was free to withdraw from the agreement or make arrangements to address the GST implications. He elected to proceed with the transaction. The Committee accepts the Licensee's submissions that this decision to proceed with the knowledge of the GST implications broke the chain of causation between the conduct and its alleged consequences/loss.

[10] In his case before the Committee, the appellant had alleged he had incurred "a substantial loss..., details of which I have provided".⁶ So far as the Tribunal can ascertain, the details provided to the Committee were:

1. The appellant's former solicitor sought on his behalf his legal costs of \$18,000 (plus GST).⁷
2. In his original complaint, the appellant referred to penalty interest paid in excess of \$10,678.18 (due to late settlement) and sought compensation of \$100,000 for unspecified items, as well as an order for costs.⁸

⁵ Complaint No: C42202 (21 February 2023), at Tab 7 of the Authority's bundle.

⁶ Letter from the appellant to the Committee (4 August 2022), at 13 of Tab 6 of the Authority's bundle.

⁷ Email former solicitor to the Authority (28 February 2022), at Tab 4 of the Authority's bundle.

⁸ Complaint (30 April 2021) at 9 and 11 of the Authority's bundle.

Appeal

[11] The appellant filed an appeal (form dated 6 July 2022) against the Committee's decision of 22 June 2022. It is apparent from his undated statement (filed in the Tribunal on 11 August 2023) that the appeal is also against the penalty decision of 21 February 2023.

[12] The notice of appeal set out three alleged procedural failures, but did not identify the findings or conclusions of the Committee the appellant contends are wrong. However, his statement (11 August 2023) set out the "Issues", including:

What loss did [the appellant] suffer as a result of [the licensee's] dishonesty?

[13] In Minute 3 (29 September 2023), the Tribunal issued directions concerning the issue as to whether the Committee was correct not to refer to the Tribunal the making of a compensation order. It stated that in respect of this issue, the appellant could not refer to any new type of loss or evidence not given to the Committee.

[14] The Tribunal has received submissions from the appellant (7 November 2023 and 14 February 2024), the Authority (29 November 2023 and 14 February 2024) and the licensee (5 December 2023 and 14 February 2024).

[15] In order to understand the parties' arguments, it is worthwhile at this juncture to set out the relevant statutory provisions concerning the respective jurisdictions of the Committee and the Tribunal as to rectification and compensation:

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:

...

- (f) order the licensee—

(i) to rectify, at his or her or its own expense, any error or omission; or

(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

...

- (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):

...

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

...

- (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:

...

- (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).

SUBMISSIONS

Submissions from the appellant

[16] In the submissions recorded in the appellant's "Notice" (7 November 2023), he largely sets out his substantive appeal against the Committee's decision. To the extent relevant to the issue before the Tribunal, he contends that the Committee adopted the incorrect threshold test for referring the matter of compensation to the Tribunal. He questions the standard used of "mid-level unsatisfactory conduct". The Committee said there was insufficient evidence without informing him what evidence might have been

produced. Although his significant financial loss attributable to the licensee's actions was acknowledged by the Committee, it was not addressed in a way which justified the decision not to refer compensation.

[17] In his reply submissions (14 February 2024), the appellant supports the submissions of the Authority as to the principles applicable to the Committee's discretion regarding whether to refer compensation to the Tribunal. He also provides some detail as to how the various losses claimed arose from the licensee's conduct. The appellant notes that the Committee failed to specify any feature or provide detailed reasoning as to why, despite the established mid-range unsatisfactory conduct, a referral was deemed unnecessary.

Submissions from the Authority

[18] In his submissions (29 November 2023), Mr Mortimer-Wang contends there are two aspects to the Committee's power:

1. It must be satisfied the unsatisfactory conduct involves more than a minor or technical breach.
2. It retains a residual discretion to nevertheless not refer compensation, stemming from the fact that the Committee "may" make an order.

[19] Examples of where a referral may be inappropriate are:

1. Compensation is not sought.
2. The request for referral is plainly vexatious or an abuse of process.
3. Compensation is sought only in respect of a point found not to have been established.
4. The label "compensation" had been wrongly attached to something that is properly a claim for rectification under s 93(1)(f) or a claim for costs.

[20] These examples require independent judgment by a committee. It does not have to mechanically refer a matter to the Tribunal in every case.

[21] A committee's role is not to pre-empt how the Tribunal is likely to decide any compensation claim. It should not perform a 'dry run' of any claim and it is not for committees to assess the merits of any such claim.

[22] Informed by these respective roles, committees should interpret “more than minor or technical” in a restrained way, so the assessment of the merits is properly reserved for the Tribunal. It is a screening mechanism designed to filter out the lowest-level claims.

[23] In the present case, the Authority’s position is that the Committee erred in its statement of the legal test for referral. Its only articulation of the test was that something more than mid-level unsatisfactory conduct was required before it would make a referral. This misstates both aspects of the power.

[24] As for the first, the Committee had already characterised the licensee’s unsatisfactory conduct as falling within the “mid-range”. As for the second aspect above, the Committee did not identify any feature which might have meant that referral was not appropriate.

[25] Nor can the Authority identify any such feature. To the contrary, the appellant potentially incurred losses that might be compensatable, such as the payment of GST, penalty interest or legal or professional fees. He might be able to sustain those claims for compensation. Whether or not he can is for the Tribunal to assess. His claims were not so improper that the Committee should have declined to refer them.

[26] If the Committee’s characterisation of referrals as rare is intended to convey that the test for a referral should be rare or exceptional, then that would be wrong. If it was an empirical observation – that there have not been many such orders – then it would not necessarily be an error. There is nothing about the legal test suggesting that referrals ought to be rare.

[27] It was not an error for the Committee to look at issues of causation when considering rectification under s 93(1)(f). It is empowered to make such decisions. This is, however, a different enquiry. Section 93(1)(f) does not empower a committee to order compensatory damages.⁹

[28] On the circumstances before the Committee, there would have been grounds to make an order under s 93(1)(ha) to refer compensation to the Tribunal.

[29] In reply (14 February 2024) to the licensee’s submissions, Mr Mortimer-Wang contends that it is not necessary for the Tribunal to determine whether an appeal is a general appeal or an appeal against a discretion.

[30] The nature of appeals from orders decisions under s 93 is not finally settled. There are inconsistent decisions of the High Court. There is a decision stating that

⁹ *Quin v Real Estate Agents Authority* [2012] NZHC 3557, [2013] NZAR 38 at [72] and [75].

appeals from orders decisions are appeals against a discretion with limited grounds of appeal, and there are decisions that they are general appeals allowing a review of the merits. The Tribunal has recognised the conflicting authorities and adopted an approach informed by the High Court's observation that in the majority of cases the outcome will be the same.¹⁰ As long as the appeal can identify an error, the Tribunal will consider matters afresh. In a highly principled area like penalty orders, it is often the case that errors may meet even the narrower grounds of an appeal against a discretion.

[31] The Committee erred when it said that something more than mid-level unsatisfactory conduct was needed before it would make a referral. That error, which is an error of law, would found both a general appeal and an appeal against a discretion.

[32] The licensee argues in favour of a slightly more expansive role for committees in choosing whether to make a referral, including being able to examine whether there is a plausible basis for compensation. In the Authority's respectful view, the narrower role of committees fits best with the statutory scheme.

[33] It is submitted by the licensee that because the Committee found that his actions were not causative of the appellant's loss in terms of rectification, s 110(6)(b) and (c) mean that the Tribunal cannot revisit that fact when assessing compensation.

[34] The Authority agrees that on a compensation referral, the Tribunal does not re-examine the Committee's factual findings about unsatisfactory conduct, but s 110(6)(b) and (c) cannot operate as a bar if a committee oversteps its role in making determinations. A committee could legitimately enquire into some aspects of causation because it has a power of rectification under s 93(1)(f), but it is not for a committee to conduct a dry run assessing compensation.

[35] On the Authority's preferred interpretation, the Committee should have made no findings about that and the licensee cannot use those findings to prevent the Tribunal from making its own decision about causation on a compensation referral. The Tribunal is the only body properly entitled by the Act to do that. If the Tribunal finds that the Committee erred and overturns its findings on causation for compensation, then those findings will no longer animate s 110(6)(b) and (c) and the Tribunal will be free to come to its own assessment.

¹⁰ *Mairs v Complaints Assessment Committee* 413 [2019] NZHC 1839 at [23]; *Fear v Real Estate Agents Authority* [2018] NZREADT 17 at [38]–[39]; and *Walker v Real Estate Agents Authority* [2021] NZREADT 12 at [17]–[18].

Submissions from the licensee

[36] In his submissions (5 December 2023), Mr Walker KC contends it is clear from s 110(6)(b) and (c) that, in deciding whether to make a compensation order in respect of unsatisfactory conduct, the Tribunal is not entitled to revisit the Committee's substantive findings.

[37] The Committee has made substantive findings:

1. The licensee's conduct was more than minor and was in the mid-range.
2. There was insufficient evidence quantifying or setting out and supporting the claimed monetary loss.
3. Any proven loss was not caused by the licensee's conduct, the chain of causation having been broken.

[38] Pursuant to s 110(6)(b) and (c), the Tribunal must apply and may not overturn those determinations of substantive matters in this case. That is so, notwithstanding that the Tribunal is conducting an appeal by way of a rehearing pursuant to s 111(3). The s 110(6)(b) and (c) prohibition against overturning the Committee's determination of a substantive matter must equally apply in respect of an appeal.

[39] The discretionary nature of the Committee's powers under s 93(1) of the Act was recognised in *Quin* and other decisions of the High Court.¹¹ They demonstrate that referral is not automatic once the floor of a more than minor or technical breach is met. Specifically, a committee is entitled to have regard to the seriousness and culpability of the licensee's conduct.

[40] The legislative history shows that s 93(1)(ha) was always meant to be a gateway limiting the number of referrals, rather than a standard for automatic referral. Parliament retained the discretion, "may", the object being to carve out minimal cases which could not be referred, in the exercise of the discretion.

[41] The Tribunal can only revisit the Committee's exercise of its discretion if the Committee:¹²

1. Made an error of law.

¹¹ *Quin v Real Estate Agents Authority*, above n 9.

¹² *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

2. Took into account an irrelevant consideration.
3. Failed to take into account a relevant consideration.
4. Made a decision which was plainly wrong.

[42] The Committee in the present case exercised its discretion correctly. There was no such *Kacem v Bashir* error. The Committee did not make any error of law. In declining to exercise its discretion because the conduct was mid-level, the Committee had regard to other relevant factors, such as there was no evidence of loss and any loss was not caused by the unsatisfactory conduct. The Committee's decision involved judgment in the round. It was not committing an error of law but was exercising its discretion on a principled and correct basis.

[43] In his reply submissions (14 February 2024), Mr Walker repeats that the Committee was exercising a discretionary judgment, having satisfied itself that the floor set by s 93(1)(ha) had been met. The Committee's discretion cannot be so severely restricted, as the Authority contends, that it ignores the range of considerations the Committee may legitimately take into account.

DISCUSSION

[44] We agree with the Authority that we do not need to resolve the conflict in the higher court authorities as to whether the nature of our power on an appeal against penalty orders is a general appeal (with expansive grounds of appeal, including the merits) or an appeal against a discretion (with more limited grounds of appeal, as articulated in *Kacem v Bashir*). This is because we find, for the reasons given below, that the Committee made an error of law in describing the conduct threshold for referral as "more than mid-level" and which "approaches a high level of unsatisfactory conduct".¹³ That error will ground an appeal irrespective of the nature of the appeal.

[45] Furthermore, since the Committee committed an error in declining to refer compensation to us, we do not need to determine the extent of the Committee's discretion to decline a referral even if the threshold is met. It is not necessary for us to decide whether it is limited as contended by the Authority. However, while we will not articulate the ambit of a committee's discretion, we will dismiss the licensee's argument that a committee has the power to make findings on the merits of a claim for compensation and that those findings bind the Tribunal.

¹³ Complaint No: C42202 (21 February 2023) at [4.8].

[46] The starting point is s 93(1)(ha) of the Act. It gives a committee the power of “referring” the matter of compensation to the Tribunal. This may be read with s 110(5) which states that if a committee “refers” the matter, the Tribunal may “make” a compensation order. In other words, it is only the Tribunal which can decide on whether a compensation order is made, not a committee. The statutory wording does not, on its face, support the contention that a committee may assess the merits of a claim for compensation, even in a provisional way.

[47] This may be contrasted with an order against a licensee to rectify an error or omission or take steps to provide relief for such error or omission at the licensee’s expense, under s 93(1)(f). A committee is expressly empowered to make such a decision, so it may consider proof of loss and causation and the merits generally, though its decision is susceptible to appeal before the Tribunal.

[48] Where the licensee has made an error or omission causing harm, the penalty orders of compensation and rectification will usually both be considered. The higher courts have developed principles governing rectification. It is, however, at least in the Tribunal’s experience, an uncommon remedy.

[49] Returning to compensation, since a committee has no statutory jurisdiction to decide compensation, it must follow that a complainant need not prove an entitlement to compensation before a committee. A complainant is not required to satisfy a committee that he or she has suffered any expense or loss or that it was caused by the licensee’s wrongdoing as upheld by a committee.

[50] The Tribunal has already expressed a preliminary view as to the formulation of a compensation claim by a complainant (appellant) in the Tribunal, as compared with what was advanced before a committee:¹⁴

[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.

[51] The Tribunal has also previously found that any loss for which compensation may be awarded must bear a “causal connection” to the unsatisfactory conduct found.¹⁵

¹⁴ *KD v Donaldson* [2023] NZREADT 12 at [57].

¹⁵ *UM v Real Estate Agents Authority (CAC 2103)* [2023] NZREADT 32 at [72].

[52] In the instant case, the appellant was not required to prove or even establish a *prima facie* case for compensation before the Committee. This is because the Committee had no power to determine any claim for compensation.

[53] The Committee declined to make an order of referral because it decided that what is required is something more than mid-level unsatisfactory conduct. The conduct must approach a high level of unsatisfactory conduct.

[54] This is contrary to the statutory threshold, which is “more than a minor or technical breach”.¹⁶ The Committee characterised the licensee’s unsatisfactory conduct as mid-level,¹⁷ so the statutory threshold was met.

[55] The Committee gives secondary reasons for declining referral:

1. There was insufficient evidence quantifying or setting out and supporting the claimed loss.
2. It was not satisfied that any proven loss was caused by the licensee’s conduct, since it considered the chain of causation to have been broken.

[56] The latter was a finding expressed to defeat the remedy of rectification, but would plainly be relevant to any assessment of compensation.

[57] Insofar as these findings are made to defeat a compensation referral, they breach natural justice and are in any event outside the Committee’s power.

[58] The Committee never asked the appellant to prove his compensation claim, and indeed had no power to do so. The appellant could not have anticipated that his claim for compensation would be defeated on its merits and therefore that he should produce evidence proving any loss, given that the Committee had no power to assess his claim.

[59] So far as the claim for compensation was concerned, the appellant was not required to prove anything, beyond the statutory threshold (which the Committee accepted was met).

[60] This may be contrasted with rectification where the Committee has the jurisdiction to make a decision. The appellant was therefore required to prove his entitlement to rectification, whether or not the Committee expressly sought such evidence. But this is not material as the appellant did not seek rectification before the Committee and is not seeking it in the Tribunal.

¹⁶ Real Estate Agents Act 2008, s 93(1)(ha).

¹⁷ Complaint No: C42202 (21 February 2023) at [4.5].

[61] This brings us to the licensee's principal argument supporting the Committee's entitlement to assess the merits of the compensation claim, which is the requirement in s 110(6) to apply and not overturn:

1. the determination of the Committee that there was unsatisfactory conduct involving more than "a minor or technical contravention" and
2. the Committee's determination of "any substantive matter".

[62] It is submitted that the Committee's findings concerning evidence and causation (the secondary reasons given above) are "substantive matter[s]" which bind the Tribunal.

[63] Respectfully, we do not accept this argument. The substantive matters in s 110(6)(b) is a reference to the findings made by the Committee in determining that there was unsatisfactory conduct and that it was more than minor or technical. It cannot relate to the quality of the compensation claim as the Committee had no power to assess it.

[64] Nor do we accept the licensee's argument that we would be bound by the Committee's findings on evidence and causation in any appeal against the decline of rectification or relief. The appellant has not sought rectification before the Tribunal and we do not intend assessing it. Had he done so, any findings by the Committee concerning rectification would be open to reassessment by us (subject to any limitation on the extent of the available grounds for an appeal against a penalty order). Section 110(6) expressly applies only in relation to the Tribunal's assessment of compensation and should not be more widely interpreted to cover the Committee's findings on rectification as well.

[65] In summary, to the extent that the Committee made findings on evidence or causation concerning the compensation claim, we may ignore them as they were outside the Committee's jurisdiction. To the extent that the Committee made evidence or causation findings in relation to rectification, they would be susceptible to reassessment by us on appeal.

Conclusion

[66] The Committee made an error of law in declining to refer compensation to the Tribunal. It misinterpreted the statutory threshold. The appellant sought referral to the Tribunal and made a claim for losses (or expenses) which might be compensatable. Whether there is merit to his claim for such losses, or any other losses which might be advanced in the Tribunal, is for the Tribunal to determine in due course.

OUTCOME

1. The appellant may formulate a claim for compensation and file it in the Tribunal. He is not bound by the losses or expenses or evidence adduced before the Committee. The timing of his claim will be discussed at a telephone conference.
2. A telephone conference will be arranged to discuss the next steps and their timing.

[67] 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

[68] Having regard to the interests of the public in the transparency of the Tribunal and the privacy of the parties, it is appropriate to direct publication of this Ruling without naming the appellant.¹⁸

D J Plunkett
Chair

C A Sandelin
Deputy Chair

P N O'Connor
Member

¹⁸ Real Estate Agents Act, s 108.