

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 19

READT 019/19

IN THE MATTER OF

An application for an award of costs under
s 110A of the Real Estate Agents Act 2008

BETWEEN

SAGAR SINGH
Applicant

AND

RAMJI GOVINDARAJAN
Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms C Sandelin (Member)

Submissions filed by:

Mr A J Woodhouse, on behalf of Mr Singh
Ms J Badenhorst, on behalf of Mr
Govindarajan

Date of Ruling:

1 May 2020

RULING OF THE TRIBUNAL
(Application for award of costs)

Introduction

[1] On 20 February 2020, the Tribunal issued a Ruling in which it declined an application by Mr Govindarajan for disclosure of its file relating to a disciplinary proceeding against Mr Singh (“the disclosure Ruling”).¹

[2] On behalf of Mr Singh and Mr Kodoor, Mr Woodhouse has applied pursuant to s 110A of the Real Estate Agents Act 2008 (“the Act”) for an award of costs against Mr Govindarajan, in the sum of \$13,417.75 (inclusive of GST and disbursements), or such other sum as the Tribunal deems just.

[3] The application is opposed by Mr Govindarajan.

Background

[4] In April 2018, Complaints Assessment Committee 416 filed a disciplinary charge in the Tribunal against Mr Singh, alleging misconduct (“the proceeding”). It was alleged that Mr Singh provided an existing client, Mr Kodoor, with an agency-branded agreement for sale and purchase, on which he had inserted the vendor’s and purchaser’s details, the property address, sale price, and a finance condition, when he did not have a signed agency agreement with Mr Kodoor in respect of the transaction, and had not informed his agency of the transaction. The transaction was for the sale and purchase of a property and business known as “Trinity Wharf”.

[5] It was alleged that this conduct constituted seriously incompetent or seriously negligent real estate agency work. Mr Singh admitted the alleged conduct but submitted that it constituted unsatisfactory conduct, rather than misconduct. The Committee subsequently withdrew the charge of misconduct, and Mr Singh admitted an alternative charge of unsatisfactory conduct.

[6] The Tribunal was then required to determine whether Mr Singh was guilty of unsatisfactory conduct and, if so, to make appropriate penalty orders. It dealt with the matter on the papers: that is, on the basis of an Agreed Summary of Facts, statements

¹ *Complaints Assessment Committee (CAC 416) v Singh* [2020] NZREADT 04.

by Mr Singh and Mr Kodoor, and submissions filed on behalf of the Committee and Mr Singh. The Tribunal did not hold a defended hearing. The Tribunal's decision (dated 31 July 2018) was published on the Tribunal's website on 3 August 2018.²

[7] On 10 July 2019, the Tribunal received an emailed request from Mr Edmondson, an attorney practising in the United States of America, for a copy of the Tribunal's file for the proceeding. Mr Edmondson said that the facts of the proceeding had been part of the record in defamation proceedings issued by Rosebank Road Medical Services Ltd ("Rosebank"), a company of which Mr Kodoor was half-owner, against his client Mr Govindarajan in the San Francisco Superior Court. Mr Govindarajan had been found not liable, but Rosebank had filed an appeal to the Californian Appeal Court. Mr Edmondson said that his request for a copy of the file was in order to "augment and/or review" the record for the purposes of oral argument on appeal.

[8] The request was referred to counsel acting for Mr Singh, who advised that it was opposed.

[9] It appears from later correspondence from Mr Edmondson that Rosebank's appeal was dismissed. However, the request for disclosure of the Tribunal's file was maintained. Mr Edmondson advised the Tribunal on 31 July 2019 that the information provided in the proceeding was still desired as there was still a chance of a re-trial, and on 30 August 2019, he advised that the information might be needed in unspecified "other matters and likely in future other matters".

[10] The Tribunal received submissions from Mr Woodhouse on behalf of Mr Singh, and New Zealand counsel instructed by Mr Edmondson on behalf of Mr Govindarajan (Ms Badenhorst). In Ms Badenhorst's submissions, reference was made to the information being sought for "mirror defamation proceedings" "recently stirred up" by Mr Kodoor in India. Later, Mr Govindarajan referred in an affidavit to a criminal prosecution in India, commenced following a complaint by Dr Ganesh in February 2016.

² *Complaints Assessment Committee 416 v Singh* [2018] NZREADT 34.

[11] In its decision declining the application, the Tribunal rejected Ms Badenhorst’s submission that the Tribunal should be guided by the Senior Courts (Access to Court Documents) Rules 2017 and the District Court (Access to Court Documents) Rules 2017 (“the courts access rules”), and accepted Mr Woodhouse’s submission that there is no express general right of access to Tribunal documents in either the Act, or any Rules or Regulations made under the Act, such that Mr Govindarajan’s application should be denied.

[12] The Tribunal then found that even if the Tribunal were to follow the approach of the courts access rules, it would decline Mr Govindarajan’s request for disclosure.³

[13] The Tribunal observed that:⁴

[40] ... As a licensee, Mr Singh had a professional obligation to co-operate with the investigation into his conduct, and to provide material when requested. It is relevant to note that the obligation to co-operate is underpinned by s 153 of the Act, which makes it an offence to (among other things) resist or obstruct an investigation.

[41] Further, in the absence of any express right of access by a non-party to the Tribunal’s file for the disciplinary proceeding, Mr Singh could reasonably have expected that except for the decision, which is a matter of public record, information he provided to the Tribunal, and any other material on the Tribunal’s file, would not be disclosed to a third party.

Jurisdiction to award costs

[14] Section 110A of the Act provides (as relevant to this application):

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:

³ *Complaints Assessment Committee (CAC 416) v Singh*, above, fn 1, at [24]–[25] and [42].

⁴ At [40]–[41].

- (c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

...

[15] The Tribunal has a broad discretion as to awards of costs. Each case must be determined on the facts and circumstances of the particular case. Some guidance is available from the judgments of her Honour Justice Mallon in *Commissioner of Police v Andrews* (where costs were sought against a complainant in proceedings under the Human Rights Act 1993),⁵ and his Honour Justice Palmer in *TSM v A Professional Conduct Committee*, (which considered costs awarded in disciplinary proceedings under the Health Practitioners' Competence Assurance Act 2003).⁶

[16] In *Kooiman v Real Estate Agents Authority (CAC 519)*,⁷ an award of costs was sought after Mr Kooiman's unsuccessful appeal against a Complaints Assessment Committee's decision not to inquire into his complaint against three licensees. The application was on the grounds that Mr Kooiman was "no stranger to the Courts and to litigation", and habitually brought hopeless cases that put people to costs, and that his appeal was vexatious, and a collateral attack on evidence given by the licensees in another matter.

[17] In declining the application, the Tribunal noted that the Complaints Assessment Committee's decision not to inquire into Mr Kooiman's complaint was not based on a finding that it was "frivolous or vexatious and not made in good faith", under s 79(2)(c) of the Act, and that no application had been made to strike out the appeal under s 109A of the Act. Further, the Tribunal was not persuaded that Mr Kooiman had not participated in good faith in, or had obstructed, the appeal process.

[18] In *Complaints Assessment Committee v Wright*,⁸ an award of costs in the sum of \$25,000 was made against Mr Wright, a licensee, after he was found guilty of misconduct under s 73(a) of the Act (disgraceful conduct). This was approximately

⁵ *Commissioner of Police v Andrews* [2015] NZHC 745.

⁶ *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21], citing *Vatsayann V Professional Conduct Committee Of The New Zealand Medical Council* [2012] NZHC 1138, at [34], per Priestley J.

⁷ *Kooiman v Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11.

⁸ *Complaints Assessment Committee v Wright* [2019] NZREADT 56.

half of the Committee's actual costs in bringing the charge against Mr Wright. The Tribunal accepted that such an order was appropriate given the nature and seriousness of Mr Wright's offending, and his failure to respond appropriately to the charge.

[19] In *Beatson v Real Estate Agents Authority (CAC 416)*,⁹ an award of costs was made against Mr Beatson, in favour of the respondent licensees. The Tribunal took into account the commercial nature of the dispute between the parties (as to payment of commission), so had close parallels to conventional civil litigation, in which the principle is that the successful party should generally be entitled to a contribution to its costs by the unsuccessful party.

Submissions

[20] Mr Woodhouse submitted that Mr Govindarajan's repeated requests for the file were in relation to matters that were irrelevant to the charge accepted by Mr Singh, and focussed particularly on Mr Kodoor, and the statement given by him to the Tribunal. He submitted that as a consequence, his attendances were required as each iteration of the requests was made, with gathering information from Mr Kodoor, and his wife, Dr Ganesh, and preparing submissions.

[21] Mr Woodhouse referred to examples in the civil courts where costs orders have been made against unsuccessful applicants for access to court files who were not parties to the proceeding they sought access to. He referred to the decisions of his Honour Justice Asher in *Commerce Commission v Air New Zealand*,¹⁰ and the Court of Appeal in *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo*¹¹ as instances of the High Court and Court of Appeal ordering costs against unsuccessful non-parties, as Mr Govindarajan was in the present case.

[22] Mr Woodhouse submitted that the invoiced costs of dealing with Mr Govindarajan's requests for disclosure of the Tribunal's file totalled \$13,417.75, inclusive of GST and disbursements. Of this, \$4,548.00 was invoiced for the period

⁹ *Beatson v Real Estate Agents Authority (CAC 416)* [2019] NZHC 45.

¹⁰ *Commerce Commission v Air New Zealand* [2012] NZHC 271.

¹¹ *Greymouth Petroleum Holdings Ltd v Empresa Nacional del Petróleo* [2017] NZCA 490.

from 11 July to 16 September 2019, when submissions were filed in response to Mr Edmondson's requests. \$8,869.73 was invoiced for the period from 14 November 2019, when submissions were submitted in response to Ms Badenhorst's submissions.

[23] He submitted that in the present case, an award should be made of indemnity costs (that is, the total invoiced costs) for attendances after 14 November 2019 and of a significant contribution to costs invoiced prior to that date.

[24] Mr Woodhouse submitted that Mr Govindarajan's requests for disclosure of the Tribunal's file had been based on false premises: that it was required for oral argument in the hearing of Rosebank's appeal, then that it might be needed for unspecified "actions pending" and other "other matters and likely in future other matters", then that it was required for an asserted new defamation proceeding allegedly "stirred up" by Mr Kodoor in India, then that it was urgently required for a prosecution brought against Mr Govindarajan in India.

[25] He submitted that additional costs had been incurred as a result of the large quantities of material submitted in support of the requests for disclosure. He submitted that attachments of some 168 pages had been annexed to the application (comprising the opening and reply briefs of the parties in the Californian Appeal Court), without any indication or reference being given as to what aspects of those documents were relevant or being relied on for the purposes of the request for disclosure.

[26] Mr Woodhouse further submitted that Mr Govindarajan's case for requesting disclosure of the Tribunal's file was hopeless. He referred to his submissions filed on 16 August 2019 in which he submitted that there was no right of access to the files of Tribunal proceedings. However, the request for disclosure of the file had been maintained, and Mr Govindarajan's counsel had failed to accept an offer that the request be withdrawn and advice that if not withdrawn, costs would be sought.

[27] Ms Badenhorst acknowledged that the Court of Appeal has ordered unsuccessful applicants for access to files to pay costs (in *Schenker AG v Air New Zealand Ltd*)¹² (a case related to *Commerce Commission v Air New Zealand Ltd*), and *Greymouth Petroleum*,¹³ but submitted that those orders were made pursuant to rr 53 and 53A of the Court of Appeal (Civil) Rules 2005, which bears very little resemblance to s 110A of the Act, as it is worded more strongly in favour of awarding costs to successful parties.

[28] She submitted that s 110 of the Act is aimed at encouraging parties to co-operate in proceedings, and geared towards party behaviour in proceedings including participating in good faith, facilitating rather than obstructing information gathering, and facilitating resolution. She submitted that Mr Govindarajan's behaviour had been exemplary, and that there was no good reason to make an order for costs against him.

[29] Ms Badenhorst submitted that the present case could in any event be distinguished from *Schenker* and *Greymouth Petroleum*, as both of the unsuccessful applicants were large commercial entities, motivated by commercial gains, whereas Mr Govindarajan is an individual of limited means, who has already spent a "fortune" in defending himself against proceedings issued by Rosebank and its appeal, has no savings or significant assets, and is facing ongoing costs in resolving a case against him in India.

[30] Ms Badenhorst also submitted that the present case could be distinguished from *Wright*,¹⁴ in which the licensee's conduct in the proceeding was described as rude and dismissive, he failed to follow directions or assurances provided by himself, failed to engage in the process, was obstructive in information-gathering, and did not facilitate resolution. Further, he had been found guilty of serious misconduct.

[31] By contrast, she submitted, Mr Govindarajan was an innocent third party seeking the assistance of the Tribunal, and had made a reasonable request for information which had the potential to assist him in litigation overseas. He had participated in

¹² *Schenker AG v Air New Zealand Ltd* [2013] NZCA 114.

¹³ Above, fn 11.

¹⁴ Above, fn 8.

good faith as the request was dealt with by the Tribunal, was respectful, and had responded to questions asked of him.

[32] Ms Badenhorst submitted that the present case could be distinguished from *Beatson*,¹⁵ in which the Tribunal referred to the commercial nature of the complaint, and found that the proceeding in the Tribunal had close parallels with conventional civil litigation. She submitted that in the present case, Mr Govindarajan is not motivated by commercial gains, but is defending himself against proceedings instigated by Rosebank in California, and Mr Kodoor's wife in India.

[33] Ms Badenhorst further submitted that if the Tribunal does not accept that no costs award should be made, indemnity costs are not appropriate. She submitted that the Tribunal should be cautious in applying general civil cost principles, and relying on cases decided in the High Court and Court of Appeal, and on provisions of the applicable costs rules that are not comparable with s 110A.

[34] In response to Mr Woodhouse's submissions, Ms Badenhorst submitted that he had insinuated dishonesty by Mr Govindarajan's United States counsel. She submitted that Mr Edmondson had intended to use Tribunal documents in oral argument on appeal, but the focus of oral arguments had been on other topics. Notwithstanding that, she submitted that the final appeal judgment had devoted an entire section to the Trinity Wharf transaction.

[35] She further submitted that rather than raising a "new" reason for disclosure by referring to a "recently stirred up defamation suit" in India, Mr Govindarajan's submissions were merely expanding on, and providing more detail of, the "other matters" referred to earlier by Mr Edmondson, and Mr Govindarajan had not understood the difference between a civil defamation proceeding and criminal proceedings. She further submitted that the criminal charges against Mr Govindarajan in India are indeed "recent", as they continue to be called in the Indian courts.

¹⁵ Above, fn 9.

[36] Ms Badenhorst also submitted that it could not be said that Mr Govindarajan's case for disclosure of the Tribunal file was "hopeless", as at the time the request was made there was no guiding precedent as to accessing Tribunal documents, and the Tribunal has the power to regulate its own procedures.

[37] In response to Mr Woodhouse's submission that Mr Govindarajan had failed to withdraw his request, Ms Badenhorst submitted that he was entitled to have his request determined by the Tribunal, especially as there was no guiding precedent.

[38] Finally, Ms Badenhorst submitted that the costs claimed by Mr Woodhouse are excessive. She submitted that if the matter had been heard in the District Court, scale costs would have resulted in an order of \$3,100. She submitted that if the Tribunal is minded to order costs, the order should not exceed that sum.

[39] Mr Woodhouse filed submissions in reply. We record that Ms Badenhorst submitted that they had been filed late, and should not be received. We have considered Ms Badenhorst's opposition, and have concluded that it is appropriate that we receive Mr Woodhouse's reply submissions.

[40] Mr Woodhouse submitted that it could not be said that Mr Govindarajan's conduct had been "exemplary", given the shifting nature of the grounds for his requests for disclosure, which (while acknowledging that this was disputed by Ms Badenhorst) he described as "sometimes obtuse and ... not forthright". He also noted that Mr Govindarajan had supplied no evidence in support of the assertion that he has limited means.

[41] In response to Ms Badenhorst's submission that the quantum of costs claimed is excessive, Mr Woodhouse submitted that the District Court scale of costs has no relevance to proceedings in the Tribunal, and that the actual costs claimed for are relevant and have been disclosed. He submitted that if the costs appear high, it is a direct result of Mr Govindarajan's multiple requests, and the shifting nature of those requests.

Discussion

[42] The decisions in *Kooiman* and *Beatson* (in which awards were sought against unsuccessful appellants) and *Wright* (in which costs were sought against a licensee found guilty on a disciplinary charge), are of assistance only as examples of the Tribunal's exercise of its jurisdiction to award costs. The circumstances in each case bear no resemblance to the present case.

[43] As the Tribunal held in the disclosure Ruling, there is no provision in the Act, or any rules or regulations made under the Act, providing for access to the Tribunal's documents, such as exists under the courts' access rules.

[44] Mr Edmondson's first request for disclosure of the Tribunal's file relating to Mr Singh's charge did not refer to any authority for such disclosure. The only provision cited by Ms Badenhorst in her later submissions for Mr Govindarajan was the Tribunal's power to "regulate its procedure as it thinks fit" under s 105(1) of the Act. Pursuant to s 104(2), that power is subject to "the rules of natural justice and to this Act and any regulations made under this Act.

[45] The Tribunal's jurisdiction to allow Mr Govindarajan's request was, at the very least, uncertain.

[46] While it was open to Mr Govindarajan to maintain his request for disclosure, he did so at the risk of an application for an award of costs being made, as noted by Mr Woodhouse in a communication to Ms Badenhorst on 15 November 2019.

[47] Pursuant to s110A(2) of the Act, the Tribunal is not limited as to the matters it may take into account in determining whether to make an award of costs. In the present case, we accept that there is force in Mr Woodhouse's submission that Mr Govindarajan's repeated requests for disclosure of the Tribunal's file, on grounds that varied over the period of the requests, led to the costs incurred by Mr Singh and Kodoor being increased.

[48] We accept that each time the grounds for the request changed, fresh instructions had to be obtained, and further submissions made. Mr Govindarajan's conduct cannot be said to have facilitated the resolution of the requests for disclosure.

[49] We also accept Mr Woodhouse's submission that costs were unnecessarily increased by including with Mr Govindarajan's submissions copies of pleadings from his appeal to the Californian Appeal Court (168 pages) without any identification of passages or aspects of these that were relevant to and relied upon for the request for disclosure.

[50] As Mr Woodhouse submitted, Mr Govindarajan has not provided any evidence as to his financial position, other than to assert that he is of limited means, and has spent "a fortune" in defending himself against Rosebank's proceedings and its appeals.

[51] We are not persuaded that the costs invoiced by Mr Woodhouse are excessive, either by reference to the hourly rates charged, or time spent.

[52] We have concluded that it is appropriate to make an award of costs against Mr Govindarajan.

[53] However, we are not persuaded that it is appropriate to make an award of indemnity costs in respect of the period after 14 November 2019. We do not consider that Mr Govindarajan's conduct in the proceeding has been shown to have been such as to justify such an award. We have concluded that the proper award of costs is that Mr Govindarajan is to pay \$8,000, which is approximately 60 percent of the invoiced costs.

Order

[54] Costs are awarded against Mr Govindarajan. Mr Govindarajan is ordered to pay \$8,000 towards the costs incurred on behalf of Mr Singh and Mr Kodoor. Such payment is to be made to their counsel, Mr Woodhouse, within 20 working days of the date of this decision.

[55] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member