IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-3010
[2015] NZHC 1616

IN THE MATTER	of an appeal under s 116 of the Real Estate Agents Act 2008
BETWEEN	DERMOT NOTTINGHAM, PHILLIP NOTTINGHAM AND ROBERT EARLE MCKINNEY Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY First Respondent
AND	MARTIN HONEY Second Respondent

Hearing: 10 - 11 June 2015

Appearances: Appellants in person
L J Clancy for the First Respondent
D Grove for the Second Respondent

Judgment: 10 July 2015

JUDGMENT OF THOMAS J

This judgment was delivered by me on 10 July 2015 at 12.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……..

Solicitors:

Meredith Connell, Auckland.
Foy & Halse, Auckland

Introduction

[1] The appellants, Messrs Dermot Nottingham, Phillip Nottingham and Robert McKinney, appeal the decision of the Real Estate Agents Disciplinary Tribunal (the Tribunal). The Tribunal's decision was as a result of an appeal from the decision of the Complaints Assessment Committee (the Committee) of the Real Estate Agents Authority (the Authority), also brought by the appellants.

[2] The essence of the appeal is that the Tribunal erred in its decision to dismiss the appeal against the Committee's failure to bring charges of misconduct under the Real Estate Agents Act 2008 (the Act); the Committee and the Tribunal acted corruptly; and the Tribunal "corruptly, dishonestly and immorally" reached its "palpably false decision" based on "dishonest misreporting" the evidence before it. The appellants seek compensation and full costs. They also seek an order that the behaviour of the Committee, the Tribunal and witnesses should be referred to the New Zealand Police.

[3] There are two appeals. The first appeal relates to a complaint brought by Mr Dermot Nottingham that the second respondent, Mr Martin Honey, operated a fraudulent RE/MAX website through his company, Pure Realty Ltd, from the date Martin Honey changed from a RE/MAX to a Ray White franchise, 13 February 2009, to the date it was taken down on 18 April 2010.

[4] The second appeal relates to a complaint made by Messrs Dermott Nottingham, Phillip Nottingham and Robert McKinney, on 29 June 2011, concerning what they considered to be a false complaint to the Authority made by Mr Honey on 28 February 2011.

Background

[5] The appellants, through their company, Property Bank Realtor Ltd, purchased an RE/MAX franchise and in October 2009 began operating as RE/MAX Advantage Onehunga. Mr Honey, through Pure Realty Ltd, was the former owner of the RE/MAX franchise operating in Royal Oak.

[6] Mr Honey's website continued to operate live web pages with RE/MAX branding. The web pages displayed listings held by his company under his new Ray White franchise. Property details on both the RE/MAX pages and Ray White branded pages were accessible via a Google search of the words "RE/MAX Onehunga" or the specific entry of the URL, or within pages of the www.martinhoney.co.nz website.

[7] What is in dispute is Mr Honey's culpability in relation to the RE/MAX web pages.

[8] The appellants' case is that Mr Honey and his web designer, Mr Taka, conspired to set up and maintain RE/MAX web pages deliberately and dishonestly so that Mr Honey was able to "poach business" which might otherwise have gone to them. The complaint to the Committee against Mr Honey was on the grounds that Mr Honey:

(a) continued to operate a website for RE/MAX for which he no longer held a franchise;

(b) misled the public into believing he was operating as RE/MAX when he was officially operating as Ray White; and

(c) caused thousands of dollars of lost commission to the new RE/MAX franchise holder due to the false website and advertising which operated for 14 months.

[9] Mr Honey's case is that he did not know about the connection between the web pages. Mr Honey said he outsourced the technical design and maintenance of his website to his web designer, Mr Taka. In an email to Mr Taka in February and April 2009, which is around the time Mr Honey left RE/MAX, Mr Honey instructed Mr Taka to change Mr Honey's website.

[10] Mr Chris Chapman, manager of RE/MAX New Zealand head-office, expressed no concerns as to any misuse of RE/MAX New Zealand's intellectual

property by Mr Honey. He was satisfied to let matters rest once the RE/MAX pages were brought to Mr Honey's attention and taken down. The appellants' complaints to the Authority were made on their own behalf and not on behalf of RE/MAX New Zealand.

[11] Mr Honey complained to the Authority that the appellants' conduct in challenging him about the RE/MAX pages was threatening and abusive. He also drafted (but did not submit) a letter of complaint to the Police. The letter was instead sent to an MP, who wrote to the (then) Associate Minister of Justice, with a copy of the documents, asking him to investigate matters with the Authority.

[12] The Authority refused to renew Mr Dermot Nottingham's sales licence on the grounds that Mr Dermot Nottingham may be "confrontational and unprofessional in the future."

[13] The appellants, in turn, lodged a second complaint to the Committee, alleging that Mr Honey's complaints to the Authority included intentionally false and dishonest accusations.

[14] The Committee decided to take no further action on either complaint against Mr Honey. The appellants appealed that decision to the Tribunal.

[15] The Tribunal upheld the Committee's decisions and dismissed both appeals.

[16] The appellants now appeal the decision of the Tribunal. The appellants have also attempted to lay criminal charges in the District Court alleging fraud by Mr Honey and others associated with him. Leave has been given to commence those proceedings in respect of two people associated with Mr Honey and other applications are pending.

Decisions

The decision of the Committee

[17] The Committee was not satisfied that Mr Honey's conduct amounted to unsatisfactory conduct or that it fell within the definition of misconduct under the Act.

[18] The first allegation, that Mr Honey continued to operate a website for RE/MAX for which he no longer held a franchise, was dismissed. The Committee was of the view that, although an error was made, there was no intention on behalf of Mr Honey to remain connected to RE/MAX. The Committee considered that Mr Honey took considerable steps to change his website and that it was reasonable for Mr Honey to have relied on the technical expertise of his web designer to ensure that his association with the RE/MAX brand was removed.

[19] The second allegation, that Mr Honey misled the public into believing he was operating as RE/MAX when he was operating as Ray White, was also dismissed. The Committee was satisfied that Mr Honey took reasonable steps "at a considerable expense" to rebrand his agency as Ray White and remove his connections with the RE/MAX brand. For example, he "rebranded his office, removal truck, car, stationery, business cards etc." and sent over 1,000 letters to clients "advising of his non-association with RE/MAX and that he was now with Ray White".

[20] The Committee was of the view that there was nothing to support the third allegation, that Mr Honey caused the appellants lost commission.

[21] For those reasons, the Commission chose to take no further action under s 89(2)(c) of the Act.

[22] The Committee was of the view that the second complaint was not "real estate agency work" and therefore could not attract disciplinary attention even if it reached the threshold of misconduct under s 73 of the Act. That Mr Honey complained about the conduct of the appellants could not reasonably amount to

misconduct, in the Committee's view, and it declined to lay any such charges to be heard by the Tribunal.

The decision of the Tribunal

[23] The Tribunal heard a combined appeal against the decisions of the Committee to take no further action on the appellants' complaints against Mr Honey.[1] The basis of the appeal was that the Committee erred in not recognising the gravity of Mr Honey's conduct in respect of the RE/MAX web pages and allegedly false complaint, and that the Committee should have laid charges of misconduct against Mr Honey.

[24] The appellants said that the Authority and the Committee "set out to constructively exculpate Mr Honey from his serious offending"; that the Committee's Chairperson was guilty of criminal malfeasance in public office; and that the Chairperson was engaged in a fraudulent conspiracy with others, including certain politicians.

[25] The Tribunal accepted that there had been an "inadequate disconnection" between Mr Honey and RE/MAX Onehunga and that "it was possible to become connected to Mr Honey's business at Ray White through a RE/MAX website." But the Tribunal was of the view that:

> [98] … we cannot be satisfied that this was in any respect whatsoever deliberate on Mr Honey's part. We accept him as an honest witness and we accept his denial of knowledge of what we have described.
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> [99] In our view, it follows that Mr Honey's lack of mens rea or guilty mind, or knowledge or intent, means he cannot be guilty of misconduct in terms of the complaints of the Appellants. His conduct cannot be regarded as disgraceful, seriously incompetent or seriously negligent. He has not been or in any way [sic] wilful or reckless in terms of s.73 of the Act.

[26] The Tribunal concluded that, since the focus was on Mr Honey himself, it was not satisfied that his conduct fell within the categories of unsatisfactory conduct defined under s 72 of the Act.

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1 *Nottingham v Real Estate Agents Authority* [2014] NZREADT 80.

[27] The Tribunal also concluded that "there was nothing untoward in conduct of Mr Honey" regarding his complaints to the Authority against the appellants.[2]

[28] The Tribunal found, therefore, that no further action was warranted on the complaints.

Notice of Appeal

[29] The appeal is on the grounds:

> That the Tribunal acted corruptly, dishonestly, and immorally, [as described in the explanatory review found annexed]; in:
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> 1.1 Misreporting or not reporting evidence that proved that Martin Honey was guilty of the alleged offending; and
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> 2.1 Misreporting or not reporting evidence that proved that the CAC had acted corruptly; and
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> 3.1 Misreporting or not reporting evidence that the Tribunal was clearly biased and predisposed to a finding of innocence of Martin Honey no matter the evidence to the contrary; and
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> 4.1 Misreporting or not reporting evidence that proved that Martin Honey, Hemi Taka, and Stephanie Honey had lied about their involvement in running a fraudulent RE/MAX website for considerable personal gain [whether obtained directly or indirectly]; and
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> 5.1 Misreporting or not reporting evidence that proved that the REAA's counsel Luke Clancy had, in a bid to hide evidence, and in a bid to prejudice the Appellants, not delivered a copy of the evidential bundle prepared by the Crown; and
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> 6.1 Acting to intimidate the Appellants and then misreport that the Appellants had attempted to intimidate the Tribunal, and others; and
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> 7.1 Ignored evidence that proved Martin Honeys clear guilt inclusive of evidence given by Martin Honey; and
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> 8.1 Stated a predisposition to finding Martin Honey innocent at the commencement of the hearing and then sought to limit admissible evidence not in Martin Honeys interests, and
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> 9.1 Alleging that the expert witness Chappell was not credible when his evidence was merely corroborative of the evidence the Tribunal misreported or did not report on; and

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2 At [102].

10.1 Misreporting or not reporting evidence that proved that Martin Honey lied to the Tribunal in making clearly false allegations against the Appellants in order to affect the credibility of the Appellants allegations against him; and

11.1 Making an impossible finding that Martin Honey and Hemi Taka were credible witnesses given the wealth and weight of evidence to the contrary that was before them which they misreported or did not report on in their decision; and

12.1 The Tribunal failed to request information that should have been available from Mr Taka or Mr Honey, whilst knowing of its availability and importance; and

13.1 The Tribunal failed to request of Mr Honey whether he accepted the evidence of Ms Earlan, the Mullers, and Mr West, especially given the fact that the Tribunal had witnessed Martin Honey lying in his brief of evidence, and then telling the [partial] truth when confronted with the evidence of Mrs West; and

14.1 Relying on the impossible explanations of Messrs Taka, and Honey, when the evidence that was before them proved those explanations as clear and relevant perjury; and

15.1 Any other relevant matter, or circumstance, identified in the annexed explanatory note, or reported to the Tribunal in the written submissions, or found in the transcript of the hearing yet to be supplied, [that has been secreted from the Appellants by the Tribunal].

Relief sought from the Appellant Courts orders, directions, or findings;

A. That the decision be overturned and Martin Honey be found guilty of misconduct pursuant to section 73 of the Real Estate Agents Act 2008, and that Martin Honey be permanently banned from working as a real estate agent; and

B. That a finding be made that the CAC acted corruptly as proven by the evidence before the READT; and

C. That a finding be made that the READT members acted corruptly, dishonestly, and immorally, in coming to its palpably false decision based on dishonestly [by commission or omission] misreporting the evidence before it; and

D. Compensation commensurate with 4 years of stress and victimisation from Martin Honey, the Real Estate Agents authority, the Complaints Assessment Committee, and the Real Estate Agents Disciplinary Authority; and

E. That the dishonest behaviour of the CAC members, Tribunal members, Messrs Halse, Clancy, Honey, and Taka, and Stephanie Honey, be referred to the police, and that there is sufficient evidence to prove that the allegations made against these person should be

subject to criminal prosecution pursuant to the latest prosecutorial guidelines from the Law Commission;

F. Full costs before the Tribunal and in this Court from whoever is found wholly or partially liable for what has led to this injustice and requirement for appeal; and

G. Such other order, directions or finding that the Court sees fit.

Relevant Law

The Act

[30] Part 4 of the Act deals with complaints and discipline. Any person can make a complaint about the conduct of a person licensed under the Act to the Authority. The Authority refers the complaint to its Committee.

[31] The Committee may make a number of determinations under s 89 of the Act. It may reach a finding of unsatisfactory conduct; decide to take no further action; or use its discretion to refer the complaint to the Tribunal. If the Committee refers the matter to the Tribunal, the Committee assumes the role of prosecutor;[3] meaning it, rather than the complainant, brings the charges in new proceedings before the Tribunal.[4] The power is discretionary.[5] Only the Tribunal can make a finding of misconduct.[6]

[32] The Tribunal also hears appeals brought against the decisions of the Committee.[7] The appeal is by way of re-hearing.[8] The Tribunal may confirm, reverse, or modify the determination of the Committee.[9]

[33] Section 73 of the Act defines misconduct as follows:

> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

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3 Sections 78(e) and 106(2).
4 Section 91.
5 Section 89(1).
6 Section 110. Though the Committee can dismiss an allegation of misconduct; s 79(2)(a).
7 Section 102.
8 Section 111(3).
9 Section 111(3).

(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or

(b) constitutes seriously incompetent or seriously negligent real estate agency work; or

(c) consists of a wilful or reckless contravention of—

(i) this Act; or

(ii) other Acts that apply to the conduct of licensees; or

(iii) regulations or rules made under this Act; or

(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

Approach to appeals

[34] An appeal against a decision of the Tribunal is a right under s 116 of the Act.

[35] The power of a Committee to refer a misconduct charge to the Tribunal (upheld, in this case, on appeal to the Tribunal) is discretionary, under s 89(2)(c) of the Act.

[36] In *K v B,* the Supreme Court drew a distinction between the test applicable on general appeals and appeals from discretionary decisions as follows:[10]

> For the present purposes, the important point arising from *Austin Nichols* is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.

[37] In the circumstances of this case, the Court should have regard to the fact that the Tribunal is a specialist statutory body with experience and expertise in considering professional standards and disciplinary issues relating to licensed real estate agents. As a consequence, the Court should exercise a level of caution on any appeal.

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[10] *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

[38] The Court may be slower to interfere in a decision of a prosecutorial nature given the policy considerations which arise. If the appellants had been successful in their appeal from the decision of the Committee, the Tribunal would have remitted the matter to the Committee, with a direction that it lay a misconduct charge. The Tribunal would then hear that charge in a separate proceeding.

[39] In the case of *Cooke v Valuers Registration Board,* Duffy J considered an application for judicial review of a decision of the Valuers Registration Board not to pursue a disciplinary prosecution following a complaint from Mr Cooke about a registered valuer.[11] Duffy J regarded it as well settled that, provided the decision-maker has demonstrated a reasonable exercise of the power and there was no evidence of bad faith or acting for a collateral purpose, the court on judicial review would not interfere with how the power has been exercised.

[40] This case involves a statutory right of appeal rather than an application for judicial review. However, there is little, if any, real difference between the principles articulated in *K v B*, above, and the requirement referred to by Duffy J that the power must be exercised reasonably. The task for the appellants is not to persuade the Court that it might have come to a different decision from the Tribunal but that the Tribunal's decision was not reasonably open to it.

[41] Finally, I accept that the Court should exercise particular caution given the advantage the Tribunal had by hearing from witnesses in person in assessing the credibility of those witnesses and the weight to be attached to their evidence.

Submissions

[42] Mr Clancy, acting for the Authority, submits that the Tribunal properly took into account a range of factors and the decision it reached was open to it and should not be disturbed on appeal. The factors taken into account by the Tribunal included:

(a) its assessment of Mr Honey and Mr Taka as honest witnesses;

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[11] *Cooke v Valuers Registration Board* [2014] NZHC 323.

(b) evidence that Mr Honey had taken considerable steps to rebrand his business at the time of joining Ray White;

(c) evidence that Mr Honey delegated his responsibility for the website to Mr Taka and Mr Taka accepted in evidence that he was entirely responsible for not having removed the website link;

(d) Mr Taka's denial that he, at any point, received instructions from Mr Honey to leave the RE/MAX pages live as a marketing ploy;

(e) that the general manager of RE/MAX New Zealand accepted the website issue had been an error and that RE/MAX had no intention of taking any action against Mr Honey;

(f) the status of the web pages was of limited value on the key issues of intention and culpability;

(g) Mr Honey's evidence that he felt intimidated and frightened by the appellants.

[43] The criticism about the weight (or lack of) placed by the Tribunal on the witnesses' evidence on which the appellants base their appeal is not founded, in Mr Clancy's submission. The Tribunal was entitled to take into account the credibility of, and give weight to, the evidence of any particular witness. That the Tribunal took a different view from the appellants on Mr Honey's credibility, for example, or that the Tribunal did not give enough weight to the evidence of the witnesses led by the appellants, does not mean that it fell into any error of law or principle nor does it render the Tribunal's decision plainly wrong.

[44] Mr Grove, acting for Mr Honey, points out that the appellants clearly do not agree with the Tribunal's findings which is not enough for a successful appeal from the exercise of a discretion. He submits the difficulty for the appellants is overcoming the credibility findings made by the Tribunal. That will be especially

difficult, in Mr Grove's submission, given the Tribunal's specialist capability and "extremely thorough airing of the issues involved over a four day hearing".

Issues

[45] In order to determine the appeal, the following issues require consideration:

(a) By what date was Mr Honey aware of the problem with his website?

(i) Did the Tribunal misunderstand or misstate the date?

(ii) What action did Mr Honey take when he was aware of the problem in July 2009?

(b) Technical evidence:

(i) Were the web pages live or cached?

(ii) Did the Tribunal misunderstand or misstate the technical evidence?

(c) Impact of the fresh evidence.

(d) Mr Honey's complaint.

(e) Bias and related allegations.

[46] In the context of those considerations, the question then is whether the Tribunal erred in principle, failed to take account of a relevant matter, took account of irrelevant matters, or was plainly wrong?

Analysis

By what date was Mr Honey aware of the problem with his website?

Did the Tribunal misunderstand or misstate the date?

[47] The appellants say that the Tribunal's decision was on the basis that Mr Honey became aware of the problem with his website in April 2010 when Mr Dermot Nottingham telephoned Mrs Honey. The evidence was that, immediately following that telephone conversation, Mr Honey took steps to ensure that the RE/MAX pages were removed.

[48] The appellants' position, however, is that the evidence before the Tribunal was that Mr Honey was put on notice of the issue by July 2009.

[49] The Tribunal said:

> [58] The first witness for the appellants had been Mrs H L West appearing under subpoena. Together with her husband, she had been a real estate salesperson under the RE/MAX banner working for Mr Honey and continuing on for a time after he moved to Ray White Real Estate. She and her husband soon purchased a Harcourts real estate franchise which they still operate. When she heard about the 18 April 2010 complaint from Mr Nottingham she asked to meet Mr Honey to enquire how it could be that his latest Ray White listings were appearing on the old RE/MAX site. It concerned her that someone was still loading them on to the RE/MAX site. She said: *"I asked because I had heard from a client that if you searched RE/MAX Onehunga on the web you were directed to Mr Honey's RE/MAX website which showed his current listings. I tested the assertion and found it happened as suggested".* She met with Mr Honey who said that he would take care of the problem. From her oral evidence to us it was clear she did not think it right that anyone looking at a RE/MAX site could be referred to Mr Honey.

[50] That the Tribunal was clearly wrong in its understanding of the evidence on the issue is confirmed, say the appellants, where the Tribunal said:

> [51] In the course of his evidence, Mr Honey said that, if we find that the RE/MAX web pages were "*live*" at material times as alleged by the appellants, then he was certainly not aware of that until 18 April 2010 when his wife referred the matter to him after being rung that day by Mr D G Nottingham about the issue.

[51] The appellants allege that the Tribunal "fabricated [misreported] the evidence of Mrs West".

[52] Mrs West's evidence was that she met Mr Honey in July 2009. She was reasonably sure about the date because of the involvement of a personal assistant working for her company whose employment finished in early August that year.

[53] When Mr Honey gave evidence, he accepted that he had met Mrs West in July 2009 and that the conversation referred to by Mrs West had taken place. This is important because Mr Honey's brief of evidence was to the effect that he was unaware of the problem until April 2010 but, once aware of Mrs West's evidence, he accepted her version of events. He said he then immediately contacted Mr Taka who told him the problem was to do with Google caching and nothing could be done about it.

[54] Mr Taka's evidence was that Mr Honey was unaware of the issues with the website until 18 April 2010.

[55] The point made on behalf of Mr Honey was that, while he recalled the conversation with Mrs West, it did not mean that he then understood the RE/MAX pages were live.

[56] Mr Clancy suggests that the Tribunal did not misunderstand the date Mrs West alerted Mr Honey to the issue, rather, it was describing the date Mr Honey appreciated the extent of the problem. In saying that, Mr Clancy conceded that the decision repeated Mr Honey's position that he was not aware until 18 April 2010 that the web pages were live.

[57] Mr Grove refers to the contemporaneous documentary evidence which was before the Tribunal. This included Mr Honey's email to Mr Taka in February 2009, asking him to undertake a rebranding of his website. That email must have been a fabrication, in Mr Grove's submission, in order for the appellants' allegations to hold weight. The same applied to Mr Honey's email of 16 April 2009, wherein Mr Honey

requested Mr Taka to take action to rectify the situation when he became aware of an email which showed RE/MAX rather than Ray White branding.

What action did Mr Honey take when he was aware of the problem in July 2009?

[58] The appellants suggest that, at the very least, an agent on notice of this type of issue would have thoroughly investigated it to ensure it was resolved.

[59] The appellants submit that, based on Mrs West's evidence, Mr Taka must have known the web pages were live in July 2009. Furthermore, Mrs West's evidence was to the effect that Mr Honey was aware of the problem, telling her that she "could not do the same thing". The appellants also refer to what they say was Mr Taka's acknowledgement of having made changes to the RE/MAX pages during the period of the offending. The appellants say Mr Taka would not have done that without being instructed by Mr Honey to do so.

[60] Although the appellants complain of inconsistencies in the evidence, I note that Mrs West was called on day three of the hearing. Mr Honey was called by the appellants and also gave evidence on day three, after Mrs West. This was more than six months after Mr Taka gave evidence. Therefore, Mr Honey's evidence that he contacted Mr Taka in July 2009 could not be put to Mr Taka. Mr Taka's evidence had been that the issue with the website was not raised with him until April 2010. He was not specifically questioned about any contact from Mr Honey in July 2009 but clearly, his evidence must be taken to mean that, at best, he did not recall any such conversation.

[61] It is not possible to know whether the Tribunal misunderstood the evidence as to the date of Mrs West's meeting with Mr Honey or implicitly accepted that, even if alerted in July 2009, Mr Honey did not understand the extent of the problem until April 2010. The protracted nature of the hearing no doubt contributed to the situation. The way in which the Tribunal discussed Mrs West's evidence, referring to what happened if RE/MAX Onehunga were searched on the internet, suggests the Tribunal inferred that Mr Honey would have known the pages were live from at least the time he met Mrs West. That was in July 2009 not April 2010 as reported by the

Tribunal. The evidence impacts on the Tribunal's assessment of the credibility of both Mr Honey and Mr Taka.

[62] The relevance of this issue to the appeal is that it could rightly be framed as a failure to take a relevant matter into account.

Technical evidence

Were the web pages live or cached?

[63] The appellants refer to the explanation which was, they say, consistently maintained by Mr Honey that the RE/MAX web pages were a single page only and "Google cached" material. Mr Honey's position was that the page was within Google's control and there was nothing he could do about it. The appellants say this was clearly a lie and Mr Honey and his advisers had been provided with evidence well before the Tribunal hearing that the pages were live. Despite this, Mr Honey's brief of evidence said he was not aware the pages were live until April 2010.

[64] The appellants say that the Tribunal deliberately omitted recording Mr Taka's admission at the hearing that the website was not cached material because that would support adverse findings of credibility against Mr Honey and Mr Taka. This is so particularly given Mr Honey's meeting with Mrs West in July 2009. Furthermore, the evidence Mr Honey gave, after he had heard the evidence of Mrs West and admitted to meeting her in July 2009, that he had immediately contacted Mr Taka who told him the pages were cached, could not be correct. That is because Mr Taka would have known that was not the case.

[65] I have viewed the DVD provided by the appellants. It demonstrates the two pages within Mr Honey's website side by side, that is, the bannered RE/MAX and the bannered Ray White pages. The RE/MAX "available properties" are identical to the Ray White "current listings". The sales history on both sites is identical. Mr Dermott Nottingham is shown filling out an appraisal form on the RE/MAX page which is something to be completed when a person makes an enquiry of an agent about selling property. Although the DVD does not demonstrate what happens when

the form is submitted, the inference is that it would go to Mr Honey, given that the form is part of his website.

[66] The appellants say that Mr Honey never provided any evidence to support the position consistently maintained by him and Mr Taka that the issue was simply as a result of Google caching.

[67] The Tribunal assessed Mr Taka as an honest and credible witness.[12] The appellants question how the Tribunal could have made that assessment given that Mr Taka consistently maintained his position that the pages were cached but eventually had to concede that the web pages were live.

[68] Mr Spence had been engaged by the Authority and provided a report based on two paper documents he was given to review. He noted that he had no actual website to review. He described the situation as follows:

> My concluded opinion which I can only repeat which is based in the back, is that based on the information I have been given and in the absence of any additional information I would conclude that the RE/MAX branded web page is within the Martin Honey website, left active but not referenced by other pages in the wider website. The effect was to, one, hide the RE/MAX branded pages from users who access the website directly and, two, to direct users utilising search engines and search terms such as "RE/MAX" and "Onehunga" to the MartinHoney.co.nz website. Users would then be presented with RE/MAX branded pages containing up to date property listings. And b, that the RE/MAX branded pages were amended to reflect the new branding style at some point before 18 April 2010. This indicates to me that there was design and intent and the direction of the users of the RE/MAX branded pages in the martinhoney.co.nz website as at 18 April 2010.

[69] Interestingly, Mr Spence was asked questions by Mr Nottingham but said he would not provide additional analysis beyond his report. Although the Chair had earlier ruled that there was no need to view the DVD as Mr Spence advised him that he did not need to see it, after hearing his evidence, the Chair observed that he would have arranged for Mr Spence to view the DVD. However, Mr Spence was not prepared to go further into the matter.

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12 At [71].

Did the Tribunal misunderstand or misstate the technical evidence?

[70] In Mr Clancy's submission, the conclusions reached by the Tribunal followed the evidence of Mr Chappell, the expert for the appellants, who accepted a series of propositions Mr Clancy put to him. The propositions were based on the evidence which had already been given by Mr Spence and Mr Taka. Although there was some criticism of the questioning being focused on two pages only, it was clear that Mr Clancy focused on the two pages which were before the Tribunal. Indeed, Mr Clancy acknowledged that there was evidence there were more than simply two pages.

[71] Given that, in Mr Clancy's submission, the technical issues were not in dispute. Rather the issue and focus of the Tribunal was on the culpability of Mr Honey. I accept that submission. What the Appellants really object to is that the Tribunal did not acknowledge that the explanation of caching, which had been maintained on behalf of Mr Honey for the period up to the hearing, was simply unsustainable. That issue, I agree, goes to credibility.

[72] The Tribunal did address this issue[13] when it recorded the Appellants' contention that Mr Honey's original response was indicative of an intention to mislead the Committee and the Tribunal. The weight attached to the evidence was a matter for the Tribunal and did not constitute an error of law, principle or a conclusion which was plainly wrong.

[73] The Appellants' other criticism is to the finding that the changes to the RE/MAX pages were "populated automatically". Whether this is the case or not remains in doubt given the evidence of Ms Earlan, referred to in the next section.

Impact of the fresh evidence

[74] The Tribunal approached the appeal on the basis that, for it to succeed, it would need to make clear adverse credibility findings against both Mr Honey and

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13 At [31].

Mr Taka, who both denied any intention or conspiracy to use the RE/MAX pages to attract customers searching for RE/MAX Onehunga to the Ray White website.[14]

[75] While the Tribunal had sympathy with the appellants' concern that it remained possible to connect to Mr Honey's business at Ray White through a RE/MAX search, it was not satisfied that this was in any respect whatsoever deliberate on Mr Honey's part. The Tribunal accepted him as an honest witness and accepted his denial of knowledge of what the true position was. The Tribunal said:

> [99] In our view, it follows that Mr Honey's lack of mens rea or guilty mind, or knowledge or intent, means he cannot be guilty of misconduct in terms of the complaints of the appellants. His conduct cannot be regarded be regarded as disgraceful, seriously incompetent or seriously negligent. He has not been or [sic] in any way wilful or reckless in terms of s.73 of the Act.

[76] At the hearing before the Tribunal Mr Honey had referred to "Lee-Ann". When the hearing had concluded, the appellants undertook further investigations as to who this person might be. They knew she had worked for Mr Honey. Eventually they tracked Ms Earlan down. She now lives in South Africa. After the hearing had closed but before the close of submissions, the appellants sent the Tribunal statements from Ms Earlan and from a Ms Muller (the fresh evidence). The appellants say they brought the fresh evidence to the attention of the Tribunal as soon as they could and their position should not be prejudiced as a result.

[77] The Tribunal then emailed the parties as follows:

> The Chair has advised that the hearing for these READT cases has finished. Any further documents or evidence relating to proceedings in the District/High Court is becoming irrelevant to the timetable that was ordered and the only concern is the closing submissions by all parties to be filed.

[78] The email suggests the Tribunal was not going to take fresh evidence into account. However, in its written decision, the Tribunal noted as follows:[15]

> There was further evidence from such persons as Ms Lee-Ann Earlan, who was Mr Honey's personal assistant at Pure Realty Limited from February to August 2009, and from Ms Colleen Muller who was receptionist for that

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14 At [33].
15 At [76].

company from February 2009 to mid 2011 but there is no need to detail that evidence.

[79] This suggests that the evidence was taken into account. The parties confirmed at an interlocutory hearing prior to the hearing of this appeal that the statements were part of the record.

[80] Ms Earlan's statement said:

> I was employed by Martin Honey, when the company was a RE/MAX franchise and a few days after I started I was informed that it was being changed to a Ray White Franchise.
>
> …
>
> When I started it was explained to me that Martin operated two website, a personal website (www.martinhoney.co.nz) along with the Ray White website (www.rwroyaloak.co.nz).
>
> I was instructed to load the property pictures and details for both websites.
>
> …
>
> … Part of my duties was to upload pictures and information to both websites that Martin ran. … I had to basically load the same property twice – once on each website.

[81] Ms Earlan's statement also said:

> There was another aspect to my work which I did not want to admit to, and that was when I was instructed by Martin Honey to load Ray White Listings onto the RE/MAX web pages contained in the same database of Mr Honey's personal website www.martinhoney.co.nz. The process was extremely time consuming and took two separate loading procedures: one for the Ray White pages and a second load for the RE/MAX pages.
>
> I would receive many calls off the RE/MAX website and take prospective clients information and hand that information on to Mr Honey. Mr Honey would then ring the clients back and arranged appointments and obtain listings that he would sell. Once the property was sold I would, according to Mr Honey's instructions, load the sold property onto the RE/MAX and Ray White websites onto the sold web pages. Again, this was very time consuming as it required two separate goes. This workload really stressed me.

[82] Ms Earlan's statement, therefore, was that Mr Honey deliberately maintained the RE/MAX pages and obtained instructions to sell properties as a result of people coming in contact with him via the RE/MAX pages.

[83] Ms Earlan's statement included a comment that Mr Honey:

> appeared to know all about the more technical aspects of the website.

[84] The appellants say the credibility of Ms Earlan's statement is enhanced because it is a statement against her interests in that she admits her part in what went on.

[85] Ms Muller was a receptionist for Pure Realty from February 2009 to mid-2011. When she started employment with Mr Honey, he was operating as a RE/MAX franchise and shortly afterwards changed to the Ray White franchise. She and her husband, who also provided a statement, were aware of the connection between Mr Honey's website and the RE/MAX pages. Ms Muller supported Ms Earlan's evidence, saying Ms Earlan used to complain to her that she had to load two websites, the Martin Honey RE/MAX website and the Ray White website.

[86] Ms Muller also gave evidence of a client coming into the office some time in late 2009 having a loud disagreement with Mr Honey. Ms Muller provided a physical description of the client and said he wanted to know why his property was being advertised on a Martin Honey RE/MAX site when he had listed it with Ray White.

[87] This evidence contradicts what the Tribunal regarded as facts established by the witnesses who gave technical evidence, in particular that property details on both the RE/MAX pages and the Ray White branded pages, accessible via the www.martinhoney.co.nz homepage, were populated automatically from one database.[16]

[88] The Tribunal also said that there was no evidence that any consumer was actually misled as to whether Mr Honey was operating a RE/MAX or a Ray White franchise. The Tribunal did observe, however, that:[17]

> … the situation must have become confusing for the consumer.

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16 At [21]
17 At [40].

[89] The statements of Ms Earlan and Ms Muller are not affidavits. They are signed but not witnessed. The Tribunal was also provided with the versions of those statements given pursuant to s 82 Criminal Procedure Act 2011 for the purposes of the District Court proceedings.

[90] The appellants filed submissions which included reference to the fresh evidence.

[91] Mr Clancy requests the Court to take a realistic and robust approach to the fresh evidence. Mr Clancy reminds the Court that Mr Honey was alerted to Mr Dermott Nottingham's concerns by his telephone call in April 2010, the complaint was made in 2011 and, in 2012, the Committee gave its decision. The Tribunal heard two days of evidence in March 2013 and it resumed for a further two days in December 2013. Closing submissions for the Authority were filed in March 2014 and the fresh evidence were not filed with the Tribunal until May 2014. The appellants filed initial submissions on 26 February, closing submissions on 12 April and closing submissions in reply which referred to the fresh evidence on 9 June 2014.

[92] Mr Clancy urges the Court to consider the statements for what they are, that is, untested evidence without the credibility or motivation of the makers being examined by the Tribunal and without the ability to question whether the statements were in the makers' own words or if they were confused in their understanding of the issues. For those reasons, in Mr Clancy's submission, the Tribunal cannot be criticised for failing to give any weight to the fresh evidence.

[93] In Mr Grove's submission, the fresh evidence was considered and it was a matter for the Tribunal to place such weight on it as it determined appropriate in light of its status, particularly given its lateness after a four day hearing. Furthermore, Mr and Mrs Honey and Mr Taka all denied there was any plan deliberately to continue with the RE/MAX pages and that was supported, in Mr Grove's submission, by the contemporaneous documentary evidence of instructions to Mr Taka to rebrand the website. In those circumstances, it was open to the Tribunal, says Mr Grove, to decide to take no further action.

[94] Mr Dermot Nottingham points out that the Tribunal did not particularise the evidence of Ms Earlan and Ms Muller but yet accepted Mr Honey's evidence by saying:

> [55] It seemed to us that Mr Honey did not understand the technicalities of operating a website and, certainly, not of transferring it or closing it down and left all that to his staff and, in particular, to Mr Taka as his IT consultant. He did not know what the word "*cached*" meant.

[95] The appellants' case is that, once the evidence of Ms Earlan and Ms Muller is taken into account, it is clear that Mr Honey lied to the Tribunal about his computer literacy; the date he became aware that live RE/MAX branded web pages were on his website; whether the RE/MAX connection actually misled anybody; and whether he achieved sales as a result of it.

[96] The appellants point out that statements from Ms Earlan and Ms Muller had been filed in the District Court and were apparently considered sufficient to support the issue of charging documents against people associated with Mr Honey. In those circumstances, the appellants are astonished that the Tribunal dealt with the fresh evidence in the way it did.

[97] As the Tribunal noted, it can properly receive, as evidence, any statement, document, information or other matter which, in the Tribunal's opinion, would assist it effectively to deal with the matter before it, whether or not the information would be admissible in court.[18]

[98] The evidence of Ms Earlan, if correct, completely undermines the findings which were the foundation of the Tribunal's decision and assessment of the credibility of Mr Honey (and Mr Taka).

[99] While I accept the credibility and motivation of Ms Earlan and Ms Muller could not be tested, there is no evidence that they might have been confused. Their statements are clear and unequivocal.

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[18] At 49.

[100] Inconvenient as it might have been, in the circumstances the Tribunal really had no option other than to either decide that the statements were such that a prima facie case existed or reopen the hearing.

[101] I acknowledge the difficulty for the Tribunal in receiving the fresh evidence at such a late stage. It is always extremely problematic when a decision-maker receives information after a hearing has closed. The real issue in this case is that, despite saying the fresh evidence would not be considered, it was referred to by the Tribunal in its decision but without considering there was any need even to detail it. Given that the fresh evidence directly contradicted that of the two main witnesses whose credibility was at issue and was comprehensively accepted by the Tribunal, the reference to, but failure to take into account, the new evidence was an error.

Mr Honey's complaint

[102] The appellants' complaint about Mr Honey resulted in what the appellants' call "a false retaliatory complaint… through two members of the legislature contacting the executive on behalf of the second respondent."

[103] Although the appellants' claim is that Mr Honey's complained to the Authority on 28 February 2011, that was the date of a letter Mr Honey drafted and addressed to the New Zealand Police. In that letter, Mr Honey said:

> Why am I writing to you?
>
> My wife and I are afraid that we have militant styled thug threatening us that is a real estate salesperson (I have no idea how he got a license) who has no reason to do such a thing. He has had my wife in tears and when I've asked around and searched his name on Google apparently he has a criminal record and has made threats against people and gets money from them for doing no work. He's also appeared as someone not to do business on the T.V show Fair Go. I've attached what I've found but I'm sure there's a lot more I don't know.
>
> His Name: Dermot Nottingham Company: RE/MAX Advantage
>
> To my knowledge I have never met or spoken to him as of this date. His claim is that I'm holding myself out to be RE/MAX agent because of a cached (old) copy of my website sat in cyberspace of the internet. He says his company is failing because I have been making sales through it. I've made no sales from it. He has made it clear he wants money from me. Just

> like other people he's got money from. Furthermore I believe it is against the Act to threaten the Act. His claims are far-fetched and ludicrous.
>
> Facts
>
> According to my website designer/manager (his letter of explanation attached) the public would never view the website this way. If you Googled RE/MAX Onehunga my Martin Honey website appears because of a history of views through Google with my name and RE/MAX together over past years. This is how Google works. In time it will probably disappear.
>
> This is a personal attack on us (My wife and I) to the point we are worried for the safety of our 3 young children. This is a desperate man.
>
> …
>
> P.S My wife is crying and upset again over this.

[104] The letter says that Mr Dermot Nottingham has viciously and verbally attacked Mr Honey's wife over the phone, making threats to ruin them. He also said:

> … This is not a sane man who has written these letters and most vendors would be afraid to write to you. (I have already had people like this bring his name up at "open homes" I've conducted. I could try and get in touch for them to testify if you like but they are probably too afraid)

[105] At the hearing, Mr Honey's evidence was that he took the letter to the Police who informed him there was nothing they could do. For that reason, he went to see his MP, Dr Jackie Blue. He then forwarded a copy of the letter to the Authority noting that Dr Blue was to pass a copy of the letter to the Minister of Internal Affairs, Nathan Guy. Dr Blue's letter to the Minister included the material provided to her by Mr Honey, noting that, if the serious allegations proved to be correct, then it cast serious concerns over the suitability of Mr Nottingham as a real estate sales person. She referred to the allegations of an extensive criminal record and history of intimidation and asked if the matter could urgently be investigated with the Authority.

[106] On 8 March 2011, Mr Honey wrote to the Authority expressing concern that his correspondence with the Authority was copied to Mr Nottingham. He referred to "Mr Nottingham's history of crime and psychopathic behaviour". He asked the Authority urgently to investigate his findings. By a letter dated 10 June 2011, he again wrote to the Authority. Attached was what he described a letter of explanation from his web designer, Mr Taka, with some information about caching. He added:

> All this aside, do I really need to put out one basic common sense fact – this being that no one would ever 'accidentally' discover this website whilst searching for real estate or anything else for that matter. It has a very unusual and specific web address and you have to be looking for it to find it. Mr Nottingham *must* realise this by now yet he persist [sic] with his act of outrage. I can only assume he does this in order to support his demands for financial compensation for his imagined losses cause by the existence of this cache.

[107] It was the letter of 10 June 2011 in which Mr Honey formally made a complaint against Mr Dermot Nottingham. The Authority responded to Mr Honey seeking clarity as to the exact nature of Mr Honey's complaint. Mr Honey confirmed the summary provided by the Authority was correct. That being:

> Dermot Nottingham in putting a complaint against me to the Authority has viciously verbally attacked my wife over the phone making threats he'll ruin us. We have perceived the correspondence received from Mr Nottingham's office in regard to the complaint as threatening, with the intention to intimidate us into doing as he demands.
>
> Mr Nottingham's behaviour as a licensed real estate salesperson is reasonably regarded by agents of good standing, like myself, as being disgraceful.

[108] There are essentially two issues raised by the appellants. The first is that Mr Honey's complaint repeated what they say is the false explanation that the website was not fraudulent, rather it was Googled cached web pages. The second issue is the nature of the allegations levelled at Mr Dermott Nottingham to the effect that he and his associates were a danger to the public generally, and Mr Honey and his family. The appellants say that, not only did Mr Honey misrepresent the situation and make false allegations against Mr Nottingham, but also he down-played his own part in the exchanges between the parties.[19]

[109] The appellants say that the involvement of MPs, as part of the Legislature, was inappropriate given the Authority's role as part of the Executive with investigative, prosecutorial and quasi-judicial powers.

[110] Furthermore, the appellants say there was no justification for the allegations made by Mr Honey. The most obvious example of this, say the appellants, is

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[19] The Appellants refer, for example, to an email exchange between Mr Nottingham and Mr Honey on 26 February 2011 when Mr Honey told Mr Nottingham he was making a "BIG MISTAKE".

Mr Honey's depiction of the conversation which took place between Mr Dermott Nottingham and Mrs Honey in April 2010. Mrs Honey was examined extensively on this at the hearing, in an effort to show that there was nothing in the telephone conversation between her and Mr Dermott Nottingham which could have justified the various descriptions of it given by Mr Honey in his correspondence.

[111] That conversation formed part of the DVD provided by the appellants. I have watched that DVD. My impression is that Mrs Honey appeared genuinely taken aback to learn of the link between the RE/MAX web pages and Mr Honey's Ray White website. Although Mr Nottingham does ask Mrs Honey who their lawyer is (the implication being that he will take the matter further), there was nothing in the telephone conversation, as recorded on DVD, to support the accusations made by Mr Honey. Indeed, one could observe that the concerns expressed by Mr Nottingham were, on the face of it, justified.

[112] The appellants were entitled to raise their legitimate business concerns with Mr Honey upon discovery of the RE/MAX pages. There is some merit in their concerns that Mr Honey's complaint, when viewed objectively, sought to minimise the issue and to cast serious aspersions on Mr Dermott Nottingham while garnering sympathy for Mr Honey and his family's situation.

[113] It is common ground that, if Mr Honey knew the RE/MAX web pages were live and deliberately allowed that situation to continue, then his conduct would constitute misconduct.[20]

[114] The Tribunal noted that Mr Honey gave considerable evidence as to how he felt "intimidated by the Messrs Nottingham's", particularly that he was disturbed and frightened by the appellants' reaction to the problem with the website and, for that reason, he approached the Police and the Authority.

[115] The Tribunal observed that Mr Honey had been closely cross-examined by the appellants about the motivation for his complaint and concluded that there was

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[20] Mr Clancy accepted the position with the caveat that, given the purpose of the Act, this type of behaviour might not be a proper matter of concern for the Authority, rather something better considered in civil proceedings.

nothing untoward in his complaint to the Authority about Mr Dermot Nottingham's behaviour.

[116] In Mr Clancy's submission, the Tribunal would have needed to be satisfied the compliant was false and malicious before the test for misconduct could have been met. Mr Honey's motives were, therefore, key and he was extensively cross-examined on them. The Tribunal was uniquely placed to make the determination and there was no identifiable error, he submits.

[117] The behaviour could not constitute unsatisfactory conduct as it did not relate to real estate agency work and there is no appeal on this point.

[118] As Mr Dermot Nottingham says, the two appeals are inextricably linked. Given the Tribunal's finding in respect of the first complaint, the result on the second was the logical conclusion. If, in light of the relevant considerations which the Tribunal failed to take into account, a charge is successfully laid against Mr Honey in respect of the first complaint, then the second complaint needs to be reassessed. The focus of the complaint would be that Mr Honey deliberately misled the Authority as to the lack of any justification for the appellants' complaint – for example, that Mr Dermot Nottingham's claim was "far-fetched and ludicrous". Any such finding would not, however, preclude Mr Honey from raising a defence that the complaint was nevertheless genuine.

Bias and related allegations

[119] The appellants say that the Tribunal demonstrated bias and pre-determination, made prejudicial and intemperate comments, interfered in examination, allowed hostile witnesses a free hand and refused to allow submissions on recusal. They describe the Chair as overbearing and threatening. The appellants unsuccessfully applied for the Tribunal (or its Chair) to recuse itself on the grounds of bias at the beginning of the second day of the hearing.

[120] The appellants say that what it considers to be the misreporting of crucial evidence, being that of Mrs West and Mr Chappell, and the failure to report the

crucial fresh evidence, was as a result of bad faith and amounts to misconduct in public office.

[121] The appellants refer to the fact Mrs West has written to the Solicitor-General complaining of what she considers to be a misreporting of her evidence and submit this supports their position. The appellants point to what they say are other omissions from the Tribunal decision, for example, not including an allegation by Mr Honey that he had taken "screen grabs" which proved the appellants were also running a fraudulent RE/MAX website. It appears that allegation was unsustainable but it shows, in the appellants' submission, that Mr Honey made false accusations. Given that, the appellants ask how the Tribunal could have concluded that Mr Honey was an honest witness.

[122] The appellants seek to make a link between what they consider to be the errors in the Tribunal decision and approach and the complaint which Mr Honey made to his local MP. That, in the appellants' submission, shows the Executive and the Legislature have become involved. The appellants refer to a text exchange between Mr Honey and Mr Dermot Nottingham before Mr Honey made the complaint to his local MP. In the exchange, Mr Honey effectively warned Mr Nottingham with the words "BIG MISTAKE". The appellants say that Mr Honey followed through with that threat by using his political connections to complain about the appellants. He requested the MP to use her contacts with the Minister in charge of the Authority which eventually, say the appellants, led to Mr Dermot Nottingham's licence not being renewed.

[123] The appellants say that the misstating of Mrs West's testimony amounts to a falsification constituting a criminal act. They make similar allegations in respect of the Tribunal's assessment of the technical evidence referred to above.

[124] The appellants criticise the behaviour of the Tribunal in seeking to limit their evidence. They contend that the Tribunal did not place sufficient weight on the fact that a number of the witnesses summoned by the appellants, for example, Mrs Honey, were hostile.

[125] The appellants contend that the witness, Mr Spence, whilst supposedly giving evidence as an expert, was in breach of the High Court Rules, referring, for example, to his refusal to look at the DVD. The appellants say that Mr Spence refused impartially to address the evidence.

[126] The appellants' complaints included the conduct of counsel. For example, the appellants claim that counsel failed to make proper enquiry of their clients before promoting false evidence, in particular that the RE/MAX pages were cached. The appellants refer to a suggestion at one point by the Tribunal that the proceedings might be able to be settled but that one lawyer was prepared to do so only with a "threat of full client solicitor costs".

[127] The appellants say that when counsel was questioning Mr Taka, Mr Spence's evidence was misrepresented to him, and deliberately so, when the question was:

> Q. Now we heard from Mr Spence that that process where a website is upgraded or rebranded whereby previous pages would be left live on the server but just not linked to the home page, is not something that's unusual as done quite often and is that your experience also?

[128] Mr Taka agreed with that proposition. Mr Dermot Nottingham explains that he did not object when the proposition was put to the witness because, by that point in the proceedings, he had been unsuccessful in all his objections so he stopped trying. I am not satisfied that there was anything deliberately untoward in this regard. The Tribunal's decision records the expert evidence that when rebranding is involved, old web pages should be removed from active directories.[21]

[129] There were some suggestions that the Tribunal should have acted to reinstate Mr Dermott Nottingham's license. However, the appellants concede that matter was not before the Tribunal and therefore was no jurisdiction for the Tribunal to do so.

[130] There was clearly some dispute between the appellants and the Tribunal as to how the appellants were running their case. For example, the Chair intervened during the questioning of Mrs Honey, observing that the questioning amounted to a

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[21] At [29] and [30].

sort of harassment. The appellants' position was that they were simply trying to clarify the evidential basis for the allegations made by Mr Honey.

[131] At one stage when Mr Dermott Nottingham was cross-examining Mr Honey, the Chair said he would have to give him a deadline and on another occasion the Chair said that questions had to be shaped around the time available.

[132] The appellants consider that the Chair showed bias against lay litigants. As the respondents point out, however, there were times when the Tribunal's rulings were contrary to the position advanced by the respondents. For example, counsel for Mr Honey objected to the appellants' seeking an adjournment of proceedings in order to obtain further evidence. This occurred on day two of the hearing. Mr Honey's counsel opposed the adjournment and said, if one were granted, then the appellants should be subject to an award of costs against them. The Chair noted that lay litigants were involved and that the subject of the proceedings was relatively novel. He therefore decided that the Tribunal would be more liberal than normal.

[133] The appellants criticise the Tribunal for apparently forgetting the second appeal. It is fair to say that there was a considerable amount of technical evidence before the Tribunal relating to the website issue and it is perhaps unsurprising that was the focus of the hearing. Furthermore, as the appellants accept, the second appeal was highly relevant to the first.

[134] The appellants complain about what they saw as an attempt by the Chair to exclude the evidence of their private investigator, Mr Hikaka, a former police officer. Mr Honey's lawyer questioned the relevance of Mr Hikaka's evidence. The Chair noted that the witness gave evidence which amounted to an assessment of the credibility of various witnesses. In its decision, the Tribunal said:

> [48] While we have been assisted by the expert evidence, particularly as to the technical status of the web pages, the various expert reports are of less assistance on the key issue of intention. Both Messrs Chappell and Hikaka give their views on the likelihood that the RE/MAX pages were left live on the internet deliberately.

[135] The Tribunal was absolutely correct when it observed:

> [49] … drawing inferences from proven facts is ultimately a matter for us rather than expert witnesses. We must reach our own conclusions as to the licensee's knowledge and intent in respect of the RE/MAX pages and his disciplinary culpability (if any).

[136] It appears that the Tribunal watched the first 10 minutes of the DVD but did not watch the part where Mr Dermott Nottingham is shown conducting the telephone conversation on 10 April 2010 with Mrs Honey. The Tribunal decided it did not need to view that part of the DVD as it had the transcript of the conversation. In the appellants' submission, demeanour was important and the Tribunal should have watched it. The Chair dealt with the issue by noting that the Tribunal had seen the witnesses and was able to make its own assessment.

[137] While the Tribunal might be criticised for not listening to the recordings of the conversation between Dermott Nottingham and Mrs Honey (and with some justification as the recording itself is the best evidence rather than the transcript[22]) I accept that it was a matter for the Tribunal and it is for it to regulate its procedures.

[138] A transcript of the Tribunal hearing was produced and formally certified as accurate by the Registrar. The appellants were unhappy the transcript was of the evidence only whereas the Registrar had advised the High Court that it was a full transcript, that is including exchanges between the parties and the Tribunal. The appellants see that as an attempt to suppress material which is prejudicial to the Tribunal. They contend it was a deliberate decision by the Tribunal because the missing passages prove the appellants' allegation of bias.

[139] The appellants produced their own version of the transcript which included the exchanges between Tribunal members, the parties and advocates. Even then, the appellants contend that the audio file supplied to them had been interfered with because there is at least one exchange they recall which does not appear to be on the audio file.

[140] The appellants recall a remark, which is not on the audio file supplied, which was made at the time the appellants made the recusal application. They recall one of

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[22] In saying that, in my assessment the recording assisted the second respondent as Mrs Honey's surprise at learning of the issue with the website appeared genuine.

the members clearly saying, "we are not going", the exchange being of a nature Mr McKinney says he will never forget.

[141] The appellants raised this matter with the Court prior to the hearing of the appeal and sought an order enabling them to "inspect" the original recording with the view to having it forensically examined. Bearing in mind the short time before the scheduled hearing date, the appeals' list Judge decided that the significance of any omission could be addressed at the hearing. She gave leave for the appellants to file an affidavit, with leave for the respondents to respond. The appellants did file an affidavit. I cannot locate any affidavit in response. Rather, the Authority's submissions address this issue by noting that the appellants have not been able to point to any relevant evidence not recorded in the transcript. There is no reference, however, as to whether anything has been omitted from the audio file.

[142] I have listened to the audio file which is on a memory stick on the Court file. The remark referred to by the appellants is not audible at the time of the recusal application. It occurred to me that, given the nature of the comment which the appellants recall, it might have been made just prior to the morning adjournment. I continued listening to the audio file. However, the Court's audio file is also incomplete. It cuts off just before the morning adjournment, omitting over a page and a half of the evidence. Having undertaken that exercise I am, therefore, in a position to accept that there may be some parts missing from the audio file supplied to the appellants, albeit that their file is more complete than that supplied to the Court. That leads to the inference that there are technical problems with the copies of the audio file.

[143] I recognise that the appellants contend it is more than that and that the audio file has been deliberately interfered with. As foreshadowed by the Judge at the pre-trial conference, the significance of the exchange itself is not particularly telling. I say that because some of the other exchanges between the Tribunal and the appellants were better evidence to support the appellants' allegations of bias than the one which was omitted. For example, the Chair told Mr Nottingham:

> you are entitled to these views but I am not interested in being bullied by you, quite frankly – you take me on review. Now let's get on with this case if you don't mind.

[144] There was an interjection from one of the members saying, "not interested".

[145] The Tribunal received the appellants' memorandum in support of the recusal application and the Chair said:

> I have bent over backwards to give you a fair hearing, Mr Nottingham, and [interjection by Mr Dermott Nottingham "we disagree"] I don't like your tone.

[146] Mr Dermott Nottingham responded:

> and I don't like your tone either Sir.

[147] The Court of Appeal when considering bias by predetermination in *CREEDNZ Inc v Governor-General* described the test as follows:[23]

> Before the decision can be set aside on the grounds of disqualifying bias it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion…

[148] Mr Phillip Nottingham helpfully referred the Court to the explanation given by Gallen J in *Loveridge v Eltham County Council* when he discussed natural justice in the conext of bias:[24]

> … whether or not it appears from all the evidence that all or any of the bodies or individuals involved had so conducted themselves that an informed objective observer would consider that they had closed their minds and were no longer giving genuine consideration to the live issues before them.

[149] I am satisfied, having considered the transcript and listened to extensive portions of the audio recording, that there was no bias or pre-determination. Indeed, the appellants were given considerable latitude to advance their case. I accept the submission on behalf of the Authority that a hearing lasting four full days is unusual. In saying that, I acknowledge the appellants' observation that considerable time was taken up with the issue of whether the web pages were cached or live.

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23 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 194.
24 *Loveridge v Eltham County Council* (1985) 5 NZAR 257 (HC) at 264.

[150] I do not accept the criticism that Mr Phillip Nottingham was restricted unfairly in his questioning of Mrs Honey. It is quite common in any court proceeding to bring a halt to questioning of a witness, particularly when it is perceived as repetitious, unhelpful or irrelevant. It is clear from the transcript that the point Mr Phillip Nottingham was endeavouring to make, that is, whether there was any justification for Mrs Honey's fearful apprehensions about Mr Dermott Nottingham, had been made. It was then a matter for submission. Nothing useful would result from continued questioning of the witness.

[151] The same comment can be made about the other times the Chair intervened when various witnesses were being questioned. A number of the witnesses had been summoned by the appellants and clearly would have preferred not to have been compelled to give evidence. They were questioned first by Mr Dermott Nottingham and then by Mr Phillip Nottingham. Inevitably, there was an overlap. The questioning was persistent. It was quite proper for the Chair continually to try and focus the appellants on the time they were taking and in the way in which questions were being put. This includes not allowing what essentially were submissions to be put to witnesses, although I note, for example, the Chair said in response to an objection by Mr Honey's counsel:

> I don't mind if those questions are put firmly and directly to him. One of my roles is to not waste the resources of the justice system. Now, you know, I want to make progress and positive progress and not all this fringe questioning. Now whatever it is you want to put to Mr Honey, would you put it to him.

[152] It is equally possible to identify aspects of the hearing when the decisions of the Tribunal were adverse to Mr Honey's interests. A clear example is the decision at the end of day two to adjourn the hearing part-heard so that Mr Dermott Nottingham could obtain expert evidence to challenge that of Mr Spence. That was strenuously opposed on behalf of Mr Honey. On another occasion, there were complaints on behalf of Mr Honey that timetabling orders regarding the appellants' evidence had not been complied with. The Tribunal said:

> I am not interested in people's conduct at the moment, I am interested in the facts of this case.

[153] I also note that the Tribunal described itself as being concerned and disturbed that the Messrs Nottingham "generated an atmosphere of intimidation in our courtroom".

[154] Given the nature of some of the appellants' allegations against the Committee,[25] the Tribunal had to ensure that the hearing was conducted in a structured and measured fashion and that the more extreme allegations did not detract from the real issues.

[155] I am satisfied that the exchanges of concern to the appellants amount to no more than the Tribunal doing its best to manage proceedings and to deal with issues sensibly and reasonably while being fair to *all* parties.

[156] Furthermore, I am satisfied, having read the transcript and listened to substantial portions of the audio file, that, on an objective basis, the behaviour and conduct of the Tribunal does not and would not give rise to the suspicion it was not impartial. The test is an objective one and this case is a good example of why it is so. Parties frequently become so focused on the proceedings that any comment perceived to be against their interest is taken by them as evidence of partiality on the part of the comment maker. Litigants in person are particularly prone to these feelings, understandably so. It is, therefore, necessary for an objective analysis to be undertaken, that is, standing back, did the Tribunal conduct itself in such a way so as to appear that the members had closed their minds and were no longer giving genuine consideration to the issues before them? I am satisfied it did not.

Did the Tribunal err in principle, fail to take account of a relevant matter, take account of an irrelevant matter or was it plainly wrong?

[157] Mr Clancy submits that, in essence, the complaint related simply to the appearance on pages with RE/MAX branding of properties which had been listed by Mr Honey, a Ray White agent. In those circumstances, he queried whether there was indeed a serious issue which would mislead consumers and would warrant a hearing into misconduct.

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[25] See [24] above. These allegations are effectively repeated in this appeal, now directed at the Tribunal.

[158] In Mr Clancy's submission, any issue as to misuse of RE/MAX's intellectual property was a matter for RE/MAX. He pointed out that Mr Chapman, Manager of RE/MAX New Zealand's head office and someone who could have taken proceedings against Mr Honey, accepted it was a mistake. Weight should be given to his opinion in light of his position, in Mr Clancy's submission.

[159] The difficulty with that submission is that it ignores the fresh evidence. Mr Chapman's reaction might not be the same if he were aware of the allegations in the statements of Ms Earlan and Ms Muller.

[160] In any event, Mr Clancy notes that there was no evidence of customers having been misled. It is not in dispute that a person taken to the RE/MAX pages would eventually be taken to the Ray White pages. There was no possibility of anyone being under a misapprehension that the properties were listed other than by Ray White, says Mr Clancy. Therefore, if it were some sort of ploy, it was, he says, a spectacularly unsuccessful one. He points out that the DVD recording of the conversation with Mrs Honey showed that any misapprehension or confusion was immediately corrected.

[161] Again, however, that conclusion is open to a question, given the fresh evidence.

[162] In Mr Clancy's submission, this was a commercial dispute regarding use of RE/MAX branding. RE/MAX itself was not concerned and the Tribunal was therefore correct to uphold the decision of the Committee that no further action was warranted.

[163] It is relevant that the complaint to the Authority came not from a consumer but from a competitor licensee complaining, essentially, about a misuse of RE/MAX branding.

[164] The Tribunal accepted that if it considered there was a prima facie case of misconduct, it would refer matters to the Authority to lay charges.[26] The inference

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[26] At [81].

from the decision is that, if Mr Honey had deliberately caused his website to have live RE/MAX branded pages on it accessible by a Google search of "RE/MAX Onehunga", then that would constitute misconduct under the Act. I concur with that approach.

Conclusion

[165] Having undertaken an analysis of the matters raised, I consider the real issue to be the failure to take into account relevant considerations. This arose in two ways. First, the apparent misunderstanding of the significance of Mrs West's testimony, evidenced by the misstatement of the date when Mr Honey was alerted to the problem by Mrs West. Taken on its own, this might not be sufficient for a successful appeal given the Tribunal's advantage of having seen and heard the witnesses. In that light, it might well be that the Tribunal concluded that, despite Mrs West's evidence, Mr Honey did not fully appreciate the problem until April 2010. Secondly, and crucially, the fresh evidence should have been taken into account. The fact the Tribunal stated there was no need to detail the evidence demonstrates that the Tribunal did not take it into account. Because the fresh evidence categorically contradicted the evidence of Messrs Honey and Taka, whose credibility was central to a decision as to whether there was evidence of misconduct, the failure to take it into account was an error.

Result

[166] The appeals against the Tribunal's decision dismissing appeals against the Committee's failure to bring changes succeeds. The parties did not address what should happen in the case of a successful appeal and are directed to do so by filing submissions (limit of five pages) within 15 working days. Pursuant to r 20.19 of the High Court Rules, the Court can remit the matter back to the Tribunal either to direct the Committee to lay charges of misconduct against the second respondent or for the Tribunal to consider the impact of Mrs West's testimony and the fresh evidence.

[167] A lay litigant is not usually entitled to recover costs.[27] Any issue as to costs is to be addressed in the further submissions.

Thomas J

[27] See Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [14.10] citing *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400 at [162].