IN THE COURT OF APPEAL OF NEW ZEALAND

CA437/2015
[2017] NZCA 1

BETWEEN	DERMOT GREGORY NOTTINGHAM, PHILLIP NOTTINGHAM AND ROBERT EARLE MCKINNEY Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY First Respondent
	MARTIN RUSSELL HONEY Second Respondent

Hearing:	19 October 2016
Court:	Asher, Heath and Dobson JJ
Counsel:	P Nottingham and R E McKinney in person M J Hodge for First Respondent D W Grove for Second Respondent
Judgment:	27 February 2017 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B The order made in the High Court is supplemented by a further direction that the Tribunal re-hearing the appeal is not to include any members of the Tribunal who sat on the first appeal.

C In all other respects, the appeal is dismissed.

D The appellants are jointly and severally liable to pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Dobson J)

Table of Contents

History of the dispute

[1] This is an appeal from the terms on which the High Court dealt with an appeal from the Real Estate Agents Disciplinary Tribunal (the Tribunal) in dismissing a challenge to a decision by a Complaints Assessment Committee (CAC) not to pursue complaints made to it by the appellants. The Tribunal was chaired by former District Court Judge Paul Barber QSO, sitting with two lay members. Mr Barber had died by the time this appeal was argued.

[2] The appellants are all associated with Property Bank Realtor Limited (PBRL). In that capacity, the appellants have had long-standing and bitter disputes with the second respondent, Mr Honey.

[3] In 2009, PBRL purchased a RE/MAX real estate agency franchise based in Onehunga, Auckland. Mr Honey's company formerly owned a RE/MAX franchise operating in Royal Oak, Auckland. Sometime after PBRL's acquisition, the appellants discovered that the website for Mr Honey's business continued to have web pages with RE/MAX branding after he had switched to a Ray White franchise.

[4] In early 2011, Mr Dermot Nottingham lodged a complaint on behalf of PBRL with the Real Estate Agents Authority (the REAA) alleging misconduct by Mr Honey in operating a website with RE/MAX branding for which he no longer had a franchise, and misleading the public into believing he was operating as RE/MAX when he was operating as a Ray White franchise. Mr Dermot Nottingham claimed that Mr Honey's actions had caused the appellants' business substantial losses.

[5] In accordance with the procedure provided for under the Real Estate Agents Act 2008 (the Act), the REAA appointed a CAC to consider the complaint.

[6] The allegedly aggressive manner in which the appellants pursued their complaint against Mr Honey was the subject of a complaint made by him to the REAA. In turn, that provoked a second complaint from the appellants that Mr Honey's complaint included intentionally false and dishonest accusations.

[7] The CAC considered both of the appellants' complaints and decided to take no further action on either of them. On Mr Honey's complaint, a CAC resolved to bring a misconduct charge against PBRL. That charge had not been heard at the time of the present hearing. The REAA has refused to renew Mr Dermot Nottingham's licence as a real estate salesperson.

[8] The appellants appealed the CAC's decisions on their complaints to the Tribunal. The Tribunal heard the appeals over four days on 11 and 12 December 2013 and 11 and 12 March 2014. Further evidence and submissions were tendered to the Tribunal after the hearings were completed. The Tribunal issued its decision dismissing both appeals in October 2014.[1] The appellants then appealed to the High Court. The appeal was heard over two days on 10 and 11 June 2015, and Thomas J delivered a reserved decision on 10 July 2015.[2]

[9] The appeal to the High Court was allowed on the ground that the Tribunal had erred in failing to take into account relevant considerations. This included the

---

1 *Nottingham v Real Estate Agents Authority (CAC 10057)* [2014] NZREADT 80.
2 *Nottingham v Real Estate Agents Authority* [2015] NZHC 1616.

content of two witness statements lodged with the Tribunal on behalf of the appellants after the hearing had concluded. That evidence suggested Mr Honey had been untruthful in denying awareness of the continued presence of a RE/MAX website in the period of more than a year between his relinquishing the franchise and when the existence of the website was brought to his attention by the appellants. Thomas J also found that the Tribunal had misunderstood the effect of evidence from an earlier witness, Mrs West, that she had discussed the continued existence of the RE/MAX branding on Mr Honey's website at a significantly earlier time than his original explanation acknowledged. Thomas J characterised that as a failure to have regard to a relevant consideration.

[10] Thomas J dismissed other grounds of appeal in which the appellants alleged bias on the part of the Tribunal. The Judge directed the matter back to the Tribunal for reconsideration of the grounds for laying charges of misconduct against Mr Honey.

[11] Despite that measure of success, the appellants pursued a further appeal to this Court, which is provided for in s 120 of the Act on questions of law only. The essence of the appellants' complaint is that the High Court judgment wrongfully rejected what the appellants regard as compelling evidence of bias by the Tribunal. The appellants allege that Thomas J was similarly biased in her failure to accept their arguments of bias in the Tribunal.

Procedural matters

[12] The notice of appeal filed on 4 August 2015 purported to identify six questions. We were concerned to ensure that the appeal was confined to questions of law and, by way of a minute issued on 16 November 2015, we invited clarification of the questions of law that were to be argued.[3]

[13] Mr Grove, counsel for Mr Honey, disputed that there was any tenable question of law framed in the notice of appeal and opposed the appeal proceeding for

[3] *Nottingham v Real Estate Agents Authority* CA437/2015, 16 November 2015 (Minute of Cooper J).

that reason. In addition, given the measure of success in the High Court, Mr Honey claimed any further appeal on a question of law would be moot.

[14] The Court directed that the terms and scope of any questions of law raised by the appeal would be determined at the hearing, and the appeal was set down.[4] By the time the hearing commenced, the appellants had filed:

(a) a 32-page memorandum dated 9 December 2015 in response to the Court's minute seeking clarification on the questions of law;

(b) a 28-page submission dated 30 June 2016;

(c) a précis of submissions, tendered on the morning of the hearing by Mr Phillip Nottingham, extending to 73 paragraphs; and

(d) a 41-page submission from Mr McKinney, also tendered on the morning of the hearing.

[15] As to the last of these, Mr McKinney confirmed during the hearing that it was largely a re-casting of the points made in the original June 2016 submissions for which Mr Dermot Nottingham had been principally responsible.

[16] In the week before the hearing, the appellants applied for an adjournment of the hearing on the basis of Mr Dermot Nottingham's ill health. The Court was reluctant to grant an adjournment and requested a medical certificate to enable better informed consideration of the grounds for adjournment. The day before the hearing, Asher J convened a telephone conference with the appellants and counsel for the respondents. Having heard arguments in support of the adjournment from the appellants, and in opposition to it from Mr Honey, the application for an adjournment was declined.[5]

[4] *Nottingham v Real Estate Agents Authority* CA437/2015, 15 December 2015 (Minute of Cooper J).
[5] *Nottingham v Real Estate Agents Authority* CA437/2015, 18 October 2016 (Minute of Asher J).

[17] Given Mr Dermot Nottingham's state of health, the Court granted leave for the appellants to appear by AVL from Auckland.[6] The respondents requested that the same arrangement apply to them, and that was accommodated. Accordingly, the hearing was conducted by the Court in Wellington, with the appellants and counsel for the respondents appearing by AVL from the Court of Appeal Hearing Centre in Auckland.

[18] At the outset of the hearing, the Court was advised by Mr Phillip Nottingham that Mr Dermot Nottingham's state of health did not permit him to appear.

[19] Two days after the hearing, the appellants filed an urgent memorandum disputing the grounds on which the Court had declined their request for an adjournment on the basis of Mr Dermot Nottingham's health. The Court considered the concerns raised by that memorandum, and issued a further minute confirming that it would proceed to deliberate and deliver a judgment on the appeal.[7] Material to that decision was the Court's view that the grounds advanced by the appellants were clear from their written submissions. In addition, Mr Phillip Nottingham, assisted by Mr McKinney, had competently canvassed the points in oral argument. We are unable to see how the appellants have been collectively or individually prejudiced. The Court's minute also confirmed that the Court would not consider materials lodged with the Court by any party to the appeal after the conclusion of the hearing.

Challenges to a tenable basis for appeal

[20] The respondents argued that the appeal should not be entertained, on two grounds. First, that no questions of law had been advanced in the appellants' various submissions. Second, that the appeal was moot in light of the High Court order for the Tribunal to reconsider the appeal, and the inevitability that such reconsideration would be before a differently constituted tribunal.

---

6 *Nottingham v Real Estate Agents Authority* CA437/2015, 18 October 2016 (Minute of Asher J).

7 *Nottingham v Real Estate Agents Authority* CA437/2015, 28 October 2016 (Minute of the Court).

[21] As to the first of these points, counsel for the REAA, Mr Hodge, relied on the decision of this Court in *Wyatt v Real Estate Agents Authority*,[8] which adopted the Supreme Court's observations in *Bryson v Three Foot Six Ltd* as to the scope of questions of law for the purposes of an appeal under s 120 of the Act.[9] In *Bryson*, the Supreme Court commented:

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.

[22] In *Wyatt*, the Court considered the nature of Mr Wyatt's criticisms of the High Court decision, and found that the High Court had either not erred in the respects Mr Wyatt contended, or the propositions he advanced did not raise questions of law. On that basis, the appeal was dismissed for lack of jurisdiction because the appeal did not give rise to questions of law in terms of s 120. Both respondents urged that the same analysis and outcome should apply here.

[23] However, as explained below, we consider that the High Court made an error of law in terms of the legal standard it applied to the appeal from the Tribunal decision.[10] The appeal therefore meets the terms of s 120 of the Act.

The factual background

[24] The background was summarised by Thomas J in the following terms:[11]

> [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:

---

8 *Wyatt v Real Estate Agents Authority* [2013] NZCA 389.
9 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
10 See [38]–[39] below.
11 *Nottingham v Real Estate Agents Authority*, above n 2.

(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.

[25] The Judge had earlier characterised the appeal in the following terms:

[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.

[26] The appellants' complaint was that Mr Honey had intentionally continued to trade using the RE/MAX brand, its continued existence having been brought to his attention from about July 2009. The appellants subpoenaed evidence at the Tribunal hearing from Mrs West who, together with her husband, had been real estate salespersons working for Mr Honey whilst he operated the RE/MAX franchise. Mrs West recalled raising with Mr Honey in around July 2009 that listings on Mr Honey's website continued to show current listings under the RE/MAX banner. She had accessed the website herself to test that assertion and found that it was accurate. Her evidence was that when she raised it with Mr Honey, he said that he would take care of the problem.

[27] Once confronted with that evidence, Mr Honey deviated from a brief of evidence that stated he had been unaware of the problem until April 2010, to acknowledge that the matter had been raised with him by Mrs West as described in her evidence.

[28] After the Tribunal hearing had concluded, the appellants undertook further research to locate witnesses who might corroborate their claims that Mr Honey had intentionally continued to use the RE/MAX brand on his website. Before final submissions had been filed, the appellants submitted unsworn statements from two further witnesses. They had located a Ms Earlan in South Africa, who had worked for Mr Honey in the period when he changed from operating a RE/MAX franchise to a Ray White one. In addition, they had obtained a statement from Ms Muller, who had been a receptionist for Mr Honey's business from February 2009 until mid-2011.

[29] The effect of Ms Earlan's statement was that she had been explicitly instructed by Mr Honey to upload pictures and information about properties Mr Honey had secured for listing onto both the Ray White website and to a personal website operated by Mr Honey, which used a RE/MAX branding. That involved her loading the same property twice, once on each website. She was reluctant to admit her part in that activity, implicitly recognising that it was inappropriate to be doing so. Ms Earlan also recalled receiving calls in response to listings on the RE/MAX website, which she would refer to Mr Honey and which might result in a sale.

[30] Ms Muller recalled a client coming into Mr Honey's office sometime in late 2009 to remonstrate with Mr Honey. The client asked why his property was being advertised on a RE/MAX site when he had listed it with Ray White. In addition, Ms Muller recalled Ms Earlan complaining about the duplication involved in her having to load newly listed properties on Mr Honey's RE/MAX website and the Ray White website.

[31] The appellants claimed that the manner in which the Tribunal rationalised these parts of the evidence with its acceptance of Mr Honey's claims that he had not intentionally continued to use the RE/MAX website until April 2010 demonstrated that the Tribunal was biased, and had conducted itself corruptly. So far as Mrs West's evidence (which had been tested at the hearing) was concerned, the Tribunal placed the relevant events she described as occurring in April 2010.[12] This was despite Mr Honey confirming in evidence that the conversation Mrs West recalled had occurred, and that it took place in July 2009.

[32] Because the timing of when Mr Honey became aware of the live status of the RE/MAX website was of primary importance to the CAC's dismissal of the appellants' complaint, this was inarguably a fundamental error.

[33] As to the further proposed witness statements from Ms Earlan and Ms Muller, shortly after they were received the Tribunal emailed the parties advising that any further evidence would be treated as irrelevant and that the Tribunal's only concern was to receive closing submissions from all parties. Then, in its decision, the Tribunal acknowledged as "further evidence" the statements received from Ms Earlan and Ms Muller, commenting only: "but there is no need to detail that evidence".[13]

[34] We have real reservations about the appropriateness of the Tribunal embarking on a full hearing of oral evidence, given the nature of its task on appeal from the CAC.[14] Within the process it adopted, the quality of the late witness statements might be challenged in that they were not in sworn form and counsel for

---

12 *Nottingham v Real Estate Agents Authority (CAC 10057)*, above n 1, at [58].
13 *Nottingham v Real Estate Agents Authority (CAC 10057)*, above n 1, at [76].
14 See [81]–[83] below.

Mr Honey had no opportunity to test them in cross-examination. However, unless some substantial ground for rejecting their reliability was available to the Tribunal, a reasonable response ought to have included some inquiry into the prospects for testing that evidence in the manner adopted for the rest of the evidence, so that it could be taken into account. For convenience, we will refer to those witness statements as the "new evidence", without wishing to convey anything as to their legal status.

Approach adopted by the High Court

[35] The High Court proceeding amounted to a second appeal of the appellants' complaints concerning the REAA's failure to take disciplinary action against Mr Honey. The appellants' concerns were both as to the outcome, and the alleged inadequacy and impropriety of the hearing before the Tribunal.

[36] Appeals before the Tribunal from decisions of the CAC not to lay misconduct charges are considered as appeals from the exercise of a discretion vested in the CAC.[15] The High Court was therefore dealing with an appeal that involved reconsideration of a discretionary decision by the CAC. However, the general right of appeal to the High Court was not confined in the same way as if the Tribunal's decision was a matter of discretion.

[37] In the present appeal, the appellants argued that it was not reasonably open to Thomas J to dismiss the evidence that the appellants relied on as insufficient to establish that the Tribunal was biased. This argument focused on the standard adopted by Thomas J in reconsidering the Tribunal's decision. Despite appreciating that the case before her was an appeal, rather than a judicial review, Thomas J adopted the standard appropriate for a review of the exercise of a discretion:[16]

> [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* … , 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

---

15 *Nottingham v Real Estate Agents Authority (CAC 10057)*, above n 1, at [10], [13].
16 *Nottingham v Real Estate Agents Authority*, above n 2.

> decision from the Tribunal, but that the Tribunal's decision was not reasonably open to it.
>
> …
>
> [46] … 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?

[38] The appellants were entitled to a general right of appeal to the High Court under s 116 of the Act. The appellate court ought to have applied the standard in *Austin, Nichols & Co Inc v Stichting Lodestar*,[17] rather than that in *Kacem v Bashir*.[18] That standard required Thomas J to come to her own view on the issues. If that analysis resulted in an outcome that was different to the one reached by the Tribunal, then that would mean that the Tribunal's decision was wrong.

[39] That error in approach gives rise to the prospect that Thomas J has assessed the appellants' criticisms of the manner in which the Tribunal dealt with the evidence according to the wrong standard. The error is one of law. In case applying the different standard of a general appeal leads to a different conclusion on one or more of the criticisms of the Tribunal, we must reconsider the appellants' criticisms in order to reach our own view.

Criticisms of the High Court analysis

[40] The gravamen of the appeal was that Thomas J's finding that the appellants had not made out bias on the part of the Tribunal was perverse and against the weight of evidence.[19] From the appellants' perspective, the strength of their evidence that Mr Honey had intentionally continued to use the RE/MAX brand on his website was so unassailable that Thomas J's rejection of their version of events tarred her with the same brush of bias as the Tribunal.

[41] The criticisms of bias by the Tribunal can be assessed under three headings:

---

17 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

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

19 The mantra used in the appellants' submissions was that the Tribunal had "acted corruptly, dishonestly and immorally". We have treated these criticisms as claims of bias.

(a) First, the Tribunal's refusal to consider the content of the new evidence once on notice of how starkly contradictory it was of Mr Honey's explanation. In addition, the ostensibly inexplicable misinterpretation of Mrs West's evidence as to the time at which she brought the RE/MAX branding to Mr Honey's attention. That failure was compounded by Thomas J not recognising the impact of that evidence in her assessment of the Tribunal's conduct.

(b) Second, the conduct of Mr Barber as chair during the hearing, specifically the way he treated the Nottinghams.

(c) Third, that the transcript and audio recording of the full hearing provided to the appellants has been doctored. They attribute responsibility for that to Mr Barber.

[42] The appellants attribute these criticisms to actual bias on the part of the Tribunal.

[43] Thomas J adopted the following test for bias by way of pre-determination from this Court's decision in *CREEDNZ Inc v Governor-General*:[20]

> 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.

That test remains good law.

[44] The tests to be applied in assessing bias were reviewed in the decision of this Court in *Riverside Casino Ltd v Moxon*.[21] That judicial review proceeding challenged the conduct of Mr Cox as a member of the Casino Control Authority, who participated in the Authority's consideration and determination of an application to grant a casino licence in Hamilton. The High Court finding that Mr Cox's conduct raised a real possibility of bias was overturned by the Court of Appeal. The test is an objective one as to whether a reasonable person who is fully informed would

---

[20] *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 194.
[21] *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78 (CA).

consider that there was a real danger of bias on the part of a member or members of the Tribunal in the sense that he, she or they might unfairly have regarded the case of one party with favour or disfavour.[22]

[45] The nature of the proceeding and the forum will be relevant to an assessment of the conduct claimed to give rise to an appearance of bias. Such allegations are to be measured against the whole of the relevant proceeding, not just some parts of it. For example, in *Riverside Casino*, Mr Cox's conduct during the hearings had to take into account the pre-hearing reading he would have undertaken of written submissions and other materials before the hearings began.

[46] In this case, the Tribunal was chaired by a former District Court Judge, with two experienced lay members. The Tribunal is empowered to regulate its own procedure.[23] It can reasonably be expected to adopt varying levels of formality, depending on the nature of the matter before it for determination.

[47] On any view, the length of the hearing, the resort to subpoenas, challenges to the chairperson's conduct of the hearing and procedural points raised throughout the hearing, made it a relatively complex matter. The transcript reveals that the appellants presented trenchant criticisms of the honesty of Mr Honey in an aggressive manner throughout the hearing.

[48] In their various written submissions, and in Mr Phillip Nottingham's oral submissions, the appellants' characterisation of the Tribunal's conduct reflected their subjective impressions presented in categorical terms as if bias by the Tribunal members was inarguably established as an empirical fact. The following statement from the appellants' original submissions typifies their approach to their claims of bias:[24]

> Often the only proof of corruption is that the outcome was clearly rigged and not supported by the evidence that was not in dispute, or more evidently, when the evidence has been falsified, misquoted, and/or ignored completely, and not reported, or moreover corruptly reported. This is the case at hand.

---

22 At [32].
23 Real Estate Agents Act 2008, s 105.
24 Appellants' 30 June 2016 submissions at [34].

[49] That approach is at odds with the law. Thomas J explained the test in the following terms:[25]

> 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?

[50] To the extent that the appellants' arguments criticised that approach, we reject them. We agree with the approach adopted by Thomas J.[26]

Rejection, misunderstanding of evidence

[51] It is fair to infer that the Tribunal members were aware of the content of the new evidence. Without forming any view on the prospective witnesses' credibility, or the weight that might be attached to their evidence, the content of their statements raised direct challenges to Mr Honey's explanation on the critical factual issue, namely, the timing of his awareness of the continued existence of the RE/MAX page. Ms Muller's statement appeared to corroborate aspects of Ms Earlan's. The matters covered were therefore highly relevant to the matter before the Tribunal.

[52] Given that the Tribunal had embarked on a full oral hearing of evidence that might support or negate a disciplinary charge, it erred in not exploring any means of hearing the new witnesses and having their evidence tested on cross-examination. However, we agree with Thomas J that the circumstances do not establish that the error was made deliberately because the Tribunal was predisposed against the appellants.

[53] The conduct that was the subject of the appellants' complaint occurred in 2009 and 2010. The proceeding before the Tribunal had started in December 2013, and resumed in March 2014, with the new evidence arising only after those

---

25 *Nottingham v Real Estate Agents Authority*, above n 2, at [156].

26 The approach is consistent with the current test as set out in *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [62] and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [89].

somewhat protracted hearings. The Tribunal's desire to achieve finality in a protracted appeal is understandable. However, if it were necessary in the interests of justice for the Tribunal to consider the additional evidence, efficiency must yield. Having said that, the Tribunal's understandable concern to achieve finality detracts from the appellants' suggestion that an inevitable inference of bias must be drawn from the Tribunal's failure to consider the new evidence.

[54] We acknowledge the possibility that the Tribunal's concern to complete their task may have been increased by a measure of annoyance or impatience at the appellants' attempt to re-open the factual issues after four days of hearings when arrangements had been made to progress the appeal to a determination. There is no clear evidence of that, but if it existed, it contributes to the Tribunal's error of judgment regarding the importance of testing the new evidence. However, that does not help to establish bias against the appellants.

[55] The second aspect of this ground for alleging bias is that the Tribunal attributed the wrong date to Mrs West's advice to Mr Honey of the continued existence of the RE/MAX website. Again, we accept that the error is a fundamental one that ought not to occur in decisions of bodies such as the Tribunal. The reality, however, is that occasionally such errors do arise. Without something more, there is no basis for an inference that the error was made deliberately, and that such deliberate error was motivated by a pre-disposition against the appellants.

Tribunal's conduct during the hearings

[56] The next group of criticisms cited by the appellants as evidence of bias against them concerned various aspects of the conduct of the appeal by the Tribunal. These focused particularly on the conduct of Mr Barber in chairing the Tribunal.

[57] The transcript records numerous testy exchanges in which the appellants gave as good as they got, extending on some occasions to trenchant personal criticisms.

[58] Challenges by the appellants during the course of the hearing to the manner in which it was being run by Mr Barber brought an invitation from him, after questioning of procedural and evidentiary rulings, to "take me on review". He

added, in respect of one such comment, that he had never been successfully reviewed.

[59] Examples cited in Thomas J's judgment of such exchanges included the following:[27]

> … 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.
>
> …
>
> [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.

[60] It is important to the respect for judicial institutions that their proceedings be conducted with decorum. Discordant arguments between judicial officers and litigants are regrettable and should be avoided if at all possible. However, like all involved in litigious proceedings, judges are human beings and cannot be expected to maintain saintly calm in the face of challenging conduct by those appearing before them.

[61] Having considered this issue independently, on the basis of the *Austin Nichols* standard of appellate review, we are satisfied that Mr Barber's conduct throughout this appeal did not cross the line into unacceptable territory. Many of his comments were understandable in the context of what was clearly an emotionally charged hearing. The evidence falls well short of establishing that Mr Barber was biased against the appellants.

[62] The appellants also criticise Mr Barber's interventions in the appellants' questioning of witnesses. This is a recurring theme in criticisms by lay litigants.

---

[27] *Nottingham v Real Estate Agents Authority*, above n 2, at [143]–[145].

[63] However competently a lay litigant is presenting his or her case, the rules of evidence and a judicial officer's immediate response in sifting the relevant from the irrelevant as evidence unfolds can readily cause consternation for inexperienced questioners when they are in full flight.

[64] Here, both Messrs Dermot and Phillip Nottingham questioned at least some of the witnesses, with a number of their witnesses having been compelled to provide their evidence by the service of witness summonses. It appears that more may have been made of this criticism of Mr Barber's chairmanship before the High Court than Mr Phillip Nottingham pursued before us. We find no basis to vary Thomas J's observation on this point:[28]

> [The witnesses] 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.

Tribunal's conduct after the hearings

[65] The appellants claim that the transcript and audio recording of the hearing that they received was incomplete and had been interfered with by Mr Barber to frustrate their attempts to criticise him. The appellants elevated this as a separate head of biased conduct.

[66] More specifically, the appellants criticised the non-transcription of exchanges between members of the Tribunal and those appearing, and the omission from the audio transcript provided to them of parts of these exchanges. The appellants assert that Mr Barber interfered with the recording to delete comments that would show him in a bad light, in the context of their allegations of bias.

[67] This criticism was considered thoroughly by Thomas J, who listened to the audio file that was provided to the High Court. By comparing the transcript of the proceedings prepared by the appellants with the content on the audio file, Thomas J was in a position to accept that there may have been some parts missing from the

---

[28] At [151].

audio file supplied to the appellants. She inferred that there were "technical problems with the copies of the audio files".[29]

[68] Respondents' counsel expressed the belief during argument that the recording and transcription services were undertaken by the Ministry of Justice's National Transcription Service (NTS). The appellants did not dispute that, and the provision of transcription services by NTS to all statutory tribunals administered by the Ministry of Justice is a fact of which we can take judicial notice.

[69] The appellants could not be expected to know that NTS is an entirely separate unit within the Ministry who provide their services independently of the Judiciary, and that its structure gives no opportunity for a judicial officer to interfere with the recording and retention of transcripts. There was no suggestion that the appellants had researched how NTS works.

[70] The appellants did not cite any evidence that Mr Barber interfered in any way with the recording and transcription of the proceedings, either at the time or thereafter. Nor was there any evidence identifying how a credible opportunity could have arisen for him to do so. Their claim that he did interfere was based solely on the inference they claimed to arise from some excluded passages that contained statements by Mr Barber that arguably showed him in a bad light. We accept for the purposes of argument that that characterisation of the statements is justified.

[71] However, on its own, that characterisation of the omitted content is insufficient to sustain the appellants' allegation of bias when weighed against the high improbability of a judicial officer having any opportunity to interfere in the process of recording and transcription. We can dismiss the prospect of any contemporaneous attempts to edit the recording during the hearings, because that would not be feasible without those attempts coming to the attention of all those attending. After the conclusion of the hearing, there would be absolutely no opportunity for a judicial officer to have access to the original recording, or to procure any editing of the transcription of the recorded words. The allegation that

---

[29] At [142].

Mr Barber had, and took, the opportunity to edit out content that cast him in an unfavourable light is fanciful and we reject it.

Cumulative weight of grounds for alleging bias

[72] A further criticism of Thomas J's analysis was that, in considering the prospect of bias, the Court was required not only to consider each ground for claiming bias on its own, but to also stand back and weigh the combined impact of all of the criticisms cumulatively. The appellants argued that, whilst the individual strains of their arguments might not hold much weight, their combined strength generated substantial weight, which was sufficient to establish bias. This argument was advanced consistently as part of the theme that Thomas J had failed to see bias and corruption where it was blindingly obvious to the appellants.

[73] Many of the strands of the appellants' arguments do not sustain any weight at all. The appellants' suspicions of tampering with the transcript and audio files are misconceived. Equally, Mr Barber's mode of conducting the hearing cannot add weight to other aspects of the appellants' complaints.[30] That leaves the Tribunal's errors in refusing to have regard to the new evidence, and its misinterpretation of Mrs West's evidence. Our own view is that, whilst these are both material failings by the Tribunal, the combination of them falls substantially short of what would be sufficient to attribute bias to the Tribunal.

[74] Having undertaken our own assessment of the appellants' criticisms, we conclude that, despite the conviction with which the appellants have pursued their claims of bias, they cannot make them out. It follows that we do not consider that the case for any additional relief reflecting a finding of bias has been made out. We consider that Thomas J's erroneous application of the standard for an appeal from a discretionary decision did not lead her to the wrong outcome.

Entity to which the matter should be referred back and the terms for doing so

[75] Thomas J ruled that the matter be referred back to the Tribunal for reconsideration. That finding is not disturbed on appeal.

---

[30] See [60] above.

[76] Separate considerations arise in determining the correct entity to which the appellants' complaint should be referred back, and the terms on which that should occur. The original decision was made by a CAC so, on one view, if the process is to start again, it ought to revert to the original decision-maker. However, going back to the initial stage in the process would risk further protracting an already extremely prolonged process.

[77] Mr Grove resisted any suggestion that a referral back ought to be to the CAC. He submitted that the Act provides for the Tribunal to draft the complaint and be responsible for it thereafter, if it allows an appeal from a CAC decision not to lay a complaint. We gathered from Mr Grove that is the practice adopted by the Tribunal in such cases. The relevant power is in s 111 of the Act, which provides:

> **111 Appeal to Tribunal against determination by Committee**
>
> (1) A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the date of the notice given under section 81 or 94.
>
> (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—
>
> (a) a copy of the notice given to the person under section 81 or 94; and
>
> (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
>
> (3) The appeal is by way of rehearing.
>
> (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
>
> (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

Notices under ss 81 and 94 are, respectively, of decisions not to take any further action, or to do so. Where the Tribunal reverses a determination of a CAC under subs (4), under subs (5) it can exercise the power the CAC would have had to draft and pursue a complaint.

[78] Those powers justify the practice described to us, which is that if a CAC decides to take no action on a complaint, and the complainant persuades the Tribunal to reverse that decision, then the Tribunal assumes the function of the CAC under s 89 of the Act. The Tribunal's options in doing so are set out in s 89(2) of the Act:

> **89 Power of Committee to determine complaint or allegation**
>
> …
>
> (2) The determinations that the Committee may make are as follows:
>
> (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:
>
> (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct:
>
> (c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.

[79] The somewhat unusual consequence is that the outcomes could include the Tribunal (standing in the shoes of the CAC) determining to refer a complaint to itself for consideration. So long as the Tribunal confines the scope of such appeals from CACs within appropriate boundaries, this sequence of events is indeed workable, and does not create a risk of prejudice to any of the parties involved. At the appeal stage, it is open to the Tribunal to find that the CAC erred in not recognising that the licensee had a case to answer on the complaint and not framing the complaint as a charge. At the second stage, the Tribunal would determine whether that charge was made out.

[80] On the basis of the statutory provisions, we accept that the Tribunal is the appropriate body to which to refer the matter back.

[81] We are satisfied that the Tribunal erred in this case by allowing a full hearing involving potentially all of the oral evidence that would be heard if a charge had been laid, when the Tribunal was only addressing the preliminary issue of whether the CAC was wrong not to bring a disciplinary charge. The appeal is supposed to be

conducted by way of re-hearing of the proceeding before the CAC.[31] The CAC conducts a hearing on the papers, unless it directs otherwise.[32] Except in exceptional circumstances, full oral hearings before the Tribunal are not appropriate. Doing so risks drawing the Tribunal away from the material comprising the record before the CAC so that a decision might be made on a quite different basis. It also raises the spectre of credibility findings in contests between complainants and the licensees who might be the subject of a charge that would expose the Tribunal to criticism of pre-determination if a charge is then laid.

[82] In a second judgment addressing disposition, Thomas J directed that the matter was to be remitted to the Tribunal "to consider the impact of Mrs West's testimony and the fresh evidence".[33] The Judge made the order in those terms, having accepted a submission for the respondents to that effect.[34]

[83] Generally, appeals by way of re-hearing before the Tribunal should start with the record of the material that was before the CAC. An aspect of the Tribunal's ability to regulate its own procedure includes its entitlement, in appropriate cases, to decide to receive new material that was not before the CAC. In the absence of any challenge to the course directed in the second High Court judgment, it is appropriate to leave the freshly constituted Tribunal to decide whether, and if so the form in which, it receives evidence that was before the Tribunal during the original appeal. It will also be for the new Tribunal to decide the extent to which, and the form in which, it admits any further evidence.

[84] We heard separate argument on the appropriate composition of the Tribunal to re-hear the appeal from the CAC's refusal to lay a complaint against Mr Honey. The orders made by Thomas J did not address any restrictions on who should comprise the Tribunal for the re-hearing. The appellants were concerned that they could only expect a fair hearing if the composition of the Tribunal the second time round is entirely different.

---

31 Real Estate Agents Act, s 111(3).
32 Section 90(1).
33 *Nottingham v The Real Estate Agents Authority* [2015] NZHC 1998 at [30].
34 At [18].

[85] Mr Barber's subsequent death and the effluxion of time would likely have addressed their concerns in any event. However, for the avoidance of doubt, it was agreed between the appellants and counsel for the respondents that, irrespective of the outcome on other aspects, our judgment would confirm a supplementary direction by way of addition to the order made in the High Court. That is that the Tribunal re-hearing the appeal would not include any of the members who sat on the first appeal. Without accepting any conflict, or necessity to do so, Mr Hodge accepted in the course of argument that a Tribunal comprising all three members who had not previously been involved would reconsider the appeal. No direction to that effect was made in the High Court judgment, but it was accepted that such a direction could be made by this Court.

Summary

[86] The only error of law in the High Court judgment was Thomas J's adoption of the wrong standard for appellate reconsideration of the issues raised by the appeal. Having formed our own views on the material issues using the standard appropriate for a general appeal, we are satisfied that the Judge's adoption of the standard applicable to an appeal from a discretionary decision did not affect the outcome in the High Court. The Judge applied the correct test for the consideration of a bias allegation. Applying that test, and having considered the material before the Tribunal and its conduct, we are firmly of the view that the allegation of bias is not made out.

[87] We have also identified an error in the approach adopted by the Tribunal. This was not a case that warranted hearing contested oral evidence. The Tribunal heard potentially all the evidence that could have been led had it been determining a complaint of the type that the appellants criticised the CAC for not pursuing. Again, that error does not impact on the outcome of the appeal before us.

Result

[88] We allow the appeal for the very limited purpose of supplementing the order for a re-hearing made in the High Court, by addition of a term that such re-hearing

before the Tribunal is to be determined by a Tribunal constituted by persons other than those who determined the first appeal.

[89] In all other respects, the appeal is dismissed.

[90] We have allowed the appeal solely to permit the Court to supplement the orders made in the High Court. In all other respects the expansive arguments advanced on appeal have failed. There was substantial overlap between the matters covered on behalf of each respondent. Without suggesting any criticism of the submissions we received, given the scope of argument and the overall outcome, we do not consider that the appellants should be liable for more than one set of costs.

[91] The appellants are jointly and severally liable to pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Meredith Connell, Auckland for First Respondent
Foy & Halse, Auckland for Second Respondent