Decision No: [2011] NZREADT 24

Reference No: READT 041/11

IN THE MATTER OF	of a charge laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10043)**
AND	**EILEEN MARY JOSEPHINE BROOKER**
	Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARING at AUCKLAND on 9 August 2011

APPEARANCES

M J Hodge for the Committee
R Latton and B Allen for the defendant

DECISION ON APPLICATION FOR LEAVE TO ADMIT HEARSAY EVIDENCE

Background

[1] This matter comes before the Tribunal because of the untimely death of Mr Brent Baird one of the complainants in this case. In April 2010 Mr Brent Baird and his partner Gay Grigg made a complaint to the REAA about the conduct of the agent for the vendor Eileen Brooker over the sale of a property in Benson Road, Nightcaps, Invercargill in July 2006 to the complainant. In their letter of 14 April 2010 Mr Baird and Ms Grigg set out the gist of the complaint against Ms Brooker which was that she failed to tell them that she had not been able to go inside the property at 21 Benson Road. This was a material fact for the complainants as they lived in Auckland and they said that they were relying upon Ms Brooker to tell them about the property. They complained that the property, although tenanted at the time of sale,

turned out to be uninhabitable requiring almost $40,000 worth of repairs compared to a purchase price of $75,000. The matter at issue is whether or not Ms Brooker told the complainants that she had not been able to get access to the property before or after the Agreement for Sale and Purchase was entered into and the Agreement became unconditional.

[2] At the end of June 2011 Mr Baird died. The counsel for the Complaints Assessment Committee told the Tribunal that he believed that his death was not expected and he died after a relatively short illness. No affidavit or completed brief of evidence had been prepared for Mr Baird. The CAC sought leave to admit as evidence three hearsay documents:

(a) A letter of complaint from Mr Baird and Ms Grigg dated 19 April 2010;

(b) An affidavit of Shaun Miller. Mr Miller was a senior investigator with the REAA and attached to his affidavit was a file note made on 29 June 2010 of a telephone conversation with Mr Baird in which he put to him the response from Ms Brooker to his complaint. Mr Miller recorded Mr Baird's comments in a job sheet.

(c) The affidavit of Gay Michelle Grigg. Ms Grigg deposes to the fact that after the purchase of the property Mr Baird telephoned the defendant to discuss the fact that the house was not habitable. She says at paragraph 1.9:

"[1.9] I remember that Brent telephoned the defendant straightaway. After he got off the phone the defendant had told me that she had confessed to him that she couldn't go into the property because of a large dog. This was the first time that she had told us that she had not viewed the inside of the property.

[1.10] Brent appeared to me to be very upset in that the defendant didn't tell us she had not viewed the inside of the property until after our purchase settled".

[3] As Mr Baird is deceased clearly he will not be able to give evidence or be cross examined on what Ms Brooker said to him or he said to her at, or just after, the purchase of the property. The issue for this Tribunal is whether or not these three statements (which will need to be examined individually) should be admitted as hearsay evidence pursuant to s 18 of the Evidence Act 2006.

The Law: ***The Statutory Provisions***

Section 18 of the Evidence Act 2006 provides:

> 18 General admissibility of hearsay
>
> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—

(i) the maker of the statement is unavailable as a witness; or

(ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

(2) This section is subject to sections 20 and 22.

Circumstances provide reasonable assurance that the statements are reliable

4.5 *"Circumstances"* are defined in s 16 of the Evidence Act as follows:

Circumstances, in relation to a statement by a person who is not a witness, include—

(a) the nature of the statement; and

(b) the contents of the statement; and

(c) the circumstances that relate to the making of the statement; and

(d) any circumstances that relate to the veracity of the person; and

(e) any circumstances that relate to the accuracy of the observation of the person.

The Real Estate Agents Act

109 Evidence

(1) Subject to section 105, the Disciplinary Tribunal may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.

(2) The Disciplinary Tribunal may take evidence on oath and, for that purpose, any member of the Disciplinary Tribunal may administer an oath.

(3) The Disciplinary Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and verifying that statement by oath.

(4) Subject to subsections (1) to (3), the Evidence Act 2006 applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a court within the meaning of that Act.

(5) A hearing before the Disciplinary Tribunal is a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury)".

[4] Section 8 of the Evidence Act provides:

"(1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will—

(a) have an unfairly prejudicial effect on the proceeding; or

(b) needlessly prolong the proceeding….."

Thus in summary, s 109 allows the Tribunal to receive any evidence but also provides that the Evidence Act applies to the Tribunal subject to the *"any evidence*

rule". The Tribunal must follow s 18 (with assistance from s 16) and then consider s 8.

[5] Clearly the first part of s 18(1)(b) has been made out – Mr Baird is dead and thus unavailable. The next step is for the Tribunal to determine whether the circumstances relating to the statement provide reasonable assurance that the statement is reliable.

[6] Both counsel appear to agree that what the Tribunal needed to do was to determine if the evidence met the "*threshold reliability"* test rather than the "*ultimate reliability*" test. The Complaints Assessment Committee provided the extract from *R v Bell* set out below:

> In relation to reliability, in *R v Bell* (DC Porirua, 17 April 2008) Judge Harrop noted the commentary of the learned authors of *Evidence Act 2006: Act and Analysis* (2007, Brookers Limited) at page 68 of that text ([19]):
>
> > *The reference to 'reasonable assurance' of reliability means presumably that the evidence is considered reliable enough for the fact-finder to consider it, and draw its own conclusions as to the weight (sometimes referred to as 'threshold reliability', as opposed to 'ultimate reliability').*

[7] Some guidance as to the approach has also been given by the High Court in the decision of *A v The Professional Conduct Committee* (HC Auckland, CIV 2008-404-2927, Keane J 5 September 2008). At paragraph 83 the Court considered the relationship between the Health Practitioners Disciplinary Tribunal's ability to receive evidence (its own *"any evidence clause"*) and the limitations provided by the Evidence Act 2006. Justice Keane said:

> *"That wide ability does not, however, free the Tribunal altogether from the Evidence Act 2006, the most fundamental principle of which is relevance: s 7. Nor did it entitle the Tribunal to receive material that is frankly prejudicial and not probative: R v S, (CA 395/06, 24 November 2006, para [12]); Doherty v Judicial Committee of the Veterinary Council of NZ (HC Wellington, CP 37/00, 15 March 2001 Doogue J).*

[8] The Tribunal therefore must weigh up these judicial statements and consider whether the hearsay evidence sought to be admitted passes the "*threshold reliability test*" outlined above.

Submissions of Counsel

[9] Counsel for the Complaints Assessment Committee urged the Tribunal to find that the evidence passed the threshold reliability test. Mr Hodge submitted that the Tribunal could determine its ultimate reliability after all of the evidence had been heard. He submitted that the statements were simple hearsay statements which were reliable because of the context in which they had been made and thus should be admissible.

[10] In opposition Mr Latton submitted that assistance could be gained from the decision of *X v the Auckland District Health Board* (No 2) (2006) 7 NZELC 98, 104 at

para [10] in which an analogous section in the Employment Relations Act 2000 was discussed. The Employment Court held that the broad power conferred to it has not been:

> *"Interpreted or applied by the court or its predecessors to permit evidential open slather. Rather, the rules of evidence in civil proceedings in the High and District Courts are considered and applied but may, on a case by case basis, be modified in circumstances where to do so will promote the ends of employment justice and where rigid adherence to rules might have the opposite result in the unique circumstances of an employment case"*.

[11] The defendant's solicitor submitted that the evidence which the CAC sought to be introduced was central to the proceedings. In these situations he submitted that the Tribunal should be reluctant to admit hearsay evidence of what was said. He submitted that in the situation such as this case where there is a direct conflict between what was allegedly said by Ms Brooker and that allegedly said (according to Mr Baird) by Ms Brooker meant that the Tribunal should require corroborating evidence and/or cross-examination. He suggested that the reliability of the statements by both Ms Grigg and Mr Miller must be considered. The gist of this submission was that the statements did not provide any assurance as to their reliability. He then submitted that the material would be unfairly prejudicial to the defendant if admitted. He submitted further that the statements at issue were made in or about July 2006 but the evidence relating to them was not progressed until at the earliest April 2010 and this delay significantly reduced the probative value of the evidence. He submitted that there was a significant prejudicial effect such that the test under s 8 of the Evidence Act had been made out.

Discussion

[12] The Tribunal is bound to consider the provisions of the Evidence Act but equally s 109 makes it clear that the Evidence Act is to be read subject to the all evidence rule embodied in s 109. However the Tribunal is mindful that it must exclude any evidence which would be in breach of s 8 of the Evidence Act, namely unfairly prejudicial to one party. We have also considered the provisions of s 18 of the Evidence Act to ensure we comply with it.

[13] We have considered these three statements separately. We consider that the joint complaint of Mr Baird and Ms Grigg dated April 2010 should be admissible – it passes the threshold reliability test. Further, given that Ms Grigg, the joint author will be available to be cross examined there can be no inherently unfair prejudice to the defendant if this evidence is admitted. The ultimate weight given to the evidence will be for the Tribunal to determine at the ultimate hearing of the matter.

[14] We also accept that the affidavit of Ms Grigg passes the threshold reliability test. It is not inherently unreliable nor does it create serious prejudice to the defence if she recites what Mr Baird relayed to her after the call and what she heard herself of the telephone call. The ultimate reliability of the evidence of this critical call will be a question of weight and for the Tribunal to determine at the hearing.

[15] We then come to the affidavit of Mr Miller which is a file note of a conversation he had with Mr Baird. While we have reservations about its weight and whether it will assist in proving the charge brought against Ms Brooker we still do not believe that

is, on the face of it, either inherently unreliable or severely prejudicial to Ms Brooker. It is simply a reiteration of Mr Baird's position. Again, in the absence of Mr Baird the Tribunal will need to weigh up all the evidence, including the evidence of Ms Brooker to determine whether or not the Prosecution has discharged its obligations on the balance of probability to prove the charge against Ms Brooker.

[16] Accordingly we order that the hearsay evidence may be admitted as evidence pursuant to s 109 of the Real Estate Agents Act.

DATED at AUCKLAND this 30th day of August 2011

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Ms K Davenport
Chairperson

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member