

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZREADT 51

Reference No: READT 058/11

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **WARREN WILSON**

Appellant

AND **REAL ESTATE AGENTS
AUTHORITY (CAC10011)**

First Respondent

AND **D McPHERSON, P & D
NOTTINGHAM AND E
McKINNEY**

Second Respondents

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

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

APPEARANCES

The appellant in person
Mr M Hodge for the First Respondent
Mr Dermott Nottingham on behalf of the Second Respondents

DECISION ON THE PAPERS

Introduction

[1] Mr Wilson appeals against the decision of the Complaints Assessment Committee on 30 May 2011 to take no further action in respect of his complaints against the second respondents. After some preliminary issues/orders the appeal came before the Tribunal on 15 March 2012. Prior to the hearing the second respondents had made an application to strike-out the appeal. They claimed *inter alia* that the appellant had failed to comply with the directions of the Tribunal on 5 September 2011 that the appellant was to file his Briefs of Evidence and submissions directed to the allegations by 21 January 2012. They submitted that there had been no evidence supplied in support of the allegations/appeal.

[2] At paragraph 15 of the submissions dated 10 February 2012 the second respondents submitted (*inter alia*) that their civil rights were substantially abused by the appellant in the following ways:

- [a] The allegations lack particularity and there is not a shred of evidence that any of the matters (other than those admitted) occurred.
- [b] The appellant had failed to supply Briefs of Evidence in accordance with the directions of the Tribunal.
- [c] There is a *prima facie* evidence of improper motive and conduct.
- [d] The respondents had not been informed of what allegation or evidence they must face at trial of the appeal.
- [e] The actions of the appellant established an attempt to ambush the second respondents.
- [f] The second respondents are irrevocably prejudiced.

[3] Following this application the Tribunal issued a minute that the strike-out allegations would be dealt with at the commencement of the hearing in March. Numerous documents were filed by all the parties prior to the commencement of the hearing.

[4] At the commencement of the hearing there was discussion concerning the strike out. The Tribunal sought submissions from Mr Wilson. He was invited to make submissions on the strike-out, however this proved difficult for Mr Wilson. Mr Wilson said (Transcript page 10).

Mr Wilson: *Alright OK, as you see I can't divide the two so I'll just sort of crossover. I can't help but crossover so I just can't.*

Chair: *Well let's have you sworn in*

Mr Wilson: *I can't wear one hat from the strike-out and another because to me it's essentially. It's all a similar situation but one would prepare in a different way so what I'm asking the Tribunal to consider here is a flap I've been into yesterday, getting all this thing at the last minute and not understanding clearly what evidence has got to be heard today".*

Mr Wilson then went into the witness box and gave evidence. He was cross examined by Mr Hodge and by Mr Dermott Nottingham (for all other second respondents who abided by the decision of the Tribunal) and by the end of the day his evidence had concluded. After some discussion it was agreed that a further day would be needed for the evidence of Mr Nottingham and submissions.

[5] The issue of the strike-out remained unresolved. Mr Nottingham who was the only attendee for the second respondent did not have a chance to make submissions.

[6] Following the adjournment of the hearing there were further documents filed. On 19 March Mr Phillip Nottingham filed a document seeking orders on the strike-out. In April Mr Nottingham made an application for recusal of the Tribunal on the grounds that:

- [a] The Tribunal failed to allow submission from the second respondents on an application to strike-out the proceedings.
- [b] The Tribunal failed to insist on compliance with the Tribunal's minute of 14 March.
- [c] Orders requiring particularity to enable the respondents to adequately answer the allegations of the appellant.
- [d] The Tribunal Chairperson predetermined the application to strike-out.
- [e] The Tribunal failed to control the process of the hearing allowing the appellant to make unsubstantiated allegations unsupported by evidence, his allegations are pejorative, scurrilous and outrageous.
- [f] The Tribunal failed to rule on the jurisdiction issues contained in the minute and the application to strike-out.
- [g] The Chairperson shares chambers with barristers who have been involved in legal proceedings with some of the second respondents. Such associations having potential and perception to have tainted her mind.
- [h] The second respondents filed affidavits in support.

[7] A timetable conference was held in May 2012 and timetable orders made for the filing of submissions and any other evidence by any party. All these documents were all to be filed by early July.

[8] Submissions were subsequently received from the first respondent and the appellant and the second respondents.

[9] On about 16 July Mr P Nottingham made a further application for an oral hearing and made submissions and filed two affidavits on 24 July 2012. These were out of time of the timetable order.

[10] After considering all the matters advanced by the second respondent's application for recusal dated 4 July 2012 and the 24 July submissions the Tribunal has determined to dismiss this application. The Tribunal have carefully considered all submissions and the law. They consider that the decision of the Supreme Court in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35 states the law on bias/recusal as it applies in New Zealand. The guidelines for judicial conduct are also helpful. The first respondent provided these.

4.22 At [71] the Guidelines state that the standard in relation to disqualification from sitting on a case is “*one of real and not remote possibility, rather than probability*”.

Judges have an obligation to sit on any case allocated unless grounds for disqualification exist. They should disqualify themselves in circumstances where a fair-minded, properly informed lay observer would have a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. The standard is one of real and not remote possibility, rather than probability.

4.23 The Supreme Court addressed the question of recusal in *Saxmere*. The Supreme Court relevantly held:

Subject to qualifications relating to waiver or necessity, a judge is disqualified ‘if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to resolution of the question the judge is required to decide’.¹

4.24 Blanchard J identified a two-step process:

- (a) Identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and
- (b) An articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.²

4.25 Blanchard J also commented as follows on the “*fair-minded lay observer*”:

The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge’s decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.³

[11] The Tribunal do not consider that the allegations of bias are in fact allegations which carry a real risk to the impartial observer that the Tribunal are biased and have an impartial mind. Those allegations which deal with the strike-out are allegations as to procedural matters which:-

- [a] Are not bias;
- [b] Can be dealt with by the Tribunal’s findings on the strike-out application; and/or
- [c] Will be answered by the completion of the hearing in October.

¹ [2010] 1 NZLR 35 at [3]

² [2010] 1 NZLR 35 at [4]

³ [2010] 1 NZLR 35 at [5]

[12] The Tribunal consider that the submissions concerning the conduct of the hearing are not relevant to the issue of bias, the submissions concerning the appellant's case are more properly directed to issues which will arise at the end of the hearing, and those relevant to the strike-out are addressed below. Finally the allegations of bias about the chamber members of the chair's chambers are correctly set out in *Saxmere* by Blanchard J at paragraph 7. In summary sharing chambers with others who may have had dealings with the second respondents does not in itself create any bias.

[13] Those which relate to Mr Wilson's allegations in the appeal and character and conduct issues will also be dealt with in the final decision. The Tribunal has reached no decision on these matters and will not do so until after all evidence is heard.

[14] The second respondents assert that there is predetermination because of the Tribunal's alleged failure to agree to make orders/findings against Mr Wilson. This submission is a misunderstanding of the nature of the appeal process. Mr Wilson lodged an appeal against the CAC's decision. He needs to prove his appeal to the civil standard of proof. When all evidence has been heard the Tribunal will reach a decision on this and decide whether or not to allow the appeal or to dismiss it.

[15] In reaching their decision the Tribunal may accept or reject Mr Wilson's (and any other parties') evidence. However whatever result is reached the Tribunal has no power to make any order against Mr Wilson. The Tribunal only has power to make orders against Real Estate Agents. Mr Wilson is not a real estate agent.

[16] The Tribunal is concerned at the plethora of applications from the second respondents. As has been said this decision was being finalised the second respondent Mr Phillip Nottingham filed "*an application to appear and be heard in person applications for recusal and strike-out*". This application also refers to unrelated READT appeals not being dealt with by this Tribunal and further submissions and affidavits. This Tribunal is dealing solely with READT No. 58/11 and nothing else. The Tribunal considers that all issues have been adequately set out in the numerous documents and affidavits already filed. No oral hearing on these preliminary issues needs to be held. The Tribunal may determine its own procedures and has determined that these interlocutory applications should be dealt with on the papers. The Tribunal will conclude hearing the evidence on this appeal on 23 to 24 October. That hearing will be in public. The allegations/actions of counsel for the READT in another appeal/matter are not relevant to this matter. Further counsel for REAA has no obligations to comply with the principles in *Saxmere*. Bias, is a concept which applies to decision makers not counsel for one party.

[17] The Tribunal therefore dismiss the application for recusal.

Strike-out

[18] The respondents also apply to strike-out the evidence of the appellant. This is the application filed by them in March prior to the first hearing and amplified since. The transcript shows that at the first hearing the Tribunal attempted to consider the strike-out application and invited Mr Wilson to give his submissions in opposition to the strike-out. The transcript shows that the issue of the strike-out was never determined as Mr Wilson's evidence took the whole of the day.

[19] It may be that many of the matters listed by the second respondents in the strike-out application will ultimately prove to be matters which the Tribunal will take into account when considering the merits of the appeal. However the Tribunal determine that in this case that they will defer the consideration of the strike-out application until the conclusion of all the evidence from both parties. As can be seen from the transcript the strike-out application was never concluded.

[20] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 23rd day of August 2012

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member