BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 34

READT 077/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**GRANT ADAMS**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20009)**
	First respondent
AND	**PETER THOMPSON, DENNIS LAW, ALEXANDER ELTON AND MAXWELL HOUSE**
	Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

BY CONSENT, HEARD ON THE PAPERS

DATE OF THIS DECISION 5 May 2014

APPEARANCES

The appellant on his own behalf
Ms J MacGibbon for the Authority
Mr T D Rea for licensees

DECISION OF THE TRIBUNAL ON STRIKE-OUT APPLICATION

The Issue

[1] Mr G Adams ("the appellant") has appealed against the 26 November 2013 decision of Complaints Assessment Committee 20009 to not inquire into his complaint against Peter Thompson, Dennis Law, Alexander Elton, and Maxwell House ("the licensees").

[2] The licensees have applied to have the appeal struck out or stayed indefinitely, as an abuse of process and that is the issue now before us. By consent we are to deal with that application on the papers.

Background

[3] The background to the complaint relates to the conduct of the licensees on the listing of two vacant sections at 244 Blockhouse Bay Road, New Windsor, Auckland.

[4] The appellant first complained about the conduct of the licensees in relation to that listing in 2012. On 25 October 2012, Complaints Assessment Committee 20006 determined that the licensees had engaged in unsatisfactory conduct; but the licensees appealed to us and we upheld their appeals in *Thompson, Law, Elton & House v REAA and Adams* [2013] NZREADT 65. That decision was issued on 1 August 2013 and covers a full review of the facts relevant to the original complaint.

[5] On 7 August 2013, a second complaint was made to the Real Estate Agents Authority by the appellant by Mr Adams. The six grounds of that complaint were set out by the Committee in its decision of 26 November 2013 as follows:

> *"1.3 The complainant says that the licensees:*
>
> *a) Failed to identify all the persons or entities with a legal interest in the property at the time of accepting their listing dated 26 April 2012 at the Mount Roskill Branch.*
>
> *b) While being fully known to them, they failed to abide to the terms of a REMAX Sale and Purchase agreement of their client and myself dated 9 December 2011, prior to marketing and advertising the two properties.*
>
> *c) Failed in their duty by only using the Council to verify street addresses for ownership or existence of thus failing to take sufficient steps.*
>
> *d) Illegally offered for sale two copyrighted sets of house design each containing 24 sheets of plans, a total of 48 plans.*
>
> *e) Illegally offered for sale two Building Consents for the properties advertised.*
>
> *f) Being misrepresentative in their advertising and marketing of the properties by offering the Building Consents and Design Plans contrary to right."*

[6] In relation to that second complaint, the Committee formed the view that the issues raised were substantively similar to those which had been raised in evidence and submissions before us on the appeal to us from the first complaint or, alternatively, were matters which could have been brought in the earlier proceeding but which were not pursued. Accordingly, under s.79(2) of the Act, the Committee determined not to inquire further into the complaint.

[7] In his notice of appeal to us and in his response to the licensees' application for strike-out, the appellant focuses on his contention that the licensees knowingly offered for sale *"my copyrighted plans for the then proposed subdivision"* [at 244 Blockhouse Bay Road].

The Stance of the Licensees

[8] As counsel for the licensees, Mr Rea submits that this second complaint from the appellant is an abuse of process and contrary to the doctrine of res judicata and the rule in *Henderson v Henderson* (1843) 3 Hare 100. He put it that his submission

to us in *Nightingale v REAA and Ors* [2012] NZREADT 55, at para [11], applies equally to the present case and we set out that paragraph:

> *"[11] Mr Rea referred to relevant legal principles as involving issues of abuse of process, the doctrine of res judicata, and the rule in Henderson v Henderson (1843) 3 Hare 100. He then put it:*
>
> > *"**Abuse of Process – Attempts to re-litigate matters already determined***
> > *6. Hunter v Chief Constable of the West Midlands Police [1982] AC 529 at 541, 3 All ER 727 (HL) at 733, per Lord Diplock, is generally regarding as the leading statement:*
> >
> > > *"The abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the Court by which it was made."*
> >
> > ***Res Judicata***
> > *7. The Court of Appeal addressed the issue of res judicata in Shiels v Blakeley [1986] 2 NZLR 262, Somers J, giving judgment for the Court, said at p.266, line 24:*
> >
> > > *"... that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits. See Spencer Bower and Turner, Res Judicata (2nd ed, 1969) para 9. The reasons for the existence of the rule are not in doubt. They were stated by Lord Blackburn in Lockyer v Ferryman (1877) 2 app Case 519,530: "The object of the rules of res judicata is always put upon two grounds – the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should not be vexed twice for the same cause."*
> >
> > ***The rule in Henderson v Henderson***
> > *8 There is long-established authority to the effect that the estoppel against raising in subsequent proceedings extends beyond matters that were expressly determined in earlier proceedings and includes matters that could have been brought in the earlier proceeding but which were not pursued.*
> >
> > *9 The most recent statement by the High Court regarding the rule in Henderson v Henderson is in Sim v Moncrieff Pastorial Ltd & Ors:*

> *"As established in Henderson v Henderson if a point ought properly to have been put before a Court which is the subject of litigation, a party may not subsequently at a later date re-open old wounds to raise a matter. To permit such a course would be contrary to the principle of finality in litigation."*

10 *The same principle is applied in the Australian Courts, referred to as "Anshun estoppel". A recent statement of the "Anshun principle" was set out by the Supreme Court of Victoria in Henderson v Henderson is in Sim Moncrieff Pastorial Ltd & Ors [2012] VSC 89, 30 March 2010, para 23:*

> *"An Anshun estoppel may arise where a matter sought to be raised by way of claim or defence in a later proceeding is so closely connected with the subject matter of an earlier proceeding that it was to be expected that it would have been relied upon in that earlier proceeding."*

[9] Mr Rea notes that although the appellant is seeking to appeal against the Committee's said decision of 26 November 2013, he is focusing only on the limited ground of complaint relating to alleged breach of copyright by Barfoot & Thompson Ltd in respect of the building plans which was an issue and the subject of express evidence and submissions by the appellant in our proceedings leading to our said decision *Thompson and Others v REAA and G Adams* dated 1 August 2013 [2013] NZREADT 65.

[10] Mr Rea relies upon s.105(1) of the Act, our said decision in *Nightingale v REAA and Ors* (supra) and the authorities cited therein, in seeking that we rule that it would be an abuse of process to allow the appellant's said current appeal to continue and that we strike out the appeal or order that it be stayed indefinitely. Section 105 of the Act reads:

> *"**105 Proceeding before Tribunal***
> *(1) The Tribunal may regulate its procedures as it thinks fit.*
> *(2) Subsection (1) is subject to the rules of natural justice and to this Act and any regulations made under this Act."*

The Stance of the Appellant

[11] Mr Adams, as appellant and respondent to the strike-out application now before us, referred to our said decision of 1 August 2013 and stated:

> *"6. During that case it was taken as read to the Tribunal that there would be a Breach of Copyright should Barfoot and Thompson be found to be selling the sections and not the residence.*
>
> *7. The Waimarama Trust, as the complainant, are not the legal holders of the copyright.*
>
> *8. The Waimarama Trust had no authority to pursue, but felt obligated to highlight, the Breach of Copyright, as neither the section sales nor the residence sale, had been determined by the READT Tribunal, led by Judge Barber.*

9. *Subsequently, on 1st August 2014 Judge Barber's determination found the Second Respondents of the current matter, when advertising 244A Blockhouse Bay Rd, in the previous matter were not selling 244A Blockhouse Bay Rd the residence, but instead selling the proposed section as 244A Blockhouse Bay Rd along with the other proposed section at 244B.* ***(Exhibit "A", paras 89 & 90, Part READT 008/13)***

Complaint Two, by CADability Limited (Copyright Holder)

10. *On 7 August 2013, in response to Judge Barber's Tribunal decision, READT 008/13, CADability Ltd as being the legal owner of the copyright, laid their own complaint with the Real Estate Agents Authority once it was known that two sections were being offered for sale and consequently Barfoot and Thompson are implicated in two Breaches of Copyright.*
(Exhibit "B", Emails to REAA Case Manager, page 3)

11. *On 15 August 2013, the complaint topic was clarified to the Case Manager, Tina Mead, who I had to prompt some 8 weeks later into replying.*
(Exhibit "B", Emails to REAA Case Manager, page 2)

12. *The case put to the CAC has never been disclosed to the complainant.*

13. *Complaint Two is being represented by CADability Ltd's Company Director, Mr Grant Adams.*

14. *It is now positively clarified that there are two separate complaints regarding the same Barfoot and Thompson personnel.*

15. *The two complaints are being pursued by the completely detached legal entities for differing outcomes.*

16. *Complaint Two could not be made until Complaint One was determined."*

[12] Mr Adams emphasises his submission that there have been two separate legal entities pursuing matters against the four licensees (the applicants/second respondents) at Barfoot & Thompson Ltd and that one is from Waimarama Trust *"concerning property matters"* and the other is from CADability Ltd *"concerning breach of copyright matters"*. He submits that the latter cannot be construed to be relitigation of the former complaint.

The Response for the Licensees

[13] Mr Rea notes the appellant's argument that two separate complaints were made by two separate legal entities so that (the appellant argues) the present appeal cannot be an abuse of process. As Mr Rea puts it, a trust is not a separate legal entity nor is it a legal entity at all. The issue is simply one of capacity in which the trustee (or trustees) holds certain property on behalf of beneficiaries. In any case, the complainant throughout this situation is Mr Adams who has routinely referred to himself as the complainant, vendor, owner of copyright, appellant and the like. Mr Rea then puts it:

"6 For example, the extracts from evidence and submissions of Mr Adams in the prior Tribunal proceedings that are annexed to counsel's memorandum of 16 December 2013 include the following references which blend the identities of parties concerned:

"The vendors, proposed copyrighted, architectural plans ..."

(The vendors were the registered proprietors, Mr Adams and Mr Rodriguez who appears to be a co-trustee)

"The building consent plans, the copyright, and the Resource Consent legally belonged to myself ..."

"Grant Adams did not assign any rights to Yan Yu to on sell the copyright plans ..."

"There is no clause allowing Barfoot & Thompson to offer for sale the copyrighted material of the Second Respondent"

The second respondent in that proceeding was Grant Adams).

7 There has never been any prior suggestion by Mr Adams that he lacked any authority or was not purporting to speak on behalf of all relevant entities at all times. It lacks credibility for Mr Adams to assert, as he has, in paragraph 8 of his memorandum, that as a trustee of the Waimarama Trust, he had "no authority" from CADability Limited to pursue a complaint relating to breach of copyright. Mr Adams is (and has been at all material times) the sole director and sole shareholder of CADability Limited."

[14] Inter alia, Mr Rea notes that the majority of the appellant's complaints have nothing to do with CADability Ltd, his company, but involved him either personally or as a trustee.

[15] In any case, we accept that the so-called legal entities are so closely related to Mr Adams as to make his current appeal an attempt at relitigation and an abuse of process. We agree with Mr Rea that (as Mr Rea put it) *"this is particularly clear in the context of a complaint under the Real Estate Agents Act where the complaint need not be made by the party directly affected by alleged conduct, and where Mr Adams did squarely raise issues of alleged copyright breach in submissions and evidence in the earlier proceedings."*

The Stance of the Real Estate Agents Authority

[16] Both in the context of the application for strike-out and on the substantive appeal, it is submitted for the Authority that the decision made by the Committee not to inquire was clearly open to it and that the appeal by Mr Adams should be dismissed.

[17] Section 79 of the Act allows Complaints Assessment Committees a wide discretion as to how to proceed when a complaint is received. It is well established that, on an appeal from the exercise of a discretion, an appellant must show that the original decision maker made an error of law or principle, took into account irrelevant considerations, failed to take into account relevant considerations or that the decision

was plainly wrong; e.g. *Kumandan v Real Estate Agents Authority* [2013] NZHC 1528 at [4], [5] and [7].

[18] Ms MacGibbon submits for the Authority that, in this case, the Committee did not err and its decision was open to it; and it was correct, and highly relevant to the Committee's decision, that the issues raised by the appellant were substantively similar to those raised in the previous complaint and appeal, or were matters which could have been raised in the earlier proceedings. She also submits that the Committee was entitled to conclude that finality was important and the appellant should not be allowed to re-litigate matters by way of a fresh complaint; and that decision was not plainly wrong.

[19] Ms MacGibbon notes that the appellant has submitted that the complainants in the two complaints are distinct legal entities. One complaint, he submits, was made by him as trustee of Waimarama Trust, the other in his capacity as sole director and shareholder of CADability Ltd. She puts it that the Authority broadly supports the submissions for the licensees on this point and submits that the capacity in which the appellant complained was not a relevant consideration which should have been taken into account by the Committee or could have affected its decision.

[20] Ms MacGibbon also puts it that the Authority broadly supports the submission for the licensees that the issue of the use of the plans, which is now the focus of the current appeal, was raised in the previous complaint and appeal, and that there was no error by the committee in assessing the second complaint in that regard.

Our Conclusions

[21] Our recollection is that Mr Adams raised issues of alleged copyright breach by the licensees in the proceedings leading to our said 1 August 2013 decision and these related to the issues (d), (e) and (f) set out in our para [5] above. The evidence did not seem to support Mr Adams.

[22] In any case, our decision of 1 August 2013 analysed the conduct of the licensees over the material events and times raised by Mr Adams so that he should have dealt with his allegations about copyright breach in that context to the extent he wished when he had the opportunity. He may well have remedies relating to those allegations in our civil Courts; but we are concerned with the conduct of real estate agents rather than with issues of civil law.

[23] Simply put, we recollect that the issue of the use of the plans was raised in the appellant's previous complaint and appeal which we dealt with in our decision of 1 August 2013 referred to above. The Committee of the Authority was correct to state in para 3.2 of its decision as follows:

> *"3.2 It is the Committee's view that all of the issues now raised by the complainant are the issues that were raised in his evidence and submissions before the Tribunal, or alternatively, were matters that could have been brought in the earlier proceeding but which were not pursued. We believe that there needs to be an end to this matter and that there is nothing to be gained by allowing an attempt to re-litigate matters. As a result, after full consideration of the evidence and the issues, the Committee has determined to take no further action under the complaint."*

[24] We endorse those views. We agree with the submissions for the licensees and for the Authority as we have covered them above.

[25] Accordingly, the application by the said licensees for strike-out of appeal 77/13 is hereby granted and that appeal is hereby struck out.

[26] We observe that if we had wide discretionary powers in awarding costs against a party (as is usual in our civil courts), which we are currently seeking from Parliament, we would probably have used that power to award costs against the appellant in this case. We think that it is unsatisfactory for a party to not have appealed our decision between the present parties of 1 August 2013 [2013] NZREADT 65, but to then decline to take *"no"* for an answer.

[27] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member