BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 75

READT 038/12

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (per CAC 10057)**
	Prosecutor
AND	**PROPERTY BANK REALTOR LTD**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms K Davenport QC - Deputy Chairperson
Mr J Gaukrodger - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 30 October 2015

REPRESENTATION

Mr L J Clancy, counsel for the Authority
Mr P Nottingham, for the defendant

RULING OF THE TRIBUNAL ON DEFENDANT'S RECUSAL APPLICATION

Introduction

[1] Property Bank Realtor Ltd faces a charge of misconduct under s 73(a) of the Real Estate Agents Act 2008. The charge relates to the allegedly disgraceful way in which the defendant company pursued a dispute with another licensee, Martin Honey.

[2] The defendant has submitted that this Tribunal should recuse itself from hearing the charge due to its involvement in a related proceeding, *Nottingham and Others v REAA and Honey* [2014] NZREADT 80 (our Tribunal proceedings), [2015] NZHC 1616 (High Court appeal), (the *Honey* appeal).

[3] The prosecuting Committee submits that the test for recusal is not made out and that we should proceed to hear the charge.

The Application for Recusal

[4] The defendant's application that this Tribunal recuse itself from hearing the above charge is dated 24 July 2015 and incorporates quite detailed argument with various case references. Mr Nottingham puts it that the record of the defendant before us is that:

> *"The parties involved have been the subject of three proceedings before the READT and have been successful in all three. The concern is all three involved false allegations of the most serious nature, none concerning real estate work and all not properly investigated by the CAC or REAA below. In all occasions the allegations were not sustainable and involve individuals involved in criminal conduct. Mr Wilson's principal Mr Mayer being convicted and sentenced to 6 years incarceration. It is the submission of the accused company and Messrs Nottingham and McKenney that "something stinks in the kingdom of Denmark and it's not the fish."*

[5] Mr Nottingham then sets out numerous grounds in support of the defendant's application for our recusal and extracts from those are as follows:

> *"[a] That the decision of Judge Barber and the Tribunal was successfully appealed to the High Court and both decisions subject to appeal were granted. ...*
>
> *[b] That Judge Barber issued a pejorative e-mail threatening to make criminal complaints against Messrs Nottingham and Property Bank Realtor Limited. ...*
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> *[c] That Judge Barber ignored relevant and cogent evidence of perjury, specifically the perjury of clearly hostile witnesses Mr Honey, Mrs Honey, Mr Taka, and Mr Spence. ...*
>
> *[d] Judge Barber inexplicably misreported the evidence of Mrs West, which misreporting was a crucial and somewhat inexplicable error given the central importance of the evidence, and that the evidence of Mrs West was confirmed in the evidence of Mr Honey, and both Mr Honey's and Mrs West's evidence was extensively referred to in written submissions that went to the core of the successful appeal. ...*
>
> *[e] That Judge Barber misreported by commission of omission to report the evidence of Pure Realty Limited's computer, reception, and administration staff that were witnesses that gave evidence against their interests, and which were clearly independent, credible, and honest, whilst Judge Barber found that Mr Honey had relied on those same staff to operate the website. ...*
>
> *That Judge Barber after commenting on his ability to recall witnesses to the Tribunal record on two occasions, refused to recall the witnesses who had committed perjury to defeat justice.*
>
> *Judge Barber made the following error of fact and law at paragraph [76] of his decision which materially provides:*

> *"[76] There was further evidence from such persons as Ms Lee-Ann Earlam, who was Mr Honey's personal assistant at Pure Realty Ltd from February to August 2009, and from Ms Colleen Muller who was receptionist for that company from February 2009 to mid 2011 but there is no need to detail that evidence. There was specialist IT evidence from Mr Cronje (referred to below), and evidence from Mr Hikaka."*

That Judge Barber refused to provide a transcript of the hearing before the Tribunal to obstruct and prejudice the making of submissions by the Appellants and the appeals in the High Court and the filing of affidavits making out further perjury by Mr Honey and Halse in their unsuccessful High Court review before Brewer J.

That Judge Barber failed to act to prevent an abuse of process by Luke Clancy in failing to supply the bundle to the Appellants and the Tribunal as noted on the Tribunal notes of evidence. That Judge Barber alleged in paragraph [40] of his decision Mr Clancy's submission that no one was misled. ...

That Judge Barber and … the registrar acted to redact parts of the transcript and recording of the Tribunal hearing the conversation above is a redaction from the transcript. ...

That Judge Barber instructed the sending of abusive and offensive e-mails to the Appellants with copies to other all other members of the Tribunal to intimidate the Appellants and sway and prejudice the lay Tribunal members to prejudice the Appellants from obtaining a fair hearing, current and future.

That Judge Barber acted to hear a proceeding prior to the hearing of an appeal to the High Court after issuing the offending e-mails. A proceeding based on the prejurious fraud by the Honey's and Mr Taka before the REAA, CAC and Tribunal.

That Judge Barber failed to sanction Luke Clancy for once again attempting to prejudice the Appellants. Mr Clancy failed to supply an evidential Bundle for the second time in accordance with a minute issued in December 2014, five months out of time. Mr Clancy attempted to proceed to a hearing. This is hackneyed childish and grossly prejudicial behaviour and not subject to excuse.

That Judge Barber failed to follow legal precedents specifically the law on proven lies and the law on the credibility of witnesses based on those proven lies. Such lies being the cached excuse and the allegations against Dermot Nottingham, subject to the conspiracy to falsely accuse.

...

Relief Sought

That Judge Barber and the lay members of the Tribunal recuse and an independent judicial officer be appointed to adjudicate the matter in accordance with the inquisitorial jurisdiction of the CAC and READT, that officer not having been subject to the prejudicial threats and commentary of his honour Judge Barber."

Relevant Legal Principles

[6] The legal principles applying to the question of whether a judicial officer should disqualify him or herself are set out in both the Guidelines of Judicial Conduct (prepared by the Chief Justice's office) and the decision of the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72.

[7] While both the decision and the guidelines are directed towards the conduct of Judges, for the purposes of this decision and application, the Tribunal accepts that the guidelines apply to individual Tribunal members, potentially to the whole Tribunal, not to just each individual member. We discuss later whether this would require the applicants to prove that each individual member of the Tribunal had been/was biased.

[8] The case law in *Saxmere* confirms that the test for disqualification is *"whether a fair minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide"*.

[9] The Supreme Court indicated that the test should be applied in two stages:

[a] Rigorous identification of what it is said might lead a judicial officer to decide a case other than on its own factual and legal merits; and

[b] Articulation of a logical connection between this and a feared deviation from the course by deciding the cases on its merits.

[10] The test is said by the Supreme Court to be an objective one assessed from the perspective of a fair-minded lay observer. The Supreme Court has said that this person is deemed to have the following attributes:

[a] They are presumed to be intelligent and to view matters objectively;

[b] They are neither unduly sensitive nor complacent about what may influence a judicial officer's decision;

[c] They are a non-lawyer, but are reasonably informed about the workings of the judicial system;

[d] They are informed about issues and facts in the case alleged to give rise to an appearance or apprehension of bias;

[e] They understand that judicial officers are expected to be independent in decision making and have taken an oath to that effect;

[f] They understand that judicial officers are obliged to sit on case before them unless grounds for disqualification exist;

[g] They understand that our legal system is adversarial in nature, and issues are decided between litigants irrespective of the merits or demerits of their counsel;

[h] They understood the relationships that conventionally exist between judicial officers and members of the legal profession.

[11] The test poses a high threshold for disqualification. It is clear that there must be a real, and not a remote possibility of any bias.

Discussion

[12] The applicant's reasons for alleging bias/predetermination and seeking a recusal are set out above. The *High Court in Nottingham & Ors v Real Estate Agents Authority* [2015] NZHC 16/16 dismissed the applicants' appeal on the issue of whether the Tribunal had been biased in that case. Justice Thomas held: *"I am satisfied having considered the transcript and listened to extensive portions of the audio recording that there was no bias or predetermination."*

[13] The facts and issues alleged by the applicants to support the current application have not changed from those made in that appeal, except insofar as the complaints now refer to the conduct of Judge Barber related to an email dated 16 October 2014 (set out below) and the claim that there have been three previous successful applications to the Tribunal. We are not aware of what is meant by that reference to three successful appeals to us.

[14] Given the decision of Justice Thomas and the fact that all of the allegations of bias/error outlined in the application for recusal were raised in the said High Court appeal, the only question against which the Tribunal might apply the *Saxmere* test is that relating to the email which reads:

> *Dear Messrs Nottingham,*
>
> *I confirm receipt of your email of 14 October 2014. This has been referred His Honour Judge Barber and the jurisdiction manager. His Honour's response as to the process from this point is below.*
>
> 1. *We will follow our usual procedures regarding the security of all files, documents, recording, etc.*
>
> 2. *Hearings are not transcribed as a matter of course. As such, there is not currently a transcript of the hearing. Hearing are transcribed if permitted by the member who chaired the hearing; the request for a copy of a transcript is declined. A transcript would be provided if directed by the High Court. The request for a copy of the recording is also declined.*
>
> 3. *A copy of your email will be sent to all Tribunal members.*
>
> 4. *I shall proceed with fixtures on Messrs Nottingham's other cases forthwith.*
>
> 5. *This email shall be referred to Crown Law for advice e.g. should the Police be consulted, is there defamation?*
>
> 6. *On this case I am functus officio.*
>
> *FW: READT 020/12 & 049/12 – Nottingham & Property Bank Realtor Ltd v CAC & ... page 5 of 8*
>
> *You are aware of your right to appeal to the High Court. We will not enter into further debate or conversation on these cases. Your other options in addition to appeal,*

should you remain unhappy, are Judicial Review or complaint about the Judge to the Minister who recommended his appointment, the Minister of Justice."

[15] That email existed long before the hearing before Thomas J on 11 and 12 June 2015 and does not suggest any bias on the part of Judge Barber or the Tribunal.

[16] The fact that the members have dealt with the cases involving the applicants before cannot in itself be any reason for bias or predetermination or grounds for recusal. Indeed, the High Court noted in its decision that Judge Barber had done his best to be fair to all parties (see paragraph [155] of that judgment). We therefore dismiss this aspect of the application.

[17] To this must also be added that there are six members of the Tribunal and any three of the six members may be chosen to hear the charge brought by the Real Estate Agents Authority.

[18] In the absence of evidence, the Tribunal cannot be said to have a collective biased view such to require the entire six members of the Tribunal to disqualify themselves (in circumstances where it would be impossible therefore for the Tribunal to discharge its statutory obligations). While we have accepted that the legal principles of bias can apply to the Tribunal as a whole, we consider that the appellants would need to demonstrate that each individual member of the Tribunal was also biased or had predetermined the matter, such as to require them to recuse themselves. Given that the High Court dismissed any claims of bias against the Tribunal which sat on the appeal relating to Mr Honey and that the only fresh material is the evidence relating to the email (which we have rejected), it is impossible for the Tribunal to determine that each and every possible member of the Tribunal could be said to be biased (as there are no allegations against any other member except Judge Barber).

Outcome

[19] We consider that there is no logical connection between the defendant's expressed concerns as to bias and any likely deviation from us determining the present charge on its merits; and that no reasonable, intelligent, informed observer could conclude to the contrary.

[20] Accordingly, we decline the application for recusal and direct the Registrar to facilitate a fixture date for our hearing the charge as soon as reasonably possible. It seems that the following simple timetable is appropriate:

[a] A one day hearing to be allocated in Auckland in the New Year 2016, and we leave it to the Registrar to arrange an appropriate date by liaising with the parties and the members of the Tribunal;

[b] The defendant is to file briefs of evidence and a defence bundle of documents (if it wishes to file a separate bundle) at least four weeks prior to the hearing;

[c] The defendant to file its submissions at least two weeks prior to the hearing.

[21] 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

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Ms K Davenport QC
Deputy Chairperson

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Mr J Gaukrodger
Member