BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 78

READT 020/12 and 049/12

IN THE MATTER OF	appeals under s 111 of the Real Estate Agents Act 2008
BETWEEN	**DERMOT G NOTTINGHAM AND OTHERS**
	Applicants/Appellants
AND	**REAL ESTATE AGENTS AUTHORITY**
	First respondent
AND	**MARTIN HONEY**
	Second respondent/Licensee

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 RULING 9 November 2015

REPRESENTATION

The appellants/applicants on their own behalves
Mr M J Hodge, counsel for the Authority
Mr D Grove, counsel for the second respondent licensee

RULING OF THE TRIBUNAL ON APPELLANTS' RECUSAL APPLICATIONS

Background

[1] These appeals are to be reconvened for hearing at Auckland 10.30 am, 23 December 2015.

[2] An application from the appellants dated 13 October 2015 seeks that the Tribunal recuse itself from proceeding further. Actually, that application is entituled as an application for the recusal of *"Chairman Paul Barber"*.

[3] The grounds relied on are allegations that our Chairperson did not hold a current judicial warrant as a District Court Judge as of March 2012; that he has not held a practising certificate as a barrister or solicitor at material times; that he has lied and misconducted himself by calling himself a Judge; that he engaged in an

"interview" with a reporter in a state of inebriation and threatened that reporter and has previously threatened Mr Dermot Nottingham in a proceeding before this Tribunal; so that (it is pleaded) the appellants do not believe that our Chairperson would act fairly and in an unbiased manner and they have concerns as to the validity of any decision we might reach.

[4] By a further application received by this Registry on 19 October 2015 Mr Earle McKinney, one of the applicants and as an authorised person for all applicants, covered the above matters more elaborately.

[5] We observe that Mr Grove makes no submissions for Mr Honey with regard to the recusal applications presently before us. He simply expresses the wish of Mr Honey to proceed with the reconvening of this substantive case as arranged for 23 December 2015.

Submissions for the Authority

[6] Mr Hodge has very helpfully filed thoughtful submissions in response to the applications for recusal referred to above. We agree with his views on general principles applying to recusal of a judicial officer and, accordingly, quote them as follows:

> *"**2. Recusal – general principles***
>
> *2.1 Guidance on when judicial officers should disqualify themselves from proceedings is set out in:*
>
> *(a) the Guidelines for Judicial Conduct, prepared by the Chief Justices' Office;*
>
> *(b) the decision of the Supreme Court in Saxmere Co Ltd v Wool Board Disestablishment Co Ltd [2009] NZSC 72.*
>
> *2.2 While the guidance is directed towards Judges, the Committee submits that the principles espoused are applicable to all judicial officers carrying out a judicial or quasi-judicial function and particularly to members of the Tribunal, who have sworn an oath before a judge of the High Court that they will carry out their duties faithfully and impartially.*
>
> *2.3 In outline, judicial officers must be independent and impartial in their decision making. This is a fundamental prerequisite to public confidence in courts and statutory tribunals.*
>
> *2.4 Independence or impartiality may be compromised, in actuality or appearance, by a conflict of interests, judicial behaviour, or associations and activities off the bench. If compromised, then a judicial officer will be disqualified from hearing the case.*
>
> *2.5 The Supreme Court in Saxmere has confirmed that the test for disqualification in New Zealand 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. [At para [3] citing Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337].

2.6 Adopting the Australian approach, the Supreme Court indicated that the test proceeds in two stages:

(a) rigorous identification of what it is said might lead a judicial officer to decide a case other than on its legal and factual merits; and

(b) articulation of a logical connection between this and the feared deviation from the course of deciding the case on its merits.

2.7 Only if there is a real, rather than a remote possibility of bias, will the judicial officer be disqualified.

2.8 The test is an objective one, assessed from the perspective of a fair-minded lay observer. The use of the fair-minded lay observer is to ensure that the test covers apparent, as well as actual bias. The Supreme Court, after reviewing New Zealand and Australian authorities, has ascribed the following attributes to this observer:

(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 cases 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 understand the relationship that conventionally exist between judicial officers and members of the legal profession.

2.9 The test sets a high threshold for disqualification. It is not sufficient to simply allege that the judicial officer has an interest in the case. The applicant must show a logical connection between that interest and a departure from impartial decision making and there must be a real, and not a remote possibility, of that departure.

2.10 Where the test is satisfied, this is typically because of a strong relationship between the judicial officer and someone involved in the case, or a strong financial interest in the outcome. While judicial conduct in earlier proceedings could satisfy the test, the conduct would have to be

outrageous for the fair-minded lay observer to conclude a real possibility of bias exists.

2.11 Since the fair-minded lay observer understands the judicial role, they understand that a judicial officer is able to put past proceedings to one side and approach new proceedings with a fresh mind."

Discussion

[7] We agree with Mr Hodge that the allegations made against our Chairperson do not relate to the conduct of these proceedings in any material way and could not be grounds for recusal of the Tribunal or Chairperson. There is simply no connection between the allegations and the apparent fear held by the appellants that we shall deviate from deciding these appeals on their merits.

[8] Mr Hodge also covered an issue in *Dermot Nottingham and Others v REAA and M Honey* [2015] NZHC 1616 where Justice Thomas considered allegations of bias made against this Tribunal and, particularly, against Judge Barber, and rejected them. Mr Hodge then continued that nothing material has occurred since the High Court judgment which could give rise to further allegations of bias. Mr Hodge noted all that has occurred since that time is the Directions Conference on 7 October 2015 as a result of which the Tribunal made directions for reconvening these appeals in accordance with paragraph [18] of the High Court's (per Thomas J) subsequent decision dated 21 August 2015. That decision was given by the High Court in the full knowledge of the procedure that had been followed by the Tribunal in these appeals.

[9] Mr Hodge then put it that the appellants cannot rely on the fact they have made allegations against our Chairperson as providing grounds for a reasonable apprehension of bias. Were the position otherwise, litigants would be free to effectively engage in "judge-shopping" by making allegations about judges or tribunal members they are unhappy with, and then simply asserting an apprehension of bias based on the fact of the allegations having been made.

[10] Mr Hodge observed that while it is not engaged on the facts here, the doctrine of necessity applies to recusal applications. He noted that the appellants are seeking the recusal of the entire Tribunal and opined that even if allegations of bias against the entire Tribunal were made out, it would still be necessary for the Tribunal to hear proceedings that are before it.

[11] Finally, Mr Hodge submits that none of the matters which the appellants seek to have the Tribunal rule upon in their recusal applications are matters that are properly addressed in these proceedings so that the appeals should proceed in accordance with our existing directions.

Outcome

[12] We consider that the tone of the material filed by the applicant appellants is contemptuous and would seem to be vexatious and made for the purposes of delay. The simple answer to assertions made for the appellants is that there can be no doubt that Judge Barber holds a valid warrant as Chairperson of this Tribunal and has done so at all material times. There is also no doubt that the Chairperson is entitled, as an honorific by legal convention, to refer to himself as *"Judge Barber"* now and at all material times and is expected so to do. In any case, we are satisfied

that, since his District Court warrant expired in about mid March 2012 the Chairperson has never maintained that he is a *"District Court Judge"*. He has merely referred to himself as *"Judge"* in terms of legal convention.

[13] We also understand that the Chairperson has never engaged in formal *"interview"* with an investigative journalist regarding any of the above matters but simply has answered a telephone call of that reporter and responded to a number of questions put to him by the reporter. We know that, due to illness, our Chairperson currently has a speech impediment which, over a telephone, might give the impression that he was inebriated.

[14] The applicants are all aware of our 30 October 2015 Ruling in *CAC v Property Bank Realtor Ltd* [2015] NZREADT 75 declining that this Tribunal recuse itself on grounds which overlap to some extent with the above. We confirm and adopt our reasoning in that Ruling and, particularly, the views we express there under the heading *"Relevant Legal Principles"*.

[15] We consider that we have responded adequately to the assertions made by or for the appellants. We agree with the submissions from Mr Hodge on behalf of the Authority. Accordingly, the current applications for recusal are hereby dismissed. The timetable to reconvening the substantive hearing at 10.30 am on Wednesday, 23 December 2015 at Auckland continues and that fixture is confirmed.

[16] 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