

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 11

READT 008/15

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

BETWEEN **JOHN REVANS EICHELBAUM** of Auckland, Barrister

Appellant

AND **REAL ESTATE AGENTS AUTHORITY (per CAC 303)**

First respondent

AND **ROSALYN CLAIRE WHITE** of Rahuikiri Road, Pakiri Beach, Auckland, Real Estate Agent

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at AUCKLAND 2 November 2015 and on 26 and 27 January 2016

DATE OF THIS FURTHER RULING 11 February 2016

COUNSEL

The appellant on his own behalf
Mr M J Hodge, for the Authority
Mr J Katz QC, for the licensee

**RULING ON ADMISSIBILITY OF EVIDENCE FROM THE LATE
MS J. D. ALEXANDER**

The Application

[1] Over 26 and 27 January 2016 many admissibility issues were raised by counsel and most have been resolved after discussion. Further, Mr Eichelbaum, as appellant, applies to adduce certain evidence given by the late Ms Julie Donna

Alexander in District Court proceedings which the appellant or his company (Revan Holdings Ltd) brought, apparently, against the licensee as defendant. We understand that case has since been withdrawn by Mr Eichelbaum or his company. Sadly, Ms Alexander passed away on 29 November 2015. We have been provided with part of the District Court record covering Ms Alexander's evidence, mainly detailed cross examination, in that case given on 20 November 2013.

[2] Presumably, the appellant wishes to have those notes of the late Ms Alexander's evidence as supplementary to her statement of evidence dated 19 March 2012 which is now before us as part of the evidence considered by the Complaints Assessment Committee in its decision which has been appealed to us.

[3] In seeking to have that evidence admitted, Mr Eichelbaum observes that counsel for the licensee puts it that the issues in that District Court case were not the same as that or those now before us. There can be no doubt about that as the issues before the District Court must have been along the lines whether the licensee was liable in any way to Mr Eichelbaum or his company for financial loss flowing from alleged misrepresentation when the appellant's company purchased the second respondent's Auckland residence, whereas we are only concerned with the conduct of the licensee in that context in terms of legal standards required by the Act and its regulations.

The Stance of Mr Eichelbaum

[4] Mr Eichelbaum submits that the issues before the District Court were identical with those now before us and puts it:

"21. The evidence touches upon both relevant issues of whether Ms White was acting as an agent and whether she knew the defects. Such evidence will routinely be admitted in these circumstances, and was in the case of CAC v Brankin [2011] NZREADT 33 where a Mr Baird's evidence was in issue. Because her evidence was tested in open Court before O'Driscoll DJ it passes the test of reliability. It is plainly relevant and hence meets the s 7 Evidence Act test of relevance.

22. *As observed in A2 (supra):*

"However, Mr Lynch submitted that it is allowance hearsay evidence in view of Dr McLachlan's untimely death in July 2003. He referred me to section 7 of the Evidence Amendment Act 1980 (No 2) which states:

In any civil proceedings where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact if the maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence.

I accept that, in the circumstances, Mr Clarke's evidence is admissible."

[5] Section 7 of the Evidence Act 2006 is set out below.

The Submissions for the Licensee

[6] In response, Mr Katz QC confirms that the said 29 March 2012 brief from the late Ms Alexander was before the CAC and, he puts it, was also given in more detail in the said District Court proceeding. He adds: *“It therefore related to, if anything, issues in that proceeding, not issues before the CAC or this Tribunal”*. That does not necessarily follow but is fair comment in this context.

[7] Mr Katz QC continued that as Ms Alexander, very sadly, died last year, she cannot be called as a witness and obviously cannot be cross-examined. He then put it: *“the cross examination in the District Court when her evidence was given for the purposes of that proceeding was limited to the issues in that forum and did not touch upon issues such as disclosure or non-disclosure of alleged defects and any misrepresentations in a disciplinary context”*.

[8] Mr Katz noted that we held at paragraph [53] of our 19 January 2016 Ruling herein that we are not concerned with the liability of the licensee (or any civil remedies), but with *“her conduct as a licensee at material times”*. He submits that the District Court evidence of the late Ms Alexander, which Mr Eichelbaum now seeks to adduce to us, was not addressed to those conduct issues and nor, therefore, was the cross-examination of her in the District Court.

[9] Accordingly, Mr Katz QC submits that to now admit that District Court evidence of the late Ms Alexander into this appeal would be clearly prejudicial and would be in breach of s 8 of the Evidence Act which reads:

“8 General exclusion

- (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.*
- (2) *In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.”*

General

[10] In brief and final oral submissions on this admissibility issue, Mr Eichelbaum simply summed up. Mr Katz QC simply emphasised that the evidence of the late Ms Alexander to the District Court related to a separate issue irrelevant to the conduct of the licensee issue before us. He noted that Mr Eichelbaum had referred to those issues being identical and to Mr Eichelbaum adding that the quite lengthy cross-examination of the late Ms Alexander in the District Court was helpful (in Mr Eichelbaum’s view) as to the business status of the licensee second respondent on the issue whether the licensee was acting as a licensee or in a private capacity when she dealt with the appellant and the late Ms Alexander, even extending to the detail

of whether the licensee used a business card as a real estate agent at material times.

Our Views

[11] It seems to us that to rule on the appellant's current application simply involves application of ss 7 and 8 of the Evidence Act 2006 together with common sense. Section 8 is set out above and s 7 reads:

"7 Fundamental principle that relevant evidence admissible

- (1) *All relevant evidence is admissible in a proceeding except evidence that is—*
 - (a) *inadmissible under this Act or any other Act; or*
 - (b) *excluded under this Act or any other Act.*
- (2) *Evidence that is not relevant is not admissible in a proceeding.*
- (3) *Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding."*

[12] In terms of s 7 we regard the evidence before the District Court as relevant to the present proceedings only in the prima facie aspect that it relates to some factors of interest to us but does not seem to meet the criterion of s 7(3) set out above. This is because it does not seem to us to have a tendency to prove or disprove anything of concern to us.

[13] In terms of s 8, we must exclude evidence if its probative value is outweighed by the risk that the evidence will either have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. Despite Mr Katz QC's submission to the contrary, we very much doubt it would have an unfairly prejudicial effect on the proceeding but feel it would needlessly prolong the hearing before us.

[14] We are influenced by the fact that the said 29 March 2012 brief of evidence from the late Ms Alexander admitted is robust and, we would have thought, helpful to the appellant. On the other hand the notes of evidence from the District Court, which involve detailed cross examination of the late Ms Alexander on behalf of the licensee as a defendant in a civil claim, do not seem to add anything useful to her existing statement of evidence already filed in these proceedings.

[15] Also, that District Court evidence was, obviously, adduced in a different forum and context where, presumably, the issue was financial liability of the licensee for alleged misrepresentation or the like as distinct from our concern to ascertain the nature of that licensee's professional conduct in terms of required legal standards.

[16] We have frequently stated over the years that, while we have quite liberal powers to admit evidence, we prefer to abide by the rules of evidence for the very reason that they have been formulated over the decades.

[17] Accordingly, we dismiss the appellant's application to adduce the said District Court notes of evidence of the late Ms Alexander as mentioned above. We respectfully observe to Mr Eichelbaum that the District Court evidence seems no more helpful to any issue he may deal with than the 29 March 2012 statement from the late Ms Alexander.

Judge P F Barber
Chairperson

Mr G Denley
Member

Ms N Dangen
Member