BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 30

READT 008/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN EICHELBAUM** of Auckland, Barrister
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 303)**
	First respondent
AND	**ROSALYN 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 on 2 November 2015 and on 26 and 27 January 2016

DATE OF THIS FURTHER RULING 18 April 2016

COUNSEL

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

FIFTH PROCEDURAL PRE-HEARING RULING

Background

[1] In our first procedural ruling herein dated 16 September 2015, our first two paragraphs read:

> *"[1] It seems that some time in 2014 the appellant complained to the Authority that the licensee failed to disclose known defects at 41 St Georges Bay Road, Parnell, Auckland, when the appellant purchased that property in March 2010. It is also alleged that the licensee falsely advertised the age of the property and failed to disclose the property's lack of compliance with Council requirements.*

> *[2] That led to a 16 January 2015 written decision from a Complaints Assessment Committee giving reasons why it declined to take further action on the complaint.*

[2] Somehow, prehearing procedures have got out of hand in these proceedings. The reason for that seems to be a focus by the parties on the issue of ultimate liability (if any) of the second respondent vendor/ licensee for damages of some type, presumably and allegedly, based on misrepresentation, breach of contract, or some other commercial law ground.

[3] Our jurisdiction is to focus on hearing appeals or charges based on complaints of alleged disciplinary breaches by licensees. If that amounts to *"misconduct"*, as distinct from a lower level of offending termed *"unsatisfactory conduct"*, we have quite wide compensatory powers. Otherwise, *Quin v The Real Estate Agents Authority* [2012] NZHC 3557, per Brewer J, abrogates our compensatory jurisdiction. In any case, compensatory aspects relate to penalty issues which do not arise until a breach of discipline has been found or confirmed.

[4] Accordingly, to make progress in this case, we are concerned to hear relevant and admissible evidence about alleged breach of discipline issues. With a view to progressing any such relevant issues, we need to cut through the large amount of submissions and memoranda filed to date on prehearing procedural matters.

[5] As we have already previously ruled, we regard a particular feature of this case as that the parties did not have the opportunity of properly presenting their respective cases to the Committee, which is why we consider that before us they should not be confined to the record before the Committee.

[6] We acknowledge that the appellant has filed a series of amended applications for recall of our rulings herein dated 19 January 2016 and 11 February 2016 and for other orders, and that our 19 January 2016 ruling be replaced with orders for a de novo hearing; and that the appellant be granted leave to call further evidence; and orders relating to disclosure of particular documents.

[7] We are also conscious that, for serious health reasons, Judge Barber has resigned as chairperson of this Tribunal as at 29 April 2016; although s 88A of the Judicature Act 1908 may come into play. Accordingly, a new chairperson will very soon be involved in this case. We now comment on some of the submissions put to us over the past two months.

Legal Principles

[8] In *Horowhenua County v Nash (No. 2)* [1968] NZLR 632, 633, the then Supreme Court, set out the three categories in which a judgment may be recalled:

[a] if there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance;

[b] if counsel have failed to alert the Court to a relevant legislative provision or decision; or

[c] if *"for some very special reason justice requires that the judgment be recalled"*.

[9] In *Svitzer Salvage BV v Z Energy Limited & Anor* [2013] NZHC 354, Goddard J held as follows:

> *"[16] Against that context, I refer to the leading statement of Wild CJ in Horowhenua County v Nash (No 2 on recall):*
>
> > *Generally speaking, a judgment once delivered must stand for better or worse subject, or [sic] course to appeal. Were it otherwise there would be great inconvenience and uncertainty.*
>
> *[17] I recalled this judgment on the basis of a plain mistake as to remedy. Striking-out the first cause of action will rectify that mistake. It will be consistent with the findings I made in the judgment, which are that there are no pleaded facts which support the first cause of action. It is not open to reverse those findings in the context of a recall application and nor do I resile from them. As the Court stated in Falcon v Commissioner of Inland Revenue:*
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> > *… it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extend to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting arguments previously given, and re-presenting them in a new form. It does not extent to putting forward further arguments, that could have been raised at the earlier hearing but were not."*

[10] The appellant relies on ground two referred to in *Horowhenua County*, and the second limb of it, namely a failure (by him) to direct our attention to an authoritative decision of plain relevance. In fact, the appellant points to at least seven further cases that he says should have been put before us. We do not consider those cases as affecting our views.

[11] We take the view that there is no inconsistency between our said rulings so far in this case and the principles contained in the cases cited by the appellant.

[12] With regard to other current preliminary issues, we set out below some of the submissions helpfully put to us by counsel for the Authority as follows and with which we agree:

> *"**3. Applications to Admit Fresh Evidence***
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> *3.1 Beyond noting the following general principles, the Authority remains neutral on the question of the admission of fresh evidence.*
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> *[a] The standard test for admission of further evidence is that it must be cogent and material and must not have been reasonably available at first instance – Telecom Corp of NZ Ltd v CC [1991] 2 NZLR 557;*
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> *[b] In Comalco New Zealand Ltd v TVNZ Ltd [1997] NZAR 97 at [25] Gallen J held:*
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> > *"It is also important the evidence should not have been available at the earlier hearing by the exercise of reasonable*

diligence. I accept also, however, that the test should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances."

[c] In Complaints Assessment Committee No 1 of the Auckland District Law Society v P [2007] 18 PRNZ 760 at [21] Duffy J noted that:

"There is always room for the special case where fresh evidence is admitted, even though it was reasonably available for the hearing at first instance. The discretionary power … is broad enough to permit a Court to allow such evidence to be adduced. Furthermore discretionary authority should never be fettered by fixed guidelines. But such exceptions should be rare …"

3.2 However, the Authority is concerned that, whatever evidence is ultimately admitted, the appeal and the hearing of the appeal should be tightly focused on the key issue in this case which reflects the fact that these are disciplinary proceedings which are intended to be dealt with expeditiously and in a relatively informal manner.

3.3 Proceedings before the Tribunal, including appeals, are not ordinary civil proceedings. The Tribunal is the proper forum for proceedings on the issue of whether the licensee has committed a disciplinary breach under ss 72 of the Act. It is not the proper forum for proceedings on the issue of civil liability of the licensee for the loss the appellant alleges he has suffered.

3.4 As a consequence the key issue in this case is what, if anything, the second respondent knew about any defects with the property. The evidence should be limited to that which is relevant to that issue. Certainly any viva voce evidence permitted should be limited to any disputed evidence about what, if anything, the licensee knew about the defects.

3.5 It follows from this that a limited number of witnesses only should need to give viva voce evidence, and on limited matters only, such that the hearing time should not need to exceed two days. It is further submitted that it is important that the hearing is tightly focused so that it does not take longer than that.

3.6 This is because the Tribunal is intended to provide a flexible, efficient and low cost method of determining appeals from Committee decisions. For this reason, the Tribunal is able to regulate its own procedure and is not bound by traditional rules of evidence, ss 105(1) and 109. No fees are charged for bringing an appeal.

…

4. *Interlocutory Applications*

4.1 This appeal has involved a high number of interlocutory applications. It is submitted that the approach being taken in this regard is not consistent

with the principles referred to above. Tribunal proceedings involve a relatively informal process focusing on the core issue of licensee conduct and by which appeals are able to be dealt with efficiently and expeditiously.

4.2 While in this case the appellant is an experienced barrister and the licensee is represented by senior counsel, Tribunal proceedings often involve unrepresented litigants (complainants and licensees) who will typically not be well placed to deal with a complex process involving a large number of interlocutory applications. Litigation of this kind in the Tribunal will reduce its accessibility.

4.4 It is submitted that the time has come to bring an end to the interlocutory skirmishing in this case. It is submitted that the Tribunal should make an order that no more interlocutory applications may be filed other than by leave, and that the matter should be progressed to a hearing, which should be of no more than two days duration if the evidence focuses on the core issue of the licensee's knowledge."

Discussion

[13] Since our ruling of 19 January 2016 the hearing before us has been resumed on 26 and 27 January 2016 and, inter alia, that led to considerable upgrading of the main briefs for witnesses when the appellant seeks to call. Since then there has been a flow of submissions from parties which have not clarified matters.

[14] At the resumed hearing over 26 and 27 January 2016, we endeavoured to assist the parties knock evidence into shape in terms of admissibility with the focus on briefs for the appellant. Frankly, in terms of subsequent submissions, at this point we have concluded that it is quicker, simpler, and fairer to admit the evidence briefs for each party as they now stand by relying on our wide powers of admission of evidence; but also using our experience as to what, if any, weight we attach to that evidence. Also, as covered above, the parties have been unable in their extensive memoranda and submissions to confine themselves to the alleged disciplinary issues and we shall do that.

[15] We have now concluded that the situation of the complaint needs to be fully heard without further ado. We are conscious that Judge Barber is no longer available to endeavour to progress this case. Accordingly, we direct the Registrar to make a fixture to hear the matter for each party as briefs now stand but on the basis that any further admissibility issues will be considered as evidence is given; also this Tribunal may then feel that it need not exclude evidence due to its wide powers of admissibility and may simply not give much weight to some evidence.

[16] We realise that we are repeating a number of the points we have made in our various prior rulings in this litigation. Inter alia, we have covered that the CAC contemplated that viva voce evidence would be given in related District Court civil proceedings then extant, but the appellant has since discontinued those proceedings.

[17] It is normal in proceedings before us for there to be an agreed bundle of documents. To the extent that there is no agreement over that, documents will need to be adduced in the usual way by the appropriate witness. At this stage, we see no need for particular discovery orders relating to documents.

[18] A strong submission from Mr Katz QC, for the licensee, is that the appellant has provided no basis at all for his submission that he could not call the evidence concerned at the September 2014 hearing because he did not know that the hearing was going to take place. However, there is Mr Eichelbaum's evidence to that effect and we accept him as an honest person.

[19] We accept that neither party was given notice of the hearing which was to take place before the Committee on 14 September 2014. We have covered that in our previous rulings herein. It follows neither party could call evidence at that September 2014 hearing because they did not know that the hearing was going to take place. Nor did either party know when further evidence or submissions needed to be put to the Committee. That is an obvious denial of natural justice.

[20] Inter alia, Mr Katz points out that the evidence of Mark Stone, as one of the appellant's witnesses, was before the Committee. Mr Katz puts it that the fresh or new evidence must be such that it could not have been obtained with reasonable diligence for use at a trial and must be such that, if given, would probably have an important influence on the result of the case. Mr Katz submits that the evidence (for the appellant) of Mr Stone could have been previously obtained with due diligence. He also puts it that the evidence of Shane Harvey was before the Committee so it cannot be fresh or new evidence. He puts it that the evidence of Messrs Stone and Julian was freely available for the Committee but the appellant failed to put it before the Committee. Nevertheless, we take the view that if the contemplated evidence is relevant we wish to hear it in full.

[21] Mr Katz emphasises that because we do not know when certain photographs which Mr Eichelbaum seeks to admit were taken, it is difficult to decide whether they could be relevant to any issue. Also Mr Katz points out that it seems the photos have been taken late 2015 or early 2016 which is six years after the appellant purchased the property. However, those photos are at least helpful background.

[22] We are conscious that we have wide powers to admit evidence. We have often said that, nevertheless, we observe the rules of evidence for the very reason they exist and have been formulated over the years. However, when appropriate, we are likely to let evidence be adduced under our wide powers of admissibility but attach very little weight to it. We have covered that in our prior rulings herein and above.

[23] In terms of the appellant's application for recall, Mr Katz QC submits that the appellant should have exercised his right of appeal or endeavoured to initiate review proceedings. We agree. We also agree with Mr Katz QC that recall is not to be used to enable a litigant improve upon the judgment obtained. Nor is it to be used in lieu of an appeal.

[24] Expert evidence needs to comply with the Code of Conduct.

Outcome

[25] We do not contemplate accepting any further applications regarding these proceedings until the hearing resumes. All applications for recall are hereby dismissed.

[26] Because, as we have stressed above, the parties were unaware of the Committee hearing date in this case, we shall generally allow witnesses to give evidence in terms of their upgraded briefs as each party now seeks.

[27] The Registrar is to forthwith allocate a three day fixture as the new Chairperson considers appropriate, probably in late June this year.

[28] The hearing will proceed on the basis of the revised witness briefs from each party subject to any rulings from us made as evidence progresses, but such evidence must be related only to the alleged conduct of the licensee in issue with regard to ss 72 and 73 of the Act, i.e. the witnesses' evidence must be confined to the alleged breach of disciplinary legislation so that as each witness gives evidence based on current briefs we may from time to time exclude evidence which we consider lacks sufficient nexus with the conduct allegations involving the licensee.

[29] 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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Mr G Denley
Member

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Ms N Dangen
Member