

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 31

READT 083/15

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

BETWEEN **JI LI & JING GAO**

Appellants

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 408)**

First respondent

AND **PAMELA RILEY and ANTHONY LOUGHRAN**

Second respondents

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS RULING 4 May 2016

COUNSEL

Messrs W Akel & K Teague for the appellant
Ms C Paterson & Mr J Simpson for the Authority
Mr T Rea for the second respondents

RULING OF TRIBUNAL ON DISCOVERY

Introduction

[1] The appellants, Ji Li and Jing Gao, purchased 23A Norman Road, Hauraki, Auckland on 7 March 2015. The second respondents, Ms Riley and Mr Loughran were, respectively, the listing agent for the property and the auctioneer.

[2] The parties agree that the issues in these disciplinary proceedings can be categorised into two areas, namely:

- (a) Whether there was non-disclosure by either respondent of any weathertightness issues and other building issues with the property; and
- (b) Whether there was misleading conduct by either respondent regarding the auction and subsequent negotiations for sale of the property.

[3] The appellants' application to us is for orders:

- (a) directing Ms Riley and Mr Loughran to make full disclosure of all documents in, or which have been in, their possession or power in relation to the listing, marketing and sale of the property;
- (b) directing Mr Loughran and Ms Riley to disclose to the appellants the name and contact details of the person who expressed interest in the property at \$1.6 million conditionally; and
- (c) that such information be provided by way of affidavit.

[4] The second respondents contend that we do not have jurisdiction to make such orders. The appellant submits that we should exercise our jurisdiction in this case and make the orders sought.

Timeline of complaints process

[5] A formal complaint was made by the appellants against Ms Riley in respect of alleged non-disclosed weathertightness and building issues on 9 October 2015.

[6] On 14 October 2015, Ms Claire Miller, an early resolutions facilitator of the Real Estate Agents Authority telephoned the appellants to discuss the complaint. In the course of this conversation, Ms Miller told the appellants that Barfoot & Thompson claimed that the appellants were advised to get a building report prior to purchase. The appellants denied being told this by Barfoot & Thompson.

[7] On 19 October 2015, a formal complaint was made by the appellants against Ms Riley and Mr Loughran in respect of alleged misleading conduct during the negotiation for sale of the property immediately after the auction on 7 March 2015.

[8] On 22 October 2015, Ms Miller called the appellants to discuss the complaint. Again, Ms Miller advised that Barfoot & Thompson claimed the appellants were told to get a building report done. This was again denied by the appellants.

[9] On 29 October 2015, the appellants sent two letters to Ms Miller confirming their position in respect of both of the complaints. In these letters the appellants confirmed their allegation that Barfoot & Thompson did not advise them to get a building report, and provided further detail about the complaint for misleading conduct.

[10] On 30 October 2015, the appellants received an email from the Authority in respect of the additional information provided. In that email the Authority indicated that Ms Miller was on leave, returning on 4 November 2015.

[11] On 6 November 2015, the Authority wrote to the appellants advising that it was taking no further action in respect of the complaints. The appellants immediately telephoned Ms Miller to inquire about this decision. It is put that Ms Miller confirmed

that she did not receive the additional information sent to her during her leave period. The appellants said that they did not agree with the Authority's position. Ms Miller advised that the next step was for the Complaints Assessment Committee to make a formal determination which would take a few months. Ms Miller advised that the Complaints Assessment Committee would talk to the appellants before a formal determination was made.

[12] On 20 November 2015, the Complaints Assessment Committee made a formal decision, pursuant to s 79 of the Real Estate Agents Act 2008, not to inquire into the complaints. Because of the Committee's decision not to inquire, the Committee's powers in ss 81 to 86 of the Act (broadly, of inquiring into the complaint in a formal manner) were not exercised, including the power to call for information or documents.

The General Case for the Appellants in terms of their Application

[13] The appellants submit that we have jurisdiction to make an order for discovery and the related orders. It is put that we have a wide jurisdiction, and that jurisdiction to make discovery orders and other directions has been found in analogous statutory tribunals jurisdictionally; and it is also consistent with both the purposes and scheme of the Act as it relates to complaints and discipline, and the principles of natural justice, for such jurisdiction to exist.

[14] The appellants rely on the following as the primary source of jurisdiction for us to make the orders sought:

- (a) Section 105 of the Act provides that the Tribunal "*may regulate its procedures as it thinks fit*", subject to "*the rules of natural justice*".
- (b) Section 109(1) of the Act provides that that Tribunal may: "*receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.*"
- (c) Regulation 17(1) of the Real Estate Agents (Complaints and Discipline) Regulations 2009 which makes the Chairperson of the Tribunal responsible for making "*such arrangements as are practicable to ensure the orderly and expeditious discharge of the functions of the Disciplinary Tribunal*".

[15] It is submitted for the appellants that a finding of jurisdiction to order discovery would be consistent with both the express purposes of (as set out in s 3(1) of the Act) and the scheme of the Act; and the principles of natural justice (which the Tribunal is statutorily obliged to observe).

[16] It is put by counsel for the appellants that, even though sections 100-115 dealing with the Tribunal do not have an express power for disclosure as the CAC has under ss 85 and 86, it is inconceivable that the legislature would seek to deprive the Tribunal from having such a fundamental feature of any dispute determination as the ability to make disclosure orders. Rather than make specific provision for various powers, the legislature has simply said in s 105(1) that the Tribunal may regulate its procedures as it thinks fit. It is submitted that this, in essence, gives the Tribunal the broadest powers possible to make such orders as it thinks fit to achieve the purpose and objectives of the Act.

[17] Counsel emphasise that s 105(2) of the Act provides that the Tribunal's power to regulate its own procedure is subject to "*the rules of natural justice*"; and the Tribunal is also obliged under s 27 of the New Zealand Bill of Rights Act 1990 to observe the principles of natural justice.

[18] It is put that fairness is the dominating criterion of natural justice and that an important element of natural justice is the disclosure of relevant material not only so that parties know the allegations and case against them, but also so that parties know, and have access to all relevant material to properly defend and prosecute a case. It is put that the discovery procedure is an integral mechanism in ensuring a fair and proper result is achieved in all litigation.

[19] Counsel for the appellants submit that it is consistent with the principles of natural justice that the orders sought be made; that, to date, the appellants have not been provided with adequate disclosure from the respondents; and no documents have been provided by the respondents to the appellants in the context of these proceedings; discovery of documents in advance of the hearing, particularly for cross examination and submissions, will assist the parties and us in expeditiously resolving factual issues.

[20] We have the specific power under Schedule 1, clause 6 of the Act to issue a summons to any person requiring that person to attend before us and give evidence. The summons may require the person to produce before us any "*books, papers, documents, records, or things in that person's possession or under that person's control in any way relating to the matter.*" Therefore we could summons Ms Riley and Mr Loughran and compel them to provide, at the hearing, the documents requested by the appellants. However, it is put by counsel for the appellants that to delay disclosure until hearing could necessitate an adjournment of the proceedings so that any new factual material can be properly responded to by the appellants and that would unnecessarily delay matters.

The Stance of the Second Respondents

[21] The second respondents oppose the making of the orders sought by the appellants and submit that we have no jurisdiction to make such orders. They note that s 105 of the Real Estate Agents Act 2008 provides that we may regulate our own procedure as we see fit, subject to the rules of natural justice and to the Act and regulations made under the Act; but submit that the ability to regulate our own procedure does not extend to a power to compel parties to take steps of the nature sought by the appellants.

[22] It is put by Mr Rea for the second respondents that the appellants have made it entirely clear that their desire is to obtain compensation from Barfoot & Thompson for their alleged losses, and while we may order compensation in appropriate cases where misconduct is established, this is not a main function of the disciplinary process. We agree.

[23] Mr Rea observes that the scope of documents requested is in the broadest possible terms. He submits that discovery would be very unlikely to advance the issues.

[24] The second respondents deny knowledge of any alleged non-disclosed defects and maintain there is not a shred of evidence produced by the appellants to the effect that any information was deliberately withheld. Mr Rea puts it that the issue relating

to the manner of construction of, and materials used in the dwelling has been addressed in solicitors' correspondence, particularly in a letter from Glaister Ennor dated 12 February 2016, which is referred to in, but not included among, the correspondence annexed to the affidavit of Claire Greaney filed in support of the appellants' application. It is put that the dwelling has been incorrectly described in a report by an undisclosed author as being "*monolithic type*" when plainly (Mr Rea asserts) it is not. He also puts it that is not an issue which will be advanced by discovery, nor is there any realistic prospect of uncovering some "*smoking gun*" that will evidence actual knowledge of undisclosed defects either by Ms Riley or Mr Loughran.

[25] The issue of the identity of the other interested parties has also been canvassed in correspondence between counsel, and Mr Loughran has advised that he does not recall their names. Mr Rea puts it that is not surprising, given his limited involvement in the overall transaction as the auctioneer on the day of the auction and the number of auctions that he conducts, but that in any event the name and contact details of a potential witness is not a matter of discovery of documents, nor is it a question that is permissible in interrogatories.

[26] As for open homes registers and similar documentation, Mr Rea notes that the suggestion appears to be that the appellants or their advisers would wish to contact attendees to canvass with them whether they were the party expressing conditional interest in a purchase. He submits that such an intrusion in the privacy of such parties is not appropriate or warranted, nor should Barfoot & Thompson be put in a position where a party making allegations based purely on speculation is permitted to make such direct contact with customers or potential customers where personal information has been obtained for a completely different purpose.

The Approach of the Authority

[27] The Authority submits that we do have jurisdiction to order discovery, but that such orders should only be made sparingly in exceptional cases.

[28] The Authority notes that the application for discovery orders in this proceeding is widely framed and has been made before the Committee record has been filed with us.

[29] Counsel for the Authority summarise the appellants' argument as that we have jurisdiction to order discovery on the basis of:

- (a) section 105 of the Real Estate Agents Act 2008 (Act), which provides that "*[t]he Tribunal may regulate its procedures as it thinks fit*";
- (b) section 109 of the Act, which provides that we have wide powers to receive evidence whether or not that evidence would be admissible in a court of law;
- (c) regulation 17(1) of the Real Estate Agents (Complaints and Discipline) Regulations 2009, which gives our Chairperson responsibility to make arrangements to ensure the orderly and expeditious discharge of our functions;

- (d) the purpose of the Act and complaints regime, the need to deal effectively with complaints and the investigatory powers of Committees, with which jurisdiction to order discovery is consistent;
- (e) natural justice requirements, one element of which is that parties should have all relevant material to properly present and defend their case; and
- (f) decisions of the Human Rights Review Tribunal and the Lawyers and Conveyancers Disciplinary Tribunal, confirming discovery can be ordered under analogous provisions.

[30] The Authority submits that we have jurisdiction to order discovery, but not for all of the reasons advanced by the appellant. The Authority submits that only s 105 may provide a basis for ordering discovery in appropriate cases.

[31] Counsel for the Authority put it that s 109 addresses our power to receive evidence, and this has no bearing on the question of discovery, which is a procedural process carried out between the parties.

[32] Counsel for the Authority submit that Reg 17(1) is not concerned with directions given in particular proceedings, but is concerned with arrangements for the efficient organisation and administration of Tribunal as a whole, which is a responsibility given to the Chairperson in a similar fashion to any other head of bench; and this is clear when read alongside Reg 17(2) which requires the Chairperson to deliver an annual report on the Tribunal's performance.

[33] It is submitted that as discovery is essentially a matter of procedure, such orders fall within the scope of s 105 of the Act and equivalent provisions.

[34] Counsel for the Authority note that, even if we find we do not have jurisdiction to make a binding order for discovery, the same outcome can be achieved if we indicate that a witness will be summonsed under cl 6 of Schedule 1 if the information is not disclosed.

[35] It is submitted for the Authority that, in appeals from Complaints Assessment Committee decisions, discovery should only be ordered in exceptional cases for the following reasons:

- (a) appeal hearings will ordinarily follow a Complaints Assessment Committee investigation;
- (b) appeal hearings are intended to be a rehearing on the evidence provided to the Committee; and
- (c) appeal hearings are intended to be a simple, efficient, and low cost method of reviewing Complaints Assessment Committee decisions.

[36] All appeal hearings will follow a determination by a Complaints Assessment Committee. Under s 78 of the Act, the functions of Complaints Assessment Committees include investigating and determining complaints, made either by the public or at the Committee's own initiative.

[37] It is put for the Authority that the initial complaint must comply with content and form requirements set out in Rule 4 of the Real Estate Agents (Complaints and

Discipline) Regulations 2009. This includes a requirement that the complaint be supported with appropriate documentation. That if, on receipt of a complaint, the Complaints Assessment Committee decides to inquire under s 79(2)(e), the following provisions (in the Act) promote a thorough and balanced investigation process. A Committee's final determination under s 89 will therefore follow an investigation where both sides have had the opportunity, or have been required to provide information. The full record of information will be before us on appeal.

[38] Counsel for the Authority submit that we should be cautious when considering applications for discovery orders which will create further procedural complexity and increase costs to users. It is put that Tribunal proceedings must focus on the conduct of the licensee concerned for the purpose of determining whether there has been conduct in breach of the standards set out in ss 72 or 73 of the Act; and that Tribunal proceedings under the Act are not a substitute or proxy for ordinary civil proceedings. We agree.

[39] Counsel for the Authority helpfully concluded as follows:

“Suggested approach to applications for discovery orders

3.16 Consistent with the above considerations, the Authority submits that application for a discovery order should only be granted where:

- (a) the application concerns information that is of plain relevance to an issue which the Tribunal must determine on appeal;*
- (b) the issue cannot be properly determined without the information; and*
- (c) the information is in the other party's control.*

3.17 It is submitted that when discovery orders are made they should be specific as to the particular type or range of information which is to be disclosed. Wide orders to produce all relevant information, for example, 'for a particular listing' should be avoided.

4. Assessment of the present application

4.1 The Authority expresses no view on the merits of the present application, but makes two observations:

4.2 First, the present application has been made prior to the Tribunal and all parties receiving the record of material put before the Committee. An order for discovery may be premature.

4.3 Second, the application for all information relating to the listing, marketing and sale of the property is widely drafted. The appellants have not been precise when describing how the entirety of this information would be relevant to issues on appeal.”

Discussion

[40] Counsel for the appellant has put it that there is no reason why we should be unduly cautious when considering discovery applications; discovery is now

streamlined in all courts; and the issues are really ones of relevance and proportionality.

[41] Counsel for the appellants referred to Kós J having noted in *Stephenson v Jones & Anor* [2015] NZHC 1455 at paragraph 45 when dealing with a disputed discovery application:

“... of course these witnesses may be cross-examined. But in doing so, counsel should be entitled to the normal benefit of relevant discovery, so witnesses testimony may be tested against the written record. This is an essential component of a fair trial in the common law system. The discovery record referable is no burned blanket. Parties are entitled to due discovery of truly relevant material unless a recognised exception exists.”

[42] The legislation setting up the Human Rights Review Tribunal and the Lawyers and Conveyancers Disciplinary Tribunal is not analogous with the Real Estate Agents Act 2008.

[43] We take the view that s 105, in its context, gives us the power to make discovery orders in the usual way, but we accept that we should exercise our discretion cautiously as advocated by the Authority. We do not see the content of the application, as set out in para [3] above as too wide-ranging or premature. We consider that the second respondents are able to, and must, respond to the discovery orders sought or explain why they might be unable to. The application by the appellants is granted.

[44] Accordingly, we order that within one calendar month the second respondents make full disclosure of all documents in, or which have been in, their possession or power in relation to the listing, marketing and sale of the property AND we direct the second respondents to disclose to the appellants the name and contact details of the person who expressed interest in the property at \$1.6 million conditionally.

[45] 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.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member