BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 40

READT 070/15

IN THE MATTER OF	an appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**PARSOA (SHAUN) BAHRAMITASH**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 402)**
	First respondent
AND	**RAJA RITHESH**
	Second respondent

Tribunal:

Hon P J Andrews Chairperson
Garry Denley Member
Catherine Sandelin Member

Hearing: On the papers by consent

Appearances:

S Sharma for the appellant
R E Savage and J Simpson for the first respondent
No appearance by the second respondent

Judgment: 13 June 2016

DECISION AS TO ADMISSIBILITY OF EVIDENCE

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[1] On 3 November 2015 the appellant, Mr Bahramitash, filed an appeal against the finding by the Complaints Assessment Committee 402 (the Committee) in its decision dated 25 August 2015, that the appellant had engaged in unsatisfactory conduct ("the

substantive appeal"),[1] and its decision as to penalty, dated 9 October 2015 ("the penalty appeal").[2] The appeals have not yet been set down for hearing.

A brief summary of the background

[2] The appellant is a licensed salesperson and in January 2015 was engaged by the vendors for the sale of a property at Flat Bush, Auckland. The complainant alleged that the appellant "put him off" making an offer on the property until a viewing could be arranged, and that when he later arrived for a viewing, the appellant advised him that an offer had been made, and accepted by the vendors, the previous night.

[3] The complainant further alleged that:

(a) The appellant did not act in best interests of the vendors;

(b) The appellant did not advise him that another offer was to be presented, and presented the eventual purchaser's offer when he knew the complainant had a strong interest in making an offer;

(c) The appellant did not inform him of other interest in the property. He alleged that the appellant should have informed all interested parties that an offer had been made.

(d) When the complaint was made, the appellant did not respond in a proper fashion.

[4] The complaint was then investigated. In the course of the investigation the appellant was asked to provide a written explanation of his conduct in relation to the complaint, and to enclose any relevant documents. The appellant responded on 25 February 2015. The Committee held a hearing on the papers (which included a report as to the investigation) and, as noted earlier, found that the appellant had engaged in unsatisfactory conduct.

[5] The Committee then held a hearing as to penalty. The appellant filed written submissions prior to the hearing, in which he addressed the Committee's decision as

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1 *Complaint No. CO7118, Parsoa Bahramitash,* 25 August 2015.
2 *Complaint No. CO7118, Parsoa Bahramitash,* 9 October 2015.

to unsatisfactory conduct, rather than penalty. The Committee considered the appellant's submissions and issued its decision as to penalty on 9 October 2015.

The appellant's appeal

[6] The grounds of the substantive appeal are that the Committee's decision was wrong and unfair, in that:

(a) The process was unfair: the Committee made its finding on basis of his initial response to the complaint, whereas he should have been invited or permitted to address issues in investigator's report, to respond to issues, and to present evidence in rebuttal.

(b) The Committee's findings and decision were not supported by the evidence, and the Committee drew erroneous conclusions.

(c) The Committee gave undue weight and credence to the complainant's and the vendor's statements and the investigator's report, but gave little or no weight to his statements and explanations.

(d) There was no evidence for the Committee's finding that he had made an inadequate response to the complaint.

[7] The penalty appeal was on the grounds that the penalty was excessive.

[8] On 15 February 2016 counsel for the first respondent (the Authority) filed a Bundle of Documents for the appeal hearing. On 10 March 2016 counsel for the appellant filed submissions in which he challenged the admissibility of two documents included in the Bundle. These are:

(a) A file note made by Tina Mead (an investigator for the Real Estate Agents Authority) regarding a telephone call made by her; and

(b) A copy of an earlier decision of the Committee dated 10 September 2015, in which it found that the appellant had engaged in unsatisfactory conduct.

[9] The appellant's application is opposed by the Authority. Submissions have been filed on behalf of both the appellant and the Authority.

Relevant principles as to the admission of evidence by the Tribunal

[10] Section 109(1) of the Real Estate Agents Act 2008 gives the Tribunal a wide power to receive evidence that may, in its opinion, assist it in determining the issues before it, whether or not that evidence would be admissible in a court of law. Pursuant to s 109(1), the Tribunal is not bound by the provisions of the Evidence Act 2006. However, those provisions are not irrelevant, and the Tribunal will still have regard to the general provisions of the Evidence Act, as set out in ss 7 and 8 of that Act, as to the probative value of evidence, balanced against the risk of evidence having an unfairly prejudicial effect on the proceeding.[3] The decision whether to admit evidence is a matter for the exercise of the Tribunal's discretion.

[11] The relevant principles as to the admission of evidence by the Tribunal are well known. The Tribunal has regard to the relative probative value and prejudicial effect of evidence sought to be admitted, and in particular whether the probative value of the proposed evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding. The decision to admit or exclude proposed evidence is at the discretion of the Tribunal.

[12] Relevant factors considered by the Tribunal are:

(a) Whether the evidence will assist the Tribunal in dealing with the matter before it;

(b) Natural justice requirements; and

(c) The probative value and risk of an unfairly prejudicial effect of the evidence.

[13] It is relevant to record that Tribunal hearings are appeals from decisions of the Committee, by way of rehearing. The approach to new evidence was set out in the Tribunal's decision in Eichelbaum v Real Estate Agents Authority[4]. These may be summarised as follows:

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3 See, for example, *Kolich v Real Estate Agents Authority* [2013] NZREADT 110, at [49]*; Complaints Assessment Committee v Brankin* [2011] READT 33 at [9]*; A v Professional Conduct Committee* HC Auckland CIV 2008-404-2927, 5 September 2001.

4 *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3, at [33]-[36].

(a) Most appeals to the Tribunal are conducted on the record of the Committee's hearing;

(b) In certain cases, the Tribunal may permit witnesses to be cross examined and to admit fresh evidence, if there are good reasons to do so;

(c) In rarer cases, where appropriate, the Tribunal may direct that the appeal be heard de novo.

[14] As the Authority submitted, the threshold for ruling evidence inadmissible is set at a much higher level than that for admitting fresh evidence: it is rare for the Tribunal to rule that evidence that was before the Committee is inadmissible, and technical rules of evidence will give way to avoiding complexity and increased costs. Further, the weight to be placed on evidence before it is a matter for the Tribunal.

The challenged documents

Ms Mead's file note

[15] The file note (at page 79 of the Bundle of Documents) is dated 29 April 2015, and records a telephone call by Ms Mead to the vendors. Ms Mead states that she mentioned dates and events to the vendors, and records their responses. Ms Mead also states that she read out portions of the appellant's response to the complaint, and records the vendors' response. The recorded comments relate to the appellant's dealings with the vendors, and their response to certain statements made by him in his response.

[16] The appellant referred in his submissions to ss 6 – 8 of the Evidence Act 2006 (as to the principles and purpose of that Act), and to ss 4, 17, and 18 (as to hearsay evidence) and submitted that the file note is inadmissible in that:

(a) By reference to the ss 4, 17 and 18 of the Evidence Act, the file note is hearsay, and is inadmissible because the circumstances in which it was made do not provide reasonable assurance that the file note can be relied on. This is because of the nature and contents of the file note, it was not adopted or verified by the vendors (by being signed by them), it was not

contemporaneous, and when the vendors were not given the opportunity to verify the file note.

(b) The vendors' recollections recorded by Ms Mead are factually incorrect, and the vendors, because of their advanced age, will not now be able to recall the actual events;

(c) The probative value of the file note is outweighed by risk of it having an unfair prejudicial effect on the hearing.

(d) The Committee placed undue weight on the file note when making its finding of unsatisfactory conduct.

[17] The Authority submitted that the file note is admissible, as:

(a) File notes by investigators are routinely used in evidence before the Committee and the Tribunal, and there is nothing inherently objectionable in admitting the file note as evidence. Counsel further submitted that there is no evidence that this file note differs in any meaningful way from any other file note that has been admitted as evidence.

(b) The information in the file note will assist the Tribunal as to what the appellant said to them regarding what offers were made to purchase the property, and as to whether the appellant presented all offers to them.

(c) Any alleged inconsistencies in the file note can be raised in the submissions for the appellant at the appeal hearing.

[18] We accept that the file note records matters that are relevant to the matters to be considered on the substantive appeal. Further, we accept the Authority's submission that the file note will assist the Tribunal in determining the appeal. The appellant may seek to adduce new evidence in response, and will in any event be well able to raise any claimed errors or inconsistencies, and to make submissions as to the weight the Tribunal should place on the file note, at the appeal hearing.

[19] We have determined that the evidence of Ms Mead's file note is admissible at the appeal hearing.

The first finding of unsatisfactory conduct

[20] On 10 September 2015 the Committee issued a decision in which the Committee found that the appellant had engaged in unsatisfactory conduct.[5] The complaint concerned representations alleged to have been made by the appellant in the course of selling a property at Papatoetoe, Auckland in late 2011. Because that complaint concerned earlier conduct, this decision will be referred to as "the first decision", and the appeal against the first decision will be referred to as "the first appeal". A copy of the first decision is included in the Bundle of Documents at pages 12-20.[6]

[21] The appellant submitted that the first decision should not be included in the Bundle of Documents, because it related to another matter altogether and was not relevant to the substantive appeal.

[22] The Authority noted that the first decision was not referred to in the Committee's decision which is the subject of the substantive appeal, but may be relevant to the penalty appeal. Thus, it was properly included in the Bundle of Documents, and decisions on other matters concerning a licensee are regularly put before both the Committee and the Tribunal.

[23] The Authority submitted that a further reason for including the first decision was that it concerned conduct which was similar to that complained of in the substantive appeal, as both involved a situation where the appellant was alleged to have failed to disclose relevant information to parties to a transaction. Questions of relevance and weight are for the Tribunal to determine.

[24] In submissions in reply, the appellant submitted that while the first decision may be relevant to the penalty appeal, it had no relevance to the substantive appeal, as he was not relying on previous good conduct for that appeal. The appellant further submitted that as he had filed an appeal against the first decision, the first decision could not be considered in relation to his appeal against penalty unless and until such time as the first appeal failed.

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5 *Complaint No. CO7645 re Parsoa Bahramitash,* 10 September 2015.

6 A further copy is included at pages 29-37, but nothing turns on this point.

[25] The Authority was given leave to submit further submissions on the appellant's submission that the first decision could not be taken into account unless and until the first appeal had failed, as this point had not been raised in the appellant's initial submissions. The Authority noted that the first appeal will be heard on 3 June 2016 and the decision on the first appeal will almost certainly be issued before the current appeal is heard. If the first appeal succeeds, the first decision can be regarded.

[26] We accept the Authority's submissions. The first decision may well be relevant to both the substantive appeal and the penalty appeal, and be of assistance to the Tribunal in considering the appeal. The first decision may therefore be included in the Bundle of Documents. Should the first appeal be decided in the appellant's favour, the decision should be disregarded. We have therefore determined that the first decision is admissible.

Result

[27] Both Ms Mead's file note, and the first decision, are admissible and may remain in the Bundle of Documents.

[28] 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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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member