BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 15

READT 005/18

IN THE MATTER OF	An appeal under section 111 of the Act
BETWEEN	PETER LAM Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 413) First Respondent
AND	JIANINE (DI) AUSTIN Second Respondent
On the papers:	
Appearances:	Mr P Lam, Appellant Ms N Copeland on behalf of the First Respondent Ms A Robertson, on behalf of the Second Respondent
Date of Decision:	16 May 2018

RULING OF THE TRIBUNAL

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[1] Mr Lam has filed an application seeking leave to admit further evidence in his appeal against the decision of the Complaints Assessment Committee 413 (**the Committee)** in which the Committee determined that it would not be taking any further action in regard to a complaint which he has made against the second respondent.

[2] The brief background to the application is that the appellant made a complaint in June 2017 concerning the conduct of a licensee, the second respondent. Further details of complaint will appear from the discussion that follows.

The Proceeding before the Committee

[3] As the committee noted in its decision dated 2 February 2018, the first part of the complaint concerned the failure of the licensee allegedly to disclose to the appellant as an intending purchaser of the property at 247 the Terrace, Wellington (**the Property)** that there was a proposal for the development of the adjoining property, 251, which, if it proceeded, would adversely affect the property. It was claimed that the proposed development would deprive the property of its extensive views. The appellant said that he was attracted because of the "all round view" available from the property. He said that two weeks after the auction the second respondent advised him of the proposed development which resulted in the entire southern view from the property being blocked. The appellant said that the licensee and the developer of the proposed development knew each other and also that the second respondent did not disclose to the appellant what she might have known about the proposed development. The appellant noted that the proposed development had been previously advertised by other real estate agents as having development potential.

[4] The appellant alleges that the second respondent knew about the proposed development and ought to have brought it to his attention before he placed his successful bid.

[5] The appellant also complained that the second respondent misrepresented the property as having five car parks when there were only three. He further asserts that a retaining wall between 247 and 251 is subject to what the committee described as a "structural issue" which was not visible to the eye of someone inspecting 247, that the licensee knew about this problem and did not disclose the information to the appellant as she ought to have.

[6] The committee decided not to take any further action on the complaint[1]

[7] As to the first part of the complaint, the committee agreed that had the licensee known about the proposed development which would deleteriously affect number 247, she would have been bound to disclose it to the appellant.

[8] The committee in summary said the second respondent's position as being that she had no knowledge of the proposed development but that she advised the appellant of it as soon as she found out about it. The second respondent had met the owner of the proposed development because at one point he had been a prospective purchaser of the property. Her contention was that while she knew that he was a property investor she was unaware that he was also a property developer. The second respondent said that she did not know about the proposed development. Her case was supported by an affidavit from the owner of number 251 concerning the proposed development in which he stated that he had not passed information on the proposed development to the licensee.

[9] The appellant's contention on the present appeal has been that the licensee and Mr Fraser are not to be believed in regard to this aspect of the matter. His position is the same as it was before the committee.

[10] The conclusion of the committee was that there was no evidence that the second respondent deliberately withheld from the appellant information about the proposed development that she held or ought to have had about it.

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1 Presumably pursuant to section 80 of the Act

[11] In relation to the "structural issue" about the wall, the appellant stated in evidence that the owner of the proposed development had informed the second respondent of the issue and she acknowledged that there had been some dialogue about the wall with the owner of the neighbouring property.

[12] The committee made reference to an email from Mr Fraser to Mr Lam dated 31 August 2017, Mr Fraser stated:

> *… As we were leaving, after viewing 247 the Terrace, I turned and said to [the Second Respondent] "well at least if we buy the place there will be no confusion over the retaining wall" I made no mention of cracks or its condition. In fact the whole comment was said in a joking manner and lasted all of 5 seconds. I am sorry if this does not aid your case at all, but as I said I can only relay what I said. I may have mentioned cracks to you when we spoke on the phone, as we talked quite in detail. (sic)*

[13] The committee apparently accepted this evidence as correct and concluded that it corroborated the evidence for the second respondent and therefore the evidence was that she was not on notice that there was a problem with the wall.

[14] The committee further concluded that at this stage when this remark was made, it appears that Mr Fraser was unaware of any significant issues with the wall so he could not in any event have alerted the second respondent of any issues associated with it[2].

[15] We interpolate that subsequently a dispute arose between the parties about the way in which the first respondent's counsel had dealt with this evidence in a memorandum directed to the Tribunal. In the submissions which counsel had filed for the hearing counsel stated that the evidence before the CAC included an affidavit from Mr Fraser confirming his position in respect to the disclosure of the brick retaining wall to the second respondent. That reference, however, was mistaken. Mr Fraser did give an affidavit dated 30 June 2017 but he did not deal with the position as to the brick retaining wall. The appellant apparently takes the view that this misstatement provides a reason, or additional reason, why Mr Fraser should be

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[2] Decision of committee at paragraph 3.12

produced for oral examination at the hearing of the appeal. Reference will be made to this aspect of the matter further below in this decision.

[16] The committee noted that the appellant had commissioned an engineering report which opined that the wall was in poor condition and required remediation in the short to mid-term.

[17] The committee also recorded the position of the second respondent as being, the owner of 251 had mentioned in passing to the second respondent that the wall might need some work but that when she told the vendor of this his response was that there had been no movement or change during the time of his ownership of around 25 years and he assured the second respondent there was absolutely no reason to be concerned about the wall. We interpolate that it is not entirely clear what the significance of this evidence, if any, was. To say of a wall that it "might need some work" could mean that in the opinion of the person making the statement a level of intervention was required before which potentially ran the gamut from minor repairs to serious structural remediation. In any case, for the purposes of this hearing it is not the position of the Tribunal to resolve the significance of this issue. The Tribunal is only concerned at this point to identify what the relevant issues were before the committee in respect of which the appellant has brought his appeal. It is only those issues which will be at large on the hearing of the appeal. Having identified the issues the Tribunal will then be in a position to determine questions such as the relevance or cogency of any evidence which the appellant proposes to bring at the appeal hearing which was not put before the committee.

[18] The committee concluded that in relation to the retaining wall, the appellant had not established any breach of obligation on the part of the second respondent .[3]

[19] So far as the issue of the car parks was concerned, the committee agreed that there had been a representation made by second respondent that the property at 247 had one garage and two carport spaces on it and two on-street car parks. It would appear that the two on street car parks that the second respondent included in the

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[3] Decision paragraph 3.12.

advertising material was a reference to the fact that as a resident the owner of the property 247 would be able to obtain parking permits in the street from the council.

[20] The marketing material for the Property clearly recorded, the second respondent said, that there were three on-site carparks and two on-street carparks in front of the garages. The second respondent asserted that all prospective purchasers, including the appellant were made aware that only three parks were available on-site. The committee recorded that the second respondent's further contention was that the vendor of the Property advised:

> That he had never had any issues with the on-street parks. As a resident, the owner of the Property is entitled to two residents' carparking permits. The vendor had never felt the need to obtain the permits because they had parked in front of the garages.

[21] The conclusion of the committee was that in the light of this last fact, the representation that there were two on street car parks was in fact correct and there therefore be no breach of obligation on the part of the second respondent. So far as the number of carparks were concerned, the committee found that the second respondent gave accurate information to all prospective purchasers, including the appellant, that only three carparks were available on-site. The committee noted that while the appellant disputed the accuracy of the licensee's representation "he offered no evidence to support his contention".[4] The committee concluded that there was no unsatisfactory conduct in respect of that part of the complaint.

[22] In overview, the committee determined not to take any action on the complaint pursuant to s 89(2)(c) Real Estate Agents Act 2008 (**the Act**). They gave as their reasons for the decision that:

[a] The committee determined that had the second respondent known about the proposed development she would have been obliged to disclose it to the purchaser. Further, the committee concluded that it would not be open to the licensee to deny knowledge of the development if she had not taken reasonable steps to acquaint herself of information about matters such as proposed developments. However, the evidence did not support

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4 Decision of Committee paragraph 3.8.

a conclusion that the licensee knew (or ought to have known) of the proposed development and that therefore the licensee was not in breach of an obligation to disclose the proposed development:

[b] There was insufficient evidence that the licensee knew (or ought to have known) the wall had a structural issue and therefore she was not in breach of an obligation to disclose the structural issue to the complainant.[5]

[c] The licensee did not misrepresent the number of carparks being sold with the Property;

The Documents Relevant to This Decision

[23] The Tribunal agrees with the submissions filed on behalf of the first respondent that the evidence which is the subject of the application can be considered as falling into two distinct categories:

[a] Documents that the appellant claims were sent to the committee but which may not have been received by the committee, being documents two, three and five (**Category One**).

[b] Documents the Appellant claims were not available to him until after the complaint was made, being documents one, four, six and seven (**Category Two**).

[24] It would appear that the submission of the first respondent does not specifically refer to document 8. That document would seem to fall into category [23] [a] above and this decision proceeds on the basis of that assumption. For convenience sake we shall adopt the numbering of the various individual documents which has been adopted by counsel for the second respondent in her submissions as follows:

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5 Committee decision paragraph 3.1.

The Appellant has filed an application to include eight documents which he says were not available to the Committee:

Document 1 – a letter from the Appellant's solicitor to the Vendor's solicitor regarding retention of funds from the settlement sum pending resolution of his allegations regarding misrepresentation and breach of warranty by the vendor. The Appellant says that this letter was only made available to him on 21 February 2018;

Document 2 - an email from the Appellant's solicitor which, in his words, outline the further steps required to resolve the matter;

Document 3 - a further email from the Appellant's solicitor which discuss the Vendor's offer to settle his claim;

Document 4 - an email from the Appellant's solicitor attaching Document 1;

Document 5- a valuation obtained by the Appellant regarding the alleged loss in value / cost of two on-street car parks;

Document 6 - a statement from the previous owner of the property. The Appellant says that he received this letter in January 2018;

Document 7 - a letter from Wellington City Council confirming that the Appellant is responsible for any unconsented work at the property. The Appellant says that this was only made available to him in February 2018;

Document 8 – an email trail between the Appellant and counsel (sent on a without prejudice basis), regarding the retaining wall and Mr Fraser's affidavit. This document was filed with the Tribunal on 9 April 2018, sometime after the due date for the Appellant's application to include new information.

Principles

[25] There is no dispute concerning the principles which are applicable to applications of this kind. Those principles are correctly described in the submissions of the first respondent's counsel in the following terms:

Legal principles regarding admission of further evidence on appeal

2.1 The Tribunal will be familiar with the principles in *Eichelbaum v Real Estate Agents Authority*.[6] Appeal hearings will generally proceed on the record of evidence that was before the Committee and submissions of the parties, without any new evidence. The Tribunal may accept further evidence on appeal if justified.

2.2 As the Court of Appeal stated in *Nottingham v Real Estate Agents Authority*:[7]

> *… The appeal is supposed to be conducted by way of re-hearing of the proceeding before the CAC. The CAC conducts a hearing on the papers, unless it directs otherwise. Except in exceptional circumstances, full oral hearings before the Tribunal are not appropriate. Doing so risks drawing the Tribunal away from the material comprising the record before the CAC so that the a decision might be made on a quite different basis. It also raises the spectre of credibility findings in contests between complainants and the licensees who might be the subject of a charge that would expose the Tribunal to criticism of pre-determination if a charge were then laid.*

2.3 The standard test for admission of further evidence on appeal is that it must be cogent and material, and must not have been reasonably available at first instance.[8] In determining whether to grant leave, the following factors may be taken into account:[9]

(a) Whether the evidence could have been obtained with reasonable diligence for use at the initial hearing;

(b) Whether the evidence would have had an important influence on the outcome;

(c) Whether the evidence is apparently credible; and

(d) Whether admitting the evidence would require further evidence from other parties and cross-examination.

2.4 The Authority notes the High Court's view in *Comalco NZ Ltd v TVNZ Ltd*:[10]

> *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.*

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6 *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3. This decision was affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

7 *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [81].

8 See for example *Telecom Corp of NZ Ltd v CC* [1991] 2 NZLR 557.

9 See *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [49], citing *Dragicevich v Martinovich* [1969] NZLR 306 (CA).

10 *Comalco NZ Ltd v TVNZ Ltd* [1997] NZAR 97 at [25].

2.5 Further, in *Foundation for Anti-Aging Research v The Charities Registration Board*, the Court of Appeal accepted that "natural justice considerations could in some cases require an oral hearing on appeal in order to 'get to the bottom' of the issues".[11] The Court further noted that:[12]

> *…there may be cases where, in order to secure the objective of a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate…The Court will be guided by the usual criteria of freshness, relevance and cogency. Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.*

2.6 In *Eichelbaum*, the Tribunal affirmed that its wide procedural powers under the Real Estate Agents Act 2008 give the Tribunal ample scope to apply these principles in a flexible way depending on the circumstances of the case. What is not permissible is to give a party to an appeal the opportunity to run their case afresh simply because they wish they had conducted it differently in the first instance.[13]

[26] In the light of those principles and statements of law the Tribunal will now consider the application as it relates to the various documents which the applicant wishes to put before the Tribunal on the hearing of the appeal.

Discussion of the Individual Documents

[27] The next step in this decision is to consider the new evidence which the appellant wishes to put before the Tribunal at the hearing of the appeal in this matter.

[28] The first respondent has advised in counsel's submissions that documents two and three were actually provided to the committee during the course of its investigation and will be included in the bundle of documents for the appeal hearing. As counsel for the first respondent points out, these are not therefore "further evidence" and no order is called for in respect of those items. Those contentions would appear to be correct and accordingly there will be no order made in respect of those documents.

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11 *Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [35].

12 At [51].

13 *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [51].

Document Five

[29] This document is a letter from a registered valuer who was retained to provide an opinion to the appellant of the loss in utility value of the property as a result of not receiving two additional carparks which the appellant considered had been represented as being part of the subject property which he purchased. That letter estimates the value lost as being $22,500 for each park, therefore totalling $45,000. While this letter was not placed before the committee when it gave consideration to this matter, reference was made to it in email correspondence which was provided. The email correspondence accurately summarises the contents of the registered valuer's report. The first respondent does not oppose the document therefore being provided to the Tribunal on appeal and the second respondent, generally, abides the decision of the Court. There will therefore be an order that document five is able to be produced to the Tribunal at the hearing of the appeal.

Category Two Documents

Documents One and Four

[30] Document one is a letter from the solicitor who acted for the Appellant. It is dated 8 September 2017 and was sent in anticipation of settlement of the agreement for sale and purchase (ASAP) occurring on that date. In the letter, various claims are made including that the qualities of the Property had been misrepresented to the appellant. Document four is an email which attached document one. It does not materially add anything of evidential cogency to the evidence and for that reason alone ought not to be admitted. There will be an order accordingly in respect of document four.

[31] Document one, the appellant says, was only made available to him on 21 February 2018. As counsel for the first respondent notes, it is not clear why the appellant did not have a copy of the letter given that it was sent by his lawyer and on his behalf. The further position of the first respondent is that the documents would not have had an important influence on the outcome.

[32] It needs to be kept in mind that the hearing in this matter took place on the papers in December 2017 and its decision was released in February 2018. The situation therefore is that at the time of settlement the solicitor for the purchaser wrote to his counterpart acting for the vendor and raised the same contentions which the appellant made about the second respondent.

[33] In the first place, it would seem unlikely that a solicitor would write a letter putting forward allegations about misrepresentations of a property which his client has purchased without the knowledge and authority of the client. While it may be literally true that the appellant did not receive a copy of the letter until sometime after it was sent, he must have known that his solicitor was going to raise allegations on his part and, therefore, been alerted to the fact that if the letter was helpful evidence, he needed to obtain a copy of it. In the view of the Tribunal, this letter was reasonably available to the appellant in good time prior to the consideration of the complaint by the CAC and could have been placed before it had the appellant acted promptly. The letter does not satisfy the requirement that the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence: *Comalco New Zealand Limited v TVNZ Limited*[14]. Therefore on this ground, the application ought to be declined.

[34] There are other relevant aspects of this letter that need to be mentioned. What the sequence of events reveals is that simultaneously with the complaint to the REA the appellant was making allegations based on the same misrepresentations against the licensee and against the vendor of the subject property. The fact that the appellant's solicitor wrote a letter to the purchaser's solicitor which echoed the very concerns which the appellant has raised in this proceeding does not mean that the letter is evidence in the disciplinary proceeding against the second respondent. The truth of the facts which the appellant claims were misrepresented is not established by the fact that they were included in the letter that his solicitor wrote on his behalf. Evidence establishing the truth of the assertions in that letter, just like the veracity of the allegations made against the second respondent, must be sought elsewhere. For these reasons the evidence in the form of the letter from the solicitor dated 8 September 2017 is not cogent new evidence which ought to be placed before the

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14 *Comalco New Zealand Limited v TVNZ Limited* [1997] NZAR 97 at [25].

Tribunal on appeal. The appellant has not established that the evidence is cogent and material[15].

Documents Six and Seven

[35] The appellant wishes to produce evidence of a statement which the previous owner of the subject property, Mr McHalick has made which is said to establish that the vendor of the property has not been truthful with regard to unconsented/unpermitted building work that had been carried out at the property. The appellant says he only received this written statement after Mr McHalick revisited the property on 28 January 2018.

[36] Document seven is a letter from the Wellington City Council (presumably to the appellant) confirming that there are unconsented/unpermitted building works that have been carried out at the subject property. This letter, the appellant says, was only made available to him on 21 February 2018.

[37] In overview, there are three separate parties who have interests which are connected to the properties at the subject property and the development property. They are the vendor, Mr Upton, the owner of the neighbouring property at 251, Mr Fraser, and Mr Lam the present owner of the subject property. There are disputes between Mr Lam and the real estate agent. It is only these latter disputes that are the subject of the present proceeding.

[38] The matters in regard to which Mr Upton is said to have been untruthful in his dealings with the council are not those with which the second respondent was concerned. The evidence is not cogent, material or relevant to the present proceeding. To allow this material in would be to accept an invitation for the Tribunal to enquire into and express opinions upon collateral matters which are beyond its brief. This part of the application is therefore declined.

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15 *Telecom of New Zealand Limited v CC* [1991] 2 NZLR 557.

Document eight

[39] Document eight concerned an exchange between the parties which included without prejudice material. Nonetheless, it was put into evidence before the CAC. The point at which disputes about that evidence ought to have been resolved, if there were any, was before the CAC. Because it was not apparently objected to, and because it was part of the evidence at first instance, our view is that the document ought to be available on the hearing of the appeal.

Cross-examination of three witnesses

[40] Mr Lam seeks an order that three persons be called by the Tribunal to give evidence at the hearing of the appeal in this matter. Those persons are:

[a] Scott Fraser - the owner of the adjoining property 251 the Terrace;

[b] the second respondent;

[c] the vendor.

[41] The appeal which the Tribunal undertakes is a general appeal which is conducted as a rehearing on the basis of the record before the committee. Such an appeal does not generally involve the hearing of oral evidence. We have already made reference to the principle that the usual approach is for the Tribunal to review the same material that the committee had before it and make its decision on that basis; *Foundation for Anti-Aging Research v The Charities Registration Board*[16]

[42] The position just stated has also been adopted in the Supreme Court decision of *Austin, Nichols And Co Inc v Stichting Lodestar*[17] the judgement of the court, after

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16 *Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449 at [24]

17 *Austin, Nichols And Co Inc v Stichting Lodestar* [2007] NZSC 103

noting what was the accepted practice for appeals from one court to another went on to say[18]:

> *Similar rights of appeal are provided by statute in respect of the decisions of a number of tribunals. The appeal is usually conducted on the basis of the record of the court or Tribunal appealed from unless, exceptionally, the terms on which the statute providing the right of appeal is expressed indicate that de novo hearing of the evidence is envisaged*

[43] Even if in the generality of cases the appellant does not have an entitlement a de novo hearing, the appellant may be able to demonstrate that because of the particular circumstances of the case before the Tribunal to allow further evidence to be put forward. In deciding whether or not to exercise its discretion in such cases, the Tribunal would approach the matter on the usual basis that applies to any evidence, whether the introduction of additional documentary exhibits, or affidavit evidence or evidence in oral form. In considering whether such evidence ought to be admitted on a discretionary basis, the Tribunal would examine the proposed material to determine whether it had the required cogency and freshness that justified it being put forward in the appeal forum when it had not been placed before the original decision maker.

[44] The application in regard to Mr Fraser requires some additional and separate comment. We have dealt earlier in this decision with the criticisms that the appellant made of the submissions for the Authority which was to the effect that Mr Fraser had given an affidavit which covered the position with regard to the retaining wall. As we noted earlier in the decision, he did not actually deal with that issue in an affidavit but there was an email before the CAC which made reference to that issue. While the appellant was within his rights to raise this issue before us, we consider that it is likely that the misstatement of the position was accidental rather than deliberate. Certainly, the fact that counsel may have erroneously recalled the evidence on the point when preparing submissions would not justify, as a separate ground, the requirement that Mr Fraser be made available for cross-examination. There is no reasonable basis upon which it can be concluded that Mr Fraser was a party to the misstatement of the evidence from him on the subject of the brick wall.

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[18] At [4]

[45] We have not been persuaded by the submissions for the appellant that an order ought to be made requiring the three nominated persons to attend to be cross-examined on their evidence. In general terms, it must have been known in advance of the CAC deliberations that they had information about the subject matter of the dispute which now brings the parties before the Tribunal. In attempting to bring these parties before the Tribunal for cross-examination the appellant is simply attempting to have a second run at his case. The application is declined.

[46] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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J Doogue
Deputy Chairperson

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G Denley
Member

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N O'Connor
Member