

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 2

READT 035/17

UNDER THE REAL ESTATE AGENTS ACT 2008

IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE REAL ESTATE AGENTS ACT 2008

Between **Akhil Chaudhary**
Appellant

And **Real Estate Agents Authority**
First Respondent

And **Subarmani Rajan and Sumintra Devi**
Second Respondent

Tribunal: Ms K Davenport QC, Deputy Chair
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances: Mr Purusman for the appellant
Ms E Mok, for the first respondent
No appearance for the second respondent

Decision: 15 February 2018

RULING OF THE TRIBUNAL
(Application to adduce new evidence)

[1] On 12 June 2017 Mr Chaudhary was found guilty of unsatisfactory conduct under s 89(2)(b) of the Real Estate Agents Act. He is said to have failed to have honoured an agreement to reduce commission and an agreement to pay the complainants a refund of \$4,000 reached at mediation. The reasons given by the Committee for their decision were that the appellant's actions breached R 5.1 (Skill, care, competence), R 6.3 (Brought the industry into disrepute), and R 6.4 (mislead or provide false information) of the Rules.

[2] He appeals this finding. Mr Chaudhary wishes to call evidence at this hearing. The evidence which he seeks to introduce includes some information about the relationship between the appellant and the complainants (the second respondents Mr Rajan and Ms Devi). He submits that he would like to call further evidence from Mr Chris Gooch, the investigator for the REAA. In his submissions to the Tribunal Mr Purusman submitted that *“the appellant applicant’s position is that the cross examination of the witnesses will shed light on a number of factors in relation to the credibility of the applicant in the wrongful process adopted by the first respondent.”*

[3] Mr Purusman submitted that if he could not call this evidence then it would be an unfair trial pursuant to ss 27(1) and 27(5) of the Bill of Rights Act 1990.

[4] The first respondent submits that whether oral evidence is allowed in a Tribunal hearing is a question for the Tribunal to decide.

[5] The Authority is neutral as to whether or not the second respondents ought to be called but opposes the application to call Mr Gooch.

[6] In the decision of the Tribunal in *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3¹ the Tribunal held there was no automatic right to call evidence at the appeal but such evidence could be called where there are exceptional circumstances.

[7] As set out in *Eichelbaum* the Tribunal must consider:

- (a) Whether the evidence was evidence which could have been obtained with reasonable diligence for use at the initial hearing;
- (b) Whether the evidence could have 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 any cross-examination.

¹ Affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

[8] The Tribunal will apply these questions to the appellant's application.

The second respondents

[9] The appellant wishes to call the second respondents to testify as to their prior relationship with him. Mr Chaudhary claims that the true nature of their relationship was a close relationship. Is this information relevant to the question of the determination of the appeal? This evidence is clearly not new and could have been obtained prior to the hearing.

[10] For the purpose of this analysis the Tribunal will assume that the appellant's assertion that the second respondents and he were close family friends can be established. If this was established the Tribunal must next consider what bearing would this have on the outcome of the appeal and whether it would potentially influence the outcome.

[11] The second respondents assert that Mr Chaudhary agreed to reduce their commission. This was a critical question for the Complaints Authority and they accepted the evidence of the second respondents that this happened. Mr Chaudhary's acceptance of this was recorded in a telephone conversation with Mr Gooch.

[12] Further, Mr Chaudhary did agree to pay this amount in a mediated settlement.

[13] However, Mr Chaudhary appears to be arguing that he agreed to reduce the commission because of this friendship at the mediation and **not** at an earlier time. It is arguable that the evidence of the second respondents as to whether there was an oral agreement to reduce commission prior to the mediated agreement could be relevant. The closeness of the friendship between the two parties is, however, not a matter to any consideration which would affect the Tribunal's culpability or otherwise.

[14] A real estate agent's duties remain the same for every client regardless of any friendship between the agent or the client.

[15] Although Mr Chaudhary has not sought to call the second respondents for the reasons set out above the Tribunal can see that the credibility of Mr Rajan and Ms

Devi's evidence as to any agreement about commission is relevant to the determination of whether there was unsatisfactory conduct.

[16] For this purpose (which is **not** the purpose that the appellant seeks to call the respondents) the Tribunal consider that their oral evidence would be relevant to the appeal.

[17] Further, as with all hearings on the papers credibility is difficult to determine from just the written word. The Tribunal therefore allow the appellant to call the respondents to examine this issue only. Mr Chaudhary should also be prepared to give oral evidence on this point and be cross-examined.

Mr Gooch

[18] The CAC relied heavily upon the evidence of Mr Gooch recorded in a file note of a telephone call on 30 January. This was months after the sale and after the mediated agreement. The note records that Mr Chaudhary agreed he had agreed to reduce the commission. Mr Chaudhary asserts that Mr Gooch misunderstood his answer and incorrectly reported that he said he had agreed to a commission reduction prior to the mediation.

[19] The first respondent objects to Mr Gooch being called saying at para 3.13 of his submission –

“Strictly speaking there does not appear to be a real dispute about the proposal evidence. Rather the appellant appears to be alleging that Mr Goch misunderstood the appellant’s statement. It is unclear what further information in addition to the information already provided in the bundle of documents could be obtained by Mr Gooch giving oral evidence. As such, it is submitted that any oral evidence would simply be repetitive of the material already before the Committee”.

[20] Mr Gooch's file note was before the CAC but no oral evidence given so his credibility could not be gauged by cross-examination. Mr Gooch's oral evidence is relevant to any appeal.

[21] The Tribunal disagrees with the Authority's submission. The question of what Mr Gooch heard and reported was relied upon by the Complaints Assessment Committee. If Mr Chaudhary disputes that he made this statement or says that Mr

Gooch misunderstood him then in fairness to his appeal he ought to have the chance to present this oral evidence and to question Mr Gooch.

[22] The Tribunal therefore find that in the circumstances of this case the Tribunal will be assisted in determining the appeal by the evidence of Mr Gooch.

Conclusion

[23] The appellant may adduce evidence from Mr Gooch as to the telephone conversation and from the second respondents as to any agreement prior to sale as to a reduction in commission.

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Ms K Davenport QC
Deputy Chair

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Ms N Dangen
Member

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Ms C Sandelin
Member