

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 64

READT 034/18

IN THE MATTER OF

An Appeal under Section 111 of the Real Estate Agents Act 2008

BETWEEN

LAURENCE (NEIL) BAKER, KENNETH RALPH, and ENDONG (ANTON) HUANG
Appellants

AND

THE REAL ESTATE AGENTS AUTHORITY (CAC 413)
First Respondent

AND

LAN (BRENDA) YU
Second Respondent (Not participating in the appeal)

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Ms N Dangen (Member)
Mr N O'Connor (Member)

Submissions received from:

Mr T Rea, on behalf of Mr Ralph and Mr Huang
Mr M Mortimer, on behalf of the Authority

Date of Ruling:

25 October 2018

RULING OF THE TRIBUNAL
(Application by Mr Ralph and Mr Huang to adduce evidence on appeal)

Introduction

[1] The appellants have appealed against the decision of Complaints Assessment Committee 413 (“the Committee”) dated 9 February 2018, in which the Committee found that they had engaged in unsatisfactory conduct (“the decision”). The appeal is set down for hearing in Auckland on 6 November 2018.

[2] Mr Ralph and Mr Huang have applied to adduce evidence on appeal, in the form of sworn affidavits by each of them (“the affidavit evidence”). The application is opposed by the Authority. Mr Baker is not involved in the application.

Background – brief summary

[3] Mr Huang was the listing salesperson for a property at Farm Cove, Auckland. The selling salesperson was Ms Ivy Zhao. Mr Ralph is a licensed Branch Manager, and was Ms Zhao’s supervisor. All three are engaged at Mountfort Real Estate Agents Limited, trading as Ray White.

[4] The property was advertised as being a “leaking home”, on 922m² of land, and was bought at auction by the second respondent, Ms Yu. Ms Yu later complained to the Authority that Ms Zhao had misled her into thinking that the property could be subdivided, but she had discovered after the purchase that it could not be subdivided, owing to a restrictive covenant on the title.

[5] In the course of its investigation into the complaint, the Committee decided pursuant to s 78(b) of the Real Estate Agents Act 2008 (“the Act”) to inquire into the conduct of Mr Huang and Mr Ralph. They were advised of the Committee’s decisions and asked to provide their responses to the complaint, including (but not limited to), specific questions. Both provided responses, which were provided to the Committee through their (then) solicitors.

The Committee’s decision

[6] The Committee found that:

[a] Mr Ralph had failed to properly supervise and manage Ms Zhao, in breach of s 50 of the Act, and r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) (under which a licensee must exercise skill, care, competence, diligence at all times when carrying out real estate agency work). The Committee found, pursuant to s 72 of the Act, that Mr Ralph had engaged in unsatisfactory conduct, in that his actions fell short of the standard that a member of the public is entitled to expect for a reasonably competent licensee, contravened provisions of the Act and Rules made under the Act and would reasonably be regarded by agents of good standing as being unacceptable.

[b] Mr Huang had failed to search and understand the title to the property he was selling, in breach of r 5. As with Mr Ralph, the Committee found that he had engaged in unsatisfactory conduct, pursuant to s 72 of the Act.

[7] In a decision dated 31 May 2018, Mr Ralph was ordered to pay a fine of \$2,500. Mr Huang was censured and ordered to pay a fine of \$3,500.

The appeal

[8] The grounds of appeal, relating to Mr Ralph and Mr Huang, were set out in the Notice of Appeal:

Mr Ralph

7 The Committee erred in finding that possible difficulty in subdivision of a property, in the circumstances of this case, was a potential problem which Mr Ralph should have identified.

8 Mr Ralph neither made nor endorsed any positive representation as to subdivision potential of the property, and he was not (nor would he reasonably have been expected to have been) privy to any alleged discussion between licensee and [Ms Yu] concerning this issue.

9 The level of supervision by Mr Ralph was appropriate and tailored to the circumstances.

Mr Huang

10 The Committee made an error of fact in finding that Mr Huang failed to understand the title. Mr Huang was not obliged to personally search the title, and this task was appropriately delegated to administrative staff.

11 Mr Huang was aware of, and understood the relevant covenant, and as a consequence the property was not marketed as being potentially subdivisible.

[9] The Notice of Appeal states further that there is no other basis for a finding of unsatisfactory conduct against the appellants, and that the appellants also appeal the findings on penalty.

Application to adduce evidence

[10] On 13 September 2018 counsel for Mr Ralph and Mr Huang, Mr Rea, filed and served affidavits by Mr Ralph and Mr Huang, with a request that the Authority consider whether their evidence might be admitted on the appeal by consent. In a response memorandum dated 1 October 2018, counsel for the Authority, Mr Mortimer, set out its position as to the application, and suggested that Mr Ralph and Mr Huang consider whether they wished to continue with their application. In a memorandum also dated 1 October 2018, Mr Rea advised that they wished to proceed with their application to adduce the affidavit evidence at the hearing of their appeal by the Tribunal.

[11] In their affidavits Mr Ralph and Mr Huang set out their responses to findings by the Committee that:

[a] (In the case of Mr Ralph), he appeared to have had no knowledge of or involvement in the transaction prior to its execution, and had failed to identify issues with the restrictive covenant and over-estimated the ability of Ms Zhao to understand the title.

[b] (In the case of Mr Huang), he failed to search and understand the title to the property.

[12] The Tribunal understands (from Mr Rea's submissions) that Mr Ralph intends to submit on appeal that issues were never put to him, contrary to natural justice: he was never asked in the course of the investigation of Ms Yu's complaint if he had read the title and covenant, or whether he understood it, and he was not asked whether he had any knowledge of, or involvement in, the transaction.

[13] The Tribunal also understands from Mr Rea's submissions that Mr Huang intends to submit that while he was asked if he had searched and understood the title, he was not asked a question following up on his response to that question.

Relevant legal principles

[14] Pursuant to s 113(3) of the Act, and as the Tribunal said in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*,¹ appeal hearings are re-hearings, and generally proceed by reference to the material that was before the Complaints Assessment Committee and the submissions made by or on behalf of the parties.

[15] However, the Tribunal may accept further evidence if it considers the evidence will assist it in determining the appeal. A party applying to submit material that was not before the Committee must identify the material sought to be submitted, explain the relevance of the material to the issues to be determined, and must establish that the material could not reasonably have been provided to the Committee.

[16] The following factors may be taken into account:²

- [a] whether the evidence was available, or could have been obtained with reasonable diligence, at the time of the Committee's consideration of the complaint;
- [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.

¹ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3.

² *Eichelbaum*, at paragraph [49].

[17] The Tribunal has procedural powers under the Act that would allow it to apply the test for admitting further evidence in a flexible way,³ but an application to admit further evidence does not give a party to an appeal the opportunity to run the case afresh simply because they wish they had conducted it differently in the first instance.⁴

Submissions

[18] The Authority acknowledges that the affidavit evidence is relevant to the issues determined by the Committee, and that it is appropriate for the evidence to be considered by a decision maker. The issue in contention is whether the evidence should be admitted and considered by the Tribunal in the course of the appeal hearing.

[19] Mr Rea submitted that Mr Ralph and Mr Huang do not seek “to run the case afresh simply because they wish they had conducted it differently in the first instance”. Rather, he submitted, they simply want to have a fair opportunity to present evidence on issues that were not put to them by the Committee (in the case of Mr Ralph), and to provide clarification of Mr Huang’s response where the Committee failed to take the simple step of making a follow up inquiry before drawing an adverse inference from his initial answer.

[20] Mr Rea submitted that it is appropriate that the Tribunal admits the affidavit evidence and hears the appeals, rather than (as submitted by Mr Mortimer) the appeals being remitted to the Committee. He submitted that it will be more efficient for the appeals to be dealt with by the Tribunal, it is in the interests of justice that this be done, and it will cause no prejudice to any party for the evidence to be adduced and the appeal determined by the Tribunal.

[21] He submitted that as well as Mr Ralph and Mr Huang, Mr Neil Baker (described in the Notice of Appeal as the “eligible officer” of the Agency) has also appealed against the Committee’s finding of unsatisfactory conduct against him, and there is no suggestion that any issue relating to Mr Baker should be remitted to the Committee. He further submitted that it would be inefficient for the appeals to be severed, resulting

³ See s 105 of the Act.

⁴ *Eichelbaum*, at paragraph [51].

in fragmentation of the proceedings and the possibility of further appeals to the Tribunal and, potentially, the High Court.

[22] For the Authority, Mr Mortimer submitted that the affidavit evidence should not be admitted and considered on the appeal. He submitted that to do so would be contrary to the established principles set out in *Eichelbaum*, and it would turn what is meant to be an appeal into – effectively – a first instance hearing. He further submitted that the Authority may wish to adduce further evidence in response to the affidavit evidence, or to cross-examine Mr Ralph and Mr Huang. He submitted that if Mr Ralph and Mr Huang want their affidavit evidence to be considered, the appropriate course is for the Tribunal to modify the Committee’s decision and remit the matter to the Committee for further consideration.

Discussion

[23] The Tribunal’s sole concern at this stage is whether leave should be given for the affidavit evidence of Mr Ralph and Mr Huang to be admitted on the appeal.

[24] There can be no doubt that the evidence could have been provided to the Committee. It is not evidence that was not available to them, or that could not reasonably have been obtained by them. The Tribunal must then ask why they did not provide it to the Committee. For both Mr Ralph and Mr Huang, the application to adduce their affidavit evidence is based on their assertions that they were not asked particular questions by the Authority’s investigator, or were not asked questions that, it is submitted, would have been a simple follow-up to his answer to one of the investigator’s questions.

[25] Mr Ralph was advised on 2 October 2017 of the Committee’s decision, pursuant to s 78(b) of the Act, to inquire into his conduct. The Authority’s letter included:

What you need to do

Can you provide a response to this complaint including (but not limited to)

1. Your response to the complaint
2. Were you aware that Licensee Zhao did not search and understand the title to [the property]? If so, what actions did you undertake? If not, why not?

3. In the event the two Licensees Zhao and Huang do not understand a title what provisions do you have in place to ensure compliance?
4. What training have you undertaken with Licensee and Licensee Huang regarding searching and understanding titles when listing and selling a property?
5. In reference to the above, and if training is provided, when did this take place and how many hours [did] this involve?
6. What supervisory provisions do you have in place to ensure training and supervision takes place and what happens?
7. What are your expectation[s] of how the Licensees you supervise should ensure that clients who are not fluent in English are made aware of all information that they are required by law or fairness to have in relation to a sale and purchase?
8. What (if any) practices do you have in place to ensure that appropriate client and customer care is exercised for parties who are not fluent in English?

Please also provide:

1. Any material relevant to the allegation, for example policy, e-mails, internal directions

[26] Mr Ralph contends that he was never asked in the course of the investigation of Ms Yu's complaint if he had read the title and covenant, or whether he understood it, and he was not asked whether he had any knowledge of, or involvement in, the transaction. Yet it is evident from the questions (in particular questions 2 and 3) that searching and understanding a title was considered by the Committee to be a central issue. The remaining questions clearly raise the issue of supervision which requires knowledge of, and involvement in, transactions being undertaken by the licensee being supervised. Further, question 1, which asks for Mr Ralph's "response to the complaint", was an invitation to him to set out any information that may assist the Committee.

[27] We noted earlier that Mr Ralph's response to the questions asked of him was submitted by his solicitors. Notwithstanding the solicitors' involvement, it was Mr Ralph's professional obligation to ensure that, in order to assist the Committee, he responded fully to the complaint and the specific matters requested of him, and included any other information about the transaction and the licensee under scrutiny in this disciplinary inquiry. If Mr Ralph now considers that his response was not as full as he would like, then the principles set out in *Eichelbaum* are against his adducing the information on appeal.

[28] Mr Huang was also advised on 2 October 2017 of the Committee's decision to inquire into his conduct. The Authority's letter included:

What you need to do

Can you provide a response to this complaint including (but not limited to)

1. Your response to the complaint.
2. Did you search and understand the title to [the property]? If so, what actions did you undertake? If not, why not?
3. Did you inform and explain the covenant to Licensee Zhao. If not, why not?
4. Did you make any reference to the covenant on the Agency file?
5. Did you tell Licensee Zhao that the property could be subdivided?
6. What training have you undertaken regarding searching and understanding titles when listing and selling a property?
7. In reference to the above, and if so, when did this take place and how many hours did it involve?
8. What supervisory provisions do you have in your place of employment?

Please also provide:

1. Any material relevant to the allegation, for example policy, e-mails, internal directions.

[29] Mr Huang's response to question 2 was to the effect that the title was searched by administrative staff and loaded onto the Agency's file for the property, and therefore available to all salespeople in the Agency to read and/or download. He did not answer the part of question 2 as to whether he understood the title.

[30] Mr Huang was asked a direct question. He was asked whether he understood the title to the property. It was his professional obligation as a licensee to answer it, and he had the opportunity to include any information about the transaction and licensee under scrutiny he considered to be appropriate to explain or expand on his answer, and to assist the Committee. Again, to allow him to do so now would be contrary to the principles set out in *Eichelbaum*.

[31] Notwithstanding the Tribunal's power to give leave for evidence to be filed on appeal, its function on appeal from decisions of Complaints Assessment Committees is, pursuant to s 111(3) of the Act, to re-hear the evidence considered by the Committee. If the affidavit evidence of Mr Ralph and Mr Huang were to be admitted, it may, in fairness, have to be put to the other parties for comment and response, before

being considered by the Tribunal.⁵ It is possible, as Mr Mortimer submitted, that the effect would be that what is meant to be an appeal is turned into a first instance hearing. We agree that such a course is not warranted where the evidence sought to be adduced is evidence that could, and should, have been put before the Committee.

[32] We turn to Mr Rea's submission that it would be more efficient, and in the interests of justice, for Mr Ralph's and Mr Huang's affidavit evidence to be admitted and the appeal heard by the Tribunal.

[33] We are not persuaded that Mr Baker's position leads to a conclusion that the affidavit evidence should be admitted and heard by the Tribunal. It is evident from the Notice of Appeal that Mr Baker's appeal is on a discrete issue: he contends that r 8.3 (as to supervision) does not apply to him, as the "eligible officer" of the Agency. That issue could be determined at a hearing which does not involve Mr Ralph and Mr Huang, or on the papers, without causing prejudice to any of the parties involved in the appeal.

[34] Nor do we accept that remitting to the Committee issues concerning its inquiry into Mr Ralph and Mr Huang would result in an undesirable fragmentation of the proceeding.

Outcome

[35] We decline the application by Mr Ralph and Mr Huang to file affidavit evidence on their appeal.

[36] It is for the parties to decide whether the appeal is to proceed without the affidavit evidence, or whether the Tribunal is to be asked to modify the Committee's decision, and remit the matter to the Committee for further consideration.

⁵ As was noted in the letters to Mr Ralph and Mr Huang, advising them of the Committee's decision to inquire into their conduct.

[37] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Mr N O'Connor
Member