

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 36

READT 13/2020

IN THE MATTER OF

Charges under s 91 of the Real Estate
Agents Act 2008

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE (CAC 1904)

AGAINST

MURRAY BRIGHT
Defendant

On the papers:

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms F Mathieson (Member)

Submissions filed by:

Ms E Mok, on behalf of the Committee
Mr Bright, Defendant

Date of Ruling:

24 August 2020

**RULING OF THE TRIBUNAL
(Cross-examination of complainant)**

Introduction

[1] Mr Bright has been charged with misconduct under s 73(a) of the Real Estate Agents Act 2008 (“the Act”), with an alternative charge of misconduct under s 73(c)(iii) of the Act (for a wilful or reckless contravention of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. The hearing is scheduled for 28/29 September 2020.

[2] The charges against Mr Bright follow a complaint being made that he behaved inappropriately towards a prospective purchaser (“the complainant”) during her viewing of a property being marketed by him. The complainant alleges that Mr Bright hugged and kissed her without her consent.

[3] Mr Bright intends to represent himself at the hearing. He has advised the Tribunal that he wishes to cross-examine the complainant on her evidence. On behalf of the Committee, Ms Mok has sought a direction that Mr Bright is not permitted to cross-examine the complainant himself.

Submissions

[4] Ms Mok referred to s 95(1) of the Evidence Act 2006 and submitted that, in the context of criminal proceedings, a defendant in a sexual case is not permitted to personally cross-examine a complainant. She submitted that although this prohibition does not strictly apply in Tribunal proceedings, the underlying policy principles do apply, as the allegations against Mr Bright are tantamount to an allegation of indecent assault, which would trigger the s 95(1) prohibition.

[5] Ms Mok also submitted that it would likely cause the complainant undue distress for her to be cross-examined by the defendant in person, given the sensitive nature of the evidence she is expected to give. She submitted that this would in turn compromise the complainant’s ability to give evidence regarding the relevant events. She submitted that the Tribunal has jurisdiction to make the ruling sought, in accordance with its ability to regulate its own procedure, as set out in s 105 of the Act, and that it is in the interests of justice to do so.

[6] Ms Mok acknowledged that Mr Bright is not obliged to retain counsel, and that the Tribunal must ensure that natural justice is dispensed. She also acknowledged that the Tribunal has no express power to appoint an amicus curiae to assist the Tribunal, and no jurisdiction to make directions for an amicus to be paid. She submitted, as alternative courses available to ensure overall fairness and to enable Mr Bright to advance his defence, and consistent with the approach under s 95 of the Evidence Act:

[a] Mr Bright could engage a lawyer to represent him in the proceeding;

[b] if Mr Bright does not want to engage a lawyer, that he formulates a list of questions to be put to the complainant, and provide these to counsel for the Committee and the Tribunal at the conclusion of the complainant's evidence in chief, which could then (subject to any objection by counsel for the Committee that is upheld by the Tribunal) be put to the complainant by the Tribunal.

[7] Ms Mok submitted that at the end of questioning, Mr Bright could be afforded an opportunity to put forward any additional questions arising out of the complainant's answers, before the complainant is re-examined.

[8] In response, Mr Bright submitted that it would be unfair and unjust not to allow him to cross-examine the complainant directly. He submitted that he knows that the alleged conduct did not occur, and cross-examination of the complainant will be the only opportunity for him to establish that. He also submitted that there was no sexual contact or sexual intent, and that this is not, therefore a sexual case, or of a sensitive nature. He submitted that he should therefore be permitted to cross-examine the complainant directly. He submitted that to require him to present a list of questions which are also provided to the Committee would allow the Committee to prepare its case knowing the questions he intends to ask.

[9] Mr Bright also submitted that he will in any event be at a disadvantage in that he is unable to attend the hearing in person. However, he submitted that that means he will not have a physical presence at the hearing, such that any perceived distress on the complainant would be reduced significantly. He also noted that the complainant

would have the protection of any questions he asked of the complainant being able to be objected to by counsel for the Committee.

[10] Mr Bright further submitted that he has suffered significant financial and personal distress as a result of the complainant's allegations and the consequences for his employment. He advised that it is not financially possible for him to engage a lawyer.

Discussion

[11] We do not accept Mr Bright's submission that requiring him to present his submissions would result in the Committee being able to prepare its case knowing the questions he intends to ask. Ms Mok's suggestion was that Mr Bright's questions be provided after the complainant has given evidence. Thus, the Committee would not know what Mr Bright's intended questions were before it opened its case and the complainant gave evidence.

[12] Section 95 of the Evidence Act 2006 provides:

95 Restrictions on cross-examination by parties in person

- (1) A defendant in a sexual case, or a defendant in or a party to criminal or civil proceedings concerning family violence or harassment, is not entitled to personally cross-examine—
 - (a) a complainant, or a party who has made allegations of family violence or harassment:
 - (b) a child (other than a complainant) who is a witness, unless the Judge gives permission:
- (2) In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge's own initiative, order that a party to the proceeding must not personally cross-examine the witness:
- (3) An order under subsection (2) may be made on 1 or more of the following grounds:
 - (a) the age and maturity of the witness:
 - (b) the physical, intellectual, psychological, or psychiatric impairment of the witness:
 - (c) the linguistic or cultural background or religious beliefs of the witness:
 - (d) the nature of the proceeding:
 - (e) the relationship of the witness to the unrepresented party:

- (f) any other grounds likely to promote the purpose of the Act.
- (4) When considering whether or not to make an order under subsection (2), the Judge must have regard to–
 - (a) the need to ensure the fairness of the proceeding and, in a criminal proceeding, that the defendant has a fair trial; and
 - (b) the need to minimise the stress on the complainant or witness; and
 - (c) any other factor that is relevant to the just determination of the proceeding.
- (5) A defendant or party to a proceeding who, under this section, is precluded from personally cross-examining a witness may have his or her questions put to the witness by–
 - (a) a lawyer engaged by the defendant; or
 - (b) if the defendant is unrepresented and fails or refuses to engage a lawyer for the purpose within a reasonable time specified by the Judge, a person appointed by the Judge for the purpose.
- (6) In respect of each such question, the Judge may–
 - (a) allow the question to be put to the witness; or
 - (b) require the question to be put to the witness in a form rephrased by the Judge; or
 - (c) refuse to allow the question to be put to the witness.

...

[13] In s 4 of the Evidence Act, “sexual case” is defined as:

- ... a criminal proceeding in which a person is charged with, or is waiting to be sentenced or otherwise dealt with for,–
- (a) an offence against any of the provisions of sections 128 to 142A or section 144A of the Crimes Act 1961 or
 - (b) any other offence against the person of a sexual nature.

[14] We note Ms Mok’s submission that s 95(1) of the Evidence Act does not apply in Tribunal proceedings, as Tribunal proceedings are not “criminal” proceedings.¹ For s 95(1) to apply, it would have to be the case that Mr Bright is either a defendant in a “sexual case”, or a defendant in or party to criminal or civil proceedings concerning family violence or harassment. Mr Bright has not been charged with a sexual case, as defined in the Evidence Act, and this is not a proceeding concerning family violence or harassment. He is charged with misconduct under s 73(a) of the Act.

¹ See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

[15] However, pursuant to s 109(4) of the Real Estate Agents Act 2008, subject to the Tribunal’s power to receive any evidence that may in its opinion assist it whether or not that evidence would be admissible in a court of law (subs (1)), its power to take evidence on oath (subs (2)), and to permit evidence to be given by a written statement verified by oath (subs 3)):

... the Evidence Act applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a court within the meaning of that Act.

[16] We therefore turn to consider whether s 95(2) of the Evidence Act applies. It provides:

In a civil or criminal proceeding, a Judge may, on the application of a witness, or a party calling a witness, or on the Judge’s own initiative, order that a party to the proceeding may not personally cross-examine the witness.

[17] In *R v Greer*, his Honour Justice MacKenzie said in the High Court in relation to s 95(2):²

The power under s 95(2) is, by its nature, a power that the Court should exercise sparingly. ... The rights of a defendant to a fair trial and to present a defence are an important consideration to weighed against the stress and trauma which a witness may suffer from giving evidence. The defendant has a legal right to represent himself, and to conduct his own defence. As counsel for the Crown submits, the fairness of the proceedings includes fairness to all parties, including a complainant. But fairness to a witness does not involve protection from cross-examination. Many witnesses suffer anxiety and stress from being required to give evidence and be cross-examined. ...

[18] Section 95(3) of the Evidence Act sets out the grounds on which an order may be made under s 95(2). Ms Mok did not refer us to any evidence as to the possible application of sub-paragraphs (a), (b), (c), or (e) of s 95(2), but we take her submission as to “the nature of the complaint”, and the “sensitive nature of the evidence she is expected to give” as being a submission that sub-paragraph (d) applies.

[19] When considering whether to make an order under s 95(2) of the Evidence Act, the Tribunal is required to have regard to the matters set out in s 95(4): the need to ensure a fair trial (sub-paragraph (a)), the need to minimise stress of the complainant or witness (sub-paragraph (b)), and “any other factor that is relevant to the just determination of the proceeding” (sub-paragraph (c)).

² *R v Greer* [2014] NZHC 358, at [20].

[20] We accept that the complainant's allegations against Mr Bright, which form the basis of the charges, are as to conduct that could (if accepted as proved) constitute indecent assault.³ It could therefore be said that the nature of the proceeding is, to some extent, "sexual". We note Mr Bright's denial of any sexual conduct or sexual intent, but it is for the Tribunal to determine whether the charges are proved. We accept that the complainant's evidence must be tested.

[21] We accept that being cross-examined can generally be said to cause stress to any witness, whatever the nature of the evidence. However, there is no evidence before us that being cross-examined by Mr Bright as to her allegations that he hugged and kissed her without her consent would cause the complainant to suffer a level of stress and trauma that would justify an order prohibiting him from cross-examining her.⁴ We also accept Mr Bright's submission that the fact that he is not able to be physically present at the hearing, and will be appearing by video-link, in itself introduces a physical distancing that can alleviate the stress that can be caused by the parties' physical presence.

[22] We are also required to take into account the need to ensure the fairness of the proceeding, and that Mr Bright has a fair hearing and can adequately present his defence, so that the Tribunal can make a just determination of the proceeding. As Mr Bright submitted, he is not in a financial position to instruct a lawyer. In the circumstances, Mr Bright's right to a fair hearing and to present an adequate defence will be jeopardised if he is not permitted to cross-examine the complainant.

[23] Having weighed Mr Bright's right to a fair trial and to present a defence against the submission that being cross-examined by Mr Bright is likely to cause undue distress for the complainant, we are not persuaded that an order prohibiting Mr Bright from cross-examining the complainant is justified. We also note, as did MacKenzie J in *Greer*, that if the way in which cross-examination is conducted leads to concerns as to stress for the complainant, that can be addressed at the hearing by the Tribunal's intervention to prevent improper questioning.

³ See the discussion of the elements of indecent assault in *R v Aylwin* [2007] NZCA 458, at [35].

⁴ We note that in *Greer*, the Court heard evidence from a clinical psychologist in support of the application for an order under s 95(2).

[24] We would add that we see little alternative to allowing Mr Bright to cross-examine the complainant. The Tribunal has no jurisdiction to pay for a lawyer to represent him for the purpose of cross-examination. Ms Mok suggested that cross-examination questions could be put by the Tribunal, but s 95(5) specifies that if a party is precluded from personally cross-examining, questions may be put by “a lawyer engaged by the defendant”, or “a person appointed by the Judge for the purpose”. It does not allow the Judge (or in this case, the Tribunal) to ask questions.

[25] Accordingly, the Tribunal will not direct that Mr Bright is not permitted to cross-examine the complainant.

[26] 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

Mr G Denley
Member

Ms F Mathieson
Member