

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 39

READT 015/20

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

DARYL ROSE SILCOCK
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1904)
First Respondent

AND

MURRAY KYLE WATSON
Second Respondent

On the papers

Tribunal:

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

Submissions filed by:

Ms Silcock, Appellant
Ms L Lim, on behalf of the Authority
Mr J Waymouth, on behalf of Mr Watson

Date of Ruling:

2 September 2020

RULING OF THE TRIBUNAL
(Application to submit further evidence on appeal)

Introduction

[1] In its decision dated 1 May 2020, Complaints Assessment Committee 1904 (“the Committee”) decided to take no further action on a complaint made by Ms Silcock against Mr Watson. Ms Silcock has appealed against that decision pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”).

[2] Ms Silcock has applied for leave to submit further evidence in relation to her appeal. The evidence she seeks to submit is a “call log” of telephone calls and text messages between herself and Mr Watson, in the period 24 – 27 July 2019, supplied by her provider, 2 Degrees. She has forwarded to the Tribunal (and the other parties) an email from 2 Degrees with the call log attached. The application is opposed by the Authority and Mr Watson.

Background

[3] Ms Silcock was the vendor of a property in Hamilton. Mr Watson (a licensed salesperson) and Ms Roslyn Coombes (a licensed agent) were marketing the property. Ms Silcock complained to the Authority about the conduct of both Mr Watson and Ms Coombes, and another licensed agent, Mr Sean Foster. In relation to Mr Watson, Ms Silcock complained that he failed to bring prospective purchasers to the property for a second viewing on the date they requested.

[4] The Committee found that there was evidence that Ms Coombes had failed to comply with an instruction to contact another licensee, but that the conduct did not reach the threshold for a finding of unsatisfactory conduct. It found that the evidence before it did not support all other complaints, and therefore decided to take no further action on them.

[5] Ms Silcock appealed against the findings in respect of both Ms Coombes and Mr Watson. She has withdrawn her appeal in respect of Ms Coombes.

Complaint against Mr Watson: evidence before the Cttee

[6] Ms Silcock said in her complaint that prospective purchasers had made an offer on the property, which she had refused, and the prospective purchasers asked to view the property a second time. She said she told Mr Watson where she had left a key, and that he could bring the prospective purchasers to the property for a second viewing, but he never did. Further, she complained that despite the prospective purchasers having asked to sign an agreement for sale and purchase, Mr Watson delayed in providing this to them, and in the meantime they became interested in another property. She said that, as a result of Mr Watson's actions, she lost the possibility of an unconditional sale to the prospective purchasers.

[7] The Committee had before it Ms Silcock's statements, a statement from Mr Watson, comprising a chronology and copies of text messages between himself and Ms Silcock, and between himself and the prospective purchasers. The Committee also had copies of communications between Ms Silcock and the Agency, in which the Agency's response to her complaint, and her replies, are set out.

Applications to submit evidence on appeal: principles

[8] Pursuant to s 111(3) of the Act, an appeal against a determination of a Complaints Assessment Committee is by way of a re-hearing of the material that was before the Committee. That is, the Tribunal considers the evidence and other material that was provided to the Committee, and hears submissions by or on behalf of the parties.

[9] However, in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*,¹ the Tribunal accepted that it may give a party to an appeal leave to submit evidence to the Tribunal that was not before the Committee, if the Tribunal considers that it is just to do so. An applicant for leave must satisfy the Tribunal that:

- [a] the evidence could not have been obtained by the party with reasonable diligence and provided to the Committee;

¹ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

- [b] the evidence is relevant to the issues to be determined on appeal;
- [c] the evidence is cogent – that is, it would have had an important influence on the outcome; and
- [d] the evidence is apparently credible.

[10] The Tribunal will also consider whether admitting the evidence would require further evidence from other parties and cross-examination.

[11] The Tribunal also accepted that material that would merely elaborate or improve upon the evidence already available in the material before the Committee is unlikely to meet the test for leave, and that its power to allow a party to submit evidence on appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.²

Submissions

[12] Ms Silcock submitted that the call log is crucial to her appeal, as it disproves claims by Mr Watson that he phoned or sent her texts on several critical occasions when, she submits, he had not done so. She submitted that it is also crucial to proving that Mr Watson's actions resulted in both his failure to discuss the prospective purchasers' offers with her, and his obstruction of their viewing of the property for weekend of 27/28 July 2019. She submitted that the Committee had chosen to believe Mr Watson against her, when they could, and should, have requested the call log to ensure that they were fully informed and acting correctly before coming to that decision. She submitted that she was not aware that she could apply to her provider herself, and thought only the Police or the Courts could do so.

[13] In her submissions in reply to the submissions for the Authority, Ms Silcock further submitted that the call log provided by 2 Degrees is cogent and material, and

² At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35]).

credible. She submitted that the call log is totally independent and cannot be contradicted.

[14] She also expanded on her submission that she was previously unaware that she could obtain the call log herself. She said that the Authority never advised her that she was able to request it. She further submitted that the call log does not elaborate or improve on evidence already produced. She submitted that it is the only evidence as to the communications between herself and Mr Watson, and is therefore the only way to prove who is lying and who is telling the truth. She submitted that it is unfair to refuse her leave to produce the call log, simply because she is not experienced enough to have known more at the time. She further said that she had lost her cellphone around the time of the sale of the property, before she moved out. The call logs did not show up when she had 2 Degrees staff transfer data when she purchased a new cellphone.

[15] Ms Silcock also submitted that “reasonable diligence” is subjective, and totally relative to experience, knowledge and capabilities. She submitted that “reasonable diligence” should not include somehow knowing something she never knew she could obtain. She submitted that she could not reasonably have obtained the call log evidence at the time of the Committee’s investigation.

[16] Ms Silcock also referred to the Authority’s submission that the burden of proof of her complaint was on her, as the complainant. She submitted that if the Authority is there to protect the public, there was an onus on it to have directed either her or Mr Watson to produce further proof or confirmation of their claims in order to reassure itself that it was making an appropriate finding. She submitted that not everyone is a lawyer or has prior experience in the complaints process, and they can only act on the extent of their knowledge. She submitted that to be penalised on a technicality for not knowing something is profoundly unfair and unjust.

[17] Ms Lim submitted for the Authority that the test for admission of evidence on appeal has not been met. She accepted that Ms Silcock was not aware that she could obtain a copy of her call logs, but submitted that the record of calls and messages was available to her through her own mobile phone, and did not require third party assistance.

[18] Ms Lim also submitted that the authenticity, and in particular the completeness of the call log submitted by Ms Silcock is not apparent on the face of the documents submitted by her. She noted that Ms Silcock had submitted a Word document, altered to include comments and other annotations by her. She submitted that the Tribunal should hesitate before determining that the document is evidence of Ms Silcock's assertion that the call log shows that Mr Watson did not make any further telephone calls to her, or send texts to her, on 27 and 28 July 2019. She further submitted that if the Tribunal were to admit the evidence, Mr Watson should be given the opportunity to provide evidence in reply.

[19] Ms Lim also submitted that whether or not Mr Watson telephoned Ms Silcock is not directly relevant to the issue of whether he deliberately refused to take the prospective purchasers for a second viewing of the property. She noted that Ms Silcock's initial complaint was that Mr Watson cancelled a property viewing with the prospective purchasers. She noted that Mr Watson's correspondence with the prospective purchasers is available in the Bundle of Documents, along with correspondence between Mr Watson and Ms Silcock. On that basis, she submitted that the call log would not have had an important influence on the outcome of the complaint.

[20] Ms Lim further submitted that it was for Ms Silcock to prove her case and provide evidence in support of it, in order for the Committee to be satisfied on the balance of probabilities. She also submitted that, in any event, a call log will only ever be determinative of a call that connected, and in this case, the parties are agreed that Mr Watson did not speak with Ms Silcock by telephone, and that no call connection was made. For that reason, she submitted, the call log has little relevance to the issues before the Committee.

[21] On behalf of Mr Watson, Mr Waymouth advised the Tribunal that he fully agreed with and supported the submissions for the Authority, and would not be filing submissions on the application.

Discussion

[22] Ms Lim correctly submitted that the call log included with Ms Silcock's application did not appear to be a copy of an original call log supplied by 2 Degrees, and contained comments and annotations. Ms Silcock subsequently forwarded to the Tribunal and counsel for the Authority and Mr Watson the email she had received from 2 Degrees, with the call log attached to it. It appears to be a record of text messages and voice calls between Ms Silcock's cellphone and Mr Watson's cellphone over the period from 23 July 2019 and 4 August 2019. The first record is of a voice call at 7.42 pm on 24 July, and the last record is of a text message at 7.24 pm on 27 July. We accept that the document appears to be authentic.

[23] The call log is only a record of the fact of text messages and telephone calls between the two selected numbers over the period covered. It records three "voice" calls (one on 24 July and two on 26 July) and 15 SMS messages (four on 24 July and 11 on 27 July) during that period. It does not provide the content of either messages or calls.

[24] Evidence as to the content of the messages between Mr Watson and Ms Silcock was before the Committee, and is available to the Tribunal as screen shots of the messages, at pages 99–102 of the Bundle of Documents. We do not understand there to be any question as to the accuracy of the screen shots. There is however a dispute as to whether Mr Watson telephoned Ms Silcock at any time other than as recorded on the call log. Ms Silcock's evidence is that he did not, and she submits that the call log is cogent evidence that he did not. If the call log is accepted as corroborating Ms Silcock's evidence, then it is evidence that may have an importance influence on the outcome of the appeal.

[25] We note Ms Lim's submissions that Ms Silcock could have obtained the call log, either from 2 Degrees or from her own cellphone, and provided it to the Committee. That may be so, but we also accept Ms Silcock's submission that she was not aware that she could request it herself. In the light of the possible significance of the call log, we consider that it would be contrary to the interests of justice, and the consumer-protection purposes of the Act, to decline leave to submit the call log for that reason.

[26] We also note Ms Silcock's submissions as to her unfamiliarity with the complaints process, and the significance of the burden on her to prove her complaint. We accept that Ms Silcock is not legally represented, and is unfamiliar with the process. Not all those who make complaints are familiar with the process and understand the significance of the burden being on the complainant. It is apparent to the Tribunal that many complainants believe that if a complaint is investigated, then all relevant evidence will be obtained by the investigator.

[27] For the above reasons, we give leave for the 2 Degrees call log to be submitted as evidence in support of the appeal. We accept Ms Lim's submission that leave should be given for Ms Watson to submit evidence in response.

Outcome

[28] Leave is given for the 2 Degrees call log to be submitted on appeal. Any evidence Mr Watson wishes to file in response must be filed within ten working days of the date of this Ruling. A telephone conference is to be convened in order for further directions to be made regarding the appeal.

[29] 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 N O'Connor
Member

Ms F Mathieson
Member