BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 45

READT 029/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	PRAKASH PATEL Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1902) First respondent
AND	MARK PHILLIPS Second respondent

On the papers

Tribunal:	Mr J Doogue (Deputy Chairperson) Mr G Denley (Member) Ms C Sandelin (Member)
Submissions filed by:	Mr Patel, appellant Ms L Lim, on behalf of the Authority Mr G Dewar, on behalf of the second respondent
Date of Decision:	22 September 2020

RULING (2) OF THE TRIBUNAL
(Application to Adduce Further Evidence on Appeal)

Background

[1] Mr Patel (**the appellant**) owned a 50% share of a residential property in Lower Hutt, together with a business associate who owned the other half share. The parties became deadlocked and it was necessary to sell the property. The co-owner applied to the High Court at Wellington for partition/sale of the property with the order being made on 24 October 2017.

[2] On 16 November 2017 the High Court made an order appointing a solicitor, Mr Hoffman-Body (**the vendor**) to act as vendor on the sale of the party in a representative capacity for the two owners. In that capacity the vendor was given power to list the property for sale with an appropriate real estate agent, accept any appropriate purchase price, sign the necessary documentation, incur any necessary expenditure as part of discharging his functions, together with other incidental costs out of the sale proceeds. He was required to pay off the mortgage and take all necessary steps to carry out the order that the property be sold.

[3] The vendor obtained appraisals of the property from two estate agents and entered into a listing agreement with Mr Phillips, the second respondent, on 9 February 2018. The property was sold after an auction on 24 May 2018. On 16 February 2018 the appellant contacted the REA with his concerns that the property was being marketed without defects in it being disclosed to interested parties, with particular reference to a leak in the living room ceiling.

[4] As it happens, the vendor was aware of problems with the property and arranged for forms which were headed "Disclosure to Bidder at Auction" to be signed by each interested party attending the auction which took place on 24 May 2018. The forms included a paragraph which acknowledged that the property was being sold "as is" and further the buyers acknowledged that:

> They may have been told that there may be a leak in the upstairs bathroom from around the base of the shower that may cause a leak through the ceiling below.

[5] There was reference as well to other defects.

[6] The appellant in his complaint told the REA that the second respondent had been made aware of the leak in the living room ceiling but did not disclose it.

[7] The Committee resolved to investigate the complaint under s 79(2)(e) of the Act and having done so they conducted a hearing and gave a decision. The Committee found that the second respondent had acted on the vendor's instructions and that he had made appropriate disclosure during the marketing of the property and at the auction. They attached weight to the fact that the property was sold on an "as is, where is" basis.

[8] The appellant submits that the Committee was wrong to find that the second respondent made appropriate disclosure pursuant to the rule 10.7.[1] and further that he failed to comply with Rule 6.4 which prohibits the withholding of relevant information.

[9] The appellant has made a second application to adduce further evidence. He submits three videos as evidence, which he says show the following:

(a) Mark Phillips locking up the ground level part of the property except for during open homes;

(b) The ceiling of the ground level part of the property which shows a major leak that he says was covered up; and

(c) The cleanliness and tidiness of the premises during open homes.

[10] He also seeks to produce two additional emails but these have already been included in the evidence and the application is unnecessary so far as it relates to them.

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1 Rule 10.7 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

Principles governing exercise of discretion

[11] Appeal hearings generally proceed on the record of evidence that the Committee considered and additional evidence is not admitted at the appeal stage. The Court of Appeal in *Nottingham v Real Estate Agents Authority* confirmed the principles set out by the Tribunal in *Eichelbaum v Real Estate Agents Authority*[2] stating that on appeal, full oral hearings of the evidence are only appropriate in "exceptional circumstances"[3]. But the Tribunal may in appropriate cases exceptionally accept further evidence on appeal.

[12] 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[4]. In determining whether to grant leave, the following factors may be taken into account[5]:

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

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

(iii) Whether the evidence is apparently credible; and

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

[13] 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".[6] The Court further noted that:[7]

> …there may be cases where, in order to secure the objective or a just and effective right of appeal, the discretion to permit further evidence or

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

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

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

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

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

[7] *Foundation for Anti-Aging Research*, above n 6 at [51].

> 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.

[14] 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.[8]

Application of Principles

[15] The question of whether the material that is now sought to be placed before the Tribunal could have been available at the Committee stage requires examination of the dealings between Mr Patel and the REA who were collecting information and material relevant to the complaint. It is our view that there was more than adequate opportunity for the video that is now sought to be introduced to be referred to the Committee. The date on video is 26 April 2018. There was an email exchange between Mr Patel and the investigator about whether the video could be submitted to the Committee as part of the material it considered when dealing with the complaint. Mr Patel's position apparently is that because of the limitations on the size of electronic files that could be emailed to the Authority, he was unable to submit the videos. There was a discussion about providing the material by the alternative means of transferring it onto a USB data stick. In our view that was a sensible suggestion. We know of no reason why Mr Patel could not have transferred the videos to the investigators in Wellington by use of this means.

[16] Mr Patel says that in a telephone discussion a staff member of the Authority discouraged him from producing videos. There is no record of this conversation and there is no contemporaneous email exchange which confirms what Mr Patel says. We do not consider that Mr Patel was prohibited from sending the videos to the

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

Authority. In our view therefore, that this evidence was available and could have been submitted to the Committee in time for the hearing that it conducted. The only questions for decision are whether the second respondent made disclosure of the leak and whether that disclosure was adequate.

[17] We are not persuaded either that the video is cogent in that it is inherently persuasive of a relevant fact that is part of the complaint. The video shows marks on the ground floor ceiling. It seems that the video is intended to provide confirmation that there was a leak from the upper level of the property to the ground floor. The evidence is apparently intended to establish that the second respondent as the licensee who was engaged to market the property must have been aware of the fact that there was a leak.

[18] Even if admitted, the evidence would not have any effect on the outcome of the appeal. It is not material to a live issue that needs to be considered as part of the appeal. As we have observed, the second respondent accepts that he knew there was a leak. He says that he disclosed it to interested parties. He says that under the instructions of the vendor, he expressly circulated material to interested parties which required their acknowledgement that they understood that there were problems with leaks in the interior of the property.

[19] When considering the appeal that has been brought, the Tribunal is confined to deciding the same complaint as it was put before the Committee on the same evidence as that which was put before the Committee. The Committee summarised the complaint and the following terms:

> 1.6. The details of the complaint are that:
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> (a) The Licensee did not disclose defects in the Property to potential buyers;
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> (b) The Licensee failed to act in good faith by recommending the Complainant vacate the Property for marketing.
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> (c) The Complainant was wrongly blamed by the Agency for delaying the sale process and

settlement of the sale and, wrongly charged for cleaning costs.

[20] It may be that there was some uncertainty about the origin of the leak with the apparent sources being either from the roof or from a shower in the upper part of the building. Even if there was some uncertainty on that question the difference does not seem to us to be a relevant issue in dispute in the proceeding. The complaint that Mr Patel made was based on the broad assertion that the second respondent had failed to disclose that there were water leaks in the property. The question of whether a leak originated in the roof or from a shower was not a question that arose for decision. We do not consider therefore that the video would have an important influence on the outcome of the case.

[21] Further, we agree with the submission made by Ms Lim, counsel for the Authority:

> 5.6 The issue in this appeal is the level of the second respondent's knowledge of defects in the property and his compliance with his disclosure obligations. The Authority submits that the videos do not add to the evidential picture before the Tribunal. The bundle of documents already contains a number of photographs that the appellant submitted, as discussed above at [5.3]. The photographs show the condition of the property, while two of the photographs also appear to show the ceiling of the property.[9] It is submitted that contemporaneous evidence is available that establishes weathertightness issues in the lower ground level of the house.[10]

[22] We read that submission as also relating to the question of whether the video would have an important effect on the question that the Committee had to answer. If there was already substantial evidence covering the point before the Committee, the additional videos would not have filled a gap in the evidence or contradicted the available evidence that the Committee had before it. It is therefore not relevant on the rehearing before the Tribunal.

[23] For those reasons it is our conclusion that the video should not be presented as new evidence because:

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[9] *BOD at 585 and 586.*

[10] *Betta Inspect It report obtained by prospective purchasers: BOD at 352.*

[a] It could have been introduced prior to the Committee consideration of the case;

[b] It is not relevant or material to an issue that the Tribunal will need to consider when determining the appeal.

[24] A second part of the video evidence that is proposed to be introduced shows the appellant trying to open two doors that appear to be locked. We are unable to accept that this material has any evidential value. As counsel for the Authority noted, they seem to show only that the doors were locked at the time the appellant took the video footage.

[25] Those videos as well do not qualify to be admitted as further evidence on appeal. The application to adduce the video so far as it relates to the locked doors is also declined.

[26] 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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Mr J Doogue
Deputy Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member