BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 50

READT 017/20

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	YANG YANG Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1905) First respondent
AND	ANWEN (MARGARET) CHEN Second respondent

On the papers:

Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms C Sandelin, Member
Submissions received from:	Ms Y Yang, appellant Ms L Lim for the first respondent Mr T Rea for the second respondent
Date of Decision:	13 October 2020

RULING OF THE TRIBUNAL
[On Application to Adduce Further Evidence on Appeal]

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[1] The appellant appeals against a decision of Complaints Assessment Committee CAC 1905 ("**the Committee**") concerning a complaint which the appellant made against the second respondent. The appeal is brought against the decision of the Committee that no further action should be taken with regard to the appellant's complaint. The complaint arose out of the purchase of a residential property at 264 Whitney Street, Blockhouse Bay, Auckland in 2015. The appellant was one of the purchasers under that transaction and the second respondent was one of the licensees who was involved in marketing the property. The second respondent carried out advertising of the property. The complaint alleges that the licensee:

[a] Falsely advertised the property as having 5 bedrooms when it has 4 bedrooms and a study.

[b] Falsely advertised the property as having 2 bathrooms when only 1 bathroom was consented.

[c] Concealed the fact that the property had an unconsented bathroom.

[d] Only provided a "partial title without the drafts".

[2] The second respondent did not dispute that she had advertised the property as having 5 bedrooms and 2.5 bathrooms. The appellant says that in May 2019 when she and her co-owner listed the property for on-sale themselves, the licensees from another real estate agency who they engaged discovered from viewing the Council property file that the fifth bedroom in the property was consented as a study and not a bedroom and that there was no consent recorded for the second bathroom.

[3] The appellant also says that the agents they had engaged to sell the property in 2019 obtained the council property file and provided a copy of it to the appellants. The appellants say when they were the purchasers in 2015, the second respondent failed to do this and that, as a result, the second respondent only "provided them with a partial title without the drafts".

[4] The appellant said as well that as part of selling the property they had to first obtain a Certificate of Acceptance (COA) from the Council for the second bathroom. The appellant claims that because of misrepresentations which the licensee made she and her co-owner incurred the expense of obtaining the COA and lost money on their sale of the property.

[5] The second respondent said that when she listed the property for sale in 2015 the vendor was asked about whether there were unconsented works which they knew about and the vendor said no and initialled the agency agreement confirming the same. She said that when she inspected the property the disputed study/bedroom was presented as a single bedroom and that because of the size, layout, window and ventilation she formed the understanding that it was a bedroom and she had no reason to suppose that it was not a bedroom.

[6] The second respondent said that having regard to the manner of presentation of the property at the time of listing and from the Land Information Memorandum (LIM) there was nothing that alerted her to the fact that unconsented work in the construction of one of the bathrooms had been carried out on the property. She did not go further and obtain the Property File from the Council because there were no "red flags" that would indicate that this was necessary.

[7] She says that since receiving the complaint against her she had researched the "study and bedroom" issue and says there are no bylaws which prevent a vendor from using a room as a bedroom so long as it meets certain criteria.

[8] As to the Certificate of Title which she gave to the appellant being incomplete she says that a copy of the certificate which consisted of two pages was available to all licensees.

[9] In coming to its decision that it would not take any further action on the complaint, the Committee considered whether there had been breaches by the licensee of relevant duties. These were to exercise skill, care, competence and diligence in relation to the property and a duty not to mislead the complainant or to misrepresent the property in regard to the fifth bedroom/study and the second

bathroom. They referenced Rules 5.1, 6.4 and 10.7 in their decision. In regard to the number of bedrooms and bathrooms at the property, the Committee found that the licensee had not falsely advertised the number of bedrooms at the property and was satisfied that there were no "red flags" to indicate to the licensee that there was a need for further investigation as to the status of the fifth bedroom at the property. The Committee said there was no evidence that the room which was referred to as the "study/bedroom" could not be used as a bedroom. Further the Committee expressed its satisfaction that on the basis of the evidence including photographic evidence there were no "red flags" to indicate the licensee should have made further investigation as to whether all of the bathrooms at the property were consented. They further found that the licensee did not falsely advertise the number of bathrooms at the property. The Committee did not accept the allegation of the complainants that the licensee concealed the fact that the bathroom was "illegal". They accepted that the licensee did not know that the bathroom was unconsented and further that another agent who was involved in the sale of the property with the second respondent said he did not think the licensee was aware of anything illegal because there was nothing noted in the system.

[10] In relation to the complaint that the licensee did not provide a full copy of the title the Committee expressed some uncertainty as to whether the complainants' complaint was that they did not receive a full copy of the title search or that they did not receive the Council Property File. They considered it was more likely than not that the appellant's complaint was that the licensee had failed to provide the complainants with the floor plans for the property – rather than the Certificate of Title. The Committee did not accept that the licensee was required to provide prospective purchasers with a Council property file for every transaction – at least in the absence of any "red flags".

[11] The appellant filed an appeal against the conclusions of the Committee. They now seek leave to produce at the hearing of the appeal new evidence that was not before the Committee. The documents sought to be produced are communications between the appellant and people who assisted her in a professional capacity in the process of obtaining a Certificate of Acceptance in respect of certain unpermitted work.

[12] The application is opposed by the first respondent and the second respondent abides the decision of the Tribunal.

Legal Principles

[13] In its decision in *Wheeler v REA*[1] the Tribunal stated the legal principles governing the discretion to admit further evidence on appeal as follows:

(a) Appeal hearings will generally proceed on the record of evidence that was before the Committee and submissions of the parties, without any new evidence. The Court of Appeal in *Nottingham v Real Estate Agents Authority* affirmed the principles set out by the Tribunal in *Eichelbaum v Real Estate Agents Authority*, holding that full oral hearings are only appropriate in "exceptional circumstances". The Tribunal may accept further evidence on appeal if justified.

(b) 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.[2] In determining whether to grant leave, the following factors may be taken into account:[3]

(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.

(c) 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".[4] The Court further noted that:[5]

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

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1 [2020] NZREADT 33

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

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

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

5 *Foundation for Anti-Aging Research*, above n 7 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.

(d) 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.[6]

Assessment of appellant's application to adduce further evidence on appeal

[14] The application is to adduce evidence consisting of correspondence between 20 May 2019 and 19 July 2019 which related to the appellant's endeavours to obtain a Certificate of Acceptance in regard to one of the bathrooms in the property. It includes text messages with trades people and consultants to advance the application for a Certificate of Acceptance.

Is the evidence material?

[15] The substance of the complaint which the appellant brings so far as it relates to the bathroom is that the second respondent either knew that the bathroom was unconsented, or that she was alerted to the possibility of an unconsented bathroom and ought to have taken steps to verify the actual position. However, the appellant says that the vendor did not disclose to the second respondent that the bathroom was unconsented. Nor did the lack of consent appear from the LIM document which the second respondent obtained and which she supplied to the appellant. It may be the case that had she taken the further step dof obtaining the Council Property File (which would have included floor plans) it would have become apparent that no consent had been obtained for the relevant bathroom.

[16] In order for the second respondent to be liable it would need to be demonstrated that her lack of knowledge about the uncontested bathroom resulted

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

from her carelessness or failure to make proper enquiries or from a conscious decision to mislead purchasers about the consent status of the bathroom. The fact that the bathroom turned out not to have been consent is not material to proving the issue that the second respondent knew or ought to have known that it was unconsented or that she was alerted to the possibility of an uncontested bathroom. That is, the fact that the bathroom turned out to have been unconsented is not proof that the licensee knew that to be the case.

[17] The appellant in order to obtain leave to adduce the evidence would need to show that the lack of consent was a material fact in the case. They could only do so if they could show that the very fact that the bathroom lacked consent demonstrates lack of care and dishonesty etc on the part of the second respondent. However, as the second respondent has pointed out, the process of obtaining consent did not involve physical work being needed. Rather, it was a matter of retrospectively obtaining confirmation from the Council that the bathroom complied with the various regulatory requirements and for the Council's records to be updated in conformity with the approval so obtained. Therefore, the fact that there was no consent for the bathroom would not have been reflected in the apparent physical state of the bathroom as the second respondent would have observed it.

[18] That being so, the undisputed fact that the appellant had to engage a draftsperson and consultants to obtain council consent for the bathroom, is not material to the issue of whether the second respondent ought to have been aware that the bathroom was unconsented.

[19] For these various reasons, the documents not having any relevance to a material issue in the case should not be admitted.

[20] A further possible ground for admitting the evidence so far as relates to obtaining the COC is that the appellant is seeking compensation for the costs of doing so. However, the fact that the appellant incurred expense in this process is not in dispute and there is already evidence which establishes that fact.[7]

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[7] BoD 79 onward.

[21] Finally, the proposed material cannot be categorised as documents which could not have been obtained with reasonable diligence for the Committee hearing. In that regard, the evidence of obtaining the COA and the expense incidental to that process was available at the time the original complaint was made and there has been no ground put forward which explains why the appellant did not bring the contested documents forward at that stage.

[22] For all of these reasons, the application to adduce further evidence is declined.

[23] 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