

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 01

READT 026/20

IN THE MATTER OF

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

BETWEEN

SARAH WALKER
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1907)
First Respondent

AND

BENJAMIN HICKSON
Second Respondent

On the papers

Tribunal:

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

Submissions filed by:

Ms Walker, Appellant
Mr R W Belcher, on behalf of the Authority
Mr J Tian, on behalf of Mr Hickson

Date of Ruling:

14 January 2021

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

Introduction

[1] On 13 September 2019, the Authority received a complaint from Mrs Walker, and Mr Paul Walker (“the appellants”)¹ against Mr Hickson, the second respondent. On 23 June 2020, Complaints Assessment Committee 1907 (“the Committee”) issued a decision in which it made a finding of unsatisfactory conduct against Mr Hickson on two elements of the complaint, and found all other elements of the complaint not proved (“the substantive decision”). On 14 September 2020, the Committee issued a decision in which it ordered Mr Hickson to pay a fine of \$1,000 (“the penalty decision”).

Background

[2] The appellants were the vendors of a property near Whakatane. In early June 2019, they listed the property with Mr Hickson, a licensed salesperson engaged at Success Realty Limited, trading as Bayleys Rotorua (“the Agency”) for sale by auction. On 26 June 2019, the appellants received a pre-auction offer from prospective purchasers, which they rejected. The prospective purchasers did not bid at the auction but purchased the property after negotiation following the auction, for the amount offered in the pre-auction offer.

[3] The appellants subsequently complained to the Authority that Mr Hickson:

- [a] failed to follow their directions as to marketing and advertising the property;
- [b] misled attendees at open homes as to their price expectations for the property;
- [c] failed to remove a clause (cl 21) from the pre-auction offer which the prospective purchasers wanted removed and the appellants requested it be removed;

¹ Although only Mrs Walker is identified as appellant in the Notice of Appeal, her correspondence and submissions clearly refer to both herself and Mr Walker.

- [d] failed to organise a meeting between themselves and the prospective purchasers to discuss a pre-auction offer;
- [e] failed to exclude light fittings from the chattels list in the agreement for sale and purchase;
- [f] sent an email to the prospective purchasers, copied to their solicitor and bank, which contained inappropriate sexist language which upset the prospective purchasers; and
- [g] failed to exercise skill, care, competence, and diligence in relation to the handling of the deposit paid by the prospective purchasers, by failing to ensure that it was paid into the bank account identified by the appellants.

[4] The Committee found the allegations set out in sub-paragraphs [a], [b], [d], and [e] were not proved. It found that while the content of Mr Hickson's email (referred to in sub-paragraph [f], above), was unprofessional, it was not established that when sending it, Mr Hickson failed to exercise skill, care, competence, and diligence. The Committee found that Mr Hickson breached r 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 by failing to remove cl 21 from the pre-auction offer (sub-paragraph [c], above), and that he failed to exercise skill, care, competence, and diligence when handling the deposit (sub-paragraph [g], above).

[5] In the penalty decision, the Committee ordered Mr Hickson to pay a fine of \$1,000.

Appeal

[6] The appellants have appealed to the Tribunal pursuant to s 111 of the Real Estate Agents Act 2008 ("the Act"). The Notice of Appeal filed by Mrs Walker refers only to the penalty decision. The appellants have not appealed against the Committee's substantive decision, and have not challenged counsel for the Authority's characterisation of the issues on appeal as being whether the Committee erred in determining that:

- [a] Mr Hickson's conduct did not affect the sale price for the property, and that a refund of commission under s 93(1)(e) of the Act was not appropriate;
- [b] as a matter of personal and general deterrence, a fine was more appropriate than ordering Mr Hickson to undergo training;
- [c] Mr Hickson's unsatisfactory conduct was in the lower range, and with a previous good record, and accepting responsibility, a fine of \$1,000 was appropriate;
- [d] it was unable to order compensation under s 110 of the Act; and
- [e] it could not refer the matter to the Tribunal under s 93(1)(ha) of the Act to consider compensation under s 110(5) of the Act, as Mr Hickson's conduct occurred before s 93(1)(ha) came into force, and that even if referral were available, the conduct did not warrant referral.

Application

[7] The appellants have applied for leave to submit evidence on appeal that was not provided to the Committee. We record that the Tribunal received two applications, filed on 2 November 2020 and 5 November 2020. The submissions filed on 5 November are more extensive than those filed on 2 November, while the application and submissions filed on 2 November annexed some emails that were not included with the documents filed on 5 November.

[8] The application is opposed by both Mr Hickson and the Authority.

[9] The evidence sought to be admitted on appeal (which we will refer to as "the further evidence") comprises (as annexed to the appellants' application and submissions filed on 5 November 2020):

- [a] an email from Mrs Walker to Mr Hickson dated 26 June 2019 at 10.05 am, headed "Jason" and identified by the appellants as "Email (a)";

- [b] three emails dated 25 June 2019: Mrs Walker to Mr Hickson at 11.30 am, Mr Hickson to Mrs Walker at 1.17 pm, Mrs Walker to Mr Hickson at 02.23 am,² headed “Feedback” and identified by the appellants as “Email (b);
- [c] three emails dated 26 June 2019: Mrs Walker to Mr Hickson at 9.06 pm, Mr Hickson to Mrs Walker at 10.02 pm, Mrs Walker to Mr Hickson at 8.03 pm, headed “Re: Jason” and identified by the appellants as “Email (c)”;
- [d] two emails dated 28 June 2019: Mr Hickson to Mrs Walker at 2.22 pm, Mrs Walker to Mr Hickson at 3.33 am, headed “Re: Second Report”, and identified by the appellants as “Email (d)”;
- [e] an email dated 14 July 2019: the purchasers to “You”³ at 9.57 pm, headed “Re: Odds and Ends” and identified by the appellants as “Purchaser Email (a)”;
- [f] an email dated 28 June 2019: Mr Hickson to the appellants at 0.14 am, headed “Fwd: 85F Mimiha Ridge, Matata, Whakatane”, attaching a copy of Mr Hickson’s email to the purchasers dated 28 June 2019 at 11.06 am, identified by the appellants as “Happy Wife Email”;
- [g] three pages of screenshots of text messages between the appellants and the purchasers, showing times between 5.49 and 6.08 pm, dated 1 August 2019, identified by the appellants as “Walker READT New Evidence”; and
- [h] one page of text messages between the appellants and the purchasers, showing times between 1.09am and 1.13 am (one showing the date 11 August 2019).

² The Tribunal understands that the appellants are now resident in France. It is assumed that apparent discrepancies in the recorded times of emails is accounted for by time differences.

³ The appellants have not stated who “you” refers to. From the content of the email, the Tribunal assumes it refers to the appellants.

[10] Some of the evidence referred to by the appellants was in fact submitted to the Committee:

[a] The emails referred to in paragraph [9][b];

[b] the email referred to in paragraph [9][d]; and

[c] the emails referred to in paragraph [9][f].

[11] To the extent that they are relevant to the issues on appeal, leave is not required for these emails to be referred to.

Legal principles as to admission of further evidence

[12] Section 111(3) of the Act provides that an appeal to the Tribunal proceeds by way of rehearing. That is, the appeal is determined by reference to the evidence that was before the Committee, and the submissions made by or on behalf of the parties to the appeal. This was confirmed by the Court of Appeal in its judgment in *Nottingham v The Real Estate Agents Authority*.⁴

[13] While the Tribunal may (pursuant to the power conferred by s 105 of the Act, to regulate its own procedures as it thinks fit) give leave for evidence to be submitted on appeal that was not before the Committee, it is well-established that the Tribunal will only do so if it is satisfied, on application, that there are proper grounds to do so. An applicant must satisfy the Tribunal that the evidence could not with reasonable diligence have put before the Committee, that it is apparently credible, and that it is cogent and material (that is, would have had an important influence on the outcome of the appeal). The Tribunal also considers whether allowing the evidence to be submitted would require further evidence from other parties and cross-examination.⁵

⁴ *Nottingham v The Real Estate Agents Authority* [2017] NZCA 1, at [81].

⁵ See *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [49] and [52]; and *Wheeler v the Real Estate Agents Authority (CAC 1901)* [2020] NZREADT 6, at [8]–[10].

[14] In its decision in *Eichelbaum*, the Tribunal agreed that the Tribunal's power to regulate its own procedures does not:⁶

... give a party to an appeal the opportunity to run their case afresh simply because they wish they had conducted it differently.

Submissions

[15] Mrs Walker submitted that the further evidence consists of copies of emails that they say are mentioned throughout the statements, and screenshots of text messages between the purchasers and themselves. She submitted that the text messages relate to the purchasers' view of Mr Hickson's behaviour and their statement of events, and contain supporting evidence that clearly shows that had Mr Hickson not alienated the purchasers, had carried out the appellants' instructions as to a face-to-face meeting, excluded the auction clause, treated the purchasers in the manner requested by the appellants, set the right price expectations, and acted professionally, the appellants would have achieved a higher price.

[16] She submitted that the appellants' reason for excluding the further evidence from the material submitted to the Committee was the personal nature of the text messages, involving a third party (the purchasers) and their personal views. She submitted that the appellants had hoped to resolve the matter without having to submit the items, but noted that they had referred to them when submitting the complaint.

[17] Mrs Walker further submitted that having read and digested Mr Hickson's statement and responses, there are a number of false statements that need to be addressed, and the false statements are pivotal and critical in determining the outcome of their claim.

[18] On behalf of Mr Hickson, Mr Tian submitted that the Tribunal should not allow the further evidence to be submitted on appeal. He submitted that as the appellants were party to all of the emails or texts sought to be admitted, they would all have been available to the appellants to provide to the Committee at the time of their complaint.

⁶ *Eichelbaum*, above n 4, at [51].

He submitted that the further evidence fails to meet the criteria for admission, as it was reasonably available to the appellants at the time they made their complaint.

[19] Mr Tian also submitted that Mrs Walker's statement that the appellants had chosen not to submit the text messages to the Committee, "because of their personal nature, involving a third party" shows that the appellants are now seeking to submit that material on appeal in order to re-argue the complaint, because they are dissatisfied with and/or disagree with the outcome of the complaint. He submitted that this is the very situation cautioned against by the Tribunal in *Eichelbaum*, in saying that leave should not be given to submit new material simply because appellants wish they had conducted their case differently in the first instance.

[20] Mr Tian further submitted that the emails are immaterial, and therefore inadmissible on appeal, as they lack any relevance to the issues on appeal. He submitted that the appeal is against the Committee's penalty orders, in particular its refusal to order a refund of commission or compensation. He submitted that the appellants seek to admit the emails in order to argue factual issues that have no bearing on the appeal issues.

[21] With respect to the text messages, he submitted that it is apparent that the appellants procured the purchaser to make the statements in the messages by effectively asking leading questions of the purchaser. He submitted that if the text messages were to be admitted, cross-examination of the purchaser would be required.

[22] Mr Belcher submitted for the Authority that the criteria set out in *Eichelbaum* for the admission of further evidence on appeal has not been met, and the appellants' application should be dismissed.

[23] Mr Belcher submitted that the appellants have accepted that all of the further evidence was available to the appellants when the complaint was before the Committee, but decided not to submit it because of the "personal nature" of the communications.

[24] He submitted that the communications between the appellants and Mr Hickson are not personal in nature, and the alleged “false statements” by Mr Hickson appear to be his response to the complaint and his submissions to the Committee. Mr Belcher submitted that evidence to contradict those statements could and should have been submitted when the matter was before the Committee. He submitted that the appellants’ application falls squarely into the category of cases in which an appellant seeks to run the case afresh in the Tribunal.

[25] Mr Belcher also submitted that the further evidence is unlikely to have an important influence on the outcome of the appeal. He submitted that the decision appealed against is the Committee’s penalty decision; the appellants have not sought to challenge the underlying findings of fact and liability made in the Committee’s substantive decision.

[26] Despite that, he submitted, the further evidence is directed towards aspects of the complaint that were not upheld by the Committee, and there is no mention in the emails and texts of the pre-auction clause or the error as to payment of the deposit, in respect of which the appellants’ complaint was upheld. Mr Belcher submitted that it does not appear, therefore, that the further evidence will assist the Tribunal to determine the issue in this appeal, which is whether the Committee erred in determining the penalty orders.

[27] Mr Belcher further submitted that despite being apparently credible, admission of the further evidence may require further evidence from the licensee and/or cross-examination. Referring particularly to the text messages, he submitted that while there is no suggestion that the messages are not authentic, they contain statements made by the purchaser, who is not a party to the appeal proceeding, and the interests of fairness to Mr Hickson may require that the purchaser should be made available for cross-examination. He submitted that this would require an oral hearing, not currently contemplated, in circumstances where it appears that the evidence is of little value.

Discussion

[28] We accept that all of the emails and text messages were available to the appellants and could have been provided to the Committee at the time of their complaint. As noted earlier in this decision, an appeal against a Committee's determination on a complaint is by way of re-hearing of the material before the Committee. An application for leave to submit further evidence must satisfy the Tribunal that the evidence could not with reasonable diligence have been provided to the Tribunal. The appellants cannot satisfy that requirement in this case.

[29] With respect to the emails, all except one (the email from the purchaser, referred to in paragraph [9][e], above) were between the appellants and Mr Hickson. We accept Mr Belcher's submission that these cannot be described as "personal in nature". We have identified emails, referred to in the appellants' application, which were before the Committee. No reason has been put forward as to why the remaining emails were not.

[30] With respect to the email from the purchaser, and the text messages, Mrs Walker submitted that the reason for not providing these to the Committee was that they were "personal nature", and the appellants had hoped to resolve the matter without having to submit them. That is not sufficient grounds for leave being given for them to be submitted on appeal. If they were considered to be relevant to, and supportive of, the complaint, they should have been provided to the Committee at the time.

[31] We also note that the appellants and Mr Hickson provided the Authority with information and emails received from the purchaser to the Authority, and the purchaser was spoken to in the course of the investigation of the complaint and was able to make comments to the investigator. Further, we note that it appears from one of the messages referred to in paragraph [9][h] that the purchaser gave the appellants permission to quote him.

[32] We have concluded that leave should not be given for the further evidence to be admitted in support of the appellants' appeal.

Outcome

[33] The appellants' application for leave to submit further evidence is dismissed.

[34] 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