

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 05

READT 030/20

IN THE MATTER OF

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

BETWEEN

RUTH CUSHLA OGILVIE
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1901)
First Respondent

AND

KEIGHLY ABEL
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Ms C Sandelin (Member)
Mr N O'Connor (Member)

Submissions filed by:

Ms Ogilvie, Appellant
Ms L Lim, on behalf of the Authority

Date of Ruling:

22 January 2021

RULING OF THE TRIBUNAL
(Application for leave to cross-examine witnesses)

Introduction

[1] Ms Ogilvie has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1901 to take no further steps on her complaint against Ms Abel.

[2] Ms Ogilvie has applied for leave to cross examine five persons who made statements to the Committee in the course of its investigation into the complaint. In subsequent correspondence to the Tribunal, Ms Ogilvie included a further person in her application. The application is opposed by the Authority. No submissions on the application were made by or on behalf of Ms Abel.

Background

[3] Ms Ogilvie listed her property in Napier (“the property” or “Ms Ogilvie’s property”) for sale with Ms Caroline Meo, a licensed salesperson engaged at Ray White Napier, in November 2018. She received a conditional offer of \$900,000 from Ms W, which was later cancelled on the basis of an unsatisfactory building report. The property was sold at auction in March 2019.

[4] Ms Abel is a licensed salesperson, engaged at New Zealand Sotheby’s International Realty, at Napier (“Sotheby’s”). In her complaint to the Authority, Ms Ogilvie said that she had been told that Ms Abel was present at the property at an open home with Ms W, and had made negative comments about the property to Ms W. She noted that Ms W had later bought a property marketed by Ms Abel.

[5] Ms Ogilvie raised her concerns with the manager of Ray White Napier, Ms Domney, in January 2019. She recorded the conversation, which was later transcribed. Ms Domney’s recorded comments included:

[Ms Abel] bagged your house to [Ms W] right in front of us, ...

[Ms Abel] who works for Sotheby’s

She came through the house with [Ms W] very early on and I wouldn’t be surprised if she fuelled the fire from the other side.

[6] Ms Ogilvie alleged that Ms Abel's comments lost her the sale to Ms W and stigmatised the property in the real estate network in Napier, leading to it achieving a much lower price at auction than its appraised value.

[7] In a decision issued on 1 May 2019, the Committee decided not to inquire into the complaint, pursuant to s 79(2)(c) of the Act. The Committee gave as its reason for this decision that the "complaint is frivolous, based as it is on gossip, and ought therefore not to be pursued". Ms Ogilvie appealed to the Tribunal against that decision.

[8] In a decision issued on 8 October 2019, the Tribunal allowed the appeal and directed the Committee to give further consideration to the complaint.¹ In the course of considering the complaint, an Authority investigator conducted interviews with Ms Abel, Mr Vaughan Wilson (licensed salesperson at Sothebys), Ms Meo, Ms Dianne Martin (licensed salesperson at Ray White), Ms Domney, Mr Max Morton (retired salesperson) with whom the property was listed when it sold at auction, and Ms W.

[9] In its decision issued on 7 October 2020, the Committee determined that there was insufficient evidence on which it could find that Ms Ogilvie's allegations were made out. It noted that Ms Abel was adamant that she had never attended at the property, and that there were statements from other witnesses confirming her evidence. The Committee referred to Ms Domney's recorded comments and said they reflected merely what she had heard in the office, and that in her interview she had said she had no first-hand knowledge.

Relevant legal principles

[10] 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.

¹ *Ogilvie v Real Estate Agents Authority (CAC 1901)* [2019] NZREADT 41.

[11] An appeal against a Committee’s decision to take no further steps, following an investigation, is a “general appeal”² and as such the Tribunal may form its own view of the evidence and may come to its own decision on the merits of the case.³ The appellant is required to establish that the Committee’s decision was wrong.

[12] It is well-established that the Tribunal will only give leave for evidence to be submitted on appeal that was not before the Committee if the Tribunal 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 been put before the Committee and that it is cogent and material (that is, would have had an important influence on the outcome).⁴

[13] The Tribunal may also give leave for witnesses to be cross-examined on the evidence they gave to the Committee, if it sees fit to do so: that is, if it is in the interests of justice to do so.⁵

Ms Ogilvie’s application and submissions

[14] Ms Ogilvie has sought leave to cross-examine Ms Abel, Mr Morton, Ms Meo, Ms Domney, and Mr Fraser Holland, the manager of Sotheby’s Napier. The grounds for the application may be summarised as follows:

Ms Abel

[15] Ms Ogilvie submits that Ms Abel visited the property and left her card when another Sotheby’s salesperson, Ms Nathan, had a listing for it 12 months before it was listed with Ray White, and that she had shown people through the property and knew it well. Ms Ogilvie also submitted that Ms Abel should identify the relationship she

² In contrast to an appeal against the exercise of a discretion.

³ See *Austin Nicholls & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 (SC).

⁴ See *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [49] and [52].

⁵ See *Eichelbaum* at [35]–[36] and *Eade v Real Estate Agents Authority (CAC 1903)* [2020] NZREADT 05, at [47].

had with Ms W, and how she used that to influence her decision to buy a property marketed by Ms Abel.

Mr Morton

[16] Ms Ogilvie submits that Mr Morton assessed the property at “high 890’s-920k” when it was listed. She asks that Mr Morton be required to re-present a correct appraisal of the property, from the historic file.

Ms Domney

[17] Ms Ogilvie submits that Ms Domney should be required to state directly which specific agent or agents made negative comments about the property, or Ms Ogilvie, or witnessed such negative comments. She submitted that if she had asked these questions when she spoke with Ms Domney, Ms Domney would have told her openly, but Ms Domney has now chosen to cover up evidence so as to not be stigmatised herself.

Mr Holland

[18] Ms Ogilvie submitted that although Mr Holland had confirmed to the Tribunal that Ms Abel had never been to the property, he must have known that Ms Abel had viewed the property at least once when it was listed by Ms Nathan. She submitted that he will have historical records of the listing with Ms Nathan, and can confirm Ms Nathan’s appraisal of the property at “850k plus”.

Ms Meo

[19] Ms Ogilvie submitted that Ms Meo could provide additional information and could describe in detail the renovations Ms Ogilvie had made to the property over the time she owned it. She also submitted that Ms Meo could also give evidence as to Sotheby’s involvement and further evidence that Ms Abel was involved by association with the Sotheby’s listing, and knew the property very well.

Submissions for the Authority

[20] Ms Lim submitted for the Authority that the Tribunal will allow oral evidence and cross-examination in cases where there is conflicting evidence, and the contradiction cannot be resolved in the absence of oral evidence and cross-examination. She submitted that this case does not meet that standard.

[21] Ms Lim submitted that Ms Abel's evidence that she did not attend the open home with Ms W is supported by statements by Ms Meo, Ms Martin, and Ms W. She submitted that Ms Ogilvie has not pointed to any additional evidence to corroborate her allegation, and has not set out any contradictory evidence she wants to put to the witnesses, and how cross-examination will assist the Tribunal beyond the evidence that is already before it.

[22] She also submitted that the cross-examination sought by Ms Ogilvie would significantly prolong the appeal hearing, to no useful end, and would have the effect of turning an appeal which should proceed on the evidence before the Committee into something resembling a full *de novo* hearing. She submitted that Ms Ogilvie has not set out grounds to justify that occurring in this case.

[23] In particular, Ms Lim submitted:

[a] Ms Ogilvie's claim that Ms Abel left a card at the property while Sotheby's had a listing for it prior to the Ray White listing is a new allegation, not raised during the investigation. Ms Lim submitted that this evidence could have been put before the Committee, and leave should not be given for it to be produced now. She further submitted that Ms Abel set out her dealings with Ms W in the course of the Committee's investigation, and it is consistent with Ms W's statements. Finally, she submitted that on the face of it this appears to be a "he said/she said" situation, other witnesses corroborated Ms Abel's account and the absence of any documentary evidence tends to support it.

- [b] The evidence sought to be adduced from Mr Morton (as to his initial appraisal) is irrelevant to the issue on appeal. She submitted that there appears to be no connection between Mr Morton and Ms Abel.
- [c] Regarding Ms Domney, Ms Lim submitted that when interviewed, Ms Domney said that she could not recall if Ms Martin had said that Ms W had told her that Ms Abel had come to a private viewing at the property, or if she had heard the information third hand and not personally. She also said that she did not see Ms Abel at the property, or hear her making comments about it. Ms Lim submitted that oral evidence from Ms Domney would not assist the Tribunal's assessment of Ms Abel's credibility. She further submitted that both Ms Martin and Ms W were interviewed and transcripts of the interviews are available to the Tribunal.
- [d] Ms Lim submitted that the proposition Ms Ogilvie seeks to put to Mr Holland related to a statement made by him at the previous Tribunal hearing, where he appeared as Ms Abel's authorised representative. Ms Lim submitted that any assertion by Mr Holland could only have been based on information provided by Ms Abel, and would therefore be hearsay. She further submitted that any "historical records" of the listing with Ms Nathan cannot have any relevance to the issue on appeal.
- [e] Ms Lim submitted that Ms Meo's evidence was that Ms Abel never attended an open home at the property, and that she never saw Ms W and Ms Abel together at the property. She submitted that Ms Ogilvie has not explained how information regarding improvements to the property is relevant to the issue on appeal, nor has she referred to any contradictory evidence that she wants to put to Ms Meo, or how evidence from cross-examination would assist the Tribunal beyond what is already contained in the transcript of Ms Meo's interview which was before the Committee. She submitted that Ms Meo's evidence is consistent with that of Ms Abel, and in the absence of any contradictory evidence, cross-examination of Ms Meo is not required in the interests of justice.

Discussion

[24] The issue for determination on appeal is whether the Committee was wrong to find that Ms Ogilvie had not proved her complaint that Ms Abel came to the property with Ms W and made negative comments about it, leading to her losing the sale to Ms W, and the property being stigmatised. The interviews conducted by the Authority's investigator focussed on that issue. Interviews were conducted of Ms Abel and her colleague Mr Wilson of Sothebys, and Ms Meo, Ms Martin, and Ms Domney of Ray White. Ms W was also interviewed. Transcripts of the interviews are before the Committee, and have been provided to the Tribunal.

[25] The Tribunal is not persuaded that cross-examination of any of Ms Abel, Mr Wilson, Ms Meo, Ms Martin, and Ms Domney will assist it in deciding whether Ms Ogilvie has satisfied it that the Committee's decision was wrong. Ms Ogilvie has not outlined any contrary evidence she wishes to put to them. To the extent that there is inconsistency between any of the witnesses' evidence, we are not persuaded that cross-examination would assist in resolving it. The Tribunal is aware of an apparent inconsistency between the statement made by Ms Domney in the course of a discussion with Ms Ogilvie and her statements to the investigator. However, we are not persuaded that cross-examination would assist in resolving that inconsistency.

[26] With respect to Mr Holland, we accept Ms Lim's submission that the statement Ms Ogilvie referred to (that Ms Abel had never been to Ms Ogilvie's property) was made by him at the previous appeal hearing before the Tribunal, in his capacity as Ms Abel's authorised representative. We accept that any assertion by Mr Holland could only be based on information given to him by Ms Abel, and would therefore be hearsay and of little probative value. We also accept that "historical records" as to the listing of Ms Ogilvie's property by Sotheby's cannot have any relevance to the issue of whether Ms Abel visited the property with Ms W while it was listed by Ms Meo of Ray White and made negative comments about it.

[27] With respect to Mr Morton, we note that he, too, was interviewed by the investigator, and a transcript of the interview was provided to the Committee and is available to the Tribunal. We accept Ms Lim's submission that the evidence Ms

Ogilvie seeks from Mr Morton as to a “correct appraisal of my property and in writing from historic file” has no relevance to the issue of whether Ms Abel visited the property with Ms W when it was listed with Ray White and made negative comments about it.

[28] Further, we accept Ms Lim’s submission that the cross-examination sought by Ms Ogilvie would unnecessarily prolong the appeal hearing, to no useful purpose.

Outcome

[29] Ms Ogilvie’s application is dismissed.

[30] In the Tribunal’s Minute of 22 October 2020, a possible hearing date (one day) during the weeks beginning 15 or 22 February 2021 was mentioned. Those dates were suggested before Ms Ogilvie indicated her intention to apply for leave to cross-examine witnesses. The Case Manager will now make enquiries as to the availability of a courtroom at a later date – likely to be in March 2021. The parties are requested to advise the Case Manager of any unavailability during that period.

[31] 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

Ms C Sandelin
Member

Mr N O’Connor
Member