

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 11

IN THE MATTER OF

Appeals under s 111 of the Real Estate
Agents Act 2008

READT 025/2020

BETWEEN

STEPHEN GEORGE WILLIAM BEATH
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 409)
First Respondent

AND

MIKE PERO REAL ESTATE LTD
Second Respondent

READT 033/2020

BETWEEN

STEPHEN GEORGE WILLIAM BEATH
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 409)
First Respondent

AND

WAYNE KEMP and MARINA SCOBLE
Second Respondents

On the papers

Tribunal:

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

Submissions filed by:

Mr S Beath, Appellant
Ms L Lim, on behalf of the Authority
Ms A Darroch, on behalf of Mike Pero Real
Estate, Mr Kemp, and Ms Scoble

Date of Ruling:

22 March 2021

RULING (2) OF THE TRIBUNAL
(Appellant's application to submit further evidence)

Introduction

[1] Mr Beath has applied for leave to submit further evidence in support of his appeals against two decisions of Complaints Assessment Committee 409 (“the Committee”) both dated 21 August 2020, and a further decision of the Committee dated 24 November 2020.

Background to the current appeals

[2] Mr Kemp and Ms Scoble (“the licensees”) are licensed salespersons, engaged by Mike Pero Real Estate (“the Agency”). The licensees marketed a property in Mount Victoria, Wellington, in 2012 (“the 2012 sale”), at which time they were engaged at a different agency. The property was bought by the trustees of a trust. The licensees later marketed the property in March 2015 on behalf of the trustees, at which time a conditional sale agreement was entered into, but did not proceed (“the March 2015 transaction”). The licensees continued to market the property and it was bought by Mr Beath in June 2015.

[3] In December 2015, Mr Beath complained to the Authority about the conduct of the Agency and the licensees, in relation to their marketing of the property.

[4] The Committee investigated the complaint (“the Committee’s first investigation”). In a decision dated 3 October 2017, the Committee found the licensees guilty of unsatisfactory conduct, for failing to disclose to Mr Beath that a party wall between the property and a neighbouring property was at risk of collapsing in an earthquake. The Committee determined to take no further action on complaints that the licensees failed to disclose issues concerning “Dux Quest” plumbing at the property, asbestos in the roof, and a leak in the roof. The Committee found the Agency guilty of unsatisfactory conduct for failing to properly supervise the licensees, and determined to take no further action on Mr Beath’s complaint that the Agency was obstructive when responding to the complaint.

[5] Mr Beath appealed to the Tribunal in respect of the Committee’s determinations in respect of the licensees. He did not appeal against the determinations in respect of

the Agency. In a decision issued on 31 August 2018, the Tribunal allowed the appeal and referred the matter back to the Committee for further investigation and consideration.¹

[6] The Committee investigated the complaint further (“the Committee’s second investigation”). In a decision dated 26 November 2019, the Committee determined to take no further action on what it described as a new complaint made by Mr Beath against the Agency during the Committee’s reconsideration directed by the Tribunal, that it colluded in the licensees’ non-disclosure relating to the party wall. Mr Beath appealed to the Tribunal against this decision.

[7] In a decision dated 11 February 2020, the Committee determined to lay charges of misconduct against each of the licensees, relating to the non-disclosure of the risk of the party wall collapsing in an earthquake. The charges have been heard by the Tribunal and findings of misconduct have been made against both licensees.²

[8] In a decision issued on 20 April 2020, the Tribunal allowed Mr Beath’s appeal against the Committee’s decision of 26 November 2019, by consent, and referred the matter back to the Committee for reconsideration.³

[9] In a decision dated 21 August 2020, the Committee determined to take no further action on Mr Beath’s complaints that the Agency colluded with the licensees, misled him in relation to the existence of an engineer’s report on the property, deliberately withheld key evidence from him, and had constantly been evasive and misleading (“the collusion issue”). Mr Beath has appealed to the Tribunal against that decision.

[10] In a second decision dated 21 August 2020, the Committee found the licensees guilty of unsatisfactory conduct in relation to their failure to disclose to Mr Beath that the property had “Dux Quest” plumbing (“the Dux Quest disclosure issue”), and to take no further action on Mr Beath’s complaints that they failed to disclose the presence of asbestos in the roof of the property or that the roof leaked (“the roof disclosure issues”). Mr Beath has appealed to the Tribunal against that decision.

¹ *Beath v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 45.

² *Complaints Assessment Committee 409 v Kemp & Scoble* [2021] NZREADT 4.

³ *Beath v Real Estate Agents Authority (CAC 409)* [2020] NZREADT 16.

[11] In a decision dated 24 November 2020, the Committee made penalty orders against the licensees. Mr Beath has appealed to the Tribunal against that decision.

The Tribunal's power to admit further evidence

[12] Section 111 of the Real Estate Agents Act 2008 ("the Act") provides that an appeal is by way of re-hearing. That is, the appeal is a reconsideration by the Tribunal of the evidence and other material that was provided to the Committee. The appeal is determined by reference to that material, the Committee's decision or decisions, and submissions made by or on behalf of the parties to the appeal.

[13] Pursuant to s 105(1) of the Act, the Tribunal may regulate its procedures as it sees fit. The Tribunal may, on application, give leave for witnesses to be cross-examined and for evidence to be submitted to the Tribunal that was not provided to the Committee, if it considers it to be in the interests of justice to do so.

[14] An applicant for leave to submit evidence must set out the evidence to be submitted and satisfy the Tribunal that it is apparently credible, could not with reasonable diligence have been provided to the Committee, and is cogent and material to the issues on appeal (that is, would have had an important influence on the outcome of the appeal). The Tribunal may also consider whether allowing the evidence to be submitted will require further evidence from other parties and cross-examination.⁴

[15] We accept that the Tribunal's discretion to allow further evidence to be submitted is limited, and that the Tribunal should not be drawn away from the material that was before the Committee unless the interests of justice require it.⁵

Submissions

[16] Mr Beath's application referred to the following:

⁴ See the Tribunal's decision in *Eichelbaum v Real Estate Agents Authority* (CAC 303) [2016] NZREADT 3 (affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

⁵ See *Nottingham*, at [81].

- [a] Emails dated 4 and 6 March 2019 (which refer to emails and documents relating to the March 2015 transaction);
- [b] Cross-claim documents in a High Court civil proceeding brought by Mr Beath against the vendors of the property, the Agency, and the licensees (“the cross-claim documents”);
- [c] Emails between the Agency’s Administrator and the licensees (if any) (“the Administrator’s emails”);
- [d] Oral evidence to be given by a solicitor acting for the Agency and the licensees (Mr Napier);
- [e] Oral evidence to be given by one of the vendors of the property (Ms Dinh); and
- [f] An emailed statement by Ms Amy Washbourn (co-purchaser of the property with Mr Beath and originally a co-complainant) to an Authority investigator, Mr Radovich.

[17] We record that the emails referred to in sub-paragraph [a], above, were before the Committee, and are included in the bundle of material provided to the Tribunal. The Tribunal’s leave is not required for Mr Beath to refer to them and to make submissions in relation to them. There is no need to refer to the emails further in this Ruling.

[18] We also record that the emailed statement referred to in sub-paragraph [f] should have been referred to the Committee. We accept Ms Lim’s submission for the Authority that the appellant’s application to submit Ms Washbourn’s emailed statement should be granted. We reject Mr Darroch’s submission that it is sufficient that the email was sent directly to the investigator and taken into account in the investigation, and the issues raised were considered by the Committee. As a document put forward in an investigation, it should have been provided to the Committee, and it should be included in the material before the Tribunal.

The cross-claim documents

Submissions

[19] Mr Beath submitted that the cross-claim documents are relevant to his appeal on the collusion issue, and they show that the Agency and the licensees were working together, running different versions of events: one for the High Court and one for the Committee. He submitted that the Agency was clearly aware and involved in both proceedings, yet failed to notify the Committee that it was aware of “an email” (this appears to be a reference to an email of 1 April 2015, from the licensees to the vendors as to the party wall) which, he submitted, “undoubtedly evidenced” their knowledge of the property defects.

[20] On behalf of the Agency and the licensees, Mr Darroch submitted that the cross-claim documents are protected to a limited extent because they were created and filed within the context of the High Court proceeding. He also submitted that they are neither relevant nor fresh. He submitted that they are of marginal assistance, at best, as they represent the untested position taken by different defendants in the High Court proceeding and do not provide information as to the relationship between the Agency and licensees. He further submitted that the documents were available well prior to the Committee’s decision, and Mr Beath has not set out any grounds as to why they were not provided earlier.

[21] Ms Lim submitted that on the face of the cross-claim documents, which were filed in the High Court proceeding in April and July 2018, they could have been obtained by Mr Beath with reasonable diligence and provided to the Committee before it issued its decision not to inquire in November 2018. She further submitted that they do not appear to be relevant to any of the issues on appeal, as neither document provides any further evidence in relation to either the collusion issue, or the issue as to Dux Quest/asbestos disclosure issue.

Discussion

[22] We accept that had Mr Beath considered that the cross-claim documents were relevant to the Committee's determination of his complaint, he could have raised them with the Authority's investigator during the Committee's second investigation of his complaint, directed in the Tribunal's decision issued on 31 August 2018. We have seen no evidence that he did so, and Mr Beath has not made any submissions as to why he should now be given leave to submit the cross-claim documents.

[23] We also accept that, in any event, the cross-claim documents do not provide any evidence in relation to either the collusion issue or the Dux Quest and roof issues. As Mr Darroch submitted, they consist of untested allegations made against each other by defendants in the High Court proceeding.

The Administrator's emails

[24] Mr Beath submitted that the Administrator's emails are relevant to his appeal on the collusion issue. He submitted that the Committee accepted the Agency's assertion that emails had been deleted because the Administrator had left the Agency. He submitted that the Authority's investigator failed to ask the licensees to forward emails from their "in" and "sent" boxes. He submitted that these emails should now be provided, and there is no good reason why they have not been provided.

[25] Mr Darroch submitted that relevant emails held by the Agency and the licensees were provided as part of the Authority's investigation, and Mr Beath has had the benefit of the additional check provided by all parties having provided affidavits of documents in the High Court proceeding. He submitted that Mr Beath appears to believe that further emails exist, but has not provided any grounds for this belief, or any factual basis for it. He submitted that the type of order sought is inappropriate.

[26] Ms Lim submitted that Mr Beath suggests that there may be further emails that the Authority's investigator failed to obtain, but has not suggested what these emails may contain, nor how they may support any error in the Committee's decision. Referring to Mr Darroch's submission that relevant emails held by the Agency and the

licensees have been provided, and that discovery has been given in the High Court proceeding, she submitted that there do not appear to be any further emails to obtain.

Discussion

[27] We accept that Mr Beath has not set out the basis for his belief that emails exist that have not been disclosed, or what he believes was the content of any such emails. Accordingly, there are no grounds on which the Tribunal could accept that there are such emails, and he has not made a case for the Tribunal to direct the Agency to produce such emails.

Requests for orders requiring evidence to be given

Submissions

[28] Mr Beath submitted that the licensees and the Agency had on multiple occasions refused to release the 1 April 2015 email to the Tribunal. He submitted that as the licensees and the Agency seem not to be able to remember why it was withheld, evidence should be obtained from Mr Napier (who appeared for the Agency and the licensees at an earlier Tribunal hearing).

[29] He also submitted that the vendor, Ms Dinh, is a key witness, whose evidence is relevant to the disclosure issues. He submitted that she had refused to cooperate with the Committee's investigation, and should be compelled to give evidence. He submitted that there would be an injustice to the entire process if she were not required to give evidence.

[30] Mr Darroch submitted that it would be highly unusual to require a lawyer to give evidence as to their earlier representation, and such evidence is likely to be protected by legal professional privilege. He also submitted that Mr Napier's evidence is unlikely to be directly relevant, or of assistance to the Tribunal, even if the issue of privilege could be dealt with.

[31] With respect to Ms Dinh, Mr Darroch submitted that any potential benefit of evidence provided by her is likely to be limited, as there is already a large volume of

evidence available through the Committee's two investigations, and contemporaneous documents and interviews. He further submitted that obtaining this type of evidence from Ms Dinh would move the appeal hearing some distance away from the material considered by the Committee, contrary to its re-hearing jurisdiction under s 111(3) of the Act.

[32] Ms Lim submitted that in the absence of a clear explanation from Mr Beath as to the evidence that questioning Mr Napier and Ms Dinh would elicit, requiring them to be present to give oral evidence would unnecessarily prolong the proceeding.

[33] With respect to Mr Napier, she also submitted that any evidence from him in relation to his involvement in this proceeding would be subject to legal privilege and is therefore not available for the purposes of his appeal.

[34] Regarding Ms Dinh, Ms Lim further submitted that the Committee's finding in relation to the Dux Quest disclosure issue was that the licensees ought to have been aware of it as a result of the cancellation of the March 2015 transaction. She submitted that the bundle of documents before the Tribunal already contains documentary evidence of Ms Dinh's purchase of the property, the March 2015 transaction, and the subsequent sale to Mr Beath, and any further evidence from her would not have had an important influence on the outcome of the proceeding.

Discussion

[35] Pursuant to s 85 of the Act, the Committee has a limited power to "require any person to produce to the Committee any papers, documents, records, or things". It is not an express power to require a person to provide information in the form of oral evidence. Pursuant to s 104 and cl 6 of Schedule 1 to the Act, the Tribunal has the power to issue a summons to require a person to attend before the Tribunal and give evidence.

[36] We accept that as Mr Napier's dealings in relation to Mr Beath's complaint and the High Court proceedings were in his capacity as counsel for the Agency and/or the

licensees, any evidence he could give would be subject to legal professional privilege, and not available for the purposes of the appeal.

[37] We also accept that there was documentary evidence before the Committee as to Ms Dinh's purchase of the property (as a co-trustee of a trust), listing the property for sale with the licensees, the later conditional March 2015 transaction (which was cancelled) and the sale to Mr Beath. The documentary evidence contains email exchanges between Ms Dinh and the licensees.

[38] We record that the previous owner of the property, and the prospective purchasers from the March 2015 transaction were interviewed during the Committee's first investigation, and answered questions regarding the property and their dealings with the licensees. However, Ms Dinh refused to provide any information to the investigation and referred the Authority's investigator to her solicitor, and the solicitor did not reply to correspondence from the investigator. While the Committee had email communications between Ms Dinh and the licensees, they did not have evidence from her as to any oral communications.

[39] Mr Beath did not point to anything in the email communications between Ms Dinh and the licensees which suggests that there was any oral discussion that is relevant to the Dux Quest and roof disclosure issues. His submission that she is "the only one that can provide a better picture as to what happened in 2012 as well as 2015 in relation to the pattern of non-disclosure" is not a sufficient basis on which the Tribunal could find that she should be required to attend and give evidence.

[40] We also accept that requiring Ms Dinh to be present for oral evidence and cross-examination is likely to require other witnesses to give evidence and be cross-examined, and is thus likely to prolong the proceeding unnecessarily.

Outcome

[41] Leave is given for the emailed statement of Ms Washbourn to be submitted to the Tribunal (see paragraph [16](f) above).

[42] Leave is declined in respect of the cross-claim documents (see paragraph [16](b)) the Administrator's emails (see paragraph [16](c)) and Mr Beath's requests that Mr Napier and Ms Dinh be required to attend to give evidence (see paragraph [16](d) and (e)).

[43] Leave is not necessary to refer to the emails referred to in paragraph [16](a).

[44] 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