

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2022] NZREADT 10

Reference No: READT 037/2021

**IN THE MATTER OF**

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

**BETWEEN**

**HD**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2102)**  
First Respondent

**AND**

**LD**  
Second Respondent

Tribunal:

D J Plunkett (Chair)  
G Denley (Member)  
F Mathieson (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	E Bergin
Counsel for the second respondent:	S Lucas, S Harris

**SUBJECT TO NON-PUBLICATION ORDER**

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**RULING OF THE TRIBUNAL**  
**(Applications for new evidence and oral hearing)**  
**Dated 18 May 2022**

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## INTRODUCTION

[1] HD (the purchaser) has filed an appeal under s 111 of the Real Estate Agents Act 2008 (the Act) against the determination of Complaints Assessment Committee 2102 (the Committee) dated 6 December 2021 to take no further action on his complaint against LD (the licensee).

[2] Both the purchaser and the licensee have applied to adduce new evidence that was not before the Committee, and to have an oral hearing.

## BACKGROUND

[3] The licensee is a licensed salesperson and at the relevant time he was engaged by [The agency] (the agency).

[4] The purchaser and his son state that on 16 September 2020 they visited a section (lot) for sale outside a coastal village north of Auckland. It was one of a number in a subdivision. They then went to the licensee's office to discuss it with him. At the meeting, the purchaser's son made an offer by signing an agreement for sale and purchase of the section. The offer was signed after hours, so it was dated 17 September 2020. It was countersigned by the vendor on 17 September 2020.<sup>1</sup> It is noted by the Tribunal that the persons present at the site visit and the later office meeting are disputed by the licensee. The nominated buyer was later changed to the purchaser.

[5] The complaint arises out of an alleged misrepresentation made by the licensee at the meeting which the purchaser says induced him and his son to purchase the property. The plan of the subdivision approved by the local council fixes the location of the building platform for each lot. The purchaser and his son were keen on lot 6 because of the view obtained from the upper part. The building platform was, however, lower on the lot.

[6] Without making any formal findings at this early stage of the appeal, it appears to the Tribunal that the parties agree that the purchaser and his son were aware they would have to build on the platform marked on the approved plan and the certificate of title. They accept that on viewing the lot, they knew the location of the building platform as it had already been excavated. They also knew the consent of the council would be required to change the location of the platform.

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<sup>1</sup> Licensee's file record – see bundle at 226.

[7] The alleged misrepresentation made by the licensee at the meeting is that it would only be a formality to obtain council consent to change the location of the platform, as this had occurred for other lots.

[8] Following settlement, the purchaser and his son later discovered that it was unlikely the council would consent to relocate the building platform.

[9] A complaint was made to the Real Estate Agents Authority (the Authority) by the purchaser and his son, based on the alleged misrepresentation. They state that they declined the insertion of a due diligence clause in the offer for this reason. The licensee denies making this representation.

*Committee decides to take no further action*

[10] On 6 December 2021, the Committee decided to take no further action, on the basis that there was no clear evidence the licensee had misled the purchaser and/or his son.

[11] The purchaser appealed to the Tribunal (notice of appeal received 14 December 2021). In filing the appeal, he also acts for his son.

[12] A Minute was issued by the Tribunal on 21 December 2021 setting out a procedural timetable.

[13] The Tribunal has received from the Authority a paginated bundle of the documents before the Committee.

**APPLICATIONS TO ADMIT NEW EVIDENCE AND FOR ORAL EVIDENCE**

[14] On 8 and 14 February 2022, the purchaser filed fresh evidence in the Tribunal:

1. Statement (undated) from his son.
2. Email (17 September 2020) from the licensee to the purchaser's son.
3. Statement (undated) from the purchaser's wife.

[15] The purchaser advised the Tribunal on 15 February 2022 that he preferred an oral hearing.

[16] On 15 February 2022, the licensee made an application to admit new evidence:

1. Email (17 September 2020) from the licensee to the purchaser's son (being the same email sought to be produced by the purchaser).
2. Deal Transaction Report (18 September 2020) signed by the licensee and his manager.
3. Statement (6 February 2022) from the licensee's wife.

[17] The licensee also requests an oral hearing and that counsel be permitted to cross-examine the purchaser and his son.

[18] Ms Bergin, for the Authority, abides the Tribunal's decision on the applications, but has helpfully provided submissions on relevance.

### *Legal principles*

[19] An appeal against a determination of a Complaints Assessment Committee is by way of a re-hearing of the material that was before the Committee. That is, the Tribunal hears submissions by or on behalf of the parties, and considers the evidence and other material that was provided to the Committee.<sup>2</sup>

[20] Appeals are therefore normally conducted on the papers, though the mode of hearing is determined by the requirements of the interests of justice.<sup>3</sup>

[21] The Tribunal may regulate its procedures as it sees fit.<sup>4</sup> It may give leave for evidence to be filed that was not provided to the Committee and may permit witnesses to be cross-examined, if the interests of justice require it.<sup>5</sup> An applicant for leave must satisfy the Tribunal that:

- (a) the evidence could not with reasonable diligence have been obtained by the party and provided to the Committee;
- (b) the evidence is relevant to the issues to be determined on appeal;
- (c) the evidence is cogent – that is, it would have had an important influence on the outcome; and

<sup>2</sup> Real Estate Agents Act 2008, s 111(3); *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

<sup>3</sup> Real Estate Agents Act 2008, ss 105(2), 107, 107A; *Nottingham*, above n 2.

<sup>4</sup> Real Estate Agents Act 2008, s 105(1).

<sup>5</sup> *Nottingham*, above n 2; *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3 at [35]–[36], [48]–[49]; *Moseley v Real Estate Agents Authority (CAC 1907)* [2021] NZREADT 19 at [59]–[60]; *London v Cartwright* [2021] NZREADT 41 at [14].

(d) the evidence is apparently credible.

[22] There is always room for the special case where fresh evidence is admitted, even though it was reasonably available for the hearing at first instance.<sup>6</sup> Material that would merely elaborate or improve upon the evidence already before the Committee is unlikely to meet the test for leave. The power to allow a party to submit evidence upon appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.<sup>7</sup>

*The purchaser's application to admit new evidence*

[23] The purchaser seeks to adduce in evidence:

1. Statement (undated) from his son.
2. Email (17 September 2020) from the licensee to the purchaser's son.
3. Statement (undated) from his wife.

The son's statement

[24] The son sets out his version of the events in a written statement. He did not provide a statement to the Committee. It is largely consistent with the purchaser's story given to the Committee. Attached to his statement is the email (17 September 2020) from the licensee to the son and the agreement for sale and purchase (the latter was before the Committee).

[25] The licensee does not oppose the son's statement being admitted in evidence, on the basis that counsel can cross-examine him. As Ms Lucas for the licensee says, he is central to the events of 16 September 2020.

[26] Since the licensee does not oppose the admission of the son's statement, we grant leave for it to be filed. We will deal shortly with the question of an oral hearing and cross-examination.

Email from licensee to purchaser's son

[27] The email on 17 September 2020 from the licensee to the purchaser's son, copied to the purchaser, attached a copy of the signed sale and purchase agreement,

<sup>6</sup> *Complaints Committee No.1 of the Auckland District Law Society v P* (2007) 18 PRNZ 760 (HC) at [21].

<sup>7</sup> *Eichelbaum*, above n 5 at [51], citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449 at [51].

and requested payment of the deposit and details of their solicitor. The sale and purchase agreement has attached to it the Certificate of Title, with a plan showing the location of the building platform for each lot.

[28] The email was actually before the Committee, as Ms Bergin points out.<sup>8</sup> Both the agreement and the Certificate of Title were before it, though not as attachments to the email. We note also that the Committee plainly proceeded on the basis that the purchaser and his son accepted they knew the location of the consented building platform before making their offer.

[29] It is therefore doubtful that the email is cogent, but it is certainly relevant. Since both the purchaser and the licensee agree it should be seen by the Tribunal, we will grant leave.

#### Statement of the purchaser's wife

[30] The purchaser's wife did not provide evidence to the Committee. She confirms that the purchaser and the son headed off on the morning of 16 September 2020 for lunch and to look at sections. They arrived home and said they had purchased lot 6. They told her the licensee assured them they could move the building platform to higher ground with a view. She confirms the purchaser and the son were together that day.

[31] Ms Lucas contends that the wife's relevant evidence (as to what the licensee said) is hearsay and unreliable. It is further submitted that the remainder of her statement is not sufficiently relevant to be admitted.

[32] We agree with Ms Lucas on both points. As for the statement of what the licensee allegedly said, it is obviously hearsay and inadmissible. In regard to the wife's evidence as to the purchaser and his son leaving and returning together, it is marginally relevant, but not cogent. It is not evidence of their inspection of the lot together, let alone without the licensee, or who was at the subsequent meeting with the licensee.

[33] The wife's statement cannot be adduced in evidence.

#### *The licensee's application to admit new evidence*

[34] The licensee applies to admit in evidence:

1. Email (17 September 2020) from the licensee to the purchaser's son.

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<sup>8</sup> Authority's submissions (28 February 2022) at [3.3].

2. Deal Transaction Report (18 September 2020).
3. Statement (6 February 2022) from the licensee's wife.

Email from licensee to purchaser's son

[35] This has been dealt with above. It will be admitted in evidence.

Deal Transaction Report

[36] This is a template agency report completed by the licensee, signed by him on 18 September 2020 and signed by his manager on 21 September 2020. There are numerous completed entries concerning the vendor, purchaser, the property, sale price, agency agreement, sale and purchase agreement and the like.

[37] Ms Lucas submits that the report is a written record of what was discussed between the son and the licensee on 16 September 2020, a critical issue before the Tribunal. It further records that the lot was inspected by the son. The licensee's evidence will be that he would not have recorded the son's inspection unless the licensee had been with him.

[38] The explanation for the failure to provide it to the Committee is that it is kept for trust accounting purposes in a separate system at the agency called 'Property Site', which administers property deals through to settlement. It does not form part of the property file kept by the licensee.

[39] When responding to the complaint, the Committee asked the licensee to provide his full agency file and correspondence, which he did. The transaction report was not within the scope of the request. However, when counsel requested further information from the licensee and the agency's director, including account ledgers and timesheets, the transaction report was identified.

[40] We do not accept that the transaction report could not have been provided to the Committee with even a modicum of diligence. It is a report completed by the licensee. He knew about it. It is patently a document held by the agency. As a matter of common sense, it is part of the agency's file or files.<sup>9</sup>

[41] Nor do we accept that the report is cogent. There is no persuasive evidence here as to whether the disputed representation concerning the building platform was made.

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<sup>9</sup> While we have not been sent the Committee's request for documents, it included the "agency file" (see the agency's response of 5 August 2021 to the Committee at 103 of the bundle).

[42] There is a checkbox answer section, with templated questions. This includes a question as to whether there were any statements/discussions about “Resource Consent and Use”, against which the “yes” box is marked with a cross. This begs the question as to what was said. The licensee does not deny that the issue of consent was raised. In answer to a question as to whether any potential problems were discussed, the answer is “none”. As to whether the licensee gave advice on any specific items, the answer recorded is “none”.

[43] Such evidence is not irrelevant, but it is not important. Whether or not the representation was made will depend on oral evidence given by those present when the representation was allegedly made (see later). It will not depend on the licensee’s view of what was a problem or a specific item worthy of note.

[44] As for the dispute as to who was present at the site visit, the purchaser and his son accept they inspected the site as the report records (noting that the licensee disputes the presence of the ultimate purchaser). The report, of itself, does not tell us whether the licensee was present. He says it is his practice to record visits only when he was present. Whether or not we believe his evidence of such a practice is no different from whether we believe he was present. In other words, it is his oral evidence of his presence that is material, not his evidence of any practice. The entry in the report concerning the visit is not important.<sup>10</sup>

[45] We decline leave to adduce the transaction report.

#### Statement from the licensee’s wife

[46] The licensee’s wife is also a licensed salesperson and works at the same office as the licensee. She did not provide evidence to the Committee.

[47] In her statement (6 February 2022), the wife relevantly states that the licensee received a call from the purchaser’s son and they (the licensee and the son) both went to look at the subdivision (she does not say though that the son left from their office). They arrived back at the office in separate vehicles. The licensee said to her he had been to the lot with the son. He did not mention the purchaser. They (the licensee and the son) sat down to draw up the agreement. She spoke to the licensee after the meeting and was told that the son did not want a due diligence clause as his offer would then be cleaner. The balance of her statement is irrelevant to the dispute between the parties.

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<sup>10</sup> As Ms Bergin notes, the licensee may have made a contemporary file record of the site visit and subsequent meeting in the office – see bundle at 226.



[48] It is submitted by Ms Lucas that the wife can corroborate the licensee's statement that only the son was present at the meeting, not the purchaser, and it provides insight into what was discussed between the licensee and the son, particularly as to the due diligence clause.

[49] We accept that the wife's evidence would be relevant as to whether the licensee was present at the site visit on 16 September 2020 and whether the purchaser attended the meeting in the office later that day when the agreement was signed. However, the dispute as to whether the licensee was present at the site visit is unimportant (as no representation concerning the platform is alleged to have been made then), though the presence or otherwise of the purchaser at the meeting at which the representation was allegedly made is cogent.

[50] As to the wife's evidence concerning what the licensee told her after the meeting about the due diligence clause, that is inadmissible hearsay. Our assessment as to whether the representation was made will be based on the evidence of those present at the meeting. In any event, her statement as to what the licensee said (that the son did not want a due diligence clause as it would make his offer clean) is not controversial. It tells us nothing about whether the representation was made (as a result of which, according to the purchaser, there was no need for a due diligence clause, which had the advantage of making the offer cleaner).

[51] We will admit the statement of the licensee's wife as to who was present at the meeting, but not as to who was present at the site visit or what the licensee said after the meeting.

### *The mode of hearing*

[52] The purchaser and the licensee both seek an oral hearing. Ms Bergin submits the Tribunal may benefit from such a hearing. As Ms Lucas contends, the entire complaint is the alleged misrepresentation concerning the building platform. The representation is denied. This critical factual issue turns on the credibility of the witnesses. The interests of justice require an oral hearing, at which the relevant witnesses (those present when the representation was allegedly made) can give evidence and be cross-examined.

## **OUTCOME**

1. Leave is given for the following to be adduced in evidence:
  - (1) Statement (undated) of the purchaser's son.

- (2) Email (17 September 2020) from the licensee to the purchaser's son.
  - (3) Statement (6 February 2022) of the licensee's wife as to who was present at the meeting in the office on 16 September 2020.
2. There will be an oral hearing in Auckland, if appropriate by AVL. Two days will be reserved.
  3. Oral evidence will be given by the purchaser (appellant), the purchaser's son, the licensee (the second respondent) and the licensee's wife. Witnesses may be cross-examined by the other parties.

[53] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, which sets out the right of appeal to the High Court of any determination at the Tribunal.

## **PUBLICATION**

[54] At this stage, no complaint against the licensees has been upheld. Having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any of the parties or their witnesses, except the Authority.

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D J Plunkett  
Chair

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G Denley  
Member

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F Mathieson  
Member