

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 61**

**READT 020/12 and 049/12**

IN THE MATTER OF

An Appeal under Section 111 of the Real  
Estate Agents Act 2008

BETWEEN

DERMOT NOTTINGHAM, PHILIP  
NOTTINGHAM, ROBERT McKINNEY &  
PROPERTY BANK REALTOR LIMITED  
Appellants

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 10057)  
First Respondent

AND

MARTIN HONEY  
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Ms N Dangen (Member)  
Ms C Sandelin (Member)

Submissions received from:

Mr D Nottingham and Mr R McKinney  
Mr J Simpson, on behalf of the Authority  
Mr D Grove, on behalf of Mr M Honey

Date of Ruling:

11 October 2017

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**RULING OF THE TRIBUNAL**  
**(Application to admit further evidence)**

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## Introduction

[1] In early 2011, Mr Nottingham lodged a complaint with the Real Estate Agents Authority (“the Authority”) against Mr Honey. He alleged that Mr Honey had operated a website with RE/MAX branding, for which he no longer had a franchise, and that he had misled the public into believing that he was operating as RE/MAX, when he was operating as a Ray White franchise. Mr Honey subsequently lodged a complaint against Mr Nottingham, alleging that he had pursued the complaint in an aggressive manner. The appellants then lodged a second complaint in which they alleged that Mr Honey’s complaint included intentionally false and dishonest accusations.<sup>1</sup>

[2] Complaints Assessment Committee 10057 (“the Committee”) considered Mr Nottingham’s complaints and in decisions issued on 28 March 2012 and 18 July 2012, decided to take no further action on either of them. The appellants appealed to the Tribunal against the Committee’s decision (“the original appeals”). The Tribunal dismissed the appeal in a decision issued on 13 October 2014.<sup>2</sup>

[3] The appellants then appealed to the High Court and, subsequently, the Court of Appeal. In accordance with the judgments delivered by those Courts,<sup>3</sup> the original appeals have been remitted back to the Tribunal. In a judgment delivered on 21 August 2015, her Honour Justice Thomas directed that:<sup>4</sup>

... the matter should be remitted back to the Tribunal to consider the impact of [evidence given to the Tribunal by Mrs H L West] and the fresh evidence [of Ms L Earlan and Ms C Muller].

[4] The Court of Appeal supplemented the High Court direction by adding a further direction, that:<sup>5</sup>

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<sup>1</sup> This summary is taken from the judgment of the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [4] and [6].

<sup>2</sup> *Nottingham v Real Estate Agents Authority (CAC 10057)* [2014] NZREADT 80.

<sup>3</sup> See *Nottingham v Real Estate Agents Authority* [2015] NZHC 1616, *Nottingham v Real Estate Agents Authority* [2015] NZHC 1998; and *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

<sup>4</sup> *Nottingham v Real Estate Agents Authority* [2015] NZHC 1998, at [18].

<sup>5</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [88].

... such rehearing before the Tribunal is to be determined by a Tribunal constituted by persons other than those who determined the first appeal.

### **Other proceedings**

[5] A private criminal prosecution was brought by the appellants in 2014 against Mr Honey and his wife, and one other person (Mr Taka), in the District Court at Auckland (“the District Court proceeding”). The prosecution was heard at a Judge-alone trial. In a reserved judgment delivered on 13 July 2016, District Court Judge Paul dismissed all charges, and acquitted all defendants.<sup>6</sup>

[6] The appellants applied for leave to appeal to the High Court against the District Court judgment. That application was dismissed by his Honour Justice Davison in a reserved judgment delivered on 24 July 2017.<sup>7</sup>

[7] On 12 September 2016, the appellants filed an application for judicial review in the High Court, against the District Court (naming Mr and Mrs Honey and Mr Taka as second defendants), in relation to procedural directions and rulings in the District Court proceeding. That proceeding was struck out in a reserved judgment delivered by his Honour Justice Gilbert on 27 April 2017.<sup>8</sup>

### **Application to admit further evidence**

[8] A Minute issued by the Tribunal following a Directions (Rehearing) Conference held on 18 August 2017 recorded as follows:<sup>9</sup>

[5] Mr Grove submitted that transcripts of the evidence given in the District Court by Ms Earlan, Ms Mullen, and Ms West (that is, examination in chief, cross-examination, and re-examination) should be admitted at the hearing before the Tribunal, in order to avoid those witnesses being required to attend at the hearing. Mr McKinney advised that the appellants consent to that course, as did Mr Hodge on behalf of the Authority.

[6] Similarly, Mr Grove submitted that transcripts of the evidence of two expert witnesses, Ms Payne and Mr Chappel, be admitted at the hearing. That, too, is consented to by the appellants and Mr Hodge. Mr McKinney’s

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<sup>6</sup> *Nottingham v Honey* [2016] NZDC 9272.

<sup>7</sup> *Nottingham v Honey* [2017] NZHC 1715.

<sup>8</sup> *Nottingham v Auckland District Court* [2017] NZHC 777.

<sup>9</sup> *Nottingham v Real Estate Agents Authority* (CAC 10057), Directions (Rehearing) Minute, 22 August 2017.

submission that transcripts of the evidence given by two police witnesses be admitted at the appeal hearing is consented to Mr Grove and Mr Hodge.

[9] The Minute also recorded that copies of the Bundle of Documents filed for the earlier appeal hearing would be provided to the members of the Tribunal who will be sitting on the appeal rehearing, and that submissions filed by or behalf of the parties would also be available to the Tribunal members. The Minute noted that it expected that the parties would wish to refresh their submissions for the purpose of the rehearing.

[10] Mr D Nottingham has applied for leave for further evidence to be admitted at the rehearing:

[a] unsigned briefs of evidence prepared by Mr Honey and Mrs Honey in December 2015; and

[b] an affidavit prepared by Mrs Honey in the course of the District Court proceeding.

[11] Mr Simpson advised that the Authority is neutral as to the application, and has filed only limited submissions.

[12] The application is opposed by Mr Grove on behalf of Mr Honey.

### **Submissions**

[13] The appellants submitted that the briefs of evidence are “the strict answers” given by Mr and Mrs Honey to “crucial evidence” given by Mrs West, Ms Earlan, and Ms Muller (“the employees”). They submitted that Mr and Mrs Honey elected not to give evidence in the District Court proceeding, and have elected not to give further evidence at the rehearing. However, they submitted that Mr and Mrs Honey could be “recalled” by the Tribunal to “clarify crucial inconsistencies, between the evidence contained in their briefs and the evidence given by [the employees]”.

[14] The appellants further submitted that as Mr Honey wants the Tribunal to accept the employees’ evidence as set out in their witness statements and the transcript of the

District Court trial, he cannot seek to disallow the “crucial latest evidence” given by Mrs Honey (described as Mr Honey’s “key employee”) in the trial process. They submitted that her evidence is completely contradictory to other evidence given by Mrs Honey on previous occasions.

[15] The appellants further submitted:

5. This Tribunal must seek to include all relevant evidence that would decide issues of fact, credibility, inconsistency, lies, perjury, remembering that its role is that of a consumer watchdog, and professional standards protector, and, finally, a mode of discipline of members of the profession. The threshold is *prima facie*, and such hearings should lead to further charges being laid on the basis of what transpired before the Tribunal during the hearings, and during factually related hearings.

6. The document’s and evidence sought to be adduced was made at the hand of the respondent, and his employee, and his lawyer. The only prejudice possible would be where it could be proven that the documents contained lies, perjury, etc which must impact on credibility. However, there can be no one else to blame for such matters should they arise.

7. The documents and evidence establishing lies and perjury would be strong grounds for further appeal should they not be adduced.

8. The Tribunal should welcome any evidence by the hand of the respondent and his employees that prove the respondents respective guilt.

9. Mr Grove does not want the documents introduced because he is aware of what they prove, and what cannot be overcome by their inclusion, given that the contents were at his clients, and his hand.

10. Given what has occurred previously with this Tribunal [albeit with other members presiding], caution to include and fully consider all relevant, and especially highly relevant evidence, would be expected by the appellant jurisdictions, and none of this evidence was before Thomas J.

[16] Mr Grove referred to her Honour Justice Thomas’s direction as to the scope of the rehearing, set out at paragraph [3], above, and submitted on behalf of Mr Honey that the rehearing is limited solely to consideration of the evidence of Ms West, Ms Earlan, and Ms Muller, together with the transcripts of evidence given at the District Court hearing by two expert witnesses and the police witnesses (recorded at paragraph [8], above. He submitted that the rehearing is not an opportunity to reopen or re-litigate the matters generally.

[17] Mr Grove submitted that, given that Ms West, Ms Earlan, and Ms Muller were cross-examined at the District Court hearing, no further evidence is relevant or

necessary, as it is the District Court record that is to be relied upon, and nothing else. He noted that neither Mr nor Mrs Honey gave evidence at the District Court hearing.

[18] Mr Grove submitted that the affidavit sworn by Mrs Honey was filed in the District proceeding in relation to an application for name suppression. He submitted that the appellants had provided no particulars as to why this evidence is relevant to the limited task now before the Tribunal.

[19] Mr Grove further submitted that the appellants' attempt to reopen issues already considered by the District Court in a hearing of over three weeks, and rejected, is an abuse of process.

[20] On behalf of the Authority, Mr Simpson advised that the Authority understands that the two unsigned briefs of evidence were prepared in December 2015, for the purposes of the Tribunal rehearing, so that Ms Earlan and Ms Muller could be advised of the areas of dispute. Mr Simpson advised that they were circulated amongst the parties in an unsigned form, but not filed in the Tribunal.

[21] Mr Simpson submitted that if the briefs of evidence are admitted, the Tribunal is unlikely to be able to afford significant weight to unsigned statements which have not been formally adopted by Mr and Mrs Honey. He further submitted that the briefs of evidence (in particular annexures to them) traverse areas which do not appear to be strictly relevant to the primary issues before the Tribunal.

[22] Mr Simpson noted that the Authority does not have a copy of the affidavit sworn by Mrs Honey, and cannot express a view. However, he noted the Authority's understanding that Mrs Honey elected not to give evidence in the District Court proceeding, as she was entitled to do pursuant to her right to silence as a defendant in a criminal proceeding.

## **Discussion**

[23] The starting point is the direction of her Honour Justice Thomas. The Tribunal has been directed to consider the impact of the evidence of Ms West, and the evidence

of Ms Earlan, and Ms Muller. The Tribunal has not been directed to, and therefore cannot, reconsider all of the evidence given at the first appeal.

[24] Regarding the appellants' submissions in support of their application, the Tribunal notes, first, that it carries out its functions (set out in s 102 of the Real Estate Agents Act 2008 ("the Act")) in the context of the purpose of the Act, set out in s 3 of the Act:

**3 Purpose of Act**

- (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
- (2) The Act achieves its purpose by—
  - (a) regulating agents, branch managers, and salespersons:
  - (b) raising industry standards:
  - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[25] The provisions in the Act are clear on their terms. No gloss should be placed on them.

[26] Secondly, the Tribunal's earlier appeal hearing has been thoroughly examined by the High Court and the Court of Appeal. Except for the particular matters that the Tribunal has specifically been directed to consider, the appellants' challenges to the earlier Tribunal hearing have been considered and dismissed by the High Court and the Court of Appeal. They may not be raised at the rehearing.

[27] Thirdly, while it is not made clear in their submissions, the appellants' reference to "factually related hearings" appears to be a reference to the District Court hearing of the criminal charges brought by the appellants. The District Court judgment was appealed to the High Court, and that appeal was dismissed. The District Court Judge's findings stand, and cannot be challenged. Further, the appellants' application for Judicial Review of rulings and directions made by the District Court in the course of the District Court proceeding has been struck out.

[28] In the light of the limited scope of the rehearing, the appellants must establish that the further evidence they seek to have admitted at the hearing is directly relevant

to consideration of the impact of the evidence of Ms West, and the evidence of Ms Earlan, and Ms Muller.

[29] The Tribunal has not seen the unsigned briefs of Mr and Mrs Honey. The Tribunal has recorded above that the Authority understands that they were prepared in December 2015, for the purposes of the Tribunal rehearing. The Authority further understands that the briefs of evidence were prepared so that Ms Earlan and Ms Muller could be advised of the areas of dispute. While they have been circulated amongst the parties, the briefs of evidence have not been signed, and they have not been filed in the Tribunal. As the Authority's understanding has not been challenged, the Tribunal accepts that it is correct.

[30] The Tribunal concludes, on the basis of the Authority's understanding, that Mr and Mrs Honey's unsigned briefs of evidence may have relevance to the evidence of Ms West, Ms Earlan, and Ms Muller. As such, they appear to be relevant to the Tribunal's consideration of that evidence.

[31] The Tribunal concludes that the unsigned briefs of evidence may be admitted at the rehearing. However, as unsigned statements, not formally adopted by the makers of the statements, the weight the Tribunal could give to them as assisting it to "decide issues of fact, credibility, inconsistency, lies, perjury", or to "prove the respondents respective guilt" is considerably limited.

[32] The Tribunal accepts Mr Grove's submission that the affidavit sworn by Mrs Honey related to an application for name suppression. The appellants have not suggested otherwise. The appellants have not made any submissions as to how such an affidavit is relevant to the limited scope of the rehearing. There is no basis on which the Tribunal could admit the affidavit at the rehearing.

## **Outcome**

[33] The Tribunal gives leave for the unsigned briefs of evidence of Mr and Mrs Honey to be submitted to the Tribunal for the rehearing.



[34] The Tribunal declines leave for the affidavit sworn by Mrs Honey to be submitted to the Tribunal for the rehearing.

[35] 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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Hon P J Andrews  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member