

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 65

READT 022/15

IN THE MATTER OF

Charges laid under s 91 of the Real Estate
Agents Act 2008

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE 304

AGAINST

CHRISTOPHER CHAPMAN
Defendant

On the papers

Tribunal

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms C Sandelin (Member)

Date of Ruling:

26 October 2017

RULING OF THE TRIBUNAL
(Direction to file evidence and opening submissions)

Introduction

[1] This Ruling is issued as a result of a memorandum filed by Mr Rzepecky, counsel for Mr Chapman, dated 23 October 2017, in which he records his opposition to filing any evidence or submissions on behalf of Mr Chapman before the hearing of the Committee's charges against him. The charges are scheduled for hearing in Christchurch during the week beginning 6 November 2017. That hearing date was set via email on 25 July 2017.

[2] The following chronology, recorded in Minutes of telephone conferences with counsel, is relevant:

- [a] The charges were laid against Mr Chapman on 15 April 2015. They were set down for hearing for three days (with two days in reserve), beginning on 31 October 2016. Timetable directions were made by consent in April 2016, as to filing evidence and submissions on behalf of both the Committee and Mr Chapman.
- [b] Because of an ongoing Police investigation which might lead to criminal charges being laid against Mr Chapman in relation to the same factual circumstance as the Committee's charges (in respect of which the Police had not made any decision), the fixture for 31 October 2016 was subsequently vacated. The Tribunal accepted a submission by Mr Rzepecky that the criminal charges (if laid) should be heard before the Committee's charges.
- [c] The Tribunal's Minute dated 16 September 2016 recorded that the Police had still not decided whether to lay criminal charges. Paragraph [4][f] of the Minute recorded:

The Tribunal notes counsels' advice that the evidence for the Committee has been filed and served, and evidence for Mr Chapman will be able to be served in short order once a hearing date is confirmed. Accordingly, once a hearing date is confirmed it will only be necessary to timetable filing any reply evidence by the Committee and filing submissions.

- [d] The Tribunal's Minute (3), dated 24 November 2016 recorded, at [1], that the Committee's charges could be heard in the District Court at Christchurch in the period 13–17 February 2017. At [2], it was noted that the Police hoped to have a decision as to whether criminal charges would be laid "by Christmas". At [6], the Minute recorded:

However, in all of the circumstances, there appears to be no feasible alternative to accepting Mr Rzepecky's suggestion that Mr Hodge's suggested timetable is adopted, but for the matter to be reviewed at the time the Police have indicated they may have made a decision. Accordingly, the following orders will apply:

- [a] The fixture for 13–17 February 2017, in the District Court at Christchurch will be maintained, subject to confirmation following the next telephone conference.
 - [b] Statements of evidence and a bundle of documents relied on by Mr Chapman are to be filed and served by 22 December 2016.
 - [c] Opening submissions on behalf of the Committee are to be filed and served by 31 January 2017.
 - [d] Opening submissions on behalf of Mr Chapman are to be filed and served by 7 February 2017.
- [e] The Tribunal's Minute (4), dated 21 December 2016 recorded that a Police decision was still awaited, and that the fixture for 13–17 February was vacated.
- [f] The Tribunal's Minute (5), dated 12 May 2017, recorded that the Police had decided not to lay criminal charges. The Minute recorded at [5] that a further telephone conference was to be allocated, but that any directions that were necessary (in particular as to the timetable for filing evidence and submissions) could be made on the papers.
- [g] The Tribunal's Minute (6), dated 26 June 2017, recorded at [7] and [8]:

Statements of evidence on behalf of the Committee have been received by the Tribunal, but the Committee may wish to file further evidence as a result of the Police disclosure. Similarly, Mr Rzepecky has statements of evidence by or on behalf of Mr Chapman ready to be filed, but may wish to file further evidence as a result of the Police disclosure.

Counsel will confer and agree on a timetable for filing statements of evidence and submissions during the period leading up to the hearing.

Submissions

[3] In his memorandum of 23 October 2017, Mr Rzepecky submitted that it would be contrary to natural justice if Mr Chapman were required to file briefs of evidence in advance of the hearing. He also submitted that if the Committee had filed briefs of evidence, those should be removed from the file, before they are read. Mr Rzepecky referred to the High Court judgment in *O'Neill v Proceedings Commissioner* in support of his submission.¹ Mr Rzepecky requested directions in accordance with his submissions.

[4] Mr Rzepecky further submitted that Mr Chapman should not be required to file opening submissions prior to the hearing. He submitted that until such time as the “prosecution” had presented its case, the defendant could not make a final decision as to what evidence to call, and that the “prosecution” would have “an opportunity to tailor its evidence according to the case theory set out in the defendant’s opening”. Again, Mr Rzepecky requested directions in accordance with his submissions.

[5] Mr Rzepecky’s requests for directions are opposed by the Committee. Counsel for the Committee, Mr Hodge, submitted that the requests were contrary to an agreed timetable request, recorded in a consent memorandum dated 19 April 2016, which provided both for briefs of evidence to be filed and served sequentially by the parties, and for submissions for both parties to be filed in advance of the hearing.

[6] Mr Hodge also referred to telephone conferences in which the impact of the Police investigation on this proceeding. He noted that in each of these, Mr Rzepecky had advised the Tribunal that defence briefs of evidence were all prepared and ready to be filed, but the defence did not wish to do so while the Police investigation was ongoing. He submitted that there was never any mention of a wider objection to briefs of evidence being filed at all.

[7] Mr Hodge further submitted that Mr Rzepecky’s submissions were contrary not only to the practice of the Tribunal, but also of other professional disciplinary tribunals. He referred to the Lawyers and Conveyancers Disciplinary Tribunal, the

¹ *O'Neill v Proceedings Commissioner* (1996) 10 PRNZ 168.

Teachers Disciplinary Tribunal, and the Health Practitioners Disciplinary Tribunal. He submitted that *O'Neill v Proceedings Commissioner* was concerned with a Human Rights proceeding, not a professional disciplinary proceeding. Further, in that case, a direction had been made for simultaneous filing of evidence, and a direction was made that the Proceedings Commissioner's evidence was to be provided first, so that Mr O'Neill was not required to file briefs until he was informed of the Proceedings Commissioner's case.

[8] Mr Hodge also referred to the abundance of case law concerning the special nature of professional disciplinary proceedings. They are not criminal proceedings, or akin to criminal proceedings.

Discussion

[9] We reject Mr Rzepecky's submissions, and accept those from Mr Hodge. In addition to the matters set out by Mr Hodge, the Tribunal notes that as a licensee under the Real Estate Agents Act 2008, Mr Chapman is required to cooperate in investigations by a Complaints Assessment Committee. That requirement in and of itself distinguishes this proceeding from any criminal trial.

[10] The Tribunal makes timetable directions in proceedings where charges are laid against licensees. These routinely provide for evidence to be filed and served sequentially by the Committee and the licensee concerned. Similarly, directions are routinely made for opening submissions to be filed sequentially.

[11] In this proceeding timetable directions have, by consent, been in place since April 2016. While the dates set out in the directions have been altered as the hearing dates had to be changed, those directions have provided for briefs of evidence to be filed sequentially on behalf of the Committee and Mr Chapman. They have also provided for opening statements to be filed sequentially on behalf of the Committee and Mr Chapman.

[12] There are no grounds on which the nature of the timetable directions that Mr Chapman has consented to should now be changed.

Directions

[13] The Tribunal directs:

- [a] Briefs of evidence of Mr Chapman and any witnesses he intends to call to give evidence on his behalf are to be filed and served no later than **27 October 2017**.
- [b] Within the same period, Mr Chapman is to file and serve any additional documents, not contained in the Committee's bundle of documents, he intends to be received into evidence at the hearing.
- [c] Opening submissions on behalf of the Committee are to be filed and served no later than **3 November 2017**.

[14] It will be noted that the above directions do not provide for reply evidence for the Committee to be filed and served, or for opening submissions for Mr Chapman to be filed and served.

[15] As Mr Hodge submitted, those two matters are not a concession by the Committee (nor is it a concession by the Tribunal) that Mr Chapman, or indeed any licensee, is not required to file evidence or opening submissions in advance of the hearing. Rather, it reflects the position the Tribunal is now in, given the imminent hearing.

[16] 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.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member