

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 69**

**READT 021/12 and 049/12**

IN THE MATTER OF

Appeals under Section 111 of the Real  
Estate Agents Act 2008

BETWEEN

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

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 10057)  
First Respondent

AND

MARTIN HONEY  
Second Respondent

Date of Ruling:

27 November 2017

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**RULING OF THE TRIBUNAL**  
**(Application to dismiss appeal; Application to adjourn appeal hearing)**

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## Introduction

[1] The re-hearing of the appellants' appeal against a decision of Complaints Assessment Committee 10057 ("the appeal to the Tribunal") is scheduled to begin on 4 December 2017. Four days have been allocated. The re-hearing was directed in the judgment of the High Court On 21 August 2015<sup>1</sup> (subsequently confirmed in a judgment of the Court of Appeal)<sup>2</sup>.

[2] On 18 August 2017, the Tribunal made directions (by consent) in relation to the re-hearing of the appeal to the Tribunal, including as to an application signalled by the appellants for leave to admit further evidence, and as to a timetable for filing submissions on the appeal. A Minute recording these directions was issued by the Tribunal on 22 August 2017.

[3] On 11 October 2017, the Tribunal issued a Ruling in respect of the appellants' application to admit further evidence.<sup>3</sup> On 7 November 2017 the appellants filed an appeal in the High Court at Auckland against that Ruling ("the High Court appeal"). The Tribunal understands that the High Court appeal has been listed for callover on 5 December 2017.

[4] The appellants did not apply for the re-hearing to be adjourned.

[5] On 16 November 2017 counsel for the second respondent, Mr Grove, filed a memorandum in the Tribunal noting that:

- [a] the appellants were in breach of the timetable directions as to the filing submissions;
- [b] the appellants had made allegations in the High Court appeal of actual bias, and had sought an order removing the Tribunal from re-hearing the appeal to the Tribunal;

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<sup>1</sup> *Nottingham v Real Estate Agents Authority* [2015] NZHC 1998.

<sup>2</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

<sup>3</sup> *Nottingham v Real Estate Agents Authority (CAC 10057)* [2017] NZREADT 61.

[c] similar allegations were made by the appellants after their appeal to the Tribunal was first heard, and were dismissed by the High Court; and

[d] the appellants' appeal to the Tribunal relates to events which occurred more than six years ago. Mr Grove submitted that a criminal prosecution brought by Mr Dermot Nottingham against the second respondent had been dismissed by the District Court, as was his appeal against the District Court judgment and an application for judicial review.

[6] Given the appellants' "refusal to comply with" the directions, Mr Grove submitted that it is appropriate that their appeal to the Tribunal should be dismissed.

[7] In a memorandum filed in the Tribunal on 16 November 2017 counsel for the Authority, Mr Simpson, made submissions as to whether the re-hearing should be adjourned. The Authority abides the Tribunal's decision as to whether the appellants' appeal to the Tribunal should be dismissed, but made brief submissions as to the principles relating to applications to adjourn a hearing while an appeal against a pre-trial rulings.

[8] On 20 November 2017 the appellants filed an application seeking 11 "orders, directions, rulings, investigations, and admissions, of the Tribunal" ("the applications"). These include that the re-hearing scheduled for 4 December 2017 be adjourned pending determination of the appellants' appeal to the High Court. The appellants seek ten other "orders, directions, rulings, investigations, and admissions, of the Tribunal". These refer to allegations made by the appellants concerning the transcript of the former hearing of their appeal to the Tribunal, and the admissibility of evidence at the re-hearing.

[9] The appellants set out seven grounds in support of the applications, and referred to affidavits and legal submissions to be filed on 23 November 2017. In response to an enquiry from the Tribunal's case manager on 23 November, the appellants advised that something would be filed the following day. No affidavits or submissions had been filed as at the close of the Tribunal's office hours on 24 November 2017.

[10] On 21 November, Mr Grove filed a memorandum in response to the appellants' applications. He submitted that the allegations made in the appellants' appeal to the High Court are "scandalous", and that the re-hearing of the appellants' appeal to the Tribunal can proceed despite the appeal. He further submitted that as the appellants' appeal to the High Court is against a pre-trial matter, it is not appealable until the re-hearing is concluded.

[11] Mr Grove also submitted that the Tribunal has no jurisdiction to make the ten other orders sought by the appellants.

[12] A memorandum was filed by Mr Simpson on 23 November 2017. He reiterated the Authority's position of abiding the Tribunal's decision as to whether the appellants' appeal to the Tribunal should be dismissed. With respect to the appellants' application to adjourn the re-hearing, he submitted that the appellants had not advanced any cogent, substantive reasons as to why the appellants' appeal to the High Court should be determined prior to the re-hearing. He submitted, in particular, that the appellants had not properly explained why this case is an exceptional case where an appeal against a preliminary ruling should proceed ahead of the substantive hearing.<sup>4</sup>

[13] Mr Simpson also submitted that most of the ten other orders sought by the appellants are outside the Tribunal's jurisdiction. In particular, he submitted that seven of the orders sought related to the transcript of the first hearing before the Tribunal, and had been addressed and determined by the Court of Appeal. He submitted that the remaining three orders sought appeared to be an application to admit further evidence, which had not previously been raised (order no. 6), were outside the Tribunal's jurisdiction (order no. 7), or indicated a change of the appellants' position as to scope of evidence to be admitted at the re-hearing, contrary to that recorded by the Tribunal in its Minute dated 22 August 2017 (order no. 8).

[14] A memorandum in response to Mr Grove's memorandum of 21 November 2017 was filed by the appellants on 22 November. The memorandum focusses on the application for adjournment. The appellants set out grounds on which the appellants

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<sup>4</sup> Citing *Attorney-General v W* (2007) 18 PRNZ 673 (CA).

submitted that the present case is “exceptional”. These appear, in essence, to be that the issues which were the subject of the Tribunal’s ruling, and other material referred to, are of particular significance to the re-hearing.

[15] At the conclusion of the memorandum, the appellants state that the “The other applications can be decided as the tribunal thinks fit and the appeal can be updated to include those decisions required to be appealed”.

## **Discussion**

[16] The Tribunal has considered the second respondent’s request for the appellants’ appeal to the Tribunal to be dismissed or struck out, and the appellants’ application for adjournment of the re-hearing and ten other orders.

[17] The Tribunal does not consider it to be appropriate at this stage to consider the second respondent’s application to strike out or dismiss the appellants’ appeal to the Tribunal, and it is declined.

[18] In its judgment in *Attorney-General v W* (referred to in Mr Simpson’s submissions), the Court of Appeal referred to its judgment in *Assn of Dispensing Opticians of NZ Inc v Opticians Board*, in which it said:<sup>5</sup>

.... Rulings made either in the course of the hearing of the proceeding (using that term in a broad sense, including for example an adjournment application), or as part of the trial conduct or management process would not ordinarily be susceptible to interlocutory appeal. On the other hand rulings which have substantive effect on the rights and liabilities in issue would be. Obviously the lines will not be cut and dried....

[19] The judgment of the High Court as to the appellants’ appeal to that Court may “have a substantive effect on the rights and liabilities in issue” in this case. The Tribunal is not required to, and does not, make a determination on that point. However, in the light of the possibility that the judgment of the High Court may affect the rights and liabilities of some or all of the parties in the present proceeding, the Tribunal has concluded that the re-hearing should be adjourned.

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<sup>5</sup> *Assn of Dispensing Opticians of NZ Inc v Opticians Board* [2000] 1 NZLR 138 (CA), at [36].

[20] The Tribunal further notes that:

[a] Given that the re-hearing is scheduled to begin on 4 December, it is now impracticable for it to proceed, as submissions on the appeal have not been filed.

[b] The outcome of the appellants' appeal to the High Court may assist the Tribunal in considering and determining the appellants' appeal to the Tribunal.

[21] The Tribunal accepts the submissions for the Authority that either the Tribunal does not have jurisdiction to consider, or that it is not appropriate for the Tribunal to consider, the remaining ten applications by the appellants for "orders, directions, rulings, investigations, and admissions, of the Tribunal".

### **Ruling**

[22] The second respondent's request that the appellants' appeal to the Tribunal be dismissed is declined.

[23] The appellants' application for the re-hearing to be adjourned is allowed. The re-hearing is adjourned pending the hearing and determination of their appeal to the High Court.

[24] The Tribunal will not consider the appellants' ten other applications.

[25] 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