

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 77

READT 021/17

IN THE MATTER OF

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

BETWEEN

GEORGE LANCASTER
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 491)
First Respondent

AND

JOHN LANTZ
Second Respondent

AND

STEPHANIE KELLAND
Third Respondent

On the papers

Tribunal:

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

Submissions received from:

Mr Lancaster
Mr Simpson, on behalf of the Authority
Ms Harkess, on behalf of Mr Lantz and Ms
Kelland

Date of Ruling:

13 December 2017

RULING OF THE TRIBUNAL
(Application for leave to admit evidence at appeal hearing)

Introduction

[1] Mr Lancaster has applied for leave to adduce further evidence, and to cross-examine witnesses, at the hearing of his appeal.

Background

[2] In August 2016, Mr Lancaster complained to the Real Estate Agents Authority (“the Authority”), concerning the conduct of the second respondent (Mr Lantz) and the third respondent (Ms Kelland) concerning the sale of a property at Meadowbank, Auckland (“the property”). Both Mr Lantz and Ms Kelland are engaged by Megan Jaffe Real Estate Ltd (trading as Ray White Remuera) (“the Agency”).

[3] The property was owned by a trust, of which Mr Lancaster was one of the trustees. Mr Lantz was the listing agent for the property. The property was to be sold by auction.

[4] As summarised by the Committee, Mr Lancaster complained that:

- [a] the trust was not provided with a Comparative Market Analysis (“CMA”) when the property was listed for sale;
- [b] the trust was charged a higher commission than agreed;
- [c] Mr Lantz lied to Mr Lancaster as to whose suggestion it was to include a clause in the sale and purchase agreement which provided that the property could be withdrawn from the auction process (“clause 24”);
- [d] Mr Lantz did not allow another licensee from the Agency to show prospective purchasers through the property;
- [e] Mr Lantz disclosed the price range to prospective purchasers without Mr Lancaster’s consent;

[f] Mr Lantz did not disclose to Mr Lancaster that he was listing the eventual purchaser's existing property for sale; and

[g] Ms Kelland had "a lot to answer for".

The decision

[5] In a decision issued on 18 May 2017, Complaints Assessment Committee 413 ("the Committee") decided pursuant to s 89(2)(c) of the Real Estate Agents Act 2008 ("the Act") to take no further action on the complaint ("the decision").¹ The following is a summary of the Committee's reasons.

[a] There was insufficient evidence to enable it to accept on the balance of probabilities Mr Lancaster's evidence regarding provision of the CMA and reject Mr Lantz's evidence.²

[b] There was no evidence to support Mr Lancaster's allegation that he was charged a higher commission than set out in the listing agreement and, in any event, the trust was ultimately charged the lesser amount.³

[c] There was "no actual or even circumstantial evidence" to support Mr Lancaster's allegation regarding the insertion of clause 24.⁴

[d] The evidence did not support Mr Lancaster's allegation that Mr Lantz had prevented another licensee from showing the property to a prospective purchaser.⁵

[e] Having referred to statements made by the eventual purchaser and two others who had viewed the property, there had been no breach of rr 9.17 or 9.4 of the Real Estate Agents Act (Professional Conduct and Client

¹ Complaint C16155, re John Lantz and Stephanie Kelland: Decision to take no further action, 18 May 2017.

² Decision, at paragraph 3.4.

³ At paragraph 3.5.

⁴ At paragraph 3.7.

⁵ At paragraph 3.8.

Care) Rules 2012 (“the Rules”) in Mr Lantz’s discussions with prospective purchasers as to the likely value or likely selling range of the property.⁶

[f] Mr Lantz was not marketing the eventual purchaser’s property at the time he was marketing the trust’s property.⁷

[6] With respect to Mr Lancaster’s complaint concerning Ms Kelland, Mr Lancaster had not identified any specific conduct that could lead to a finding of unsatisfactory conduct against Ms Kelland, and the Committee could not itself identify any such conduct.⁸

[7] Mr Lancaster has appealed against the decision. The appeal was scheduled to be heard on 31 October 2017. That hearing was vacated pursuant to the Tribunal’s Minute dated 4 October 2017, as timetable directions made by the Tribunal had not been complied with. A new hearing date has not been allocated.

Points on appeal

[8] Mr Lancaster challenges all of the Committee’s findings. He also submits on appeal that Mr Lantz provided no evidence to support claims he made in the course of the investigation, omitted to refer to key events and information, fabricated documents and withheld information, and gave a different response to the Committee than had earlier been indicated to Mr Lancaster. Mr Lancaster also submits on appeal that Ms Kelland omitted to refer to key events, and gave a statement to the Committee that was different from an explanation she gave to Mr Lancaster.

[9] Mr Lancaster also makes allegations as to the Committee’s investigation of his complaint: that he was not given a full set of documents which meant that he was not given a fair opportunity to respond, two witnesses were not spoken to, the investigator did not communicate properly with him, made mistakes in his report to the Committee, assured him that transcripts of audio recordings would be provided to the Committee

⁶ At paragraph 3.9.

⁷ At paragraph 3.12.

⁸ at paragraph 3.13.

but then provided only a brief overview, did not make enquiries of Ms Jaffe of the Agency concerning the commission dispute, and the investigation took too long.

Application to admit evidence at the appeal hearing

[10] Mr Lancaster has indicated that he intends to cross-examine witnesses whose statements were before the Committee, call other evidence, and produce material that was not before the Tribunal. Mr Lancaster was advised that he is required to apply to the Tribunal for leave to do so. The matters required to be addressed in such an application were set out in the Tribunal's Minutes dated 22 August 2017 and 15 September 2017.

[11] On 20 October 2017 Mr Lancaster filed an "application to adduce further evidence", but that application did not address the required matters. In the Tribunal's Minute dated 25 October 2017, Mr Lancaster was directed to file an amended application, which clarifies the evidence he seeks to have admitted (and any annexures to that evidence⁹), sets out the nature of the evidence and its relevance to the Tribunal's consideration of his appeal, and explains why he did not provide the evidence to the Committee.

[12] Mr Lancaster filed an amended application dated 7 November 2017, received by the Tribunal during the evening of 10 November 2017.

[13] Mr Lancaster's application was received by email, as a collection of 18 pdf attachments. Apart from the application itself, one attachment was labelled "Attachment marked A", and comprised Mr Lancaster's original complaint to the Authority, together with material submitted with the complaint. The remaining 16 pdf attachments were each labelled "Attachment A". The attachments were not paginated, or identified in any other manner. The Tribunal has considered the attachments in the order in which they appeared in a print-out of Mr Lancaster's application. The Tribunal notes Mr Lancaster's statement in his application that the items marked "Attachment A" were all provided in his initial complaint.

⁹ This is a reference to a statement by Mr Lancaster that evidence would be filed "with annexures"

[14] Mr Lancaster stated that the application is “to adduce further evidence, and also to raise the issue that evidence that should have been considered during the investigation process was largely ignored by the [Authority’s] Investigators.”

[15] In particular, Mr Lancaster sought “relief” as follows:

9. That the Application be allowed, as it serves the purpose of the Act, and cannot prejudice any of the parties, or the due administration of justice, which includes open justice.
10. That the evidence that has already been supplied to the CAC, REAA, READT is investigated in the proper method.
11. That witnesses be called for cross examination and to bring any relevant documents within their control.
12. That the Respondents file [their] replies in sworn affidavit form, and to reply to each and every point of the Applicants complaint, for completeness, and for the purposes of examination.

Applicable principles

[16] Pursuant to s 111(3) of the Act, an appeal against a Complaints Assessment Committee’s decision is a re-hearing; that is, the appeal is determined by reference only to the material that was before the Committee, and the submissions made by or on behalf of the parties to the appeal.

[17] As the Tribunal said in *Eichelbaum v The Real Estate Agents Authority*, the Tribunal may accept further evidence, or material that was not put before the Committee, if it considers the evidence or material will assist it in determining the appeal. Such evidence or material must be cogent and material to the Tribunal’s determination of the appeal, and not reasonably available to be put before the Committee. The Tribunal may also permit witnesses to be questioned as to their statements to the Committee. In deciding whether to admit further evidence or further material, or to permit witnesses to be questioned, the Tribunal will have regard to the interests of justice.¹⁰

[18] A party applying to adduce evidence that was not before the Committee must identify the material sought to be submitted, explain the relevance of the material to

¹⁰ *Eichelbaum v The Real Estate Agents Authority* [2016] NZREADT 3.

the issues to be determined, and must establish that the material could not reasonably have been provided to the Committee.

[19] As the Court of Appeal said in *Nottingham v Real Estate Agents Authority*:¹¹

... The appeal is supposed to be conducted by way of re-hearing of the proceeding before the CAC. The CAC conducts a hearing on the papers, unless it directs otherwise. Except in exceptional circumstances, full oral hearings before the Tribunal are not appropriate. Doing so risks drawing the Tribunal away from the material comprising the record before the CAC so that a decision might be made on a quite different basis, it also raises the spectre of credibility findings in contests between complainants and the licensees who might be the subject of a charge that would expose the Tribunal to criticism of pre-determination if a charge were then laid.

[20] The Tribunal's task in an appeal against a decision of a Complaints Assessment Committee is to determine whether the appellant has established that the Committee's decision was wrong, in that the Committee made an error of law or principle, took into account irrelevant matters, failed to take into account relevant matters, or was clearly wrong. A decision that is "clearly wrong" is one that was not open to the Committee to make, on the material before it.

[21] It is apparent from Mr Lancaster's application that his appeal focusses on his assertion that the Committee's decision was "clearly wrong", in that it was not open to the Committee to make it.

[22] As noted earlier, the appeal is a re-hearing of the material that was before the Committee. Material that was not before the Committee will not be considered by the Tribunal unless leave is given for it to be put before the Tribunal, in accordance with the principles set out above. The Tribunal does not itself carry out its own investigation into the facts and circumstances out of which the appeal arose.

¹¹ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [81].

Mr Lancaster's submissions

[23] Mr Lancaster submitted that:

- [a] Evidence he provided to the Committee, the Authority, and the Tribunal has been ignored and/or deliberately overlooked. Mr Lancaster submitted that despite promises by the Investigator there was not one meeting or telephone call between himself and the Investigator, and that inconsistencies between the Investigator's summary and the evidence had never been acted on.
- [b] The Investigator failed to contact three persons (Mrs Tracey Lancaster, Ms Marina Oetgen, and Ms Anne Needham) whose names Mr Lancaster provided to him. Mr Lancaster submitted that they are able to provide cogent proof that the responses given to the Tribunal by the second and third respondents and the Agency are false, and that they had deliberately misled the Tribunal. Mr Lancaster requires the witnesses' evidence to be submitted to the Tribunal by way of sworn affidavit, and he intends to call them to be questioned and examined at the hearing.
- [c] The attachments to his application for leave had been provided in his initial complaint, and to the Investigator, as they proved his position that the responses of the second and third respondents and the Agency were false and that they had deliberately misled the Tribunal. He submitted that those responses were being taken as "good as gold", and that their word was simply being taken as the truth.
- [d] The bundle of documents provided by the Authority was out of context, and the reference or summary of pages does not correlate to the evidence. He submitted that the bundle was badly put together and completely confusing, and needs to be done again properly.

Responses

[24] The Tribunal has received submissions from Ms Harkess, on behalf of the Mr Lantz and Ms Kelland, and from Mr Simpson, on behalf of the Authority.

[25] Ms Harkess made submissions as to each of the items marked “Attachment A”. In summary, she submitted that with the exception of three, each of the items is on the record and was before the Committee, and is contained in the bundle of documents prepared for the purposes of the appeal. She also submitted that handwritten annotations on the items (which she assumes to have been made by Mr Lancaster) will not assist the Tribunal to determine the appeal, as they are not evidence of facts which would tend to support or disprove any allegations in the appeal.

[26] Ms Harkess submitted that the remaining three items (which are not in the bundle of documents) do not contain any fresh evidence, could have been provided by Mr Lancaster in the course of the investigation of his complaint, do not tend to prove or disprove any matter in the complaint, or are not required to determine the issues on appeal.

[27] Ms Harkess also submitted that the Tribunal should dismiss Mr Lancaster’s application to require evidence to be given by way of sworn affidavit by Mrs Lancaster, Ms Oetgen, and Ms Needham, as any such evidence is not “fresh”, because statements from each of them could have been provided by Mr Lancaster in the course of the investigation of his complaint. She submitted that Mr Lancaster has not explained why he did not do so. Ms Harkess further submitted that the Tribunal already has sufficient evidence and material to determine the appeal.

[28] Ms Harkess further submitted that the Tribunal should also dismiss Mr Lancaster’s application for an order that Mr Lantz and Ms Kelland be ordered to file sworn affidavits and to reply to each and every point of his complaint. She submitted that he had not identified any circumstances, let alone exceptional circumstances, warranting a direction that oral evidence be heard.

[29] Mr Simpson did not seek to repeat the assessment made by Ms Harkess of the various items in the attachments. He submitted that the annotations on the items are in part matters of submission which Mr Lancaster may advance at the appeal hearing, and in part a repeat of his evidence to the Committee. He also submitted that it is not clear how those items that are not in the bundles of documents add to the material that was before the Committee, or why they were not provided to the Committee during its investigation of the complaint.

[30] With respect to the proposed affidavit evidence, Mr Simpson submitted that Mr Lancaster had not provided any new evidence with his application, and that the application to adduce that evidence could not be determined until such time as the proposed affidavits are provided.

[31] Mr Simpson further submitted that Mr Lancaster has not complied with the Tribunal's directions regarding his application, as set out in the Tribunal's Minute of 25 October 2017.

Reply

[32] Mr Lancaster filed a reply to each of the submissions by Ms Harkess and Mr Simpson. The replies firmly reassert his position as to the factual disputes that were before the Committee, and his assertion that the investigation was inadequate.

Discussion

[33] The principal submission made by Ms Harkess was that the items marked "Attachment A", with the exception of three items, have been contained in the bundle of documents prepared for the appeal hearing. Ms Harkess has provided page references for each of these items.

Items which were before the Committee and are included in the bundle of documents

[34] As Mr Lancaster's complaint ("Attachment marked A"), and the items each of which is marked "Attachment A" are already in the bundle of documents, there is no basis on which Mr Lancaster can be given leave for them to be admitted as evidence

at the appeal hearing. These items are not “fresh” evidence, as the Tribunal already has them. The Tribunal will be able to consider whether Mr Lancaster has established that the Committee was wrong to decide to take no further action on his complaint, by reference to all of the items in the bundle of documents, including those which Mr Lancaster has applied to have admitted as evidence.

[35] Mr Lancaster’s annotations on the attachments do not change that position. For the most part, the annotations set out what may be matters of submission in support of Mr Lancaster’s appeal, but they cannot be said to be evidence which should be admitted at the appeal hearing.

[36] It is not necessary to refer to each item marked “Attachment A” individually. We accept Ms Harkess’s submission that each item is already contained in the bundle of documents, and Mr Lancaster’s annotations refer to matters that were in dispute before the Committee, and/or his assertion that the investigation was inadequate. We accept that these are matters for submission, not evidence which tends to prove or disprove Mr Lancaster’s allegations. To the extent that any of the annotations might possibly be considered to be Mr Lancaster’s evidence, that evidence could have been provided by him to the Committee in support of his complaint.

[37] The Tribunal will not give leave to Mr Lancaster to admit any of the items in his attachments that are included in the bundle of documents (whether annotated or not) as evidence in this appeal.

Attachments not included in the bundle of documents

[38] As noted earlier, three of the attachments are not included in the bundle of documents. The first of these (which is the fifth item marked “Attachment A”) is an email from Mr Lancaster to the Investigator, in which Mr Lancaster asked for the “header” of an email from Mr Lantz. It has not been explained to the Tribunal why this email was not included in the bundle. If it was omitted by oversight, then a supplementary bundle may be filed. An annotation on this item appears to suggest a submission that the Agency’s information “lacked basic verification”. We accept Ms

Harkess's submission that the weight the Committee, or the Tribunal, should place on any document before it is a matter for submission.

[39] The second attachment (the thirteenth item marked "Attachment A") is an email from Mr Lantz to Ms Kelland, in which he asserted that he was not provided with a CMA. Again, it has not been explained to the Tribunal why this email was not included in the bundle, and again it may be included in a supplementary bundle. In any event, we accept Ms Harkess's submission that the email repeats an allegation that was made in Mr Lancaster's complaint, and considered by the Committee. The same information as that in this email is included in documents included in the bundle.

[40] The third item (the fifteenth item marked "Attachment A") cannot be identified by the Tribunal with any certainty. However, as it contains the statement "He has successfully convinced the CAC that there are 2 listing forms this is a lie" the item clearly post-dates the Committee's decision. It is evident from its nature that this item comprises submissions, not evidence. Leave cannot be given for it to be admitted as evidence.

[41] The Tribunal will not give Mr Lancaster leave for any of the three items in the attachments that are not included in the bundle of documents to be admitted as evidence in the appeal.

Application for leave to adduce affidavit and/or oral evidence

[42] Mr Lancaster "requires" the evidence by sworn affidavit of Mrs Lancaster, Ms Oegten, and Ms Needham to be submitted to the Tribunal. He also states that he intends to call each of these to be questioned and examined at the hearing of his appeal. Mr Lancaster further seeks an order that Mr Lantz and Ms Kelland reply, by sworn affidavit, to "each and every point" in his complaint.

[43] We accept the submissions made by both Ms Harkess and Mr Simpson that Mr Lancaster has not complied with the Tribunal's direction that he clarify the evidence he seeks to have admitted, describes the annexures to any such evidence, set out the

nature of the evidence and its relevance to the appeal, and explain why the evidence was not provided to the Committee.

(a) Mrs Lancaster, Ms Oetgen, and Ms Needham

[44] Mr Lancaster has not set out the nature of the evidence he expects that any of Mrs Lancaster, Ms Oetgen, and Ms Needham may give to the Tribunal, or why he could not have submitted that evidence to the Committee during the investigation of his complaint. Mr Lancaster cannot rely on an assertion that “the investigator failed to make contact” with them as grounds for it being “required” that they give evidence to the Tribunal. As complainant, he could, and should, have presented any material to the Committee that he thought would support his complaint.

[45] As Ms Harkess noted in her submissions, Mr Lancaster indicated to the Investigator on several occasions that Mrs Lancaster would be providing a statement to the Committee, and he was expressly given an opportunity to provide Mrs Lancaster’s statement before the file was referred to the Committee. Mr Lancaster has not set out any reason why the Tribunal should now receive a sworn affidavit from Mrs Lancaster now, when he did not provide a statement from her to the Committee.

[46] We also accept Ms Harkess’s submission that Mr Lancaster has not set out how any of Mrs Lancaster, Ms Oetgen, and Ms Needham have direct knowledge of factual matters in dispute, or will assist the Tribunal to determine the issues it is required to determine in this appeal.

[47] The Tribunal will not make an order “requiring” the evidence by sworn affidavit of Mrs Lancaster, Ms Oetgen, and Ms Needham to be submitted to the Tribunal, or that they be “required” to attend to be questioned and examined at the hearing of his appeal.

(b) Mr Lantz and Ms Kelland

[48] Mr Lantz and Ms Kelland both gave statements during the course of the investigation in response to Mr Lancaster’s complaint, and submissions were made on

their behalf. Mr Lancaster had an opportunity to respond to their statements. The disputed facts were squarely before the Committee.

[49] Mr Lancaster has not set out what evidence he would expect Mr Lantz and Ms Kelland to give in affidavit form, or provided any support for his contention that they should be required to repeat their evidence in the form of sworn affidavits, and be required to attend the hearing of the appeal for the purpose of examination and cross-examination. In the circumstances, the Tribunal is not able to consider Mr Lancaster's application with regard to Mr Lantz and Ms Kelland.

[50] Further, the Tribunal refers to the caution expressed by the Court of Appeal in *Nottingham v Real Estate Agents Authority*,¹² that a full oral hearing (that is, where there is examination and cross-examination of witnesses)

... risks drawing the Tribunal away from the material comprising the record before the CAC so that a decision might be made on a quite different basis, it also raises the spectre of credibility findings in contests between complainants and the licensees who might be the subject of a charge that would expose the Tribunal to criticism of pre-determination if a charge were then laid.

[51] That caution is apposite in the present case, in the light of Mr Lancaster's submission, in paragraph 1 of his application to admit further evidence, that the Committee:

... is not applying the relevant law as to the required nature, and strength of the allegations and evidence provided, that required the CAC to decide a charge should be drawn and filed against the agent. The purpose of the charge is to test the allegations in the proper form, hold an agent to account, compensate the injured party, and act as a deterrent and educational for other agents, and to ultimately give the public the confidence that [their] rights as a paying consumer are protected.

[52] Where a submission is made, or indicated, in the course of an appeal against a decision of a Complaints Assessment Committee, that the Committee should have laid a charge against a licensee, the Tribunal should not be put in the position of being required to make credibility findings on the evidence considered by the Committee. The proper course is for the matter to be referred back to the Committee for reconsideration.

¹² *Nottingham v Real Estate Agents Authority*, above n 4.

[53] The submission set out above indicates that Mr Lancaster contends that the Committee should have laid charges against Mr Lantz and Ms Kelland. In the circumstances, it would not be appropriate for the Tribunal to go beyond the record comprising the material that was before the Committee.

[54] The Tribunal will not make an order that Mr Lantz and Ms Kelland reply, by sworn affidavit, to “each and every point” in his complaint.

Ruling

[55] Mr Lancaster’s application to file further evidence is dismissed.

[56] 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

Ms N Dangen
Member

Ms C Sandelin
Member