

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 01

READT 036/19

IN THE MATTER OF

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

BETWEEN

JENNIFER LEITH
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1903)
First Respondent

AND

JULIANNE COBHAM
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Mr N O'Connor (Member)

Submissions filed by:

Ms Leith, Appellant
Ms S Earl, on behalf of the Authority
Mr G Dewar, on behalf of Ms Cobham

Date of Ruling:

24 January 2020

RULING OF THE TRIBUNAL
(Application to submit further evidence on appeal)

Introduction

[1] Ms Leith has filed an appeal under s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1903 (“the Committee”) dated 19 September 2019, in which the Committee decided to take no further action on her complaint against the second defendant, Ms Cobham.

[2] Ms Leith has applied for leave to submit further evidence in support of her appeal.

The Committee’s decision

[3] Ms Leith bought a property (a unit in a two-unit property under the Unit Titles Act 2010) in Khandallah, Wellington, on 23 September 2016 (“the property”). The vendor owned both of the units. On 19 March 2018 she complained to the Authority that Ms Cobham, who marketed the property:

- [a] did not identify defects in the property, including a leaking roof, a major leak in the garage, leaky spouting, blistering paint work, leaky windows, and a leaking balcony; and
- [b] did not comply with her legal obligations under the Unit Titles Act, by not providing completed pre-sale disclosure documents (including the body corporate rules, information on levied contributions, and the maintenance plan).

[4] The Committee decided to take no further action on the complaint on the following grounds:

Disclosure of defects

- [a] The Committee found that Ms Cobham did not know that the defects existed. With the exception of a defective power point, the vendor did not advise her of any defects, and the defects identified by Ms Leith were not visibly obvious or immediately apparent to Ms Cobham.

- [b] Ms Leith had the benefit of a builder’s inspection report. The Committee understood that Ms Leith was not satisfied with the report (and had received a refund), but the fact that it was substandard did not change the fact that Ms Cobham was not aware of the defects.
- [c] Ms Cobham did not have a duty under s 10.76 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 to discover hidden or underlying defects, but was required to disclose known defects to Ms Leith. She did not have a duty to disclose defects of which she was not informed, and which were not immediately apparent to her.¹

Unit Titles Act disclosure

- [d] At the time the property was sold to Ms Leith, there was no body corporate for the property. Consequently, there were no body corporate rules in existence, nor body corporate insurance, a bank account, or monthly operating fee.
- [e] The Committee was satisfied that Ms Cobham had turned her mind to the fact that because there was no body corporate, required detail such as the body corporate rules could not be provided to prospective purchasers.
- [f] Ms Cobham took legal advice and was advised that it was common (particularly in small developments) for the Unit Titles Act not to be complied with. She noted “N/A” in the relevant portions of the disclosure material for the property. The Committee considered it unlikely that Ms Cobham neglected to discuss the absence of a body corporate with Ms Leith, as she would have had to explain the “N/A” note.
- [g] Ms Leith took legal advice before signing tender documents, and did not raise any issue as to compliance with the Unit Titles Act. She completed the purchase knowing that there was no body corporate in place.²

¹ Committee’s decision, at paragraphs 3.1 – 3.5.

² At paragraphs 3.6 – 3.11.

Appeal

[5] In essence, Ms Leith contends that the Committee reached the wrong decision in finding that the defects were not visibly obvious or immediately apparent to Ms Cobham. She also contended that she had only one meeting with Ms Cobham before submitting her tender, and that the Committee was wrong to find that it was unlikely that Ms Cobham would have neglected to discuss the absence of a body corporate, and the significance of the “N/A” note

Principles as to admission of evidence on appeal

[6] Pursuant to s 111(3) Act, 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 reconsiders the evidence and other material that was provided to the Committee. However, in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*, the Tribunal accepted that the Tribunal may give a party to an appeal leave to submit evidence to the Tribunal considering an appeal, which was not before the Complaints Assessment Committee, if the applicant for leave satisfies the Tribunal that:³

- [a] the evidence could not have been obtained by the party with reasonable diligence, and provided to the Committee;
- [b] the evidence is cogent – that is, it would have had an important influence on the outcome; and
- [c] the evidence is apparently credible.

[7] The Tribunal will also consider whether admitting the evidence would require further evidence from other parties, and cross-examination.

[8] However, the Tribunal referred in *Eichelbaum* to the judgment of the Court of Appeal in *Foundation for Anti-Aging Research v The Charities Registration Board*, in

³ *Eichelbaum v Real Estate Agents Authority (CAC 303)*, [2016] NZREADT 3, at [49].

which the Court noted that “material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instances is unlikely to meet the test” for admission.⁴ The Tribunal accepted that its power to allow evidence does not mean that a party can be given the opportunity to run their case afresh simply because they wish they had conducted it differently before the Committee.⁵

Material sought to be admitted

Defects

[9] Ms Leith noted that the building report was provided to the Committee. She submitted that, in error, she had omitted to refer the Committee to defects identified in the report, in order for the Committee to assess whether they were visible to Ms Cobham. These related to rust in the Meter Board, corrosion on balcony rails, dampness in the basement, efflorescence in the basement, structural cracks in a retaining wall and the garage wall, visible rot in windows, and wear in the carpet.

[10] Ms Leith submitted that further defects were not identified in the building report. These were leaks in the roof, blistered paintwork, cracks on the concrete balcony, corrosion holes at the front door rails, corrosion on a rail at the back of the house, subsidence and cracks in the driveway, efflorescence in a pillar (construction joint) in garage, a crack in drain on exterior southern basement wall, rusty spouting and leaking downpipes, and a leak into the garage.

[11] The material sought to be submitted comprises:

- [a] An affidavit sworn by Mr Andrew Tilly on 22 November 2019. Mr Tilly is a plumber who carried out work at the property in early December 2016. At the time, he pointed out a number of plumbing and drainage defects to Ms Leith.

⁴ *Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449, at [35].

⁵ *Eichelbaum*, at [51].

- [b] Quotations and invoices for remedial work, provided to Ms Leith. Some of these pre-date the Committee's decision, and have been included in the Bundle of Documents containing the material considered by the Committee. Other quotations and invoices either pre-date the Committee's decision, but are not included in the Bundle of Documents (and are assumed not to have been provided to the Committee), or post-date the Committee's decision.
- [c] Photographs: again, some of these pre-date the Committee's decision, and are included in the Bundle of Documents. Others post-date the Committee's decision, or are undated.
- [d] Ms Leith's application contains many statements of fact. To some extent, these statements were made in her communications with the Authority, in the course of her complaint.

Body corporate disclosure

[12] Ms Leith seeks leave to submit her cell phone log for September 2016. She also seeks leave to submit an email thread between Ms Cobham and herself, and including correspondence with her solicitor, a valuer, insurers, and her bank. Some of the emails are included in the Bundle of Documents.

Discussion

[13] The Tribunal is not required to give leave for any material that Ms Leith provided to the Committee to be submitted for consideration on appeal. The Tribunal will consider that material. The Tribunal will also consider submissions by or on behalf of the parties.

Defects

[14] The issue for determination on appeal will be whether Ms Leith has satisfied the Tribunal that the Committee was wrong to conclude that Ms Cobham was not made

aware of defects in the property by the vendor, and the defects identified in the building inspection report and subsequently were not “visibly obvious” to her.

[15] Ms Leith did not make her complaint until March 2018 (some 17 months after she settled the purchase). Ms Leith provided information to the Authority’s investigator up until May 2019. She provided the investigator with photographs, and quotations and invoices for remedial work done in respect of defects identified in the building inspection report, and identified by her subsequent to that report.

[16] Ms Leith has not provided any submission as to why Mr Tilly’s affidavit, and the quotations, invoices and photographs that were not provided to the Committee could not with reasonable diligence have been obtained and provided, at the time her complaint was being considered. Her statement that she “in error omitted to reference defects” does not provide justification for allowing the additional material to be submitted to the Tribunal. As noted earlier, the power to allow further evidence to be submitted does not provide Ms Leith with the opportunity to run her case afresh simply because she wishes she had conducted it differently before the Committee.

[17] Further, we note that, in any event, the quotations, invoices, and photographs appear to be submitted in support of Ms Leith’s identification of defects as part of her complaint. We accept Ms Earl’s submission that they do not add materially to the evidence that was before the Committee.

Body Corporate

[18] The issue to be determined on appeal will be whether Ms Leith has satisfied the Tribunal that the Committee was wrong to find that Ms Cobham was not in breach of any of her professional obligations in relation to the fact that the property did not comply with the Unit Titles Act.

[19] Again, Ms Leith has made no submissions as to why she could not with reasonable diligence have provided her cell phone logs, or the email chain, to the Committee. Some of the emails are in the Bundle of Documents. We note Ms Earl’s submission that these appear to be the most relevant emails – in particular, an email in

which Ms Cobham advised Ms Leith that there was “no body corp set up as same owner”, and that the remaining emails may not assist the Tribunal in determining the appeal.

Decision

[20] Ms Leith has not satisfied us that the evidence she seeks leave to submit to the Tribunal in support of her appeal could not with reasonable diligence have been provided to the Committee. Further, we are not satisfied that the evidence would materially assist us in determining her appeal. Accordingly, her application for leave to submit the evidence is declined.

[21] Pursuant to s 113 of the Act, the Tribunal draws the parties’ attention to s 116 of the Act, which sets out the right of appeal to the High Court. 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

Mr N O’Connor
Member