

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 50

READT 014/19

IN THE MATTER OF

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

BETWEEN

VIGGO ZIGU HU
Applicant

AND

THE REAL ESTATE AGENTS
AUTHORITY (COMMITTEE 416)
First respondent

AND

SIU (SAM) YEUNG
Second respondent

Hearing:

29 August 2019

Tribunal:

Mr J Doogue, Deputy Chairperson
Mr G Denley, Member
Ms N O'Connor, Member

Appearances:

Mr Tan on behalf of the Appellant
Ms Woolley on behalf of the first
respondent
Ms Keating and Mr Brownless on behalf of
the second respondent

Date of Decision:

14 November 2019

DECISION OF THE TRIBUNAL

[1] The Complaints Assessment Committee issued a decision on 12 March 2019 in which it found that unsatisfactory charges against the Licensee Siu (Sam) Yeung was established. One charge against the Licensee was however found not to have amounted to unsatisfactory conduct. The complainant, Viggo Hu who is the Appellant in the present proceedings, has filed an appeal against the dismissal of another complaint of unsatisfactory conduct.

[2] The background will be discussed subsequently in this decision. In brief the complaint against the Licensee which was dismissed by the Committee and which is the subject of the appeal, involved the on-sale of his property at 40 Glamorgan Drive, Torbay (**property**) on settlement day at a profit. The complaint was that the agent had not only been involved as the agent on the transaction from the Appellant to the first purchaser (**Purchaser 1**) but had also, unknown to the complainant, been the vendor's agent when the first purchaser on-sold the property to the second purchaser (**Purchaser 2**)

Background

[3] The details of the complaint are set out in the decision of the Complaints Assessment Committee. The complainants stated that in 2016 they decided to sell their property through an agency who had been acting as the property managers. The Licensee who was employed by the agency was introduced to them and he took steps to market the property. Initially the property failed to sell at an auction.

[4] Approximately one year later the complainants contacted the Licensee and told him that they were interested in selling the property. Shortly after their initial contact the Licensee produced to them an agreement from Purchaser 1. The agreement was an unconditional one to buy the property for \$1,050,000. The Appellant considered this and instructed the Licensee to revert to the offeror to try and get a further \$50,000. However that approach, although made, was unsuccessful. The complainants then accepted the original offer after the Licensee agreed to reduce his commission by \$5,000..

[5] The Appellant said he asked the Licensee to tell them who the buyer was. It appears that the Licensee told the Appellant that he met Purchaser 1 because she was the mother of a friend of his son.

[6] Subsequently the Appellant learned that the property was on-sold on the settlement day in December 2017 for \$1,200,000. Purchaser 1 had therefore resold the property to purchaser 2 at a gain of \$150,000.

[7] The Complaints Assessment Committee found that the Licensee had engaged in unsatisfactory conduct in a number of respects including failing to provide a comparative market analysis at the time that the agency agreement was entered into.

[8] The Appellant alleged that the Licensee had also been appointed as the vendors' agent in regard to the on-sale to purchaser 2. The Licensee told the Complaints Assessment Committee that he had had no knowledge of the second sale and he was only informed about it later.

[9] The Complaints Assessment Committee noted that the Appellant had obtained a private investigator's report but that it did not consider that the outcome of the enquiries made in fact established that the Licensee was involved in the on-sale of the property. The Committee concluded that it was not established that the Licensee had engaged in unsatisfactory conduct by acting as the agent for Purchaser 1 in the second sale which transferred the property to purchaser 2.

[10] Neither the first or second purchaser provided evidence to the Committee.

Complaint of inadequate investigation

[11] One of the grounds put forward in support of the appeal is that the Committee did not carry out an adequate examination of the complaint. In support of his assertion that the investigation was inadequate, the Appellant obtained the report from a private investigator to which reference has already been made. The report was provided to the Committee. At the conclusion of its report, the private investigator, Belso Investigations, summarised matters in a memorandum that it sent to the REA

and which is undated. That report (“**report**”) expressed the view that the Authority needed to take additional steps to collect information that, in the view of the report writer, was necessary in order for a full understanding to be obtained of the conduct of the Licensee. A specific example was that the report said that the valuer whom Purchaser 1 apparently said had gone to the property with the Licensee, should be located and interviewed as to his knowledge of the circumstances surrounding his visit. The Committee concluded that it was not established that the Licensee had engaged in unsatisfactory conduct by acting as the agent for the Purchaser 1 on the second sale which

[12] In conducting its enquiries, the Committee may, as provided in s 82(2) of the Act authorise any person to assist it with its enquiry. One of the functions of the Committee pursuant to s 78 is to enquire into and investigate complaints made under the Act. The Committee determines its own procedure: s 84. It is authorised on its own initiative to enquire into and investigate allegations about any Licensee: s 78. It has the power, but it is not obliged to, require any person to produce to it any papers, documents, records or things.¹

[13] In this case, it is common ground that the enquiries were made principally by an investigator employed by the Authority, Mr Radovich, and there does not seem to be any issue that the enquiries that were carried out were properly authorised.

[14] The first issue is whether, even assuming that the complaint that the investigation was inadequate are correct, that that matter can assist the Appellant on this appeal.

[15] On one view of it, because the rehearing which the Tribunal carries out is limited to the same evidence that was before the Committee² the question of whether the Committee did or did not go far enough in its enquiries is irrelevant. The evidence is what it is. On the other hand, it could be considered that the Tribunal has a wider function than hearing charges and appeals, and has the additional responsibility of reviewing the investigative process and, if it determined, that they

¹ Section 85(1).

had not been in compliance with the Act, either require the Committee to reconsider the matter in such a way that did comply with the Act, or alternatively, the Tribunal could itself initiate a second enquiry to overcome the insufficiencies in the first.

[16] Unfortunately, the Appellant did not provide any material or submissions relating to these questions. The approach that he took was to assert that the Committee failed to make adequate enquiries with the inherent conclusion from that circumstance being that if it had, it would have found material which would have led to the complaint being upheld.

[17] The Tribunal is a statutory body and any power that it purports to exercise must be sanctioned by the Act creating it. We were not addressed on matters of how one would assess what was an adequate extent of enquiries. We note that resolving such a question would involve consideration of the extent of the resources available to the Committee and the Authority amongst other questions.

[18] However, leaving aside the question of jurisdiction to embark upon an enquiry of the kind proposed, we consider that even if there was power for the Tribunal to conduct a review of the adequacy of the investigation, we would not have in the circumstances of this case been justified in carrying out such a review anyway. That is for the reasons discussed further on in this decision which are to the effect that we have not been persuaded that there is a substantial possibility that had additional enquiries been carried out, such enquiries might have affected the decision that the Committee actually came to.

[19] Our conclusion is that the appeal to the extent that it is based upon an inadequacy of the initial investigation is misconceived.

Should the Tribunal summons witnesses to give additional evidence?

[20] The Appellant also put forward an argument that the Tribunal should summons Purchaser 1 and Purchaser 2 in order for them to be examined at the appeal hearing.

² Unless there were exceptional circumstances justifying the admission of new evidence which would not apply in this case.

[21] To accede to the request of the Appellant would involve an order permitting the additional evidence to be considered by the Tribunal. Such an order is required because there is no entitlement as of right to put forward additional evidence on the appeal which had not been heard by the Committee

[22] In determining that question, the starting point is that on hearing an appeal the Tribunal is generally restricted to the evidence that was actually before the Committee. Exceptionally, the Tribunal may decide that that evidence should be supplemented by additional evidence.

[23] It is the Tribunal's understanding that the objective of obtaining the order is so that Purchaser 1 and Purchaser 2, can be asked questions about whether the Licensee was involved in the second transaction.

[24] The first question is whether the Tribunal has power to compel the attendance of witnesses to give evidence. The rules do not make explicit provision for the type of situation that has arisen in this case. However, s 153A expressly provides that it is an offence for any person who has been summoned to attend to give evidence before the Tribunal to refuse to answer any questions etc. The existence of that section, combined with the power of the Tribunal to regulate its own procedure under s 84 makes it reasonably clear that the Tribunal would have authority to summons Purchaser 1 and 2 to give evidence if it considered in the overall circumstances that it ought to do so.

[25] The situation under consideration has some differences from a case where a party wishes to place before the Tribunal evidence which that party has already obtained. In contrast, the position in this particular case is that the evidence is not yet in existence and the detail of that evidence would only be known once the witnesses, having been summonsed, give the relevant evidence.

[26] However, it is our view that, notwithstanding such differences, when considering the situation that would result from issuing the summonses that are sought, the Tribunal should act consistently with the principles that have been developed with regard to a case where it is sought to put new or fresh extant

evidence forward on appeal. That is, by whatever means the evidence is to be brought before the Tribunal, whether by written statement, or by a witness who attends pursuant to a summons, the Tribunal should only permit such a course to be taken exceptionally. We will now refer to the principles to be applied in deciding whether to allow the new evidence in this case.

[27] The well-settled test for admitting further evidence requires it to be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial³.

[28] In the context of this case, references to “trial” are to be taken as references to the hearing before the Committee.

[29] Adopting the approach that we have just been considering, we now set out our conclusions about whether additional evidence should be taken from Purchaser 1 and Purchaser 2 by the Tribunal.

[30] In the private investigator’s report there is considerable discussion of whether the Licensee’s conduct in securing access and taking additional persons (one of whom was allegedly Purchaser 2) to the property after the time that the agreement had been entered into, suggested that the Licensee was functioning in the role of the vendor’s agent in the on-sale from Purchaser 1 to Purchaser 2.

[31] The Appellant regarded it as important that the Licensee was allegedly involved in bringing unknown persons who had no connection to the purchase by Purchaser 1 onto the property during the period leading up to the settlement date. He believes that by bringing these persons onto the property he facilitated the purpose of Purchaser 1 which was to on sell the property to Purchaser 2. That is, the persons that were brought onto the property were there to inspect as potential purchasers which the vendor knew nothing about. The Appellant apparently accepts that it would have been legitimate for the Licensee to assist in bringing people onto the property such as a registered valuer is who may have been required to carry out a valuation of the property. However, it is his view that the Licensee deliberately misled him, the

³ *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 192.

Appellant, as to the identity of some of the visitors to the property. These persons, according to the Appellant did not have any legitimate purpose associated with the sale to Purchaser 1 for coming to the property. They were there, in his view, to facilitate the sale from Purchaser 1 to Purchaser 2 and the Licensee cooperated in concealing the true identity of such persons. It is his belief that this was how Purchaser 2 was introduced to the property.

[32] One significant way in which the Licensee misled the Appellant, he considers, was to pass off one of the visitors as a registered valuer who was required to inspect the property.

[33] The principal grounds for this proof of the falsity is said to be the following:

[34] The ASP between the vendor and Purchaser 1 was not subject to a finance clause. It therefore follows, in the contention of the Appellant, that the representation that a registered valuer was required to come onto the property must have been false. The process of reasoning is that if the ASP was not conditional on finance, there was no need to involve a registered valuer and to bring that person to the property.

[35] The Appellant also considers that the Licensee in conjunction with Purchaser 1 misled him about a visit to the property by a supposed insulation installer.

[36] We consider that these claims are amply met by the submissions for the Authority which stated:

6.8 (c) It is also speculative for the Appellant to assert that the lack of a finance clause in the Agreement and any lack of attempts by the first buyer of the property, Ms Han (**Buyer 1**), to borrow money from a local bank is supportive of the suggestion that the Licensee did not take a valuer to the property on 13 December 2017. Further, this does not provide evidence to link the Licensee to the on-sale of the property.

(d) The Authority submits the following points raised by the Appellant also do not provide evidence linking the Licensee to the on-sale of the property:

(i) the views of the tenants of the property about whether certain people shown through the property by the Licensee

fit the description of a property valuer or insulation inspector;

(ii) any misleading conduct undertaken by Buyer 1;

(iii) that the Licensee was present at the property with both Buyers;

- (e) The Authority notes that that [the Private Investigator's] Report concludes there is sufficient circumstantial evidence to suggest the Licensee was involved in the on-sale. This statement means there is no direct evidence of the Licensee being involved in the on-sale. Yet, during the investigation, the investigator spoke to Buyer 1 and her sister. In that conversation, both Buyer 1 and her sister confirmed the property was on-sold to a friend and that the Licensee had no involvement in the sale. This aspect of the report does not support the conclusion drawn by the investigator. The Authority submits that in respect of the [investigator's] Report, the Committee correctly concluded that the [investigator's] Report did not provide any evidence to link the Licensee to Buyer 2. While the Committee's decision on penalty is not subject to this appeal, the Authority notes the Committee's comments in that decision where it again reiterated that the [investigator's] Report held no proof of involvement by the Licensee in the on-sale of the property. The Committee noted that the report contained conjecture and opinion but lacked evidence to link the Licensee to Buyer 2. The Authority submits this is a correct characterisation of the [investigator's] Report.⁴

[37] We would add that the private investigator's report asserted that Purchaser 1 stated that she did not require finance to implement the purchase. However, it is not clear on what date that conversation took place. It could have been correct at the time when Purchaser 1 entered into the ASP however circumstances may have subsequently changed.

[38] It is not the obligation of the Tribunal to propose alternative scenarios that might explain why a valuation was required in this situation, but for the purposes of illustrating the shortcomings in the logic of the report they would include that the expected source of finance for the transaction became unavailable or that a non-bank lender who was prepared to lend, wished to know what the market value was.

[39] This evidence is therefore equivocal concerning the question of whether the Licensee and the purchaser/s were dishonest with the vendor in asserting that they wished to have a valuer visit the property.

⁴ References in original text have been removed

[40] It also said to be suspicious that Purchaser 1 and Purchaser 2 both declined to be interviewed by the private investigator. It is apparently assumed that there could be no legitimate reason justifying that refusal. It is asserted that this additional circumstance is supportive of the belief of the Appellant that there was a covert arrangement to on sell the property which involved the Licensee. We do not accept that this is so.

[41] There was no obligation on the two purchasers to submit to interview by the private investigator. The two individuals concerned may simply have not wanted to get involved.

Other evidence supporting the appeal

[42] The evidence that the Appellant requires would be such as to establish that there was complicity between the Licensee and Purchaser 1.

[43] An attempt was made to show that the Licensee was likely to have been involved because he had become known to Purchaser 1 through their children being friends.

[44] This circumstance does not provide evidence that makes it more likely than not that the Licensee became involved in the second transaction.

[45] It is apparently contended that because of the above connection between the Licensee and Purchaser 1, that made it likely that Purchaser 1 disclosed to the Licensee, an intention that she had, to on sell the property at a profit. In order for such a scheme to work, it would have of course, be necessary for the Licensee not to disclose his knowledge about it to the Appellant who was his principal.

[46] We consider that the fact that the Licensee was apparently an acquaintance of Purchaser 1 is an insufficient basis to persuade us that the Licensee must therefore have been involved in Purchaser 1's scheme to on-sell the property.

[47] A further factor is that there is no evidence whatsoever which establishes that the Licensee was instrumental in introducing Purchaser 2 to Purchaser 1. All that is known is that Purchaser 1 and Purchaser 2 apparently come from the same ethnic background. During the investigation, the investigator spoke to Purchaser 1 and her sister in the course of which conversation, Purchaser 1 and her sister confirmed the property was on-sold to a friend and that the Licensee was not involved in the sale.

[48] The point is that a plausible explanation has been put forward and that explains how Purchaser 1 and Purchaser 2 came to be dealing with each other as purchaser and vendor of the property. Such an explanation of course displaces any need for the involvement of the Licensee as part of the on-sale to Purchaser 2.

Conclusion on proposed additional evidence

[49] The Tribunal by analogy with cases such as *Eichelbaum v Real Estate Agents Authority*⁵ ought not to cooperate with the proposed course of action unless, amongst other things, there is reason to suppose that summoning the two witnesses and requiring them to give oral evidence is likely to assist the position of the Appellant and therefore should be directed as would be directed in the interests of justice.

[50] The Tribunal considers that it is particularly helpful to focus on the requirement for new evidence to be cogent.

[51] We would accept that evidence from Purchaser 1 and Purchaser 2 that the Licensee was in fact involved in the on sale to Purchaser 2, that would be cogent evidence. But for the reasons that we have set out earlier in the discussion, we do not consider that there is any reasonable basis upon which it can be supposed they would give such evidence.

[52] For all of these reasons, there is no rational ground upon which the Tribunal could conclude that the proposed evidence of purchasers 1 and 2 would, if summonsed, assist the case for the Appellant. In the case of Purchaser 1, she has

⁵ *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [51].

already made a statement that the Licensee was not involved in the on sale. In the case of Purchaser 2 we simply do not know what she would say.

[53] For those reasons, we conclude therefore that there is no justification for taking the exceptional course of issuing witness summonses and requiring the purchasers one and two to submit to examination before the Tribunal on appeal. We do not consider that exercising the discretion that we have to control the procedures of the Tribunal, that it would be reasonable to reopen the hearing of evidence and making orders for the purchasers to be summonsed to give evidence before the Tribunal. The exercise would be likely to be one of futility.

[54] Understandably, the Appellant is aggrieved that Purchaser 1 was able to make a profit on the resale of his property by on-selling it on the date of settlement for an additional \$150,000. But there is nothing inherent in the circumstances which requires acceptance of the view that the Licensee was a party to this arrangement.

Conclusion

[55] For the reasons we have given we are not persuaded that the Committee erred when it concluded that it was not proved that the Licensee was involved in the onsale from Purchaser 1 to Purchaser 2. The appeal is therefore 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.

Mr J Doogue
Deputy Chairperson

G Denley
Member

N O'Connor
Member