

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 51

READT 029/19

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	PRAKASH PATEL Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1902) First Respondent
AND	MARK PHILLIPS Second Respondent

On the papers

Tribunal:	Hon P J Andrews (Chairperson) Mr G Denley (Member) Ms C Sandelin (Member)
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Submissions filed by:	Mr Patel, Appellant Ms L Lim, on behalf of the Authority Mr G Dewar, on behalf of Mr Phillips
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Date of Ruling:	25 November 2019
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RULING OF THE TRIBUNAL
(Application by Appellant to cross-examine witnesses and for further evidence to be admitted)

Introduction

[1] Mr Patel has appealed pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1902, dated 5 August 2019, to take no further action on his complaint against the second respondent, Mr Phillips.

[2] Mr Patel has applied to the Tribunal for leave to cross-examine witnesses, and to call further evidence, in relation to his appeal. The application is opposed by both the Authority and Mr Phillips.

Background

[3] Mr Patel and a business associate, Mr Kumar, each owned a 50 percent share in a property in Lower Hutt, which was mortgaged to the ANZ bank. The relationship between Mr Patel and Mr Kumar became acrimonious, and mortgage payments were not made. The bank issued a notice of default under the Property Law Act 2007. The default was not remedied. Mr Patel obtained a valuation of the property, and offered to buy out Mr Kumar’s share. Mr Kumar did not accept the offer.

[4] On 24 October 2017, on the application of Mr Kumar, an order was made in the High Court at Wellington for the property to be sold. On 16 November 2017, a further order was made, appointing a solicitor, Mr Hoffman-Body, to act as vendor on the sale of the property. Mr Hoffman-Body was authorised to list the property for sale with an appropriate real estate agent, accept any appropriate purchase price, sign any necessary forms, incur any necessary expenditure to effect a sale, pay his own and any other incidental costs out of the sale proceeds (including the mortgage), and take all necessary steps to carry out the order that the property be sold.

[5] Mr Hoffman-Body obtained appraisals of the property from two estate agents and entered into a listing agreement with Mr Phillips, of the Professionals agency, on 9 February 2018. The property was sold after an auction on 24 May 2018.

[6] During the course of marketing the property (during which time he was living at the property), Mr Patel contacted the Authority, expressing concern as to whether defects in the property, in particular a leak in the living room ceiling, would be disclosed to prospective purchasers. The auction documents disclosed a number of defects in the property, including that “there may be a leak in the upstairs bathroom from around the base of the shower that may cause a leak through the ceiling below”, and the auction sale and purchase agreement provided that the property was being sold on an “as is where is” basis. After the sale of the property, Mr Patel made a formal complaint to the Authority. His complaint included an allegation that Mr Phillips was made aware of the leak in the living room ceiling, but did not disclose it.

[7] After investigating the complaint and conducting a hearing on the papers, the Committee found that Mr Phillips had acted on Mr Hoffman-Body’s instructions, and made appropriate disclosures during the marketing and in the auction documentation, with clear advice to prospective purchasers that the property was being sold on an “as is where is” basis, and that there would be no recourse in respect of the condition of the property or any matters affecting it.

[8] In his appeal, Mr Patel contends (among other things) that the Committee was wrong to find that Mr Phillips made appropriate disclosure, and was wrong to find that Mr Phillips acted in good faith in dealing with the property.

[9] At a directions telephone conference concerning the appeal, Mr Patel indicated that he wished to cross-examine witnesses who made statements that were provided to the Committee. He was directed to file and serve an application for leave to cross-examine witnesses. He then also applied for leave to produce evidence, in the form of an exchange of emails with the purchaser of the property.

Mr Patel’s application to cross-examine witnesses

Relevant legal principles

[10] Section 89(1) of the Act provides that a Complaints Assessment Committee may make a determination, after “both inquiring into a complaint or allegation and

conducting a hearing with regard to that complaint or allegation”. Section 90 of the Act provides:

90 Hearings on papers

- (1) A hearing conducted under section 89(1) by a Committee is to be a hearing on the papers, unless the Committee otherwise directs.
- (2) If the Committee conducts the hearing on the papers, the Committee must make its determination on the basis of the written material before it.
- (3) Consideration of the written material may be undertaken in whatever manner the Committee thinks fit.

[11] Committees routinely consider complaints pursuant to s 89(1) by way of hearings “on the papers”, on the basis of the written material before them, and without conducting an oral hearing. That is understandable, given that the hearing follows an investigation by one of the Authority’s investigators, which has resulted in the Committee being provided with written material and statements by the complainants, licensees, and others.

[12] Pursuant to s 111(3) Act, an appeal against a determination of a Complaints Assessment Committee is by way of re-hearing. 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. In its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*, the Tribunal accepted that most appeals will be conducted on the record which was before the Committee, but that the Tribunal may allow witnesses to be cross-examined on their evidence provided to the Committee, if it considers that would assist it to determine the issues on the appeal.¹

[13] However, as the Court of Appeal confirmed in its judgement in *Nottingham v Real Estate Agents Authority*, a full oral hearing of the evidence is not appropriate except in exceptional circumstances.²

[14] The directions as to Mr Patel’s application for leave to cross-examine witnesses included that he was to identify the issues in which cross-examination is sought, and that he was to include submissions as to how the cross-examination would assist the Tribunal in determining the appeal.

¹ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [35].

² *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [81],

Submissions

[15] Mr Patel applied for leave to cross-examine Mr Phillips, Mr Hoffman-Body, Mr Gallacher (an Authority investigator, who dealt with Mr Patel both before the sale of the property and in investigating his formal complaint), the owner of a property appraised by Mr Phillips, and the valuer who valued the property for Mr Patel. He stated the issues for cross-examination as being “leaks in the property”, “delay in listing of the property”, “vacation”,³ “property marketing malpractice”, and “cleaning”.

[16] Mr Patel submitted that cross-examination would assist the Tribunal to determine where the Committee went wrong, made wrong assumptions and wrong decisions, ignored vital evidence or misunderstood evidence, and unnecessarily favoured Mr Phillips. He further submitted that he did not expect the Committee’s decision to be made on the papers. He submitted that cross-examination is “crucial, necessary, imperative and of paramount importance” to counter the Committee’s assumptions and reasoning.

[17] On behalf of Mr Phillips, Mr Dewar submitted that Mr Patel had not identified any manner in which the Tribunal is likely to be assisted by cross-examination, and had not focussed on his complaint or the Committee’s decision. He submitted that the Tribunal could not identify from Mr Patel’s submissions what particulars of any issues or evidence the named witnesses would be expected to refer to, and that Mr Patel had made no attempt to address the manner in which the Tribunal would be assisted.

[18] Mr Dewar further submitted that in the complaints process the complainant has the opportunity to put all relevant material before the Committee, and there is no right of cross-examination. He submitted that it would be illogical to assert that cross-examination ought to be available on appeal when it is not part of the process available at the Committee stage.

³ The Tribunal understands Mr Patel to be referring to a statement made to him by Mr Phillips that it would assist in marketing the property if he were to vacate it, and the property was “staged”.

[19] Ms Lim submitted for the Authority that Mr Patel had not provided clear grounds in respect of what each witness would be questioned on, or identified any particular statements as being untrue or incorrect, or any suggestion that a witness provided false evidence to the Committee. She submitted that in the absence of a clear explanation of the evidence that questioning witnesses would be expected to elicit, requiring witnesses to be present for oral evidence would unnecessarily prolong the proceeding.

[20] Ms Lim also submitted that with respect to the substantive issue on the appeal (that the Committee was wrong to find that Mr Phillips complied with his disclosure obligations) there is no dispute as to the extent of disclosure made as to the property. She submitted that it was set out by Mr Phillips in his response to the complaint, the listing agreement, disclosure in the auction documents, and in marketing material. She submitted that Mr Patel relies on an inspection report commissioned by a prospective purchaser. Thus, she submitted, the contemporaneous evidence is almost exclusively documentary.

[21] Ms Lim submitted that this issue turns on the weight the Committee and Tribunal place on the documentary evidence, rather than any active factual dispute that could be resolved by cross-examination of Mr Phillips, or any other of the proposed witnesses.

[22] Ms Lim further submitted that Mr Patel is also contending that the Committee incorrectly assumed that he contributed to a delay in listing the property and reluctantly participated in the process, and that it was wrong to find that Mr Phillips was complying with his professional duties in advising that the property may obtain a better sale price if it were vacant and staged for sale. She submitted that each of these issues is directed at the Committee's reasoning, rather than any factual issue. On that basis, she submitted, cross-examining the proposed witnesses would not assist the Tribunal to determine the issue.

[23] Mr Patel filed submissions in response to those for the Authority. He submitted that he was not made aware of the process adopted by the Committee in reaching a decision, and did not expect it to be solely based on the papers before the Committee. He submitted that the cross-examination he sought would ensure that:

- a) No facts would be left out which in return will eliminate further possibilities for assumption.
- b) Where exactly the Committee erred as to the facts and reasoning.
- c) Contentment to all the parties that all the relevant points were considered and will aid the tribunal in attempting to reach to the depth of the issue/s before delivering a decision.
- d) Pathway to the root of the matter and will aid in simplifying Tribunal's task of delivering natural justice.

Discussion

[24] The fact that the Committee considered Mr Patel's complaint "on the papers" is not in and of itself grounds for granting his application for leave to cross-examine the persons he has listed. Equally, however, the fact that cross examination was not part of the process before the Committee does not lead to it being "illogical" to assert that cross-examination ought to be available on appeal, as Mr Dewar submitted. The Tribunal has the power to regulate its own procedures (pursuant to s 105 of the Act) and, as made clear in *Eichelbaum*, it has the power to allow witnesses to be cross-examined on their evidence to the Committee, if it considers that would assist it to determine an appeal before it.

[25] As Ms Lim submitted, the substance of Mr Patel's appeal is that Mr Phillips was aware (because Mr Patel told him) that there was a leak in the living room ceiling at the property, was required to disclose it pursuant to his obligation under r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 to disclose known defects, and did not disclose it to prospective purchasers, and that the Committee was therefore wrong to find that he was not in breach of r 10.7. The focus must be on Mr Phillips' knowledge and conduct. The knowledge and conduct of other people is of little relevance in determining the appeal.

[26] For that reason, the Tribunal would not be assisted by cross-examination of Mr Hoffman-Body, Mr Gallacher, the owner of a property appraised by Mr Phillips, or the valuer, Mr Webb.

[27] However, the Tribunal would be assisted by cross-examination of Mr Phillips as to his knowledge of the leak in the living room ceiling (as distinct from any other leak

at the property) and his disclosure of defects in the property. Accordingly, leave is given for Mr Phillips to be cross-examined, as outlined. In respect of the remaining witnesses identified by Mr Patel, leave to cross-examine is declined

Me Patel's application to admit further evidence

Relevant legal principles

[28] As the Tribunal said in *Eichelbaum*, a party to an appeal may be given 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:⁴

- [a] the evidence could not have been obtained 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.

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

Submissions

[30] Mr Patel sought leave to admit as “fresh evidence” the following exchange of emails between himself and the purchaser of the property:

7 October 2019: Mr Patel to the purchaser:

Was there any water leaking in the property after you bought the property?
What costs did you incur to fix it? Let me know in detail if you want to claim.
I have taken action against the agent.

9 October 2019: the purchaser to Mr Patel:

Hi Prakash

⁴ *Eichelbaum*, above fn 1, at [49].

Yes I have paid for repairing of roof and replacing part of up floor and garage gutters, and bathroom's leaking pipe. Also repair lounge ceiling coursing by leaking.

[31] Mr Patel submitted that the evidence “is recent and thus wasn't with me before”, and is important as it “confirms that the leak was still there and wasn't remedied and was just covered up”, and “the new owner had to attend to it within a short period of time after the purchase”. He submitted that the evidence is “vital”.

[32] Mr Dewar submitted that there is no basis to conclude that the evidence would be “cogent” on any aspect of the appeal, nor any basis on which the Tribunal could conclude that it could not reasonably have been obtained at first instance. He further submitted that the evidence does not appear to have any logical relevance, given that “the property was sold on an “as is” basis with known defects drawn to the attention of purchasers”.

[33] Ms Lim submitted that the evidence is not relevant to the central issue on appeal (whether Mr Phillips was aware of the leak in the living room ceiling and complied with his obligation to disclose known defects), and would not have had a significant influence on the outcome of the proceeding before the Committee.

Discussion

[34] As the Tribunal has already stated, the focus of the appeal is on Mr Phillips' knowledge and conduct. For that reason, the exchange with the purchaser of the property is of limited relevance.

[35] Further, it is clearly evidence that could have been obtained by Mr Patel and presented to the Committee. He knew the purchaser, whom he showed through the property. That fact that the evidence is “recent” is not sufficient for it to be admitted on appeal. Mr Patel could have obtained a statement from the purchaser at the time of his complaint. As the Tribunal accepted in *Eichelbaum*, notwithstanding the Tribunal's power to allow further evidence to be provided on appeal, “what is not

permissible is to give a party to an appeal the opportunity to run their case afresh simply because they wish they had conducted it differently in the first instance.”⁵

Outcome

[36] Leave is given for cross-examination of Mr Phillips, as outlined in paragraph [27], above. In all other respects, Mr Patel’s applications to cross-examine witnesses and to submit further evidence are declined.

[37] A telephone conference is to be convened in order for further timetable directions to be made as to the hearing of the appeal, and filing submissions on appeal.

[38] 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

Ms C Sandelin
Member

⁵ *Eichelbaum*, above fn 1, at [51].