



## **Introduction**

[1] The appellants, Mr and Mrs Eade, have appealed against the decision of Complaints Assessment Committee 1903, dated 20 August 2019, in which the Committee decided to take no further action on their complaint against the second respondents, Mr Quinton and Bayleys Real Estate Limited (“the Agency”).<sup>1</sup>

[2] The appellants have applied to submit further evidence in support of their appeal, and to cross-examine witnesses on their statements to the Authority. The applications are opposed by both the Authority and the second respondents.

## **Background**

[3] On 12 May 2015, the appellants entered into an agreement to purchase an apartment in a building in Freemans Bay, Auckland, known as “Hereford Residences” (“Hereford”), a development by the Tawera Group (“the developer”). The appellants’ purchase was “off the plans”. Mr Quinton, who is engaged by the Agency, was the selling agent. Settlement took place in July 2017.

[4] In August 2018, the appellants complained to the Authority that Mr Quinton had made representations in the course of marketing Hereford, as to a concierge, live-in manager, swimming pool, gym, theatre, and security. They alleged that contrary to the representations, there was no concierge or live-in manager, the swimming pool was on land leased from another entity rather than owned by the Hereford body corporate, the “gym” and “theatre” were empty rooms for which equipment and furniture had to be purchased or leased by the body corporate, and the body corporate had had to fight to obtain swipe-card access.

[5] The Authority decided to inquire into the complaint. On its own motion, it inquired into the Agency’s conduct.

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<sup>1</sup> Complaint No C27106 Quinton and Bayleys Real Estate Limited: Decision to take no further action, 20 August 2019.

[6] In their responses to the Complaint, the second respondents agreed that the marketing brochures contained statements that Hereford would have a concierge and a live-in manager, but also referred to disclaimers in the advertising material and the agreement for sale and purchase, and stated that decisions on those matters (and others) had been made by the developers of Hereford and/or the body corporate, without the knowledge of, or input from, Mr Quinton or Bayleys. They further stated that there had been no representation as to the ownership of the swimming pool, the gym and theatre room were shown on the plans for Hereford and there was no representation that equipment and furniture would be provided by the developers, and that there was no representation that security would be different from what was in place.

### **Application to submit further evidence**

[7] The appellants seek leave to submit the following:

- [a] extracts from the Real Estate Agents Act 2008 (“the Act”) and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) (referred to by the appellants as “Exhibit A”);
- [b] a “Timeline of Events”, comprising press releases and newspaper articles, emails, newsletters, and Agency listing documents dated from 2014 to August 2017, sourced from Mr Quinton, the Agency, and the developer (“Exhibit B”);
- [c] documents relating to the shareholding of Auckland Body Corporate (“ABC”, the manager of the Hereford body corporate) (“Exhibit C”);
- [d] photographs of the pool and “Zen garden” at Hereford (“Exhibit D”);
- [e] minutes of a meeting of the Hereford body corporate on 18 May 2017 (“Exhibit E”);<sup>2</sup>

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<sup>2</sup> Although referred to in the appellants’ application as a meeting of 18 May 2018, the Minutes are in fact dated 18 May 2017.

- [f] screenshots of material on the Agency’s website on 13 December 2019 (“Exhibit F”);
- [g] screenshots of Facebook posts by Mr Quinton concerning a separate development of apartments referred to as the “Boat Houses” (“Exhibit G”);  
and
- [h] a screenshot from the marketing material for Hereford, which identifies Mr Quinton as “Sales Director” (Exhibit H”).

*The test for admission of further evidence on appeal*

[8] Pursuant to s 111(3) of the 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 considers the evidence and other material that was provided to the Committee.

[9] However, in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*, the Tribunal accepted that it may give a party to an appeal leave to submit evidence to the Tribunal that was not before the Committee, if the Tribunal considers that it is just to do so. An applicant for leave must satisfy the Tribunal that:<sup>3</sup>

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

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<sup>3</sup> *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

[10] However, the Tribunal also accepted that material that would merely elaborate or improve upon the evidence already available in the material before the Committee is unlikely to meet the test for leave, and that its power to allow a party to submit evidence on appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.<sup>4</sup>

[11] Leave is not required to refer to and make submissions regarding provisions of the Act or Rules, or material that was provided to the Committee. For that reason, we do not need to refer further to Exhibits A (extracts from the Act and Rules) or H (screenshot of the Hereford website identifying Mr Quinton as “Sales Director”). We turn to consider the remaining items.

*Exhibit B: Timeline of Events*

[12] The appellants submitted that it is necessary to submit Exhibit B, in response to the Committee’s statement in its decision that it had taken into account (among other things) that “it was open to the [appellants] to make inquiries and seek clarification and confirmations at any time during the period of more than two years from the date of the [agreement for sale and purchase] to date of settlement”.<sup>5</sup> They submitted that the Committee admonished them for not keeping themselves informed about the Hereford development, whereas they were regularly informed that the development was going well, with no conditional statements or doubt as to delivery on the representations made in the marketing material.

[13] Ms Davies submitted for the Authority that the appellants have not explained why this material was not obtained and placed before the Committee. She further submitted that in any event, the issue is whether the second respondents’ representations should attract disciplinary responsibility, and the inclusion of the timeline of representations would not make a material difference to the outcome of the appeal. This is because the Authority does not understand there to be any dispute as to the nature and timing of representations made by the second respondents.

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<sup>4</sup> At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35].

<sup>5</sup> Committee’s decision, at paragraph 3.1(j).

[14] Mr Brownless's submissions did not refer to Exhibit B

[15] We accept that the appellants have not explained why Exhibit B was not, and could not with reasonable diligence have been, provided to the Committee. However, it appears that no issue was raised by any other party during the complaint process that the appellants could (and should) have been making their own inquiries as to whether the development was continuing in accordance with the representations made in the marketing material.

[16] Accordingly, the Committee's reliance on its finding that it was open to the appellants to make their own inquiries was not put to the appellants during the course of the investigation, and they have had no opportunity to respond to it. We consider that it is necessary and in the interests of justice that the appellants may present evidence as to the representations made over the period up to the date of settlement. This will assist the Tribunal to consider whether the Committee was wrong in the matters it considered and its conclusion on the complaint.

[17] Leave will be given for Exhibit B to be submitted on appeal. The appellants must provide full copies of all material submitted, rather than the extracts set out in Exhibit B.

*Exhibit C: Evidence relating to the shareholding of ABC*

[18] The appellants seek leave to submit evidence that ABC is a subsidiary of the Agency. The appellants submit that ABC should be treated as "a party to the action". They further submit that the agency, through ABC, had "first hand" knowledge of most of the downgrades and omissions in the Hereford development, but kept this secret from the appellants.

[19] Mr Brownless submitted for the second respondents that the appellants are alleging a conspiracy between the Agency and ABC to change or reduce the amenities available to owners at Hereford, solely on the basis of a business connection between them. He submitted that without further evidence, a business association does not

establish a conspiracy, and that the evidence sought to be admitted is neither cogent nor material to the issues on appeal.

[20] Mr Brownless also referred to Mr Quintin's evidence to the Committee that he had no knowledge of, or input into, decisions made by the Hereford body corporate. He further submitted that the material sought to be admitted was readily available to the appellants and could have been provided to the Committee.

[21] Ms Davies also submitted that the appellants have given no explanation as to why this material was not provided to the Committee. She submitted that this aspect of the appellants application equates to their seeking to run their case differently before the Tribunal.

[22] Ms Davies further submitted that in any event, the evidence would not have a material bearing on the issue before the Tribunal, as the fact of a business association is not in and of itself probative of whether either of the second respondents breached their professional responsibilities in respect of their knowledge of or representations made about Hereford.

[23] We accept that evidence as to the shareholding of ABC will not assist the Tribunal in determining whether the Committee was wrong to decide to take no further action on the appellants' complaint. We agree with the submissions for the second respondents and the Authority that a shareholding in ABC is not probative of whether either or both of Mr Quinton and the Agency were in breach of any of their professional obligations to the appellants. Leave will not be given for Exhibit C to be submitted on appeal.

*Exhibit D: Photographs of pool and "Zen" garden*

[24] The appellants submitted that leave should be given to submit photographs of the pool and "Zen" garden, in order to demonstrate the difference between the representations as to what would be provided at Hereford, and what has been provided.

[25] Mr Brownless submitted that the relevant issue on appeal is whether the Committee was wrong to find that “legal use of the pool and Zen garden” was the key feature represented in the marketing material (rather than that the pool area would be owned by the body corporate) not the appearance of the pool and garden, and that there is no clear purpose for the appellants to provide photographs. He submitted that the photographs are neither relevant nor material to determination of the appeal. He further submitted that it is also likely that photographs of the pool and garden could have been provided to the Committee during the course of the investigation.

[26] Ms Davies also submitted that the photographs of the pool and garden are not relevant to the issues to be determined on the appeal, as it is not in issue that the pool and garden appear differently from their representation in the marketing material. She also submitted that the appellants have given no explanation for not having provided this information to the Committee.

[27] The disciplinary process arising out of the appellants’ complaint necessarily focussed on what the second respondents knew and did during the period between when Hereford was marketed to the appellants, up to the time they settled their purchase. Photographs taken subsequently will not have any significant probative value.

[28] Further, the focus of the appellants’ complaint regarding the pool, and their appeal, appears to be the fact that the pool is not on land owned by the Hereford body corporate. Rather, it is on land owned by a different entity, and there is an easement allowing apartment owners access to it. Photographs of the pool will not assist the Tribunal to determine whether the Committee was wrong to find that access to the pool was the key feature, rather than ownership.

[29] With respect to the “Zen” garden, the appellants’ assert that the Committee was wrong to say in its decision that the garden is “associated with the pool”. The actual siting of the garden does not appear to be in dispute. Photographs of the garden will not assist the Tribunal to determine this appeal point.

[30] Leave will not be given for Exhibit D to be submitted on appeal.

*Exhibit E: Minutes of Hereford body corporate meeting on 18 May 2017*

[31] The appellants submit that this document is referred to several times by both of the second respondents, as support for their contention that even if there were omissions and changes in the Hereford development, they were approved by the body corporate. They submit that it was also used for that purpose by the Committee. They submit that the Minutes show that the Committee was wrong to find that matters such as whether there would be a contract caretaker rather than a live-in building manager, and that payment for gym and theatre equipment and furniture, were decided by apartment owners at a body corporate meeting, after settlement. Rather, the Minutes show that these matters were decided at a body corporate meeting some two months before settlement, attended only by a representative of the developer (at that time, owner of all units) and the body corporate manager. The appellants submit that the Minutes were not provided to them until seven months later.

[32] Mr Brownless's submissions address the Minutes as if they were of a meeting held in May 2018. As noted earlier, the Minutes refer to a meeting date of 18 May 2017.

[33] Ms Davies submitted that the appellants have failed to provide an explanation as to why these Minutes were not provided to the Committee. She points out that it was for the appellants to provide evidence to support their complaint.

[34] Again, we accept that the appellants have failed to provide submissions as to why these Minutes were not provided to the Committee. However, that is not determinative of the application.

[35] It appears that the Committee's acceptance that certain changes to the features for Hereford were ratified by the body corporate, after settlement, was a factor in its decision to take no further action on the appellants' complaint. It appears that the meeting recorded in Exhibit E occurred prior to settlement of the appellants' purchase, and the membership of the body corporate at that time comprised only the developer.

The Minutes may therefore be relevant to the Tribunal's consideration of whether the Committee's decision was wrong. It is appropriate and in the interests of justice that the Minutes be provided to the Tribunal.

[36] Leave will be given for Exhibit E to be submitted on appeal.

*Exhibit F: Screenshots from Agency's Website dated 13 December 2019*

[37] The appellants submit that the screenshots demonstrate that five years after the original misrepresentations, and 15 months after their complaint to the Authority as to misrepresentations about Hereford, the entries repeat the misrepresentations, as to a live-in building manager, concierge, and "Zen" garden. They submit that the screenshots demonstrate systemic misrepresentation and repeated breaches of the Act, and that that the Committee was wrong to find that the second respondents did not breach any of their professional obligations.

[38] Mr Brownless submitted that the screenshots from the Agency's website are not relevant to the appeal issues, which focus on the second respondents' conduct with regard to the appellants' purchase of their apartment in Hereford.

[39] Ms Davies submitted that the allegations of systemic misrepresentation are fresh allegations which relate to the second respondents' responsibility for representations it makes about Hereford now. That is not an issue that was subject to investigation or determination by the Committee. She submitted that the Tribunal's jurisdiction is limited to determinations of the Committee, such that the Tribunal does not have jurisdiction to consider the allegation of systemic misrepresentations.

[40] We accept Ms Davies' submissions. We have no jurisdiction to consider the fresh allegation of ongoing misrepresentations. We decline leave for Exhibit F to be submitted on appeal.

*Exhibit G: Screenshots of Facebook posts by Mr Quinton concerning "Boat Houses"*

[41] The appellants submitted that the "Boat Houses" were presented at the time of their purchase as part of Hereford, and that Mr Quinton had bought one himself. They

submitted that the “Boat Houses” appeared in their complaint, but were ignored by the Committee. The submitted that they did not think they would have to present a picture of the “Boat Houses” for the Committee to acknowledge them, but now know that they do.

[42] They further submitted that “Boat Houses” played an important part in their confidence that the pool was on land owned by Hereford, and the loss of that development was a substantive and material loss to the Hereford development.

[43] Mr Brownless submitted that photographs of the property Mr Quinton bought (although the development did not in fact proceed) will not assist the Tribunal in determining the appeal. He submitted that the evidence is neither cogent nor material.

[44] Ms Davies submitted that it is not clear how photographs of the “Boat Houses” are material to the issues raised on appeal. She further submitted that the photographs could, with reasonable diligence, have been provided to the Committee.

[45] There appears to be no dispute that the “Boat Houses” were marketed at the same time as the apartments in Hereford, and that Mr Quinton bought one of them. We agree with Ms Davies’ submission that it is difficult to discern how photographs of the proposed development are material to the appeal issues. We will decline leave for Exhibit G to be submitted on appeal.

### **Application to cross-examine witnesses**

[46] The appellants seek leave to cross-examine the members of the Committee, Mr Quinton, Mr Tony Bayley, Mr Chris Newman, and one of the principals of the developer. The application is opposed.

#### *The test for giving leave to cross-examine witnesses*

[47] In its decision in *Eichelbaum*, the Tribunal agreed with a submission from the Authority that “[the Tribunal] may allow certain witnesses to be cross-examined on their evidence provided to the Committee, if we see fit, and may also allow new

evidence to be admitted if we consider there are good reasons to do so”.<sup>6</sup> The Tribunal also accepted the Authority’s submission that its power to determine its own procedure (under s 105 of the Act) allows it “more flexibility”.<sup>7</sup> We therefore do not accept Ms Davies’ submission that we should take the same approach to an application to cross-examine witnesses on their statements to the Authority as we do to an application to submit further evidence. The test is whether the Tribunal “sees fit” to allow cross-examination: that is, we conclude that it is in the interests of justice to do so.

### *The Committee*

[48] We accept Ms Davies’ submission that the Committee is a quasi-judicial body and cannot be compelled to give evidence. We decline leave to cross-examine members of the Committee. Committee decisions may be challenged by virtue of the right of appeal.

### *Mr Quinton*

[49] The appellants have set out questions they wish to ask Mr Quinton, as to his representations about Hereford, actions taken to verify those representations, actions taken to remedy misrepresentations, knowledge of body corporate matters, and knowledge of the Agency’s marketing of commercial premises.

[50] Mr Brownless submitted that any of the questions set out by the appellants that are relevant to the issues on appeal have already been addressed by Mr Quinton in his statement to the Authority.

[51] Ms Davies submitted that Mr Quinton has denied having any knowledge of the changes the developer made to the Hereford development, and denying withholding information from the appellants. She submitted that the Authority does not understand the appellants to be alleging that Mr Quinton has provided false evidence, and that the evidence they seek is focussed more on what Mr Quinton did, or should have done, with the knowledge he may have had. She submitted that the Tribunal is well-placed

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<sup>6</sup> *Eichelbaum*, above fn 3, at [35]–[36].

<sup>7</sup> At [46].

to make a decision on the appeal without hearing further evidence from Mr Quinton, given its knowledge of the standards and competence required of licensees.

[52] We do not accept the submissions by Mr Brownless and Ms Davies that the fact that Mr Quinton has said that he was unaware of, and not involved in, the body corporate's decision-making is grounds to decline leave to cross-examine him. The point of cross-examination is to ask questions aimed at assisting the Tribunal to decide whether his statement should be accepted.

[53] Having reviewed the evidence before the Committee, we have concluded that we would be assisted by cross-examination of Mr Quinton on his statements, particularly in light of the differing evidence given to the Committee by the appellants and Mr Quinton. We will therefore grant leave to the appellants to cross-examine Mr Quinton on his evidence to the Committee. Cross-examination is to be restricted to matters that are relevant to issues raised in the appellants appeal.

*Mr Bayley*

[54] Mr Bayley is the Group Licensee, Compliance Manager, and Director of the Agency. He was not involved in the sale of Hereford to the appellants. He provided statements to the Authority as to the Agency's response to the appellants' complaint, and as to the appellants' allegations, and he obtained information from the developer as to changes made to the Hereford development, which he passed on to the Authority.

[55] The appellants wish to cross-examine Mr Bayley as to his statements to the Authority that "no representations were made by [the Agency]", the body corporate meeting on 18 May 2017, and his statements that Hereford was part of a "precinct style development".

[56] Mr Brownless submitted that Mr Quinton said in his statement to the Authority that he told the appellants that Hereford was part of a "mixed use" development, and Mr Bayley had also addressed the point in a statement. He submitted that in the circumstances, questions put to Mr Bayley would not assist the Tribunal to determine the issues on appeal.

[57] Ms Davies submitted that it is not clear what evidence the appellants are seeking from Mr Bayley, and repeated her submission that the Tribunal is well-placed to determine the issues on appeal without further evidence.

[58] We have concluded that cross-examination of Mr Bayley would assist us in determining the issues on appeal, in particular as to his statement that no representations were made by the Agency. We will therefore grant leave for Mr Bayley to be cross-examined.

*Mr Newman*

[59] The Tribunal understands that Mr Newman is a director and general manager of ABC. He attended the Hereford body corporate meeting of 18 May 2017, in his capacity as representative of ABC.

[60] The appellants wish to cross-examine Mr Newman in relation to this meeting and as to why he allowed decisions against the benefit of apartment owners to be made shortly before settlement, and why Minutes of the meeting were not distributed to the appellants and Mr Quinton (as an owner and selling agent).

[61] Mr Brownless submitted that Mr Quinton's evidence to the Committee is that he was not aware of, and not involved in, any body corporate decision-making. He submitted that any evidence Mr Newman might give would not assist the Tribunal in determining the issues on appeal.

[62] Ms Davies repeated her submission in relation to admission of the Minutes of the 18 May 2017 body corporate meeting: that the appellants have failed to explain why the Minutes were not provided to the Committee.

[63] As indicated earlier, we will allow the appellants to submit the Minutes of the 18 May 2017 meeting on appeal. However, the issues on appeal must focus on the professional obligations of Mr Quinton and the Agency, on what they knew or should have known, what they did or should have done, and whether they have complied with all of their professional obligations.

[64] We have concluded that cross-examination of Mr Newman would not assist us, and decline leave accordingly.

*The developer*

[65] The appellants wish to cross-examine a representative of the developer on the grounds that “there is only one party who knows all the facts about the missing signature features” of Hereford”. They submitted that the developer “knows when the decisions were made and who was complicit in covering them up”. They wish to ask the representative as to when decisions were made to change or omit those features, whether Mr Quinton was informed, what steps were taken to keep the buying public and selling agents informed, and what steps were taken to keep information from them.

[66] Mr Brownless submitted that it is Mr Quinton and the Agency’s knowledge of decisions concerning the Hereford development that is important, not the decisions themselves or their timing. He submitted that answers to the questions indicated by the appellants will not assist the Tribunal to determine the issues on appeal.

[67] Ms Davies submitted that this is a disciplinary proceeding. The Committee and the Tribunal are concerned with the professional conduct of the second respondents. She submitted that evidence from the developer will not be material to the outcome of the appeal, and leave should not be given.

[68] We accept Mr Brownless’s and Ms Davies’ submissions. As noted earlier, the focus is on Mr Quinton and the Agency, and whether they each complied with their professional obligations as licensees. We have concluded that we would not be assisted in determining the appeal by cross-examination of a representative of the developer.

## **Ruling**

[69] With regard to the appellants' application to submit evidence:

- [a] Leave is not required to submit Exhibits A (extracts from the Act and Rules) and H (screenshot of website identifying Mr Quinton as "sales "Director");
- [b] Leave is given for Exhibit B (Timeline of Events) to be submitted on appeal. Full copies of the items referred to in the Timeline of Events must be provided, rather than the extracts set out in the application.
- [c] Leave is given for Exhibit E (Minutes of Hereford body corporate meeting on 18 May 2017) to be submitted on appeal.
- [d] Leave is declined in respect of Exhibits C (shareholding of ABC), D (photographs of pool and "Zen" garden), F (screenshots of Agency's website 13 December 2019), and G (Screenshots of Mr Quinton's Facebook posts concerning "Boat Houses").

[70] With regard to the applicants' application to cross-examine witnesses:

- [a] Leave is given for Mr Quinton to be cross-examined on his statements to the Authority, on matters relevant to the issues on appeal.
- [b] Leave is given for Mr Bayley to be cross-examined, in particular as to his statement that no representations were made by the Agency.
- [c] Leave is declined for cross-examination of members of the Committee, Mr Newman, and a representative of the developer.

[71] The case manager is to schedule a telephone conference, in order to make further directions as to this proceeding: in particular, to set a hearing date and make timetable directions as to filing and serving submissions.

[72] 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.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms C Sandelin  
Member