

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 07

READT 043/19

IN THE MATTER OF

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

BETWEEN

KAI DENG
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1093)
First Respondent

On the papers

Tribunal:

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

Submissions filed by:

Ms H Bowering-Scott, on behalf of the
Appellant
Ms A-R Davies, on behalf of the Authority

Date of Ruling:

25 February 2020

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

Introduction

[1] Mr Deng has appealed against the decision of Complaints Assessment Committee 1903, dated 20 September 2019, in which the Committee found that he had engaged in unsatisfactory conduct. He has also appealed against the Committee's decision dated 27 November 2019, in which the Committee censured him and ordered him to pay a fine of \$4,000.

[2] Mr Deng has applied to the Tribunal to submit further evidence on appeal, namely, opinion evidence from an expert witness, Mr Graham Crews. The application is opposed by the Authority.

Background

[3] Mr Deng is a licensed salesperson, engaged by Barfoot & Thompson ("the Agency"). As from 23 July 2017, the Agency held a sole agency to market two neighbouring properties in Te Atatu, Auckland ("the property"). The agency was renewed from time to time and was to expire on 20 October 2018. Mr Deng was aware that the vendor was anxious to sell.

[4] Before the sole agency expired, a licensee from another agency ("Glovers") approached the vendor, indicating that it could sell the properties within a ten-day period. Glovers was aware that the vendor's sole agency with the Agency was to expire on 20 October 2018. The vendor signed a sole agency agreement with Glovers on 13 October 2018, to commence on 21 October 2018. However, the sole agency was for 90 days, not ten days.

[5] Mr Deng saw the Glovers advertising for the properties (at a reduced price). He enquired of the vendor as to why there was a new agency handling the property. He says that the vendor advised him that he had signed a general agency agreement with Glovers for ten days. Mr Deng then advised a fellow salesperson at the Agency that the properties were available for a reduced price. That salesperson in turn brought the properties to the attention of one of his buyer clients. The client indicated that it wanted to put in an offer on the properties.

[6] Mr Deng's manager advised him that he should obtain a general agency agreement with the vendor before taking any further action. Mr Deng obtained a general agency agreement with the vendor, and the properties were subsequently sold to the Agency's client.

[7] Glovers later claimed a commission on the sale of the properties, based on their sole agency agreement, and lodged a caveat against the properties. In order to achieve settlement, the vendor paid Glovers a commission and legal fees. The vendor then complained to the Authority that Glovers had failed to highlight that the agency was for longer than ten days, failed to explain the contract or advise him to seek legal advice, and failed to speak with him about pricing the property, or change the price of the property when asked to do so.

[8] During its investigation of the vendor's complaint, the Committee launched an "own-motion" investigation into Mr Deng, under s 78(b) of the Real Estate Agents Act 2008. The Committee found that Mr Deng had failed to undertake full due diligence with respect to checking the terms of the Glovers agency agreement before entering into a general agency agreement with the vendor. The Committee found that this was unsatisfactory conduct, as being a breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, and by falling short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(b) of the Act).

Legal test for the admission of further evidence on appeal

[9] 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 considers the evidence and other material that was provided to the Committee, and hears submissions by or on behalf of the parties.

[10] 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:¹

- [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.

[11] 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.²

Mr Deng’s application

[12] Mr Deng seeks leave to submit expert evidence from Mr Crews, as to “the standard of care reasonably expected from a licensee in Mr Deng’s scenario”.

[13] Ms Bowering-Scott submits that Mr Crews is a licensed real estate agent and is the Director of Real Estate Management Solutions Ltd. He is a Fellow member of the Real Estate Institute of New Zealand and an Associate member of the Arbitrators’ and Mediators’ Institute of New Zealand. The Tribunal is aware that Mr Crews regularly conducts Continuing Professional Development verifiable training on behalf of the Authority.

¹ *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

² At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35]).

[14] Ms Bowering-Scott submitted that expert evidence is important and will assist the Tribunal in determining the standard of care to which Mr Deng must conform. She submitted that evidence from Mr Crews will assist the Tribunal in understanding what a reasonably competent licensee would have done in the circumstances, and determining the standard of care reasonably expected of the real estate industry. She further submitted that Mr Crews also has a comprehensive understanding of the Rules and their interpretation.

[15] Ms Bowering-Scott submitted that the evidence was not submitted to the Committee for the following reasons:

- [a] up until he received the Committee's decision, Mr Deng did not appreciate that he needed expert opinion as to the standard of care required of a licensee;
- [b] he had understood during the Committee's investigation that the issue considered revolved around due diligence and analysis of the facts, not a question about the standard of care required (which relies on expert opinion);
- [c] there was no indication in the Authority's investigation that the Committee would base its decision on the standard of care of licensees and reasonable expectation of the public; and
- [d] had he known that the Committee would be undertaking an analysis as to the standard of care required, Mr Deng would have obtained and provided expert evidence on this point to the Committee.

[16] Ms Bowering-Scott submitted that Mr Crews has given expert evidence to the Tribunal before, and is familiar with the High Court Code of Conduct for Expert Witnesses (schedule 4 of the High Court Rules). She submitted that his evidence will be credible.

[17] Ms Davies submitted for the Authority that Mr Deng could have obtained and provided expert evidence to the Committee. She accepted that the central issue in this appeal is whether Mr Deng complied with r 5.1 when signing the general agency agreement with the vendor, and that the questions asked of him during the Committee's investigation were not framed specifically in terms of r 5.1. However, she submitted, the factual matters underpinning the Committee's findings were squarely put to him for his response, and the investigation focussed on the steps he took when signing a general agreement with a vendor in circumstances where he knew that another agency agreement was in place.

[18] Ms Davies submitted that the clear focus of the investigation naturally leads to an inquiry as to what steps a licensee should have taken in the situation Mr Deng was in. She submitted that Mr Deng was squarely on notice that what was in issue was his conduct and competence as it related to entering into the second general agency agreement with the vendor.

[19] Ms Davies noted that the further evidence sought to be submitted had not been provided. Accordingly, the Authority reserves its position in relation to the cogency and credibility of the proposed further evidence. However, she submitted that expert evidence would be unlikely to have a significant influence on the outcome of the appeal.

[20] She submitted that r 5.1 sets out the general standard of professional skill, care, competence, and diligence required of a licensee, and is not a technical rule. She submitted that it is difficult to conceive of a complaint that would not engage, on some level, a consideration of r 5.1. She submitted that the present case requires a consideration of the general competence and diligence of a licensee, and the Tribunal is well-placed to make a finding as to whether a licensee has met the requirements of r 5.1. She referred to the finding of her Honour Justice Thomas in *Complaints Assessment Committee v Jhagroo*, that:³

... the Tribunal is well paced to draw the line between what constitutes serious negligence or incompetence, or mere negligence or incompetence, because the Tribunal has considerable expertise and is able to draw on significant experience in dealing with complaints under the Act.

³ *Complaints Assessment Committee v Jhagroo* [2014] NZHC 2077, at [49].

[21] Ms Davies further submitted that the Tribunal applies the Act and Rules and has primary responsibility for setting appropriate standards of conduct within the real estate industry.⁴ She submitted that the Tribunal is a specialist body that deals with a large number of cases every year concerning real estate practice and breaches of acceptable standards by real estate licensees, and has expert members of the industry on its panel.

[22] Ms Davies acknowledged that the Tribunal has been assisted by expert evidence in a number of cases. She referred to handwriting evidence received in *Complaints Assessment Committee 413 v Marr*,⁵ and evidence as to the source of the “provisional value” required to be inserted on “Form 2” (when required pursuant to s 134(2) of the Act) received in *Advantage Realty v Real Estate Agents Authority (CAC 303)*,⁶ which was reviewed by the Tribunal in *Tremain Real Estate (2012) Ltd v Real Estate Agents Authority (CAC 403)*.⁷ In contrast to those examples, she submitted that in the present context, the further evidence sought to be submitted would go to the ultimate issue that the Tribunal itself is well placed to determine: she submitted that rather than being expert evidence, it is an expert’s opinion as to the application of r 5.1 to the facts of this case.

[23] Finally, Ms Davies submitted that it is likely that if Mr Crews’ evidence were admitted in this appeal, the Authority would seek to cross-examine him, and may seek to submit its own expert evidence. This would inevitably have an impact on the efficiency of the proceeding.

Discussion

[24] We have difficulty with Ms Bowering-Scott’s submission that Mr Deng did not appreciate that he needed expert opinion evidence as to the standard of care required of a licensee, but understood that the issue revolved around due diligence and an analysis of the facts. It appears from the Committee’s decision that its focus was on

⁴ Citing *Robinson v Real Estate Agents Authority* [2014] NZHC 2613, (2014) 15 NZCPR 670, at [21] and [22].

⁵ *Complaints Assessment Committee 413 v Marr* [2019] NZREADT 28.

⁶ *Advantage Realty Limited v Real Estate Agents Authority (CAC 303)* [2015] NZREADT 83.

⁷ *Tremain Real Estate (2012) Ltd v Real Estate Agents Authority (CAC 403)* [2018] NZREADT 54.

an analysis of the facts surrounding Mr Deng's entry into the general agency agreement with the vendor when the vendor was party to a sole agency agreement with Glovers. We accept Ms Davies' submission that an analysis of the factual circumstances of a complaint is the basis for an inquiry as to whether the licensee complained of has breached any of the applicable Rules.

[25] It is difficult, therefore, to accept that Mr Deng would not have appreciated that the Committee's consideration of the complaint would be against the provisions of the Act and Rules. The nature of the complaints and disciplinary process is an inquiry as to whether a licensee has complied with the Act and relevant Rules. We also note that rr 3.2 and 3.3 of the Rules provide:

3 Scope and objectives

...

3.2 These practice rules set out the standard of conduct and client care that agents, branch managers, and salespersons (collectively referred to as **licensees**) are required to meet when carrying out real estate agency work and dealing with clients.

3.3 These practice rules are not an exhaustive statement of the conduct expected of licensees. They set minimum standards that licensees must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and dealt with despite the charge not being based on a breach of any specific rule.

...

[26] Rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 provides:

5 Standards of professional competence

5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

As Ms Davies submitted, it is difficult to conceive of a complaint that would not involve, at some level, a consideration of r 5.1.

[27] Notwithstanding that concern, we turn to consider whether we should receive expert opinion evidence as to what is expected of a licensee put in Mr Deng's position. We note the examples given by Ms Davies of cases where the Tribunal has received such evidence. The Tribunal also received expert opinion evidence, by consent, in *Li*

v The Real Estate Agents Authority (CAC 408), to the effect a licensee should appreciate that all types of cladding on a property may have defects, and the need for a close inspection by the licensee prior to marketing,⁸ and in *Complaints Assessment Committee 304 v Chapman*, where the Tribunal heard expert opinion evidence as to what industry standards expect of a commercial property manager.⁹

[28] We have considered the relevant provisions of s 25 of the Evidence Act 2006 as to expert opinion evidence:

25 Admissibility of expert opinion evidence

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.

...

[29] Reliance on expert opinion evidence has been described as the process by which a “fact-finder” (in the present case, the Tribunal) receives sufficient evidence to be able to perform its role properly.¹⁰ The requirement that the expert opinion evidence must be likely to provide “substantial help” to the fact-finder is a higher threshold than the expert simply providing probative information, and will depend in the relevance, reliability, and probative value of the expert’s opinion.¹¹

[30] We have not been provided with a statement of the evidence sought to be given by Mr Crews. The only indication given by Ms Bowering-Scott is that his evidence would “consider the standard of care reasonably required from a licensee in Mr Deng’s scenario”. It is possible that we may obtain “substantial help” from Mr Crews’ opinion as to the standard of care reasonably required of Mr Deng, and we have concluded that

⁸ *Li v The Real Estate Agents Authority (CAC 408)* [2017] NZREADT 9.

⁹ *Complaints Assessment Committee 304 v Chapman* [2018] NZREADT 6.

¹⁰ See *RA v R* (2010) 25 CRNZ 138.

¹¹ See *Mahomed v R* [2010] NZCA 419, at [35].

we should not exclude that possibility by declining the application to submit his evidence.

[31] Accordingly, the application will be allowed. We note Ms Davies' indication that the Authority may seek to cross-examine Mr Crews, and to submit further expert evidence.

Result

[32] The application to submit independent expert opinion evidence by Mr Crews is allowed. Leave is reserved to the Authority to apply to cross-examine Mr Crews and/or to submit further independent expert opinion evidence

[33] 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