

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 11

READT 021 and 022/19

IN THE MATTER OF	Appeals under s 111 of the Real Estate Agents Act 2008
BETWEEN	BRUCE RAYMOND CATLEY and TIMOTHY JOHN BOYLE Appellants/Applicants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	MARGARET and ROBERT FLANAGAN Second Respondents

On the papers

Tribunal:	Hon P J Andrews (Chairperson) Mr J Doogue (Member) Mr N O'Connor (Member)
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Submissions filed by:	Mr T Rea, on behalf of Mr Catley and Mr Boyle Ms E Mok, on behalf of the Authority Ms J Storey, on behalf of Mr and Mrs Flanagan
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Date of Ruling:	10 March 2020
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RULING (3) OF THE TRIBUNAL
(Application to submit further evidence on appeal)

Introduction

[1] Mr Catley and Mr Boyle have appealed against the decision of Complaints Assessment Committee 521, dated 26 April 2019, in which the Committee found that they had engaged in unsatisfactory conduct.

[2] They have applied for leave to submit further evidence on appeal. The application is opposed by Mr and Mrs Flanagan. The Authority abides the Tribunal's decision on the application, but has provided submissions in relation to it.

Background

[3] In July-August 2015, Mr Catley, a licensed agent, was the managing director of CBRE South Auckland ("the Agency") and Mr Boyle was a licensed salesperson engaged at the Agency. On behalf of prospective purchasers, they were involved in the sale of a property at Drury, Auckland, which was owned by Mr and Mrs Flanagan.

[4] In August 2018, the Authority received a complaint from Mr and Mrs Flanagan that Mr Catley and Mr Boyle had lied to them about who would be liable for commission on the sale, had not obtained all the required signatures on the agreement for sale and purchase, had not provided a written appraisal for the property or reason why they were unable to do so, had asked them to backdate the agency agreement, had granted the purchaser an extension of the agreement for sale and purchase without their consent, and had acted contrary to their interests.

[5] The Committee found that Mr Catley and Mr Boyle had engaged in unsatisfactory conduct, in that they:

- [a] were in breach of r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 when they did not obtain all the required signatures on the agency agreement;
- [b] were in breach of r 10.2 (or alternatively r 10.3) when they failed to provide a written appraisal or explanation why they were unable to do so;

[c] were in breach of r 6.3 by having brought the industry into disrepute by having falsely recorded the commencement date of the agency agreement and backdated the date on which the agreement was signed; and

[d] were in breach of r 5.1 in trying to commit Mr and Mrs Flanagan to pay the commission rather than the purchasers, and in failing to draft an agreement in which there was no room for doubt as to who would be paying the commission.

[6] In reaching its decision that Mr Catley and Mr Boyle had backdated the date on which the agency agreement was signed, the Committee took into account Mr and Mrs Flanagan's statement that they had been asked by Mr Catley and Mr Boyle, some three weeks after they signed the agreement for sale and purchase of the property, to sign an agency agreement and backdate it to 18 August 2015, and Mr Boyle's statement that:¹

I cannot now recall, and I do not have the records to show, when the agency listing agreement was signed but I do know that it followed the signing of the sale and purchase agreement. I know that it was not signed on the day following so it was backdated but we were not trying to be disingenuous as it still records that it was signed *after* the sale and purchase agreement.

The Committee also took into account Mr Catley's statement that "backdating a listing agreement is not something I would do".

[7] The Committee was not satisfied that Mr Catley and Mr Boyle had lied to Mr and Mrs Flanagan about who would be paying the commission, or that they had granted the purchaser a contract extension without Mr and Mrs Flanagan's consent.

Appeal

[8] Both Mr Catley and Mr Boyle state in their notice of appeal that the Committee erred in law and/or fact in relation to its findings of unsatisfactory conduct against them.

¹ Committee's decision finding unsatisfactory conduct, at paragraph 4.10. Emphasis as in original.

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:²

- [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 will also consider whether admitting the evidence would require further evidence from other parties and cross-examination.

[12] 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.³

² *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

³ At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35]).

Evidence sought to be admitted

[13] The evidence sought to be admitted on appeal (“the evidence”) comprises:

[a] A chain of internal emails between Mr Catley and Mr Boyle:

17.8.15 2.36 pm: Mr Catley to Mr and Mrs Flanagan (copied to Mr Boyle):

We expect to hear tomorrow in respect of the agreement and will be in touch as soon as we have received the reply.

17.8.15 3.23 pm: Mr Boyle to Mr C:

Also need to get Agency Agreement signed before we present offers back to them. Do you want me to call [Mr Flanagan] this arvo about it?

17.8.15 3.28 pm: Mr Catley to Mr Boyle:

Yes did we leave it with them last time?

17.8.15 9.34 pm: Mr Boyle to Mr Catley:

I’ve spoken to [Mr Flanagan] tonight, said we’d trade the agency agreement with our feedback on the offers – he hadn’t seen your email, so said we hoped to have something to him tomorrow.

Didn’t surprise me, doesn’t strike me as the kind of guy who would read the paper online every morning!

18.8.15 9.02 am: Mr Catley to Mr Boyle:

The agreement signed by the purchaser unchanged is on my desk. So yes he hands over the agency agreement and we hand over the offer

[b] A photograph of the index of the Agency’s electronic deal file, which includes:

120 Flanagan Rd Drury AGENCY FINAL 18/08/15 11:08 AM

Agency Agreement_Executed 18/08/15 2:33 PM

[c] An email from Mr Boyle to the Authority (Mr Powell), dated 13 June 2019, to which was attached a screenshot from Mr Boyle’s “Dropbox” of a signed agency agreement which records that it was “last modified” on 18 August 2015 at 2:33pm.

Affidavit evidence in support of the application

[14] In affidavits filed in support of the application, Mr Catley and Mr Boyle set out their reasons for contending that the evidence was not, and could not have been, provided to the Committee in the course of investigation of the complaint.

Mr Catley

[15] Mr Catley said that when responding to the complaint, he struggled to recall exact dates. He said this was because there was a period of three years between the transaction and the complaint, and that as managing director of the Agency, he oversaw many negotiations and transactions. He said that he had been told by the Agency's legal team that he should not have any contact with Mr Boyle, and for that reason he was not aware that Mr Boyle would say that the agency agreement had been backdated, which was something he would not do, or countenance.

[16] Mr Catley said that the Agency's legal team drafted his response to the complaint, and he approved it. He understood that the legal team obtained all archived emails concerning the property (which were not copied to him), but did not produce the emails to the Committee. He does not know why this was. He said he did have access to the Agency's electronic deal file for the property, but did not notice the "electronic date stamp" on the two versions of the agency agreement and he was not aware it could be evidence. He said he was told about this by Mr Boyle after the Committee's unsatisfactory conduct finding.

Mr Boyle

[17] Mr Boyle said that by the time the complaint was made, he had left the Agency, and had his own business. He said he had no access to Agency records (so could not provide them to the Committee), and he had no contact with the Agency or Mr Catley. He said his recollection of the transaction was patchy, and he told the Committee so. He said his statement was provided to the Committee without his being able to check any records.

[18] Mr Boyle said that after receiving the Committee's decision, he discovered that he had uploaded a copy of the agency agreement onto the online Dropbox account which he had used while at the Agency. He said that after starting his own business he used another storage programme.

[19] Mr Boyle said that the copy of the agency agreement on his Dropbox account shows that he was mistaken in his statement to Committee. He said that in fact, the Agency received the agreement for sale and purchase from the purchasers on 17 August 2015, and he contacted Mr and Mrs Flanagan that evening. He printed a copy of the agency agreement from the Agency's electronic deal file on 18 August 2015 at 11.08 am, and the executed agreement was saved into Agency's electronic deal file on 18 August 2015 at 2.33 pm. Therefore, he said, the agency agreement was signed some time between 11.08 am and 2.33 pm on 18 August 2015, and it was not backdated, as alleged by Mr and Mrs Flanagan.

Mr Wong

[20] An affidavit by Mr Wong, Senior Tech Support Analyst for the Agency was also filed in support of the application. He stated that the Agency's electronic deal file for the property contained a pdf file entitled "120 Flanagan Rd Drury AGENCY FINAL" bearing an electronic modification date and time stamp of "18/8/15 11:08AM" and a pdf file entitled "Agency Agreement_Executed" bearing an electronic modification date and time stamp of "18/8/2015 2:33PM".

Submissions

[21] Mr Rea submitted for Mr Catley and Mr Boyle that the evidence is cogent and relevant. He submitted that the only evidence before Committee as to when the agency agreement was signed was from Mr and Mrs Flanagan and Mr Boyle. Mr Boyle said he knew the agreement not signed until the day after the agreement for sale and purchase was signed, and the Committee concluded that both he and Mr Catley had backdated the agency agreement to 18 August 2015. He submitted that the evidence contradicts Mr Boyle's statement to the Committee, as it is plain from the electronic

date stamps of the versions of the agency agreement that it must have been signed on 18 August 2015.

[22] Mr Rea submitted that the Committee's finding that the agency agreement was backdated was one of three main "charges" which led to the Committee's unsatisfactory conduct finding and the substantial penalty imposed on Mr Catley and Mr Boyle. He submitted that the issue of backdating is central to their appeal, which is brought solely on that ground.

[23] Mr Rea submitted that the evidence could not with reasonable diligence have been provided to the Committee. He submitted that Mr Catley's access to the Agency's email records was limited by decisions made by the Agency's legal team, and he was not aware that metadata of the agency agreement versions could be used as evidence. He submitted that Mr Boyle had no access to the Agency's emails and documents at the time of the complaint, and was barred from contacting Mr Catley. He further submitted that Mr Boyle had no legal assistance at the time he responded to the complaint, such that his incorrect statement was "clumsy". Mr Rea noted that Mr Boyle did not discover the agency agreement in his Dropbox account until around 13 June 2019, after the Committee's decision was issued.

[24] Mr Rea submitted that the evidence establishes that Mr and Mrs Flanagan were mistaken in their allegation that the agency agreement was signed some weeks after the agreement for sale and purchase.

[25] Mr Rea further submitted that granting leave to Mr Catley and Mr Boyle to submit the evidence on appeal will not necessitate calling witnesses or allowing for cross-examination of witnesses, but will allow the appeal issue to be explored in submissions for the parties, and assist the Tribunal to decide whether the Committee erred in finding that the agency agreement was falsely backdated.

[26] Ms Storey submitted for Mr and Mrs Flanagan that the evidence could with reasonable diligence have been provided to the Committee. She noted that Mr Catley accepts that he reviewed the electronic deal file before responding to the complaint. She submitted that it is not a sufficient excuse to say that he left it to the Agency's

legal team to decide what was put before the Committee, as he had an obligation, as a licensee, to ensure that information was given to the Committee, notwithstanding involvement of lawyers.⁴

[27] Ms Storey submitted that Mr Boyle's sole reason for not providing the agency agreement is that he failed to check his Dropbox account. She submitted that he had access, all that was required was for him to log in to it, and he has not explained why he had not done so. She also submitted that Mr Boyle had not given any explanation as to why he did not ask the Agency for copies of the relevant documents. She submitted that if the Agency had refused, Mr Boyle could have asked the Committee to assist. She submitted that Mr Boyle should have taken reasonable steps to obtain documents he knew existed, and his failure to do so meant that leave to submit them now should be declined.⁵

[28] She submitted that both Mr Catley and Mr Boyle now wish to be permitted to produce evidence that was available to them at time of the complaint, merely because they took a casual attitude to preparation of their response to the complaint, or made or approved tactical choices they now regret.

[29] Ms Storey also submitted that the evidence is relevant to only one of four findings against Mr Catley and Mr Boyle, and has no bearing on the Committee's findings as to the signatures on the agreement for sale and purchase, their failure to provide a written appraisal, or their failure to make clear provision as to commission in the agreement for sale and purchase. She further submitted that the evidence is relevant to only one part of the Committee's finding that Mr Catley and Mr Boyle falsified the agency agreement: the Committee found that the agency agreement was falsified both as to the backdated signature date, and as to its commencement date.

[30] She submitted that even if the evidence is accepted, that would not overturn the Committee's overall findings – in particular its key finding that the agreement for sale and purchase should have been drafted so that there was no room for lack of clarity.

⁴ Citing *Baker v Real Estate Agents Authority (CAC 413)* [2018] NZREADT 64.

⁵ Citing *Lam v Real Estate Agents Authority (CAC413)* [2018] NZREADT15.

Accordingly, she submitted, the evidence is not sufficiently material to be accepted on appeal.

[31] Ms Storey further submitted that the evidence is incomplete, and more evidence needs to be provided. She submitted that the versions of the agency agreement should have included those where other amendments were made (for example, to show when Mr Catley and Mr Boyle first envisaged that Mr and Mrs Flanagan (rather than the purchaser) would pay commission, and that (particularly in light of the Agency's legal team's decision not to provide them) any other email exchanges surrounding those set out in the evidence should be provided.

[32] Ms Storey submitted that the evidence puts forward a narrative that differs significantly from what Mr Catley and Mr Boyle presented to the Committee. She submitted that Mr and Mrs Flanagan have a draft unsigned agency agreement provided by Mr Catley and Mr Boyle when the purchaser's offer was first made. She submitted that if Mr Catley and Mr Boyle are given leave to submit the evidence on appeal, natural justice requires that Mr and Mrs Flanagan are given the opportunity to respond with reply evidence. She also submitted that the evidence calls Mr Boyle's credibility into question, so leave should be given for him to be cross-examined. She submitted that the effect would be that the appeal hearing would turn into a first instance hearing, but would deprive Mr and Mrs Flanagan of their right of appeal to the Tribunal.

[33] Ms Storey submitted that Mr Catley and Mr Boyle are clearly wanting to run their case afresh because they wish they had conducted it differently. She submitted that this is contrary to the principles set out in *Eichelbaum*, and leave should therefore not be given.

[34] While recording that the Authority will abide the Tribunal's decision on the application, Ms Mok submitted for the Authority that the Tribunal will take into account the reasons why Mr Catley and Mr Boyle did not seek to provide the evidence to the Committee, the relevance and cogency of the evidence, and whether further evidence and cross-examination will be required. She submitted that the fact that the evidence was available to them at the Committee stage would not preclude the Tribunal from allowing evidence to be submitted, if the Tribunal considers it in the

interests of justice to admit it. She submitted that the ultimate question is whether admitting the evidence is in the interests of justice.

[35] Ms Mok also noted Mr Rea's submission that the evidence relates to the Committee's finding that Mr Catley and Mr Boyle falsely backdated the agency agreement which they "have indicated will be the sole Committee finding challenged on appeal".

[36] Ms Mok submitted that the Authority accepts that the evidence is relevant to the finding as to the false backdating of the date of signature of the agency agreement, although noting that it does not address the Committee's finding that the agency agreement also falsely recorded the commencement date of the agreement as being 5 August 2015. She also submitted that the evidence (and in particular the supporting evidence from Mr Wong as to his review of the Agency's metadata) appears to be reliable and cogent. She noted that the emails refer to the need to get the agency agreement signed, and support the view that the agency agreement was signed on 18 August 2015 and was not, therefore, falsely backdated. She submitted that if the evidence had been available to the Committee, it is likely it would have had an important influence on the Committee's finding on the issue.

[37] She submitted that the emails, and the index of the Agency's electronic deal file would have been reasonably available to Mr Catley at the Committee stage, and it would have been open to him to have arranged for the Agency server's metadata to be reviewed. She noted Mr Catley's evidence that he was not aware that the metadata could be checked to confirm the date when the signed agency agreement was uploaded onto the electronic deal file, and that he does not know why the Agency's legal advisers did not provide the email correspondence to the Committee.

[38] Ms Mok accepted that the email correspondence, and access to the Agency's electronic deal file, was not available to Mr Boyle at the time of the complaint, as he no longer worked for the Agency. However, she submitted, Mr Boyle would have been able to access his Dropbox account at the Committee stage, which would have shown him the last modification date. She noted the explanation given by Mr Boyle, that he had overlooked the fact that he had loaded a complete version of the agency

agreement in his Dropbox account, because of the length of time between the transaction and the complaint, and the fact that he had switched to an alternative storage programme in the intervening period. She noted Mr Boyle's evidence that he had attempted to provide a screenshot of the document to the Authority, but by the time he did so, the Committee had already issued its decision finding unsatisfactory conduct.

[39] Ms Mok also submitted that if leave is given for the evidence to be submitted, it is possible that further evidence and cross-examination would be necessary, in the interests of justice.

[40] Mr Rea filed submissions in reply. He submitted that:

- [a] Ms Storey's submissions incorrectly referred to the "date of upload of the signed agency agreement" as being 25 July 2015, when "the correct date is 25 July 2017";
- [b] Mr Catley and Mr Boyle intend to rely on the evidence sought to be submitted "in relation to the Committee's finding as to backdating of the agency agreement as having been signed on 18 August 2015", and that other findings of the Committee are not relevant to the application, nor to the appeal, other than to provide context;
- [c] Ms Storey was wrong to characterise Mr Wong's evidence as being presented as expert evidence when that is not the case: Mr Wong's evidence is as to fact, and he is not held out as expert;
- [d] Ms Storey submitted that natural justice would require that Mr and Mrs Flanagan be given the opportunity to file reply evidence, but did not say what evidence would be required or be available;
- [e] Ms Storey was wrong to submit that admission of further evidence would deprive parties of their right of appeal, because the appeal is heard *de novo*, and Mr and Mrs Flanagan will be able to make submissions as to the

significance of the evidence to the findings under appeal, and also as to the originally produced evidence relevant to the findings.

[41] Ms Storey filed brief submissions in response to Mr Rea's reply submissions.

Discussion

Reliability, cogency, and relevance of the evidence

[42] We accept that the evidence appears to be reliable and cogent, and that it is relevant to the Committee's finding that Mr Catley and Mr Boyle falsely backdated the date the agency agreement was signed. If it had been provided to and accepted by Committee, it is at least possible that the Committee would not have made an adverse finding that the signature on the agency agreement was backdated. Therefore, the evidence could have had an important influence on the outcome of the complaint.

[43] That conclusion must be tempered by the fact that it is only part of the finding of falsification of the agency agreement, as the Committee also found that the commencement date of the agreement was falsely stated. We understand from Mr Rea's reply submissions that that finding is challenged on appeal but is not relevant to the application to submit evidence. Further, the Committee's findings of other breaches are not affected by the evidence. Given the broad wording of their Notices of Appeal (set out at [8], above) it is not clear whether Mr Catley and Mr Boyle challenge those findings on appeal.

[44] However, the cogency and relevance of the evidence supports leave being given for it to be submitted.

Could the evidence with reasonable diligence have been provided to the Committee?

[45] We turn to the explanation given by Mr Catley and Mr Boyle for not having provided the evidence to the Committee. We accept Ms Mok's submission that the evidence was "available", and "could with reasonable diligence" have been provided.

[46] Mr Catley had access to the email correspondence, and he reviewed the Agency's electronic deal file for the property. He reviewed the response to the complaint prepared for him by the Agency's solicitors. We note that although he said in his response to the complaint that he was attaching "all documents which remain in my possession since the transaction", including "the complete property file for this transaction", the documents he provided to the Committee did not include the index to the Agency's electronic deal file (which refers to two versions of the agency agreement) or any emails between himself and Mr Boyle concerning the transaction.

[47] The Tribunal's decision in *Baker* is relevant. There, the Tribunal considered an application to submit evidence on appeal. The licensee applicants submitted that it was necessary to submit the evidence in order to address matters not put to them during the investigation of a complaint. One of the licensees submitted that his responses to the Committee had been provided by his solicitors. The Tribunal did not accept that as excusing his failure to provide information.⁶

... Notwithstanding the solicitors' involvement, it was [the licensee's] professional obligation to ensure that, in order to assist the Committee, he responded fully to the complaint and the specific matters requested of him, and included any other information about the transaction and the licensee under scrutiny in this disciplinary inquiry. If [the licensee] now considers that his response was not as full as he would like, then the principles set out in *Eichelbaum* are against his adducing the information on appeal.

[48] Mr Catley had a professional obligation to ensure that all information about the transaction was provided to the Committee. With reasonable diligence he could, and should, have queried why information, of which he was aware, was not provided to the Committee, and ensured that it was provided.

[49] We note that in an affidavit in support his earlier application for leave to appeal out of time, affirmed on 23 October 2019, Mr Boyle said that he had "uploaded the signed pdf version of the Agency and Listing Agreement concluded with [Mr and Mrs Flanagan] into my Dropbox account on 18 August 2015". In his affidavit in support of the present application, Mr Boyle said that he uploaded the agreement to his Dropbox account "some time after it had been signed by Mr Flanagan" (para 24). Both

⁶ *Baker v Real Estate Agents Authority (CAC 413)*, above fn3, at [27].

of these statements are inconsistent with Mr Rea's submission that Mr Boyle uploaded the agreement on 25 July 2017.

[50] While Mr Boyle did not have access to the emails, he had a copy of the executed agency agreement in his Dropbox account, but he did not check the Dropbox until after the Committee's decision was issued. He responded to the complaint with an admission that the agency agreement had been backdated. He has given no explanation for not having requested information from the Agency, if he were unsure as to the sequence of events at the time. We note Ms Storey's submission that it would have been open to him to have sought assistance from the Authority if his approach to the Agency were denied.

Would admitting the evidence require further evidence from other parties and cross-examination?

[51] If the evidence is admitted on appeal, Mr and Mrs Flanagan should be given the opportunity to respond, as it is contrary to evidence given by them that they were asked to backdate the date of signature on the agency agreement. They would have been given this opportunity if the evidence had been provided to the Committee.

[52] We also note Ms Storey's submissions that Mr and Mrs Flanagan have an unsigned version of the agency agreement (which does not appear to have been provided to the Committee), and that there may be further communications between Mr Catley and Mr Boyle that are relevant to the transaction but were not referred to in the application. Further, as the evidence raises an issue as to credibility, it is likely that the parties would seek leave for cross-examination.

[53] Allowing the evidence to be submitted on appeal therefore risks the appeal hearing being turned into – effectively – a “first instance” hearing. The Tribunal's function on appeals from decisions of Complaints Assessment Committees is, pursuant to s 111(3) of the Act, to re-hear the evidence considered by the Committee, not to undertake a first instance consideration of a complaint. That is the function of a Complaints Assessment Committee.

[54] We do not accept Mr Rea’s reply submission that “the appeal is heard *de novo*.” The starting point is s 111(3), which provides that the appeal is by way of re-hearing. As the Tribunal accepted in *Eichelbaum*, the ordinary course is (pursuant to s 111(3)) for an appeal to be by way of re-hearing.⁷

Is it in the interests of justice for leave to be given for the evidence to be submitted?

[55] It has long been recognised that there is a potential tension in the application of the principles that evidence must be “fresh” (that is, it could not with reasonable diligence have been produced to the Committee), and that it may be admitted if it is in the interests of justice that the evidence be admitted.⁸ In *Paget v Station Properties Ltd*, the Court of Appeal referred to the general rule that to be admissible, further evidence must be fresh, credible and cogent, but went on to say:⁹

However, the absence of freshness is not an absolute disqualification for admission. Evidence which is not fresh may still be admitted where there are exceptional circumstances and compelling grounds to justify it. Such evidence must still pass the tests of credibility and cogency.

[56] The evidence is relevant to an issue on which the Committee made a serious adverse finding against Mr Catley and Mr Boyle. It is evidence which the Committee could, and should, have had before it. The failure to provide it to the Committee should not necessarily preclude leave being given for it to be submitted now, if it is in the interests of justice for leave to be given.

[57] We are conscious that the events complained of occurred nearly five years ago, and do not wish to prolong the proceeding unduly. That said, Mr and Mrs Flanagan did not complain to the Authority until August 2018, and any further delay must be balanced against the interests of Mr Catley and Mr Boyle in having the evidence received and considered.

[58] We also take into account that admitting the evidence on appeal would inevitably prolong the proceeding. Further, we accept that if the Tribunal were to undertake a first instance consideration of the complaint, the effect would be to deprive the parties

⁷ *Eichelbaum*, above fn 2, at [55].

⁸ See the discussion in *Dragicevich v Martinovich* [1969] NZLR 306 (CA), at 307–309.

⁹ *Paget v Station Properties Ltd*, [2011] NZCA 570, (2011) PRNZ 46

of the right of appeal to the Tribunal against a Committee's first instance consideration of a complaint.

[59] A similar situation arose in *Baker*, where the Tribunal accepted a submission from counsel for the Authority that the appropriate course would be for the matter to be remitted back to the Committee for consideration of the evidence.¹⁰

Notwithstanding the Tribunal's power to give leave for evidence to be filed on appeal, its function on appeal from decisions of Complaints Assessment Committees is, pursuant to s 111(3) of the Act, to re-hear the evidence considered by the Committee. If the evidence of [the licensees] were to be admitted, it may, in fairness, have to be put to the other parties for comment and response. It is possible, as Mr Mortimer submitted, that the effect would be that what is meant to be an appeal is turned into a first instance hearing. We agree that such a course is not warranted where the evidence sought to be adduced is evidence that could, and should, have been put before the Committee.

[60] We have concluded that the application to submit evidence on appeal must be declined. It is evidence that should, and could with reasonable diligence, have been presented to the Committee.

[61] As occurred in *Baker*, the evidence could be considered by the Committee, if the matter is remitted back to it. By consent the Tribunal would be willing to exercise its jurisdiction under s111(4) of the Act to remit the matter back to the Committee to consider the evidence, and any other evidence relevant to the appeal issues. We note Ms Storey's submission, in her response to Mr Rea's reply submissions, that if the evidence is to be adduced, it will be appropriate for the Tribunal to remit the case for re-hearing by the Committee.

Ruling

[62] Mr Catley's and Mr Boyle's application for leave to submit the evidence is declined.

[63] It is for the parties to decide whether the appeal is to proceed without the evidence sought to be submitted by Mr Catley and Mr Boyle, or whether the Tribunal

¹⁰ See *Baker*, above fn 3, at [31].

is to be asked to modify the Committee's decision and remit the matter back to the Committee for further consideration.

[64] 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 J Doogue
Member

Mr N O'Connor
Member