

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 25**

**READT 004/17**

IN THE MATTER OF

An Appeal under Section 111 of the Real Estate Agents Act 2008

BETWEEN

DIANA HANDLEY  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 412)  
First Respondent

AND

STEVE FEJOS  
Second Respondent/Applicant

On the papers:

Tribunal:

Hon P J Andrews (Chairperson)  
Mr G Denley (Member)  
Ms N Dangen (Member)

Submissions received from:

Mr Fejos (Applicant)  
Ms Bishop, on behalf of the Authority  
Ms Handley

Date of Ruling:

12 April 2017

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**RULING OF THE TRIBUNAL**  
**(Application to adduce fresh evidence on appeal)**

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## **Introduction**

[1] Ms Handley has appealed against the decision of Complaints Assessment Committee 412 (“the Committee”) issued on 20 December 2016, in which the Committee decided not to inquire into her complaint against Mr Fejos.

[2] The appeal is set down for hearing in Wellington on 29 June 2017. Mr Fejos has applied to the Tribunal for leave to have his reply to Ms Handley’s initial complaint, and a supporting letter, admitted at the appeal hearing.

## **Relevant events**

[3] Ms Handley’s complaint related to Mr Fejos’ conduct as salesperson of a property in Wellington which was sold by tender. She contended that Mr Fejos had delayed in forwarding a LIM and building report to her in sufficient time for her to submit an unconditional offer, which led to her offer being rejected.

[4] The complaint was received by the Real Estate Agents Authority (“the Authority”) on 12 October 2016. On 6 December 2016 the Committee considered the information submitted by Ms Handley supporting her complaint.

[5] On 13 December 2016, Mr Fejos provided the Authority with a substantive response to the complaint. Included with that response was a letter from the vendor of the property. Neither document was provided to the Committee before it released its decision not to inquire into the complaint.

[6] On 20 December 2016 the Committee issued its decision not to inquire into Ms Handley’s complaint. Subject to the right to appeal to the Tribunal, Ms Handley’s complaint was at that time at an end.

[7] Ms Handley filed an appeal to the Tribunal on 24 January 2017. Her grounds of appeal are, in essence, that the Committee was wrong to decide not to inquire into her complaint and, in particular, that the Committee was wrong to characterise her allegation against Mr Fejos in relation to his forwarding a LIM and Building Report

as being “a minor delay”, wrong to accept that “there was a short delay in forwarding” information to her, and wrong to find that Mr Fejos had failed to address her concerns “in a reasonable way”.

### **Appeals against decisions not to inquire into a complaint**

[8] When a complaint is received by a Complaints Assessment Committee, it must consider it as soon as practicable, and determine whether to inquire into it.<sup>1</sup> The Committee may:<sup>2</sup>

- (a) determine that the complaint alleges neither unsatisfactory conduct nor misconduct and dismiss it accordingly;
- (b) determine that the complaint discloses only an inconsequential matter, and for this reason need not be pursued;
- (c) determine that the complaint is frivolous or vexatious and not made in good faith, and for this reason need not be pursued;
- (d) determine that the complaint should be referred to another agency, and refer it accordingly;
- (e) determine to inquire into the complaint.

[9] The Committee’s decision whether to inquire into a complaint involved the exercise of its discretion as to which (if any) of the alternatives set out in s 79(2) of the Act it would pursue. As noted earlier, if the Committee’s decision is not to inquire then, subject to the right of appeal, the complaint is at an end. If the Committee decides to inquire into the complaint, then it will undertake that inquiry, which will include obtaining information from the licensee concerned.

[10] An appeal against the exercise of the Committee’s discretion can only succeed if the appellant establishes that the Committee made an error of law or principle, failed to take into account relevant matters (or took irrelevant matters into account), or was plainly wrong. A decision will be “plainly wrong” if it was not open to the Committee to make it on the material before it.

[11] An appeal against a decision of a Complaints Assessment Committee is determined by the Tribunal as a “re-hearing”.<sup>3</sup> This means that unless the Tribunal

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<sup>1</sup> See section 79(1) of the Act.

<sup>2</sup> See Section 79(2).

directs otherwise, the Tribunal conducts the appeal hearing “on the papers”, that is, on the record of the documents and information that was submitted to the Committee by the parties and the submissions made by the parties in relation to the Committee’s decision. The Committee has the power to allow questioning of the parties or witnesses in respect of any information that was provided to the Committee. If the Tribunal considers it is justified, it may allow a party to file fresh evidence for the hearing.<sup>4</sup>

### **The present appeal**

[12] In the present case, the power that the Committee was considering exercising was whether to decide to inquire into the complaint, or not to inquire. If Ms Handley’s appeal succeeds, the Tribunal will refer the complaint back to the Committee for reconsideration. It is not for the Tribunal to undertake an inquiry into the complaint.

[13] We accept Ms Bishop’s submission that the Tribunal’s task in this appeal is to decide whether the Committee was correct to decide not to inquire into Ms Handley’s complaint on the basis of the information that she provided. We also accept her submission that information from Mr Fejos would not become relevant until such time as a decision is made to inquire into the complainant’s complaint. Indeed, to consider the evidence Mr Fejos seeks to have admitted would result in the Tribunal pre-empting any inquiry that the Committee may decide to undertake.

[14] Accordingly, the Tribunal should not accept Mr Fejos’ statement, and the letter from the owner of the property, as material to be considered in determining Ms Handley’s appeal.

[15] The same considerations must apply to any material, beyond that provided to the Committee, submitted by Ms Handley. We note that Ms Handley attached a document to her Notice of Appeal headed “Timeline” for 75 Old Karori Road,

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<sup>3</sup> See section 111(3) of the Act.

<sup>4</sup> See *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3. See also *Nottingham v The Real Estate Agents Authority* [2017] NZCA 1, at 81.

WELLINGTON tender”. The document is in part in black type and in part in blue type. At the top of the document there is the following statement:

NB Blue type is additional to info sent to the REAA. As well as the end summary.

[16] There then follows a timeline from 15 September 2016 until 3 October 2016. For the entry dated 26 September 2016, Ms Handley has set out the event (in this case an arrangement to meet Mr Fejos to view the property), then set out several paragraphs in blue type. According to the statement set out above, these paragraphs were not provided to the Committee.

[17] At the end of the document there is a section headed “SUMMARY”. Although this is in bold type rather than blue, it appears from the statement that it is also additional to the material provided to the Committee. However, although the summary was not provided to the Committee, it does not set out any information that the Committee did not have.

[18] It is apparent that Ms Handley has put before the Tribunal information that is additional to that she provided in support of her complaint. That is, she has submitted evidence beyond that considered by the Committee. The Tribunal’s approach to the appeal, and Mr Fejos’ application to submit further evidence, must be consistent for all parties.

[19] Accordingly, the Tribunal rules that neither Mr Fejos’ statement, nor Ms Handley’s additional material, can be referred to at the appeal hearing.

[20] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties’ attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights.

[21] Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley, Member  
Member

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Ms N Dangen  
Member