

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 36

READT 002/17 and 003/17

IN THE MATTER OF

Appeals under Section 111 of the Real Estate Agents Act 2008

BETWEEN

CHRISTOPHER and MARCIA WOULDES
Appellants

AND

REAL ESTATE AGENTS AUTHORITY (CAC 409)
First Respondent

AND

SIMON TREMAIN
Second Respondent

AND

MARLENE NATHAN
Third Respondent

READT 013/17

BETWEEN

MARLENE NATHAN
Appellant

AND

REAL ESTATE AGENTS AUTHORITY (CAC 409)
First Respondent

AND

CHRISTOPHER and MARCIA WOULDES
Second Respondents

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Submissions received from:

Mr and Mrs Wouldes
Mr J Simpson, on behalf of the Authority
Mr T Rea, on behalf of the Mr Tremain and Ms Nathan

Date of Ruling:

1 June 2017

RULING OF THE TRIBUNAL
(Application to submit further evidence)

Introduction

[1] On 8 May 2016, Mr and Mrs Wouldes complained to the Real Estate Agents Authority (“the Authority”) about the conduct of Ms Nathan in relation to their purchase in May 2014 of an apartment in a complex in Napier, in respect of which Ms Nathan was the listing salesperson. The complaint concerned disclosure of building defects in the complex. Complaints Assessment Committee 409 (“the Committee”) found Ms Nathan guilty of unsatisfactory conduct.

[2] The Tribunal notes that Ms Nathan is employed by Tremains, a real estate agency of which Mr Tremain is managing director and principal. Ms Nathan bought an apartment in the complex in 2005, and Mr Tremain bought an apartment in November 2006. Both sold their apartments in 2015.

[3] In the course of its investigation of the complaint, the Committee, on its own motion pursuant to s 78(b) of the Real Estate Agents Act 2008 (“the Act”), joined Mr Tremain into the inquiry. In a decision issued on 8 December 2016, the Committee decided not to take further action against Mr Tremain. Mr and Mrs Wouldes have appealed against that decision, and the finding of unsatisfactory conduct against Ms Nathan, and have applied to submit further material in support of their appeal.

[4] We note that Ms Nathan has appealed against the Committee’s finding against her. That appeal is not relevant to the present application to submit further material.

[5] Submissions in relation to the application have been received from Mr Rea, counsel for Mr Tremain and Ms Nathan, and from Mr Simpson, on behalf of the Authority. By consent, the application has been considered on the papers.

The material sought to be submitted

[6] The application relates to two documents. First, a report prepared by Hawkes Bay Building Certifiers & Consultants Ltd (“HBBC”), dated 31 August 2009, in relation to the complex (“the HBBC report”). The report was addressed to “Colleen & Ray Petersen”. The Tribunal understands that they are (or were) owners of another apartment in the complex. Secondly, a letter dated 23 November 2009 sent by Langley Twigg (solicitors for the Petersens) to Mr Tremain, enclosing the HBBC report (“the

Langley Twigg letter”). For convenience, these two documents will be referred to collectively as “the new evidence”.

Submissions

[7] The new evidence was not produced to the Committee. Mr and Mrs Wouldes stated in their application that it was not available to them at the time they lodged their complaint, and that they did not become aware of it until after they sent a copy of the Committee’s decision to Langley Twigg (who acted for them in their purchase of the apartment), and asked for comment on the decision. They said that the new evidence was released to them at that time, with the approval of the Petersens.

[8] The HBBC report considered five “points of concern”: “noise from building roof movement”, “substandard finish of ceiling linings”, “possible roof leak”, “structural steel corrosion”, and “dampness seepage in basement stairwell”. The report identified defects in respect of each of the points considered, and concluded that in those respects the building was failing to meet requirements of the building code.

[9] After referring to the HBBC report, the Langley Twigg letter concluded “I am happy to discuss these issues with you further, however believe that full disclosure of the building defects should be made to each of the building owners”.

[10] Mr and Mrs Wouldes submitted that the new evidence is relevant to the issues to be determined in their appeal, in that it challenges an assertion by Mr Tremain to the Committee that he was only aware of roof and structural issues in the complex to the extent of the information contained in the Body Corporate pre-contract disclosure statement (which did not include either the HBBC report or the Langley Twigg letter, or any other report).

[11] They further submitted that the HBBC report was clearly the catalyst to a later “Specific Building Condition Survey” of the property, prepared by Erne Joyce of AAA Design & Consultancy Ltd, dated 17 November 2010 (“the Joyce report”), commissioned by the Body Corporate. Mr Tremain also told the Committee that he had no knowledge of the Joyce report.

[12] Mr and Mrs Wouldes submitted that the new evidence is crucial and supports their challenge to the Committee's decision not to take any further action regarding Mr Tremain, and that Mr Tremain "needs to be asked if he simply forgot about" the Langley Twigg letter and HBBC report.

[13] On behalf of Mr Tremain, Mr Rea submitted that the application should not be granted. He submitted that the "relevance to the appeal issues" of the new evidence, as identified in the application, was as to Mr Tremain's statement that "he was only aware of the roof and structural issues to the extent of the information in the pre-contract disclosure statement from the Body Corporate".

[14] He submitted that the only part of the HBBC report that was relevant to that statement was the first "point of concern": "noise from building roof movement". He submitted that the information contained in the pre-contract disclosure statement provided to Mr and Mrs Wouldes clearly alerted them to a "roof deflection" issue, and also advised them that legal proceedings had been issued, and that the scope of remedial work was uncertain. He submitted that the pre-contract disclosure statement identified the same issue, and provided specific information as to litigation, which was not in the HBBC report prepared five years earlier.

[15] Mr Rea also submitted that the new evidence could have been submitted to the Committee, as it was in possession of the solicitor who acted for them (Mr Twigg), who could have made it available to them when he acted for them on their purchase.

[16] Finally, Mr Rea submitted that there is already a bundle of documents before the Tribunal, comprising approximately 650 pages, and considerable expense has already been incurred in responding to Mr and Mrs Wouldes' complaints. He submitted that the Tribunal should decline leave to admit the new evidence, for being irrelevant, does not advance the issues on appeal, and could have been produced to the Committee.

[17] While noting that the Authority is neutral as to the application, Mr Simpson noted that the inquiry into Mr Tremain was broadly as to supervision issues, Mr Tremain's knowledge of the building issues, and the sale and purchase of the unit bought by Mr and Mrs Wouldes. It was not limited to the purchase. He further noted that one of the issues on appeal is as to Mr Tremain's knowledge and disclosure of defects, and that it may be relevant to consider the Tribunal's indication in *Martin v The Real Estate*

Agents Authority (CAC407) that agencies should have systems in place to ensure that salespersons share information about current listings.¹

[18] Mr Simpson submitted that the new evidence is prima facie inconsistent with Mr Tremain's statements to the Committee, and may indicate that he had a wider awareness of issues beyond that in the pre-contract disclosure statement. He submitted that if the Tribunal considers it will be helpful to its determine of the appeal, it is open to it to admit the new evidence so that these issues can be explored in substantive submissions.

[19] Mr Simpson commented that Mr and Mrs Wouldes had not confirmed that they did not, in fact, have, or have access to, the new evidence as the time of the Committee's investigation of their complaint. He suggested that they should provide such confirmation.

Discussion

[20] Pursuant to s 111(3) of the Act, this appeal is a rehearing; that is, the appeal is determined by reference to the material that was before the Committee, and the submissions made by or on behalf of the parties.

[21] The Tribunal may accept further evidence, if it considers the evidence will assist it in determining the appeal.² A party applying to submit material that was not before the Committee must identify the material sought to be submitted, explain the relevance of the material to the issues to be determined, and must establish that the material could not reasonably have been provided to the Committee.

[22] In the present case, Mr and Mrs Wouldes have clearly identified the material they wish to submit on appeal.

Is the new evidence relevant to the issues to be determined?

[23] The issues to be determined in relation to Mr Tremain were set out in paragraph [4][b][i]–[iii] of the Tribunal's Minute (2), dated 18 April 2017, as follows:

¹ *Martin v The Real Estate Agents Authority (CAC 407)* [2016] NZREADT 67, at [98].
² See *Eichelbaum v The Real Estate Agents Authority* [2016] NZREADT 3.

- [i] whether the Committee was correct to find that Mr Tremain did not fail to disclose information about defects in the complex;
- [ii] whether the Committee was correct to find that Mr Tremain was not in breach of his supervisory obligations in respect of Ms Nathan; and
- [iii] whether Mr Tremain, like Ms Nathan, had a conflict of interest that was not properly dealt with.

[24] The first issue requires consideration of Mr Tremain's knowledge of issues affecting the complex. Mr Rea referred in his submissions to the Body Corporate's pre-contract disclosure statement. As relevant to the appeal, the statement said:

10. The unit or the common property is not currently and has never been the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or any other civil proceedings relating to water penetration of the buildings in the unit title development. The Body Corporate has identified a problem with roof deflection and is currently working through a remedial solution. Proceedings have been issued against liable parties pending the extent of remedial works being clarified.

[25] Mr Tremain's responses to the Committee, when asked whether he was advised of, or was aware of, "roof issues" and "structural issues", or other issues with the complex, were "only to the extent as disclosed in the Body Corporate disclosure statement".

[26] We accept Mr Simpson's submission that the new evidence appears to be inconsistent with Mr Tremain's statement to the Committee. It may be probative as to whether Mr Tremain had wider knowledge of issues relating to the apartment complex than is set out in the pre-contract disclosure statement. We conclude that the new evidence is relevant to the issues to be determined by the Tribunal.

Could the new evidence have reasonably been provided to the Committee?

[27] Mr and Mrs Wouldes said that they did not become aware of the new evidence until after they received the Committee's decision, sent a copy of it to their solicitor, Mr Twigg, and asked for comment on it. They went on to say that:

The additional material (evidence) has been released with the approval from Apartment owners Ray and Colleen Petersen, after consultation and discussion with our solicitor, Peter Twigg of Langley Twigg.

[28] In response to the confirmation sought by Mr Simpson, Mr and Mrs Wouldes advised the Tribunal on 29 May 2017 that they first became aware of the new evidence

on 21 December 2016. When they sent a copy of the Committee's decision to Mr Twigg for comment, he directed them to the Petersens. The Petersens told them that they had asked Mr Twigg to write to all Napier agents to ensure that their purchasers were aware of the building issues. The Petersens then authorised Mr Twigg to release copies of the documents to them.

[29] We reject Mr Rea's submission that the new evidence was in the possession of their solicitor, so could have been provided to the Committee. The HBBC report was addressed to the Petersens. A copy of it was sent to Mr Tremain by Mr Twigg, as solicitor for the Petersens. It is apparent that the HBBC report was held by Mr Twigg as solicitor for the Petersens, not for Mr and Mrs Wouldes. Without authority from the Petersens, he could not provide it to Mr and Mrs Wouldes. It is apparent that such approval was given after the Committee's decision, when the new evidence was sent to Mr and Mrs Wouldes.

[30] We conclude that the new evidence could not reasonably have been provided to the Committee by Mr and Mrs Wouldes.

Will the new evidence assist the Tribunal to determine the appeal?

[31] We reject Mr Rea's submission that the Body Corporate pre-contract disclosure statement provided more information than that contained in the new evidence. Both the HBBC report, and Langley Twigg's letter, provide relevant evidence as to building defects, the extent of Mr Tremain's knowledge of them, and as to whether proper disclosure was made to Mr and Mrs Wouldes.

[32] We accept Mr Simpson's submission that admission of the new evidence will allow the issues on appeal to be explored in the submissions to be filed by or on behalf of the parties, which will assist the Tribunal to determine the appeal.

[33] Finally, while Mr Rea correctly notes that the "bundle of documents" relating to the appeal comprises 659 pages, over three volumes. If leave is given for it to be admitted, the "bundle of documents" will comprise the material that was before the Committee, together with the new evidence. We do not consider that the addition of the new evidence will significantly adversely affect the Tribunal's task in determining the appeal.

Outcome

[34] Leave is given for the HBBC report and Langley Twigg letter to be admitted for the appeal.

[35] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. 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.

Further directions

[36] In paragraph [5] of Minute (3) dated 1 May 2017, it was noted that, by consent, the appeals brought by Mr and Mrs Wouldes and Ms Nathan would be determined on the papers. In paragraph [10] of that Minute, it was noted that this Ruling would include directions as to the filing of submissions regarding the appeals.

[37] The Tribunal's directions regarding submissions in respect of the appeals are set out below. The Tribunal notes that all submissions must be filed in the Tribunal, and copied to the other parties, by the dates set out.

[a] Submissions in support of each appeal:

[i] Submissions by or on behalf of Mr and Mrs Wouldes in support of the appeals against the Committee's findings in respect of Ms Nathan and Mr Tremain: by **23 June 2017**.

[ii] Submissions on behalf of Ms Nathan in respect of her appeal against the Committee's finding against her: by **23 June 2017**.

[b] Submissions in opposition to each appeal:

[i] Submissions by or on behalf of Mr and Mrs Wouldes in opposition to the appeals brought by Ms Nathan: by **21 July 2017**.

[ii] Submissions on behalf of Ms Nathan and Mr Tremain in opposition to the appeals brought by Mr and Mrs Wouldes: by **21 July 2017**.

[c] Reply submissions:

[i] Submissions by or on behalf of Mr and Mrs Wouldes in reply to the submissions on behalf of Ms Nathan and Mr Tremain: by **18 August 2017**.

[ii] Submissions on behalf of Ms Nathan to the submissions by Mr and Mrs Wouldes: by **18 August 2017**.

[d] Submissions on behalf of the Authority in respect of all appeals: by **18 August 2017**.

[38] The appeals will then be determined on the papers.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member