BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 29

READT 020/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	ELAINE LETHBRIDGE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC) First Respondent
AND	COLIN FENTON Second Respondent

and READT 022/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	COLIN FENTON Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC) First Respondent
AND	ELAINE LETHBRIDGE Second Respondent

On the papers:

Tribunal:	Mr J Doogue, Deputy Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissions received from:	Mr R Webber, on behalf of the complainant Ms E Mok, on behalf of the Authority Ms E Lethbridge, licencee
Date of Decision:	20 July 2018

RULING OF THE TRIBUNAL
(Application to submit further evidence)

Introduction

[1] On 29 January 2018 the Complaints Assessment Committee ("CAC") issued a decision on a complaint which Mr Colin Fenton (**the complainant**) made against a licensee, Elaine Lethbridge (**the licensee**) relating to the conduct of Ms Lethbridge as the selling agent involved in the sale of a property owned by Mr Fenton situated at Waiuku. There were eight elements to the complaint which Mr Fenton brought. The key complaint for present purposes was that Ms Lethbridge marketed and sold the property without advising Mr Fenton to get legal advice; and further that this occurred at and at the time he was unwell and taking medication which rendered him incapable of making reasoned and informed decisions on his own.[1]

[2] In its decision, the Authority recorded the complainant's assertions that the licensee was aware of his mental incapacity and took advantage of his position.[2]

[3] A key aspect of the decision is set out at paragraph 4.12 of the decision and which is to the following effect:

> 4.12 The evidence he has produced to the Committee are copies of the medical "fact sheets" for medications he said he was taking and a brief statement from a medical practitioner. The complainant says that he was suffering from a number of side effects of the medications but provides no further evidence other than the fact sheets. He says that the Licensee knew of his disability because she uplifted a prescription for him from a pharmacist and saw medicine bottles in the property.
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> 4.13 Both the Licensee and Sales Associate B have agreed that they were aware that the complainant had some health issues. He was elderly and told them about his upcoming surgery, which was a reason for some delay in the listing. The Licensee has stated that she had no reason to consider that he was incapable of understanding.

[4] The Committee reached the conclusion that it had not been established on the balance of probabilities that the licensee was aware that he was under a disability at the relevant time.

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1 BD 555.
2 BD 556, paragraph 4.11 of decision.

[5] A central part of the case which the complainant brought was that the licensee must have known about the type of medication that he was taking for two reasons. First, on one occasion the licensee had collected a prescription for the complainant from the pharmacy. Secondly, she would have seen the containers in which his medication was kept when she visited the property. There was no evidence that the licensee actually saw the medication bottles or inspected them or that she paid any attention to the contents of the packet which she picked up from the pharmacy.

[6] The licensee generally denied any knowledge about these two matters. She generally denied that she had been given any reason to believe that the complainant was confused or in some other way adversely affected by the drugs at the time when he signed the offer for his property which had been put forward by the purchasers.

[7] The CAC also considered that the medicine information sheets which were produced in evidence did not establish anything beyond that some people have reported certain side effects of the medicines which the complainant was taking. But they are not evidence that the complainant actually experienced those side effects or that the licensee was aware of that.[3]

[8] The CAC also made reference to High Court proceedings which the purchasers of the property had brought against the complainant in which substantially similar issues were raised for consideration. In its judgement the High Court concluded that the complainant was unable to provide medical evidence that supported his contention he was incapable of making decisions at the relevant time.

[9] The Committee concluded[4] that it had not been established that the complainant was "incapable of entering into a contract". By way of interpolation it is observed that as Mr Webber, counsel for the complainant has submitted, with some apparent justification, that the question of whether a binding contract was entered into or not was not the issue which the CAC had to determine. The issue is whether the licensee behaved with impropriety in not taking steps to protect Mr Fenton by ensuring he got legal advice in circumstances where there was reason to suppose he was of impaired mental ability.

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3 BD 557 paragraphs 4.14 and following.

[10] For present purposes, we assume that the issue the Tribunal will have to consider will be whether the complainant was suffering from material mental impairment as a result of taking pain killers and whether the licensee knew of his impairment and the reasons for it at the time when she took steps to have him sign the ASP.

[11] To conclude this brief statement of the background, the Committee concluded that this aspect of the charges brought against the licensee was not established, although it did find that there were shortcomings to other aspects of the way in which the Licensee carried out her responsibilities.

The additional evidence sought to be adduced

[12] Counsel for the complainant, Mr Webber annexed to the application for leave to adduce further evidence the brief statements setting out the proposed additional evidence the complainant sought to put before the Tribunal in support of his appeal against the decision of the CAC. This evidence is addressed to the question of whether the complainant was labouring under mental incompetence at the time of the contract brought about by his medication and whether the licensee knew that to be so.

[13] The evidence of the first of the proposed witnesses, Eugene Garon, on the issue of mental competence was in the following terms:

> The amount of Medications on the Kitchen Bench and in the cupboard, it is evident that someone was quite ill residing there. (Morphine).

[14] The second person from whom it is sought to adduce additional evidence is Maria Jackson who apparently was the cleaning person that the complainant employed. In her short brief she states:

> I Maria Jackson, saw all the medicine that Colin Fenton, when I use to come and do cleaning at his house … they are all on left side of his table. As a support worker I observe all the medication of my client.

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[4] BD 557, paragraph 4.19.

[15] The third element of the proposed additional evidence is set out in a statement from Dr Christine March who is the medical general practitioner who was providing medical care to the complainant in late 2015 when the events which are the subject of the complaint took place.

[16] Dr March has given a brief written statement dated 22 June 2018 confirming that the complainant was her patient and that he had chronic back and leg pain. He had such severe pain, she said, that he needed to take morphine (M-eslon), tramadol and an anti-depressant (venlafaxine). She said that sometimes if he cannot sleep he needs to take a sleeping tablet (zopiclone) and if he has breakthrough pain he takes sevredol. She stated that all of the tablets that he is taking "can have an impact on memory and concentration and cause drowsiness". She said that if some of the medication was taken at the same time he "could be quite drowsy and confused and probably should have had some independent advice before signing any documents".

[17] She further opined that after his release from hospital where he had surgery, the complainant had fewer pain control medications provided to him and that led to him taking other than ideal medication types with the result that the medication he was taking "can make you feel very drowsy and would impair judgement especially in an elderly patient. If Colin signed papers late in the evening he may have already had his sleeping tablet the combination of sevredol and zopiclone could cause confusion and memory impairment again more marked in an elderly patient".

[18] The question which this decision deals with is whether the additional information from these three witnesses should be allowed in evidence before the tribunal when it was not part of the hearing record before the CAC.

Principles

[19] Counsel for the Authority, Ms Mok made the following submissions concerning the principles which are applicable in cases where it is proposed that additional evidence which was not before the CAC, should be adduced on appeal:

2.1 The Tribunal will be familiar with the principles in *Eichelbaum v Real Estate Agents Authority*.[5] Appeal hearings will generally proceed on the record of evidence that was before the Committee and submissions of the parties, without any new evidence. The Tribunal may accept further evidence on appeal if justified.

2.2 As the Court of Appeal stated in *Nottingham v Real Estate Agents Authority*:[6]

> *… The appeal is supposed to be conducted by way of re-hearing of the proceeding before the CAC. The CAC conducts a hearing on the papers, unless it directs otherwise. Except in exceptional circumstances, full oral hearings before the Tribunal are not appropriate. Doing so risks drawing the Tribunal away from the material comprising the record before the CAC so that a decision might be made on a quite different basis, it also raises the spectre of credibility findings in contests between complainants and the licensees who might be the subject of a charge that would expose the Tribunal to criticism of pre-determination if a charge were then laid.*

2.3 The standard test for admission of further evidence on appeal is that it must be cogent and material, and must not have been reasonably available at first instance.[7] In determining whether to grant leave, the following factors may be taken into account:[8]

(a) Whether the evidence could have been obtained with reasonable diligence for use at the initial hearing;

(b) Whether the evidence would have had an important influence on the outcome;

(c) Whether the evidence is apparently credible; and

(d) Whether admitting the evidence would require further evidence from other parties and cross-examination.

2.4 The Authority notes the High Court's view in *Comalco NZ Ltd v TVNZ Ltd*:[9]

> *It is also important the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. I accept also, however, that the test should not be put so high as to require the circumstances to be wholly exceptional. Every case must be considered in relation to its own circumstances.*

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5 *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3. This decision was affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

6 *Nottingham v Real Estate Agents Authority* [2017] NZCA 1, at [81].

7 See for example *Telecom Corp of NZ Ltd v CC* [1991] 2 NZLR 557.

8 See *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [49], citing *Dragicevich v Martinovich* [1969] NZLR 306 (CA).

9 *Comalco NZ Ltd v TVNZ Ltd* [1997] NZAR 97 at [25].

2.5 Further, in *Foundation for Anti-Aging Research v The Charities Registration Board*, the Court of Appeal accepted that "natural justice considerations could in some cases require an oral hearing on appeal in order to 'get to the bottom' of the issues".[10] The Court further noted that:[11]

> *…there may be cases where, in order to secure the objective of a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate…The Court will be guided by the usual criteria of freshness, relevance and cogency. Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.*

2.6 In *Eichelbaum*, the Tribunal affirmed that its wide procedural powers under the Real Estate Agents Act 2008 give the Tribunal ample scope to apply these principles in a flexible way depending on the circumstances of the case. What is not permissible is to give a party to an appeal the opportunity to run their case afresh simply because they wish they had conducted it differently in the first instance.[12]

[20] There is no dispute that the foregoing summary of principle is correct.

Assessment of complainant's application to adduce further evidence

[21] The application which the complainant has made and the material brought forward in support of it do not go into the question of whether the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence.

[22] It is incumbent upon an applicant in the position of the complainant to establish why the evidence should not have been available at the earlier hearing by the exercise of reasonable diligence. This requirement is not discussed at all in the application.

[23] The contention is put forward that while the complainant apparently took legal advice at various stages of the dispute, he did not have the assistance of a lawyer analysing the evidence in support of the application. We understand that this is the

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10 *Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [35].

11 At [51].

12 *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [51].

explanation relied upon for explaining the failure to provide the additional evidence to the CAC.

[24] It was however clear that in general terms the effects the medication had on him would be a relevant matter for the CAC to consider. That is why he produced extracts from leaflets describing some of the possible side effects of the various medications that he was taking.[13]

[25] As to the point about the knowledge of the licensee that he was taking medication, his complaint of course was predicated on the fact that not only was he mentally impaired but that the licensee knew of the causes for that impairment, namely the drugs which he was taking.

[26] In the material which he sent to the Committee in support of his complaint the complainant made reference to the fact that it must have been obvious to the licensee that he was taking many drugs because they were stored in the open in his house and she had come to the house on numerous occasions. It is that evidence, together with the evidence that he asked the licensee to pick up a prescription from the chemist for him and bring it to his house, on which the complainant based his case that the licensee must have known about his mental state.

[27] He now wishes to address the additional evidence which has already been mentioned, that of Mr Garon and Ms Jackson which is in the same vein. There is no explanation as to why this evidence could not have been obtained previously.

[28] In our view the evidence of these two additional witnesses ought not to be allowed. In seeking to put this evidence forward, the complainant is attempting to elaborate or improve upon the evidence which was provided to the CAC. It has not been demonstrated that the evidence could not have been discovered with reasonable diligence prior to the hearing of the CAC. We do not accept that as a matter of principle that the evidence should now be put forward by the complainant in support of his appeal.

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[13] For example at BD 239.

[29] Similar comments can be made about the evidence of Dr March. Her evidence deals with the question of whether the medication would have made the complainant drowsy and confused. It is to that point that the evidence is directed rather than the further limb of the complaint which was that the licensee would have been aware of those problems.

[30] There is no required explanation, as to why this evidence which was not placed before the CAC should now be heard by the Tribunal as part of the process of hearing the appeal. It would seem that Dr March was the complainant's medical general practitioner at the time when evidence was being collected by the CAC.[14] The general relevance of Dr March's evidence was obvious by then. It had been referred to in the judgment of the High Court in their litigation between the complainant and the purchasers of his property: *Kennedy v Fenton*[15].

[31] In that case the Judge referred to the evidence of Dr March and its bearing upon the issues between the parties. He noted that the doctor had not expressed any opinion as to whether the complainant was actually suffering from memory loss or confusion at the time when the agreement was negotiated and entered into.[16] In our view there is no reasonable basis upon which the complainant can assert that he could not have discovered this evidence with reasonable diligence. The complainant ought not now be permitted to put forward this evidence when he did not do so at the CAC hearing.

[32] The overall result is that the application to reduce further evidence is dismissed.

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14 This would have been around September 2017 with the hearing on the papers apparently taking place on 8 November 2017: BD 555.

15 *Kennedy v Fenton* [2016] NZHC 2927.

16 At paragraph 44 of the judgment.

[33] 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. 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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J Doogue
Deputy Chairperson

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C Sandelin
Member

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Mr N O'Connor
Member