

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 39**

**READT 023/18**

IN THE MATTER OF

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

BETWEEN

JENNA RAHIM  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 416)  
First Respondent

AND

KEITH DOWDLE, JOHN STEMPE, and  
MAXTON EVES  
Second Respondents

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Ms C Sandelin (Member)  
Mr N O'Connor (Member)

Submissions received from:

Mr Rahim, on behalf of Ms Rahim  
Ms J Trezise, on behalf of the Authority  
Mr M Eves, (and on behalf of Mr Dowdle  
and Mr Stempa)

Date of Ruling:

8 August 2018

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**RULING OF THE TRIBUNAL**  
**(Application to adduce further evidence)**

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## **Introduction**

[1] Ms Rahim has appealed against a decision of Complaints Assessment Committee 416 (“the Committee”) to take no further action on her complaint against Mr Dowdle, Mr Stempa, and Mr Eves (“the Committee’s decision”). The appeal has been set down for hearing on 3 October 2018.

[2] Ms Rahim has applied for leave to submit new evidence in support of the appeal. Her husband made submissions on her behalf.

## **Background**

[3] Ms Rahim and her husband bought a cross-lease property in Auckland at auction on 15 September 2013. Mr Stempa is a licensed agent, and was the listing salesperson for the property. Mr Dowdle is a licensed salesperson, and introduced Ms Rahim and her husband to Mr Stempa, as being prospective purchasers of the property. He was the auctioneer at the auction. Both Mr Stempa and Mr Dowdle were engaged at Custom Residential Ltd (“the Agency”) at the relevant time.<sup>1</sup>

[4] On 29 July 2017 Ms Rahim made a complaint to the Real Estate Agents Authority (“the Authority”) against Mr Dowdle and Mr Stempa. Her complaint was that when they bought the property Mr Stempa misrepresented the number of “legal” carpark at the property (as being a garage and one off-street carpark in front of the garage), and as to the terms of the cross-lease regarding the colour the house could be painted. She said these matters led to issues between the complainants and their neighbours.

[5] Ms Rahim also complained that Mr Dowdle and Mr Stempa misled her and her husband as to the reserve price for the property before and during the auction.

[6] The Committee noted in its decision that the carpark issues were the “last straw”, which led the complainants to make the complaint.

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<sup>1</sup> The Committee noted in its decision that Mr Stempa voluntarily suspended his licence in mid-2017.

## **The Committee's decision**

[7] Pursuant to s 79(2)(e) of the Real Estate Agents Act 2008 (“the Act”) the Committee decided to investigate the complaint. In the course of its investigation the Committee decided pursuant to s 78(b) of the Act to inquire into the conduct of Mr Eves, whom it described as the “eligible officer for the Agency”.<sup>2</sup> Following the investigation, the Committee considered the complaint and, as noted earlier, decided to take no further action on it.

[8] With respect to the off-street car park the Committee referred to the terms of the lease as to car parking, which provided that no vehicle could be parked or left on the common area so as to impede or obstruct the other party to the cross-lease from reasonable use and enjoyment of the common area. With respect to the colour the house could be painted, the Committee referred to the lease’s provision that exterior painting of the property was to be in a colour scheme agreed by the other party.

[9] The Committee noted that Ms Rahim had had the opportunity to consult a solicitor and peruse each clause in the cross-lease before proceeding to bid at the auction. The Committee noted Ms Rahim’s admission that she had received the memorandum of lease and title documents, had forwarded them to her solicitor, and had subsequently met with the solicitor.

[10] The Committee referred to Mr Stempa’s statement that he had not said that there were two “legal” car parks and had been told by the vendor that an area outside the garage could be used for parking as long as it did not obstruct the neighbour’s use of the driveway or turning area. The Committee also referred to a statement from the vendor as to car parking, to the same effect.

[11] Ms Rahim alleged that she had disclosed her maximum buying price for the property to Mr Stempa, and that it was used at the auction to get the final sale price up to that level. The Committee concluded that the auction was carried in accordance with the Agency’s in-house rules.

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<sup>2</sup> The term “eligible officer” is not defined, or referred to, in the Act. Mr Eves’ status as “eligible officer” is not explained by the Committee.

## **Appeal**

[12] As set out in her notice of appeal, Ms Rahim's reasons for appealing are that the Committee's decision was "unfair – mainly due to the lack of clarification of breaches of the Fair Trading Act by the Agency". She repeated the essence of her complaints against Mr Stempa and Mr Dowdle.

## **Application to submit further evidence**

### *Submissions*

[13] Ms Rahim seeks leave to produce emailed statements from real estate salespersons from four agencies, all of which state that they are unable to market the property as having two car spaces. The emails are dated in June or July this year. Ms Rahim stated that she and her husband are relocating out of Auckland, and had asked the four agencies to appraise the property for sale. She said that this information was not provided to the Committee, as she and her husband had never engaged with other agencies before now.

[14] Ms Trezise submitted for the Committee that the statements do not meet the test for admission of further evidence. She submitted, first, that evidence in the nature of the statements would not have had an important influence on the Committee's decision to take no further action on the complaint. This was because the Committee's decision was based on Mr Stempa's statement as to the information given to him by the owner, the provisions of the cross-lease, and the fact that Ms Rahim had the opportunity to take, and took, legal advice before bidding at the auction.

[15] Ms Trezise further submitted that the basis on which the four salespersons reached the opinion that they could not market the property as having two carparks was unclear, and that if the statements are admitted, the salespersons would have to give evidence as to the basis of their opinions, and this would unnecessarily prolong the hearing. Finally, Ms Trezise submitted that statements from other salespersons could have been obtained by Ms Rahim and provided to the Committee during its investigation of her complaint.

[16] Mr Eves made submissions, which were also on behalf of Mr Dowdle and Mr Stempa. Those submissions reflect the submissions made by Ms Trezise.

### *Discussion*

[17] We record, first, that the jurisdiction of this Tribunal is as defined in the Act, and is concerned with the conduct of real estate agents, as measured against the Act, the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, and any other regulations or rules made pursuant to the Act. The Tribunal does not have jurisdiction to consider an alleged breach of the Fair Trading Act 1986.

[18] Secondly, it is relevant to record that the appellant, Ms Rahim, has the responsibility of persuading the Tribunal that the Committee was wrong to decide to take no further action on her complaint.

[19] As the Tribunal said in its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*,<sup>3</sup> appeal hearings generally proceed on the record of the material that was before the Complaints Assessment Committee and the submissions of the parties. The Tribunal may accept further evidence if that is justified. The test for giving leave to admit further evidence is that it must be cogent and material. The following factors may be taken into account:<sup>4</sup>

- [a] whether the evidence could have been obtained with reasonable diligence at the time of the Committee's consideration of the complaint;
- [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.

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<sup>3</sup> *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3.

<sup>4</sup> See *Eichelbaum*, at paragraph [49].

[20] The Tribunal has procedural powers under the Act that would allow it to apply the test for admitting further evidence in a flexible way,<sup>5</sup> but an application to admit further evidence does not give a party to an appeal the opportunity to run the case afresh simply because they wish they had conducted it differently in the first instance.<sup>6</sup>

[21] In this case, we would not dismiss Ms Rahim's application on the grounds that she could have obtained evidence as to other salespersons' views about references to car parks in marketing the property when her complaint was before the Committee. While it was for her to establish the grounds for her complaint, it is understandable that her focus was on the manner in which the property was marketed to her, and she had not engaged with any other agencies before she and her husband recently asked for appraisals in the context of selling the property.

[22] Nor would we have any concern as to the apparent credibility of the salespersons' statements. Each of them refers to the terms of the cross-lease. We would, however, be concerned that if each salesperson were to be required to attend at the appeal hearing to give evidence in person and be cross-examined, the required hearing time for the appeal could be considerably lengthened. That factor would have to be balanced against factors that would favour admitting the statements.

[23] However, the focus in Ms Rahim's complaint, and the Committee's decision, was on what Mr Stempa said to her when marketing the property. We have concluded that the salespersons' statements as to what they would do at present will have little, if any, relevance to the Committee's decision as to whether Mr Stempa misrepresented the possible use of the carpark when marketing the property, and whether his statement that he relied on information provided to him by the vendor, should be accepted.

[24] Further, the Committee's finding that Ms Rahim was given the cross-lease and title documents and forwarded them to her solicitor before bidding at the auction could not have been affected by having the salespersons' statements before them. Ms Rahim's seeking advice from her solicitor was independent of representations made by the salesperson of the property.

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<sup>5</sup> See s 105 of the Act.

<sup>6</sup> See *Eichelbaum*, at paragraph [51].

[25] We have concluded that Ms Rahim should not be given leave to submit the salespersons' emails in support of her appeal. Accordingly, her application is dismissed

[26] 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.

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Hon P J Andrews  
Chairperson

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Ms C Sandelin  
Member

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Mr N O'Connor  
Member