IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-3010
[2015] NZHC 529

IN THE MATTER	of an appeal pursuant to ss 113 and 116 of the Real Estate Agents Act 2008
BETWEEN	DERMOT NOTTINGHAM and PROPERTY BANK REALTOR LIMITED Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY First Respondent
	MARTIN HONEY Second Respondent

Hearing: 18 March 2015

Appearances: D Nottingham in person and for Property Bank Realtor Limited
L J Clancy for First Respondent
D Grove for Second Respondent

Judgment: 23 March 2015

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie on 23 March 2015
at 12.30pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Register

Date:

Solicitors: Meredith Connell, Auckland
Foy & Halse, Auckland

Copy to: D Nottingham,Auckland

Introduction

[1] Mr Nottingham and Property Bank Realtor Limited appeal a decision of the Real Estates Agents Disciplinary Tribunal dated 13 October 2014.

[2] The Tribunal in turn was sitting on appeal from a decision of the Complaints Assessment Committee, which decision was dated 18 July 2012.

Background

[3] In late September 2009 Property Bank Realtor Limited purchased a REMAX franchise, and in October 2009 it began operating a real estate business known as REMAX Advantage Onehunga.

[4] The franchise had previously been owned by a company controlled by the second respondent, Mr Honey. The company had operated a real estate business in Royal Oak.

[5] In early 2011 Mr Nottingham complained to the Real Estate Agents Authority pursuant to s 74 of the Real Estate Agents Act 2008 ("the Act"). He asserted that Mr Honey, who is a licensed real estate agent, continued to operate live web pages with REMAX branding after February 2010, and that those web pages displayed listings held by Mr Honey's company under a new franchise – Ray White. Mr Nottingham alleged that Mr Honey was continuing to operate a website utilising the REMAX franchise when he no longer held a franchise from REMAX, that he was misleading the public into believing that he was operating a REMAX franchise when he was in fact operating a Ray White franchise, and that as a result, Property Bank Realtor Limited had lost "thousands of dollars" in commission over a 14 month period.

[6] This complaint was allocated number READT 20/12. It was accepted by the Real Estate Agents Authority on 26 April 2011, and it was referred to a Complaints Assessment Committee.

[7] Mr Honey then complained to the Authority about Mr Nottingham's conduct in the course of pursuing complaint READT 20/12. Mr Nottingham, his brother

Phillip Nottingham and a Mr McKinney in return responded by submitting a cross complaint, asserting that the allegations made by Mr Honey were false, and made with dishonest intent. This cross complaint was allocated number READT 49/12.

[8] The Committee considered the complaints on 24 May 2011 and determined to enquire into them. The Committee obtained and considered an investigation report and it conducted an inquiry into the complaints pursuant to s 89(1) of the Act. It made a decision pursuant to s 89(2)(c) to take no further action on the complaint.

[9] Mr Nottingham then appealed this decision to the Real Estates Agents Disciplinary Tribunal.

[10] The Real Estates Agents Disciplinary Tribunal held a hearing over four days, starting in December 2013, and concluding in March 2014. It then received extensive submissions in writing and its decision issued on 13 October 2014. It held that it was being asked to reconsider the exercise of a discretion by the Complaints Assessment Committee, and that accordingly, the onus was on Mr Nottingham to establish that the Committee had erred in law, taken into account irrelevant considerations, failed to take into account relevant considerations, or was plainly wrong. There was an allegation of bias by the Committee. It reviewed the evidence and concluded that the appellant had failed to prove bias. It also noted the hearing before it had been de novo and very full. It accepted that Mr Honey was an honest witness and found that he did not have any "mens rea" or guilty mind. Accordingly it considered that he could not be guilty of misconduct in the terms alleged by the appellant. It held that Mr Honey's conduct could not be regarded as disgraceful, seriously incompetent, or seriously negligent, and that he had not been, in any way, willful or reckless. It did not think that Mr Honey's conduct fell within any of the categories of unsatisfactory conduct defined in s 72 of the Act. It also found that there was nothing untoward in Mr Honey's conduct in complaining to the Authority about Mr Nottingham. The Tribunal took the view that no further action was warranted on the complaints, and it dismissed the appeals.

[11] The appellants now appeal this decision pursuant to s 116 of the Act.

The notice of appeal

[12] The notice of appeal runs to some 86 pages. It is more than four times longer than the Tribunal's decision. It alleges that the Tribunal acted "corruptly, dishonestly, and immorally", and, in broad terms, that the Tribunal "misreported", or failed to report evidence that the appellants consider should have been accepted by the Tribunal. It is asserted that the Tribunal endeavoured to intimidate the appellants, that it ignored evidence, that it was pre-disposed to find Mr Honey innocent, that it made "impossible findings", that it relied on "impossible" explanations, and that broadly its decision was wrong. The appellants seek that the Tribunal's decision should be overturned, and that Mr Honey should be found guilty of misconduct pursuant to s 73 of the Act. They also seek a finding that the Complaints Assessment Committee acted "corruptly", as did the Disciplinary Tribunal. It is asserted that the members of the Tribunal acted "corruptly, dishonestly, and immorally" in coming to its "palpably false decision" based on "dishonestly misreporting" the evidence before it. Compensation is sought. An order is sought that the behaviour of the Complaints Committee members, and Tribunal members, as well as witnesses, should be referred to the police. Full costs are sought.

[13] The substantive appeal has been allocated a fixture on 10 and 11 June 2015.

[14] An interlocutory application has been filed by the appellants. They initially sought orders as follows:

(a) Permitting them to adduce further evidence;

(b) Allowing Mr Nottingham to represent Property Bank Realtor Limited;

(c) That the appeal be heard by a full Court;

(d) That any important questions of law identified at the hearing be sent directly to the Court of Appeal;

(e) That any related review proceedings in the High Court brought by Mr Honey be "adjoined", and heard at the same time as the appeal.

The application was not accompanied by a supporting affidavit or affidavits.

[15] In the event, applications (d) and (e) were not advanced by Mr Nottingham, and application (b) was resolved by a consent order which I record below.

[16] Mr Honey filed a notice of opposition together with a supporting affidavit. The Authority filed a notice of opposition. It opposed the application to produce further evidence, and to have the appeal heard by a full bench of this Court. It advised that it will abide the decision of the Court on the other aspects of the application.

[17] The hearing of these interlocutory matters was set down for hearing on 17 February 2015 by Katz J. At the same time Her Honour made various timetable directions. The appellants breached those directions. They failed to serve points on appeal that clearly state the issues on appeal. They failed to file any affidavit evidence in reply to the evidence put forward by Mr Honey. They failed to file submissions, or a numbered and indexed bundle of documents for this hearing. Rather, the appellants have filed a further interlocutory application seeking "an unabridged recording" of the Tribunal hearing. They also sought that the directions given by Katz J should be vacated until an unabridged and accurate version of the transcript is produced and agreed between the parties. They sought that the transcript should be supplied in "word" format, and that the Tribunal's file should be used by the Court and the parties, so that the need for filing documentation is lessened.

[18] The further application was filed in Court on 12 March 2015. Although there were no notices in opposition it has proved possible, again by consent, to deal with the further application and I record orders in this regard below.

Analysis

[19] I deal first with the various aspects of the first interlocutory application in turn. I then turn to the 12 March 2015 application.

Application to adduce further evidence

[20] The extent of the further evidence the appellants seek to adduce was not clear from the interlocutory application. It appeared from that application that the appellants wished to call further evidence from the following:

(a) Mr Nathan Guy, an MP;

(b) Mrs Jackie Blue, a former MP;

(c) Mr Sam Lotu-Iiga, an MP;

(d) Mr Keith Manch, an employee of the Real Estate Agents Authority;

(e) Mrs Charlotte Gerrard, an employee of the Real Estate Agents Authority;

(f) Mr Ross Gouverneur, an employee of the Real Estate Agents Authority;

(g) Mr Ancari Van Nie Kerk, an employee of the Real Estate Agents Authority; and

(h) Ms Anna Tierney, also an employee of the Real Estate Agents Authority.

In addition, the appellants asserted a further expert witness is required to comment on various computer-related issues. They also asserted that the evidence of witnesses which was filed with the Tribunal after the close of the hearing, but before the Tribunal's decision issued, should be available at the appeal hearing.

[21] In the event, the application was maintained only in respect of Mr Guy, Mrs Blue and a further computer witness. It was common ground between all parties that briefs of evidence which were filed after the hearing had concluded, but before the Tribunal's decision issued, should form part of the record which comes before this Court on appeal. This is because it is not clear from the Tribunal's decision whether or not additional evidence filed by the appellants was taken into account. The evidence which the appellants seek to adduce is from a Ms Earlan, and a Ms Muller. Briefs of evidence from these witnesses were forwarded to the Tribunal by the appellants in mid-2014, some months after the hearing had concluded. The Tribunal, through its case manager, issued an email to the parties. It read as follows:

> The chair has advised that the hearing for these READT cases has finished. Any further documents or evidence relating to proceedings in the District/High Court is becoming irrelevant to the timetable that was ordered and the only concern is the closing submissions by all parties to be filed.

This suggests the Tribunal was not going to take the additional material into account. However, in its written decision, at paragraph 76, the Tribunal noted as follows:

> There was further evidence from such persons as Ms Lee-Ann Earlan, who was Mr Honey's personal assistant at Pure Realty Limited from February to August 2009, and from Ms Colleen Muller who was receptionist for that company from February 2009 to mid 2011 but there is no need to detail that evidence.

This suggests that the evidence was taken into account. The relevance of this material, and the Tribunal's approach to it is a matter which the Court may have to deal with when the substantive appeal is heard. The briefs of evidence belatedly filed should be before the Court. They should be put in the bundle of materials which were before the Tribunal, and which the appellants will be required to file as part of the case on appeal. It is not, however, further evidence, and no order is necessary in regard to the same.

[22] The evidence which the appellants seek to adduce from Mr Guy, Mrs Blue, and from a further expert computer witness are in a different category. They are covered by r 20.16 of the High Court Rules. That rule provides as follows:

20.16 Further evidence

(1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.

(2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.

(3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

(4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[23] It is the appellants' argument that Mr Honey complained about Mr Nottingham to Mrs Blue, that Mrs Blue in turn raised the issue with Mr Guy, and that Mr Guy appointed the members of the Tribunal. The appellants seem to be alleging that there was some kind of conspiracy, to which Mrs Blue and Mr Guy were parties.

[24] I cannot see that any evidence from Mrs Blue and Mr Guy is relevant to the issues which will be before the Court. The issue before the Court will be whether or not the Tribunal's decision, in relation to the complaint which Mr Nottingham made against Mr Honey, and the complaint which Mr Nottingham, Mr Phillip Nottingham and Mr McKinney made, also against Mr Honey, is correct. Whether or not Mr Honey spoke to Mrs Blue, and what actions Mrs Blue did or did not take, will simply not be relevant to the key issue on the appeal.

[25] I note that the Tribunal was asked to issue witness summons for a number of witnesses, including Mrs Blue and Mr Guy. It refused to do so. There is no challenge to the Tribunal's decision in that regard, and I cannot see that there is any "special reason", as required by r 20.16, requiring the Court to grant leave to the appellant to adduce further evidence from Mrs Blue or Mr Guy. This part of the application is declined.

[26] The proposed further evidence from the computer expert also falls for consideration. One of the issues before the Tribunal was whether or not Mr Honey had made sufficient endeavours to remove the REMAX web pages from the website

for his Ray White franchise. The Tribunal heard technical evidence from a Mr Taka, who was Mr Honey's web designer, from a Mr Spence, who was an expert engaged by the Complaints Assessment Committee to report to it, and from a Mr Chappell, who was called by the appellants.

[27] An appeal generally proceeds on the evidence that was before the first instance decision-maker, and parties are not entitled, as a matter of course, to attempt to bolster their case by filing new evidence in the context of an appeal.[1] New evidence can be adduced only with leave of the Court, and it is well accepted that the power to grant leave is to be sparingly used. The Court has held as follows:[2]

> Rule 718 of the High Court Rules provides in subcl (4), that in respect of a general appeal, the Court has full discretionary powers to hear and receive further evidence. Nevertheless, there are limitations on the introduction of fresh evidence on an appeal … I accept that the jurisdiction is to be exercised sparingly and the cogency, relevance and possible effect of the evidence on the result, must be taken into account. Generally speaking, the appeal should not be turned into a new case. It is also important that 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.

[28] Further, in respect of appeals from an expert body, such as The Real Estate Agents Disciplinary Tribunal, the Court of Appeal has observed as follows:[3]

> First, there is power on such an appeal to rehear the whole or any part of the evidence or to hear and receive further evidence under R 696 of the High Court Rules. It is common ground that R 696 is applicable, but in exercising these powers the Court must be alert against the danger of allowing what the legislature intends to be a genuine appeal against a decision of an expert body - and a decision reached, it may be added, after a somewhat distinctive procedure of investigation, draft determination and conference - to be converted into a new trial, the prior proceedings being but a prelude or, as some counsel put it in argument, a dummy run. This consideration must weigh strongly against the allowance of any evidence which is little more than an improvement on, or a revised version of, material that was before the Commission.

[29] Here there was a very full hearing before the Tribunal. All parties called evidence from computer experts (although Mr Taka was also a witness of fact). In

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1 *VP v RH* [2015] NZHC 260.
2 *Comalco NZ Ltd v Television New Zealand Ltd* (1996) 10 PRNZ 573 (HC) at 579.
3 *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1991] 2 NZLR 557 (CA) at 558.

particular, the appellants called their own expert. There is no explanation offered as to why the additional material which the appellants say they now require could not have been made available at an earlier point in time by the exercise of reasonable diligence on their behalf. Indeed the additional evidence it is sought to adduce is not clearly set out. In my judgment the appellants should not be allowed to have a fresh run of their case in the context of an appeal to this Court. The appeal process should not be frustrated. Appellants cannot treat hearings by first instance Tribunals as a prelude to, or a dummy run, for an appeal. The application for leave to call an additional computer related expert is declined.

Lay representation

[30] This issue can be dealt with relatively simply.

[31] Mr Clancy, appearing for the first respondent, helpfully explained that the company Property Bank Realtor Limited has never been a party to any of the complaints lodged with the Real Estate Agents Authority. Its name seems to have come in inadvertently, as a result of a minute issued at a relatively early stage by the Complaints Assessment Committee. The parties agreed that the appropriate course is to delete the name of Property Bank Realtor Limited as an appellant, and to substitute the names of Phillip Raymond Nottingham, and Robert Earle McKinney as appellants. As I have noted above, Mr Phillip Nottingham and Mr McKinney were parties to one of the original complaints – READT 49/12.

[32] I order that the names of the parties be amended to this extent.

[33] I record that I have advised Mr Nottingham that he will not be able to represent either his brother, or Mr McKinney, and that they reasonably will have to make such submissions as they see as being appropriate to their respective positions. Mr Nottingham acknowledged this.

Application to have substantive hearing heard by a full court

[34] Relevantly s 19 of the Judicatory Act 1908 provides as follows:

> **19 Powers of the court may be exercised by 1 or more Judges**
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> (1) Each Judge or any 2 or more Judges may in any part of New Zealand exercise all the powers of the court, except such powers as may by any statute be required to be exercised by the full court or by any specified number of Judges.

[35] Whether or not to order a full Court, and if so the number of judges a full Court will comprise, is a discretionary decision, for the Judge hearing an application.

[36] The issue was discussed by Smellie J in *Fay Richwhite v Davison*.[4] The Court there held that there are three factors which can be weighed in exercising the discretion – administrative considerations, the potential difficulty of two or more Judges disagreeing, and the desirability of applying two or more judicial minds to the fact finding required. I doubt that this list is exhaustive.

[37] Here Mr Nottingham argued that the issues raised by the appeal are serious. He will be asserting that the Tribunal acted corruptly, dishonestly and immorally. He says that he is making serious allegations against Tribunal members, and that a full Court should be convened to consider those allegations of this nature.

[38] Mr Clancy asserted that the seriousness of the allegations made should not be the determining factor, and that the issues before this Court on appeal will be relatively straightforward. Mr Grove for the second respondent argued that there are no important issues of fact or law involved in the appeal, and that to convene a full Court would cause undue delay and cost.

[39] I cannot see that it is necessary to order a full Court.

[40] The issue before the Court on appeal will be relatively straightforward - was the Tribunal's decision correct or not? That will require the Court to assess the evidence which was before the Tribunal, and determine whether or not the Tribunal's

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4 *Fay Richwhite v Davison* (1997) 11 PRNZ 190 (HC).

conclusions in relation to that evidence were open to it, and were correct. On the face of it, that is a relatively straightforward task, which this Court faces on a day by day basis when it deals with appeals from inferior Courts or Tribunals. The fact that serious allegations are made is not of itself a determining factor. It could not be, otherwise appellants would be driving the exercise of the discretion.

[41] Judicial time is a scarce and costly resource, which the community is entitled to expect is used effectively and efficiently.[5] Were a full Court to be ordered, there would be associated costs, and likely delay, given the need to ensure that two or more Judges would be available. Unless there are compelling reasons requiring the appointment of a full Court, I cannot see that it is appropriate to do so. There are no such compelling reasons in the present case. The application is in this regard is declined.

Application to have important questions of law identified during the appeal, and referred to the Court of Appeal

[42] This application was not advanced by Mr Nottingham.

Application that any related review proceedings in the High Court be consolidated with the appeal

[43] Again, this application will not advanced by Mr Nottingham.

Application dated 12 March 2015

[44] I now turn to the application lodged on 12 March 2015. The parties were agreed that this application can be resolved readily.

[45] On 2 December 2014 Woodhouse J ordered that a transcript of a hearing before the Tribunal was to be provided to this Court and to the parties as soon as it was reasonably possible. I am told that a transcript has been provided, but that it is a transcript of the evidence only, and not of the legal submissions, or of the interchange which took place between Tribunal members and counsel, and between Tribunal members and Mr Nottingham.

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5 At 192.

[46] Given the matters in issue, counsel and Mr Nottingham are agreed that I should direct that a full transcript is made available, of the entire hearing, including interchanges between Tribunal members and counsel, interchanges between Tribunal members and Mr Nottingham, and the submissions made by the parties. I agree that this is appropriate and make this direction accordingly.

[47] The parties are also agreed that I should order that an electronic copy of the transcript be made available to the parties. This will enable them to check the accuracy of the transcript. Again, I am satisfied that this is appropriate and I make a direction to this end.

[48] There was some debate before me as to who should be liable for the costs of ordering that additional material be transcribed. The transcript to date has been prepared by the National Transcription Service. Normally that service does not charge for providing a written transcript, where one is ordered by the Court at the request of parties to litigation. I am not proposing to make any order for the payment of costs at this stage. If it turns out that the costs of preparing a transcript of the additional material are wasted, then that is a matter which can be taken into account by the Judge hearing the substantive appeal.

Costs

[49] Mr Clancy sought that costs should be reserved. Mr Grove sought costs on a 2B basis.

[50] I do not consider it appropriate to award costs at the present point in time. Many aspects of the application advanced by Mr Nottingham were able to be resolved by consent and the hearing was narrowed to a significant extent. In my view it is appropriate to reserve costs. They can be dealt with by the Judge hearing the substantive appeal.

[51] I do, however, record that Mr Nottingham failed to comply with the timetable directions made by Katz J. I also record that the hearing before me took a quarter of a day.

Further orders

[52] I make the following orders, to ensure that the matter is ready for substantive hearing:

(a) On or before 5 pm on 31 March 2015, the appellants are to file and serve their points on appeal, identifying succinctly the matters they wish to raise at the substantive hearing.

An unless order is made in regard to this direction. The filing of points on appeal was ordered by Katz J some time ago, and the appellants have failed to comply with her direction in this regard. It is important that the points on appeal be identified accurately as soon as it is reasonably practicable. If the points on appeal are not provided by the date and time specified above, then the notice of appeal is to be struck out.

(b) The appellants' submissions, and an index for the bundle of documents to be produced at the appeal hearing, are to be filed and served by 30 April 2015.

(c) Submissions for the first and second defendants are to be filed and served by 22 May 2015. At the same time the first and second respondents are to advise the appellants of any additional documents they require in the bundle, or of any objection they have to documents proposed to be contained in the bundle.

(d) The completed bundle is to be filed and served by the appellants on or before 29 May 2015.

(e) A bundle of authorities referred to in submissions by the appellants, and by all respondents, is to be filed and served by the first respondent on or before 5 June 2015.

(f) The hearing will commence at 10.00am on 10 June 2015.

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Wylie J