BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2011] NZREADT 34

Reference No: READT 060/11 and 066/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL JACKMAN**
	Appellant
AND	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 10100)**
	First respondent
AND	**MARIE RAOS**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at WELLINGTON on 13 October 2011

DATE OF SUBSTANTIVE DECISION 31 October 2011

DATE OF THIS SUPPLEMENTARY DECISION ON CROSS APPEAL OF SECOND RESPONDENT: 22 November 2011

COUNSEL

Mr B A Corkill QC, for appellant
Mr M J Hodge, for first respondent
Mr L W Divers, for second respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] In our decision herein of 31 October 2011 we found that the conduct of the second respondent, (as complained of by the appellant), was not in breach of the Real Estate Agents Act 2008. We confirmed the decision of the first respondent committee that the second respondent licensee was not guilty of any unsatisfactory conduct under s.72 of the Act. Accordingly, the appeal was dismissed.

[2] However, we did not deal with a cross appeal from the second respondent against the decision of the committee to direct full publication of its decision nor with a further application by her (under s.108 of the Act) for non publication of our substantive decision. In its decision the committee simply stated:

> *"6.1 One of the committee's functions pursuant to section 78(h) of the Act is to publish its decisions.*
>
> *6.2 The Committee directs full publication of its decisions ..."*

[3] Simply put, consequent upon our substantive decision of 31 October 2011 the second respondent licensee now seeks an order that her name as licensee not be published. This means we need to address s.108 of the Act which reads as follows:

> ***"108 Restrictions on publication***
> *(1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make 1 or more of the following orders:*
> *(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
> *(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
> *(c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.*
> *(2) Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 116, an order made under subsection (1) continues in force as specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or of any other person.*
> *(3) Subsection (1)(c) does not apply to any communications between the Disciplinary Tribunal and the Authority."*

The Stance of Mrs Raos

[4] Mr Divers counsel for the second respondent licensee, has noted that the Committee did not set out reasons for directing full publication. Also, he referred to an affidavit filed by the second respondent (sworn on 24 June 2011) in support of an application for an interim order prohibiting publication, and relied on its contents. It was accepted that if the appeal by Paul Jackman had succeeded and if we had found unsatisfactory conduct on the part of the appellant, then no reasonable grounds would have existed for an order directing non publication.

[5] Mr Divers then put it for the licensee that there had been no evidence to suggest an intention by her to mislead any member of the public; it had been found that her conduct did not fall short of the standard of conduct that a reasonable member of the public would expect from a reasonably competent licensee; and there had been no breach of the relevant provisions of s.72 of the Act, and no finding adverse to the appellant. Accordingly, Mr Divers submitted that this Tribunal take into account the interests of the licensee and the potential damage which could be caused to her reputation by the mere knowledge that she had been the subject of a complaint to the Authority notwithstanding the successful outcome for her. Mr Divers then continued:

> *"Publication may be said to provide some degree of protection to the Public or to the Real Estate Industry. Where no adverse finding has been made however, the interests of the appellant [the licensee] assume far greater weight when being balanced against the public interest. As stated by [the licensee] in her affidavit, until this decision every determination by the Complaints Assessment Committee that no further action be taken included an Order for Non Publication of the name of the Licensee. That practice clearly involved a recognition of the potential harm publication of the name of the Licensee could cause where the Committee determined the Licensee had not breached any provision of the Act or Code of Conduct."*

[6] Mr Divers referred to the decision of this Tribunal in [2011] NZREADT 02 setting out relevant principles for determining whether an order prohibiting publication should be made. We cite from that decision below but point out that it allowed an Interim Order prohibiting publication of the Committee's adverse finding to that licensee on the particular facts and features of that case; and the Tribunal emphasised the interim nature of the Order and that nothing should be assumed if the appeal is dismissed. In the present case, the licensee is a respondent and has been vindicated.

[7] Mr Divers then submitted that the public interest can still be served by the publication of the decision with the licensee's name removed and that the personal circumstances of this licensee as outlined in her said affidavit make it proper and appropriate to prohibit publication of her name under s.108(1)(c) of the Act.

[8] In her said 24 June 2011 affidavit, the licensee deposed, inter alia, that her identification as the person complained about has the potential to have significant impact on her reputation in the industry not withstanding the finding of no unsatisfactory conduct on her part. She then outlined her 15 year involvement in the real estate industry which has led to her having a large network of contacts and many loyal clients. She has had awards as a supreme salesperson in 2010 as number one in New Zealand and number 10 internationally in her employer's group; and had achieved *"numerous achievement awards"* over the years.

[9] She also deposed of the adverse effect of even a suggestion of a complaint against her as a salesperson, and of the distress to her of the complaint in this case, and of her having taken immediate remedial action.

[10] Inter alia, Mr Divers had submitted that if we decided in favour of Mrs Raos (which we did), she seeks suppression of name under s.108 on the basis of the content of her said affidavit. He put it that until April this year where the Committee decided to take no further action against a licensee, there had been an order for non publication and this would have been because public knowledge of a complaint against an agent can badly affect the business for that agent. Mr Divers stated that it was unclear to him why the Committee had departed from that stance.

The Stance of the Committee

[11] By memo of 7 October 2011, Counsel for the Committee had queried the proposition for the licensee that the Committee should always direct that its decisions to take no further action be published without identifying the licensee concerned. Mr Hodge also submitted that, whereas under s.84(2) of the Act a Committee may direct such publication of its decisions as it considers necessary or desirable in the public interest, in exercising

that discretion it would be wrong for a Committee to apply the fixed rule of the kind sought by this licensee. Counsel also noted that, unlike us, the Committee does not have a discretionary power about non identification so that, even if it directed publication of its decision (in practice, on the Real Estate Agents Authority's website) without identifying the licensee, that does not prohibit others from identifying the licensee. Mr Hodge then continued:

> *"3.4 In Ms Raos's case the Committee found she did not make a misleading statement. With a judgment in her favour, on the facts of this case there was no basis for suppression of her identity even if the Committee had the power to make a prohibitive order of that kind."*

[12] In oral submissions, Mr Hodge added (correctly, in our view) that this issue of non-publication is a matter for the application of our discretion case by case. In practice, publication is on the Authority's website but it is possible that the media may obtain a copy of our decisions.

[13] Mr Hodge also submitted that, generally, any disciplinary measures of the Committee must be publicly recorded. He noted that, in general, if there had been unsatisfactory conduct it would be unlikely that there be a suppression order made by a Committee or by this Tribunal. He noted the general rule in New Zealand of open justice and that Mrs Raos has been completely vindicated with a total absence of fault on her part; but he accepted there could be exceptional circumstances where, even in that context, a non publication order might be made.

[14] The final submission from Mr Hodge on this point is that if no further action is to be taken, there would need to be some compelling reason for granting Mrs Raos name suppression because she has been exonerated and our system is one of open justice.

Views of Appellant

[15] Mr Corkill helpfully responded on this issue, inter alia, that Mrs Raos would need to establish exceptional circumstances to obtain a non publication order in this case. He emphasised that s.108 does not use that expression but refers to whether this Tribunal *"is of the opinion that it is proper to do so"* having regard to the interests of any person including, without limitation, the privacy of the complainant and the public interest. He referred to relevant case law as *S v Wellington District Law Society* [2001] NZAR 465 (HC) (referred to below) and to *SFK Tonga v Director of Proceedings* (High Court Christchurch) CIV 2005-409-002244, 21 February 2006 per Panckhurst J HC. In the latter case, the appellant had been found guilty of professional misconduct for failures as a surgeon and was denied permanent name suppression. The issue was covered in detail in relation to the particular facts and Panckhurst J considered it de novo and, inter alia, put it:

> *"[60] ... Standing back and looking at all matters I do not consider that this is one of those cases where final rehabilitation is likely to be compromised on account of name publication. ...*
>
> *[62] ... Openness and transparency in relation to the hearing and outcome of a medical disciplinary process are in themselves important values. But more than that, the right of the public to know of failings on the part of a general surgeon is to my mind a most pressing public value consideration in the circumstances of this case. Potentially, the most persuasive counter-interest was that of rehabilitation, on account of the personal and public value to be placed on it. But, for the reasons I*

have given, I do not see this is a case where permanent name suppression needs to be part of the rehabilitation package. ..."

[16] Of course, in the present case there has been no misconduct by Mrs Raos.

Discussion

[17] In our said decision [2011] NZREADT 02 we, inter alia, stated:

"[28] The Tribunal can make an Order under s.108 of the Act if it is of the opinion that it is "proper to do so". The Oxford English dictionary 11 Ed (2004), defines "proper" as meaning "suitable" or "appropriate"

[29] When considering whether to make an order under s.108, the Tribunal must have regard to "the interest of any person, and to the public interest".

[30] The Court of Appeal in R v Liddell [1995] 1 NZLR 538 stated that (at 546):

> "The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates' of the public."

[31] In Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546, Elias J for the Court stated:

> "In R v Liddell [1995] 1 NZLR 538 at pp 546 – 547 this Court declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by any legislative prescription. But it is recognised that the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings: *"What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*

[32] In Lewis Elias C J listed the factors which it is usual to take into account:

> "(a) the seriousness of the offending:
>
> (b) the public interest in knowing the character of the person seeking name suppression, an interest which has been acknowledged in cases involving sexual offending, dishonesty, and drug use; and
>
> (c) circumstances personal to the person appearing before the Court, his family, or those who work with him and the impact upon financial and professional interests."

[33] It is significant that cases coming before this Tribunal are not criminal in nature but are disciplinary proceedings taken to give effect to the Purpose of the Act. These proceedings have been said to be civil in nature see Director of Proceedings v I, [2004] NZAR 635.

> ***3. Purpose of the Act***
> *(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*
> *(2) The Act achieves its purpose by –*

(a) regulating agents, branch managers, and salespersons:
(b) raising industry standards:
(c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[34] In the context of non publication of name the issue of the distinction if any between disciplinary Tribunals and the court in criminal proceedings was canvassed at length by Frater J in Director of Proceedings v I, (supra).

[35] In F v Medical Practitioners' Disciplinary Tribunal, (AP 21-SW01, HC Akld, 5 December 2001) Laurenson J said at para [93]:

> "In the end result both the Tribunal and the Judge accepted that the principles referred to in Lewis were applicable in the present case. The question remains whether there is nevertheless a fundamental distinction which should be noted before they are applied in cases involving professional discipline under the new Act."

[36] But he went on to say at para [94]:

> "In my view there is such a fundamental distinction but on close examination the impact of this is likely to be more apparent than real".

[37] In S v Wellington District Law Society [2001], NZAR 465 a full bench of the High Court said at 469:

> "Proceedings before the disciplinary Tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public, the profession and Court: Auckland District Law Society v Leary (High Court, Auckland M 1471/84, 12 November 1985, Hardie Boys J). To a similar effect is the decision of the Court of Appeal in Re Lundon [1923] NZLR 236, 242 Salmond J, delivering the judgment of the Court, said:
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> > It is well settled by authority that a solicitor is not so dealt with by way of punishment. He is removed from the rolls because he is deemed unfit to be further trusted with the powers, rights and duties attached to the responsible position of a solicitor of the Supreme Court. He is deprived of that position not by way of penal discipline in respect of offences committed by him, but for the purpose of protecting the public and the administration of justice from the danger involved in the continued authority of a solicitor who, by his conduct, has shown that he is not fit to be trusted with the possession of such an office.
>
> We conclude from this approach that the public interest to be considered, when determining whether the Tribunal, or on appeal this Court, should make an order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the Court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication.
>
> The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach directed by s.111(2). Thus we do not agree with the approach of the Tribunal that the matters put forward by the practitioner must *'justify the exceptional step'* of prohibiting the publication of the report."

> *[38] The Tribunal adopts those observations and reaffirms its view that it has an unfettered discretion under s.108 to make orders under that section provided it is "proper to do so" and that discretion extends to both interim and final orders prohibiting publication."*

[18] We note that s.107 of the Act provides for our hearings to be in public unless we think otherwise, in effect, for the reasons given in s.108 for restricting publication. It is settled law that open justice is desirable. There must be a presumption that hearings and the result of hearings should be public – refer S v Wellington District Law Society (supra).

[19] It is clear from our substantive decision herein that the complaint made by Mr Jackman is rather esoteric and that Mrs Raos's conduct cannot be criticised in any way and she has been completely vindicated. We accept that the publication of the substantive decision herein encroaches to a limited degree the privacy of Mrs Raos but not in any concerning way. We consider it to be in the public interest that our decision be available and relate to the particular parties. We do not consider that it is *"proper"*, in terms of the use of that word in s.108(1) of the Act, to make an order prohibiting the publication of Mrs Raos's name or any particulars relating to our decision. However, we do not consider that it is necessary for such an appellant to establish exceptional circumstances for non-publication.

[20] Accordingly the application for non publication is hereby dismissed.

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Judge P F Barber
Chairperson

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Mr J Gaukrodger
Member

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Mr G Denley
Member