

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Decision no: [2012] NZREADT 41

Reference no: READT 002/12

**IN THE MATTER OF**

an appeal under s.111 of the Real Estate Agents Act 2008

**BETWEEN**

**DAVID GRAVES**

Applicant/Appellant

**AND**

**REAL ESTATE AGENTS  
AUTHORITY (CAC 20003)**

First respondent

**AND**

**NICHOLAS LANGDON**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms J Robson - Member  
Mr G Denley - Member

**HEARD ON THE PAPERS**

**DATE OF THIS RULING:** 23 July 2012

**REPRESENTATION**

The appellant/applicant on his own behalf  
Messrs L J Clancy and J Pridgeon, counsel for Authority  
Second respondent on his own behalf

**NON-PUBLICATION RULING**

***The Application***

[1] Our 6 July 2012 memorandum referred, inter alia, to the interim order for non-publication of the appellant's name, or any identifying details, which we made by consent on 6 March 2012. The appellant has applied for an Order, under s.108 of the Real Estate Agents Act 2008 ("the Act"), extending that interim order until a substantive fixture for the appeal which, currently, is set at 9 October 2012. That application is opposed by the first respondent, the Real Estate Agents Authority. The second respondent has not responded.

[2] The appellant has appealed against a decision of Committee 20003 of the Authority dated 19 December 2011 finding that he had engaged in unsatisfactory

conduct and making orders of censure and rectification. The Committee directed publication of its decision under s.78(h) of the Act.

### **Orders under Section 108**

[3] The Act (s.63) requires the Registrar of the Authority to maintain a public register of those holding licences under the Act, and providing information about, inter alia, any action taken on a disciplinary matter in respect of a licensee in the past three years. Accordingly, a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned if the finding and orders were made within the past three years.

[4] Mandatory publication is subject only to the making of an order for non-publication by the Tribunal. Section 108 of the Act grants power to the Tribunal to make orders prohibiting, inter alia, publication of the names or particulars of parties to appeals and decisions of Complaints Assessment Committees under appeal.

### **Background**

[5] The second respondent made a complaint against the appellant (as sole director of Borders Real Estate Ltd) that he was using a listing agreement which imposed unfair conditions on sellers to such an extent that the listing agreement is in breach of s.131 of the Real Estate Agents Act 2008 (about right to cancel after 90 days) and r.9.12 of the Professional Conduct and Client Care Rules 2009 (an agency agreement is not to contain conditions which are not reasonably necessary to protect the interest of the agent).

[6] The complainant included with his complaint a copy of an agreement dated 6 December 2010, entered into by the appellant's company with a vendor. The appellant's response to the complaint indicated that the agreement in the form as submitted continues to be used by his company in the course of its business. The relevant provisions of that agreement were clauses 3, 8, 18 and 19. The complainant alleged that those clauses were a breach of the Act and the Rules because they imposed unnecessary conditions on a client wishing to terminate the agreement.

[7] Before the Committee, the appellant contended that, as the complaint did not specifically come from a vendor, the Committee should not be considering the matter. He considered that the terms of his agreement were "*vendor friendly*" and were "*printed in plain English in large print*". He emphasised that his company goes to "*extreme lengths*" to ensure that clients understand what they are signing.

[8] After conducting an inquiry into the complaint, the Committee held a hearing on the papers and made a determination on the basis of the written material before it. The Committee determined that, in entering into the listing agreements that he did, the appellant engaged in unsatisfactory conduct in carrying out real estate agency work; and that this is because his listing agreements did not refer to the right set out in s.131 of the Act to cancel a sole agency agreement after 90 days of the agreement being signed. The Committee considered that this was a crucial provision which could not be contracted out of; and despite this, the appellant's agreement attempted to do just that; and it also prevented signage and access by other agencies during a general agency period; and, furthermore, some of its clauses were misleading and likely to confuse members of the public.

[9] The Committee made censure and rectification orders and directed publication of its decision.

### ***The Appellant/Applicant's Grounds for his Current Non Publication Application***

[10] The appellant has put it that he *“does not expect prohibition of the decision and the names of those involved in the event that the appeal is not upheld. He does, however, request that the suppression of names applies until that appeal is heard”*. He states that the primary ground for that application is *“that the case was brought in the name of the licensee of the company instead of the company. The matter is to do with a listing form which is that of the company, not of the licensee. Because this issue is a major plank in the appeal it seems unjust to publicly punish an individual for an alleged weakness in part of a company's infrastructure in the interim. The REAA has sent correspondence to the appellant stating that the case concerns the business and not the individual”*.

[11] Accordingly, he requests that the suppression of names continues until the substantive appeal is heard.

[12] The applicant also states that naming him before his appeal is heard is *“morally wrong”*, that naming him when he considers that he is the incorrect party to the complaint is *“wrong”*, and that publication could be *“injurious”* to his business *“for no good reason”*.

[13] The application is not further particularised and no evidence in support has been filed. The applicant's stance is somewhat vague except for his point about separating him from the corporate personality of his company.

### ***Discussion***

[14] As indicated above, the Act requires the Registrar of the Authority to maintain a public register of those holding licences under the Act and providing information about any action taken on a disciplinary matter in respect of a licensee in the past three years, ss.63-66 of the Act.

[15] The effect of those provisions is that, subject to a non-publication order from us, a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned, if the finding and orders were made within the past three years.

[16] Section 108 of the Act grants a wide power to us to make orders prohibiting, among other things, the names of parties to appeals and decisions of Complaints Assessment Committees under appeal.

[17] The principles relating to applications of this type are set out in *An Agent v Complaints Assessment Committee* (CAC 10028) [2011] NZREADT 2. That case also considered an application for an interim order prohibiting publication of the determination of a Committee decision pending the outcome of the appeal. The Tribunal held that it had the power to make non-publication orders on appeals and set out the principles to consider when determining whether to make such orders. Relevantly, the Tribunal relied on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said at paragraph [41]:

*“In R v Liddell ... this Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by legislative prescription. But it 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.”* (Citations omitted).

[18] The Tribunal went on to consider whether those principles were applicable to proceedings of a disciplinary nature. In doing so, it referred to the purposes of the Act, which focus on consumer protection, as well as other decisions referring to principles applicable to disciplinary Tribunals and non-publication orders, namely, *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001; *S v Wellington District Law Society* [2001] NZAR 465 (HC). In those decisions, the Courts accepted that the principles referred to in *Lewis* were applicable to disciplinary tribunals.

[19] At [38] in *An Agent v CAC* 10028, the Tribunal adopted the views accepted by a full bench of the High Court in *S v Wellington District Law Society* [2001] NZAR 465 (HC) that the public interest, to be considered in non-publication applications in disciplinary hearings, 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 this public interest that is to be weighed against the interests of other persons, including the licensee.

[20] The Tribunal went on to reaffirm that it has an unfettered discretion under s.108 of the Act to make Orders under it, provided that it is “*proper to do so*”, and that discretion extends to both interim and final Orders prohibiting publication.

### **Outcome**

[21] Essentially, the appellant seeks to rely on the relevant listing form, or agency agreement, being with his company rather than with him as a salesperson licensee.

[22] We find that it is not proper to make the Interim Orders now sought on the grounds raised by the applicant. These grounds are insufficient to warrant such an Order being granted, especially when the public register provisions in the Act, the public interest, and open justice are considered.

[23] Counsel for the Authority notes that the fact that the Committee’s decision is under appeal can be noted on the public register which would adequately enough address any potential prejudice to the applicant. We agree in the present circumstances.

[24] We also agree with counsel for the Authority that the matters raised by the appellant/applicant in support of this application for an Interim Non-publication of Name Order go more to the merits of the appeal rather than to his application for such an Order. We find that the matters raised by the appellant/applicant are insufficient to warrant such an Order being granted, especially when the public’s interest in open justice is taken into account.

[25] Accordingly, we have decided that the interim order prohibiting publication (made by consent on 6 March 2012) is now at an end and is hereby revoked, and we order accordingly. This application from the appellant for interim non-publication is dismissed.

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Judge P F Barber  
Chairperson

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Ms J Robson  
Member

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Mr G Denley  
Member