BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZREADT 53

Reference No: READT 085/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MS C**
	Applicant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10036)**
	First respondent
AND	**TONI WHITEHORN**
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION/RULING 31st August 2012

APPEARANCES

The appellant on her own behalf
Ms N Wilde counsel for the Authority
The second respondent on her own behalf

RULING OF THE TRIBUNAL

Introduction

[1] On 10 August 2011 the Authority's Complaints Assessment Committee 10036 determined that licensed salesperson Ms C ("the appellant"), had engaged in unsatisfactory conduct by marketing a property as a *"home and income"* when, in fact, the property could not be rented out because the bedsit on the property was not code-compliant.

[2] The Committee found that while the licensee did not intend to mislead the purchasers, her marketing was nonetheless a misrepresentation. At its paragraph [2.12] the Committee found:

> *"In this case, the complainant [the second respondent] specifically asked the licensee about the legality of the bedsit. The licensee was put on notice by that enquiry. Bedsits and granny flats, as any competent agent would know, must be legally established if the property is to be advertised as "home and income". This one was not legally established."*

Issue

[3] Should that decision be published?

[4] The licensee does not appeal the Committee's finding of unsatisfactory conduct. This appeal is confined to the narrow issue of whether the Committee, having made a finding of unsatisfactory conduct, was correct to direct publication of its determination.

[5] The licensee submits that because her unsatisfactory conduct occurred before the commencement of the Real Estate Agents Act 2008, s.172 of the Act precludes the Committee from publishing its decision because a direction for publication is an *"order in the nature of a penalty that could not have been made against [the licensee] at the time when the conduct occurred"* – in terms of s.172(2) to which we refer further below.

[6] We note that, somehow, this file was mislaid for a time in our Registry; and we apologise to the parties for the consequential delay.

The 10 August 2011 Decision of the Complaints Assessment Committee 10036

[7] The Committee's decision considered the issue of publication of its finding of unsatisfactory conduct against the appellant. The Committee explained that because the conduct in issue occurred before the 2008 Act came into force, the complaint was considered under s.172 of that Act; and this meant that the Committee was only able to impose a penalty against the licensee which could have been made under the 1976 Act. A salesperson would not have been subject to the imposition of any penalty for unsatisfactory conduct under that Act. Accordingly, the Committee had no jurisdiction to make any order against the appellant beyond its finding of unsatisfactory conduct.

[8] On the issue of publication, the Committee noted that one of its functions, pursuant to s.78(h) of the 2008 Act, is to publish its decisions. It noted that the complainant maintained it was in the public interest for the decision to be published and that the licensee needed to be held accountable for her actions. However, the licensee sought that there be no publication as she had been working in the industry for nearly 11 years with an unblemished record and had provided significant testimonials about her.

[9] Inter alia, the Committee considered that publication gives effect to the purpose of the Act of ensuring that the disciplinary process remains transparent, independent and effective, and that publication of this particular decision concerning the appellant is desirable for the purposes of setting standards; so that it is in the public interest that it be published. Overall, the Committee could not see any basis for not publishing the decision and it directed that on the basis of including the names of the

licensee and the complainant but omitting the names and identifying details of any third parties.

The Stance of the Appellant

[10] Essentially, the appellant submits that publication of her name in the CAC decision would be a *"penalty"* for her.

[11] In helpful submissions the appellant put it, inter alia, as follows:

> *"... Therefore the CAC may well be incorrect in determining that that my name should be published as I believe they are using the provisions of the REAA 2008 to impose a nature of a penalty on me when section 172(2) prevents them doing so.*
>
> *The word "penalty" is not specifically described in either Act, but is generally understood by a reasonable member of the public and is fully described in the Oxford dictionary, i.e. mete out punishment, sentence, discipline, inflict a handicap on, cause to suffer, retribution, penance, etc. With regard to the real estate industry, I believe the term penalty means specific action against a licensee to caution, fine or revoke a licence. Having one's name published on a public website is, in my view, definitely a penalty against me. Further, if my name is published, I understand that the complainant would then be free to discuss this case with the media. That would inevitably lead to a further on going and indeterminate penalty against me. I contend that any real estate licensee would consider name publication as a penalty, and any reasonable member of the public would also consider it to be a penalty. It would penalise me in that further business would be affected as a result of the general public feeling a loss of confidence and suspicion.*
>
> *The Tauranga District Court, Disputes Tribunal, reference CIV-2010-070-000851, have already dealt with this matter. They found an element of guilt with my conduct and I was fined accordingly and have paid a sum of money to the complainant. Whilst I recognise that was a different jurisdiction, I have already received a penalty under that judicial process.*
>
> *To further my appeal for the non-publication of my name, I include some testimonials from previous clients and customers and I reiterate that in the 10 years I have been involved in listing and selling real estate, this is the only issue of contention that I have had."*

The Stance of the Authority

[12] It is put for the Authority that publication of the finding of unsatisfactory conduct against the licensee on the public register is mandatory irrespective of the Committee's direction as to publication of its decision. This is because of the public register provisions of the Act (referred to below) and the absence of a prohibitive suppression power being conferred on a Complaints Assessment Committees of the Authority.

[13] It is also put that a direction by a CAC as to publication under s.84(2) of the Act is not an *"order"* in terms of s.172(2) of the Act.

[14] Also, publication was permitted under the Real Estate Agents Act 1976, so that retrospectivity concerns do not arise.

Section 172 of the 2008 Act

[15] Section 172 reads as follows:

> ***"172 Allegations about conduct before commencement of this section***
> *(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—*
> *(a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*
> *(b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*
> *(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred."*

Discussion

[16] The following factual matters are not now in issue, namely that:

[a] the licensee engaged in unsatisfactory conduct by misrepresenting a property as *"Home and Income"* when the bedsit on the property could not be rented out because it did not comply with local Council regulations;

[b] the misrepresentation was not deliberate; and

[c] section 172 of the Act applies to the licensee's conduct because the conduct occurred before 17 November 2009, at the time of the conduct, the licensee was an approved salesperson under the 1976 Act, and could have been complained about under the 1976 Act, and had not been dealt with under that Act.

Available Orders

[17] Under the new statutory regime of the 2008 Act, once a CAC has made a determination of unsatisfactory conduct against a licensee relating to conduct which occurred after the 2008 Act came into force, that CAC has the power to make a range of nine different orders which are expressly set out in s.93 of that Act as follows:

[a] Censure or reprimand (s.93(1)(a));

[b] That any settlement determines all or part of a complaint by consent (s.93(1)(b));

[c] Apology (s.93(1)(c));

[d] Undergo training or education (s.93(1)(d));

[e] Reduce, cancel or refund fees for work complained about (s.93(e));

[f] Rectify or provide relief for error or omission (s.93(1)(f);

[g] Fine ($10,000 for individual, $20,000 for company) (s.93(1)(g));

[h] Make business available for inspection (s.93(h));

[i] Pay costs or expense (s.93(1)(i)).

[18] All of those orders can properly be characterised as positive orders which can be made by a CAC against a licensee (or their supervising agent under s.93(1)(h)).

[19] However, the power of a CAC to make orders against a licensee for unsatisfactory conduct is more restricted if the unsatisfactory conduct occurred before the Act came into force. As already indicated, the relevant transitional provision of the Act is s.172.

[20] Section 172(1) expressly permits CACs (and us) to consider complaints about conduct which occurred before the Act came into force in certain circumstances. If a CAC finds that a licensee engaged in unsatisfactory conduct before the Act came into force, it makes a finding in the usual way under the 2008 Act. However, on making such a finding, the CAC is restricted in the orders it may make against the licensee.

[21] Section 172(2) defines the restriction on the CAC's power to make orders to the orders in the nature of a penalty which could have been made against the licensee under the 1976 Act. In the case of an employing agent, the CAC is confined to a fine or censure or, if the conduct is serious enough, suspension or cancellation of the agent's licence.

[22] This Tribunal has held that there is a three-step process when s.172 applies; *CAC 10026 v Dodd* [2011] NZREADT 01 at [65]:

> *"[65] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s.172 creates a three step-process:*
>
> ***Step 1**: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?*

> ***Step 2****: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?*
>
> ***Step 3****: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal."*

[23] It is only *"Step 3"* which is in issue in this appeal.

[24] We have previously held that findings of unsatisfactory conduct are analogous to findings made by a Regional Disciplinary Sub-Committee under the old statutory framework, (refer *CAC 10024 v Downtown Apartments Limited* at [39] to [44].

[25] The orders which could be made by Regional Disciplinary Sub-Committees (for breaches of the Real Estate Institute of New Zealand Rules) were a maximum fine of $750 and/or censure. However, these were orders against the approved salesperson's employing agent rather than the salesperson personally. Therefore, in reality, no orders could have been made against a salesperson personally under the 1976 Act.

[26] It is noted that under the Rules of the Real Estate Institute of New Zealand Inc which applied under the former regime, RDS findings were published by the Chief Executive of REINZ in the Institute's official publication. Rule 16.22.2 of those rules provided: *"Where the RDS finds a breach of duties and obligations imposed by the Act or these rules: ... the Chief Executive shall publish notice of each RDS decision in the Institute's official publication, unless the RDS has directed otherwise".* Therefore, there could be publication of findings about the conduct of a salesperson, albeit that no orders could be made against the salesperson.

[27] In summary, if a CAC makes a finding of unsatisfactory conduct against a licensed salesperson for conduct which occurred before the Act came into force, the CAC is restricted in the orders it can make against the licensee. If the licensee was a salesperson under the former regime, then the CAC cannot make any orders against the licensee.

Publication Provisions

[28] The purpose of the 2008 Act is to promote and protect the interests of consumers in respect of transactions which relate to real estate and to promote public confidence in the performance of real estate agency work. The Act aims to achieve its purpose by regulating licensees, raising industry standards, and providing accountability through a transparent, effective, and independent disciplinary process.

[29] The Act requires the Registrar of the Authority to maintain a public register of licensees providing information about any action taken on a disciplinary matter in respect of a licensee in the past three years. For present purposes, the key public register provisions are ss.63 to 66 of the Act.

[30] The effect of these provisions is that action by a CAC finding unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned, if that action was within the past three years. This mandatory publication is subject only to any available orders of non-publication under the Act, as discussed below. There is nothing in the Act to suggest that the

mandatory administrative publication, on the public register, of a finding of unsatisfactory conduct is an *"order"* to which s.172 applies.

[31] No express power of non-publication is conferred on CACs under the Act. In contrast, we do have a suppression power under s.108 of the Act, which provides 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 and the Authority."*

[32] We have held that orders under s.108 bind the Registrar so that an order made under s.108 has the effect of preventing publication on the public register – refer *CAC v Z & X* [2010] NZREADT 05. We have also held that an order under s.108 may be made both where misconduct charges have been laid by a CAC (refer *An Agent v CAC & Anor* [2011] NZREADT 02), and on an appeal under s.111 against a decision by a CAC (refer *CAC v Z & X*).

[33] Therefore, while the CAC may direct publication of its decisions, it does not have a prohibitive power and, as such, the Registrar's obligations under ss.64 and 66 of the Act remain. In other words, the Registrar is obliged to publish the disciplinary action taken by the CAC on the register, subject to any order made by us under s.108. If there is no such order made by us under s.108, be it interim or otherwise, publication is a mandatory requirement under the public register provisions of the Act.

[34] It follows that the licensee's present appeal is misconceived. Even if the Committee was precluded from directing publication (which it was not), as it did, publication on the public register would have occurred anyway. We consider that the mandatory provisions in ss.64 and 66 cannot be characterised as an *"order"* under s.172.

[35] Our power (under s.108) to order non-publication is properly considered an *"order"*, however, the same cannot be said of the default position of publication. In other words, non-publication is the exception of the mandatory administrative function of the Register. To avoid publication, a licensee must apply to us under

s.108 for a non-publication order. If we decline to grant a non-publication order, then an order to that effect simply has not been made, and s.172(2) is not engaged.

Our Conclusion

[36] The reference to *"order"* in s.172(2) contemplates the positive orders which are available to a CAC under s.93 as penalty, and which can be made against a licensee on a finding of unsatisfactory conduct. It does not include the CAC's discretion to direct publication of its decision (in practice on the Authority's website), which is not an order in the nature of a penalty. Furthermore, as noted above, publication was permissible under the 1976 Act, so that retrospectivity concerns do not arise.

[37] As we explain above, the appellant licensee's present appeal is misconceived. She has not framed her appeal in terms of an application to us for an order under s.108 prohibiting the publication of the Committee's decision. If she intends to amend her appeal to make such an application, or to make such an application separately, further submissions will be required. However, so far, we see no merit in her stance. Accordingly, this matter is adjourned for one month so that the appellant may further clarify her stance if she so wishes. If no further step is taken within the next calendar month, this appeal is dismissed.

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Judge P F Barber
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member