BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 104

READT 21/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**AIDAN O'CONNOR AND SUZANNE McHOWELL** of Paraparaumu Beach, Complainants
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**DELLA RANDALL** of Kapiti, Real Estate Agent
	Second respondent

BY CONSENT ON THE PAPERS

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr G Denley - Member

DATE OF DECISION November 2013

REPRESENTATION

The complainants on their own behalf
Ms J MacGibbon, counsel for the Authority
Mr N Russell, counsel for second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Following a complaint made by Mr A O'Connor and Ms S McHowell (the appellants) the Authority's Complaints Assessment Committee 20004 determined on 9 November 2012 that Della Randall ("the licensee") had engaged in unsatisfactory conduct.

[2] On 25 March 2013 the Committee determined that the finding of unsatisfactory conduct was sufficient and did not impose any further penalty. In relation to publication of its decision, the Committee said:

> *"3.4 Because this case involves conduct under prior legislation, and because of the unusual fact situation, the Committee does not consider that publication in this case is either necessary or desirable in the public interest"*.

Accordingly, the Committee made *"no order for publication"*.

Factual Background

[3] The licensee was the listing agent for a property at 49 Manly Street, Paraparaumu.

[4] In April 2005 the original owners of the property had lodged a weathertightness claim with the Weathertight Homes Resolution Service (WHRS). An assessor's report identified water damage. WHRS quoted a cost of $36,000 to repair the damage. The owners stopped the claim process and listed the property exclusively for sale with Remax on 16 November 2006.

[5] Prior to 2007, there was no obligation to have the results of any weathertightness claims lodged with New Zealand authorities. However, in 2007 Parliament made it mandatory for all weathertightness claims to be notified on LIM reports; refer s.126 of the Weathertight Homes Resolution Service Act 2006, commencement date 1 May 2007.

[6] The licensee stated that the owners advised her that the property was in sound condition. They signed a property description sheet and did not disclose knowledge or concerns about the weathertightness of the property. They have confirmed that they did not inform the licensee that a weathertightness claim had been lodged and withdrawn.

[7] On 20 July 2007, a prospective buyer, Ms Jillian Taylor, made an offer to purchase the property conditional on her receiving a favourable building report. She obtained a 35 page building report from Coastal Homes Ltd which raised concerns about the property. Her sale and purchase agreement was cancelled because of this report which, according to the licensee, was forwarded to the Remax office.

[8] The vendor commissioned two further reports, one by Design Network Kapiti, and the other by Plaster Systems Ltd. The latter report was only two pages long. The Design Network report was also concise. Both these reports were provided to the Remax office.

[9] In 2007 the owners cancelled the listing and listed the property with another agency. The property was not re-listed with the licensee's agency until February 2008. By this time the property had been redecorated.

[10] Around this time another licensee, from the same agency, introduced a buyer who wanted a report from Coastal Homes Inspection Coy. The vendors refused entry to the property. On 22 July 2008 an exclusive agency was signed with the second respondent licensee as listing agent but, again, the vendors did not disclose any weathertightness issue.

[11] In March 2009 a different licensee (Richard Dow) from the agency introduced a further purchaser to the property, namely, the appellants. He stated that the Coastal Homes Inspection Coy report was not then on the agency file for the property and as such this was not disclosed to the appellants. This fact is disputed by the licensee, Della Randall, who held an open home on 15 March 2009 which the appellants attended. They state that the licensee told them that a leak had been fixed and that all other upgrades were to building standards.

[12] On 19 March 2009, the appellants had a pre-purchase inspection carried out by someone recommended by Richard Dow, namely, by New Zealand House Inspection Co. Ltd.

[13] On 27 March 2009 the appellants entered into the sale and purchase agreement with the sellers/owners at an agreed purchase price of $900,000.

[14] After settlement (on 23 April 2009) the appellants commissioned reports from Realsure Ltd, Beagle Consultancy Ltd, and Helfen Ltd (Building Surveyors). The total estimate of necessary remedial costs was $724,000 (GST inclusive). We are informed that in May 2012, the vendors compensated the appellants in excess of $500,000.

[15] As covered above, the Committee found the licensee guilty of unsatisfactory conduct. This was due to her failure to seek further information from the vendors regarding defects identified in the building inspection report by Coastal Homes Ltd. That information formed the basis of an earlier prospective purchaser declining to proceed with the property. Given that the conduct was prior to the Real Estate Agents Act 2008, under its s.172 the only penalties were those available (under the 1976 Act) prior to the 2008 Act coming into force.

The Stance of the Appellant

[16] The appellants have simply appealed the penalty orders imposed by the Committee and ask us to substitute the following penalties upon the licensee, namely:

[a] Impose one month suspension of the licensee's licence to sell real estate; and

[b] Order publication of the proceedings; and

[c] Order that they receive a written apology from the licensee.

[17] They have not appealed the Committee's finding of unsatisfactory conduct, nor has the licensee cross appealed against that finding. The appellants have expanded on their appeal by, inter alia, stating at the outset:

> *"We suggest that publishing the finding of unsatisfactory conduct against Della Randall would be an absolute minimum order from the Committee, and are surprised the Committee did not recommend much stronger sanctions for the following reasons:*

- *There has been a finding of unsatisfactory conduct.*

- *The behaviour was happening when a new high profile law was being passed even if not taking effect, when awareness was very high about expected standards of behaviour for real estate agents.*

- *To be falling short at such a time indicates a high disregard for ethical and acceptable behaviour and potential customers deserve to have that information made available.*

We would like an explanation about why the committee observes that the case is considered unusual, when the substantive facts describe behaviour that is considered widespread and damaging to the reputation of real estate agents.

From our perspective, the substantive facts are that a home owner with a leaky home tried to hide that, and a real estate agent who had first hand knowledge of the issue hid that information. It perpetuates an image of real estate agents who are prepared to mislead to effect a sale. That should not be tolerated or hidden by the oversight body set up to protect consumers.

We find it aggravating that the agent continues to deny any responsibility and tries to blame colleagues.

We believe that the Committee needs to send a strong signal that this is not acceptable behaviour.

For these reasons, we think a more appropriate finding would be a one month suspension of Dalla Randall's licence to sell real estate, publication of the finding, that the finding is also publicly available, and a written apology from Della Randall to us acknowledging that we were misled explicitly and by omission in this transaction."

The Stance of the Licensee

[18] It is emphasised by counsel for the licensee (Mr N Russell) that the Committee decided not to impose any orders in the nature of a penalty upon Ms Randall, having regard to the following unusual circumstances:

[a] The fact that one of the vendors of the property was a builder;

[b] That vendor concealed the fact that he had filed a weathertightness claim with the Weathertight Homes Resolution Service, then discontinued that claim because he did not wish to *"suffer the stigma of being noted as a leaky building"*;

[c] That vendor provided Ms Randall with two reports suggesting that there were no weathertightness problems with the property;

[d] That vendor gave assurances that leaks had been fixed and that other upgrades had been completed in accordance with the Building Code;

[e] That vendor told Ms Randall there were no problems with the cladding;

[f] That vendor warranted in his agency contract that there were no issues with the property which required disclosure;

[g] The appellants were aware of leaky building problems, and brought a builder friend to view the property.

[h] The appellants carried out their own pre-purchase inspection in accordance with a recommendation made by Ms Randall, using a company recommended by Mr Dow; and

[i] The case involved conduct under *"prior legislation"*, i.e. the Real Estate Agents Act 1976.

[19] Ms Randall has no prior history of complaints or disciplinary action in a 20 year career as a licensed real estate agent. There have been no further complaints against her since this matter.

[20] It is submitted for Ms Randall we should dismiss the appeal. It is put that the appellants have not alleged or disclosed any error on the part of the Committee; and the decision to make no further orders was reasonably available for the Committee to make, having regard to the circumstances and the unusual facts set out above; they have not challenged the substantive finding of unsatisfactory conduct, rather, the substance of their submissions is simply that they believe we should impose a heavier penalty because we should *"send a strong message"*; and the penalties demanded by the appellants are ultra vires the Real Estate Agents Act 2008, and cannot lawfully be imposed by us.

[21] It is submitted for Ms Randall that this is not a sufficient reason for the Tribunal to overturn or interfere with the Committee's decision; and that the events underlying this complaint date back to 2009, prior to the commencement of the 2008 Act under which the obligations of real estate agents have changed substantially so that there is no public interest requiring us to *"send a message"* in this case.

[22] Section 172(2) of the 2008 Act provides that if the Committee considers a complaint that took place before the commencement of that section (on 7 November 2009), then the Committee can only make orders in the nature of a penalty that could have been made against that person at the time when the conduct occurred. An order of suspension is an order in the nature of a penalty, and therefore the provisions of the Real Estate Agents Act 1976 ("1976 Act") apply in determining whether the Committee could have made an order of suspension.

[23] The Committee accepted that, under the 1976 Act, for the purposes of the substantive decision of unsatisfactory conduct the only available orders against a real estate agent in the position of Ms Randall were a maximum fine of $750 and censure. There was no provision under the 1976 Act to order a real estate agent to apologise. Nor could there be suspension of a licensee for unsatisfactory conduct. It follows that we have no jurisdiction to impose the penalties of suspension and/or an apology as demanded by the appellants.

Discussion on Penalty

[24] We have previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are broadly analogous to findings made by Regional Disciplinary Sub-Committees under the old statutory framework refer *CAC 10024 v Downtown Apartments Limited* [2010] READT 06 at [39] to [44].

[25] The orders that 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 censure. Accordingly, the penalties sought by the appellants are unavailable to us in this case. We see no particular reason to alter the findings of the Committee which we confirm.

Publication or Non-publication of the Decision

[26] Mr Russell also submits that, having regard to the public interest, we should not publish any outcome or aspect of this appeal and that the following factors are relevant.

- The Committee, in its Orders, found that the vendors of the property at 49 Manly Street, Paraparaumu – one of whom was an experienced builder – had concealed information from Ms Randall and had assured her that there were no weathertightness issues with the property.

- The Committee also stated in its Orders that the appellants (who were wary of watertightness issues) had taken a friend who was a builder through the home before purchase and had carried out their own pre-purchase inspection of the property.

- The case concerns the obligations of a real estate agent under the 1976 Act, which has now been repealed. It is unlikely the public or the profession will benefit from publication of the Committee's decision.

- Further, in a real estate career spanning 20 years, Ms Randall has had no prior disciplinary complaints made or upheld against her prior to this complaint, and none have been made since. There is no need to publish the outcome of this appeal to protect the public.

- Also, if we confirm the Committee's decision not to publish the finding of unsatisfactory conduct, then it is consistent with the Committee's Order to not publish the outcome of this appeal, i.e. we should not publish our decision if we dismiss the appeal.

[27] Mr Russell puts it that, overall, the decision to not publish the substantive decision was reasonably available for the Committee to make in the circumstances, as an exercise of discretion and in the absence of any error, and we should not interfere with that discretion.

[28] Mr Russell puts it that whether we should make a non-publication order under s.108 is not the primary issue on this appeal; but is an ancillary issue to be determined once we have considered whether, in terms of s.84 of the 2008 Act, the Committee's decision not to publish was correct.

[29] Section 78(h) of the Act provides that it is a function of the Committee, among other things, to publish its decision. Mr Russell referred to s.84 as directed specifically at natural justice and publication. It reads:

> *"**84 Procedure of Committee***
>
> *(1) A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice.*
>
> *(2) The Committee **may**, subject to subsection (1), direct such publication of its decisions under section 80, 89 and 93 **as it considers necessary or desirable in the public interest**.*
>
> *(3) The Committee may regulate its procedure in any manner that it thinks fit as long as it is consistent with this Act and any regulations made under it."*
>
> [Emphasis added]

[30] It is further submitted for Ms Randall that s.84(2) confers on the Committee a discretion not to publish its decisions and that the Committee correctly exercised that discretion in determining that, taking into account the requirements of natural justice, it was not necessary or desirable in the public interest to direct publication of its decision in respect of Ms Randall.

[31] It is also submitted by Mr Russell that there is an important legal distinction between a general appeal and an appeal against an exercise of discretion. He puts it that the decision whether to publish or not under s.84 of the 2008 Act is clearly discretionary in nature. We agree. Parliament has specifically used the words *"may"* and *"it considers necessary or desirable in the public interest"* in respect of the Committee's decision to publish or not. He submits that there is no statutory duty to publish as s.78(h) confers on the Committee a power to publish decisions, but does not create a duty to publish; nor is there any statutory presumption that decisions of Complaints Assessment Committees will be published; rather, the matter is left to the discretion of each individual Committee to determine, according to the circumstances of the particular case. Again, we agree.

[32] An appellate body may only interfere with a discretionary decision where it finds an error in first instance reasoning: it is not entitled to substitute its own decision with that of the first instance body simply because it reaches a different view. It is put that this is described as proceeding on an *"error principle"*.

[33] Mr Russell also noted that, in terms of a general appeal, the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 1414 (SC) stated at [13] and [16] that an appellate Court was entitled to reach its own view on the merits of a case and substitute its own view for that of the first instance Court, even if it did not find an error in the first instance reasoning. However, where the decision appealed against is discretionary in nature, the appellate body must proceed on an *"error of principle"*. This was made clear by the Supreme Court in *Kacem v Bashir* [2011] NZLR 1 at [32]:

> *"But, for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion*

> *involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion.* ***In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong***. *The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. In any event, as the Court of Appeal correctly said, the assessment of what was in the best interests of the children in the present case did not involve an appeal from a discretionary decision ..."*
>
> [Emphasis added by Mr Russell]

[34] Therefore, Mr Russell submits that we may not intervene in terms of the publication issue unless we first find that the Committee made an error of law or principle, took into account irrelevant considerations, failed to take into account relevant considerations, or was plainly wrong. He submits that the onus is on appellants and/or the Authority to satisfy us that the Committee made one or more errors of this nature.

[35] It is submitted by Ms MacGibbon for the Authority that publication should proceed in the usual way unless sufficient grounds exist to justify a non-publication order pursuant to s.108(1) of the 2008 Act. It is acknowledged that the Committee found that there was no requirement for publication. However, the Act requires the Registrar of the Authority to maintain a public register of those holding licences under the Act, providing (inter alia) information about any action taken on a disciplinary matter in respect of a licensee in the past three years – refer ss.63-66 of the Act. The effect of these provisions is that 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. As we found in *Mrs C v Real Estate Agents Authority* [2012] NZREADT 53:

> *"[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 Registrar. 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."

[36] In *Complaints Assessment Committee v Party Z and Party X* [2010] NZREADT 05, we made a finding of unsatisfactory conduct against Party X for pre-Act conduct. The non-publication order was granted by us in relation to the identifying details of the parties. However, counsel for Party X had produced medical evidence from a consultant psychiatrist as to the impact of publication upon Party X's mental health. We concluded that:

"... on a finding of unsatisfactory conduct at the level of culpability referred to, taken together with s.172 of the Act and the personal circumstances of Party X the presumption in favour of reporting is displaced in the particular case of Party X and the making of the order sought is proper on the facts of this case."

[37] It is the Authority's submission that, in the present case, there are no grounds raised by the licensee which trump the presumption of publication of identifying details. It is put that although the conduct alleged was prior to the 2008 Act coming into force, the conduct is still relevant given the extent of weathertightness issues in real estate transactions. Further, we have previously published decisions which relate to conduct prior to the commencement of the 2008 Act. The Authority submits that the ground of reputational impact is not enough, and it is not proper to make the non-publication orders with regard to this appeal.

Relevance of Section 108

[38] Section 108 of the 2008 Act provides:

*"**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."*

[39] Mr Russell puts it that s.108 does not apply to determinations of the Committee; and the Committee's procedure as to publication is expressly governed by s.84(2). We agree, except for the effect of s.66(1)(f)(v). It follows that the Committee's discretionary decision not to publish cannot be wrong (in the sense specified by the Supreme Court in *Kacem v Bashir*) simply because the Committee has exercised its discretion differently to a Tribunal acting under s.108.

[40] On this basis, Mr Russell submits that if we uphold the Committee's decision not to publish the finding of unsatisfactory conduct, and he submits we are bound to do in the absence of any error, then we should also exercise our discretion under s.108(1)(a) not to publish its decision. He puts it that a decision to publish the outcome of the appeal would, in effect, overturn or negate the decision of the Committee at first instance by causing the very outcome (publication of the decision) that the Committee expressly decided against. Mr Russell submits it would be perverse for us to uphold the decision of the Committee in this respect, but then reverse the decision by publishing our own decision.

Our Decision about Publication

[41] We see no particular need to interfere with the Committee's finding that there be no order for publication. However, in our view, it does not follow that we should exercise our discretion under s.108(1)(a) not to publish this decision of ours. In a number of decisions over the past year, we have covered that there is a principle of open justice subject to consideration of factors supporting non-publication. In the present case we do not find any meritorious factors leading to a suppression order.

[42] We realise that allowing publication of this decision abrogates from the stance of the Committee about publication, but we do not consider it perverse to allow publication of this decision of ours. Accordingly, we make no order under s.108. We realise that s.66(1)(f)(v) will be implemented by the Registrar in due course.

[43] It is accepted that the licensee is guilty of unsatisfactory conduct. The point of this appeal is that the complainants seek imposition of some penalty on Ms Randall in addition to that finding. We have no power to suspend her as sought by the appellants; nor to require her to apologise to them. We do have power to deal with publication as we think to be just, and we have covered that above.

[44] Simply put, having regard to the interests of the parties to this case and, particularly, the desire of the licensee to protect her privacy and business reputation by way of a non-publication order, and to the public interest in open justice and knowledge about weathertight issues, we do not think it proper to make any order restricting publication of this decision in terms of s.108 of the Act.

[45] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

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Ms N Dangen
Member

_____
Mr G Denley
Member