BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 24

READT 85/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MS C**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY**
	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 OUR FIRST SUBSTANTIVE RULING HEREIN 31 August 2012 [2012] NZREADT 53

DATE OF THIS SECOND RULING 15 March 2013

REPRESENTATION

The appellant on her own behalf
Ms J MacGibbon, counsel for the Authority
The second respondent on her own behalf

SECOND RULING OF THE TRIBUNAL

The Issue

[1] The appellant seeks an order under s.108 of the Real Estate Agents Act 2008 prohibiting publication of her name.

Background

[2] In our 31 August 2012 ruling [2012] NZREADT 53, we referred to the Authority's Complaints Assessment Committee 10036 having, on 10 August 2011, determined

that the appellant licensed salesperson 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.

[3] We noted that the Committee found that while the licensee did not intend to mislead the purchasers, her marketing was none the less a misrepresentation as we explained.

[4] The licensee appellant did not appeal the Committee's finding of unsatisfactory conduct but raised the issue whether the Committee, having made a finding of unsatisfactory conduct, was correct to direct a publication of its determination. We dealt with the related arguments in some detail and now set out the following portions of our 31 August 2012 ruling because they have relevance to the current approach of the appellant:

> *"[10] Essentially, the appellant submits that publication of her name in the CAC decision would be a "penalty" for her. ...*
>
> *[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.*
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> *[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.*
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> *[14] Also, publication was permitted under the Real Estate Agents Act 1976, so that retrospectivity concerns do not arise. ...*
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> *[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. ...*
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> *[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. ...

[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."

Discussion

[5] The appellant originally appealed against a decision of Complaints Assessment Committee 10036 to publish her name on the grounds that the Committee had no power to order publication in respect of conduct that occurred before the Act came into force. That Committee had found her guilty of unsatisfactory conduct. We found

that the Committee did have power to order publication; *C v REAA and Whitehorn* [2012] NZREADT 53 (August 2012).

[6] The present application by the licensee appellant for an order prohibiting publication is opposed by the Authority.

[7] The Committee's finding of unsatisfactory conduct against the appellant was on the basis that she had misrepresented that a property could be rented out as a two bedroom unit, plus a bedsit. The property was marketed as a home and income. In fact, the *"bedsit"* was not code compliant.

[8] As at the time of the conduct the licensee was a salesperson under the Real Estate Agents Act 1976, the Committee could not impose any penalty other than the finding. The Committee published the decision.

[9] The licensee has previously asserted that the public interest function of the disciplinary process can be met by publication of the decision without her identifying details.

[10] The appellant licensee has also stated that the Committee's comment that, *"but for the fact that the complaint had to be considered under the 1976 Act, the licensee would have been facing a much more serious penalty under s.93 of the 2008 Act"* is damaging to the licensee and is irrelevant. It seems very relevant to us.

[11] The licensee's essential ground for seeking name suppression seems to be that of reputational impact.

[12] In a 15 February 2013 memo to us, the appellant seemed to be criticising the administration of her case by the Authority but we see no merit in that criticism. We record that, in the course of these proceedings, the appellant has filed a number of testimonials as to her good character, diligence, hard work and commitment as a real estate salesperson. There is reference to her honesty, reliability, trustworthiness, and that she is generally regarded by her clients as very professional with a very pleasing personality and as an overall top-class real estate salesperson.

[13] The Act requires the Registrar of the Authority to maintain a public register of those holding licences under the Act providing information about any action taken on a disciplinary matter in respect of a licensee in the past three years; ss.3-66 of the Act.

[14] The effect of those 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.

[15] That mandatory publication is subject only to the making of an order for non-publication by us. Section 108 of the Act grants us power to make orders prohibiting, among other things, publication of the names of parties to appeals and to decisions of a Complaints Assessment Committee under appeal.

[16] The principles relating to applications of this type are set out in *X v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 2. That case considered an application for an interim order prohibiting publication of the determination of a Committee decision pending the outcome of the appeal. We held that we 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, we relied on *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR 546 (CA) where Her Honour Elias CJ said:

> *"In R v Liddell ... this Court of Appeal declined to lay down any code to govern the exercise of 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).

[17] We went on to consider whether those principles were applicable to proceedings of a disciplinary nature. In doing so, we 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: *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.

[18] We 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 interest of other persons, including the licensee.

[19] In *Jackman v CAC 10100 & Anor* [2011] NZREADT 34 we upheld a Committee determination to take no further action in respect of a complaint against licensee, Mrs Raos. She applied for an order under s.108 on the basis of affidavit evidence which deposed:

[a] Her identification as a licensee complained about had the potential to have a significant impact on her reputation in the real estate industry notwithstanding the finding of no unsatisfactory conduct on her part;

[b] She had 15 years involvement in the industry and a large network of contacts and loyal clients and a number of achievement awards;

[c] Even the suggestion of a complaint against her as a salesperson had an adverse effect on her and she suffered distress.

[20] In deciding whether to grant a non-publication order, we noted that *"Mrs Raos would need to establish exceptional circumstances to obtain a non-publication order in this case"*. We considered that the following factors are relevant to the assessment of whether non-publication should be ordered:

[a] Disciplinary proceedings are not criminal in nature but are proceedings taken to give effect to the consumer protection purpose of the Act;

[b] The effect of publication on the protection of the public, the profession, or the Court;

[c] The interests of other persons, including the licensee.

[21] We stated that there is a presumption that hearings and the result of hearings should be public. We accepted that publication of the decision to take no further action would encroach on Mrs Raos' privacy to a limited degree, but it was nevertheless in the public interest that the decision should be published. In declining to make a non-publication order we said:

> *"[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' 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."*

[22] 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 and we granted a non-publication order 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."*

[23] In the present case, it is the Authority's submission that there are no grounds raised by the licensee/appellant which trump the presumption of publication of identifying details as were identified in the case above. We agree. Also, the Authority submits that the ground of reputational impact is not enough and as such it is not proper to make the suppression orders sought by the appellant; that it is always possible to allege reputational impact following an adverse decision and, if this was sufficient, non-publication would always follow; and this would subvert the purpose of the public register provisions of the Act. Again, we agree.

[24] There is also the jurisdictional question whether a licensee can apply to us for name suppression following an adverse Committee decision, unless it is part of a general appeal brought on other grounds. The present application for name suppression purports to be part of an appeal process but that issue is arguable. However, in light of the history of these proceedings, the Authority does not oppose the licensee's application being dealt with on the merits, but wishes to reserve this point for argument, should the issue arise. As it happens, we recently had the benefit of submissions from Mr M J Hodge, regarding another case, on that reserved point. We agree with those submissions and now cover them.

[25] As dealt with above, the Committee does not have a suppression power.

[26] We may make an order under s.108 only where there is a proceeding before us, namely one of the following types of proceedings:

[a] A charge against a licensee brought by a Committee (or an application for interim suspension pending the determination of a charge) (s.102(a) and (b));

[b] An appeal under s.111 against the determination of a Committee (s.102(c));

[c] An application to review a decision of the Registrar (s.102(d)).

[27] Parliament cannot have intended to create a *"two-track"* system where complaints being dealt with by a Committee are dealt with by us at the same time in relation to suppression issues. The statutory scheme is that we hear matters only when they have been decided by a Committee, whether by way of an appeal of a Committee decision or if a Committee decides to lay a charge.

[28] Section 108 does not compel a contrary conclusion and is consistent with us exercising our powers only when we are otherwise seized of a proceeding. We note that:

[a] Section 108(1)(a) refers to *"any proceedings before [the Tribunal];*

[b] Section 108(1)(b) refers to the production of books, papers, or documents *"at any hearing"*;

[c] Section 108(1)(c) refers to any *"person charged"*.

[29] Unlike us, committees hear complaints in private, subject to the power of a Committee to direct that a decision be published (s.84(2)). If such a direction is made, the parties have the opportunity to appeal the decision to us before publication takes place. Accordingly, although committees do not have suppression powers, there is protection to that extent.

Our Conclusion

[30] When the public register provisions in the Act and the public interest in open justice are considered, the grounds relied on by the appellant are insufficient to warrant a suppression order being granted for her.

[31] Further, there needs to be accountability through the disciplinary process. The appellant licensee has not pointed to any meritorious ground to show that non-publication of her details would protect the public interest, the privacy of the complainant, nor any special interest of hers.

[32] Accordingly, the appellant's application under s.108 is declined.

[33] 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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Mr G Denley
Member

_____
Mr J Gaukrodger
Member