BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 36

READT 090/12

IN THE MATTER OF	an application for permanent name suppression under s.108 of the Real Estate Agents Act 2008
BETWEEN	**MR D**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	Respondent

MEMBERS OF TRIBUNAL

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

DECISION ON PENALTY ISSUED 14 March 2013

DATE OF THIS DECISION ON NAME SUPPRESSION 10 May 2013

COUNSEL

Mr M MacFarlane, for applicant
Ms J MacGibbon, counsel for respondent

BY CONSENT HEARD ON THE PAPERS

DECISION OF THE TRIBUNAL ON APPLICATION TO PROHIBIT PUBLICATION

The Application

[1] The defendant applies for an order prohibiting publication of his name, or of any names, places, or details with regard to the conduct we refer to below, and for confidentiality to him under the register of licensees kept by the Registrar of the Authority under s.36 of the Real Estate Agents 2008 ("the Act").

The Relevant Conduct

[2] The applicant pleaded guilty to a misconduct charge on 30 January 2013. The charge was that in the course of conducting an open home, while in the vendor's

bedroom, he went through a drawer containing lingerie and took out and held in his hands underwear and a bra; and that he then left the vendor's bedroom and returned later to again take the lingerie out of the drawer and hold it in his hands.

[3] On 14 March 2013 we issued a penalty decision under [2013] NZREADT 23. Noting that, in September 2012, the defendant had voluntarily surrendered his licence under s.61 of the Act, which means that his licence was cancelled at about that time, we suspended his licence for six months from 30 September 2012 and fined him $1,500 with costs of $1,000.

Relevant Law

[4] Counsel referred to our extensive powers to make orders prohibiting publication set out in s.108 of the Act. Those powers are prefaced with the words *"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 ..."*.

[5] Both counsel have referred us to a number of our decisions dealing with non-publication applications, but each case must be analysed in terms of its particular facts and factors. Such decisions abide by such case authorities as *Lewis v Wilson & Horton Ltd* [2000] 3NZLR 546 (CA) where Her Honour Elias CJ said:

> *"In R v Riddell ... 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."*

[6] We have also 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.

[7] There is a presumption of publication of our decision subject only to our making an order for non-publication in terms of s.108 of the Act.

Further Factual Background

[8] Counsel for the applicant advises that the applicant has lost his employment as a result of the incident and puts it as local public knowledge that the applicant has surrendered his licence and not sought to renew it. Currently, it is not public knowledge that he has been charged and fined nor what were the details of the incident making up the charge. However, it is also put that various media reports have led to speculation about the above situation which has attracted a community response very difficult for the applicant's family to deal with.

[9] A number of affidavits in support of the application for non-publication have been filed with us.

[10] A counsellor for the defendant and his wife expresses serious concern about the health and wellbeing of the defendant's wife on account of past and further adverse publicity. In particular we note specialist medical advice that these proceedings have greatly aggravated her eczema condition. The applicant's son and daughter equally express concern for themselves, their children and their parents. The applicant refers to the adverse impact of publication on his ability to provide a limited income for himself and his wife following, in particular, their intended move from the city where they have long lived to another New Zealand city.

[11] The material contained in the said affidavits outlines, in quite some detail, the concerning effect of the applicant's offending on his wife and family and, indeed, on his own financial situation. There is evidence that enormous pressure has been placed on the family, and acute embarrassment, which has led to a drastic loss of self confidence and to the applicant's wife, in particular, retreating from public contact and social interaction with concerns about the consequential fragility of her health and wellbeing. The applicant's wife has outlined how the incident has dramatically changed her life with the local community having ostracised her husband and the humiliation making each day a struggle for her. She has given up her various interests *"because I have lost all confidence in myself"*. The affidavits also outline such aspects as concern for the marriage of the applicant and his wife and for their mental wellbeing.

Discussion

[12] Counsel for the applicant, Mr MacFarlane, submits that there is no need to protect the public or the industry from the applicant's behaviour because he is no longer able to practice as a real estate agent and must reapply for his licence if he wished to do so; when he would be accountable for the incident referred to above.

[13] Mr MacFarlane also submits that there is no public interest need to know that it was the applicant who was involved in the incident and that there is a countervailing need to protect third-party family interests. He submits that the applicant has suffered sufficient penalty to date and that open justice may be served by an appropriate form of prohibition which does not lead to the applicant's identification.

[14] It is submitted by Ms MacGibbon for the Authority that there are no grounds raised by the licensee which trump the presumption of open reporting.

[15] She also puts it for the Authority that the applicant's misconduct was serious and in direct conflict with the public protection policy of the Act; that licensees are trusted in people's private homes and the applicant's conduct involved a severe breach of that trust; that it is in the public interest that such a decision is published and the offending licensee is named; and this outweighs any private interest. Those points are compelling.

[16] She stresses that the main ground for the application is based on reputational impact to both the applicant and his wife, and his extended family; which is supported by affidavits filed from family members and from the couple's counsellor.

[17] Ms MacGibbon notes that there has already been publication in respect of the incident with a significant amount of information in the public domain; and this should be taken into account when weighing the applicant's residual interest in privacy against the public interest.

[18] With regard to the applicant stating that this reputational impact will affect his ability to provide an income for his family, Ms MacGibbon notes that the applicant is leaving the community where he was practicing as a salesperson to live in another city where he does not intend to work in the real estate industry.

[19] It is also put for the Authority that, although counsel for the applicant has stated that the public risk is mitigated because the applicant has surrendered his licence, given the penalty order against him was one of suspension for six months running from 30 September 2012, that period of time is now complete and the penalty order at an end, and there has been no penalty ordered against the applicant which would prohibit him from being eligible for a new licence.

[20] However, we note that should the applicant apply for and be granted a licence, s.66(1)(f)(v) of the Act would require the registrar to record on the public register any disciplinary action taken over the last three years. As Ms MacGibbon puts it, this emphasises the importance of openness and the public interest in publication.

[21] Ms MacGibbon submits that the grounds relied on are insufficient to warrant an order being granted when the public interest in open justice is considered; and that although publication will have a negative impact upon those connected with the applicant, this reflects the seriousness of the offending in which the applicant engaged and is the natural consequence of it.

[22] Essentially, Ms MacGibbon puts it that there needs to be accountability through the disciplinary process so that this application for suppression under s.108 of the Act should be declined. We accept that is the starting point. The defendant's misconduct was serious in nature and a breach of trust against a private home owner.

[23] We are conscious that the defendant, his wife in particular, and family are paying a very heavy price in terms of their own respective positions in their community. We note that the defendant has lived in that community for about 22 years and established a high reputation as a real estate agent and as a contributor to the community at a high level. He has been brought down by a rather silly spontaneous act which some might regard as victimless.

[24] We are conscious that the period of suspension which we imposed has ended but, being realistic, if the applicant wishes to seek a licence he needs to show the registrar, inter alia, that he is a fit and proper person to hold a licence and, in terms of s.37(1)(c) of the Act, he seems to be currently prohibited from being licensed because his licence has been cancelled within the previous five years due to his having surrendered it. Also, it is unlikely he could obtain re-registration without there being humiliating ventilation for him of the facts of this case.

[25] Mr MacFarlane put it that there is no need to protect the public or the industry from applicant's behaviour because he is no longer able to practice as an agent and must reapply for his licence if he wishes to do so. However, there is a need to

protect the public from such conduct and there is a need for offenders to be held accountable.

[26] Insofar as Mr MacFarlane put it that there is no need, in the public interest, to disclose that it was the applicant who was involved in the particular incident, we accept that the public are entitled to transparency and open justice.

[27] Having said all that, it does seem that there is a very strong need in the present case to protect the interests of the applicant's wife, in particular, and to some extent children, their spouses, and grandchildren.

[28] We are also conscious of evidence from the defendant, which, as it happened, was not tested by cross-examination, that the scope of his offending was not nearly as extensive as set out above. His stance seemed to be that, at an open home, someone had left the owner's underwear drawer open and he looked into that drawer and, we infer, handled some underwear to some extent. In our said penalty decision we put the facts as follows:

> *"**Factual Background***
>
> *[4] It is put that on 16 September 2012, while conducting an open home at X X Crescent, X X, and without the authority of the vendor, the appellant looked through a drawer containing lingerie while in the vendor's bedroom, and took out and held in his hands her underwear and a bra. He then left the vendor's bedroom to talk to customers who were attending the open home. Afterwards, he returned to the vendor's bedroom and again took lingerie out of the drawer and held it in his hands.*
>
> *[5] In terms of the precise facts, the defendant maintains that he did not leave the bedroom to talk to customers as the open home time had terminated and there were no customers left at the property, but he left the room because he thought he heard a noise. He also states that he did not open the drawer in the bedroom of the client vendor but had found it open at the close of the open home. He has also stated to us: "I looked in the drawer more out of curiosity and intrigue than out of malicious intent. It was a foolish thing to do and I regret it. The consequences of leaving things as I had found them may have been worse"."*

Outcome

[29] Despite the logic of the case put for the Authority in terms of the law, we feel there must be overall fairness in the extent of effective punishment of the defendant. On the particular facts of this case, we consider that overall justice can be served by our suppressing the name of the applicant and of the publication of any name, or place likely to identify the defendant, both in terms of our said decision of 14 March 2013 and of any entry in the register of the Authority; but we do not consider that details of the incident or the fact that it occurred in the context of an open home need to be suppressed – as sought by Mr MacFarlane.

[30] Accordingly, to that extent the application for prohibition of publication is granted.

[31] 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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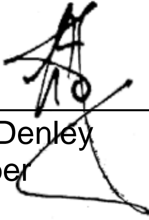
Judge P F Barber
Chairperson



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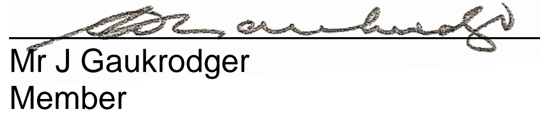
Mr G Denley
Member



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Mr J Gaukrodger
Member