BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 42

READT 85/11

IN THE MATTER OF	an application under s.108 of the Real Estate Agents Act 2008
BETWEEN	**MS C**
	Appellant
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

DATE OF OUR FIRST SUBSTANTIVE RULING	31 August 2012 [2012] NZREADT 53
DATE OF OUR SECOND RULING	15 March 2013 [2013] NZREADT 24
DATE OF THIS THIRD RULING	17 May 2013

REPRESENTATION

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

THIRD 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 with regard to a 10 August 2011 determination of the Authority's Complaints Assessment Committee 10036 that she 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 also found that while the licensee did not intend to mislead the purchasers in that case, her marketing was none-the-less a misrepresentation. The Committee also seemed to conclude that because the complainant had specifically

asked the appellant about the legality of the bedsit, there was a lack of competence in the appellant not establishing the position.

[3] Section 108 requires that we consider it proper to restrict publication *"having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest"*. As it happens, this application eventually relied on seeking privacy for the licensee, rather than the complainant, for reasons relating to the licensee's children.

Background

[4] We covered the facts of the case and the stance of the parties in some detail in a Ruling we issued on 15 March 2013, ([2013] NZREADT 24) which, in turn, referred to a detailed ruling we gave regarding this matter on 31 August 2012 [2012] NZREADT 53; but on 18 March 2013 we recalled our ruling of 15 March 2013 on the application of the appellant as we explain below. Our ruling of 31 August 2012 was that the appellant's appeal to us about penalty was misconceived in treating the Committee's directive about publication as a penalty order. That led to our decision of 15 March 2013 declining name suppression on the submissions then before us.

[5] In an 18 March 2013 email to us, the appellant referred to being *"deeply shocked and very surprised"* at the issue of our ruling of 15 March 2013 as, apparently, we had given her until 18 March 2013 to make a further submission in writing. The appellant put it, inter alia, that *"the action by the Tribunal can only be seen as an abuse of, and failure to adhere to, the laws of natural justice".*

The Stance of the Appellant

[6] The submissions from the appellant which we received on 18 March 2013 are quite detailed and, inter alia, cover her interpretation of various provisions of the Act and her views on various aspects of the Committee's finding against her of unsatisfactory conduct. Some of the appellant's views seem to derive from her having studied 80 decisions of this Tribunal and its predecessor over the period September 2003 to November 2009.

[7] The appellant then dealt with in some detail what she referred to as the *"reputational effect of name publication"* on her. Those submissions are very wide and general but we accept that a good reputation is critical for a licensee real estate agent.

[8] The appellant then dealt specifically with five decisions where this Tribunal granted name suppression to a licensee in particular circumstances. She then set out what she referred to as her *"business profile"* and then her *"personal profile"*. Essentially, she covered that publication of her name in relation to the said finding of unsatisfactory conduct by the Committee will be much published in her area, and beyond in general media exposure, which would lead (as she puts it) to *"a potential catastrophic effect on the appellant's reputation, business and family. This amounts to a penalty, certainly, at least of a punitive nature ..."*.

[9] More importantly, she then set out some rather sad family details, advised that she has recompensed the complainant, and covered that she has demanding family commitments which show a very commendable stance on her part. She outlined heavy family responsibilities which she bears and will carry for a lifetime. She stressed that this case has caused her constant anguish and trepidation for nearly

two years *"as she is the only income provider for her family"*. She submitted that damage to her reputation as a real estate agent will cause her financial loss and affect the charitable work she focuses on together with her difficult family responsibilities.

[10] Her overall argument is that what we had covered in our said recalled second ruling of 15 March 2013, coupled with her further typed submissions to us of 18 March 2013 *"unequivocally supports the application by the appellant to the Tribunal for a non publication order"*.

The Publication Issue for the Committee as at 10 August 2011

[11] We understand that neither of the other parties to this case wish to respond to the appellant's said submissions of 18 March 2013. We are conscious that, in its 'Decision On Orders' of 10 August 2011, the Committee gave careful consideration to the issue of publication and decided that its decision finding unsatisfactory conduct by the appellant should be published. The submissions put before the Committee seem to have been quite different from those put to us and included an issue of whether the complainant had some type of vendetta against the appellant and a focus on the appellant having then worked in the real estate industry for 11 years with an unblemished record as a highly successful agent. There did not seem to be consideration of the appellant's family circumstances.

[12] Some extracts from that decision of the Committee are:

> *"1.4 Because the conduct complained about occurred before the Real Estate Agents Act 2008 (the Act) came into force, the complaint was considered under section 172 of that Act. The Committee was only able to impose a penalty against the licensee that could have been made under the 1976 Act.*
>
> *1.5 The Committee found that a salesperson would not have been subject to the imposition of any penalty under the 1976 Act upon the making of a finding of unsatisfactory conduct.*
>
> *...*
>
> *2.2 In her submission, the complainant said it was in the public interest for the decision to be published. She considered that the licensee needed to be held accountable for her actions. Unless the determination of the Committee was published, the complainant considered the whole procedure would simply have been a waste of time, barely a rap over the knuckles for the licensee.*
>
> *...*
>
> *2.8 The committee has carefully considered the submissions of the complainant and the licensee. It does not accept that the complainant is being vindictive when she asks that the determination be published.*
>
> *2.9 Publication gives effect the purpose of the Act of ensuring that the disciplinary process remains transparent, independent and effective.*

2.10 The Committee also regards publication of this decision as desirable for the purposes of setting standards, and that it is in the public interest that the decision be published.

...

2.12 In this case, the complainant 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.

2.13 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 section 93 of the 2008 Act.

2.14 The Committee cannot see any basis for not publishing the decision."

[13] We feel that reasoning of the Committee was sound in terms of the submissions then before it.

Discussion

[14] For some reason, in an email of 19 March 2013 the appellant puts it, inter alia, that our Ruling of 15 March 2013 (since recalled) was premeditated and breaches natural justice. She then asked that we allow her 30 days to retain counsel and provide a further submission. We granted that application.

[15] However, by an email we received on 9 May 2013, the appellant has advised that she wishes her submission of 18 March 2013 *"to be now accepted as my formal submission and to be considered by the Tribunal"*. She continued: *"I note that there is further recourse for me in the High Court should a decision be delivered against me, and the legal opinion that I have obtained, is that I may be better served by retaining counsel, if required, in that appeal jurisdiction. ..."* Of course, it is usually open for an Appellate Court to review our findings.

[16] We ended our (since recalled) ruling of 15 March 2013 with the sentence *"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."* However, in particular, her subsequent submission of 18 March 2013 explains that she is the sole provider for four adult daughters and two of them require indefinite special care for brain injuries existing since birth. The appellant seems to be also involved in much charity work related to care of disadvantaged persons.

[17] We are now satisfied that non-publication of the appellant's name in relation to these proceedings is appropriate, despite the public interest factor, having regard to the privacy of the appellant and her children in the particular family circumstances of this case.

[18] Our recalled decision of 15 March 2013 sets out some of our views on the concept of name suppression so that we reissue it as an attachment to this decision.

[19] However, in all the circumstances of this case, we Order that the name of the appellant be suppressed from any publication of the Authority's said decision of 10 August 2011, from our first ruling of 31 August 2012 and from this decision and its attachment; and, of course, we also order a prohibition on publication of any details which may lead to the appellant's identification.

[20] Accordingly, the appellant's application for name suppression is granted in the particular circumstances of this case.

[21] 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