BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 76

READT 030/13 and 032/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**IAN CHARLES MORGAN**
	Applicant/Defendant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)**
	Respondent/Prosecutor

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mrs C A Sandelin - Member

COUNSEL

Messrs D Chesterman and B McCorkindale for applicant/defendant
Mr L J Clancy for Respondent/Prosecutor

HEARD ON THE PAPERS

DATE OF THIS DECISION 6 September 2013

DECISION OF THE TRIBUNAL ON APPLICATION FOR INTERIM RESTRICTION ON NAME PUBLICATION

The Application

[1] The applicant licensee (Mr I C Morgan) applies for an interim order that neither his name, nor the name of his real estate company (Diagonal Holdings Ltd), be published in any decision or other material released by the Complaints Assessment Committee or by us.

[2] He faces charges of misconduct and he has appealed against the decision of the Committee to lay them.

[3] The application is made under s.108 of the Real Estate Agents Act 2008 ("the Act") on the basis that any publicity surrounding the issue of a decision will cause significant hardship to the business of the applicant which, it is put, would be particularly unfair in all the circumstances. Section 108(1) reads:

*"**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."

[4] We understand that the parties or consumers involved in the relevant real estate transaction make no complaint about and were pleased with the services of the licensee in relation to the real estate transaction described below. It is put that the complaint to the Committee came from a former employer (a real estate agency company) of the licensee due to a particular dispute it has with him.

[5] The complaint is that, on a particular transaction the licensee did not disclose to a vendor that he received a fee from a purchaser. That vendor has confirmed to the Authority's investigator that it (the vendor) was informed by the licensee that the purchaser would be paying a fee to the licensee. It is alleged that the former employer *"has exhibited a strong desire for a finding against the licensee"* (as counsel for the applicant puts it). It is submitted for the applicant that the Authority has not followed the principles of natural justice in dealing with the complaint. It is also submitted there is no element of protection of the public involved in this case.

Basic Facts As Put To Us

[6] The original complaint was that the licensee received a fee from a purchaser, Mr Denize, without disclosing that fact to the vendor, Waitoki Downs Ltd. It was then also put that the licensee received two fees from the same transaction.

[7] We were informed that from 28 September 2012, the Authority commenced preliminary investigations, in which its investigator, Christopher Delaney, interviewed the vendor and purchaser and established the following facts (although that information is a little inconsistent with the charges later laid and set out below).

[a] The vendor was informed by the licensee that a fee would be paid to the licensee by the purchaser – but, allegedly this was not disclosed to the licensee's former employer which may have retained the listing at material times;

[b] That fee was not paid as a commission on sale, but was paid by the purchaser in circumstances where he and the vendor had located each other and were negotiating privately and had called in the licensee to assist them when they reached an impasse;

[c] The purchaser and vendor took no issue with the fee being paid by the purchaser to the licensee;

[d] The vendor and purchaser both confirmed they did not wish to make a complaint against the licensee and were happy with the work he carried out for them, which was to assist them in their negotiations once they had reached an impasse;

[e] The transaction in which the licensee received a fee from Mr Denize was a different transaction from that in which he previously received a commission from the vendor.

[8] There also seems to be a dispute between the licensee and the Committee about discovery of material related to the complaint.

[9] The licensee has operated his own real estate agency (company) since October 2012 without any other complaint, and is its proprietor and director.

The Specific Charges

"Charge 1

Following a report made by PGG Wrightson Real Estate Ltd, Complaints Assessment Committee 20003 (CAC 20003) charges Ian Charles Morgan (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

The defendant provided services for the purpose of bringing about an agreement for sale and purchase of 771 Rotokoku Road, Te Aroha (property) between Waitoki Downs Ltd (vendor) and Mathew John Denzie (purchaser), in return for a fee or commission of $47,5000 plus GST paid by the purchaser.

The property was subject to an agency agreement between the vendor and PGG Wrightson Real Estate Ltd (PGG Wrightson) signed by the defendant on behalf of PGG Wrightson as listing agent. The vendor had previously paid commission to PGG Wrightson in respect of a separate agreement that related, in part, to the property and which failed to settle.

The defendant failed to disclose the fee or commission he agreed and received from the purchaser to PGG Wrightson.

Charge 2

CAC 20003 further charges the defendant with misconduct under s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars:

(a) Acting on the sale of the property from the vendor to the purchaser in return for a fee or commission from the purchaser without ensuring that any previous agency agreement between the vendor and PGG Wrightson was at an end.

(b) Failing to disclose in writing to the vendor that the defendant would benefit financially from the sale of the property, namely by receiving a commission or fee or one per cent (plus GST) of the sale price from the purchaser.

(c) Preparing an agreement for sale and purchase of the property which recorded PGG Wrightson as the real estate agent acting, acknowledged as the vendor's agent by operation of cl 12.1, creating a risk that the vendor would be exposed to liability for commission to PGG Wrightson on the transaction.

(d) Inviting the signature of the purchaser on a purchaser's agency agreement:

(i) That was not signed by the defendant;

(ii) Without settling out in writing an estimated cost (dollar amount) of the commission or fee payable;

(iii) Without settling out in writing that further information on agency agreements and contracted documents is available from the Real Estate Agents Authority"

Relevant Law

[10] Proceedings before us are generally open to the public and may be reported on. However, under s.108 of the Act we may make orders restricting publication of, among other things, the name of a person charged.

[11] We considered the principles relevant to applications under s.108 in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02 and *Graves v Real Estate Agents Authority (CAC 20003) & Langon* [2012] NZREADT 41. Both cases involved applications for interim orders prohibiting publication pending the outcome of appeals against Complaints Assessment Committee decisions.

[12] In *An Agent*, we held that we had the power to make non-publication orders on appeals and we then set out the principles to consider when determining whether to make such orders. Relevantly, we relied on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said:

> *"In R v Liddell ... the 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."* (citations omitted)

[13] We went on to consider whether those principles were applicable to disciplinary proceedings. 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. In those decisions, the Courts had

accepted that the principles referred to in *Lewis* were applicable to disciplinary tribunals.

[14] 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 interests of other persons, including the licensee.

[15] We affirmed that we have a discretion under s.108 of the Act to make orders provided that it is *"proper to do so"* and that the discretion extends to both interim and final orders prohibiting publication.

[16] With regard to the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013] NZREDAT 51, we confirmed that:

> *"... we are not in a position to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media."*

Discussion

[17] It is put there is no element of public protection to be weighed here; and that no consumer has made a complaint, only a former employer company. We are told that it is likely to be argued whether the licensee was engaged in real estate work at material times; and that he did disclose to the vendor that he was acting for the purchaser, but the complaint includes that, at material times, the licensee should have disclosed his fee or commission to the former employer, and he had not confirmed that the former employer's agency was at an end.

[18] The licensee has deposed to us that he takes his vocation as a real estate agent seriously and professionally, and that the present complaint and its issues are stressful and taking many months to progress. He maintains that the allegations against him from the former employer company are untrue and defamatory and that they will lead to unfair speculation or false conclusions by the public of, in particular, Matamata which is a small town where he is well known. He is concerned at the detrimental affect of that on his real estate business, and on his family who include a permanently ill son. He emphasises that neither of the two consumers involved in the facts of this case complain about his conduct or service but have expressed their satisfaction to him.

[19] The application for suppression filed on behalf of the licensee deals largely with matters which go to the merits of the appeal and the Committee's decision to lay misconduct charges.

[20] In terms of the specific grounds on which an order restricting publication is sought, we identify the following:

> [a] That publicity *"will cause significant hardship to the business of [the licensee and his company]";*

[b] That no consumer has complained about the licensee, no harm was caused to consumers, and there is therefore no public protection element in favour of publication;

[c] That it would be *"unfair"* for the licensee's name, or that of his company, to be published until he has exhausted his appeal rights.

[21] We consider that the application for restriction on publication is speculative about the effects of any publication, and that the matters raised on behalf of the licensee do not displace the public interest of openness in disciplinary proceedings.

[22] As confirmed in *Ryan*, we will not make assumptions about how proceedings might be reported, but will proceed on the basis that any media reporting will be fair and accurate. Mr Clancy puts it that, in this case, all that would be reported is that charges have been referred to us, that the charges are not accepted by the licensee, and that we are yet to make a determination, so that it is difficult to see how such reporting could be said to be *"unfair"* or likely to cause *"significant financial hardship"* to the licensee or his company; and that, no evidence has been adduced to suggest that any such effect is likely. However, it seems likely to us that the content of the charges may be published and that publication may have some detriment to the licensee's business, and we take that factor into account.

[23] Public protection is only one element of the public interest in open reporting. There is a clear public interest in disciplinary proceedings being transparent and open to public scrutiny. Transparency encourages public confidence in the regulatory regime and, accordingly, in the performance of real estate agency work. Indeed, achieving transparency in the disciplinary process is an explicit purpose of the Act as set out in its s.3(2).

[24] We are wary of any suggestion that orders restricting publication should be made as a matter of course where charges are opposed and the laying of them is subject to appeal. As we held in the cases referred to above, decisions to make orders under s.108, even on an interim basis, must be based on the legal principles identified.

[25] We are sensitive to and concerned about the views expressed on behalf of the licensee and his company, but s.108 requires us to have *"regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest"*. Generally speaking, we operate a public forum and also the law is clear that, prima facie, justice must be open and be seen to be done.

[26] We do not wish to create a precedent along the lines that orders restricting publication should be made as a matter of course on an interim basis. At this stage, we consider that when the above legal principles are applied to the situation of the applicant in terms of his application for an interim restriction on publication, the balance weighs in favour of openness.

[27] Accordingly, the application is presently declined, but not dismissed because we grant the applicant leave to reapply to us in terms of further developments during the continuance of these proceedings.

[28] 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 J Gaukrodger
Member

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Mrs C A Sandelin
Member