BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 82

READT 079/12 and 080/12

IN THE MATTER OF appeals under s.111 of the Real Estate Agents Act 2008

BETWEEN **LEEON JOHNSTON**

Appellant/Applicant (READT 079/12)

AND **VINING REALTY GROUP LIMITED**

Appellant (READT 080/12)

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**

First respondent

AND **JOHN REID**

Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at NELSON on 20 May 2013

DATE OF SUBSTANTIVE DECISION HEREIN 5 August 2013 [2013] NZREADT 67

DATE OF THIS DECISION REGARDING NAME SUPPRESSION 8 October 2013

COUNSEL

Mrs N J Grimes and Mr C A Morice for the appellant
Mr L J Clancy, counsel for the Authority
Mr J Waymouth for second respondent

DECISION OF THE TRIBUNAL ON NAME SUPPRESSION

Introduction

[1] In our substantive decision of 5 August 2013 herein we stated:

"[51] A party is, of course, entitled to apply for name suppression, but we are currently of the view that while name suppression might be appropriate for Vining Realty Group Ltd, such name suppression should not extend to Mr Johnston as the responsible licensee over material times."

[2] We confirmed the findings of the Committee that the licensee (Mr L Johnston) and his employer Vining Realty Group Ltd, the co-appellant, were guilty of unsatisfactory conduct.

[3] By formal application of 26 August 2013, the Vining Realty Group Ltd sought an order restricting publication of its name and identifying details in connection with our said substantive decision of 5 August 2013. The grounds for such application are as follows:

"(i) the damage caused as a result of the publication of the applicant's name would be disproportionate to the level of culpability the Tribunal found against the applicant when upholding the Committee's finding of unsatisfactory conduct against the applicant.

(ii) the applicant was not found to have acted in bad faith; rather acted very responsibly towards the vendor in this case (refer paragraph [38] of the Tribunal's decision). Accordingly, protection of the public interest will not be jeopardised by non-publication of the applicant's name.

(iii) the Tribunal imposed an order for costs rather than the more punitive order of a fine against the applicant and Mr Johnston; and

(iv) the Tribunal itself noted, in paragraph [51] of its decision, that name suppression might be appropriate for the applicant."

[4] Such grounds were supported by an affidavit of Mr W G Vining who is co director and a 50% shareholder with his brother in the applicant company. He referred to our having also stated in our decision:

"[38] Mr Clancy put it that there has been no suggestion of bad faith by either Mr Johnston or Vinings Realty and that both have acted very responsibly towards the vendors Mr and Mrs Burke. We agree

...

[47] ... However, the vendors have no criticism of the appellants."

[5] It is put that the applicant company acted in good faith with regard to the factual background of our above substantive decision and that, while we found it did not act to the letter of the law in that it breached Rule 9.11 (explaining the risk of double commission to a prospective vendor) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, it complied with the spirit of the law by providing an oral assurance to the vendors that they would not be put at risk of paying two commissions. It was also put that the vendors supported the applicant's case at the substantive hearing before us and have not criticised the appellants; and Vinings honoured its commitment to the vendors about commission.

[6] It is submitted for the applicant that this is not a case where non-publication will subvert the protection of the public or public interest, but that publication of the

applicant company's details will damage it far beyond the damage caused by its breach of Rule 9.11. We are informed that the applicant is the principal sponsor of the Royal New Zealand Foundation for the Blind Guide Dogs in the Nelson and Marlborough area and that publication of the details of this case, in so far as the applicant company is involved, would damage that association particularly in terms of fund-raising efforts for that Society.

[7] It is also put that the applicant's salespeople are mostly independent contractors and publication of the applicant's name in relation to our substantive decision will adversely impact on their incomes.

[8] The Authority opposes this application for an order restricting publication. Counsel for the second respondent did not wish to file submissions but put it that *"if requested for my client's position would support the position adopted by the REAA's counsel"*.

Restriction on publication – principles

[9] Proceedings before us under the Real Estate Agents Act 2008 are generally open to the public and may be reported on (e.g. s.107 of the Act generally expects hearings to be held in public.

[10] However, under s.108 of the Act we may make orders restricting publication of, among other things, the name of a person involved in proceedings. 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."*

[11] We have considered the principles relevant to applications under s.108 in various decisions including *An Agent v Complaints Assessment Committee (10028)* [2011] NZREADT 02 and *Graves v Real Estate Agents Authority (CAC 20003) & Langdon* [2012] NZREADT 41.

[12] In *An Agent*, we held that we had the power to make non-publication orders on appeals from decisions of Complaints Assessment Committees before setting 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 at para [41]:

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

[14] 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.

[15] With regard to the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013] NZREADT 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."*

The Present Application

[16] The application filed on behalf of the applicant real estate company focuses on the potential damage that might be caused to the applicant's business and reputation if a suppression order is not granted. It is also submitted that, as the finding of unsatisfactory conduct confirmed by us did not involve any element of bad faith, the public interest would not be jeopardised by an order under s.108.

[17] While the first respondent Authority accepts that we did not find bad faith against the applicant, its counsel notes that 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, refer *Morgan v REAA* [2013] NZREADT 76 at [23]. Achieving transparency in the disciplinary process is an explicit purpose of the Act as set out in s.3.

[18] It is also put for the Authority that, consistent with the comments in *Ryan* quoted above, we should also be slow to assume that media reporting will be unduly negative. If reported fairly, our decision is quite clear regarding the nature of the unsatisfactory conduct findings we confirmed and as to the limited extent of the applicant's culpability.

[19] Counsel for the Authority (Mr Clancy) also notes that the decision of the Committee which was appealed to us, was previously published by the Authority in the normal way; there has been no prior application under s.108; and the present application appears to have been triggered by our comments in the substantive decision. Mr Clancy submits that, in those circumstances, the applicant's residual interest in restricting publicity at this late stage must be limited.

[20] Overall, Mr Clancy submits for the Authority that, when the relevant legal principles are applied to the present application for restriction on publication, the balance weighs in favour of openness and the application should be declined.

Our Views

[21] We are very much aware that in our comment at para [51] of our substantive decision of 5 August 2013 (and that para [51] is set out above), we unilaterally suggested that name suppression might be appropriate for the company appellant, Vining Realty Group Ltd but not for the licensee Mr Johnston. However on giving the matter deep thought in terms of the relevant legal principles, the above issues, and the particular facts of this case, we agree with the submission for the Authority that the balance weighs in favour of openness and it is not proper to restrict publication of the details of the applicant company in connection with our findings and reasoning in our said decision of 5 August 2013.

[22] We do not think that any damage caused as a result of publication of the company name would be disproportionate to the level of culpability which we found when upholding the Committee's finding of unsatisfactory conduct. We do agree that there has been no suggestion of bad faith on the part of either appellant and we found that both appellants acted responsibly towards the vendors in this case. However, we do not think it follows that protection of the public interest will not be jeopardised by non-publication of the applicant company's name.

[23] It is, of course, fundamental law that the prima facie presumption as to reporting is always in favour of openness. Generally speaking, it is important that there be open judicial proceedings. While in many ways the public interest might not seem to be jeopardised by some type of suppression order under s.108 of the Act, there is a clear public interest in disciplinary proceedings being transparent and open to public scrutiny as explained above. Also, in this particular case there is very little for either appellant to wish to be coy about as there was no bad faith but a willingness to remedy a double commission situation by waiving commission. We found that both appellants had acted very responsibly towards the vendors.

[24] In our decision we explained in some detail why we upheld the Committee's finding of unsatisfactory conduct. We emphasised that by virtue of s.126 and Rule 9.10, all material particulars must be inserted in the agency or listing agreement; and that a guarantee to waive commission if a double commission liability arises for the vendors, is such a material particular. We explained that the appellants had breached Rule 9.10 because they had a sole agency signed by their vendors without covering the assurance from the appellants to protect the vendors against a double commission situation. That meant that a material particular of the agency agreement was not inserted into the listing agreement.

[25] We also recorded:

> *"[47] It also seems that Mr Johnston let the issue drift once he was given to understand by Mr Brereton that there would be a commission split; and that Vining Realty did not resolve matters until litigation was threatened against the vendors. However, the vendors have no criticism of the appellants"*.

[26] It also concerned us that the company failed to promptly respond to a 30 August 2011 letter from First National claiming commission. While we noted that Mr Johnston did not quite understand the strong contractual position of First National in terms of entitlement to commission on the facts of this particular case, we felt there was a lack of supervision of Mr Johnston by the applicant company *"in that he should not have been left to give the verbal assurance to the vendors; and that issue of potential double commission should have been dealt with [by] Mr Vining on behalf of his real estate agency company"* refer our para [49].

[27] However, we record that while the assurances of the appellants of protecting the vendors from double commission were oral, rather than written, the assurance was given and also was honoured.

[28] Section 108 gives us a wide discretion to grant suppression orders if we are *"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"*. Nevertheless, we are bound by case law and its principles on this issue. Simply put, any need of the appellant company for privacy does not nearly outweigh the public interest and the principle of open justice.

[29] Accordingly this application is dismissed.

[30] 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

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Mr G Denley
Member