BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 83

READT 012/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL WEBER**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**DAVID PENROSE**
	Second respondent/ Applicant
AND	**BROWN'S REAL ESTATE**
	Third respondent / Co-Applicant

MEMBERS OF TRIBUNAL

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

HEARD at QUEENSTOWN on 10 December 2012 and 1 February 2013 (and with series of subsequent written submissions)

DATE OF OUR SUBSTANTIVE DECISION 2 September 2013 [2013] NZREADT 75

DATE OF THIS DECISION 8 October 2013

APPEARANCES

The appellant on his own behalf (with Mr A Rose as a McKenzie friend)
Mr R M A McCoubrey, counsel for the Authority
Mrs F E Guy Kidd, counsel for second and third respondents

DECISION OF THE TRIBUNAL REGARDING NAME SUPPRESSION

The Application

[1] In a decision of 2 September 2013 we dismissed the appellant's appeal against the Authority's determination to take no further action against Mr D Penrose ("the licensee") and Brown's Real Estate Ltd (trading as NZ Sotherbys International Realty

Ltd) with regard to the marketing of a Queenstown property for the appellant. Our penultimate paragraph read:

> *"[60] Simply put, it has not been proven that the licensee, or Brown's, failed in their conduct and duty to the appellant by not achieving a special high price from the neighbour. We agree with the reasoning and conclusions of the Committee of the Authority. Accordingly this appeal is dismissed."*

[2] The second and third respondents (i.e. Mr Penrose and Brown's Real Estate Ltd) now apply for orders prohibiting the publication of the following names and particulars, as Mrs Guy Kidd puts it:

> *"i. The name of the third respondent Browns Real Estate and its trading name referred to in paragraphs 1, 15 and 24 of the decision (New Zealand Sotherby's International Realty Limited).*
>
> *ii. The names of the licence holder of the third respondent, Nigel Brown, and the sales associates employed by the third respondent who gave evidence at the hearing, namely, Julian Brown and the second respondent David Penrose.*
>
> *Iii The fraternal relationship between the licence holder Mr Nigel Brown and the sales associate Julian Brown [para 28 of the decision] and the fact that Mr Julian Brown has international real estate connections [para 29] as these facts may lead to the identification of the third respondent.*
>
> *iv. The location of the office of the third respondent, namely, "the Mountaineer Building in Queenstown" as this would identify the third respondent.*
>
> *v. The town involved, namely, Queenstown.*
>
> *vi. The name of the purchaser of the property the subject of the hearing namely, Margaret Scott on behalf of Pop Properties Ltd, the addresses of 59 Atley Road, Arthurs Point, and 61 Atley Road, Arthurs Point."*

[3] The grounds of the application are that it is proper to restrict publication having regard to the interests of the second and/or third respondents and the purchaser named in the decision, and taking into account the public interest. The application is made under our power to regulate our procedures as we see fit in terms of s.105(1) of the Real Estate Agents Act 2008 and the principles in *A v The Dentists Disciplinary Tribunal* (High Court, Napier, AP No. 12/95, 11 February 1997, per Neazor J). The overall ground put by Mrs Guy Kidd is that the deletions she seeks are necessary in the interests of fairness and because our making of certain factual comments was inconsistent with the principles of natural justice and related to matters where we had no jurisdiction.

[4] The appellant formally opposes the application to restrict publication upon the ground, as he puts it, *"that it is a private interest not a "public" interest served by certain self-serving farcical comments of Mrs Guy Kidd and that she is advocating censorship for private not public interest"*.

[5] Counsel for the Authority is simply *"neutral as to the application".*

Discussion

[6] In the course of his submissions, the appellant put it that if there is to be any suppression, then his name should be suppressed but that, in any case, there is no need to suppress that the events happened in Queenstown.

[7] Under s.108 of the Act, we have a broad and unfettered discretion to make orders prohibiting the publication of the name or the particulars of the affairs of the person charged or any other person 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"*. It is not necessary for an application to establish exceptional circumstances for non-publication.

[8] We appreciate that this is a matter of quite some importance to the applicants so that we now cover the very helpful and thoughtful submissions from Mrs Guy Kidd.

[9] The suppression orders sought fall into two categories, first, orders to prohibit publication of the names of the second respondent licensee and the third respondent Browns and its licence holder and employees and matters which could lead to their identification; and, secondly, orders prohibiting publication of the identity of, or leading to the identification of, the purchaser of the particular Queenstown property.

[10] The second and third respondents also seek the recall of the decision and deletion of its paragraphs 56 to 59 inclusive which read:

> *"[56] A matter which did arise from the evidence is that an appraisal which the licensee gave the appellant in about July 2010, shortly after receiving the appellant's instructions to market the property, seems quite inadequate. It seems to have only comprised the licensee advising the appellant that the licensee thought the value of the property was at least $1.2 m to a buyer "off the street", and, likely, significantly more to a neighbour. If that was the only appraisal given, it does not comply with Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:*
>
> > *"9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations."*
>
> *[57] We cannot be satisfied that there was no further appraisal than that. There was evidence that on 2 August 2010 the licensee provided the appellant by email with information regarding sales in the area. Also, we are conscious that the asking price was driven by the firm requirements of the appellant at all material times including from the outset. The evidence of Mr N Brown is that, at material times, he would have appraised the property at about $700,000; but he would regard himself as a little conservative in terms of the optimism of his sales-people. The evidence of the licensee is that in his own mind he appraised the value of the property at material times at about $1 m, but that the appellant would not listen to him in that respect.*
>
> *[58] In any case, there has been no complaint about the nature of that appraisal. We note that it shows that, at the outset, there was some thought given to the possibility of a buyer being a neighbour.*

> *[59] While, if more evidence was heard on the issue of the appraisal, it might be possible to find that there had been unsatisfactory conduct on the part of the licensee in that respect, there has simply been no complaint about the appraisal aspect. In any case, that issue was not put to the Committee of the Authority. Our jurisdiction under s.111 of the Act provides for an appeal "against a determination of the Committee". We consider that if there is no such determination then we have no jurisdiction to deal with such an issue on an appeal and, indeed, that is the view Woodhouse J expressed in Wyatt v Real Estate Agents Authority HC Auckland CIV-2012-404-1060, 3 October 2012."*

Re: The Application for Orders Prohibiting the Publication of the Names of the Second and Third Respondents, the Licence Holder, and Employees

[11] This was an appeal against the decision of the Complaints Assessment Committee (CAC 20002) to take no further action in respect of a complaint made by Paul Weber. We upheld that earlier decision agreeing with the reasoning and conclusions of the Committee. We found the serious complaints alleged by Mr Weber against the second and third respondents to be unproven. We held at para [55]:

> *"We are unable to find any failure on the part of the licensee or of Brown's Real Estate in terms of the issues on appeal. We find no merit in the appellant's assertion that they hindered him achieving a higher price from the neighbour in the circumstances."*

[12] Mrs Guy Kidd submits that, in those circumstances, it would be unfair to the real estate agents concerned to have their names published in the context of such allegations; there is a real risk that despite the second and third respondents being vindicated by the decision that publication of their names in the context of such allegations could cause damage to their reputation which is key to the success and profitability of real estate agents; Mr Penrose has been working in real estate since 2004 and has never been the subject of any adverse finding by the READT or its predecessor; and, essentially, there is a real risk that *"mud sticks"*.

[13] The approach to the *"public interest"* consideration is as set out in *S v Wellington District Law Society* [2001] NZAR 465 (refer para [37]) in the context of a legal practitioner as follows:

> *"We conclude from this approach that the public interest to be considered, when determining whether the Tribunal, or on appeal this court, should make an order prohibiting the publication of the report of the proceedings, 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 the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication"*.

[14] Also it is submitted for the applicants that, given our findings, publication is not necessary in order to protect the public, and that the location of Queenstown should also not be published as, in a small place like Queenstown, media coverage may lead to identification of the real estate company involved.

Re: The Application for Orders Prohibiting Publication of Name and Particulars of the Purchasers

[15] It is submitted that it is proper to suppress the name and features which may lead to the identification of the purchasers of the property because they are a third party consumer not represented at the hearing and having a reasonable expectation of privacy. It is put that publication of their names or of matters which could identify them, including the location of the property concerned, would be contrary to the purpose of the Act set out in s.3: *"To promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."*

Re: The Application to Delete Paragraphs [56]-[59] of our Decision of 2 September 2013

[16] Mrs Guy Kidd puts it to be unusual that, despite accepting that we had no jurisdiction to deal with the issue of the adequacy of the appraisal given by the second respondent, as acknowledged in paragraph [59] of the decision, we commented unfavourably on that appraisal at paragraph [56] of the decision stating that the appraisal given to the appellant in about July 2010 *"seems quite inadequate"*. Furthermore, we went on to find at paragraph [59]:

> *"While, if more evidence was heard on the issue of the appraisal, it might be possible to find that there had been unsatisfactory conduct on the part of the licensee in that respect, there has simply been no complaint about the appraisal aspect ...*

[17] Mrs Guy Kidd advises that these factual comments are of great concern to the second and third respondents. She emphasised that there had been no complaint by the appellant regarding the appraisal so that our comments were made in a context where (she submits) there is no jurisdiction to make findings on that issue.

[18] She noted that counsel for the Authority (CAC 20002) had submitted at the hearing that the sufficiency of the appraisal did not appear to be part of the original complaint and remarked: *"If that is the case, then there may a difficulty with the Tribunal enquiring into that matter"*. However, that issue was raised with us.

[19] Mrs Guy Kidd, as counsel for the second and third respondents, submitted that we have has no jurisdiction to consider the point of the adequacy of the approval, that the appraisal was not the subject of substantive submissions by any party, and the issue should, therefore, not have been the subject of substantive comment or discussion in the decision. She further submits that the findings in paragraph [56] to [59] are unfair and contrary to the right to the observance of the principles of natural justice by the Tribunal as guaranteed by s.84 of the Real Estate Agents Act, by s.27 New Zealand Bill of Rights Act 1990, and the overriding principle of fairness. She refers to the High Court having held in *Udompun v Ministry of Immigration* (2003) HRNZ 238 at [143]:

> *"Both the terminology employed in s.27(1) of the Bill of Rights and the general purpose of the provision suggest that the object is to ensure that those who exercise public authorities (whether acting judicially or administratively) exercise their functions in a manner which can be assessed, objectively, as 'fair' to those who may be affected by their decisions."*

[20] Mrs Guy Kidd further submits that it is unfair for the Tribunal to make findings and particularly adverse findings on subjects which are simply *"not before"* it in a legal or jurisdictional sense; and that such findings, which are outside the jurisdiction of the Tribunal as prescribed by s.111(4) Real Estate Agents Act 2008, cannot stand: *A v The Dentists Disciplinary Tribunal* (supra) at page 23.

Our Conclusions

[21] We consider that the views and reasoning contained in our substantive decision of 2 September 2013 (including those in paras [56] to [59] inclusive) relate to the fabric of the appeal before us and conform to the purpose of the Act.

[22] We consider that the concerns of the second and third respondents regarding publication are somewhat exaggerated and, in this particular case, must yield to the public interest and, realistically, should be of little concern to the respondents.

[23] Simply put, we take the view that, in the ordinary course, justice must be seen to be done. This is a case where the issues and facts have been fully covered and the two respondents exonerated. We consider it in the public interest that this knowledge be available.

[24] Accordingly the said applications are dismissed.

[25] 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

_____
Mr G Denley
Member

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Mr J Gaukrodger
Member