

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 19

READT 039/13

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

BETWEEN **LUKE DOMB**

Applicant

AND **REAL ESTATE AGENTS AUTHORITY**

Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD ON THE PAPERS

DATE OF SUBSTANTIVE DECISION 24 January 2014 ([2014] NZREADT 5)

DATE OF THIS DECISION 18 March 2014

COUNSEL

Mr L H Pratley, barrister, for the appellant
Mr L J Clancy for the Registrar

DECISION OF THE TRIBUNAL
ON APPLICATION FOR RECALL AND AMENDMENT

Background

[1] On 14 February 2014 counsel for the applicant filed an application for recall and amendment to our decision of 24 January 2014 ([2014] NZREADT 5). Since then there has been a series of communications between counsel and our chairperson.

[2] Essentially, the applicant had refused to consent to the New Zealand Police disclosing to the Registrar any information relating to him other than criminal conviction information, if any. There is no evidence of the existence of any such information and, certainly, no criminal convictions. For a time, i.e. from 18 June 2013 until 5 July 2013, that stance had led to the Registrar refusing to renew the applicant's licence as a real estate agent.

[3] In our substantive decision of 24 January 2014 herein, we found in favour of the applicant on the substantive issue and we quashed the Registrar's 18 June 2013 decision. This means that the applicant, or any other applicant for renewal of a

licence, need only sign the statutory form 7 when renewing a real estate agent's licence and not the version which the Registrar and NZ Police preferred.

[4] The application has been made because the applicant is concerned about adverse inferences which, it is put for the applicant, could be drawn from our decision. Included in the application is the statement "*The decision contains statements that Mr Domb finds problematic in that the harm sought to be alleviated by his application is, with respect, exacerbated by the publication of the decision in its present form.*" At least inferentially, that is a reference to our having provided a reasoned declinature of an application by the applicant for name suppression made on the basis that, in the substantive case, he had simply raised before us an important legal issue and been successful, so that his name should not be associated with opposing the Registrar. We note that at para [66] of our said substantive decision we stated:

"[66] This proceeding is not a case about the conduct of the applicant in terms of disciplinary issues. However, we do not think that any consideration of the interests of the applicant, or his privacy, when compared to the public interest in open justice, leads us to make any type of suppression order in this case. Accordingly, we decline the applicant's request for name suppression.

Stance of the Registrar

[5] The Registrar opposes the application for recall and amendment and her counsel, Mr L J Clancy, referred to *Goulding v Chief Executive, Ministry of Fisheries* [2004] 3 NZLR 173 (CA) at [43] and put it that where an administrative decision, taken in the exercise of a statutory function, is communicated by the decisionmaker in a way which makes it clear that the decision is not of a preliminary or provisional kind, that decision is final and irrevocable. We accept that is the position with regard to our said decision of 24 January 2014.

[6] As Mr Clancy also put it, we are created by statute with statutory powers but no inherent jurisdiction; although our chairperson does have sundry administrative powers and jurisdiction in terms of the Real Estate Agents (Complaints and Discipline) Regulations 2009.

[7] We accept that the Real Estate Agents Act 2008 ("the Act") does not confer on us an express power to recall or amend a determination. We also accept that the amendments sought by the applicant do not relate to minor factual errors or slips; although our chairman regarded them as non controversial and not in any way affecting the content of our 24 January 2014 substantive decision herein. However, as Mr Clancy pointed out, we are *functus officio* in terms of the application now before us. If the applicant wishes to challenge any aspect of our said substantive decision, his remedy is to appeal to the High Court.

[8] A point which seems to concern counsel for the Registrar was a proposal to amend our decision by adding something along the lines "*We record that Mr Domb has no criminal history*". Certainly, there is no evidence whatsoever of the applicant having any criminal history, but counsel for the Registrar seems concerned about the meaning of the phrase "*criminal history*" in the context of the licensing provisions of the Act. We were not required to deal with the meaning of that phrase in terms of our said substantive decision but would expect that most District Court Judges would regard a person's criminal history, if any, as that which the NZ Police provide for a Judge in relation to every-day sentencing in the District Court. We realise that the

phrase could be interpreted to include much more information than that e.g. such as a person's previous interaction with the Police in various ways.

[9] We can accept that even if it was appropriate for us to state somewhere that we record that Mr Domb has no criminal history, such an amendment goes to a substantive matter and it would be an inappropriate amendment in the context of an application for recall.

Our Views

[10] For the record, by email dated 21 February 2014, the following comments of our chairperson Judge Barber, were conveyed to the parties by the registry:

"I appreciate the helpful views of both counsel but feel that we need not over-react. While I am not prepared to recall our decision, I feel that the amendments sought by the applicant are reasonable in all the circumstances. Section 108 can be applied. Also Regulation 17 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 must mean something."

[11] By further email dated 24 February 2014, the registry provided the following further comments from Judge Barber:

"1 - ... I am minded to issue an amended decision

2 - The deletions or additions would be

- Remove para (3)*
- After the quote within para [21] the addition of "We record that Mr Domb has no criminal history"*
- Remove "having had the benefit of considering information from the Police and information from the applicant about that" from para [25]*

3 - There would not be name suppression

4 - I would rely on s 108 of the Real Estate Agents Act 2008 and/or reg 17 of the Real Estate Agents (Complaints and Discipline) Regulations 2009."

[12] We agree that there is no statutory basis allowing us to amend our substantive decision herein. We are conscious that the applicant was successful on the substantive challenge dealt with by our decision but not on the issue of name suppression for reasons which we set out in some detail in our 24 January 2014 decision. We agree with Mr Clancy that it is not for the applicant to seek changes to our decision to render it more satisfactory from the applicant's point of view and, of course, there must be finality in litigation.

[13] Also, at the time our chairman made the above comments with a view to seeking a by consent administrative solution to the application for recall and amendment, we had declined an order for name suppression under s.108 in our 24 January 2014 decision. What was subsequently sought by the applicant was an order prohibiting publication of two rather short and minor passages in that substantive decision.

[14] All in all, we now think it inappropriate for us to revisit our substantive decision. Any matters of concern to the applicant could be dealt with on appeal or review to the High Court. In our substantive decision we gave detailed consideration to the issues (including that of name suppression in general) and sought to be careful in the wording of our decision. None of the amendments requested by the application refer to slips or errors of fact but simply reflect a wish on the part of the application that, on two occasions in the decision, we had expressed ourselves differently in rather minor respects.

[15] In any case, in terms of overall fairness and justice, we do not think there are nearly sufficient grounds for us to recall and amend our said decision of 24 January 2014. Accordingly, the present application is declined.

[16] 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.

Judge P F Barber
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member