BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 21

READT 045/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**DAMIEN HENAGHAN AND GRANT HENDERSON**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**BRUCE AND JANE McDONALD**
	Second respondents

READT 047/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**BRUCE AND JANE McDONALD**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**DAMIEN HENAGHAN AND GRANT HENDERSON**
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON NON-PUBLICATION 21 March 2014

COUNSEL

Mr P Hunt and Ms Ellie Harrison for appellant applicants
Ms J MacGibbon for the Authority
Mr R Mulgan for the complainant respondents

DECISION OF THE TRIBUNAL
ON ISSUE OF INTERIM NAME SUPPRESSION

Introduction

[1] Damien Henaghan and Grant Henderson, the licensee appellants in READT 045/12 (being the respondents in READT 047/13), have applied for interim name suppression pending their appeal being heard by us. That application is opposed by the first respondent Authority. Mr and Mrs McDonald, the complainants, are neutral on the issue.

[2] The licensees have appealed against the 26 April 2013 decision of Complaints Assessment Committee 20002 finding them guilty of unsatisfactory conduct. Also, the complainants have cross-appealed against the 8 August 2013 penalty determination of the Committee that each licensee be censured and that there be publication of the said decisions in the usual way.

Background

[3] The complainant, Mr McDonald listed 31 Maritime Terrace, Birkenhead, Auckland with Harcourts Milford (the Agency) on 10 July 2011, with an auction set for 7 August 2011 unless sold prior. Mr Henaghan was the listing agent and Mr Henderson was his sales manager.

[4] On 27 July 2011, Ze Sheng Wu (Ms Wu) viewed the property with the selling agent, Matty Ma, and registered for the auction.

[5] On 1 August 2011, Wenjie Mao (Ms Mao) completed a written offer to purchase the property at a price of $2.1 million. This was later verbally increased to $2.25 million with settlement to take place within 14 days and the appropriate amendment to offer was initialled. Later that day a letter of intent was received from Ms Mao's accountant stating that the pre-auction offer was open until midnight 2 August 2011.

[6] The licensees declared a multi-offer situation and proposed to the complainants that the property be withdrawn from auction due to an unconditional offer being presented.

[7] After consultation with a Mr Andrew North, the then auction manager and one of the directors of the Agency, Mr Henderson proposed that the property be withdrawn from auction. It was arranged that all interested parties be given until 6pm on 2 August 2011 to present an unconditional offer. This plan was later confirmed by the complainant.

[8] At 2.03pm, Ms Mao withdrew her offer in the belief that the auction was being brought forward to 6pm on 2 August.

[9] The property was subsequently passed in at auction on 7 August 2011 but later that day was sold to Ms Wu for $2.2 million.

Issues for Appeal

[10] The broad issue on appeal is to be whether the licensees failed in their duties to the complainant in the way in which they dealt with Ms Mao's offer. This will require evidence on a dispute between the licensees and complainants about exactly what was said and done at material times.

[11] The issue on the complainants' appeal is whether the Committee wrongly exercised its discretion as to what orders should be made in declining to make a monetary award in favour of the complainants in respect of:

[a] The difference between Ms Mao's offer and the successful offer following the subsequent auction;

[b] Interest paid on bridging finance;

[c] Legal costs incurred on the complaint.

Relevant Statutory Provisions on Publication

[12] The Real Estate Agents Act 2008 requires the Registrar of the Authority to maintain a public register of those holding licences under the Act, which includes a mandatory requirement to provide information about any action taken on a disciplinary matter in respect of a licensee in the past three years, refer ss.63-66.

[13] The effect of these provisions is that a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned if the finding and orders were made within the past three years. This reflects a clear policy decision by Parliament to promote consumer information and choice in accordance with the purposes of the Act.

[14] Mandatory publication is subject only to the making of an order for non-publication by us. Section 108 of the Act grants a power to us to make orders prohibiting, among other things, the names of parties to appeals and decisions of Complaints Assessment Committees under appeal. 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.*

The Grounds of this Application

[15] The licensees seek an order preventing publication of the Complaints Assessment Committee's said decisions until determination of the appeal to us. The grounds are put as that the licensees are well respected agents with unblemished records and excellent reputations built up over many years of hard work. It is put that the finding of unsatisfactory conduct, rather than penalties, carries a stigma difficult to remove even if the appeal to us is successful.

[16] A further ground for the application is that (it is put) the detrimental effect of publication of the Committee's findings is disproportionate to the unsatisfactory conduct *"which, even on the Committee's findings was at the lowest end of the scale of wrongful conduct"*.

[17] It is also put that even if the appeal before us is successful, publication in the meantime of the appellant's names in the register in relation to the Committee's decision will cause them irreparable harm which cannot be remedied by subsequent publication of the decision which we may give as *"a muddied reputation is hard to shake"* and people who have read about the Committee's decision may not learn of ours.

[18] In the grounds for the application there is reference to the principle of free speech a pending criminal trial or appeal being paramount and taking precedence over considerations such as a defendant's reputation. It is put for the applicants that such considerations are not as pertinent in the professional disciplinary forum because all relevant witnesses have been identified and the circumstances are sufficiently unique that publication pending our decision would not lead to further complainants coming forward with similar complaints. It was also put that the present application does not significantly impact on the principle of free speech because the determinations of the Committee and of us will be published in the register after the appeal has been determined.

Opposition by Authority

[19] Counsel for the Authority notes that, in their application for non-publication, counsel for the appellants have relied on the fact that the conduct was found by the Committee to be at the lower end of unsatisfactory conduct and put it that this should weigh in favour of non-publication. However, counsel for the Authority submits that this in fact weighs in favour of publication and that the public should be trusted to interpret disciplinary decisions and comprehend where conduct falls on the disciplinary spectrum; and that conduct which is at the lower end of the spectrum reflects less adversely on the reputation of the licensee.

[20] Ms MacGibbon also emphasises that, in the absence of other grounds, the effect of an application such as the present one, could be regarded as that name suppression should apply automatically whenever an appeal to us is filed. Ms MacGibbon submits there is no justification for such a de facto rule and, apart from incentivising appeals, this is contrary to general principles of open justice which we apply.

[21] Ms MacGibbon also submits that the present application is not analogous to one made in proceedings before liability has been established; e.g., interim name suppression in criminal proceedings before trial. Here, a finding of liability (and

penalty orders) has already been made by the first instance decision-maker, the Complaints Assessment Committee. Granting interim name suppression in a case such as the present is, effectively, to treat an appeal right as conferring a stay on the first instance decision which is contrary to general principle.

[22] Ms MacGibbon therefore submits for the first respondent Authority that there are insufficient grounds for the granting of an interim suppression order.

The Final Reply for the Applicants

[23] Counsel for the applicants accepts that the provisions of the Act requiring publication on the public register of disciplinary action may generally reflect a policy of openness (ss. 63-66 of the Act) but submit:

> *"(1) The requirement to record disciplinary action is not without qualification. As the first respondent has acknowledged, there exists express power under s.108 (under which section this application has been made) for the Tribunal to make an order of non-publication after considering relevant factors including the complainant's privacy and the public interest.*
>
> *(2) There is no particular threshold to overcome before a non-publication order can be granted under s.108. This can be contrasted with s.200 of the Criminal Procedure Act 2011 which requires an applicant for name suppression in criminal proceedings to establish that publication of his or her name would cause "extreme hardship"."*

[24] Counsel for the applicants submits that it follows that the Act is much less emphatic regarding a presumption in favour of publication; and that the key issue is to consider the public interest. In that respect, counsel for the applicants note that the appeal is set down for hearing on 5 May 2014 so that interim non-publication orders, if granted, would only endure for about seven weeks; that the complainants are neutral on the question of interim name suppression; and put it that this case is highly fact-specific such that the Committee's decision is unlikely to be of general educational use to the real profession.

[25] It is also submitted for the applicants as follows:

> *"4. Second, the first respondent submits that the grounds for publication are stronger because the first-instance decision maker has already made a finding of unsatisfactory conduct. The first respondent compares this to criminal proceedings where name suppression is granted before guilt is determined. However, the threshold for name suppression in the criminal process under s.200 of the Criminal Procedure Act 2011 is the same whether or not the application is made prior to trial, pending appeal and post appeal. Accordingly, it does not assist the first respondent's submissions to contrast non-publication orders in Tribunal proceedings with criminal provisions for name suppression.*
>
> *5. Finally, the first respondent submits that the public should and can be trusted to interpret disciplinary decisions and comprehend where conduct falls on the disciplinary spectrum. However, the public register does not record the Committee's decision, so the public cannot properly evaluate where conduct falls on the disciplinary spectrum ... It simply records the*

finding and penalty ... there is no explanation of the reasons for the decision.

6. *Even if the Complaints Assessment Committee's decision were published, the appellants' appeal is based in part on a submission that the Committee made erroneous factual determinations.. if that ground of appeal is correct, the public reading the committee's decision my form an adverse view based on incorrect facts. If that ground is incorrect, the Tribunal's decision will correctly record events for publication."*

Discussion

[26] The licensee's essential ground for seeking name suppression seems to be that of harmful reputational impact on them.

[27] The Act requires the Registrar of the Authority to maintain a public register of those holding licences under the Act providing information about any action taken on a disciplinary matter in respect of a licensee in the past three years; ss.63-66 of the Act.

[28] The effect of those provisions is that a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned if the finding and orders were made within the past three years.

[29] That mandatory publication is subject only to the making of an order for non-publication by us. Section 108 of the Act grants us power to make orders prohibiting, among other things, publication of the names of parties to appeals and to decisions of a Complaints Assessment Committee under appeal.

[30] The principles relating to applications of this type are set out in various decisions of ours. In *X v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 2 we considered an application for an interim order prohibiting publication of the determination of a Committee decision pending the outcome of the appeal. We held that we had the power to make non-publication orders on appeals and set out the principles to consider when determining whether to make such orders. Relevantly, we relied on *Lewis v Wilson & Horton Ltd* [2003] 3 NZLR 546 (CA) where Her Honour Elias CJ said:

> *"In R v Liddell ... this Court of Appeal declined to lay down any code to govern the exercise of 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).

[31] We went on to consider whether those principles were applicable to proceedings of a disciplinary nature. 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: *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioners' Disciplinary Tribunal* (HC Auckland AP21-SW01, 5 December 2001); *S v Wellington District Law*

Society [2001] NZAR 465 (HC). In those decisions, the Courts accepted that the principles referred to in *Lewis* were applicable to disciplinary Tribunals.

[32] 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 (legal) profession, or the Court. It is this public interest that is to be weighed against the interest of other persons, including the licensees.

[33] We take the view that conduct which is at the lower end of the spectrum reflects less adversely on the reputation of the licensee; and it is quite clear that the Committee found the wrongful conduct of the licensees to be at the lower end of unsatisfactory conduct.

[34] We emphasise that there can be no concept of automatic name suppression whenever an appeal to us is filed. That would encourage appeals to freeze a situation for quite some time and, in any case, is contrary to general principles of open justice.

[35] The fact is that there has been a finding of liability for unsatisfactory conduct against the licensees from an experienced Committee carrying out its statutory duty. The fact that there is an appeal process enabling us to both rehear and review the situation cannot lead to interim name suppression without compelling reasons, such as serious medical, family, or financial consequences as we have covered in other cases over the past few years.

[36] We consider that the public should and can be trusted to interpret disciplinary decisions and comprehend where conduct falls in the disciplinary spectrum. We appreciate that the public register referred to above merely records outcomes rather than reasons for them. It simply records the finding and penalty without explanation of the reasons. In the ordinary course, if our decision is favourable to the appellant then there cannot be any stigma in the minds of sensible people and our decision is readily available in full to members of the public.

[37] We agree with counsel that s.108 of the Act, which gives us jurisdiction to make restrictions on publication, gives us a wide discretion and we are to have regard to the interest of any person including, without limitation, the privacy of the complainant and the public interest.

[38] In previous cases we have put it that factors relevant to our assessment of whether non-publication should be ordered are that disciplinary proceedings are not criminal in nature but are taken to give effect to the consumer protection purposes of the Act; there is the effect of publication on the protection of the public, the real estate industry, or the Court; and the interests of other persons, including the licensee. We have stated that there is a presumption that hearings and the result of hearings should be public.

[39] Simply put, we consider that no grounds have been raised by the appellant licensee which trump the presumption of publication of identifying details regarding the decisions of the Committee on the facts referred to above. The ground of reputational impact is not strong enough for us to make the suppression orders sought by the appellant. Indeed, it is always possible to allege reputational impact

following an adverse decision and, if that was sufficient, non publication would always follow. That would subvert the purpose of the public register provisions of the Act and the principle of open justice.

Our Conclusion

[40] When the public register provisions in the Act and the concept of public interest in open justice are considered, the grounds relied on by the appellants are insufficient to warrant a suppression order being granted for them regarding the Committee's decision or these proceedings. Also, as we have said in other decisions, there needs to be accountability through the disciplinary process. The appellant licensees have not pointed to any meritorious ground to show that non publication of their details would protect the public interest, the privacy of the complainants, nor any special interest of theirs.

[41] We agree with Ms MacGibbon that, in the present case, there are simply insufficient grounds for the granting of the interim suppression order sought for the appellants.

[42] Accordingly, the appellants' application under s.108 is declined.

[43] 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

_____
Ms N Dangen
Member