BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 24

READT 074/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**GARY AND VICKI WALLACE**
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	First respondent
AND	**MICHAEL AND SUSAN BAKER**
	Second respondents

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 RULING RE PUBLICATION 26 March 2014

COUNSEL

Mr R Latton and Ms A Hellaby for appellant applicants
Ms J Pridgeon for the Authority
No submission on this matter for the complainant second respondents

DECISION OF THE TRIBUNAL

Introduction

[1] The licensees have appealed Committee decisions (dated 24 April 2013 and 8 November 2013) respectively finding them guilty of unsatisfactory conduct and making penalty orders. Their appeal is to be factually based and heard by us on 23 June 2014. Meanwhile they now apply for interim non-publication orders.

Background

[2] Michael and Sue Baker (the complainants) retained the licensees to sell their property at 8 Ventnor Road, Remuera, Auckland. They subsequently filed a complaint alleging the following:

[a] First, that the licensees failed to disclose to the purchasers of the property that three freestanding BoConcept wardrobes in the house were not included in the sale. We note that the wardrobes were valued at about $42,000.

[b] Second, that a discussion paper (also described as a *"comprehensive house specification list"*) they prepared to assist the licensees with marketing the property was included in an information pack which the licensees prepared and gave to the purchasers. The complainants say that this was done without their consent. Apparently, the wardrobes were listed on that specification list.

[c] Third, that a pre-settlement inspection took place without their proper notification, and the licensees contacted the purchaser's solicitor without first speaking to the complainants.

[3] The property was sold for $3,650,000 but, to effect settlement, the complainants needed to return the wardrobes to the property.

The Committee's Findings

[4] The Committee found:

[a] Regarding the wardrobes, that the licensees should have taken more care and confirmed the exclusion or otherwise of the wardrobes, particularly, given they had been put on notice about the uncertain status of the wardrobes at an early stage. The licensees had not attached enough importance to the wardrobes, and did not clarify whether they were fixtures or chattels. They breached their obligations to the complainants by not acting according to instructions.

[b] As regards the licensees contacting the complainants' solicitor directly and a pre-settlement inspection taking place without the complainants knowing, the Committee found that the licensees did not breach their duties; and their actions were prudent and reasonable in the circumstances.

[5] The Committee did not seem concerned about the discussion paper being included in the information pack and noted that *"no mention was made by the complainants to the licensees about not wanting the comprehensive specification list included in the information pack"*.

[6] Overall, the Committee found that the licensees engaged in unsatisfactory conduct. It ordered the licensees to supply, at their own expense, the equivalent BoConcept wardrobes and to pay their cost of transport and assembly the wardrobes. Further, the licensees were ordered to pay a $500 fine.

The Licensees' Application for Non-Publication

[7] The licensees raise three main grounds in support of their application:

[a] That publication would not provide any special protection to the public because the only protection to be gained in this case *"would be to alert the public to the finding that the Wallaces did not listen to the instructions given to them, and subsequently breached those instructions"*. The licensees submit that the finding against them does not highlight a particular aspect of real estate industry practice which should raise any concerns; and that any *"protection"* can only be in relation to protecting the public from the licensees themselves.

[b] The licensees' private interests outweigh the public interest because they are high-profile agents, and any decision about them would likely attract media attention which would have a detrimental effect on their unsullied reputations.

[c] The Committee's unsatisfactory conduct decision is based on a factual finding which is under appeal. This makes their appeal and their non-publication application different to others which come before us because, the licensees submit, no previous decision of ours on non-publication has been on an appeal which will turn on our assessment of the facts. They assert that in this case, it would be unjust to publish the decision.

Relevant Law

[8] Complaints Assessment Committees have a number of functions, one of which is to publish decisions – Real Estate Agents Act 2008 ("the Act"), s.78(h). Publication of decisions gives effect to the purpose of the Act to ensure that the disciplinary process remains transparent, independent, and effective. Pursuant to s.84(2) of the Act, a Committee may direct publication of its decisions under ss.80, 89 and 93 *"as it considers necessary or desirable in the public interest"*.

[9] The Act also requires the Registrar of the Authority to maintain a public register of those holding licences under the Act to provide information about any action taken on a disciplinary matter in respect of a licensee in the last three years - ss.63-66 of the Act. The effect of this is that a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequential 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. Publication on the register is therefore mandatory unless we make an order for non-publication under s.108 of the Act: - *Mrs C v Real Estate Agents Authority* [2012] NZREADT 53 at [33].

[10] The principles relating to applications for non-publication were set out by us in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02 and have most recently been discussed in *W v The Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 9.

[11] Both cases were applications for an interim order prohibiting publication of the Committee's determination pending the outcome of an appeal. *An Agent* was the first time we considered an application of this type and we relied on *Lewis v Wilson &*

Horton Ltd Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said at [41]:

> *"In R V Liddell ... this 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 and emphasis added)

[12] More recently, in *W* we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act to promote and protect consumer interests.

[13] Any application for non-publication must be weighed against the public interest in publication. This requires an analysis of the extent to which publication of the proceedings would provide some degree of protection to the public or the (legal) profession. It is this public interest that is to be weighed against the interests of other persons, including the licensee - *S v Wellington District Law Society* [2001] NZAR 465 (HC).

Submissions for The Authority

[14] For the Authority, Ms Pridgeon submits that the Committee's findings against the licensees highlight one of the key aspects of real estate industry practice which should raise the concerns of the public and us, namely, that a licensee act according a client's interests and instructions unless to do so would be contrary to the law, Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Ms Pridgeon submits that, on the facts as the Committee found them to be, the licensees failed to do this.

[15] The licensees argue that because they are high-profile agents, they would be subject to more media attention, presumably when compared to less well-known agents. In support of this, they have attached to their submissions what appear to be their own marketing publications from the Bayleys website as they are Bayleys' agents. They hold themselves out as Bayleys' number one national residential sales team. The Authority submits that this, without more, is not evidence that they will attract more media attention than other agents.

[16] However, if it is accepted that this is sufficient evidence of the licensees' high-profile status and the likelihood of more media attention, the Authority nevertheless submits that this is not a reason for non-publication. Parliament is taking a stricter approach to the requirement for publication, - see for example Parliament's test for publication, as set out in the Criminal Procedure Act 2011. The fact that a person is well known in the community does not, of itself, mean that publication of his or her name will result in undue hardship – *W* (supra).

[17] The Authority emphasises that the licensees have been found to have engaged in unsatisfactory conduct. We accept that this is a factor favouring publication. The consumer protection purposes of the Act must not be undermined by the grant of non-publication orders. The importance of freedom of speech, open judicial proceedings, and the right of the media to report on Court proceedings means that the starting point must always be publication - *Lewis v Wilson & Horton Ltd* (supra).

[18] Ms Pridgeon also submits that the fact that hearings before the Committee are conducted on the papers, and the Committee therefore does not usually have the benefit of hearing from witnesses in person, cannot count against publication.

[19] Ms Pridgeon noted that counsel for the licensees has submitted that the licensees were not given the same opportunity as the complainants were to present their case to the Committee; and that the complainants were interviewed, but the licensees were not. Ms Pridgeon understands that this is, in fact, not the case; and that neither the licensees nor the complainants were interviewed. She understands that the licensees relied on two factors to make the submission that the complainants were interviewed.

[a] First, there is a line at [1.3] of the Committee's unsatisfactory conduct decision which states: *"After further investigation, the Committee considered further evidence gathered on 11 February 2013"*. Counsel for the licensees understood that to mean that there was further evidence gathered on 11 February 2013 that the licensees were not privy to, and assumed it must have been an interview with the complainants.

[b] Second, there is a reference in the Committee's discussion at [4.1] of the unsatisfactory conduct decision to *"freestanding, on carpet, the skirting board ..."*. Counsel for the licensees understood that none of the documents disclosed to them made references to those matters, and again assumed it must have come from evidence obtained at an interview with the complainants to which they were not privy.

[20] Ms Pridgeon puts it that in relation to point (a) above, the Committee met on 11 February 2013 to consider all the evidence gathered. The sentence relied on by the licensees can be interpreted in the manner it has been in their submissions. However, there was no further evidence gathered on 11 February 2013; that date was in fact the date of the Committee's meeting, as opposed to the date of further evidence or an interview with the complainants.

[21] In relation to point (b) above, the Authority understands that the licensees were provided with a document during disclosure that made references to *"freestanding, on carpet, the skirting board ..."*. That document is a response on paper from the licensees, not an interview with the complainants.

Final Response of Counsel for the Licensees/Applicants

[22] The major points made for the applicants is that the private interest of an agent, in not having a Real Estate Agents' Authority decision published, outweighs the public interest in publication in circumstances where:

[a] The REAA decision at issue is based on what one person is alleged to have said to the other;

[b] The only evidence on what was said involves written assertions made by the parties themselves;

[c] There is no objective evidence available (i.e. contemporaneous documentary evidence, or corroborating neutral witness testimony) to assist the REAA, in determining what was or was not said; and

[d] An appeal has been made on the basis that the REAA's finding on what was said is incorrect.

[23] It is emphasised for the applicants that is the fact that an appeal is based on a dispute of fact is not of itself grounds for non-publication. It is accepted that many REAA decisions, and appeals, will involve disputes of fact.

[24] It is put that what appears to be rare in this case is the situation where the REAA has to rule on the question of who said what to whom without any objective (i.e. documentary) supporting evidence; whereas in the *W* decision there was documentary and other evidence before the REAA. It is also put that, in this present case, the REAA could only rely on diametrically opposed written assertions about what was said.

[25] The basis for the REAA's decision was the fact that the applicants had been put on notice about the wardrobes. This finding was made because the complainants said that they had told the applicant that the wardrobes were not to be part of the sale. The applicants said that they were not told this. It is submitted by counsel for the applicants that the only evidence on this crucial point was the complainant's written assertion that they told the applicants that the wardrobes were not included in the sale; and the applicants' written assertion that they were never told that.

[26] It is put by counsel for the applicants that this evidence was the key to the REAA's decision; and if the REAA had preferred the applicants' written assertion, its decision would have been in their favour. Instead, it preferred the complainants' written assertion and found that the applicants had been put on notice that the wardrobes were not to form part of the sale; and their action in not responding to that was held to be unsatisfactory conduct.

[27] It is also put that, in the circumstances outlined above, the REAA was unable to properly test the evidence before it and that the only way to properly test such evidence ("he said/she said" evidence) is to hear oral testimony.

[28] It is submitted that it is unjust in this limited circumstance for the decision to be published as, to do so, would mean that the applicants face the consequences of publication without the case against them having been tested in a proper way (i.e. by oral evidence and cross-examination).

[29] Accordingly, counsel for the applicants submit that, pending the substantive hearing of the evidence at their appeal to the READT, the applicants' interests outweigh the public interest in publishing.

Discussion

[30] The licensees' appeal raises factual issues which will need to be tested before us. However, we do and have considered non-publication applications where the issues before the Tribunal are factual ones. Indeed, the *W* appeal (which has not yet been substantively dealt with by us) has been filed on the basis of what appear to be factual issues. The Authority does not accept the licensees' submission that the *W* appeal *"was largely based on supposed 'unjust actions' by the REAA"*. In our decision on the non-publication application of Mr and Mrs W, we dismissed any assertion in the grounds for non-publication that there had been *"unjust actions"* by the Authority.

[31] The issue of carrying out a client's instructions is important and warrants publicity in the usual way in accordance with the purposes of the Act.

[32] As we have recognised more than once, the fact of an appeal itself is not sufficient grounds to grant a non-publication order. That the Committee's decision is under appeal will be noted on the Authority's website. It cannot be that lodgement of an appeal prohibits publication in the ordinary way, as directed by Parliament. That would serve as an unwarranted inducement to appeal.

[33] We accept that the complainants were not interviewed by the Committee's investigator. The licensees were given an opportunity to respond to the complaint made against them and provide any evidence in support of their response. The Committee considered the responses submitted but, on the papers, preferred the evidence provided by the complainants. Under the Act, the Committee may so proceed. Parliament legislated that unless the Committee directs otherwise, it is to conduct its hearing on the papers and make its determination on the basis of the written material before it; s.90 of the Act.

[34] As noted above, Parliament has further directed that one of the Committee's functions is to publish its decisions, and the Committee directed that in this case. Parliament has also mandated that the Authority's Registrar maintain a public register recording action taken on any disciplinary matter against a licensee, ss.63-66. In this regard, the Act does not distinguish between disciplinary matters decided by the Committee as opposed to us; and "*Any action taken on a disciplinary matter"* is directed to be published, s.66(1)(f)(v). We consider that we should guard against the appeal process being used to defer the point at which a finding of unsatisfactory conduct is recorded on the public register; refer *An Agent v Complaints Assessment Committee* (supra).

[35] In previous rulings about publication or non-publication, we have adopted the views accepted by a full bench of the High Court in *S v Wellington District Law Society* (supra) that the public interest to be considered in non-publication applications in disciplinary hearings (about lawyers) 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 present licensees/applicants.

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

[37] The starting point must always be publication because this reflects Parliament's intention in passing the Act; the promotion and protection of consumer interests. The licensees state that they are well regarded real estate agents in their community and that publication would be devastating on their reputation. In relation to criminal proceedings at least, Parliament has recently taken stricter views of submissions such as this, legislating that the fact that a person is well known in the community does not, of itself, mean that publication of his or her name will result in extreme hardship: refer Criminal Procedure Act 2011, s.200. That s.200 spells out that, instead, Courts in criminal proceedings may only make suppression orders if publication would be likely to:

[a] Cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or

[b] Cast suspicion on another person that may cause undue hardship to that person; or

[c] Cause undue hardship to any victim of the offence; or

[d] Create a real risk of prejudice to a fair trial; or

[e] Endanger the safety of any person; or

[f] Lead to the identification of another person whose name is suppressed by order or by law; or

[g] Prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or

[h] Prejudice the security or defence of New Zealand.

[38] This reflects a stricter approach to publication being required by Parliament.

[39] That the licensees are high profile agents, and that publication of their offending may be detrimental to their business, is a factor to be taken into account; but, in the present case, it does not over-ride the basic principle of open justice.

[40] The licensees have been found to have engaged in unsatisfactory conduct must be a factor in favour of publication. We need to be satisfied that the consumer protection purposes of the Act are not undermined by granting non-publication orders.

[41] Finally, the fact of an appeal itself is not sufficient to grant a non-publication order. That the Committee's decision is under appeal will be noted on the Authority's website. It cannot be that lodgement of an appeal blocks publication in the ordinary way.

[42] Essentially, Ms Pridgeon submits that none of the licensees' grounds justify non-publication; and we should not grant the application.

[43] We find that the licensees' application raises insufficient grounds to justify a non-publication order. The application is refused and dismissed.

[44] 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 N Dangen
Member