BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 30

READT 52/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**H and T X**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**COLLEEN (VICKI) NELSON**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF OUR FIRST DECISION RE INTERIM NON-PUBLICATION – 7 February 2014

DATE OF THIS SECOND DECISION ON INTERIM NON-PUBLICATION - 17 April 2014

REPRESENTATION

The appellants on their own behalf
Ms J Pridgeon, counsel for the Authority
Mr Nick Nelson as husband – representative for the second respondent

SECOND THRESHOLD DECISION OF THE TRIBUNAL ON APPLICATION FOR INTERIM NON-PUBLICATION OF COMMITTEE'S DECISIONS

Introduction

[1] H and T X ("the licensees") have appealed against the 11 May 2012 determination of Complaints Assessment Committee 20004 finding them guilty of unsatisfactory conduct following for a complaint by Vicki Nelson. On 23 July 2012 the Committee made penalty orders against the licensees and ordered publication of its decisions.

[2] On 15 November 2013, the licensees filed with our Registry an application for non-publication of the Committee's liability and penalty decisions against them. The Real Estate Agents Authority opposed the application.

[3] In a decision of 7 February 2014 ([2014] NZREADT 9) we set out more background. There is a fixture for the substantive appeal ON 3 June 2014 at X City.

[4] We concluded our said threshold decision herein of 7 February 2014 as follows:

> *"[25] We find that, currently, there are insufficient grounds to make any type of order for interim non-publication. However, rather than dismiss the application, we allow the applicant/appellants three working weeks from the date of this decision to supply medical evidence to us if they wish.*"

Recent Developments

[5] Since then quite a saga has developed. Essentially, the licensees have provided us with a medical report dated 12 February 2014 relating to the health of the wife licensee which we find compelling in terms of there being a need for the interim non-publication order sought by the licensees. The general practitioner concludes that publication of the wife licensee's name *"would cause her severe harm; far in excess of that likely to be experienced by someone without her background of illness"*.

[6] In the ordinary way, we would have provided the first and the second respondents with a copy of that medical report and invited submissions. However the licensees strongly did not wish the content of that medical report of 12 February 2014 to be disclosed to anyone, and we can understand that viewpoint.

[7] Of course, the respondents cannot be expected to make reasoned submissions on this further aspect of the application for non-publication without being able to peruse a copy of the medical report. After quite some toing and froing matters progressed to the stage where the licensees agreed to the report being disclosed to the second respondent and to counsel for the first respondent Authority but not in any circumstances to staff of the Authority. This means that counsel for the Authority, Ms J Pridgeon, cannot seek instructions from her client the Authority.

[8] We consider that it would be surprising if the respondent did not agree with our view from the medical report that we should grant the appellant's application for non-publication of the Committee's liability and penalty decisions against them because of the effect publication is likely to have on the health of the wife licensee.

The Stance of the Authority

[9] We have been appreciative of the reasoned submissions from Ms Pridgeon on behalf of the Authority about this impasse and now summarise them.

[10] In succinct submissions of 3 March 2014 Ms Pridgeon noted that on 7 February 2014 we had found that there were insufficient grounds to grant the licensees' application for interim non-publication but we had said that if there was *"convincing medical evidence ... available to support the applicants ..."* we would reconsider our decision. She acknowledged that we had since received medical evidence supporting the interim non-publication application. She noted we regarded it as compelling in favour of granting an interim non-publication order but we had sought

the views of the parties. Naturally, Ms Pridgeon sought on behalf of the Authority that it be given the opportunity to review the medical evidence. She inferred that, in such case, the Authority might be neutral on the application but that, without the opportunity to review it, the Authority is denied the opportunity to meaningfully respond. That is a fair and correct approach.

[11] In a further submission of 18 March 2014, Ms Pridgeon referred to our Registrar's 14 March 2014 email (sent on behalf of our Chairperson) informing counsel for the Authority that the medical evidence would be sent to counsel with a direction that it be held by counsel and not sent to the Authority and that the medical report would also be sent to the second respondent complainant on her undertaking that the report be kept strictly confidential to her and that any breach of those terms would be considered by us as contempt of Court.

[12] Ms Pridgeon again noted that the Authority cannot meaningfully address matters contained in the medical report, nor provide views as to its effect on the application for interim non-publication, without taking instructions from its client, the Authority. She put it to be unclear as to why the licensees have taken their position about keeping the content of the medical report as confidential as possible because she rejected any suggestion that the Authority might do something improper with the information. Accordingly she submitted that the medical evidence material should be served on the Authority so that she, as its counsel, can take instructions from the Authority in the usual way on the application presently before us for interim non-publication of the Committee's decisions. We think that Ms Pridgeon's stance is understandable and reasonable.

[13] By further helpful submission of 21 March 2014, Ms Pridgeon noted one of our Chairperson's comments about this situation where he put it by email: *"I understand very well Ms Pridgeon's difficulty in obtaining instructions. Frankly, I am finding this series of communications rather tiresome. I am becoming inclined to simply deal with the matter myself but Ms Pridgeon's professional view as to the notice I should take of the medical report would be helpful. After all, we are only considering an interim suppression in a concerning medical situation."*

[14] We accept, of course, that no party wishes to be unhelpful in any way.

[15] Ms Pridgeon then put it that the Authority submits that the notice we should take of the medical report is an orthodox one, namely:

> *"(a) The medical report is filed with the Tribunal and should be served on all other parties, or counsel for other parties.*
>
> *(b) If counsel is instructed by any of the parties, counsel must take instructions on their client's view as to the difference the medical report makes to the Tribunal's interim name suppression decision.*
>
> *(c) For the avoidance of doubt, the Authority accepts that in principle, medical evidence can be an important consideration in a decision on whether or not to grant interim name suppression. It may be that that once the Authority has had an opportunity to review the medical evidence, it would not oppose interim name suppression. However, the Authority would need to view the report to be able to take that position."*

Our View

[16] Our Chairperson is given various procedural powers and responsibilities under the Real Estate Agents (Complaints and Discipline) Regulations 2009 including *"making such arrangements as are practicable to ensure the orderly and expeditious discharge of the functions of the Disciplinary Tribunal"* – refer reg.17(a). However, the Chairperson feels that the ruling below should properly be made by us rather than solely by him.

[17] We take the view that there has been quite enough toing and froing through the Chairperson and Registry staff endeavouring to meet all parties' wishes if possible regarding extent of disclosure of the content of the medical evidence. At this stage, the substantive hearing is fairly imminent and we regard the content of the medical evidence as compellingly in favour of our granting the application for interim non-publication of the Committee's said decisions.

[18] Accordingly, that application is now granted and we order that the said Committee's substantive decision of 11 May 2012 finding the licensee guilty of unsatisfactory conduct and its penalty decision of 23 July 2012 not be published nor may any identifying details of the licensee be published in any way pending our dealing with the substantive appeal in due course as arranged.

[19] We emphasise that we know that staff of the Authority would display complete integrity and confidentiality in handling the medical report. However, we do not wish to over-ride the concerns of the (ill) wife licensee in this particular short-term situation.

[20] 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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Ms C Sandelin
Member