BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 46

READT 057/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN DARLING** of Dunedin, Company Director and Real Estate Agent
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**DAVID PENROSE**, of Queenstown, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at QUEENSTOWN on 28 March 2014 (with subsequent written submissions)

DATE OF THIS DECISION 24 June 2014

COUNSEL

Mr D R Tobin, Barrister, for appellant
Mr L J Clancy, for the Authority
Ms J Eckford and Ms A J Nash, for second respondent licensee

DECISION OF THE TRIBUNAL

Introduction

[1] John Darling ("the appellant") appeals against a 20 June 2013 decision of Complaints Assessment Committee 20002 (the CAC) to take no further action on one of the grounds of his complaint against David Penrose ("the licensee"). The CAC found the licensee guilty of unsatisfactory conduct in respect of the other two grounds of the complaint.

[2] By a 13 September 2013 decision on penalty, the CAC censured the licensee and fined him $2,000. It also accepted the licensee's offer to apologise to the complainants and requested a copy of the apology. The appellant also appeals these penalty orders.

Background

[3] The directors and shareholders of Anchorage Properties Ltd (the appellant and Ms Christina Murphy) retained the licensee as their real estate agent when listing that company's commercial property at 180 Glenda Drive, Dunedin, for sale in early 2012. The appellant confirmed those instructions by email in April 2012 indicating he would take $1.6 million for the property and that the rental paid by the tenant of the property was $125,000 plus GST per annum. The appellant seems to have later taken over the said complaint on behalf of Ms Murphy and their company.

[4] The complainants allege that the licensee did not provide them a signed agency agreement (i.e. a listing agreement) until July 2012, although the agency agreement was dated 10 April 2012. They also allege that the licensee did not provide a current market appraisal (CMA) when listing the property.

[5] On 4 April 2012 the vendor entered into a conditional agreement to sell the property for $1,550,000 plus GST. Settlement was fixed for 11 August 2012 and the agreement became unconditional on 21 May 2012. The licensee was paid $25,000 plus GST in June 2012 as half of the commission.

[6] In particular, the complainants also claimed that, about six weeks prior to settlement, the licensee spoke to the tenant of the property and was informed that the tenant was only paying $98,443.40 per annum in rent instead of $125,000 per annum in terms of the lease. The licensee had discussions with that tenant without contacting the complainants to confirm the relevant details.

[7] There was then a dispute between the complainants (on behalf of their vendor company) and the purchasers with regard to the rent. The complainants allege that this delayed settlement and caused them a loss of $150,000.

Relevant Statute Law

[8] Section 72 of the Real Estate Agents Act 2008 ("the Act") reads:

> *"**72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
>
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
>
> *(c) is incompetent or negligent; or*
>
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

[9] Rules 6.1, 6.2, 6.4, 9.1, 9.3, 9.6 and 10.2 of the Real Estate Agents (Professional Conduct Client Care) Rules 2009 read:

> *6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.*

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

...

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

...

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

9.6 An advertised price must clearly reflect the pricing expectations agreed with the client.

...

10.2 A licensee must ensure that prospective clients and customers are aware of these procedures before they enter into any contractual agreements.

The CAC Decision of 20 June 2013

[10] The licensee admitted that an agency agreement was not in place prior to beginning the selling process. The licensee had received an email on 10 April 2012 from the appellant authorising him to sell the property and stating that the licensee should take that as an authorised general agency at the normal commission rate. An agency agreement was emailed by the licensee to the complainants on 27 July 2012 and was signed and returned on 30 July 2012.

[11] The Committee found that the licensee's failure to have an agency agreement in place prior to beginning the selling process constituted a breach of Rule 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. The licensee has not appealed against this finding.

Current Market Appraisal

[12] The licensee also admitted that no CMA for the property was submitted by him to the vendor. However, he stated that he did not believe that the complainants expected this to be carried out for them, given their previous working and social relationship with him. The CAC found that the licensee breached Rule 10.2 of the Rules. Again, this finding is not under appeal.

Rental Income

[13] The complainants alleged that two weeks prior to settlement the licensee spoke to the current tenant of the property who informed him that he was only paying $98,443.40 per annum in rent instead of $125,000 per annum, seemingly, as required by the lease.

[14] While the CAC questioned why the licensee did not contact the complainants for an explanation, it found that the licensee acted appropriately in alerting the other parties to the apparent misrepresentation as he was required to do under rule 6.4 and 9.1.

The 13 September 2013 Penalty Decision of the CAC

[15] The appellant submitted that the following orders be made against the licensee, namely; that the licensee refund fees paid by the complainants; and that the licensee compensate the complainants for the $25,000 (plus GST) commission already paid to the licensee and monetary compensation towards the basic loss that they have incurred (total $150,000 reduction in price plus penalty interest).

[16] The licensee submitted that given he acted in good faith, the CAC should consider not imposing any further penalty.

[17] The CAC rejected the complainant's request for compensation and a refund of fees/commission charged, having concluded that the licensee acted appropriately in alerting the purchaser to the apparent misrepresentation as he was required to do under the said client care rules. It imposed the penalties set out in paragraph [2] above on the basis of the licensee's failures regarding the listing agreement and the current market appraisal.

Relevant Evidence Adduced to us

The Evidence of the Appellant

[18] The main witness for the appellant was its proprietor, the said appellant, Mr J A L Darling of Dunedin, who is an experienced property investor and is a real estate licensee. His evidence is quite detailed and he was extensively cross-examined. He covered the history of his acquiring the property and settling its purchase on 1 April 2009. A new lessee occupied the premises from April 2010 at an annual rental of $125,000 per annum payable by monthly payments of $11,718.75. Mr Darling said that the first hint of any difficulty with the rent came in September 2010 when a director of the lessee requested that the rent be reduced to $84,000 plus GST per annum but related to the next six months. The lessor declined that request due to its commitments to its bank.

[19] The rent was due to be reviewed as at 27 February 2011. On 9 June 2011 the appellant received an email from the director of the lessee providing a rental valuation for the property at $98,443.40 per annum plus GST and advising that the lessee could not sustain what it regarded as the then current inflated rent. The lessor declined to reduce the rent and provided a valuation report showing that the market rent remained $125,000 per annum plus GST.

[20] However, the appellant then stated that, notwithstanding his stance towards the lessee's request, the lessee began paying rental at the rate of $98,000 per annum plus GST. The appellant said he did not understand these emails to be invoking the rent review clause but thought this was a case simply of a lessee complaining. The appellant then stated:

> *"24. While the tenant appeared to have got away with paying the lower rate of rental at all times Guy Shallard [the director of the lessee] was aware that the properly payable rental was $125,000. For example, in an email dated 16 November 2011, I asked Guy whether he had any interest in purchasing the property. The reason I asked was because at that time we were pursuing other business opportunities and Guy, in an earlier email in September 2010, had asked whether we would be interested in selling.*

25. In my email of 16 November 2011, I specifically stated that the current rental was $125,000 per annum. Although Guy did not take me up on my offer, in his reply email of 28 November, he did not dispute or query my statement that the current rent was $125,000.

26. Also, I never accepted that the lesser payments were in satisfaction of the full rent and throughout this period until the property was sold we continued to invoice for rental at the old rate of $125,000 per annum plus GST, plus we made demands for unpaid rental.

27. At the time, I think I had about 150 commercial tenants. There were several who were seriously in default for large amounts of money. By comparison, Mr Shallard was a relatively minor problem. In hindsight, I probably did not chase him as much as I could have, but payments were actually coming in on a monthly basis.

28. We decided to sell the property in February 2012 basically because we were over geared with the bank. We had found an opportunity to buy a building in Dunedin. The bank thought that we were over exposed and said that if they were to fund the purchase, we would have to sell 180 Glenda Drive.

29. In February 2012 I emailed David Penrose asking him if he would be interested in listing the property for sale. ...

[21] The appellant said that, in the course of instructing the licensee to market the property, he had said to the licensee that the vendor would take $1.6 million for the property and that the rent was $125,000 plus GST per annum plus all outgoings and the appellant considered that was a fair market rent for that type of property.

[22] As covered above, on 4 April 2012 the appellant company entered into an agreement to sell the property for $1,550,000 plus GST with settlement due for 11 August 2012 and the agreement was subject to due diligence. The agreement became unconditional on 21 May 2012 and in June 2012 the second respondent was paid $25,000 plus GST being half of the commission.

[23] The appellant then expressed his concerns that the licensee did not provide the vendor with a written appraisal on the property nor with an agency agreement until July 2012. He pointed out that was well after the selling process had begun and after the licensee became aware that the sale might not proceed because of apparent issues over the rent. The appellant stated, inter alia, that he felt that the licensee had not acted in his best interests and did not tell him for over three weeks (i.e. for the period 26 July 2012 to 22 August 2012) that the tenant had spoken to the licensee about the rent being $98,000. The appellant then stated:

"39. My main concern is that Mr Penrose not only failed to act in my best interests, as my agent, but actually went behind my back and gave false information to the purchaser.

40. I did not know at the time that Guy Shallard had telephoned Mr Penrose and told him that the rental was actually only $98,000 per annum plus GST.

41. Instead of asking me about this, Mr Penrose told this to the purchaser."

[24] The appellant is of the view that the licensee's actions were a direct cause of the purchaser's solicitors coming back to the appellant and demanding a reduction in the purchase price. He had his solicitors endeavour to explain to the purchaser that there had been no misrepresentation and that the rental was and always had been $125,000. However, the purchaser would only settle if the price was reduced.

[25] The appellant said that he was in a difficult position and had committed to purchase a property in Dunedin and needed to sell the Queenstown property. He said the end result for the vendor company was that it was forced to sell the property, which it regarded as worth $1.55 million and rented it out at $125,000 per annum, at the reduced price of $1.4 million or an immediate loss of $150,000. The appellant then stated:

> *"52. If David Penrose had taken the time to contact me, his client, before he took it upon himself to speak to the purchaser, I could have easily clarified the position. I would have explained that while the tenant had, in June 2011, requested a reduced rental, our response had been to dispute that request and to clearly specify that the rent properly payable under the lease was $125,0000 per annum plus GST. There had, therefore, been no rent review.*
>
> *53. I would have further explained to David that although the tenant had been getting away with paying rental at a lower rate, we continued to invoice for the full and properly payable rental under the lease. Indeed, on occasions the tenant paid the full amount of rental payable under the lease."*

[26] The appellant completed his evidence-in-chief as follows:

> *"57. The first time that I became aware that David Penrose gone behind my back to speak with the purchaser was on 22 August 2012, nearly two weeks after the sale was supposed to have settled. He contacted me by telephone and said something to the effect that "the rent did not add up". He then actually accused me of being dishonest. My response to this was of utter amazement. I took offence at his comments and felt that he was trying to defend his actions.*
>
> *58. The sale eventually settled at the end of September 2012. As I have said, we had to reduce the price by $150,000 plus we had to pay an $8,000 penalty to the bank. This would not have happened had David Penrose clarified matters with me, as he should have done. I would have explained to him that there had been no rent review, that the rent determination procedure had not taken place, that the proper rental payable under the lease was $125,000, and that there was no shortfall or misrepresentation.*
>
> *59. Instead, David Penrose told the purchaser that the rent was incorrect; I was not given the opportunity to clarify the position with the result that Anchorage lost considerably on the sale.*
>
> *60. On 6 September 2012 David emailed me acknowledging that the sale was "messy" and that he felt that he had let me down. I replied by email on 7 September 2012 agreeing that the sale was messy and that the reason for that was because he had not kept us in the loop about his conversations with the tenant and purchaser."*

The Evidence of the Licensee

[27] The licensee gave evidence consistent with the facts covered above. He admits that he did not prepare an agency agreement when instructed to sell the property on 10 April 2012; but noted that the appellant's email of that date authorised him to proceed and stated *"take this as an authorised general agency at my normal commission rate"*, and the appellant was a licensed real estate agent, so that the licensee (Mr Penrose) focussed on marketing the property rather than preparing a formal listing agreement.

[28] The licensee noted that the purchaser was keen to purchase the property but that the current rental income from it was extremely important to him. An agreement for sale and purchase was entered into on 4 May 2012 with settlement due on 11 August 2012. The deposit was paid on 24 May 2012. The licensee stated that on 26 July 2012, for the sake of completeness (he puts it), he sent an agency agreement to the appellant dated 10 April 2012 as the date he had accepted instructions to sell the property and, he said, the point of doing that *"was to confirm the position regarding our agency's commission"*.

[29] The licensee stated that, at the end of July 2012, he received a telephone call from the director of the lessee who told the licensee that he thought the purchaser should know that the lessee was not paying the full rent of $125,000 per annum. The licensee said that, because he then totally believed in the appellant's integrity, he believed the rent would have been $125,000 per annum, despite what the lessee had told him, but he thought he should pass the allegation on to the purchaser's solicitor and leave it to that solicitor to investigate whether the lessee was correct.

[30] On 22 August 2012 the licensee advised the appellant of that development and the appellant's response was that he was not personally aware of any rent shortfall as his staff dealt with such matters.

[31] The licensee then stated that he believes the appellant deliberately misrepresented the amount of rent in order to obtain a higher purchase price. The licensee points out that it would have been in his (the licensee's) interests for the vendor to achieve a higher purchase price in terms of the rate and amount of real estate agents' commission but he states in his evidence-in-chief: *"However, I considered that I had a duty to notify the purchaser's solicitor of the possible reduced rent being paid pursuant to Rule 6.4 of the Real Estate Agents Conduct of Conduct"*.

[32] Under cross-examination from Mr Tobin, the licensee insisted that although, with hindsight, he can see that when he heard from the lessee about the rent being paid being lower than $125,000 per annum, it would have been prudent for him to have contacted the appellant or his solicitor at the time, it did not occur to him that he might be discrediting the appellant and he simply felt he had a duty to let the purchaser know the allegation. He said that by the time about three weeks had passed he ascertained from the purchaser's solicitor the concern of the purchaser which he had not expected. Accordingly, he telephoned the appellant to warn him of the position thinking that the lessor's staff had failed to collect the correct rent.

[33] Again, when cross-examined by Mr Clancy the licensee stated that, with hindsight, he should have immediately telephoned the appellant about the allegation made by the tenant on 26 July 2011 but he did not because he never doubted the appellant and so did not believe the tenant could be correct. He again added *"on reflection it would have been wise of me to advise Mr Darling immediately but at the*

time I did not think the allegation was serious and I did not think there could be anything in it". He again said that it was only when he found that the issue was likely to cause difficulties from the purchaser that he telephoned Mr Darling on 22 August 2012 and advised him of the telephone call he had had from the tenant on 26 July 2012.

The Stance of the Appellant

[34] The essence of the appellant's complaint is that the licensee should not have disclosed to the purchaser's solicitor the tenant's claims about rental without first seeking clarification from his client vendor company and that, having done so, the licensee had a duty to inform his vendor client of what he had done.

[35] Of course, it was stressed for the appellant that the allegation of the tenant about the quantum of rent was vital to the sale and its price. It was stressed that, as at 26 July 2012, there had been plenty of time for the vendor (through the appellant) to clarify the situation with the purchaser, and indeed the tenant, had he known of the tenant's call to the licensee on 26 July 2012.

[36] It is put for the appellant complainant that the CAC failed to recognise the gravity of the licensee's actions in talking to the purchaser's solicitor without first seeking clarification from the appellant on behalf of the vendor, and that this was a significant breach of the Rules which has caused considerable financial loss to the vendor company. Accordingly, it is submitted for the appellant that the CAC should also have made a finding of unsatisfactory conduct on that ground against the licensee and, by way of penalty, ordered that at least the licensee refund the commission paid and also pay compensation *"for the significant losses his breach caused to his vendor"*.

[37] Counsel for the appellant developed the above themes in some detail and with reference to various case authorities. We agree that a fundamental issue is whether the licensee breached his fiduciary duty to Mr Darling as his client. We prefer to focus on the facts of this particular case.

[38] Counsel for the appellant also submits that failure alone is unsatisfactory conduct under s.72(a) and (b) of the Act at a serious level. The appellant seeks a order from us for the refund of the $25,000 commission share referred to above; that the balance of the commission not be paid; that the licensee apologise to the appellant forthwith; that the licensee be censured; that the licensee be fined $10,000; and that there be an order for costs in favour of the appellant.

[39] In the course of final submissions Mr Tobin submitted that, as a result of the said failure by the licensee, the purchaser was able to ambush the appellant on the day of settlement with an allegation of misrepresentation and, ultimately, obtain a significant reduction in the purchase price of the property.

[40] Mr Tobin also points out that had the licensee immediately advised the tenant's allegation to the appellant and then disagreed with the appellant's reaction to that, it would have been the licensee's duty to cease to act rather than go behind his client's back and advise the purchaser's solicitor of the tenant's allegations about the correct amount of rent payable by the tenant.

The Stance of the Second Respondent Licensee

[41] We appreciate the detailed and oral submissions from counsel for the licensee as we do those from both other counsel in this case.

[42] It is put that the licensee was unfortunately caught up in the appellant's attempt to deliberately mislead the purchaser as to the yield of the property and that the appellant had deliberately tried to keep the purchaser at arm's length from the tenant because he was aware that there was an unresolved rent review instigated by the tenant's email of June 2011. There was reference to the appellant having admitted that he had not chased up the tenant as much as he could have about underpaid rent. Inter alia, it is put for the licensee that the appellant's explanation that there was no misrepresentation, and that the rent was $125,000 per annum plus GST, is disingenuous because the rent payable and the amount of rent being paid were not the same so that the rental position had been misrepresented to the purchaser.

[43] While we value the very detailed typed and oral submissions on behalf of all parties, because of our own clear assessment of the situation we do not need to deal with them in such detail. Indeed, we cover Mr Clancy's submissions in our discussion below.

[44] Counsel for the licensee submitted, inter alia, that the licensee of a real estate agency must regularly face difficulties in balancing duties to the client with those of other parties. It is put that, in this case, the licensee was merely putting the purchaser on an even footing with the appellant about rent for the property; and that the licensee had a duty to pass the tenant's allegation on to the purchaser whether or not he believed it; and that the best person to investigate the allegation was the solicitor for the purchaser. The licensee also takes the view that the adverse circumstances which arose for the appellant vendor were entirely its own fault in misrepresenting to the purchaser the rental position of the property.

[45] In the course of final submissions, counsel for the licensee state: *"The respondent has also admitted that, with hindsight, it would have been good practice to inform the appellant of his intended telephone call to the purchaser's solicitor. Such an admission does not, however, amount to an admission of the breach of the Rules. The respondent's actions were entirely in good faith and in complete compliance with his relevant duties"*.

DISCUSSION

[46] There is a dispute between the parties as to whether the information provided by the complainants to the licensee and the purchasers about the rent was incorrect, misleading, or amounted to a misrepresentation.

[47] If we find, as a matter of fact, that the purchasers were provided with incorrect/misleading information, then the question becomes whether the licensee was in breach of his duties under the 2009 Rules in providing further information to the purchaser to correct any misleading impression, without the authority of his vendor client.

[48] Rule 6.4 of the 2009 Rules (also set out above) provided: *"A licensee must not mislead a customer or client, nor provide false information, nor withhold information*

that should by law or in fairness be provided to a customer or client." "Customer" was defined in Rule 4.1 to include potential purchasers.

[49] Licensees are required by the Rules to balance duties of disclosure to purchasers with duties owed to vendor clients. That balance may not always be straightforward in practice. For example, where a client directs the withholding of information which the licensee considers should be disclosed to a purchaser, the licensee must not continue to act for that client; refer the 2009 Rules, Rule 6.6; Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, Rule 10.8.

[50] In *Henton v Real Estate Agents Authority & Barfoot & Thompson Ltd & Wallace* [2014] NZREADT 2, a case involving a salesperson passing on an email to a purchaser without the authority of the vendor, we found at paragraph [65]:

> *"Despite the overall conclusions were come to as set out below, we feel that, at least with hindsight, Ms Wallace as the vendor's agent could have been expected to have first contacted Mr Henton [the vendor] before passing the email on to the purchaser. However, we find that, in all the circumstances, her failure to do so does not meet the threshold of unsatisfactory conduct as defined in s.72 of the Act; nor does it breach any rule in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. It would have been a breach of Rule 6.4 if she had not passed on to the purchaser the content of the 19 December 2011 email because that comprised information urgently needed by the purchaser. Nevertheless, she would have been wise to at least have told Mr Henton of the content of the email before she passed it on to the purchaser and, preferably, to have conferred with Mr Henton before doing so"*

[51] The Authority submits that, on the particular facts of this present case, it was open to the Committee to find that the licensee acted appropriately in alerting the other parties to the issue regarding the rental income. We can accept that.

[52] However we consider that, upon receiving the telephone call from the tenant about the state of rental on 26 July 2012, the licensee (Mr D Penrose) should have immediately telephoned the appellant, as effectively his client, for an explanation and clarification. If at that point he had felt that there had been a misrepresentation by his client to the purchaser, then he would have needed to withdraw from acting further on the sale transaction.

[53] We find that the licensee's failure to so inform the appellant is unsatisfactory conduct. It is not only a breach of the 2009 Rules (particularly rules 6.4 and 9.1) but it falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (in terms of s.72(a)); and would reasonably be regarded by agents of good standing as being unacceptable in terms of s.72(d) of the Act. We would hesitate to say that it shows incompetence or negligence in the circumstances but, in terms of s.72(b) it does contravene the Rules. In fairness to Mr Darling, the licensee should have promptly told him of the content of the tenant's telephone call and it was not in the vendor's interests for the licensee to have failed to do that. However, we take into account that the licensee believed in Mr Darling's integrity and did not accept that the tenant could be correct.

[54] At material times, the licensee believed that the appellant would not be in any compromised position over the rental issue. This meant that he did not foresee that his disclosure of the tenant's allegation to the purchaser's solicitor could create a problem and, certainly, not financial loss to the vendor. In many ways the licensee

did not give sufficient thought to the advice/allegation he had received from the lessee. Frankly, it is difficult to regard as credible that the appellant was unaware that rent was being significantly underpaid and the reasons for that.

[55] However, at material times the licensee was the agent of the appellant and his company. The Rules of disclosure requirements do not override the proper reporting by an agent to a principal and require an understanding of the full picture.

[56] When we stand back and look objectively at the facts of this case, we conclude that the CAC was correct to find unsatisfactory conduct by the licensee for the reasons it gave; and that it was also unsatisfactory conduct by the licensee to fail to promptly raise the content of the tenant's telephone call with Mr Darling. We emphasise that the licensee did not knowingly give any false information to the purchaser's solicitor. He was unaware of the correct rental position and that the rental had been misrepresented to the purchaser. He could not have known whether the tenant's advice to him by phone was correct or not. Accordingly, he should have promptly clarified the position with Mr Darling as his instructing client rather than passing on the tenant's information to the purchaser's solicitor and leaving that solicitor to sort out the rental issue but with Mr Darling unaware of that.

[57] We think that penalty is best now treated as a separate issue to be handled by a series of succinct written submissions from each party. We direct the Registrar to arrange a telephone conference with our Chairperson to arrange that.

Name Suppression

[58] Counsel for the licensee have also made submissions that there be no publication of the parties' names in our decision (because they seek name suppression for the licensee) regardless of whether there are findings against him. They refer to the wording of s.108 of the Act. They note that we have ordered interim suppression and they stress that public knowledge of a complaint can badly affect business for an agent.

[59] Counsel for the licensee accept that the starting point for us must be the openness of the proceedings to the public. However, they submit there are no real public interests factors in this case given the specificity of the facts and, put it that in any case, any such interest could still be met by the parties not being identified by our decision. It is accepted that our decision on the substantive matters will be relevant. They then put it as follows:

> *"[12] In S v Wellington District Law Society, a case involving disciplinary action against a solicitor, the full bench of the High Court noted that the purpose of the disciplinary proceedings was to protect, "the public, the profession and the Court." There was no requirement to prove "exceptional circumstances" and the public interest must be balanced with the interests of the practitioner.*
>
> *[13] The likely disadvantage to the respondent must be balanced with the following factors, as provided in his evidence:*
>
> *(a) Mr Penrose was acting in good faith at all times;*

(b) Changes in Mr Penrose's office procedures since the circumstances of this claim to ensure an Agency Agreement and Comparative Market Analysis are provided prior to listing;

(c) Mr Penrose's admission that with hindsight he should have telephoned his client prior to contacting the purchaser to avoid any confusion;

(d) Mr Penrose has also already been adversely affected by this claim, not just in these proceedings, but in having to restore confidence with the purchaser, a long-standing client;

(e) Mr Penrose's otherwise unblemished career since 2009, with no other finding of misconduct, and as an Associate Member of the REINZ; and

(f) The difficult balance Mr Penrose found himself having to deal with as a result of the appellant's misrepresentation.

[14] The respondent submits that the potential harm to the appellant significantly outweighs the public interest knowledge of the parties' identities and that the parties' names should not be published."

[60] In terms of the licensee seeking a non-publication order of this decision, Mr Tobin seems to agree with Mr Clancy's submissions, which we cover below, and will abide our order on that point.

[61] Proceedings before us are generally open to the public and may be reported on. Under s.108 of the Act we may, however, make orders restricting publication of, among other things, the names of persons involved in proceedings.

[62] We considered the principles relevant to applications under s.108 in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02. There we held that we had the power to make non-publication orders on appeals from decisions of Complaints Assessment Committees and we set out the principles to consider when determining whether to make such orders. Relevantly, we relied on *Lewis v Wilson & Horton Ltd* where Her Honour Elias CJ said at paragraph [41]:

> *"In R v Liddell ... the 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]

[63] We went on to consider whether those principles were applicable to disciplinary proceedings. 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 Practitioner's Disciplinary Tribunal* HC Auckland AP 21-

SW01, 5 December 2001; and *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.

[64] More recently, in *W v The Real Estate Agents Authority* (CAC 20004) [2014] NZREADT 9 at [17] we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act.

[65] As regards the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013] NZREADT 51, we confirmed that at paragraph [10]:

> *"... we are not in a position to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media."*

[66] Mr Clancy submits (for the Authority) that the application for suppression in this case is too vague to support the grant of an order and that no evidence has been filed to suggest that publication would have any impact on the licensee's business. We agree.

[67] It cannot be that a mere fear that publication might impact a licensee's business is enough to rebut the presumption in favour of openness. If that was the case, virtually all licensees appearing before us would be granted an order prohibiting publication of their name.

[68] There is a public interest in openness in judicial proceedings, whatever the facts of the particular case, and that interest is not outweighed by any agreement between the parties as to restricting publication. Where parties bring disputes before Complaints Assessment Committees and/or us, that must be on the basis that they are engaging in a public and open process and their names may be reported subject to good reasons for an order restricting that.

[69] We agree with Mr Clancy that the reasons advanced in the current case are insufficient to rebut the presumption in favour of openness, and that the application for an order restricting publication should be declined. We dismiss that application.

[70] 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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Mr G Denley
Member

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Ms N Dangen
Member