

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 5

READT 039/13

IN THE MATTER OF

an application to review under
s.112 of the Real Estate Agents
Act 2008

BETWEEN

LUKE DOMB

Applicant

AND

**THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY**

Respondent

MEMBERS OF TRIBUNAL

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

HEARD at WELLINGTON on 11 November 2013

DATE OF THIS DECISION

24 January 2014

COUNSEL

Mr L H Pratley, Barrister, for the applicant
Mr L J Clancy for the Registrar

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Luke Domb (“the applicant”) applies to us for a review of the Registrar’s 18 June 2013 determination refusing to renew his licence as a real estate agent. The Registrar made the determination following the applicant’s refusal to consent to disclosure to the Registrar by the New Zealand Police of any information relating to the applicant, other than criminal conviction information.

[2] On 4 July 2013, the applicant consented to disclosure of any information held by the Police so that the Registrar subsequently agreed that the applicant’s licence would be active pending a decision on renewal once any information was provided by the Police and considered.

[3] As a result of the applicant’s 4 July 2013 consent, information was received from the Police. The Registrar requested that the applicant provide information and comment on the Police information on 10 September 2013, and he has done so.

Having considered all this material, the Registrar has decided to renew the applicant's licence.

The Issue

[4] The present review is, therefore, concerned with a point of principle regarding the form of consent required by the Registrar to be signed by a licensee. However, the issue is important for annual renewals of licence for the applicant and for other real estate agents.

[5] It is put by Mr Clancy that this case concerns the Registrar's ability to make properly informed decisions about the fitness and propriety of an applicant for a licence, and that this is no less than consumers and industry members would reasonably expect.

[6] Mr Clancy submits that the Registrar has not sought consent to disclosure of information beyond the scope of that which is permitted under the statutory scheme; that the statutory scheme does not prohibit the Registrar from amending standard forms, provided the effect of any amendment is not to go beyond the scope of that which is permitted under the statutory scheme; and, here, the Registrar's amendment was fair in properly putting applicants on notice of the information sought.

[7] Mr Clancy also puts it that the mere fact the Registrar receives information is not prejudicial; it is how the Registrar uses that information which is potentially prejudicial, if the Registrar acts unfairly or reaches a conclusion based on the information which is plainly wrong; and applicants are protected in such circumstances with a right of review to us, as with all decisions of the Registrar.

[8] Mr Pratley's basic submission is that there is nothing in that Act or Regulations which enables or empowers the respondent Registrar to self-prescribe or amend the wording of a statutory form.

The standard form (Form 7)

[9] Section 52(1) of the Real Estate Agents Act 2008 (*"the Act"*) provides that licensees must apply to renew their licence before it expires. A renewal application is made to the Registrar *"in the prescribed form"* and the prescribed fee must accompany it. Sections 36 (entitlement to licence), 37 (persons prohibited from being licensed), and 43 (Registrar to license applicant or decline application) of the Act apply to the renewal application, subject to s 52(3) (compliance with continuing education), which is irrelevant for present purposes. In practice, such licences are renewed annually.

[10] Section 36 contains prerequisites to a person being licensed as an agent, branch manager, or salesperson. One of these prerequisites is that the person must satisfy the Registrar that he or she *"is a fit and proper person to hold a licence"*.

[11] Section 37 prohibits certain classes of persons from being licensed, including persons with dishonesty convictions of less than 10 years old.

[12] Section 43 prescribes when the Registrar must grant a licence. For present purposes, it is relevant that licences must be granted if the Registrar is satisfied that

the applicant is entitled to a licence under s 36, which includes the fit and proper person test, and is not prohibited from being licensed under s 37,

[13] Section 156 of the Act grants the Governor-General power (by Order in Council), to make regulations for (among other things) prescribing the form, manner, or content of applications ... required under the Act” (s 156(1)(c)). Pursuant to s 156, the Governor-General issued the Real Estate Agents (Licensing) Regulations 2009 (“the Regulations”) on 28 September 2009.

[14] Regulation 5 of the Regulations is entitled “Transitional forms”, indicating that the specified forms, all contained in Schedule 1 of the Regulations, are to be used when a licensee makes one of the specified applications for the first time under the Act. This is the position explained in the explanatory note to the Regulations and the first note at the end of Form T1 in Schedule 1.

[15] Regulation 6 of the Regulations provides that “The forms in Schedule 2 specified in the first column of the following table must be used in respect of the matters specified in the third column”. The first column refers (*inter alia*) to Form 7 (“the standard form”) and the corresponding third column states that it is to be used for applications for renewal of an agent’s licence issued to an individual, a branch manager’s licence, or a salesperson’s licence. The Schedule 2 forms are used for second or subsequent applications.

[16] Also relevant is the first note at the end of Form T1 contained in Schedule 1 of the Regulations. Form T1 is the transitional form for a licensee’s first licence renewal application after the Act coming into force. That note 1 provides:

“1. This form must be used to renew for the first time a licence that was originally issued under the Real Estate Agents Act 1976 and that is deemed by section 166 of the Real Estate Agents Act 2008 to be a licence under that Act. Form 7 must be used for all subsequent licence renewals.”

[17] The “*Explanatory Note*” to the Regulations “*is intended to indicate their general effect*”. It provides (*inter alia*):

“The forms in Schedule 1 must be used to renew, for the first time, a licence or certificate of approval that was originally issued under the Real Estate Agents Act 1976 and that is deemed by section 166 of section 167 to be a licence under the Act. The schedule that contains these forms will automatically expire on 31 March 2010, by which date all deemed licences will have either been renewed or lapsed. After the initial renewal of a deemed licence using the appropriate form in Schedule 1, licensees must then use form 7 in Schedule 2 for all subsequent applications to renew their licence.”

[18] The section of the standard form (Form 7) relevant to the review before us is its final paragraph under the heading “*Consent and certification*”. It requires an applicant for licence renewal to:

“... consent to the making of inquiries to, and the exchange of information with, the authorities in New Zealand or in any participating jurisdiction regarding matters relevant to this application.”

The Registrar's form

[19] The Real Estate Agents Authority has amended the standard form (Form 7). It is the Registrar's form, as opposed to the standard form, which licensees are required to fill out and sign for a renewal application.

[20] Mr Domb was asked (*inter alia*) to complete and sign the Registrar's version of Form 7 under the heading "Consent and Certification" on page 4 of the Registrar's form. He was required to agree to the following:

On page four of the Registrar's form:

"I authorise disclosure to the Real Estate Agents Authority by New Zealand Police of ANY information that may be held by Police, including any interaction I have had with Police in any context or any information received by Police. I understand that this is not limited to conviction information."

[21] There is also a "Consent to Disclosure of Information" form as part of the Registrar's version of Form 7 although it is additional to the statutory Form 7. The applicant was required to agree to the matters contained in this form. Upon receiving an application, the Authority sends the form to the NZ Police. The Consent to Disclosure of Information form required the applicant to insert personal details, and again to agree to authorise disclosure to the Authority by the NZ Police of:

"... ANY information that may be held by Police, including any interaction I have had with Police in any context or any information received by Police. I understand that this is not limited to conviction information."

Where that information relates to any record of criminal convictions I might have, I understand that it will automatically be concealed if I meet the eligibility criteria stipulated in Section 7 of the Criminal Records (Clean Slate) Act 2004."

The Registrar's decisions

The applicant refused to sign the Registrar's form provided to him without altering what information he agreed the Police might release to the Registrar. He would only allow disclosure by the Police of any conviction information about him, and nothing more.

[22] Upon receiving the form as altered by the applicant, a licensing administrator wrote to the applicant informing him of a requirement under s 36 of the Act that the Registrar had to be satisfied that a person is "a fit and proper person to hold a licence". The applicant was informed that meeting this test requires disclosure of information wider than a licensee's recorded criminal convictions. He was told that without the information sought, the Registrar may not have all the sufficient evidence to establish that the applicant was a "fit and proper person". He was invited to file an unaltered consent form before the Registrar considered the decision, but refused to. The licensing administrator informed the applicant that his application would be processed on the limited consent form provided by him.

[23] The applicant referred the matter to the Ombudsman, but the Registrar was not prepared to await that ruling before processing the renewal application. The licensing administrator explained to the applicant that the consent form he was

required to sign was one recommended by the NZ Police for use by organisations requiring licensing-related information. The administrator put it to him that the wording in the standard form is in fact *wider* than the wording contained in the Registrar's form which he was required to complete unaltered.

[24] On 18 June 2013, in a detailed letter, the Registrar declined Mr Domb's application for a licence renewal. That letter put it that while the applicant met the statutory requirements under s 37 (including that he did not have relevant convictions), the Registrar could not be satisfied on the information provided that he met the statutory test under s 36(c) of being a "fit and proper person to hold a licence". It was also put that the legislation directed the Registrar to consider more information than just criminal convictions; and a person may not be prohibited from holding a licence under s 37, but may nevertheless not satisfy the Registrar that he or she is a fit and proper person, refer to *Reville v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41 at [9]; *Mason v The Real Estate Agents Authority* [2013] NZREADT 7.

[25] As noted above, the Registrar subsequently agreed that the applicant's licence could be active pending renewal once he provided the consent in the Registrar's form. The Registrar's initial decision was therefore superceded. As also noted above, the Registrar has subsequently approved Mr Domb's application, having had the benefit of considering information from the Police and information from the applicant about that.

Mr Clancy's submissions for the Registrar

[26] Mr Clancy noted that Mr Pratley, counsel for the applicant, has raised two principal points. First, Mr Pratley submitted that the Registrar cannot use a form other than the standard Form 7 because it would not be the prescribed form; and that by requesting Mr Domb to fill out the Registrar's version of Form 7, the Registrar acted unlawfully.

[27] Mr Clancy puts it that Mr Pratley's second submission is related to his first. It is that the Act and Regulations do not impose a requirement on a licence renewal applicant to allow disclosure of "any interaction" the applicant has had with the NZ Police or "any information received by Police". Mr Pratley submits that by requiring this, the Registrar is embarking on "a fishing expedition to find out all that it can that may possibly be of interest" and the standard form does not permit this.

[28] It is submitted for the Registrar that alteration of the standard form is permitted upon a proper reading and interpretation of the Regulations.

[29] Mr Clancy puts it that Regulation 6 (when read in the context of reg 5), the note at the end of Form T1, and the Explanatory Note to the Regulations outlined above states that the standard form *must* be used for all subsequent applications to renew a licence. However, Mr Clancy submits for the Registrar that the direction to use the standard form is aimed at distinguishing between licence renewal applications made for the first time after the 2008 Act came into force (first renewals), and applications made subsequent to the first renewal application under the 2008 Act (subsequent renewals). The Regulations direct that Form T1 must be used for first renewals, whilst the standard form (Form 7) is to be used for subsequent renewals. The Registrar submits that this direction is not focussed on ensuring that exact replicas of the standard form or Form T1 are used in all licence renewal applications. Rather, it

is aimed at ensuring that versions of each of the forms are used, depending on whether it is a first or subsequent renewal application.

[30] The Registrar accepts that alterations to the standard form must not have the effect of requiring disclosure of information that cannot be required under the standard form. However, the Registrar submits that alterations are permissible provided they seek to clarify what can already be obtained under the standard form. For example, the Registrar submits that it is lawful to narrow the standard form so as to fairly put an applicant on notice as to exactly what information is being sought; and that is in fact the case with the Registrar's version of Form 7 now under review by us.

[31] The standard form (under the heading "*Consent and Certification*") requires applicants to consent to "*the making of inquiries to, and the exchange of information with, the authorities in New Zealand or in any participating jurisdiction regarding matters relevant to this application*". We agree that it is a wider consent to disclosure provision.

[32] The Registrar's form requires applicants to consent to disclosure by NZ Police of any information that may be held by Police, including any interaction the applicant has had with Police in any context, or any information received by Police. Applicants are fairly put on notice that this is not limited to conviction information. The Registrar submits that rather than being a "fishing expedition", the requirements in the Registrar's version of Form 7 are in fact a narrower version of what the Governor-General permits in the standard form; and that if anything, applicants are put on notice of the exact New Zealand authority that enquiries are to be made of, as well as the scope of those enquiries.

[33] The information from NZ Police required by the Registrar is not limited to conviction information. The Registrar is required to have all information before him/her in order to make a decision that a person is "fit and proper". Section 36 of the Act does not limit the "*fit and proper*" test to information about an applicant's criminal convictions only. The scope of s 36 is wider than conviction information as we have recognised in *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41 at [9]; and *Mason v The Real Estate Agents Authority* [2013] NZREADT 7. The Registrar's standard form does not itself limit enquiries to be made of criminal conviction information. It is much wider than this.

[34] Mr Clancy submits that, ultimately, the issue in this case is the Registrar's ability to make properly informed decisions; and that just because the Registrar receives information from NZ Police, does not mean that the decision which the Registrar makes will necessarily be adverse to an applicant, as this case shows. Mr Clancy adds that the Registrar's version of Form 7 did not result in Mr Domb being unable to work as an agent between 18 June 2013 and 5 July 2013; but Mr Domb brought that consequence upon himself when he refused to provide the Registrar with all information necessary to make a properly informed assessment of whether he is a fit and proper person to hold a licence. That is a very moot point.

[35] For the reasons outlined above, the Registrar submits that this review application should be dismissed and that the Registrar has not acted unlawfully.

A Summary of the Applicant's Case

[36] Mr Pratley noted that the applicant has been a real estate agent in a large Wellington suburb since 2001. This case does not concern his conduct in any way but has come about because he objects to the Registrar amending the said Form 7. He believes that the Registrar's insistence that he sign an amended version of that Form 7 was unlawful and that the Registrar's refusal to consider the applicant's application for renewal of his agent's licence in the usual way, unless he completed and signed that amended version of Form 7, is unlawful and *ultra vires*.

[37] The applicant simply seeks that the determination of the Registrar set out in her letter of 18 June 2013 be reversed or modified, together with any other consequential orders we may think fit.

[38] We can understand that, eventually, the applicant signed the amended Form 7, without prejudice to his position, so that he could continue in his vocation as a real estate salesperson while the Registrar gave further thought to this issue.

[39] Apart from stress and incurring legal fees, the applicant would have only been adversely affected by the Registrar's stance in that he was unable to work as a real estate agent between that 18 June 2013 decision of the Registrar and 5 July 2013 when he signed the modified Form 7 on a without prejudice basis, i.e. for 17 days. Also, we can understand that he was subjected to gossip within the real estate industry by way of a local rumour in real estate circles that he had been "*struck off*".

[40] Mr Pratley took us carefully through the relevant legislation as covered above. He puts it that Regulation 6 is plainly worded and can only mean that the forms in Schedule 2 must be used; so that the Registrar is not to use any form unless its content is prescribed in the Regulations.

[41] Simply put, Mr Pratley refers to the relevant wording on the prescribed form as reading:

"Consent and certification

I consent to the making of inquiries to, and the exchange of information with, the authorities in New Zealand or in any participating jurisdiction regarding matters relevant to this application.

I certify that the above particulars are true and correct."

[42] Mr Pratley points out that the form to which the applicant is objecting differs from the above in that it authorises disclosure to the Real Estate Agents Authority by the New Zealand Police of any information that may be held by Police, including any interaction with Police which an applicant may have had in any context or any information received by the Police.

[43] The exact wording under focus is set out above.

[44] Mr Pratley emphasises that there is nothing in the Act or the Regulations which imposes a requirement on an applicant for renewal to allow disclosure of "*any interaction*" which an applicant has had with the Police: nor is there anything which requires an applicant to allow Police to disclose "*any information received by Police*". Accordingly, he submits it is of particular concern to the applicant that the amended

Form 7 makes reference to “*interaction with the Police*” and “*any information received by Police*”.

[45] Mr Pratley puts it that the Registrar is requesting information about “*interaction with the Police*” and information received by Police even though that may have nothing to do with whether a person is ineligible to hold a licence in terms of s 37 of the Act. Also Mr Pratley puts it that Form 7, as amended by the Registrar, does not define the meaning of “*interaction*” with Police and that, of course, there is a huge diversion of situations where people have “*interaction*” with the Police; and Mr Pratley covered many examples.

[46] Mr Pratley also put it that there is no definition on what is meant by “information received by Police” and, as he said, the Police receive all kinds of information.

[47] *Inter alia*, Mr Pratley records that the applicant accepts that the onus is on him to satisfy the Registrar that he is fit and proper but submits that does not give the Registrar carte blanche to deviate from the Form 7 prescribed by the Regulations. Although the applicant has, without prejudice to his stance completed the Registrar’s amended version of Form 7, Mr Pratley emphasised that the applicant “*nevertheless, remains concerned at this action being taken by the Registrar*”.

[48] In his final submissions Mr Pratley emphasised, *inter alia*, the requirement in Reg 6 that “*The forms in Schedule 2 ... must be used*” and submits that the statutory scheme therefore prohibits the Registrar, or anyone else, from amending the forms. He also submits that the Registrar should only act on information which she is lawfully entitled to obtain.

Our Reasoning

[49] Simply put, this case concerns a refusal of the applicant to sign a version of Form 7 required by the Registrar which amends the statutory Form 7 as explained above.

[50] We agree that the relevant information or evidence to apply the fit and proper person test (s 36 of the Act) will go well beyond ascertaining whether an applicant has a criminal history. Both parties seemed to be of the view that an applicant’s “*criminal history*” (if any) must be disclosed to the Registrar. We think that the phrase “*criminal history*” certainly includes not only any criminal conviction information, but also information about any conviction and discharge, or discharge without conviction. The latter two situations involve guilt to some extent. Otherwise, we do not think that “*further interaction*” with the Police is covered by the expression “*criminal history*”.

[51] However, the issue raised by the applicant is whether he was obliged to sign a version of Form 7 modified by the Registrar in the manner explained above. We can understand the concern of the Registrar to know whether an applicant has had more interaction with the Police than a response showing criminal history or previous convictions might disclose. However, the Registrar has required the above version of Form 7 to be completed with its focus on authorising disclosure to the Authority by the Police of any information held by the Police including any interaction in any context or any information received by the Police, not being limited to conviction information.

[52] In our view, it is not for the Registrar to expand the scope of the statutory Form 7 nor to insist that an altered version be signed by the applicant. The Registrar may

ask an applicant to sign another form creating greater scope for her to obtain information from the Police or anyone else about the applicant, but the applicant need not agree to such a course. If such a refusal by an applicant leads to the Registrar deciding to decline the applicant's registration or re-registration then her requirement can be reviewed in terms of natural justice. Any such declinature must be based on fair and just reasoning. The Registrar may not create requirements of an applicant which are more stringent than provided for in the Act and its Regulations.

[53] We accept that the Registrar may wish to investigate and seek far-flung information and may get leads from a particular source; but it is for the applicant whether he (or she) facilitates that.

Our Decision

[54] While the Registrar is to be commended for being so careful and thorough regarding the background of prospective real estate agents, for the reasons outlined above we quash her decision of 18 June 2013 so that the applicant or any other applicant need only sign the statutory Form 7.

The Issue of Name Suppression

[55] The applicant seeks name suppression on the basis that he simply raised an important legal issue (and been successful) so that his name should not be associated with opposing the Registrar.

[56] That stance is resisted by Mr Clancy, on behalf of the Registrar, on the basis of settled law that justice must be open and we should proceed openly and, subject to the application of s 108 of the Act, our proceedings are normally public, as in any other Court forum.

[57] Mr Clancy submits that if the applicant seeks an order under s 108, he needs to submit cogent reasons with supporting evidence in the usual way; and that in terms of inferences from our above coverage, it would take a long bow to suggest that this case would bring any adverse effects upon the applicant.

[58] Under s 108 of the Act, we have extensive powers to make orders prohibiting publication. We have dealt with name suppression or restriction on publication in quite a number of cases in recent years, but always in the context of disciplinary proceedings under the Act. The present case does not involve an analysis of any conduct of the applicant for disciplinary reasons. It is concerned with the powers of the Registrar in considering applications for registration or renewal of registration for a real estate agent.

[59] The principles relating to applications of this type in the context of disciplinary proceedings under the Act are set out in *X v Complaints Assessment Committee* (CAC 10028) [2011] NZREADT 2, and *Graves v REAA* (CAC 20003) & *Langdon* [2012] NZREADT 4.

[60] In *X v Complaints Assessment Committee* (CAC 10028) (as in *Graves*), we considered an application for an interim order prohibiting publication of the determination of a Committee decision pending the outcome of an appeal to us. 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. We relied

on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) when Her Honour Elias C J 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]

[61] 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.

[62] We adopted the views accepted by a full bench of the High Court in *S v Wellington District Law Society* 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 profession, or the Court. It is this public interest that is to be weighed against the interests of other persons, including the licensee.

[63] We affirmed that we have a discretion under s 108 of the Act to make orders provided that it is “*proper to do so*” and that the discretion extends to both interim and final orders prohibiting publication.

[64] With regard to the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013], NZREADT51, we confirmed that:

“... 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.”

[65] Our powers and discretion under s 108 are prefaced with the words “*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 one or more of the following orders ...*”

[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.

[67] The applicant has been successful and our above orders would appear to cover what the applicant substantively seeks; nevertheless, we reserve leave to apply.

[68] 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