BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 51

READT 073/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PRADEEP JAIN**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20007)**
	First Respondent
AND	**ANDREW AND ROBIN MARTIN**
	Second Respondents

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin – Member

HEARD at Auckland on 4 June 2014

DATE OF DECISION

APPEARANCES

Mr P J K S Spring and Ms C Peter – for the appellant
Ms J F MacGibbon – for the Real Estate Agents Authority
No appearance for the Second Respondent

DECISION OF THE TRIBUNAL

[1] Mr Pradeep Jain was found to have been guilty of unsatisfactory conduct with respect to his marketing of the Grey Lynn Pre-School Child Centre. The Complaints Assessment Committee in their decision dated 29 July 2013 found that Mr Jain (as the licensee who brokered the sale) was asked by the complainants, in order to preserve confidentiality of the listing of the business, to ensure that potential purchasers viewed the Childcare Centre after hours or at weekends. However this instruction was not recorded in the agency agreement. However prospective buyers were required to sign a confidentiality agreement before any information was given to them. The complainants alleged that Mr Jain sent potential purchasers to the Centre during the week posing as parents interested in enrolling their children in the Centre but did not accompany them himself. Mr Jain denied this. He said he never told any purchasers to pose as parents. However the purchasers of the property and two of

the three people who also signed confidentiality agreements confirmed that Mr Jain had told them that it was difficult to view the property so they should turn up at the Centre and pretend to be parents. As a result of this conduct the Complaints Assessment Committee found that Mr Jain had been guilty of unsatisfactory conduct as an agent. The Committee found this was not "*a practice that can be considered by the industry as professional or acceptable and was not in accordance with the complainant's instructions*" [at 4.2].

[2] In a subsequent decision on penalty on 5 November 2013 the Complaints Assessment Committee determined that:

> *"the breach by the licensee is at the lower end of the scale. However the Committee is satisfied based on the evidence that the conduct of suggesting purchasers view the property during business hours posing as parents, was contrary to the direct instructions from the complainants. On that basis the Committee finds that the licensee should be reprimanded and fined."* [at 4.2]

[3] Mr Jain was fined the sum of $1,500, and he was reprimanded for his conduct. The Complaints Assessment Committee decided that its decision should be published, omitting the details of the complainant, including the address of the property and any third parties. However they decided that Mr Jain and his agency should be named.

[4] In a Notice of Appeal dated 2 December 2013 Mr Jain appealed against the penalty decision for himself and in respect of his employer Link Business Broking Limited. The appeal is only against the decision to name Mr Jain.

[5] Mr Jain sought an interim order. This was granted. For that application Mr Jain filed an affidavit, which sets out the information which he says the Tribunal should consider when considering whether or not the appeal should succeed.

[6] In this affidavit he says:

(i) To the best of his recollection he only discussed the sale of the business with one prospective purchaser.

(ii) That the conduct was at the lower end of the scale and therefore the decision to name Mr Jain and the business was disproportionate to his conduct taking into account the following circumstances:

1. The business was sold to the individual who had viewed the property previously and independent of Mr Jain's role.

2. The respondents thanked him for his efforts in obtaining a sale.

3. He was disappointed in himself and embarrassed that the Committee had found him guilty of unsatisfactory conduct.

4. He recognised there was room for improvement and would endeavour to achieve high standards in the future.

5. He had had no previous complaints and had enjoyed a successful career for 20 years.

[7] Mr Jain submits further that his interests, in particular his professional and personal circumstances, outweighed the public interest and the need for an order publishing his name. He submitted:

- Any publication would adversely affect his professional profile because he relies on his good reputation and publication would jeopardise this reputation and therefore his business.

- If his employer's name was published this would have a detrimental effect on its outstanding reputation in the industry and deter prospective clients from engaging Link to conduct the sale and purchase of businesses.

- To the best of his knowledge Link has never been the subject of any complaint or disciplinary action by the Tribunal or the Committee and publication would taint a flawless reputation.

- The proceedings had been very stressful for him and if his name was to be published then he would suffer even more stress and anxiety because he would be easily identified in an industry where he had maintained a reputable standing and he is a highly respected member of the profession.

- Publication would cause him to lose his confidence in his professional life.

- Prospective clients would not engage him as their broker to conduct a sale and therefore affect his income.

- It will adversely affect his family's reputation in their jobs as his surname is distinctive and members of his family would be easily identified. He referred specifically to his wife who is a medical specialist.

- Dr Jain filed an affidavit confirming her concerns for her reputation and her sons if they were named.

[8] The appellant made the following legal submissions:

(i) The Complaints Assessment Committee failed to give appropriate weight to the personal and professional interests of the appellant in making the order to publish.

(ii) They failed to consider the privacy interests of the appellant which should be measured against the public interest.

(iii) The finding of unsatisfactory conduct is a severe punishment in itself. Mr Jain recognises he has room to improve.

(iv) The publication would be detrimental to the appellant's flawless reputation, reputation of Link and taint other agents.

(v) The objective of disciplinary proceedings is not to punish the professional but to ensure that appropriate standards of conduct are maintained. Mr Spring submitted that the decision to publish failed to appreciate that the

public interest and/or the deterrent aspect can be served by publishing the decision but omitting the name of the appellant. This, he submitted, does not undermine the consumer protection provisions because there is no suggestion in the Complaints Assessment Committee's decision that the appellant was a risk to consumers.

[9] Mr Spring also referred to the well known authority of *Lewis v Wilson & Horton Limited* [2000] 3 NZLR 546 in which the Court confirmed the importance of open justice, freedom to receive and convey information protected by s 14 of the New Zealand Bill of Rights Act 1990 and identified a number of factors relevant to the question of whether the presumption in favour of a publication should be displaced including:

- Whether there has been a conviction.
- The seriousness of the offending.
- Adverse impact on the prospects of rehabilitation.
- Public interest in knowing the name of the person seeking name suppression.
- Circumstances personal to the person appearing before the Court.

[10] Mr Spring then referred to the Tribunal's decision in *Or* CAC [2011] NZREADT 02 in which the Tribunal held as follows:

- The Tribunal has an unfettered discretion under s 108 to make the orders it considers proper to do so.
- Where the appellant has been found to have engaged in unsatisfactory conduct that in general should be a powerful factor against prohibition of publication.
- The Tribunal 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 in circumstances where an appeal has little or no merit.
- Each case must be considered on its own merits.
- Non publication will only be made in circumstances that ensure consumer protection is not undermined.

[11] Mr Spring expanded on these points and submitted that publication was not proper in terms of s 108 because:

- The offending by the appellant was not serious nor was it criminal.
- It was described by the Complaints Assessment Committee as offending at the lower end of the scale of unsatisfactory conduct.
- Did not raise issues as to the integrity or character of the appellant or Link.

[12] He submitted that the prejudice to the appellant, his family and Link outweighed any public interest in publication. He submitted that the prejudice faced by Mr Jain and his family would be disproportionate to the public interest in publication which displaces by a 'wide margin' the presumption of open reporting.

[13] He submitted that:

(i) Parliament's intention in respect of the Real Estate Agents Act 2008 was to protect consumers but this was only a starting point and must be weighed against personal circumstances and privacy interests of the appellant. He submitted that the Parliament has conferred upon the Tribunal a discretion whether to publish the Committee's decision or not.

(ii) That the consumer protection purpose of the Act could be achieved by publishing the Committee's by anonymising the appellant's name and details.

(iii) If Mr Jain's name was published it would place an undue burden on consumers to determine for themselves the gravity of the conduct.

(iv) Mr Spring also urged the Tribunal to consider and recognise the privacy rights of the appellant. He submitted that he has a right to anonymity and the right not to have his personal information or details published.

[14] The Real Estate Agents Authority submitted that:

- There are no grounds raised by the appellant which require a departure from the presumption of publication especially where a disciplinary finding has been made.

- Publication reflects Parliament's intention in passing the Act which promotes and protects consumer interest (see *Wallace v the Real Estate Agents Authority* [2014] NZREADT 24).

- The fact that the conduct is at the lower end of unsatisfactory conduct weighs in favour of publication as the public will be able to see that it is not a very serious matter.

[15] The Complaints Assessment Committee referred to the recent decision of *O'Connor & McHowell v REAA* [2013] NZREADT 104 in which the Tribunal considered reputational impact, but where the Tribunal determined that there were no meritorious factors which should lead to a suppression order.

[16] Ms MacGibbon submitted that it was tenuous to suggest that the members of the public will draw adverse inferences about the appellant's family because of any publication of Mr Jain's name as no other family members are in the real estate agent position.

[17] Ms MacGibbon also submitted the Managing Director of Link said that if the appellant had done what was alleged then it would be of little concern to him and therefore she submitted publication should also provide very little concern.

Discussion

[18] The starting point is s 108 which gives the Tribunal power to make an order prohibiting the publication of anyone's name if it is proper to do so having regard to the interests of any person including, without limitation, the privacy of the claimant and to the public interests. The Tribunal therefore have an unfettered discretion to determine whether in any particular case it is proper to make an order for non publication.

[19] The Tribunal has discussed this power in many cases and determined that the exercise of the power depends upon the facts. The Tribunal noted in a decision of *O'Connor & McHowell v REAA* [2013] NZREADT 104 at paragraph 41:

> "In a number of decisions over the past year we have covered that there is a principal of open justice subject to consideration of factors supporting non publication. In the present case we do not find any meritorious factors leading to a suppression order."

[20] The power of the Tribunal to order a suppression order sits within a number of other pronouncements by the Courts. In *R v Liddell* [1995] 1 NZLR 538 the Court said:

> *"In considering whether the powers given by s.140 should be exercised, the starting point must always be the importance and a democracy of freedom of speech, open judicial proceedings and the right of the media to report the matter fairly and accurately as 'surrogates of the public'. … The basic value of freedom to receive and impart information has been re-emphasised by s.14 of the New Zealand Bill of Rights Act 1990."*

[21] Further, in *M v Police* [1991] CRNZ 14, Fisher J said:

> *"In general, the healthy winds of publicity should blow through the workings of the Courts. The public should know what is going on in their public institutions. It is important that justice be seen to be done."*

[22] This is reinforced by s 14 of the New Zealand Bill of Rights Act which enshrines freedom of speech and the media's right to publish details of any hearing– see *Lewis v Wilson & Horton* Ltd [2000] 2 NZLR 546.

[23] The Courts have accepted that the presumption of openness should prevail unless good reason is shown why the [agent's] interests should take precedence.

[24] In the legal disciplinary context, interim name suppression has been considered recently by the Court of Appeal and the Supreme Court. The Court of Appeal in *Hart v Standards Committee No. 1 of the New Zealand Law Society* [2011] NZCA 676 at para [19] said:

> *"We were not persuaded that any ground had been made out which would warrant us disturbing the decision made in the High Court. We agreed with the Judge that the balance in the present case lay firmly in favour of publication of Mr Hart's name for the reasons the Judge identified. The Judge properly weighed the reputational and other matters raised by Mr Hart but concluded they could not prevail against the public interest factors pointing in the opposite direction. No error of principle was suggested, no matter of significance was overlooked and no irrelevant matter was considered."*

[25] At paragraph [9] they identified those matters which had been relied upon in the High Court by Toogood J (and approved by them) as follows:

*"[9]**.** The open justice principle expressed by this Court in R v Liddell was the appropriate starting point and applied equally in civil proceedings. He adopted the approach discussed by Fisher J in M v Police which involved balancing the public interest factor favouring publication against considerations which might render it just to favour the personal interests of the applicant for suppression.*

- *The Tribunal had earlier refused an application by Mr Hart for interim name suppression and there had been no appeal by Mr Hart against that decision (although Mr Hart maintained the Tribunal's decision had not been drawn to his attention until early December 2011).*

- *Section 238 of the Act presumptively provides that hearings of the Tribunal must be held in public.*

- *An important consideration in disciplinary proceedings under the Act is the maintenance of public confidence through the ability of the public to access and scrutinise information about disciplinary proceedings and the workings of the disciplinary process.*

- *Mr Hart was not entitled to be treated any differently from a junior practitioner who did not have a high public profile.*

- *The extent of harm to Mr Hart, his professional colleagues and family members had been exaggerated and the Judge was not satisfied that any such harm would outweigh the public interest in open justice."*

[26] Thus the exercise of the Tribunal's discretion, while not fettered, must be weighed against the well recognised principal of the need for open justice. Open justice and public interest do not mean only the right to know whether an unnamed agent has committed a wrongdoing but also to know whether any particular agent has been guilty of professional misconduct. Publication assists in the maintenance of public confidence by ensuring the free and open reporting of proceedings in Courts and disciplinary Tribunals. Publication is generally not regarded as punishment, although it cannot be ignored that an order for publication does have significant consequences for an agent.

[27] However as the Supreme Court said in *Hart v Standards Committee No 1* [2012] NZSC 4:

> A Tribunal Judge is exercising a discretion which, in a disciplinary context, must allow for any relevant statutory provisions as well as a more general need to strike a balance between open justice considerations and the interests of the parties' in suppression. The likely particular impact of publicity on that party will always be relevant, but it is untenable to suggest that professional people of high public profile such as the applicant have anything approaching a presumptive entitlement to suppression.

[28] The Tribunal therefore must determine whether in the circumstances of this case, having regard to all of the principals of open justice and the interests of the agent, that Mr Jain and his employer should be granted name suppression.

[29] To do this we must analyse the personal factors which Mr Jain says must outweigh the right to publication. We have set those factors out in paragraph [6] above. We deal with them now:

(i) *Professional reputation*

It is undeniable that publication of this case may have a negative impact upon Mr Jain and his reputation. This may impact upon future real estate work. This is an inevitable consequence of publication and conviction. Having considered carefully the submission, the Tribunal do not consider that in this case it can outweigh the need for open justice.

(ii) *The damage to Mrs Jain and Mr Jain's children by publication of Mr Jain's name*
Mrs Jain is a doctor and their sons are respectively a doctor and a lawyer. We do not consider that publication of Mr Jain's name will have a professional reputational impact upon them. Their professions are quite different and it is unlikely that any members of the public would link Mr Jain's name with theirs. There are six doctors registered with the surname Jain[1], so Dr Jain will not be immediately identified. The Tribunal acknowledges that they are likely to feel considerably distressed by the publication of any information but the reality is that publication is more likely to be embarrassing than lead to loss of reputation.

(iii) *Mr Jain's previous spotless reputation*
This is a factor which would weigh in Mr Jain's favour.

(iv) *The relatively minor nature of the breach*
The Tribunal do not agree that this finding is at a more minor end of the scale. In our view telling prospective purchasers to visit a daycare centre pretending to be parents, is conduct which is clearly unsatisfactory and which most agents would find wrong. We do not think however that the misconduct reaches the level of professional misconduct but do not consider that the offence can be trivialised.

(v) *Stress on Mr Jain*
The Tribunal acknowledge that Mr Jain has found this proceeding stressful but unlike other cases that the Tribunal has no medical evidence on which to assess the risk to Mr Jain's health should there be publication.

[30] Mr Spring identifies Mr Jain's right to privacy as important. This is the nub of the balancing exercise which must be carried out but the Tribunal do not consider that the right to privacy is a factor on its own which outweighs the need for open justice. One of the functions of professional discipline is the need to maintain public standards and to protect the public. This means not just protecting the public by generalised publication but also by identifying the agent to enable the public to make an informed choice about any agent that they might want to engage to sell their house or property. This is an important function of professional discipline and cannot be ignored. We do not consider that Mr Spring's submission is correct when he limits the right to open justice and consumer protection to seeking an anonymous decision. More is required. Open justice is just that – a complete right to know.

[31] Having carefully weighed up all the circumstances we do not agree that it is proper to make an order for name suppression. Mr Jain's personal circumstances are not so compelling as to outweigh the need for open justice. No real distinction can be made for the name of the business. The appeal is therefore dismissed.

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[1] Website: Medical Council of NZ

[32] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

DATED at AUCKLAND this 10th day of July 2014

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Ms K Davenport
Chairperson

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Mr J Gaukrodger
Member

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Ms C Sandelin
Member