BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 59

READT 025/14

IN THE MATTER OF	an application for interim non-publication under s.108 of the Real Estate Agents Act 2008
BETWEEN	**GRAHAM LEWIS**
	First appellant
AND	**DAVID CATTANACH**
	Second appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20005)**
	First respondent
AND	**PETRUS AND WENDY VAN DER WALT**
	Second respondents

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON NON PUBLICATION 1 August 2014

COUNSEL

Mr P Hunt and Ms K Rowe for appellants/applicants
Ms J Pridgeon for the Authority
The second respondent complainants abide our decision on this application

DECISION OF THE TRIBUNAL ON ISSUE OF INTERIM NAME SUPPRESSION

Background

[1] On 27 November 2013 the appellant licensees were found by Complaints Assessment Committee 20005 to have engaged in unsatisfactory conduct. Broadly, that related to a failure to warn a prospective purchaser of potential weathertightness risks regarding a particular type of house in Auckland. By a further decision of the Committee dated 17 February 2014, each licensee was fined $1,000, also licensee David Cattanach was censured as well.

[2] Both licensees have applied for interim non-publication orders pending the outcome of their appeal to us. A fixture date for that has yet to be made but should be in about November this year. The Authority opposes the application for interim non-publication. The complainants simply abide by our decision on that issue.

[3] It is accepted that the licensees' appeal is factually based. We also accept from the rather detailed grounds of appeal that there are a number of arguable issues.

[4] The licensees raise four main grounds in support of their application:

[a] That there is no justifiable reason for the decision to be published until we have decided the appeal;

[b] That it would be unduly detrimental to the licensees and they would suffer unnecessary harm if the CAC decision is published prior to our appeal decision;

[c] That they have strong grounds for an appeal; and they set out various factual assertions in support of this submission;

[d] As the CAC decision will be quashed if the licensees are successful in their appeal to us, there is no justifiable reason to publish the CAC decision in advance of our decision on appeal.

Legal Principles – Publication

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

[6] The Act also requires the Registrar of the Authority to maintain a public register of those holding licences under the Act which provides information about any action taken on a disciplinary matter in respect of a licensee in the past three years; ss.63-66 of the Act. The effect of this is that a CAC finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the license concerned if the finding and orders were made within the past three years. Publication on the register is therefore mandatory unless we make an order for non-publication under s.108 of the Act which commences:

> *"(1) 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 1 or more of the following orders …"*

[7] These orders include non-publication of decisions or names and identifying details.

Legal Principles – Applications for Non-publication

[8] The principles relating to applications of this type were set out by us in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02, *W v The Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 9 and have most

recently been discussed in *Wallace v Real Estate Agents Authority (CAC 20006)* [2014] NZREADT 24.

[9] All three cases were applications for an interim order prohibiting publication of the Committee's determination pending the outcome of the appeal. *An Agent* was the first time we considered an application of this type and we relied on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said at [41]:

> *"In R v Liddell … this Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by legislative prescription. But it recognised that the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings: What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*
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> (Citations omitted)

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

Discussion

[11] Any application for non-publication must be weighed against the public interest in publication. The public interest to be considered in non-publication applications in disciplinary hearings requires an analysis of the extent to which publication of the proceedings would provide some degree of protection to the public or the profession. It is this public interest that is to be weighed against the interests of other persons, including the licensee.

[12] We stated in *Wallace* at its para [41] that *"the fact of an appeal itself is not sufficient to grant a non-publication order"*. We noted that, if this were the case, then parties would be incentivised to appeal in order to block publication in the ordinary way. It will be noted on the Authority's website that the Committee's decision is under appeal.

[13] The licensees' said grounds one and four appear to be the same in substance and they submit that there is no justifiable reason for the decision to be published until the appeal has been determined. However, the mere fact of an appeal itself is not a good reason for non-publication. It cannot be that lodgement of an appeal prohibits publication in the ordinary way, as directed by Parliament. That would serve as an unwarranted inducement to appeal to us (and beyond).

[14] The licensees have provided no evidence to support their assertion that the publication of the decision will be unduly detrimental to them or cause them unnecessary harm.

[15] Parliament takes a strict approach to the requirement for publication, as demonstrated in Parliament's test for publication set out in the Criminal Procedure Act 2011. Evidence demonstrating harm needs to be convincing and compelling.

[16] We accept that the licensees' appeal raises factual issues that will need to be tested before us. The Authority has acknowledged that the Committee considered

the licensees' conduct to be at the lower end of the spectrum of unsatisfactory conduct. However, the licensees were still found to have been engaged in unsatisfactory conduct.

[17] Consumers have an interest in the publication of Committee decisions. This interest is protected by the Act and should not be undermined by the grant of non-publication orders. The importance of freedom of speech, open judicial proceedings, and the right of the media to report on Court proceedings means that the starting point must always be publication. The consumer has a right to view these decisions, and if the conduct is at the lower end of the spectrum, then the consumer should be trusted to understand this. As noted above, the decision will be reported with a note that it is under appeal.

[18] It is not enough for an application of interim name suppression or non-publication that the licensees believe they have strong grounds for a successful appeal. That is a matter for us to determine at the appeal. Possible strong grounds for an appeal is only one of the factors for us to take into account when considering a non-publication application and is not necessarily determinative. If non-publication orders were granted in every case when the appeal grounds were arguable, this could result in such a low threshold that, effectively, all appeals would be granted interim name suppression or non-publication. This would be inconsistent with Parliament's intention to have a system that protects consumers through transparency. Of course, natural justice must be observed.

Outcome

[19] We consider that there are insufficient grounds in this case for us to make an interim name suppression or non-publication order under s.108. Accordingly, this application for interim name suppression is dismissed.

[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