BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 62

READT 024/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL MIDDLEDITCH**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**KEYS KERDEMELIDIS-KIESANOWSKI**
	Second respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION (ON NAME SUPPRESSION) 7 August 2014

REPRESENTATION

Mr J Craw counsel for appellant
Ms J MacGibbon counsel for the Authority
(No appearance on this issue from second respondent)

DECISION OF THE TRIBUNAL ON APPELLANT'S APPLICATION FOR NAME SUPPRESSION

[1] On 25 September 2013 a Committee of the Authority found the appellant licensee guilty of unsatisfactory conduct for misleading advertising. By a further decision of 14 February 2014 the Committee imposed a penalty for that, namely, a fine of $1,000; a requirement to complete and pass a particular educational course; and an order that the licensee pay the complainant $256.

[2] The appellant has appealed those findings and the appeal is to be heard in Christchurch on Monday 1 September 2014.

[3] Meanwhile the appellant has applied for name suppression pursuant to s.108 of the Real Estate Agents Act 2008 ("the Act") pending the outcome of his appeal. The grounds

of appeal are detailed and suggest that the appeal issues are arguable. All parties accept that our power to prohibit or restrict publication is discretionary and quite wide in terms of s.108 of the Act which commences:

> ***"108 Restrictions on publication***
> *(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: …"*

[4] The application for name suppression is supported by a concise affidavit from the appellant deposing, inter alia, that until the appeal is determined it is not appropriate to state that he has engaged in unsatisfactory conduct; that publication will *"potentially"* cause him financial hardship and affect his ability to earn money as a licensed real estate agent; that his legal advice is that his appeal has merit; that there is no public detriment from non publication at this stage; that publication will adversely affect himself and his family; and that there is no need for the public to be protected from him at this stage. These grounds are understandable but rather general.

[5] The Act requires the Registrar of the Authority to maintain a public register of those holding licences under the Act, with a mandatory requirement to provide information about any action taken on a disciplinary matter in respect of a licensee in the past three years; refer ss.63-66.

[6] The effect of these provisions is that a Complaints Assessment Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee concerned if the finding and orders were made within the past three years. This reflects a clear policy decision by Parliament to promote consumer information and choice in accordance with the purposes of the Act.

[7] Mandatory publication is subject only to the making of an order for non-publication by us. Section 108 of the Act grants us power to make orders prohibiting, among other things, the names of parties to appeals and publication of decisions of Complaints Assessment Committees under appeal.

[8] Counsel for the appellant has relied on the fact that the nature of the licensee's conduct is yet to be determined before us and that publication should only occur at the conclusion of the appeal. The appellant has stated that the publication would have a detrimental effect, which is premature in nature, because the appeal has not been determined.

[9] The effect of an application, such as the present one, is that name suppression should apply automatically whenever an appeal is filed. There is no justification for such a de facto rule. Apart from incentivising appeals, that would be contrary to general principles of open justice.

[10] As we recently stated in *Vanderhoof v REAA and Anor* [2014] NZREADT 49:

*"**Restriction on publication – principles***

[11] Complaints Assessment Committees have a number of functions, one of which is to publish decisions: refer Real Estate Agents Act 2008 (the Act), s 78(h). Publication of decisions gives effect to a purpose of the Act being to ensure that the disciplinary process remains transparent, independent, and effective. Pursuant to s 84 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".

[12] The Act also requires the Registrar of the Authority to maintain a public register of those holding licences under the Act to provide information (inter alia) about any action taken on a disciplinary matter in respect of a licensee in the past three years:- ss 63-66. The effect of this is that a Committee finding of unsatisfactory conduct, and any consequent orders made, must be recorded on the public register in relation to the licensee 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 – Ms C v Real Estate Agents Authority [2012] NZREADT 53 at [33].

[13] We considered the principles relevant to applications under s 108 in An Agent v Complaints Assessment Committee (CAC 10028) [2011] NZREADT 02. Relevantly, we relied on Lewis v Wilson & Horton Ltd [2000] 3 NZLR 546 (CA) at [41] where Her Honour Elias CJ said:

> *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 face presumption as to reporting is always in favour of openness.*
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> *(citations omitted)*

[14] More recently, in Wallace v The Real Estate Agents Authority (CAC 20006) [2014] NZREADT 24 at [87], we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act; namely, the promotion and protection of consumer interests.

[15] In that case, we also observed that, in relation to criminal proceedings at least, Parliament has recently taken a stricter approach in respect of applications for name suppression, with reference to s 200 of the Criminal Procedure Act 2011. …

[16] Any application for non-publication must be weighed against the public interest in publication. This requires an analysis of the extent to which publication of the proceedings would provide some degree of protection to the public. That public interest must be weighed against the interests of other persons, including the licensee –Wallace at [13], citing S v Wellington District Law Society [2001] NZAR 465 (HC).

Discussion

[17] As indicated above, it is settled law that the starting point is for judicial proceedings to be open unless there is a compelling reason for some type of suppression or non-publication. The Authority submits that the grounds relied upon by the appellant do not support the granting of an order for non-publication in this case. We agree. …"

[18] The present application is not analogous to one made in proceedings before guilt has been established; e.g. interim name suppression in criminal proceedings before trial. Here, a finding of unsatisfactory conduct (and orders) has already been made by the first instance decision-maker, a Complaints Assessment Committee of the Real Estate Agents Authority. Granting interim name suppression in a case such as the present would be, effectively, to treat an appeal right as conferring a stay on the first instance decision. Again, this is contrary to general principle.

[19] The appellant has stated that this will have an adverse effect on his reputation. However, next to the unsatisfactory conduct decision, the Register records a notation that the matter is under appeal. Therefore, consumers will be made aware that the appellant disputes the findings.

[20] In relation to the public interest and open justice, we see no undue invasion of the privacy of the appellant and his family. We find that there are insufficient grounds for the granting of an interim suppression order. Accordingly, the application is dismissed.

[21] 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