

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 76

READT 054/14

IN THE MATTER OF a charge laid under the Real Estate Agents Act 2008

BETWEEN **THE REAL ESTATE AGENTS AUTHORITY (CAC 20004)**

Prosecutor

AND **Mr G**

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

HEARD ON THE PAPERS

DATE OF THIS DECISION 25 September 2014

APPEARANCES

Ms J MacGibbon, counsel for prosecution
The defendant on his own behalf

**DECISION OF THE TRIBUNAL
ON PENALTY AND NAME SUPPRESSION**

Introduction

[1] On 28 May 2014, the prosecution laid a misconduct charge against the defendant pursuant to s.73(a) of the Real Estate Agents Act 2008. Essentially, the prosecution alleges that the defendant used a total of \$14,900 of client funds for his own personal use, when those were properly payable to his then agency. There has been no particular public protection issue existing since this prosecution was laid before us because the defendant is not presently practising as a salesperson and seems to have surrendered his licence.

[2] It is accepted that the defendant suffers from serious psychological issues, and has suffered significant distress as a result of the issues arising from his conduct which is the subject of the said charge. Accordingly, a consent interim non-publication order was made by our Chairperson on 24 June 2014.

[3] Mr G has acknowledged his guilt to the matters charged and therefore we formally find the charge dated 28 May 2014 against Mr G proved.

[4] Mr G has filed an application for permanent name suppression and an affidavit in support. We are asked to decide this matter on the papers.

The Charge

[5] The charge reads in full:

“READT No 054/14

In the matter *of a charge laid under s.91 of the Real Estate Agents Act 2008*

Between *Complaints Assessment Committee 20004*

And *Mr G*
Defendant

Charge

Following a complaint by Mr L of X Real Estate Limited, trading as X, Complaints Assessment Committee 20004 (Committee) charges Mr G (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

Particulars:

Providing a personal bank account number to Mr K, a client of X Real Estate Limited, trading as X (agency), and misrepresenting that account number to be the agency’s nominated account number, for the purpose of obtaining the following payments from Mr K for his own personal benefit:

- (i) \$2,000 on 16 July 2012;*
- (ii) \$9,500 on 29 November 2012;*
- (iii) \$3,000 on 9 August 2013;*
- (iv) \$400 on 25 October 2013.*

Paul Morten

Chairperson

Complaints Assessment Committee (CAC 20004)”

DISCUSSION

[6] The defendant applies for permanent name suppression to protect the interests of his family but, if we decline such suppression for him, he seeks that any detail about his family *“even if it is considered non identifying”* be withheld i.e. suppressed.

[7] Our powers to place restrictions on publication are extensive and discretionary. They are and set out in s.108 of the Act and, for present purposes, we set out s.108(1) of the Act as follows:

“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:*
- (a) *an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:*
 - (b) *an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:*
 - (c) *an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.”*

[8] The Committee submits as follows:

- [a] That an order for cancellation of licence be made under s.110(2)(b) of the Real Estate Agents Act 2008;
- [b] In the exceptional circumstances of this case, the Committee does not oppose a final order prohibiting publication of the matters sought by Mr G.

[9] The defendant does not oppose cancellation of his licence but, as covered above, seeks permanent name suppression of his own name, the names of his former employer, *“the client of that employer against whom I offended”*, of any name, place or details likely to identify him, his former employer or the client; and suppression of the release or publication of any document he has filed either with the Authority or us.

[10] The defendant has accepted full responsibility for his actions and seems to have cooperated fully since the laying of the charge. He has had his solicitor put his position to us clearly by letter and provide us with an affidavit from him. He does not intend to return to real estate and undertakes not to apply for a licence to practice as a real estate agent.

[11] Inter alia, the defendant covers that his wife has suffered greatly as a result of his actions and seeks that members of his family who hold responsible professional roles also be protected by suppression of his name. Indeed, it seems that one of his sons has health problems which have been exacerbated by the defendant’s conduct now in question.

[12] The defendant covers that the complainant does not object to the making of a suppression order and has accepted the defendant's apology and does not wish to be named; nor does the defendant want that. Similarly the defendant seeks that his former employer be not named as that could be detrimental to that employer.

[13] The defendant was employed as a real estate agent for 20 years and dedicated to that career but, somehow, stress developed in his life which led to alcohol problems which seem to have brought about the offending conduct. That has led to financial ruin for the defendant but to treatment for alcoholism.

[14] The defendant seeks to rebuild his life and is concerned about the pressure which would come upon him if his name is released at the close of these proceedings. He has provided medical evidence together with a letter from his addictions counsellor.

[15] The defendant is currently employed as a product salesman in another city but is not responsible for handling any money. He concludes his affidavit in support of his application for suppression of identification as follows:

- “18. I do not believe I pose a risk to the community in my current employment, or otherwise. However, I do sincerely believe that my employers would not want to risk the reputation of their relatively new venture by keeping me in that employment if my name was published. It is also likely I would struggle to obtain alternative employment if my name was published.*
- 19. I believe that it is important for my recovery and wellbeing that I be able to continue working.*
- 20. I believe that the length of my career and residence in the Christchurch area would mean that publication would not go unnoticed by the community and the media.*
- 21. As outlined above, I undertake not to reapply for a Real Estate Agent's Licence. I also acknowledge that my misconduct will be recorded against my name with the Authority, and I would likely not be granted a licence in any event.*
- 22. I wish to express my sincere apology for any harm brought to the reputation of the real estate industry by my actions.”*

[16] In terms of the said letter to the Authority from solicitor for the defendant, we also note that a very serious illness to one of the defendant's children during 2012 and 2013 overwhelmed the defendant with stress and anxiety and required the defendant to take large periods of time off work both to manage his own stress and to help with his son's recovery. That had financial implications and seemed to exacerbate the defendant's own depressive illness. The transaction for which he has been charged presented him with an unfortunate opportunity, as his solicitor put it. She has analysed that situation for us in some detail, and the family stresses referred to above, together with the health and financial stresses being undergone currently by the defendant.

Penalty

[17] The conduct which Mr G has admitted to, is serious misconduct as set out above in the charge. The misuse of client funds is at the top end of misconduct that a licensee can engage in, given the trust and confidence reposed in licensees. Mr G himself accepts that he will never practice as a real estate licensee again.

[18] It is submitted for the prosecution that the appropriate order is one of cancellation of his licence. Mr G does not seem to oppose that.

[19] Mr G has surrendered his licence. We have dealt with this situation in previous cases. An example is *CAC 20002 v Kitto* [2013] NZREADT 70 in which we made an order for cancellation where Ms Kitto had surrendered her licence (by letting it lapse). The prosecution seek an order for cancellation of Mr G's licence accordingly.

[20] No other orders by way of penalty are sought by the prosecution.

[21] It is noted that the affected client (the complainant) of Mr G has not suffered monetary loss, because the agency for which Mr G worked did not seek to enforce its rights against that client, given Mr G's offending. It is therefore Mr G's former agency which is out of pocket. The agency does not seek compensation through this forum. For these reasons, no compensation order is sought by the prosecution.

[22] Accordingly, we hereby cancel the defendant's licence.

Final Non-Publication order

[23] Mr G presently has interim name suppression. This order was made by us at the invitation of the prosecution, as a result of its knowledge of serious concerns about Mr G's mental health condition, and the potential effect of publication on his rehabilitation.

[24] It is accepted that these are relevant considerations on the question of whether a final order should now be made under s.108. Mr G has also filed an application and affidavit with further detail, including further medical information. That evidence addresses the potential detrimental effect of publication on his mental health condition and rehabilitation.

[25] In these special circumstances, the prosecution does not oppose a final order being made under s.108. It is submitted that only in rare cases should we make a final non-publication order in cases where unsatisfactory conduct or misconduct is admitted or proved. However, the prosecution acknowledges that it is open for us to conclude that this is such a case, and that is why it does not oppose the order.

[26] It is noted that an order under s.108 can be revoked upon an application to do so (s.108(2)). Although it is not anticipated that the need will arise, if contrary to his present position, Mr G ever applies for and obtains a licence in the future (and it is noted that this cannot be within the next five years if a cancellation order is made), then, in those circumstances, revocation of the order might be appropriate.

[27] It is also put for the prosecution that, with one qualification, a non-publication order as sought by the defendant would appear to be appropriate, if we decide to make a non-publication order. The qualification is that the category of any

information filed by him with the Authority which Mr G seeks to have suppressed would appear to be unnecessarily wide. We agree with counsel for the Authority that category should be confined to any information about his mental health condition.

[28] It is noted that Mr G does not seek suppression of any non-identifying details in the judgment. Our judgment is to be published with all information in the categories referred to either redacted or substituted with non-identifying descriptions.

[29] Although we grant the defendant's application for name suppression we set out below our general views about name suppression.

[30] 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.

[31] 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]

[32] 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.

[33] 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.

[34] 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."

[35] However, in this case, for the reasons set out above, we grant the application for suppression. We reserve leave for either party to confer with us on the implementation of this order in terms of appropriate deletions or substitutions.

[36] 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 J Gaukrodger
Member

Ms C Sandelin
Member