BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 89

READT 072/14

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN SISLEY AND PETER LISSINGTON**
	Applicant/Appellant licensees
AND	**REAL ESTATE AGENTS AUTHORITY (CAC301)**
	First respondent
AND	**BARRY BRUNTON**
	Second respondent/complainant vendor

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON PUBLICATION 14 November 2014

COUNSEL

Ms H R Smith and Mr W J Hamilton for the applicant/appellants
Ms N Copeland for the Authority
Mr M Hunwick for the second respondent

DECISION OF THE TRIBUNAL ON NON PUBLICATION

Introduction

[1] John Sisley and Peter Lissington (the appellant licensees – at material times employed by PGG Wrightson Real Estate, Hamilton) have appealed against the Complaints Assessment Committee's decisions of 13 May 2014 and 15 August 2014 respectively finding that they engaged in unsatisfactory conduct and imposing penalty orders. In the meantime, the appellants seek an order for name suppression and/or non-publication of these Committee decisions on the following grounds:

[a] That the public interest in publication is outweighed by the hardship that publication would cause to the appellants;

[b] The appellants did not have the opportunity to address a legal finding that formed the basis of the Committee's decision;

[c] The appellants intend to apply for permanent name suppression if their appeal is unsuccessful; and

[d] The appellants will suffer irreparable harm if the Committee's decisions are published.

[2] The Real Estate Agents Authority opposes the application as does the complainant second respondent. The appellants and the second respondent are at odds on a number of substantive issues both legal and factual.

[3] The essential concern of the complainant vendor is that, allegedly, the appellants were responsible for releasing a valuation to a prospective purchaser without the complainant's authority and, indeed, contrary to the complainant's instructions.

A Summary of the CAC Decisions

[4] As the CAC put it, the complaint is about the September 2012 sale of a property at 3153 Ohaupo Road, Rukuhia, Hamilton and, specifically, that:

> *"● The licensees bullied and pressured the complainant and family into agreeing to reduce the asking price for their home so that they could try and get a quick sale with no valuer information behind their assertions.*
>
> *● [Mr Sisley] after being explicitly told not to release the Fergusson Lockwood Valuation did so to a potential purchaser who immediately lowered his offer on the property.*
>
> *● The licensees were seriously negligent in their management of the sale. They repeatedly dropped out of communication, they allowed chattels to be sold that were not agreed to, and the complainant feels that at no time did they have his best interests in mind."*

[5] The Committee then set out the material facts as follows:

> *"**MATERIAL FACTS***
>
> *In mid 2012 the complainant's son listed the property with Bayleys Real Estate for a month long marketing cycle which did not produce any offers. The property was listed for sale at $1,775,000.*
>
> *A valuation dated 18 April 2012 had been prepared by Ferguson Lockwood & Associates for the complainant which indicated a market value for the property of $1,620,000. The complainant later provided a copy of this valuation to the licensees with the instruction that it was not to be disclosed.*
>
> *An appraisal and marketing proposal of the property was supplied by [Mr Sisley] which suggested a market valuation of between $1,600,000 and $1,675,000 + GST and suggested that the advertised price be $1,675,000. The acceptance of this proposal was signed on behalf of Jean Stewart Limited by Mrs Brunton*

on 15 September 2012. A Rural Agency Agreement with PGG Wrightson Real Estate was signed by the vendor on 17 September 2012.

Mr William Hodgson the father of a staff member of PGG Wrightson Real Estate, Hamilton disclosed to [Mr Sisley] on 22 September 2012 that his daughter had shown him the Fergusson Lockwood & Associates valuation held at the Harcourts office. Mr Hodgson's daughter subsequently admitted that she had done this and offered her resignation which was accepted by the licensee.

The property was sold to Mr Hodgson on 25 September 2012 for $1,655,000.

The complainant later asked Darragh Valuation Limited (Darragh) for their view on the value of the property and what they would have expected it to sell for. In their letter of 5 July 2013 Darragh state that their initial view (subject to a comprehensive valuation) is that the property ought to sell for approximately $2,000,000. However as the letter from Darragh Valuation Limited implies, the estimate they provided would, in the view of the Committee be of doubtful assistance to anyone, for it is not based on a comprehensive valuation, which would be a pre-requisite if they supplied a formal valuation."

[6] The Committee dealt with the issues in some detail and then concluded as follows:

> *"5.6 Whilst the committee has determined that two of the complaints against the licensees have not been proven to the Committee's satisfaction, it has found that the licensees allowed a situation to occur where confidential information was released without authority of the complainant. Accordingly the Committee has determined under section 89(2)(b) of the Act that it has been proved, on the balance of probabilities, that in relation to the unauthorised release of the valuation document licensee 1 and licensee 2 have engaged in unsatisfactory conduct. In respect of all remaining aspects of the complaint the Committee does not find that unsatisfactory conduct has been proven."*

The Committee's Penalty Decision

[7] Subsequent to its 13 May 2014 decision finding unsatisfactory conduct as covered above, in the usual way the Committee dealt with penalty by a separate decision on 15 August 2014. Having carefully covered appropriate facts and principles, the Committee fined each licensee $1,000 and ordered they each be censured. The Committee also noted they had each offered to provide a written apology to the complainant and requested that a copy of that apology letter be forwarded to the Authority after it had been delivered to the complainant.

[8] The Committee noted that both parties had requested name suppression and recorded that it regarded publication of the decision as desirable for the purpose of setting standards and as in the public interest. It directed publication of its decision, omitting the names and identifying details of the complainant (including the address of the property) and of any third parties; but required that the name of the licensees and the company for which they work be published. It also decided that both its said decisions be published unless an application for non publication is made to us before the period for filing an appeal to us had expired.

Restrictions on Publication – General Principles

[9] Complaints Assessment Committees have a number of functions, one of which is to publish decisions; refer s.78(h) Real Estate Agents Act 2008. Publication of decisions gives effect to a purpose of the Act which is 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"*.

[10] 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. The effect of this 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. 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 …"*

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

[12] We have often considered the principles relevant to applications under s.108 e.g. in *An Agent v Complaints Assessment Committee (CAC 10028) [2011] NZREADT 02,* 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 facie presumption as to reporting is always in favour of openness."* (Citations omitted)

[13] More recently, in *Wallace v The Real Estate Agents Authority (CAC 20006)* [2014] NZREADT 24 at [37], we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act; i.e. the promotion and protection of consumer interests. 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.

[14] As we also said in *Wallace* at paragraph [13], 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 licensees and their privacy.

Submissions for the Applicants

[15] The initial submissions to support the application include the following:

> *"**Appellants have not had an opportunity to address the key finding***
>
> *13 The unsatisfactory conduct finding is based on the first respondent's determination that the licensees are vicariously liable for Ms Hodgson's actions.*
>
> *14 The decision dated 13 May 2014 notes that the appellants "have not attempted to deny that the Agency was at fault as a result of her actions". With respect, the licensees have not had the opportunity to address that issue. The statements provided by the licensees to the first respondent contained full details of the actions taken by the licensees to prevent disclosure of the valuation, in terms of the policies and procedures the appellants had put in place, and the express instructions given to Ms Hodgson that the valuation was to be kept confidential.*
>
> *15 In preparing their statements, the appellants had not envisioned or appreciated that the first respondent might use the concept of vicarious liability to sheet home liability to them as individuals. This will be a central ground of appeal.*
>
> *16 As noted above, the appellants' evidence was directed to the duties they performed as agents in respect of the transaction. The first respondent did not have the benefit of full evidence as to Ms Hodgson's employment situation. The appellants will explain to the Tribunal that Ms Hodgson was engaged in dual roles:*
>
> *16.1 As an independent contractor with PGG Wrightson Real Estate (Ms Hodgson was a licensed real estate agent in her own right); and*
>
> *16.2 In her personal assistant role as an employee of J Sisley Realty Limited. Mr Lissington is not a director or shareholder of J Sisley Realty Limited.*
>
> *17 The appellants consider that they have not had the opportunity to address the concept of vicarious liability before the first respondent. As such, it is submitted that fairness dictates that the suppression and non-publication orders sought be made pending determination of the appeal.*
>
> ***Interim publication would render potential future application nugatory***
>
> *18 If their appeal is unsuccessful, the appellants may wish to make an application under section 108 for permanent suppression of their details and/or non-publication.*
>
> *19 The grounds for such an application would likely include:*
>
> *19.1 That the public interest could adequately be served by publication without the inclusion of details of their identities;*

19.2 By virtue of the nature and circumstances that gave rise to the findings, protection of the public is not a relevant concern; and

19.3 The negative impact of publication would outweigh the public interest.

20 It is submitted that to allow publication on an interim basis pending determination of the appeal would preclude the applicants from exercising their right to apply for an order under section 108 after determination of the appeal.

Publication will cause irreparable harm to the appellants

21 It is submitted that publication on an interim basis would cause irreparable harm to the appellants, in that:

21.1 The impact on their reputations would be severe. Both are experienced real estate agents who have clean disciplinary records. They both maintain relatively high profiles in the Waikato area both in respect of and separately from their real estate work.

21.2 The impact on their colleagues and co-workers, and the PGG Wrightson Real Estate brand, is unjustified in that the unsatisfactory conduct finding was based on a finding of vicarious liability in terms of an employment arrangement that is with a separate entity.

21.3 It would unjustifiably punish them based on a finding by the first respondent which is not based on their actions, but a legal concept which they have not had the opportunity to address.

21.4 In particular, it would unduly punish Mr Lissington, against whom a finding of vicarious liability has been made despite the fact that he is in no way engaged with Ms Hodgson's employment.

21.5 As noted above, it would effectively prohibit them from making a future application under section 108, which it is submitted would merit consideration in the circumstances.

22 The appellants acknowledge that there is no automatic right to name suppression simply because an appeal has been filed. However, for the reasons set out above it is submitted that, in the unique circumstances of this case, the public interest in publication is outweighed by the hardship that would be suffered, and the interim orders sought should be made."

The Stance of the Authority

[16] 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.

[17] Ms Copeland notes that the appellants submit that the Committee's finding of unsatisfactory conduct was based on a legal finding which the appellants have not had the opportunity to address (i.e. vicarious liability). She submits that the Committee's decision is not quite as characterised by the appellants and that there is clear implication in the Committee's decision that the appellants were negligent in

carrying out their responsibilities in relation to the release of the valuation; and the Committee found that the appellant allowed a situation to occur where confidential information was released without the second respondent's authority.

[18] Ms Copeland notes that the appellants take issue with these findings but put it that, for present purposes, the point is that they are not merely a finding of vicarious liability.

[19] It is also noted that in our recent decision *Nottingham v REAA & Honey* [2014] NZREADT 80 we said this relevant to issues of vicarious liability:

> *"[103] Accordingly, we do not find any unsatisfactory conduct on the part of Mr Honey. We accept that there can, of course, be circumstances where, although the conduct in issue is effected on behalf of the licensee rather than by the licensee, that licensee could be guilty of unsatisfactory conduct, himself, herself, or itself. However, this is not such a case."*

[20] Ms Copeland has referred to copies of a 25 November 2013 email from a case manager at the Authority sent to each of the appellants asking them to provide a written explanation to a series of questions, including the circumstances in which the valuation was disclosed. The disclosure was squarely in issue and it was a matter for the appellants to address why they were not responsible for it, whether directly or vicariously as supervisors.

[21] The Authority submits that the grounds relied on by the appellants are insufficient to support the grant of an order in this case. Ms Copeland put it that the effect of an application, such as the present one, was addressed in the recent decision of *Middleditch v REAA & Keys Kerdemelidis-Kiesanowski* [2014] NZREADT 62, where we stated:

> *"[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."*

[22] As stated in *Middleditch*, the Registrar would record a notation that the matter is under appeal on the appellants' disciplinary records so that members of the public, or other people in the industry, would know that the appellants do not agree with the decision made by the Committee.

[23] Accordingly, the Authority submits that the reasons advanced in the current case will not cause the degree of hardship to the licensee necessary to rebut the presumption in favour of openness and the protection of consumer interests; and that the application for an order restricting publication should be declined.

Stance of the Complainant

[24] As indicated above, the second respondent submits that the appellants be not granted suppression of their names and identifying particulars nor non-publication of the Committee's decisions. Concern was expressed for the complainant that the appellants are at least inferring that the seriousness of their offending was minimal and seemed to be relying on their own failure to discern the law. It is also put for the complainant as follows:

> *"6. The appellants then argue that the appellants had no part in the disclosure of the valuation, that the person responsible no longer works with them and that the second respondent was not financially disadvantaged by the disclosure of the valuation. Therefore they say there was no need to make their acts or their names public as there was no longer a risk in their agency to the public or indeed public interest in the facts now because the applicants were not responsible.*
>
> *7. The second respondent rejects this line of argument, as he believes the findings show involvement by the appellants in the disclosure as well as involvement in many other unsatisfactory outcomes involving this sale (which he respectfully submits were not adequately reviewed by the REAA). He advances one important fact as an example, that the valuation was not only disclosed by Leslie Hodgson to her father (who subsequently reduces his purchase offer because of this by $25,000, ringing the second respondent to advise him of this reason), but also when the appellant's office disclosed the valuation to Dean Pettit of the Levin office of PGG Wrightson, when they sought to subsequently use it to justify the sale price achieved.*
>
> *8. The appellants then argue that despite missing the opportunity to do so they have not had the opportunity to address the key finding of unsatisfactory conducting their appeal, and so interim publication would prejudice or preclude their case to further apply under Section 108 for permanent name suppression and/or publication. They wrongly argue that the REAA decision was based on a legal concept, rather than their actions, which they have not had the opportunity to address. The second respondent rejects this, and says, irrespective of the fact that the appeal has not been heard, their own failures were an instrumental factor assessed when the REAA were reviewing the matter and making their decision, so to now say they didn't have opportunity to address the key findings is a nonsense."*

[25] It is also submitted for the complainant that the appellants have not identified any particular prejudice that would arise to them from publication of their names. It also seemed to be put that the public need to know of the so called *"rogue employee"* and that the agent is responsible for the acts of a personal assistant.

The Reply for the Applicant/Appellants

[26] In final reply it was put for the appellants that there is no evidence that the employee is still working in the real estate industry and that before any disciplinary process could commence she had immediately tendered her resignation which was accepted by the appellants. It is also put for the appellants that the findings of the Committee relate to the conduct of the appellants although the focus of the case has been on the employee and her actions, and that the findings against the appellants

have been made on the basis of vicarious liability only. Counsel for the appellants then put it that it is the appellants who will likely suffer harm as a result of the finding under appeal and that these unique circumstances make an order for interim non-publication appropriate.

[27] The typed submissions for the appellants were rather detailed but we have covered them sufficiently above. Included in their final submissions is the following paragraph:

> *"4. The Authority submits the appellants had the opportunity to comment on the circumstances in which the valuation was disclosed, and should have addressed the vicarious liability issue. In support, the Authority has referred to emails sent to the licensees requesting an explanation as to "circumstances" regarding the disclosure of the valuation. It is submitted that that is a factual enquiry and it is not reasonable to suggest that the appellants were required to go beyond providing their factual account of the instructions given. This is particularly so in the case of Mr Lissington, against whom the finding of vicarious liability has been made despite the fact that he is not engaged in any way with J Sisley Realty Limited which employed Ms Hodgson."*

[28] As already indicated, it is submitted for the appellants that there are unique factual circumstances which put this case outside the usual sphere of applications for name suppression and non-publication and that these include the following:

> *"7.1 The central action in this case is the release of the valuation by Ms Hodgson, not the appellants.*
>
> *7.2 In these circumstances it is submitted the public interest (in terms of protection of the public) is relevant only to Ms Hodgson, who is no longer employed by J Sisley Realty Limited and who was never employed by Mr Sisley or Mr Lissington.*
>
> *7.3 The finding of unsatisfactory conduct is, it is submitted, based solely on a legal concept and not upon the actions of the appellants. It is submitted that this sets this case apart from the previous cases considered by the Tribunal.*
>
> *7.4 It is noted in Middleditch (paragraph 18) that an application pending appeal is not analogous to an application in criminal proceedings before guilt has been established, because a determination of unsatisfactory conduct has been made. As previously noted, it is submitted that the appellants have not had an opportunity to address the basis for the finding of unsatisfactory conduct because it was not properly put to the appellants and is erroneous on the facts of this case.*
>
> *7.5 If the unsatisfactory conduct finding is upheld, the conduct of the appellants is at the lowest end of the spectrum and there is, it is submitted, a reasonable prospect of the appellants making a successful application for permanent suppression under section 108 after the appeal is determined. If interim publication is allowed, the appellants right to apply for permanent suppression will be rendered nugatory. This issue was not raised or considered in Middleditch, however it is submitted that it is particularly relevant here."*

[29] It is then submitted for the appellants that the unique circumstances of hardship are the severe impact of publication on the reputations of the licensees who are experienced with clean disciplinary records otherwise and who hold a high profile in their area; that the impact on their colleagues and co-workers and that the findings of the Committee were based on vicarious liability by an employee; that it is unjust to punish the appellants in terms of a legal concept rather than on their own actions especially when they have not yet had the opportunity to address the legal concept; and that the employee concerned had no nexus with the business of Mr Lissington.

[30] It is acknowledged for the appellants that there is no automatic right to name suppression simply because an appeal has been filed.

Outcome

[31] It seems to us that the CAC's decisions were based on an analysis of the conduct of the licensees in the context set out above. Seemingly confidential information was released contrary to a vendor's instructions.

[32] There is no particular evidence of hardship to the licensees from publication of the CAC decisions, although it can be inferred that such publication might impede their business activities to an extent.

[33] We do not think that the presumption of openness in reporting judicial proceedings has been rebutted. The public/consumer interest is important and is stressed in s.3 of the Act which sets out the purpose of the Act as:

> *"**3 Purpose of Act***
>
> *(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*
>
> *(2) The Act achieves its purpose by—*
>
> *(a) regulating agents, branch managers, and salespersons:*
>
> *(b) raising industry standards:*
>
> *(c) providing accountability through a disciplinary process that is independent, transparent, and effective."*

[34] It is put for the licensees that the conduct of the licenses *"is at the lowest end of the spectrum"*. There may be some merit in that submission so that publication is not appropriate.

[35] Having absorbed the submissions and approaches for the parties as covered above 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 of the Act. We particularly concur with Ms Copeland's submissions for the Authority as we have set them out above.

[36] Accordingly, this application is dismissed.

[37] 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

_____
Mr J Gaukrodger
Member

_____
Ms C Sandelin
Member