

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 9

READT 52/12

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **H and T X**

Appellants

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

First respondent

AND **COLLEEN (VICKI) NELSON**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Mr N Dangen - Member

Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF DECISION 7 February 2014

REPRESENTATION

The appellants on their own behalf

Ms J Pridgeon, counsel for the Authority

Nick Nelson as representative for the second respondent

THRESHOLD DECISION OF THE TRIBUNAL ON APPLICATION FOR INTERIM NON PUBLICATION OF COMMITTEE'S DECISION

Introduction

[1] H and T X (“the licensees”) have appealed against the determination of Complaints Assessment Committee 20004 finding them guilty of unsatisfactory conduct following a complaint by Vicki Nelson. The Committee has since made penalty orders against the licensees and ordered publication of its decisions.

[2] On 15 November 2013, the licensees filed with our Registry an application for non-publication of the Committee’s liability and penalty decisions against them. The Real Estate Agents Authority opposes the application.

The Licensees’ Application

- [3] The licensees raise five grounds in support of their application:
- [a] They have suffered huge stress as a result of the complaint with associated health issues; and H X is particularly affected.
 - [b] Their reputations would be destroyed by publication of the Committee's decisions.
 - [c] Given that their agency trades as "X Real Estate", publication of the decision against them would have an adverse affect on other licensees working at their agency.
 - [d] The Authority has carried out "*unjust actions*" with this process and it would be "*inappropriate*" and "*hypocritical*" to publicise the decision given the Authority has "*formally acknowledged*" that they have fallen short in respect of the licensees' natural rights.
 - [e] The Committee's decision is wrong and decisions under appeal should not be published.

The Stance of the Authority

[4] Simply put, Ms Pridgeon submits for the Authority that no grounds exist to justify non-publication of the Committee's decision even on an interim basis as sought by the applicant/licensees. We deal with Ms Pridgeon's very helpful submissions in the course of our discussion and reasoning below.

Stance of the Second Respondents

[5] In very thoughtful and balanced submissions, the complainant responded to the application of the licensees for interim non-publication. They covered such matters as general prima facie requirements for non-publication and the need to promote and protect consumer interests rather than, perhaps, reputation of real estate agents. They also query the effect of the Committee's decision on the applicants' agency as being particularly detrimental to it or to the applicants. They note that the applicant-agents have not provided evidence to support the applicants' assertions of unjust treatment by the Committee.

[6] The second respondent noted, as had Ms Pridgeon for the Authority, that no medical evidence has been adduced to us in relation to the effect of stress on the licensees and that from the submissions of the licensees they seem to have other stresses in their lives.

The Relevant Statutory Provision

[7] Our powers to place restrictions on publication are discretionary and are derived from s.108 of the Act which reads 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.*
- (2) *Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 116, an order made under subsection (1) continues in force as specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or of any other person.*
- (3) *Subsection (1)(c) does not apply to any communications between the Disciplinary Tribunal and the Authority.”*

[8] Over the past year or so we have issued a number of decisions on relevant principles to the application of s.108 but we simply encapsulate them below.

Relevant Legal Principles

[9] A Complaints Assessment Committee has a number of functions, and one of which is to publish decisions. This gives effect to a purpose of the Real Estate Agents Act 2008 (“the Act”) 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 made under ss.80, 89 or 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 and provide information about any action taken on a disciplinary matter in respect of a licensee in the past three years. The effect of this is that a Complaints Assessment Committee’s 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.

[11] The principles relating to applications of this type are set out in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02 and have been affirmed in *Graves v Real Estate Agents Authority (CAC 20003)* & *Landon* [2012] NZREADT 41. Both cases were applications for an interim order prohibiting publication of the Committee’s determination pending the outcome of the appeal.

[12] In *An Agent*, we held that we had the power to make such non-publication orders on appeals and we set out the principles to consider when determining whether to make such orders. We relied on *Lewis & Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said at para [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.”

(citations omitted).

[13] We went on to consider whether those principles applied to proceedings of a disciplinary nature. 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 e.g. *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioners Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001; *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.

[14] We adopted the views accepted by a full bench of the High Court in *S v Wellington District Law Society* (supra) that the public interest to be considered in non-publication applications in disciplinary hearings (about lawyers) requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the legal profession, or the Court. It is this public interest that is to be weighed against the interest of other persons, including the present licensees/applicants.

[15] We reaffirmed that we have a discretion under s.108 of the Act to make orders under it provided that it is “*proper to do so*” and that discretion extends to both interim and final orders prohibiting publication.

Discussion

[16] Ms Pridgeon submits that no evidence has been filed to support the licensees’ submission regarding their medical conditions having been caused or made worse by the Committee’s findings. Neither has evidence been filed relating to conditions that are likely to be caused as a result of publication. That is correct; but the emails sent to us for the appellants suggest that the authors (the applicants) are suffering from severe stress.

[17] As Ms Pridgeon also put it, the starting point must always be publication because this reflects Parliament’s intention in passing the Act; the promotion and protection of consumer interests. The licensees state that they are well regarded real estate agents in their community and that publication would be devastating on their reputation. In relation to criminal proceedings at least, Parliament has recently taken stricter views of submissions such as this, legislating that the fact that a person is well known in the community does not, of itself, mean that publication of his or her name will result in extreme hardship: refer Criminal Procedure Act 2011, s.200. That s.200 spells out that, instead, Courts in criminal proceedings may only make suppression orders if publication would be likely to:

- [a] Cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
- [b] Cast suspicion on another person that may cause undue hardship to that person; or

- [c] Cause undue hardship to any victim of the offence; or
- [d] Create a real risk of prejudice to a fair trial; or
- [e] Endanger the safety of any person; or
- [f] Lead to the identification of another person whose name is suppressed by order or by law; or
- [g] Prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- [h] Prejudice the security or defence of New Zealand.

[18] Ms Pridgeon submits for the Authority that this reflects a stricter approach to publication being required by Parliament. We agree.

[19] Ms Pridgeon emphasises that the licensees have been found to have engaged in unsatisfactory conduct. We agree that this must be a factor in favour of publication. We need to be satisfied that the consumer protection purposes of the Act are not undermined by granting non-publication orders. The Authority submits that, given the seriousness of the conduct in question in this case, it would be proper for the licensees' interests in non-publication to be outweighed by factors in favour of publication, particularly the factor of consumer protection.

[20] The Committee's decisions on liability and penalty clearly state that its findings are against the licensees themselves, not the agency "X Real Estate". Ms Pridgeon submits that the fact that the licensees' agency is named "X Real Estate" and that other agents work from that agency cannot be a factor in favour of non-publication. However, we accept that the agency would clearly suffer from findings against the licensees or either of them.

[21] The Authority does not accept that it has carried out "*unjust actions*" in the complaints process. It is put that the licensees were afforded their natural justice rights, and indeed, allowed further time to file their submissions on penalty. We find no evidence of any injustice and we would not expect such allegations to have any merit.

[22] Finally, the fact of an appeal itself is not sufficient to grant a non-publication order. That the Committee's decision is under appeal will be noted on the Authority's website. It cannot be that lodgement of an appeal blocks publication in the ordinary way.

[23] Essentially, Ms Pridgeon submits that none of the licensees' grounds justify non-publication; there has been no evidence filed in support of them; and we should not grant the application.

[24] We agree entirely with the stance of the Authority and of the second respondent complainant as summarised above, except that if convincing medical evidence is available to support the applicants we would reconsider our decision. We are conscious that the substantive fixture for this appeal is some time away, namely on 3 June 2014, although that is due to meeting the convenience of the appellants.

[25] We find that, currently, there are insufficient grounds to make any type of order for interim non-publication. However, rather than dismiss the application, we allow

the applicant/appellants three working weeks from the date of this decision to supply medical evidence to us if they wish.

[26] 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

Ms N Dangen
Member

Ms C Sandelin
Member