

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 51

READT 058/15

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN ENAYATTULLAH (NATHAN) NAJIB
Appellant/Applicant

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)
First respondent

AND BRUCE LINDSAY
Second Respondent

Hearing: 30 June 2016 (at Christchurch)

Tribunal: Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms N Dangen (Member)

Appearances: Mr G J Ryan (on behalf of the Appellant/Applicant)
Mr M Hodge (on behalf of the First Respondent)
Mr M J McKay (on behalf of the Second Respondent)

Date of Ruling: 27 July 2016

RULING OF THE TRIBUNAL

(Appeal against direction as to publication/Application for restriction on publication)

[1] Following a complaint made by the Second Respondent, Mr Lindsay, Complaints Assessment Committee 403 (the Committee) found on 27 May 2015 that the Appellant, Mr Najib, had engaged in unsatisfactory conduct (the substantive decision).¹ The Committee's decision on orders was issued on 30 July 2015 (the

¹ Decision of the Complaints Assessment Committee; Complaint CO4914, 27 May 2015.

orders decision).² The Committee censured Mr Najib and ordered him to pay a fine of \$2,000. The Committee also ordered publication of Mr Najib's name and the Agency he worked for at the time of the conduct.

[2] On 24 August 2015 Mr Najib filed a Notice of Appeal against the Committee's decision as to publication. He has not appealed against the Committee's substantive finding of unsatisfactory conduct, or the order for censure and fine.

[3] Mr Najib applied for an interim non-publication order. In a ruling dated 4 May 2016 the Tribunal granted an interim order, pending the hearing of Mr Najib's appeal against the Committee's order for publication.³

Factual background and the Committee's decision

[4] Mr Najib is a licensed agent. At the time of the relevant conduct he was a licensed salesperson, engaged as an independent contractor to Phoenix Real Estate Ltd, trading as Harcourts Phoenix (the Agency), of which Mr Lindsay (the second respondent) is the principal. Mr Najib resigned from the Agency on 11 March 2014.

[5] Following Mr Najib's departure from the Agency, Mr Lindsay filed a complaint with the Real Estate Agents Authority (the Authority) alleging that Mr Najib:

- [a] Purchased two properties listed with the Agency: one at 1 Langdale Place (Langdale Place), the other at 24 Lagan Street (Lagan Street);
- [b] Transferred two listings held by the Agency to his new Agency: one at 12 Doncaster Street, the other at 510 Armagh Street;
- [c] Failed to provide the vendor of 12 Doncaster Street with a listing agreement; and

² Complaints Assessment Committee Decision on Orders, CO 4914, 30 July 2015.

³ *Najib v Real Estate Agents Authority* [2016] NZREADT 32.

[d] Signed new listing agreements for 12 Doncaster Street and 510 Armagh Street, exposing the vendors to the possibility of paying double commission.

[6] The Committee did not make findings of unsatisfactory conduct in relation to [b], [c], and [d], above. The finding of unsatisfactory conduct, the penalty imposed, and the order for publication relate to the purchase of the Langdale and Lagan properties. The publication order must be examined in the context of that finding.

[7] Section 134 of the Real Estate Agents Act 2008 (the Act) provides that licensees may not acquire land or businesses from a client unless the client gives written consent on a prescribed form. Section 135 of the Act provides that the client must also be provided with an independent valuation. The prescribed form is Form 2 of the schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009 (the Regulations).

[8] Mr Najib bought the Langdale property on 23 May 2013, while it was subject to a sole agency with the Agency. He withdrew the listing from the Agency's system without formally cancelling the listing. The agreement for sale and purchase for this property referred to the sale being a private sale, with a note that the vendors knew that Mr Najib was a licensed salesperson. No commission was paid by the vendor. While Mr Najib obtained an independent valuation, he failed to ensure that the vendor's consent was in the prescribed form.

[9] Mr Najib purchased the Lagan property on 21 October 2013, again while it was subject to a sole agency with the Agency. Again, he withdrew the listing from the Agency's system without formally cancelling the listing. As with the Langdale property, Mr Najib obtained an independent valuation. The sale and purchase agreement for this property included the words "private treaty" and included a clause to the effect that it was subject to "Form 2 under s 134, Real Estate Agents Act". However beyond that, a Form 2 client consent was not completed. No deposit was paid to the Agency, and the vendor was not asked to pay commission. According to the vendor, neither the listing nor commission were discussed.

[10] The Committee found that Mr Najib's actions in relation to the two purchases would reasonably be regarded by agents of good character as being unacceptable.⁴ It accepted that Mr Najib had made an effort to comply with the Act, in that he had obtained valuations for both properties, and both vendors were aware that he was a real estate agent. However, the Committee found that he did not comply with the requirements of s 134 for either property, in that he failed to obtain the vendor's written consent on Form 2 for Langdale Place, and failed to obtain a properly completed Form 2 consent for Lagan Street. The Committee further found that Mr Najib had not strictly followed the Agency's in-house policy in respect of agents buying listed properties.⁵

[11] The Committee noted that neither vendor had complained or been charged commission. It described Mr Najib's conduct as careless, rather than a deliberate attempt to deprive the Agency of commission, so amounted to unsatisfactory conduct and did not warrant a finding of misconduct.⁶

[12] In its decision as to orders, the Committee considered that a censure and fine were warranted in the light of the need for strict compliance with s 134. The Committee said:⁷

We have made an order for publication of our decision. We have considered Licensee Najib's submission that publication of his name would be out of proportion with the findings against him. We disagree. Publication serves a wider role of educating the industry as to what standards are expected and it is appropriate that the industry and the public be made aware of the importance of compliance with the sections 134 and 135 of [the] Act. In addition, because of the ongoing disputes between the parties, we think the public interest is better served by having our decision publicly available.

And later, the Committee said:⁸

Publishing the Committee's decision supports the purposes of the Act by ensuring that the disciplinary process remains transparent, independent and effective. The Committee also considers that publishing this decision helps to set standards and that is in the public interest.

⁴ Substantive decision, at [3.1].

⁵ Substantive decision, at [3.9], [3.11] and [3.12]

⁶ Substantive decision, at [3.11] and [3.13].

⁷ Orders decision, at [3.8].

⁸ Orders decision, at [4.3].

[13] The Tribunal records Mr Najib's advice at the appeal hearing that he commenced business as a real estate agent on his own account in January 2016.

Provisions of the Act as to publication and restriction on publication

The purpose of the Act

[14] Any consideration of publication, or restricting publication of a licensee's name following a disciplinary finding against the licensee must begin with the purpose of the Act. As s 3 of the Act provides, the Act's purpose is "to promote and protect the interests of consumers ... and to promote public confidence in the performance of real estate agency work".

The register of licensees

[15] Sections 63 to 66 of the Act deal with the register of licensees, maintained by the Registrar. Section 63 provides that the Registrar "must establish, keep, and maintain, in accordance with this Act, a register of licensees". Section 64 sets out the purposes of the register, which include "to enable the public to ... choose a suitable agent or salesperson and ... know which licensees have been disciplined within the last 3 years ..."

[16] Pursuant to ss 65 and 69, the register is available on the Authority's website, and may be searched by the public free of charge.

The Committee's power to direct publication

[17] Section 78(h) of the Act states that one of the functions of a Complaints Assessment Committee is to publish its decisions. Further, s 84(2) provides that a Committee may direct such publication of its decision as it considers necessary or desirable in the public interest.

[18] We accept Mr Hodge's submission for the Authority that a Committee does not have a general power to suppress publication of its decisions, and cannot make orders that affect the Registrar's obligation under s 63 to publish information on the

public register. Findings of unsatisfactory conduct, misconduct, and orders imposed within the last three years must be included with the licensee's details on the register.⁹ This is in line with the purposes of the Act, including the protection of consumers, and to facilitate informed consumer choice.

[19] We note at this point Mr Hodge's submission for the Authority, which we accept, that as the Committee has no power to make an order under s 108 restricting publication, it is not strictly accurate to say that Mr Najib is "appealing" against the Committee's decision. The Tribunal proceeds on the basis that an "appeal" against the Committee's decision should be treated as an application for an order from the Tribunal restricting publication.

The Tribunal's power to restrict publication

[20] The Tribunal has the power to restrict publication. Section 108 of the Act provides that the Tribunal may make orders prohibiting publication of proceedings, documents produced at a hearing, and the name or any particulars of the affairs of the person charged or any other person. The power may be exercised if the Tribunal considers it proper to do so, having regard to the interest of any person (including the privacy of the complainant) and the public interest.

[21] In its decision in *Complaints Assessment Committee v Z* the Tribunal held that the Tribunal's power under s 108 must be read as being subject to ss 64 to 66, such that if the Tribunal makes an order under s 108 to prohibit publication of a licensee's name, the disciplinary finding cannot be published on the public register.¹⁰ Thus, an order restricting publication of a licensee's name or particulars means that the licensee's name may not be published in either the Tribunal's decision or the Committee's decision.

⁹ This has been confirmed by the Tribunal in, for example, *C v Real Estate Agents Authority* [2012] NZREADT 53, at [32]-[34], and *O'Connor v Real Estate Agents Authority* [2013] NZREADT 104, at [35].

¹⁰ *Complaints Assessment Committee v Z* [2010] NZREADT 05, at [4.2] and [4.6]-[4.7].

Principles as to the exercise of the Tribunal’s power to restrict publication

[22] In the light of the Act’s purposes as to consumer protection and promotion of public confidence, the requirement for a public register, and the fact that Tribunal hearings are in public, there is a presumption in favour of publication. This is consistent with the policy as to publication evident in ss 63 to 66, and the principles of open justice, transparency, and freedom of speech.¹¹

[23] As noted earlier, the Tribunal may make an order to restrict publication if it considers it “proper to do so”. This will require the Tribunal to weigh the public interest in publication and the presumption of publication against the interests of the licensee seeking an order restricting publication. As the Tribunal said in *Vanderhoof v Real Estate Agents Authority*,¹² compelling reasons are required to outweigh the public interest in publication.

[24] Counsel referred us to previous decisions under s 108, in which suppression was granted or not granted. While confirming the general principles set out above, these are of limited assistance, as the balance must be struck by reference to the particular circumstances of the applicant.

Submissions

[25] In his notice of appeal, Mr Najib set out detailed grounds for the appeal. He emphasised the importance of his reputation, the lack of negative consequences flowing from his conduct (in particular the absence of any complaint from either of the vendors), and said that the Act’s objectives of education and demonstrating the importance of compliance with the Act could be met without disclosure of his name and details.

[26] In oral submissions Mr Ryan submitted for Mr Najib that his appeal was based squarely on the impact of publication on his reputation (incorporating the impact on

¹¹ See *Wallace v Real Estate Agents Authority* [2014] NZREADT 9, at [17]; *Wallace v Real Estate Agents Authority* [2014] NZREADT 59, at [17]; and *R v Wilson & Horton Ltd* 2000] 3 NZLR 546 (CA), at [41].

¹² *Vanderhoof v Real Estate Agents Authority* [2014] NZREADT 49, at [17].

his livelihood). He further submitted that that impact would be out of all proportion to the nature of the finding of unsatisfactory conduct (which was, he submitted in respect of only a minor technical breach), and the lack of any adverse consequences of Mr Najib's conduct.

[27] Mr Ryan submitted that in this case, reputational damage is a powerful factor. He submitted that Mr Najib has a relatively unusual position and reputation: he is young, he has won awards, and has a high profile. He further submitted that Mr Najib has recently commenced business in his own agency, and is seen as a trailblazer. He noted that Mr Najib is mentored by an entrepreneurial Australian agent who has an international reputation. He submitted that for those reasons Mr Najib is much more vulnerable than the average agent.

[28] On the issue of proportionality, Mr Ryan submitted that publication would be out of proportion to Mr Najib's conduct. He submitted that Mr Najib's conduct involved a minor technical breach of ss 134 and 135 but he had complied with the spirit of those provisions. Accordingly, he submitted, that Mr Najib's conduct was at the lower end of the scale of unsatisfactory conduct.

[29] Finally, Mr Ryan submitted that Mr Najib's interests as to restriction on publication outweighed the presumption for publication. He submitted that the purposes of publication would not be prejudiced if no identifying details were given; there was no need to make the public aware of Najib's disciplinary history; no vendors had complained; and the complainant did not oppose his application for restriction on publication. He further submitted that this is the only disciplinary finding against Mr Najib; he has learned his lesson; is apologetic and contrite; and there is a low risk of any repetition. He noted that Mr Najib had co-operated fully with the Committee, and had not sought to minimise his conduct, and makes significant contributions to charities.

[30] The Tribunal records that immediately after the hearing, a member of the Tribunal received an email from Mr Najib. The Tribunal directed that the email be forwarded to counsel for the parties, noting that it is inappropriate for a party to make direct contact with the Tribunal, or any of its members, and advising that the fact of

the email being sent to a member would be recorded in this ruling. The parties were also advised that the contents of the email would be disregarded.

[31] On 7 July 2016 the Tribunal received a lengthy email from Mr Najib setting out submissions as to why the Tribunal should make an order restricting publication. These submissions largely repeated the submissions made by Mr Ryan at the hearing. Annexed to the email was what was said to be a medical certificate from Mr Najib's doctor. The Tribunal notes that the certificate is unsigned, so can be given little weight. It states that Mr Najib is "currently experiencing a lot of stress" and is "concerned about the impact of a negative finding in his legal matter and the impact this could have on his business and reputation". The document also states that "[Mr Najib] is not clinically depressed".

[32] The Tribunal will not accept Mr Najib's further submissions, or the medical certificate. Neither the further submissions nor the certificate advances his application for a restriction on publication. The submissions do not provide the Tribunal with any submissions that could not have been (or in fact were not) made at the hearing. Further, the certificate falls well short of establishing medical grounds which would support a restriction on publishing.

[33] Mr Hodge submitted for the Authority that the Committee found that Mr Najib was at fault in two respects: first, he did not comply with ss 134 and 135 of the Act and secondly, he did not follow the policies set by the Agency as to salespersons' private purchases of the Agency's listings. Against those faults, he submitted that none of the grounds put forward by Mr Najib, individually or collectively, were sufficient to outweigh the public interest in publication.

[34] Mr Hodge submitted that Mr Najib's conduct was not at the lower end of the scale of unsatisfactory conduct: there was a clear breach of ss 134, 135 of the Act, which were long-standing provisions, and should be well-known to agents and salespersons. A breach of these provisions should not be taken lightly. They are designed to protect situations where licensees' personal interests conflict with their fiduciary obligations to their clients. For these reasons, Mr Hodge submitted that the finding of unsatisfactory conduct is in itself a powerful factor for publication.

[35] Mr Hodge submitted that an impact on a licensee's reputation will always be a consequence of publication of a disciplinary finding. Notwithstanding that, Parliament has enacted the provisions as to publication in the register of licensees. He submitted that it would subvert the purpose of Act to give too much weight to the impact on reputation. He further submitted that any impact on Mr Najib's reputation is a direct consequence of his own actions, there cannot be a "high-profile" exception to publication, and there was no evidence that this impact was so much more severe than those experienced by other licensees as to justify a restriction on publication.

[36] Mr Hodge further submitted that publication is necessary for "informed consent" when members of the public are choosing a real estate agent. He noted that the Committee's decision put Mr Najib's conduct in context, including mitigating factors, and publication would allow the public to understand the circumstances leading to the finding.

[37] Regarding Mr Najib's submission as to his new business, Mr Hodge submitted that it was Mr Najib's choice to set up his new business when he had a disciplinary finding against him, and an order for publication in place.

[38] Finally, Mr Hodge submitted that the Tribunal should disregard Mr Ryan's submission for Mr Najib that the educative purpose of the Act can be met without naming Mr Najib: he submitted that that can always be argued, and is therefore not a material factor in the determination.

Assessment

[39] It was suggested in Mr Ryan's submissions that the Tribunal's decision to make an interim order for restriction on publication supported the Tribunal making a final order. While we note that decision it is, self-evidently, an interim decision, made without the benefit of full argument. Further, as Tribunal noted in the decision, it was not to be taken as indication of eventual outcome of his application for a restriction on publication.

Impact on Mr Najib's reputation

[40] We are not persuaded that publication will have a significant impact on Mr Najib's reputation, business, or livelihood. We note, first, that Mr Najib set up his business (as an agent on his own account) in January 2016. There has been little opportunity for him to have established any particular reputation in the business. Mr Najib offered no evidence in support of the submission, other than his own foreboding. Further, we note that Mr Najib established his new business at a time when he had a disciplinary finding against him, an order had been made that it be published, and his appeal seeking suppression had not yet been heard (in fact, his application for an interim order had not been determined). Mr Najib clearly took the risk that his application for restriction on publication would not succeed, with the consequence of damage to his reputation, and livelihood.

Proportionality

[41] Many factors affect this issue.

Nature of the breach

[42] First, this was not a minor, technical, or insignificant breach. Mr Najib failed to comply with ss 134 and 135 of the Act which set out a specific regime to apply when a licensee acquires property listed by the Agency. In particular, it requires written consent to the transaction to be given, on a prescribed form. The requirement is long-standing, and has been in force since the Real Estate Agents Act 1963.¹³ In each case, the legislation required the consent of the agent's principal to be given "on the prescribed form". This demonstrates a clear, long-standing Parliamentary policy to ensure transparency in real estate transactions, and the need for clients to give informed consent to transactions with real estate agents.¹⁴

¹³ Section 78 of the Real Estate Agents Act 1963 was in similar terms to s 134(1) of the 2008 Act, s 26 of the Real Estate Agents Amendment Act 1963 added provisions in similar terms to s 134 (4) to (6) of the 2008 Act, and ss 63 and 64 of the Real Estate Agents Act 1976 Act contained equivalent provisions to ss 134 and 135 of the 2008 Act.

¹⁴ As to "informed consent", see *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2016] NZCA 105, at [42].

[43] Further, Mr Najib did not only fail to comply with the Act, he also failed to comply with the provisions of the Agency’s “Policy and Procedures Manual”. Section [8.8] of the Manual is headed “Purchase of Property by Employee or Consultant”, and sets out requirements which largely reflect, and refer to, ss 134 and 135 of the Act.

Was the disciplinary decision “in the nature of an educational decision”?

[44] Mr Ryan referred us to the Tribunal’s decisions in *N v Real Estate Agents Authority (CAC 20002)*¹⁵ and *K and N v Real Estate Agents Authority (CAC 20002)*¹⁶ in which restrictions on publication were granted. Those decisions do not assist Mr Najib, as they were concerned with breaches of s 136 of the Act (as to “disclosure of other benefits”), which was inserted into the 2008 Act as a new provision. A disciplinary decision concerning a breach of a relatively new provision may reasonably be seen as being “in the nature of an educational decision for the members of the real estate industry”.¹⁷ That consideration does not apply to ss 134 and 135.

Mr Najib’s reputation

[45] We have not been persuaded that publication would lead to a significant impact on Mr Najib’s reputation, business, or livelihood. We note Mr Ryan’s submissions, and Mr Najib’s evidence of his contrition; that he has “learned his lesson”, and that there is a very low likelihood of his offending in the future. However we record, in relation to this submission, that during the hearing, Mr Najib told the Tribunal that he was engaged in mentoring new entrants into the industry, and that he had lectured on the need for integrity and honesty. In answer to a question from the Tribunal as to whether he had advised those he was mentoring of the disciplinary finding against him, he said that he had not. That admission causes Tribunal concern as to Mr Najib’s understanding of the obligations of integrity and honesty.

[46] Mr Najib’s post-hearing submissions do not cause us to alter our view.

¹⁵ *N v Real Estate Agents Authority (CAC 20002)* [2013 NZREADT 22.

¹⁶ *K and N v Real Estate Agents Authority (CAC 20002)* [2013 NZREADT 111.

¹⁷ As noted in *N v Real Estate Agents Authority*, at [15].

The policy evident in the Act

[47] The Tribunal accepts that it should take careful account of the policy directions evident in the purpose of the Act, set out in s 3, and the clear expression of the policy in ss 63 to 66 concerning the register of licensees. We also take account of our acceptance that those sections are subject to an implied exception, in that they do not apply in cases where the Tribunal has made an order under s 108 restricting publication.

The balancing exercise: would publication be out of all proportion to the nature of Mr Najib's conduct, and his interests?

[48] The Tribunal has stood back and considered Mr Ryan's submissions on behalf of Mr Najib and Mr Hodge's submissions as to publication. Weighing all matters put before us, we are not persuaded that publication of Mr Najib's name would be out of all proportion to the nature of his unsatisfactory conduct and his personal circumstances.

Outcome

[49] The Tribunal declines to make an order restricting publication of Mr Najib's name and particulars.

[50] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms N Dangen
Member