THE TRIBUNAL HAS MADE AN ORDER PURSUANT TO S 108(1)(c) OF THE REAL ESTATE AGENTS ACT 2008, PROHIBITING PUBLICATION OF THE NAMES OR ANY PARTICULARS OF THE APPELLANT AND ANY OTHER PERSON INVOLVED IN THIS PROCEEDING

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 38 READT 052/16

UNDER	THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF	AN APPEAL UNDER SECTION 111 OF THE ACT
BETWEEN	NO and U REALTY LIMITED Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First respondent
AND	Mr and Mrs A Second respondent

Hearing: At Auckland on 1 May 2017

Tribunal: Ms K Davenport QC – Chair
Mr J Gaukrodger, Member
Ms N Dangen, Member

Appearances: Mr D Grove, for appellant
Mr M Mortimer, for first respondent
Mr and Mrs A in person

Decision: 16 June 2017

DECISION OF THE TRIBUNAL

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[1] NO is a real estate agent in practice in Auckland. He has been found guilty of unsatisfactory conduct for his failure to supervise another agent – a Ms O.

[2] Ms O was the vendor's agent and sold the property that Mr and Mrs A purchased in Greenlane, Auckland. Mr and Mrs A were unaware at the time that they signed the agreement for sale and purchase that the property had previously been owned by Ms O and that the vendor was her daughter and son-in-law. The Complaints Assessment Committee found that Ms O should have declared her interest in the property at the time she gave them the agreement for sale and purchase, that a person related to her could financially benefit from the transaction (pursuant to s. 136 Real Estate Agents Act). Further, she failed to disclose her previous ownership and connection with the property until after the agreement was unconditional. Finally, she allowed herself to become, and remain in a *"conflict of interest situation as a consequence of which she could not and did not meet her obligations to disclose relevant information to the complainants"*.

[3] The complainants had also complained that Ms O had hidden from them significant weathertight issues with the property, which had led to them having to undertake repairs and move out of their house for a period of some weeks while these works were being done.

[4] Ms O does not challenge the findings against her. This was therefore upheld.

[5] With respect to Mr O and the agency the Complaints Assessment Committee found that Mr O failed to fully understand the requirements of s 136. The Committee also found that Mr O had engaged in unsatisfactory conduct under s 50 Real Estate Agents Act as he failed to properly supervise Ms O. The Complaints Assessment Committee concluded that Mr O was not aware of the full implications of s 136 of the Act, and in particular that the Act requires an agent to disclose a financial interest **in writing**. Finally, the CAC found that Mr O did not recognise the conflict of interest situation that the licensee was in.

[6] The Complaints Assessment Committee subsequently made the following orders against Mr O:

- He was censured.
- He was ordered to undergo training by completing unit standards 23136 (demonstrating knowledge of misleading and deceiving conduct and misrepresentation).
- The agency was censured and ordered to pay a fine of $10,000.

[7] Mr O and the agency appealed both these penalty orders. Mr O also seeks name suppression.

A. Approach on appeal from sentence

[8] Is this appeal against penalty a general appeal (as set out in the Supreme Court decision of *Austin v Nichol*[1]) or an appeal from the exercise of a discretion as set out in *May v May*[2]? Those narrow grounds are:

- That there has been an error of principle.
- The CAC took into account irrelevant considerations or failed to consider relevant considerations?
- The Committee's decision was plainly wrong.

[9] The Complaints Assessment Committee submit that the decisions of the High Court in *Morton-Jones v CAC*[3] is applicable to this issue. Mr O however argues that the appeal should be a general appeal and submits that the decision of *Morton-Jones* is not applicable. The Tribunal have considered this point and other cases on the issue and determine that the imposition of a penalty is a discretionary matter for a CAC. Accordingly, the Tribunal must adopt the *May v May* approach to determine whether or not the appeal by Mr O ought to be allowed. Thus it will not be sufficient

[1] *Austin v Nichols* [2007] NZSC 103
[2] From *May v May* [1982] NZLR 165

for the Tribunal to conclude it would have reached a different conclusion. Rather the narrow grounds must be established.

[10] There are three parts to Mr O and the company's appeal:

(i) Appeal against the imposition of a training requirement.

(ii) The appeal against publication of Mr O's name.

(iii) Appeal by the agency against the level of fine imposed upon it.

The submissions of the second respondent

[11] Mr and Mrs A both spoke movingly of the distress, cost and inconvenience that they had experienced caused in their submission, because of the actions of Ms O. These were primarily caused by the discovery that the house leaked and that they needed to urgently repair it. They had to move from the house. They were concerned to see that what happened to them did not happen to any other person. They did not want the penalty imposed upon Mr O and the agency to change and indeed urged the Tribunal to consider further orders relating to payment of their costs and expenses. On that point the Tribunal explained to them the Tribunal's limited ability to order compensation for their costs and expenses. The Tribunal were advised that there were civil proceedings.[4]

[12] On behalf of Mr O, Mr Grove submitted that Mr O had undertaken, of his own initiative, significant auditing of his office process and procedures. This audit had produced a number of forms and check lists for the agency with the assistance from an outside third party. This meant he was (now) fully informed of his obligations and no longer in need of orders requiring him to undertake further training. Mr Grove expanded on this and provided examples of the forms prepared and that Mr O had now met all reasonable education obligations.

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[3] *Morton-Jones v CAC* [2016] NZHC 1804

[4] We believe these proceedings do not involve Mr O but involve Ms O and Mrs and Mrs Eade.

[13] As a general principle the Tribunal considers that all education for any agent is helpful and in keeping with the obligations of the Real Estate Agents Act to ensure the protection of public interest and to maintain professional standards.

[14] However the Tribunal can see that at a time **after** the sale but before the CAC penalty Mr O undertook significant work on the agency's processes and his understanding of the requirements of the Act. The agency undertook a revision of its systems before the complaint was laid, which included training for all sales people. Mr O also employed an outside expert to carry out an annual audit of the company's systems and employed an operations manager for the group. As part of the review of systems specific documents were prepared for agents to use for each sale. This contains a checklist for agents and forms for them to complete which comply with the Act.

[15] Because of these facts the Tribunal consider that the Complaints Assessment Committee failed to take into account this relevant material in imposing this penalty. This work was done by Mr O and the company to ensure future compliance with the Act. The Tribunal consider that this work has benefited all agents working with Mr O as well as and Mr O. Accordingly the Tribunal consider that Mr O has taken the appropriate steps to address his education needs and no further education is required on this point. Accordingly the Tribunal modify the Complaints Assessment Committee's decision by removing the need for Mr O to undergo further training.

Name suppression for Mr O

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[16] At para [4.85] of the decision the Complaints Assessment Committee dealt with the request for name suppression by noting that the Committee did not have a power to suppress publication of Mr O's name. The Tribunal has that right.

[17] When considering name suppression the Tribunal must balance the need for open justice against an agent's own circumstances. Section 108 provides that if the Tribunal *"considers it is proper to do so, having regard to the interests of any person*

including the privacy of the complainant and the public interest, it may make an order, inter alia, prohibiting publication of the name and affairs of the person".

[18] In *Erceg v Erceg* [2016] NZSC 135 the Supreme Court reinforced the well-established principle of open justice requires there to be publication of the names of those involved in a case unless the private interests of the person charged outweigh the public interest in open justice. Arnold J said at [13] that a person *"seeking a non-publication order must show* ***specific adverse consequences*** *that are sufficient to justify an exception to the fundamental rule of open justice (emphasis added)".*

[19] In our view Mr O has overcome that high hurdle. He filed a detailed affidavit providing sufficient details of the difficulties and relentless attacks that he has been subject to from another party in an ongoing disciplinary matter, which has been to the Tribunal, the High Court and the Court of Appeal and is on its way back to the Tribunal for further orders.

[20] The Tribunal does not propose to canvass in detail the personal matters which Mr O has set out in his affidavit or the name of the other party, but suffice to say that the details set out in his affidavit are extreme and serious and show the significant harm that might come to Mr O and his family if his name is published. Accordingly the Tribunal considers that in this case the Tribunal order that there be no publication of any information that might identify Mr O and his family. Mr O should have his name suppressed in all reports of this case which can be reported as ***OB v CAC***.

Fine against U Realty

[21] Mr Grove submits that the fine of 50% ($10,000) of the total available fine is excessive. He provided the Tribunal with a number of cases where the party concerned received a lesser fine. The Tribunal have considered these cases carefully. The Tribunal conclude that there is no basis on which to overturn the level of fine. There is no error of law, wrong weighting of evidence nor is it plainly wrong. The fact that the Tribunal may have imposed a slightly lower fine does not mean that the Complaints Assessment Committee made an error of principle, considered irrelevant matters, failed to consider relevant matters or was plainly wrong. The decision that

they made to fine the company 50% of the maximum fine is defensible on the information before it. There are no grounds on which to overturn the decision and the appeal is therefore refused.

[22] The Tribunal accordingly modify the penalty decision by:

(a) deleting the requirement for Mr O to undergo further training.

(b) adding the fact that Mr O shall have name suppression of his name and the publication of any detail which might identify him or his family, including this decision.

(c) The appeal against U Realty is dismissed which means the $10,000 fine remains.

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

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Ms K Davenport QC
Chairperson

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Mr J Gaukrodger
Member

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Ms N Dangen
Member