BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

	[2018] NZREADT 67
	READT 049/18
IN THE MATTER OF	A charge laid under section 91 of the Real Estate Agents Act 2008
BETWEEN	COMPLAINTS ASSESSMENT COMMITTEE 10020 Applicant
AND	JULIE MCDONALD Defendant
On the papers:	
Tribunal	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms N Dangen, Member
Submissions by:	Ms J McDonald Ms L Rice, on behalf of the Authority.
Date of Decision:	5 November 2018

DECISION OF THE TRIBUNAL
(application for non-publication)

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[1] Ms McDonald (the applicant**)** was found guilty of misconduct on 17 October 2013,[1] and on 17 April 2014 the Tribunal suspended the applicant for three years and fined her $5,000.[2] The substance of the misconduct that was proved against the applicant was that she had forged documents in order to facilitate a claim for real estate agents commission to which she was not entitled.

Remedies that the applicant seeks and the grounds upon which they are sought

[2] In the informal application which the applicant has filed she states that she wishes the Tribunal to make an order removing the decisions which found her guilty of misconduct and suspended her license from the Ministry of Justice (READT) website.

[3] Additionally, the applicant envisages that an order to restrain publication by the New Zealand Herald of what is contained in the READT website should be made. It is not clear what the response of the New Zealand Herald would be if the decisions were removed from the READT website. The Tribunal has not heard from the New Zealand Herald but it assumes that in the absence of an order prohibiting publication or an order which has substantially that effect, the New Zealand Herald would not remove reference to the applicant's case from its website. It is assumed that the application has not been served on the New Zealand Herald.

[4] Amongst other points which she made, the applicant said:

> Surely this article can then be removed from the Ministry of Justice site and then it could be removed from the NZ Herald site.

[5] As matters stand, it is possible for a member of the public using a search engine to locate the original decision in which the Tribunal determined that charges against the applicant had been proved. The identity of the applicant and what she did which justified a conclusion that she had been guilty of misconduct will then be known by the person making the enquiry. The adverse information about which the applicant is concerned will continue to be available to the public even if continuing availability of

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[1] *Real Estate Agents Authority (CAC 10020) v McDonald* [2013] NZREADT 89.
[2] *Real Estate Agents Authority* (*CAC 10020) v McDonald* [2014] NZREADT 29.

the decision on the New Zealand Herald website is prohibited. That is to say, there will be no point in making an order for non-publication by the New Zealand Herald if it is possible for members of the public to obtain the information from the READT website which holds the original Tribunal decision in its database.

[6] The approach that the Tribunal will take will be first to consider whether it is possible to order that the decision is to be removed from the READT website. Alternatively, consideration will be given to whether different kinds of orders making the material on the website confidential can be made.

[7] Before considering the detail of the application, the Tribunal notes that the general basis upon which the applicant brings her application is that the continuing presence in the public domain of harmful and damaging material about the applicant is having a major negative effect on her ability to operate a business as a licensee. She considers that because of the passage of time that has gone by and the fact that there has been no repetition of misconduct on her part, the continuing publication of the circumstances of the original complaint is having a disproportionate and unfair effect on her and one that is no longer serving any legitimate purpose of the disciplinary process.

The functus officio point

[8] Before discussing further the question of whether orders can be made restricting access to the Tribunal archive and suppressing the identity of the applicant, consideration needs to be given to the point which was raised by the Real Estate Agents Authority that because of the passage of time the Tribunal no longer has the power or jurisdiction to make the orders sought. Brief consideration will now be directed to this point.

[9] The broad point that has been made is that following the Tribunal pronouncing its decision, its jurisdiction to make further orders in this matter was exhausted. Therefore, it is too late to now make the orders which the applicant seeks. That submission was directed to the making of the non-publication orders. It is that aspect of the application which will be dealt with first. Consideration will also be coupled to

whether there are any time limits for making orders restricting a search of the Tribunal archive.

[10] There are two aspects of this issue in turn which need to be considered. The first possibility is that it is now too late to apply for an order for suppression of name. If that is so, there is no point in considering making other orders including limiting access to the Tribunal file. It may also be the case that even if an order for non-publication can still be made -it may be too late for such an order to serve any useful purpose. Whether this last possibility has substance or not will only need to be considered if the Tribunal concludes that it is not now too late to revisit the original orders.

[11] If it is too late for the Tribunal to make orders, because of the operation of the concept of "functus officio" that will either come about because the Real Estate Agents Act 2008 (the Act) makes it explicitly or impliedly clear that there is a time within which such applications are to be made, or it may be that general policies of the common law are applicable which prevent the making of an application at such a late stage.

[12] The power to make orders under s 108 of the Act is exercisable on a broad discretionary basis. There is little guidance in the section detailing the circumstances in which orders should or should not be made. Specifically, there is no time limit within which an applicant can apply for an order pursuant to the section. There is therefore no explicit statutory obstacle to making a prohibition order, even a number of years after the original decision of the Tribunal.

[13] Common law courts have, though, consistently taken the view that it is in the public interest that there is an end to litigation and that it is in the private interests of parties to court processes to not be subjected by their opponents to vexatious litigation.[3]

[3] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2013] 1 NZLR 804, at [28].

[14] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*[4] provides some guidance. That case was concerned with the possible recall and alteration of a judgment. The issue in the present case is whether the same broad policy considerations are applicable to an application of the present kind to now revisit the case and make an order ancillary to the main decision, that order being one for restriction of publication.

[15] It is the view of the Tribunal that the principle which is under discussion is engaged in the present circumstances of this case.

[16] We note at the outset that there was never any application made for prohibition of publication at the original hearing. No decision was made on such a matter at the original hearing.

[17] The reason why the matter of prohibition of publication was not considered at the original hearing was because the applicant did not take part in the proceeding at that point. Had the applicant taken a more sensible approach to the original hearing and engaged with the Tribunal, the question of non-publication as one of the matters that needed to be considered might have emerged at that point. It is unfortunate that that did not occur. But that is not a reason why the Tribunal should not now consider making an order for non-publication of the original result.

[18] However, it is not the case that a party who fails to make an application at an earlier stage can come back to the court at a later stage and seek orders that were not originally made on the grounds that he or she failed to seek them at the earlier point of time. It would cut across the principal of finality of litigation if parties who had second thoughts could return to the court at a later stage and seek orders which varied the original case by varying the original decision, abrogating parts of the judgement or adding to it.

[19] It is possible in limited circumstances that a party can come back to the court for such purposes but that is only were something went wrong with the procedure and that would be unjust for the original decision not to be reconsidered. Orders can be

[4] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2013] 1 NZLR 804.

made in exceptional circumstances, with a classic example being a case where a party to the litigation was not able to be heard at the hearing because, for example, she had not been sent notice of the date of hearing. In that case such a clear miscarriage of justice will have occurred that the court allows the matter to be recalled for further consideration because the particular injustice would outweigh the requirements of the principle of finality of litigation.

[20] A leading case in which this principle was identified was the decision of Wild CJ in *Horowhenua County v Nash (*No 2) [1968] NZLR 632 (SC) at 633:

> Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are, I think, three categories of cases in which a judgment not perfected may be recalled — first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason justice requires that the judgment be recalled.

[21] The Tribunal is not however satisfied that this is such a case. It is correct that the applicant did not attend at the hearing before the Tribunal. However, that fact on its own would not justify making an order to now consider a matter that ought to have been dealt with at the original hearing. The reasons for the nonappearance of the applicant at the hearing is a matter of central importance to consider.

[22] The Tribunal record of the position in the following terms in its substantive decision of 17 October 2013;

> ***Post-hearing Developments***
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> [53] On the second working day after the hearing the defendant contacted our registry about various concerns which she recorded by email of 9 October 2013. These were along the lines that she maintains she did not know of the hearing and would have attended; that for many months communication with or by her has been difficult for various reasons; that she did not know that her barrister had withdrawn even though this registry was notified of that many months ago; that she has recently returned from visiting family in the United Kingdom, apparently since about April 2012, and various other such reasons; and would *"very much appreciate the opportunity to put my side of the story to you in person if that is at all possible"*.

> [54] The defendant seemed to understand that our decision had been reserved. In fact, towards the end of the hearing we found the charges, proved against the defendant but we did not pronounce penalty. This means she is guilty of misconduct in terms of the particulars set out in the charges except that the fifth charge was withdrawn, as explained above, and on the fourth charge we merely found the offence of unsatisfactory conduct, as also explained above.
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> [55] It would seem, as endorsed by counsel for the Authority in submissions subsequent to the hearing and related to the defendant's said email of 9 October 2013, that the defendant's only course, if she does not accept our findings, is to appeal our decision on guilt. However, we have not yet finally fixed penalty and, of course, we welcome submissions from the defendant on that aspect.
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> [56] Accordingly, we direct the registrar to arrange a telephone conference between the Chairman and counsel for the Authority/prosecution and the defendant to either set a timetable towards a hearing on penalty or to deal with the penalty aspect *"on the papers"*.

[23] It would appear that the Tribunal did not regard the allegations of inability to attend the hearing as having given rise to a substantial injustice. The position of the applicant was that she invited the Tribunal to reopen the hearing between the point where the Tribunal had completed it and the point where it issued its decision. It is implicit in the fact that the Tribunal did not agree to reopen the hearing into whether the charges were proved that it rejected this is being an appropriate case where it should re-open the hearing. There has been no appeal from the decision of the Tribunal which was subsequently delivered, as noted above, on 17 October 2013.

[24] Our conclusion is that the applicant had an opportunity to attend at the hearing before the Tribunal gave its decision but she failed to do so. We would accept that had she provided cogent evidence, for example establishing that a notice of hearing was sent to the wrong address, then we might have been prepared to consider recalling the original decision of the Tribunal. However, there is no such evidence. It is not even clear that at the original hearing the applicant wanted to apply for prohibition of publication of her name and that she would have done so had the hearing proceeded. We do not consider that in the totality of the circumstances of this case that the principle in *Horowhenua County* is applicable.

[25] In any case, the memorandum from the Tribunal which we have quoted from above makes it clear that the Tribunal extended to the applicant an opportunity to be heard on questions of penalty at which stage the matter of a prohibition of publication order would have been considered had it been requested.

[26] We do not consider that the applicant has been denied her rights in this matter including an opportunity to be heard on the matter that she now wishes to raise some years after the event.

[27] There is a further aspect of procedure which this application raises. In general, a court or tribunal makes its orders on a "once and for all" basis. Having delivered a decision, a court does not re-open the case at a later date. After giving a decision, it does not later review what it has decided in the light of events which have occurred since the hearing. Such an approach is consistent with the dominant principle of finality of litigation which we considered earlier in this decision.

[28] There may be an exceptional case where this approach should be departed from. However, there is no justification for doing so in this case, even if we have a discretion to do so. It could have been foreseen at the time of the hearing before the Tribunal that publication of the circumstances of the disciplinary proceedings against the applicant would potentially harm her business. The consequences of publicity that she now invokes as a reason to prohibit publication of her name could reasonably have been foreseen at the time of the hearing and have been raised before the Tribunal at that point for its consideration and the possible making of a prohibition order.

[29] For the foregoing reasons we conclude that the Tribunal should not now reopen consideration of aspects of this case. We accept that the publicity about the disciplinary proceedings may have had an adverse effect on her business. Unfortunately, the applicant did not take sensible steps to anticipate this occurrence by seeking an order for non-publication at the original sentencing hearing. Regrettably, by her actions (or rather, inaction) she has brought these consequences on her own head.

[30] For the foregoing reasons, the application is dismissed.

J Doogue
Deputy Chairperson

Mr G Denley
Member

Ms N Dangen
Member