

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 7**

**READT 025/2017**

IN THE MATTER OF

An Application for Review of a Registrar's  
decision, under Section 112 of the Real  
Estate Agents Act 2008

BETWEEN

DUNCAN JOHN NAPIER  
Applicant

AND

THE REGISTRAR OF THE REAL  
ESTATE AGENTS AUTHORITY  
Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Ms N Dangen (Member)  
Ms C Sandelin (Member)

Submissions received from:

Mr S McAnally, on behalf of Mr Napier  
Mr R Belcher, on behalf of the Registrar  
Ms T C Goatley, on behalf of NZME  
Publishing Limited

Date of Decision:

25 February 2019

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**DECISION OF THE TRIBUNAL  
(Re-determination of non-publication orders)**

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## **Introduction**

[1] The High Court has directed the Tribunal to re-determine its ruling prohibiting publication of non-publication rulings made pursuant to s 108 of the Real Estate Agents Act 2008. Those rulings are an oral ruling made on 10 October 2017 (“the oral ruling”),<sup>1</sup> and a ruling issued on 27 November, in which the interim non-publication order was revoked (“the revocation ruling”).<sup>2</sup> Except where it is necessary to refer to these rulings separately, we will refer to them collectively as “the rulings”.

## **Brief background**

[2] Mr Napier was a licensed salesperson. On 2 May 2016 he applied to renew his licence. The Registrar declined to do so, on the basis that his fitness to hold a licence had been called into question by a judgment entered against him in 2015 for the sum of \$1.418m in civil proceedings in the High Court at Auckland, and upheld by the Court of Appeal.

[3] On 1 August 2017 Mr Napier applied under s 112 of the Act for review of the Registrar’s decision. The application was heard by the Tribunal on 10 October 2017. At the conclusion of the hearing the Tribunal heard submissions on behalf of the parties, and by a reporter who had been present at the hearing, as to the continuation of an interim non-publication order made, without opposition, prior to the hearing. The oral ruling continued the interim order.

[4] The Tribunal allowed the application for review in its substantive decision issued on 24 October 2018 (“the substantive decision”).<sup>3</sup> The Tribunal agreed that the High Court findings gave rise to serious concerns as to Mr Napier’s fitness to practise, and that conduct of such a nature would be in breach of fundamental obligations under the Act and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. The Tribunal was also concerned that notwithstanding the High Court findings, Mr Napier had continued to steadfastly deny any wrongdoing, both to the Registrar and in his formal statement to the Tribunal. The Tribunal was, further, concerned that

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<sup>1</sup> *Napier v The Registrar of the Real Estate Agents Authority* [2017] NZREADT 63.

<sup>2</sup> *Napier v The Registrar of the Real Estate Agents Authority* [2017] NZREADT 70.

<sup>3</sup> *Napier v The Registrar of the Real Estate Agents Authority* [2017] NZREADT 64.

he was not able to give a clear expression of the wording used to advise clients or prospective clients of the High Court and Court of Appeal judgments.

[5] Against that, the Tribunal referred to the established principle that the approach to review applications in these circumstances is “forward” rather than “backward” looking, that the conduct leading to the High Court findings had occurred at least five years previously (before Mr Napier entered the real estate industry), he had carried out real estate agency work without complaints, had considerable support within the community, and had satisfied the judgment debt. The Tribunal placed significant weight on the detailed and comprehensive measures set out by the Agency with which he was engaged, for their supervision, management, and mentoring of Mr Napier.

[6] The Tribunal subsequently received submissions on behalf of the parties and NZME Publishing Limited as to whether the interim non-publication order should be made permanent. Both parties accepted the well-understood principles as to the importance of freedom of speech, open judicial proceedings, and the right of the media to report proceedings fairly and accurately as surrogates of the public. They also accepted, as a starting point, the need to take into account and recognise and apply the purposes of the Act, including the promotion and protection of the interests of consumers.

[7] Mr McAnally submitted for Mr Napier that publication of the Tribunal’s substantive decision would give life to matters that are increasingly historical, would add nothing to what is already known, and that the public interest in publication of the circumstances of the proceeding is limited, and outweighed by the potential prejudice of renewed publicity.

[8] Ms Cropp submitted for NZME that publication of the Tribunal’s substantive decision would be advantageous to Mr Napier, and would ensure transparency of the Tribunal’s processes, outweighing any private interest Mr Napier, his family, or his employer might have.

[9] [redacted]

[10] Ms Cropp further submitted that should the Tribunal's decision not be made publicly available, it remained suitable that Mr Napier's name and that of his employer be redacted from the decision.

[11] The Tribunal issued the revocation ruling on 25 November 2017. It recorded Ms Cropp's submission set out at paragraph [9], above. Before concluding with the mandatory advice as to appeal rights the Tribunal ruled, at paragraph [20]:

Publication of any part of this ruling and the oral ruling and any account of this ruling and the oral ruling is prohibited.

The Tribunal has accepted that the paragraph [20] ruling does not record any considerations the Tribunal took into account in making it.

[12] On 19 December 2017 the parties were advised in a Tribunal Minute that the Tribunal had been notified that Mr Napier was surrendering his salesperson's licence.

[13] NZME sought clarification of whether or not the fact of Mr Napier's application for a non-publication order, the relevant arguments, and the Tribunal's determination were subject to non-publication. In a Chairperson's Minute dated 11 January 2018 the parties were referred to paragraph [20] of the revocation ruling.

## **Appeal**

[14] NZME appealed against the paragraph [20] ruling. There has been no appeal against the oral ruling or the revocation ruling.

[15] The appeal was heard in the High Court at Auckland, and the judgment of his Honour Justice Muir was delivered on 6 July 2018.<sup>4</sup> His Honour held that:

[a] The failure to give reasons is recognised as itself an error of law or principle and a free-standing ground of appeal;<sup>5</sup>

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<sup>4</sup> *NZME Publishing Limited v The Registrar of the Real Estate Agents Authority* [2018] NZHC 1657.

<sup>5</sup> At paragraph [27], citing *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 (UKCA).

[b] The present case does not fall within the limited exception where the reasons could be abbreviated, where “they will be evident without express reference”;<sup>6</sup>

[c] It was not apparent that the weighing exercise had occurred;<sup>7</sup> and

[d] The Tribunal was required “to determine again, with reasons and having regard to the observations in this judgment, the prohibition [of] publication contained in [paragraph [20]]”.<sup>8</sup>

[16] His Honour therefore allowed NZME’s appeal and remitted the paragraph [20] ruling to the Tribunal for re-determination.<sup>9</sup> The Tribunal was provided with a copy of his Honour’s judgment on 25 September 2018.

### **Submissions**

[17] Mr McAnally submitted for Mr Napier that there is no public interest in publication of the oral ruling, as it solely continued interim orders, which had been made without opposition.

[18] He further submitted that publication of the revocation ruling is not necessary to facilitate, and is in fact irrelevant to, the applicable objectives of the Act: namely consumer protection and the promotion of public confidence in the performance of real estate agency work. He submitted that the revocation ruling does not restrict in any way (but allows), publication of the subject matter of the application for review.

[19] Mr McAnally referred to the submission made by Ms Cropp on behalf of NZME in opposition to Mr Napier’s application for a permanent non-publication order, which is recorded at paragraph [9], above. He submitted that that submission was unfairly made without any evidential foundation and was a matter of pure speculation. He submitted that any publication that implied that Mr Napier is or may be the subject of

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<sup>6</sup> At paragraphs [31] and [32], citing *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546 (CA), at [81].

<sup>7</sup> At paragraph [35].

<sup>8</sup> At paragraph [43].

<sup>9</sup> At paragraph [45].

criminal proceedings would be highly prejudicial to him and outweighs any public interest in knowing that he applied unsuccessfully for a non-publication order.

[20] Mr McAnally also submitted that in the face of the limited public interest in the revocation ruling (if fairly and accurately portrayed), the private interests of third parties became more relevant. He submitted that the private interests in not being associated with a person who may or may not be the subject of criminal proceedings, and may or may not have surrendered his salesperson's licence for some ulterior reason, outweighs the limited public interest in publication of the revocation ruling.

[21] Mr McAnally submitted that public interest in the fact that Mr Napier applied for a non-publication order would only arise if there were something "sinister or unusual" about his application, which there was not. He submitted that in the circumstances, there is only limited public interest in publishing the fact of the application for a permanent non-publication order, which is outweighed by private interests.

[22] Mr Belcher submitted for the Registrar that there is public interest in the fact that Mr Napier sought non-publication orders, and the Tribunal's reasons for declining to make such orders. He submitted that the public interest in this proceeding extends beyond the substantive decision to its procedural decisions and interlocutory steps. He submitted that it is normal for the media to report such details either as the case progresses or at the conclusion of the proceedings, as permitted by the relevant court or tribunal.

[23] He further submitted that in the present case, publication is part of achieving the purposes of the Act. He submitted that an important part of promoting public confidence is the maintenance of a robust regulatory framework, including the Tribunal. He submitted that this extends to decisions in relation to non-publication, and the reasons for those decisions.

[24] With regard to private interests, Mr Belcher submitted that the context in which the application for a permanent non-publication was made is particularly important: the entire history of this matter is already in the public domain and has been reported

on. He submitted that for that reason, Mr Napier must point to particular private interests, either his own or those of third parties. He submitted that Mr Napier had not advanced any such legitimate private interests.

[25] Finally, Mr Belcher submitted that Mr Napier's concern that there may be unfair or unbalanced reporting is not a proper basis on which to make a non-publication order. He further submitted that any concerns may be addressed by a targeted order.

[26] On behalf of NZME, Ms Goatley referred the Tribunal to relevant authorities as to the presumption of open justice, and the public interest in publication of disciplinary decisions. She submitted that there has been legitimate public interest in the present proceeding to date. She did not refer to any particular expression of such interest, but submitted that given the factors which led to the Tribunal's revocation ruling, there could be no proper reason for restricting publication of the fact that Mr Napier sought name suppression.

[27] Ms Goatley also submitted that open reporting of the rulings, and Minutes of the Tribunal and the Chairperson, would "provide some degree of protection to the public, the profession, and the Court, because there is inherent, legitimate public interest in the process followed by the Tribunal in reaching its decisions". She submitted that the public should be entitled to that information, and the availability of it facilitates accountability in the industry, and transparency of the Tribunal's processes. She also submitted that "noteworthiness", or lack thereof, is not a relevant consideration, as all aspects of the Tribunal are of public interest, including whether a person has unsuccessfully sought name suppression.

[28] She further submitted that it is necessary for the media to explain why the matter was not reported contemporaneously with the substantive hearing before the Tribunal (ie without an explanation that Mr Napier had name suppression and/or unsuccessfully sought name suppression), as the public will wonder why they were not informed about the proceeding earlier in its progression before the Tribunal.

[29] Ms Goatley went on to submit that there is no proper basis for any restriction on publication. She submitted that the subject matter leading to the proceedings before

the Tribunal is largely in the public domain, such that there is no privacy interest which is sufficient to outweigh the starting point of open justice.

[30] Finally, Ms Goatley submitted that it is not for the Tribunal to make orders on the basis of concerns as to what NZME might publish. She submitted that NZME is a respected media organisation, subject to relevant Codes of Conduct, and can accordingly be trusted to carry out fair and accurate reporting. In any event, she submitted, how the media may elect to report on matters before the Tribunal is not a relevant ground for consideration in the exercise of its discretion to make orders prohibiting publication.

## **Discussion**

### *Introduction*

[31] Although submissions as to whether the Tribunal should make a non-publication order in respect of the oral ruling and the revocation ruling were received on behalf of NZME, a news media organisation, as well as on behalf of Mr Napier and the Registrar, it is important to bear in mind that “publication” does not refer only to publication by news media organisations. Decisions are published on the Tribunal’s website, on various legal databases (for example, NZLII), and are available through the Real Estate Authority’s website.

[32] We note an ambiguity in the submissions for NZME. Its appeal to the High Court, and his Honour Justice Muir’s judgment, related to the paragraph [20] ruling. The Tribunal was only directed to re-determine whether a non-publication order should be made in respect of the the oral ruling and the revocation ruling.

[33] NZME’s submissions recorded that it seeks to report “in essence, the fact that Mr Napier unsuccessfully sought name suppression”. It also submitted that “there can be no proper reason for restricting publication of the fact that [Mr Napier] sought name suppression”. However, later in its submissions, NZME submitted that Tribunal Minutes should also be published. This submission is inconsistent with, and goes beyond, the scope of NZME’s appeal, and the scope of his Honour’s judgment. The

Tribunal's reasoning, set out below, focusses on the re-determination directed by his Honour.

### *Applicable principles*

[34] All proceedings before the Tribunal (not just disciplinary proceedings) focus on the fundamental purposes of the Act, as set out in s 3 of the Act. The Tribunal accepts the principles of open justice, and that there is a public interest in reporting the Tribunal's decisions. The principles, and their relevance to proceedings before the Tribunal, were discussed in *X v Complaints Assessment Committee 10028*,<sup>10</sup> and *Graves v Real Estate Agents Authority (CAC 20003)*.<sup>11</sup> In those decisions, the Tribunal referred to the principles expressed in *Lewis v Wilson and Horton Ltd*,<sup>12</sup> *Director of Proceedings v I*,<sup>13</sup> and *S v Wellington District Law Society*.<sup>14</sup> The Tribunal agrees (and has expressed on many occasions) that it is rare for the Tribunal to prohibit publication of a decision.

[35] There is a legitimate public interest in the process followed by the Tribunal in reaching its substantive decision. The process by which the Tribunal concluded that Mr Napier's application for review should be allowed is set out in detail in the substantive decision. As a result of the revocation order, the substantive decision may be published. There was no lack of openness in the Tribunal's processes.

### *The s 108 discretion*

[36] The Tribunal has a discretion pursuant to s 108 of the Act to make non-publication orders if it is satisfied that they should be made. The Tribunal's discretionary power under s 108 is extensive.<sup>15</sup> NZME's submission that the public should be "entitled" to information (in the present case the oral ruling and the revocation ruling) would deprive the Tribunal's discretion of any content and render

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<sup>10</sup> *X v Complaints Assessment Committee 10028* [2011] NZREADT 2.

<sup>11</sup> *Graves v Real Estate Agents Authority (CAC 20003)* [2012] NZREADT 4.

<sup>12</sup> *Lewis v Wilson and Horton Ltd* [2000] NZCA 175, [2000] 3 NZLR 546.

<sup>13</sup> *Director of Proceedings v I* [2004] NZAR 635 (HC).

<sup>14</sup> *S v Wellington District Law Society* [2001] NZAR 465 (HC).

<sup>15</sup> See *Ryan v Real Estate Agents Authority (CAC 10067)* [2013] NZREADT 15, at paragraph [15].

it devoid of any meaning. We reject the submission that the public interest and the principles of open justice lead to a conclusion that the public is (or should be) “entitled” to be informed of every aspect of all proceedings before the Tribunal.

[37] We accept the Registrar’s submission that the media may report on proceedings before the Tribunal either as the case progresses or at the conclusion of the proceedings, as permitted by the Tribunal. The words “as permitted by the Tribunal” are an important qualification, as they recognise the Tribunal’s discretion to make an order for non-publication, having had regard to the interest of any person, and to the public interest.

#### *The oral ruling*

[38] The oral ruling continued an interim non-publication order made earlier in the proceeding without opposition, pending the issue of the substantive decision, which was expected to be (and was) for only a short period.

[39] Beyond the fact that an interim order was continued pending the substantive decision, we see little in the oral ruling that would further the public interest, the interests of open justice, or the purposes of the Act. However, we were not pointed to any particular private interest of Mr Napier or any third party that would outweigh such public interest as there is.

[40] The paragraph [20] ruling will therefore be varied by removing the prohibition on publication of the oral ruling.

#### *The revocation ruling*

##### *(a) The fact that the order was made*

[41] We accept that there may be a legitimate public interest in publication of the fact that Mr Napier applied, unsuccessfully, for an interim non-publication order to be made permanent. On this point, we find that the public interest in publication of the fact that the application was made, and ruled on, outweighs Mr Napier’s private interests.

(b) *Information in the public domain*

[42] We accept that the background facts of the civil proceedings are already in the public domain. The Tribunal was provided with copies of news reports published at each stage of the proceedings. We do not consider that the fact that there was extensive reporting of the civil proceedings is determinative of whether the principles of open justice and the public interest outweigh Mr Napier's private interests and require publication of the Tribunal's rulings.

[43] [redacted]

(c) *Public/private interests: NZME's submissions recorded in the revocation ruling*

[44] Other matters pertaining to Mr Napier's application for review, that is:

- [a] his name;
- [b] the civil proceedings;
- [c] the grounds given by the Registrar for declining to renew his salesperson's licence;
- [d] the arguments put forward by him in support of his application for review and by the Registrar in opposition; and
- [e] the Tribunal's decision and its detailed reasons for making it (including the Tribunal's reliance on the assurances given by the Agency in which he was engaged as to mentoring and supervision of Mr Napier),

have been able to be published by the news media since the date of the revocation ruling (27 November 2017), by way of publication of the substantive decision. The substantive decision has been published on the Tribunal's website. The Tribunal is aware that it has been published on the NZLII database. There was no reference in the submissions to the Tribunal of any publication of the substantive decision by the news media since the revocation ruling was made.

[45] [redacted]

[46] The Registrar and NZME submitted that the public interest in publication of the content of the Tribunal's revocation ruling (as opposed to the fact that the ruling was made) outweighs Mr Napier's private interests, and the interests of any third party.

[47] [redacted]

[48] [redacted].

[49] [redacted]

[50] [redacted]

[51] [redacted]

[52] In *Ryan v Real Estate Agents Authority*,<sup>16</sup> the Tribunal said:

... we are not able to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media.

[53] In that case, a complaint against the licensee was dismissed by a Complaints Assessment Committee. The complainant's appeal to the Tribunal was also dismissed. The licensee applied for an order that an interim non-publication order be made permanent, which the Tribunal dismissed. The context of the Tribunal's consideration in *Ryan* (where it was found that the licensee had not engaged in unsatisfactory conduct) is different from that where there is an indication of publication of information that is prejudicial to the licensee.

[54] We do not accept that concern as to the publication of the Tribunal's record in the revocation ruling of NZME's unsubstantiated "understanding" is a concern as to "how matters 'might' be reported". This is not an expression of concern on the part of

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<sup>16</sup> Fn 15, above, at paragraph [10].

the Tribunal as to the manner in which matters might be reported, or how they might be understood by impressionistic readers.

[55] The submission that the NZME can be trusted to publish a fair and accurate report of a Tribunal decision does not deal with the many websites and databases on which decisions are published. As noted earlier, publication of Tribunal decisions is not limited to what the news media may elect to report. Given the variety of means by which a decision may be published, the Tribunal should not be precluded from preventing publication of the record of a submission that is speculative but highly prejudicial.

[56] [redacted]. In this instance, Mr Napier's private interest outweighs any legitimate public interest such publication might have. We are satisfied that we should make an order prohibiting publication of paragraphs [6][d], [10], and [11] of the revocation ruling.

[57] We go on to consider whether a non-publication order should be made as to the balance of the content of the rulings.

[58] NZME submitted that there has been "legitimate public interest in "the proceedings" to date. The Tribunal is not aware of any public interest in the present proceeding, and NZME did not point to any expression of such interest. Accordingly, we give this submission little weight. Without substantiation, it is speculative.

[59] NZME also submitted that it is "necessary" for the media to explain why the "matter" was not reported contemporaneously with the substantive hearings before the Tribunal. NZME submitted that in the absence of an explanation that there was an interim non-publication order in place, and/or had unsuccessfully been sought, the public will wonder why they were not informed about the proceeding earlier in its progression before the Tribunal.

[60] NZME did not refer to any evidence of any such "wonder". We do not accept that speculation as to what the public may or may not "wonder" justifies a conclusion that the public interest requires publication of the revocation ruling. There has been

no bar to publication of the Tribunal's substantive decision since the date of the revocation ruling. We infer from the absence of any evidence of the decision having been published, that the media has preferred to delay doing so. In any event, publication of the fact that Mr Napier applied, unsuccessfully, for a non-publication order after the substantive decision was issued should provide a sufficient explanation for the delay in reporting the substantive decision.

[61] The revocation ruling re-stated most of the oral ruling, as to which we have revoked the paragraph [20] ruling. With the exception of paragraphs [6][d], [10], and [11] (in respect of which we are making a non-publication order), having re-considered the respective interests, we have concluded that the public interest in publication of the revocation ruling outweighs Mr Napier's private interests in there being no publication.

#### *Minutes*

[62] We reject NZME's submission that the public is entitled to "open reporting" of the Tribunal's Minutes.

[63] Tribunal Minutes are not distributed beyond the parties. In this case, NZME's reporter was provided with copies of two Tribunal Minutes as a courtesy, as he had been present at the review hearing. In the Tribunal's experience it is well understood that members of the media who have been present at a hearing may be provided with Minutes relating to "in Chambers" matters, but on the understanding that they are not to be published.

[64] Tribunal Minutes are not part of the Tribunal's public file. The Tribunal is not subject to the Official Information Act 1982, or any other statutory provision which might be thought to allow public access to Tribunal Minutes (for example, the Senior Court Act 2016).

[65] We are not persuaded that the public interest, the interests of open justice, or furthering the purposes of the Act, requires the Tribunal to allow publication of its Minutes. Nor are we persuaded that reporting of the Tribunal's Minutes (either in

general, or in respect of the two Minutes referred to by NZME) would provide any degree of protection to the public, the real estate industry, or any other body. The public interest in the process by which the Tribunal reaches its decision is well met by publication of the decisions themselves.

### **Outcome**

[66] Paragraph [20] of the revocation ruling is varied as follows:

[a] Publication of the oral ruling is not prohibited;

[b] With the exception of paragraphs [6][e], [10], and [11], publication of the revocation ruling is not prohibited

[67] If any issue as to non-publication, or publication, of this re-determined ruling arises, submissions must be filed with the Tribunal within 10 working days. In the interim, this ruling will not be published.

[68] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of Act, which sets out the right of appeal to the High Court.

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Hon P J Andrews  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member