

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 24

READT 022/2020

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

RODNEY and MICHELE BAKER
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 1901)
First Respondent

AND

HAMISH DRUMM, MARK COFFEY and
SAFARI REAL ESTATE (t/a TOMMY'S
HUTT CENTRAL)
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Mr N O'Connor (Member)

Submissions filed by:

Mr Baker
Ms A-M Davies, on behalf of the Authority
Mr G Dewar on behalf of Mr Drumm

Date of Ruling:

18 May 2021

RULING OF THE TRIBUNAL
(Application for prohibition on publication)

Introduction

[1] The Tribunal is issuing its decision as to penalty, following its finding of unsatisfactory conduct against Mr Drumm.¹ This Ruling addresses the application made by Mr Drumm for an order prohibiting publication of his name.

Submissions

[2] Mr Drumm seeks an order under s 108 of the Act prohibiting publication of his name and those of the other second respondents. Mr Dewar submitted on behalf of Mr Drumm that an order is justified on the grounds that Mr Drumm's breaches were minor, caused no loss to the appellants, and are unlikely to occur again. He also submitted that Mr Drumm will suffer reputational damage from publication which may impact on his career advancement.

[3] He further submitted that the appellants are likely to seek their own form of justice for which publication of Mr Drumm's name will provide ammunition. In his penalty submissions, Mr Dewar stated that on 24 July 2020 (the day the Committee's decision to take no further action was issued) Mr Baker contacted the Authority, who subsequently warned Mr Drumm that they had received notice of threats to harm him, that they regarded as being sufficiently serious to warn Mr Drumm that his safety may be compromised.

[4] Mr Dewar submitted that an order is not sought prohibiting publication of the full Tribunal decision, it is sought only in respect of the names of Mr Drumm and the other second respondents. He submitted that the decision could still be of educational benefit to real estate licensees.

[5] An affidavit sworn by Mr Drumm was submitted in support of the application. In relation to the application for a prohibition on publication, he said that he believes that the consequences of publication are professionally and personally significant for him and his family. He referred to his voluntary work for charitable causes across

¹ See *Baker v Real Estate Agents Authority (CAC 1901)* [2021] NZREADT 10 and *Baker v Real Estate Agents Authority (CAC 1901)* [2021] NZREADT 23.

Wellington and said that he believes that publication of his name will compromise his ability to act for charities. He also believes it will hinder his career advancement and impact on his ability to obtain clients.

[6] Mr Drumm states that he believes that “Mr Baker will continue to seek to do harm to me and possibly my family through angry and uncontrolled actions”. He believes that Mr Baker “continues to accuse me of fraud, that he will continue to seek opportunities to attack me and that publication of my name will result in a very real risk of harm at his hands as he continues to distort matters”.

[7] An affidavit sworn by Mr Drumm’s manager at the agency where he is now engaged was also filed. In relation to the application for a prohibition on publication, the manager said that he did not consider that the interests of consumers or the industry would be advanced by publication of Mr Drumm’s name.

[8] Ms Davies, on behalf of the Authority, opposes the application. She submitted that while the application requires the Tribunal to balance Mr Drumm’s privacy interests against the public interest in open justice, the starting point should always be the presumption of open justice. She submitted that given the consumer-protection purposes of the Act, it will be proper in most circumstances for the Tribunal to order publication of the name of a licensee who is subject to a finding of unsatisfactory conduct and the threshold to displace the presumption of open justice is high.

[9] Ms Davies acknowledged that Mr Baker had made a telephone call to an Authority investigator in which he made threats against Mr Drumm. She submitted that this appeared to have been provoked by release of the Committee’s decision to take no further action on the appellants’ complaint: that it is more likely that it was the “no further action” aspect of the event, rather than publication of the decision, that prompted the threat. Either way, she submitted, a basis for a prohibition on publication is not made out on the basis of the threat.

[10] Ms Davies further submitted that individually or collectively, the grounds set out on behalf of Mr Drumm's application are not sufficient to outweigh the public interest in publication. She first submitted that reputational damage, while unfortunate, is a normal consequence of disciplinary proceedings and by itself, it not generally considered sufficient to displace the presumption of open justice. She submitted that there is no evidence to demonstrate that damage to Mr Drumm's reputation would be much more severe than the ordinary consequences of an unsatisfactory conduct finding.

[11] Secondly, while acknowledging Mr Drumm's concerns in respect of his charity work, she submitted that the evidence does not establish that publication will or is likely to have the effect of compromising his ability to act for charities.

[12] Thirdly, Ms Davies referred to the submission that Mr Drumm's conduct was at the lower end of the spectrum of unsatisfactory conduct. She submitted that the Authority has a different view of the conduct, but in any event conduct being at the lower end of the spectrum would not form a basis for suppression.

[13] Fourthly, Ms Davies submitted that while Mr Drumm submits that he is unlikely to engage in conduct requiring disciplinary intervention in the future, there is an inherent public interest in publication where a provision of the Act or Rules is breached, deriving from the need for public protection. She submitted that publication, including on the public register, helps to facilitate informed consumer choice, a factor to which the Tribunal should have regard. She submitted that the public register is designed to convey relevant information about licensees to the public, and the public should be able to choose a suitable agent or salesperson and to know if a licensee has been disciplined within the last three years.

[14] Finally, Ms Davies submitted that it is determinative that the Tribunal has previously published a decision (the Tribunal's first decision) in respect of the appellants' complaint, which was not subject to any publication prohibition. She submitted that Mr Drumm's name is already associated with this disciplinary proceeding, as are the appellants. She submitted that given the unique factual circumstances in this case, even if publication of Mr Drumm's name were prohibited, Mr Drumm could be identified from that decision.

Discussion

[15] Section 108 of the Act provides (as relevant):

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 (of any)) and to the public interest, it may make 1 or more of the following orders:

...

- (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charges or any other person.

[16] The Tribunal agrees with the submissions for the Authority as to the principles relating to applications for an order prohibiting publication, and as to whether Mr Drumm's application should be granted. It is not necessary to repeat them. Mr Drumm has not established that an order should be made for an order prohibiting publication.

Outcome

[17] The application for an order prohibiting publication is declined.

[18] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Addendum

[19] Shortly before this decision was issued, the Tribunal received a communication from Mr Baker, in which he made submissions concerning the telephone call he had

made to the Authority after the Committee's decision was issued on 24 July 2020 (referred to in paragraph [3], above), and as to his claim for costs. The Tribunal has considered Mr Baker's submissions and does not consider that any amendment to this decision is required.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Mr N O'Connor
Member