

Decision No: [2011] NZREADT 15

Reference No: READT 071/10

IN THE MATTER OF an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN **Mr O**
Appellant

AND **COMPLAINTS ASSESSMENT COMMITTEE (CAC 10028)**
First Respondent

AND **Mrs T**
Second Respondent

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

APPEARANCES

William Akel and Kate Eaglen for the appellant
Mr Clancy for the first respondent
No appearance for the second respondent

Introduction

[1] This is an appeal by Mr O (“the appellant”) against the decision of Complaints Assessment Committee 10028 (“the Committee”) who make a finding of unsatisfactory conduct against Mr O, a licensed real estate agent employed by XX Realty, an agent under the Real Estate Agents 2008 (“the Act”). The appeal is by way of rehearing under s 111(3) of the Act.

[2] The appellant was at all material times employed as a licensed real estate agent by XX Realty which carried on business as real estate agents in XX, Auckland.

[3] The second respondent made complaints about the conduct of Mr O and complained about a number of aspects of the way in which he carried out his work when he was the agent acting on the sale of her property. Her complaint is dated as being received on 3 March 2010. A summary of her complaints are:-

- (i) Mr O introduced a buyer who made an offer on the property which the T's subsequently believed was not a genuine offer and which was used by Mr O to obtain the listing for the sale of the house.
- (ii) There was a dispute about the number of parties who had attended open homes and as to whether Mr O had shown the complainants the open home registers. The Ts claimed that they had asked to see these books and that Mr O had refused to show the books to them on the grounds of that to do so would breach the Privacy Act.
- (iii) They complained about his misuse of statistics in respect of his claims that he had sold more property in XXX than any other agent and that the property was in zone for XXXX which had the best NCEA results of any school on the XXXX.
- (iv) They complained that Mr O was unethical and unprofessional in the way that he disparaged another agent who worked in the XX area.
- (v) They complained that Mr O continued to advertise their house for sale in the Property Press after their agency with him had expired.

[4] The complaints involve conduct alleged to have occurred prior to the Act coming into force on 17 November 2009. In its decision dated 22 November 2010 the Complaints Assessment Committee referred to s 172 of the Act which confers on the Committee discretion to consider such complaints. The Complaints Assessment Committee determined under s 89(ii)(b) of the Act that it had been proved on the balance of probabilities that Mr O had engaged in unsatisfactory conduct, albeit at a lower level (see paragraph 5.2).

[5] ***Committee Decision***

The Committee made the following decisions:

"4.2 Consideration of the complaint

4.2.1 The CAC has considered the complaint from Ms T and the response from Mr O.

Locked Ms T and her husband into a 3 month exclusive agency by using non genuine purchaser

The CAC is concerned that Mr O was unable to find any information relating to the apparent purchaser for the T's property who enabled

him to obtain an agency agreement. Mr O provided no contact details for the purchaser nor the Sale and Purchase Agreement which he was required by his agency to keep on file. In the CAC's view on the balance of probabilities "Jo" the "non genuine purchaser" did not exist.

Lied about the number of people who were viewing their property during the open homes

Mr O provided no evidence to support the number of people viewing the T's property including the booklet which he maintains was lost. In the CAC's view if the numbers Mr O was reporting were accurate he should also have been able to provide information such as diary notes, appointment times and contact details.

Did not advertise their property with the appropriate ID numbers for websites

The CAC accepts that Mr O does not choose to display website addresses in order to make the buyers ring him directly.

Continued to advertise their property after the agency agreement ended

The CAC accepts that Mr O removed the advertising when requested by the Ts but in future should be aware of his advertising and marketing obligations under the Professional Conduct and Client Care Rules 2009.

Was misleading in the use of statistics in his own advertising

In the CAC's view there is no evidence to support this part of the complaint.

Is unethical and unprofessional in this he tried to bring the name of another agent into disrepute and be disparaging of him

In the CAC's view this matter lies with Mr O for consideration in his future dealings with his clients.

- 4.3 Having considered the full complaint and response from the licensee the CAC prefers the evidence of the complainant in relation to securing the agency agreement and claims of the numbers viewing the open homes. In the CAC's view there was a lack of honesty on the part of Mr O and sufficient evidence to support a finding that the actions of Mr O amount to unsatisfactory conduct".

Relevant Legislation

[6] "72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or

- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”

“73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee’s fitness to be a licensee.”

The Appellant’s Case

[7] The appellant was represented by counsel at the hearing of his appeal and called evidence.

[8] The evidence called by the appellant came from the appellant himself and from his wife Mrs O.

[9] Mr O evidence was that he had been a licensed real estate agent since 1997 and had worked in the XX area all of that time. He works out of the XX Realty office in XX, XX specialising in residential property in the XX area. Up until March 2009 he had worked with a Mr XXXX, another licensed real estate agent. Mr XX had handled all the paperwork and financial side of the business. He told the Tribunal that at the time he became the agent for the Ts he was doing all the record keeping and was

relatively new to that. He said that at the end of August 2009 he became very unwell with the Swine Flu. He told the Tribunal that he had been asked by a fellow agent at XX Realty to appraise the T's property at XXXX, XXXX. This was in August 2009. He was told that two other agents Mr N of XX Property and XXXX of Barfoot and Thompson were also appraising the property. He gave a market appraisal of \$790,000 to \$830,000, this was a verbal appraisal. He told the Tribunal that soon after appraising the T's property he was out collecting open home signs on a Sunday afternoon when he was approached by a lady calling herself "Jo". Jo was looking for a property with privacy preferably down a Right of Way. He offered to show Jo a property at XXXX, XX which matched her description. She did not have a landline or cellphone number as she was new to Auckland. He gave Jo his business card and told her to call if she was interested. Jo turned up to the open home at the property at XXXX, XX but Mr O did not record her name in the open home register. He told the Tribunal this was because she arrived just as he was packing up to go. He recalled that she was of Eastern European descent and that her legal name was difficult to pronounce so he did not commit it to memory.

[10] Jo was not interested in XXXX but was told about XXXX and said that she would like to see it. He rang Mrs T who agreed to let Jo view the property and Mr O made an appointment with Jo to meet her at the property. He introduced her to Mrs T before giving her a tour of the property. Mr O told the Tribunal that Jo said that she wanted to make an offer but could only pay high \$700,000s for the property. Mr O said he told her that if she wanted the property she would have to make an offer in the \$800,000's. He agreed to meet Jo at his house on Tuesday evening 1 September so she could make an offer. He said that he arranged to meet the Ts on Tuesday evening after Jo made her offer. He said he documented her unconditional cash price offer of \$810,000. Jo said she would go out to dinner while he presented the offer and would meet Mr O back at his house after the offer was presented. Mr O said that he gave the offer to the Ts telling them (he said) that it was a good offer. He said that the Ts told him that they wanted to countersign at \$830,000. The Tribunal notes that the T's evidence given in their written complaint to the REAA is that Mr O told them to countersign the offer. They said "*he advised us to counter this offer and an amount of \$835,000 was agreed upon*". When they had countersigned Mr O said that he should have a contract authorising him to act and he said they were then happy to sign the listing agreements.

[11] He returned to his home and told Jo that the Ts had countersigned at \$830,000. He said that she was upset and he said that she had thought that her offer was very generous. Mr O told the Tribunal that she became very vocal and said that she did not think any property in that street had ever sold for \$800,000 and that she stressed that her offer had been outstanding. She made it clear to Mr O that she did not want to countersign. He said she left the house talking about purchasing a property in Titirangi instead. Mr O said that he did not have the energy to argue with Jo. He said that because he was ill he did not keep and file the offer as it was his usual practice and told the Tribunal that his record keeping was not up to scratch.

[12] He told the Tribunal that he believed that the price of \$810,000 was a good one. He said he finds it hard to understand why the Ts believe that Jo's offer could not have been genuine, as the offer was higher than any property in the street had ever sold for and was in the middle of the price range that he had appraised for the

property and was unconditional. He denied that he presented this offer simply to get a listing.

[13] He subsequently told the Tribunal that he did not ring the Ts back on the evening of 1 September to tell them that the property was not sold. He did not ring them on 2 September because it was his birthday but on 3 September he says that he called them and told them that the property had not sold.

[14] The Ts, in their written response claimed they had rung him on 3 September to find out why they had not heard about the sale. It was their written evidence that they had been told by Mr O that Jo only had finance pre-approved up until \$780,000 and the bank would not loan her an amount above this. Mr O denied that he said this to the Ts.

He then reiterated that when he started open homes for the T's he was unwell with Swine Flu. He said that on the second week of the T's open home he asked his wife Mrs O (who was a registered real estate agent) to run one of the weekend days, as he was too sick to manage both. He said he had weekly meetings with the Ts to discuss how the marketing of the property was progressing and on the third week he was asked to attend a meeting with the Ts. He said he was terribly ill and tried to reschedule the meeting but the Ts would not let him do this. He said that he was not prepared for the meeting as he usually would be and did not have either open home register with him. He said that he estimated that about 15 groups had attended the open homes, based on the number that had attended on the day that he had run the open home and from his general impressions of his discussions with his wife. While his written statement did not specify this he later agreed that there had also been a discussion regarding the Privacy Act and the open Home Registers. He agreed that his manager had been rung by Mrs T and after a discussion with the manager (Mr O claimed the next day) he was told to show them the register. He says that he returned sometime in the next week and showed the open home registers to the Ts in the presence of his wife. He said that in the telephone call that took place with the manager, the manager told the Ts that they could be released from their sole agency but they declined this offer. The Ts written statement says that they never saw the registers.

[15] Mr O told the Tribunal that the following week there was another meeting with the Ts and his wife Mrs O accompanied him. At this meeting they had the open home registers and discussed the attendees at the open homes and he told the Tribunal that after his meeting he felt that all the issues had been resolved. He referred to the fact that Mrs T had done some baking and left a note that he could help himself to the baking, and to the letter written in 2009 at the end of the agency by the Ts. In this letter they told him that the agency was at an end but said that he could present any cash unconditional offer from any contacts made during the exclusive agency. He said they said in that letter "*thank you for the efforts that you have made on our behalf thus far*". He said he did not know that there were any outstanding issues with the Ts until he received the complaint. He told the Tribunal

that he had been deeply depressed by the determination by the CAC and referred to the counselling he was undertaking with a psychotherapist. He also told the Tribunal that he had tried to commit suicide as a result of this complaint and the outcome. He said that he had had to stop work because of the stress and the financial cost had added to his stress of the situation. He told the Tribunal that a Mr N was his main competitor and said he felt that the complaint had been solicited by Mr N. Mrs T denies this in her response to the CAC.

[16] Mrs O then gave evidence. Her written evidence said that she did not think anything of Jo coming to her house to discuss an offer on the T's property and she recalled Jo mentioning the Titirangi area. In giving her oral evidence she said that she had never met Jo, and while it was possible that Jo had been in the house while she was there, she was unwell during this time and may have been in her bedroom which was two floors above the living area. She also told the Tribunal that she had done one of the open homes for the T's property and took both registers with her when she went to a meeting with the Ts sometime in September or early October 2009. She confirmed for the Tribunal that her husband was not a good organiser or paper manager.

[17] It was unfortunate that the Tribunal did not get to hear from Mr and Mrs T and thus many of the issues that they raised in the complaint could not be tested by cross examination.

[18] Other material was put before the Tribunal including a letter from XX Realty dated 13 October 2010 advising the REAA that Mr O would have been required to have kept a copy of the uncompleted contract on his property file as part of the policies of XX Realty. The manager also confirmed that he remembered a telephone discussion between Mr (O) and Mrs T concerning the open home registers and said that he told Mr O to show them the open home register to help diffuse the situation. He said Mr O *"disagreed with me on this as he thought that privacy was an issue"*.

[19] Mr O also produced some of his medical records. These show that on 28 August 2009 he was diagnosed with a *"H1N1 flu-like illness"*. On 7 September 2009 he was seen again with post-viral coughing and with bronchitis. Mr O went to see the doctor again in October 2009, and the notes report a history of *"ongoing cough, miserable"*

[20] The Tribunal also had a copy of an e-mail from Mrs T sometime before her complaint dated 14 February 2010 to the manager of XX Realty complaining that Mr O had still been advertising their home at XX XX and reminding them that there had been no agency to sell the house since 1 December 2009. They said *"we have found them to be highly unprofessional and unethical. We do not appreciate being blatantly lied to nor his frequent and unrelenting attempts to discredit another agent from a different agency. Nor do we appreciate the way in which in which he persuaded us to sign him up as an agent. We are very unhappy with our experience of him as an agent and this is the story that we relate to others who ask"*.

[21] Finally the Tribunal also had a report from Mr O's psychotherapist dated 2 April 2011 saying that Mr O presented with anxiety and depression.

The Case for the Committee

[22] The CAC submitted that it was neutral as to whether the findings of fact made by the CAC were upheld. However it raised a number of issues relating to the relevant law which will be considered below:-

[23] The principles applying to the exercise of appellate jurisdiction have been considered by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*, [2008] 2 NZLR 141. According to the judgment, a Court considering an appeal from a lower Court is not obliged to defer to the reasons of the decision appealed from. Rather, the appellate Court has the responsibility of arriving at its own assessment of the merits of the case [paragraph [16]:

"[16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion".

[24] In *Kacem v Bashir* [2010] NZSC 112 the Supreme Court has clarified that the principles in *Austin, Nichols* apply to Courts exercising jurisdiction over general appeals from lower Courts, not appeals from decisions made in the exercise of a lower Court's discretion. The distinction between general appeals and appeals from discretionary decisions is set out at paragraph [32]:

"[32] But for present purposes, the important point arising from 'Austin, Nichols' is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary. (emphasis added)".

[25] Section 89 of the Act confers on the Committee the power to make a determination on a complaint after it has inquired into it and conducted a hearing. Determinations pursuant to s 89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s 89 would generally be regarded as 'general appeals'. All parties agree that the Tribunal should apply the principles set out in *Austin, Nichols*, as reiterated by *Kacem v Bashir (supra)*.

[26] Sections 89(1) and 89(2) of the Real Estate Agents Act 2008 provide as follows:-

“89 Power of Committee to determine complaint or allegation

- (1) *A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.*
- (2) *The determinations that the Committee may make are as follows:*
- (a) *a determination that the complaint or allegation be considered by the Disciplinary Tribunal;*
 - (b) *a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct;*
 - (c) *a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.”*

The Committee process under s 89 of the Act is analogous to depositions in criminal proceedings.

Effect of Committee Decision

[27] Mr Akel for Mr O submitted that the Complaints Assessment Committee erred in reaching a decision that Mr O's conduct was unsatisfactory conduct. He submitted that it was Mr O's case that the purchaser was genuine, that he did not lie or intentionally deceive the Ts with respect to the number of people attending the open home, and that what took place was a genuine, innocent mistake. He submitted that Mr O was not dishonest.

[28] He submitted that the CAC failed to take into account that there were reasons why Mr O might not have been able to locate a copy of the Agreement for Sale and Purchase and any register of open homes. He also submitted that the CAC ignored the evidence put forward by Mr O that the purchaser was genuine, and that he was not looking for a sole agency agreement with the Ts as he was so unwell. He further submitted that Mr O's statement regarding the number of people viewing the property was given as an estimation not as a statement of fact, and that he has always accepted that this estimation was incorrect and that it was subsequently

corrected. Mr Akel also submitted that there was no evidence to support the allegation that the buyer was not genuine and the fact that there was an incorrect estimate of the numbers attending an open home should not lead to the adverse inference that Mr O lied rather than making an innocent mistake.

The Tribunal's role under s 111

[29] Under s.111 the Tribunal is given the power to confirm, reverse or modify the determination of the Committee and in reversing or modifying the decision it may exercise any of the powers that the Committee could have exercised.

The Decision

[30] We have carefully examined the decision of the Complaints Assessment Committee and looked at the evidence that was before it and the additional evidence that was before the Tribunal. We have determined to modify the decision of the Complaints Assessment Committee by substituting the following reasons for the Complaints Assessment Committee's decision. We confirm the Complaints Assessment Committee's finding of unsatisfactory conduct.

[31] We have taken into account the effect of s 172 in our decision.

[32] Section 172 requires a 3 step process as follows:

Step 1

Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

Step 2

If so does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

Step 3

If so only orders which could be made against the defendant under the 1976 Act in respect of the conduct may be made by the Tribunal.

[33] Under s 99 of the 1976 Real Estate Agents Act the board could cancel a Certificate of Approval issued for any salesperson or suspend that person's licence.

[34] The Tribunal agrees with the Complaints Assessment Committee's conclusion that that Mrs T would have been entitled to have made a complaint under the 1976 Act. We note while s 99 sets a high standard the test under s 172 is only that the licensee *could have been* complained about or charged under that Act.

[35] We consider that Mr O has been guilty of unsatisfactory conduct in that his conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee (s 72(a)) or that pursuant to s 72 (c) he is incompetent or negligent).

[36] The reasons for the Tribunal's decision are as follows:-

[37] Mr O's handling of the agency work for the Ts was generally of an unacceptably low standard. We are concerned over the contract to Jo and whether or not that contract may or not have been a genuine contract. It is also of concern to the Tribunal that Mr O did not keep any copy of the agreement for sale and purchase and has no record of any form of contact for "Jo". Mr O cannot remember her full name and never appears to have written it down in any open home register, home register or in any other way or recorded the information in any other place eg his database. He has not kept a copy of any of the open home registers. He has not made available or kept a copy of or recorded any of the names on the open home register or seemingly transferred them into his database.

[38] However, while we have these concerns we are also not convinced that Jo was fictitious. Certainly someone came to view the property. But, if the Ts' evidence was to be believed and Mr O suggested that the offer be countersigned he was certainly protecting himself from any chance that the unconditional offer might be accepted. However we cannot be satisfied on the balance of probabilities that the agreement was not genuine especially in the absence of any evidence from the Ts. We can conclude however that Mr O's recordkeeping and conduct as an agent was unsatisfactory in this respect. We do not accept his evidence that his documents were lost after he moved into temporary accommodation. We accept the evidence of Mrs O that the move was after the complaint was received from the Ts.

[39] Mr O should have notified the vendors immediately that the offer had not been accepted ie on 1 September not 3 September. He should have suggested to Jo that she wait while he advised the Ts that the offer was \$810,000 or nothing. He certainly should have advised the Ts as to why the contract had not proceeded.

[40] We find that Mr O's conduct over the open home registers was also less than satisfactory for an agent. An agent is just that, an agent for the vendor. To suggest that a vendor might not be able to see lists of those who attended their open homes for privacy reasons is both inappropriate and wrong. It also suggests a fundamental ignorance of Mr O's role as an agent – ie that he was acting on behalf of the Ts not any prospective purchaser.

[41] We accept the Ts' comments about Mr O's references to Mr N as this is supported by the references to Mr N in Mr O's own evidence. The references in his evidence to the actions of Mr N are less than satisfactory conduct for an agent. Mr N seems to have been blamed for the complaint when the evidence suggests that the Ts were unhappy for some months before listing with Mr N. We also do not find that the Ts were motivated to complain by Mr N. What seems to have motivated Mrs T was a discovery that the property was still being advertised by Mr O in February 2010, well after the agency ended. The e-mail in February 2010 complaining about this does set out her ongoing concerns about his conduct.

[42] Further we consider that if Mr O was too unwell to carry out his duties then as an agent with XX Realty Mr O should have asked for his work to be carried on by

another agent while he was unwell. His medical records support that he had ongoing issues with a cough and generally was feeling unwell during that time.

[43] We do not consider that there is evidence to sustain the allegation that Mr O lied about the number of people who were viewing the property during the open homes. However he was certainly less than forthcoming with the Ts for the reasons which we have outlined above. This contributes to his general unsatisfactory conduct as an agent for the Ts.

[44] For the reasons that we have set out above therefore we modify the reasons for the decision of the Complaints Assessment Committee 10028 but otherwise uphold the findings of the Complaints Assessment Committee.

[45] We do not consider that any financial penalty is appropriate in this case.

Name Suppression

[46] The Tribunal has power under s 108 to prevent publication of its decisions if it believes that it is proper to do so. In determining whether or not to suppress the name of an agent the Tribunal takes into consideration that Disciplinary cases such as this are civil cases and although they naturally have a punitive element, the principle purpose of regulation of real estate agents is protection of the public and maintenance of public standards.

[47] Section 108 requires the Tribunal to have regard to the interests of any person including, without limitation, the privacy of the complainant and to the public interest when making a decision about whether or not it is proper to order name suppression. In many disciplinary cases the courts have said that in carrying out an analysis of whether or not it is proper to order name suppression requires the Tribunal to balance the interests of Mr O against the public interest in openness of justice.

[48] There are a number of factors which have been identified as public interest factors as follows:-

- Openness and transparency of disciplinary proceedings.
- Accountability of the disciplinary process.
- The public interest in knowing the identity of a real estate agent charged with a disciplinary offence.
- The importance of freedom of speech and the right which is enshrined in s 14 of the New Zealand Bill of Rights Act 1990.
- The risk that if the real estate agent is not named then other innocent real estate agents might be unfairly impugned.

[49] Justice Pankhurst in *A v the Director of Proceedings* said:

“Following an adverse disciplinary finding more weighty factors are necessary before permanent suppression would be desirable. This, I think, follows from the protective nature of the jurisdiction. Once an adverse finding has been made, the probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases. Thus a statutory test of what is ‘desirable’ is necessarily flexible. Prior to a substantive hearing of the charges the balance in terms of what is desirable may incline in favour of the private interests of the practitioner, after the hearing by which time the evidence is out and the findings have been made, what is desirable may well be different the more so when professional misconduct has been established”. (CIV 2005-409-002244, High Court, 21 February 2006, para 42).

[50] Against the public interest must be taken into account the private interests of Mr O. These have been identified by his Counsel and in the affidavits he and his wife filed as the fear of shame to Mr O and Mrs O and her extended family if his name is published, damage to Mr O’s reputation, and to Mr and Mrs O’s general mental health.

[51] The Tribunal considers that in most circumstances it will be proper for the Tribunal to order the publication of the name of a real estate agent. One of the criticisms of previous legislation relating to a discipline of real estate agents was that the disciplinary process was not been seen to be open and transparent with properly accountable outcomes where agents and agencies are clearly named and identified. In most circumstances the public has the right to know the name of the real estate agent who has been held to have infringed the provisions of the Real Estate Agents Act 2008 and been found guilty of a disciplinary offence.

[52] However it is trite but true to say that every case must be determined upon its own facts. In this particular case we consider that there is a significant risk to Mr O’s mental health such that it would be proper to order that his name is not published. We have considered but have rejected the claim that Mrs O’s family would be embarrassed and distressed by publication. Sadly, it is an inevitable effect of publication that the family members close to the real estate agent can be as adversely affected as the agent. However, that in itself is not a reason to grant name suppression. We see from the medical evidence put before us that there is some suggestion that Mr O has attempted suicide. It does not seem from the psychotherapist’s report that this leads to hospitalisation or referral to a psychiatrist but it is nonetheless of significance. These facts add to our conclusion that it is proper not to publish Mr O’s name. In the circumstances therefore we make an order under s 108 prohibiting the publication of the name or the particulars or any detail that might identify Mr O’s, including the area in which he worked and his real estate agency. However we believe it is appropriate that an anonymous version of this decision be published so that other real estate agents can see and learn from the mistakes made by Mr O.

Conclusion

[53] For those reasons the Tribunal accordingly modifies the determination of the Committee pursuant to s 111 of the Act.

[54] The modification is to modify the reasons for a finding of unsatisfactory conduct. In all other respects the Tribunal confirms the decision of the Complaints Assessment Committee.

[55] Pursuant to s.113 of the Act the Tribunal advises the parties of the existence of the right to appeal this decision to the High Court as conferred by s.116 of the Act.

DATED at AUCKLAND this 15th day of July 2011

Ms K Davenport
Chairperson

Mr J Gaukrodger
Member

Mr G Denley
Member