

Decision No: [2011] NZREADT 02

Reference No: READT 071/10

IN THE MATTER OF 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

Judge Michael Hobbs - Chairman
K Davenport - Member
G Denley - Member

William Akel for the appellant
Michael Hodge for the first respondent

DECISION ON THE PAPERS

Introduction

[1] This is an application for an interim Order prohibiting publication of the determination of the Complaints Assessment Committee 10028 (CAC) finding that the appellant had engaged in unsatisfactory conduct until the determination of his appeal to the Tribunal.

Background

[2] On 22 November 2010, the CAC issued a determination finding that the appellant had engaged in unsatisfactory conduct pursuant to s 72 of the Real Estate Agents Act ("the Act").



[3] Mrs T had complained that the appellant:-

- (a) Locked her and her husband into a three month exclusive agency for the sale of their property by introducing a potential purchaser described as “Jo” who was not genuine;
- (b) Lied about the number of people who were viewing their property during the open homes;
- (c) Did not advertise their property with the appropriate ID numbers for websites;
- (d) Continued to advertise their property after the agency agreement ended;
- (e) Was misleading in the use of statistics in his own advertising; and
- (f) Was unethical and unprofessional in that he tried to bring the name of another agent into disrepute and be disparaging of him.

[4] The CAC held that on the balance of probabilities “Jo” was not a genuine purchaser. The CAC noted that there was no information relating to this purchaser. The appellant had no contact details for “Jo” and did not have the sale and purchase agreement for the unconditional offer made by “Jo” that he was required to keep.

[5] The CAC noted that there was no evidence to support the number of people viewing the property and that the appellant should have been able to provide diary notes, appointment times and contact details.

[6] The CAC preferred the evidence of the complainant to that of the appellant.

[7] The CAC concluded that in their view there was a lack of honesty on the part of the appellant and there was sufficient evidence to support a finding of unsatisfactory conduct.

[8] The CAC then decided to censure the appellant and directed that the decision be published *“in the interest of ensuring the disciplinary process remains transparent, independent and effective”*.

Appeal

[9] The appellant filed a Notice of Appeal from the determination of the CAC on 13 December 2010 setting out extensive grounds which are not relevant to this application and which will be heard by this Tribunal on 7 June 2011.

Relevant Law

[10] It is common ground that the Act makes no specific provision allowing an appeal against the decision of the CAC’s decision to publish its determination



[11] The public register provisions in Part 3 of the Act are relevant to the issue of restrictions on publication. Subsections 63, 64 and 66 provide:-

63 Register of licensees

- (1) The Registrar must establish, keep, and maintain, in accordance with this Act, a register of licensees.
- (2) The Registrar must enter in the register—
 - (a) the name of every licensee; and
 - (b) the information about the licensee that is specified in section 66, to the extent that the information is relevant to that person.
- (3) The Registrar must make any other entries in the register that may be required, permitted, or directed to be entered by or under this Act or the regulations.

64 Purpose of register

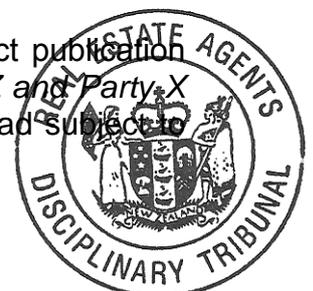
The purpose of the register is—

- (a) to enable the public to—
 - (i) determine whether a person is a licensed agent, branch manager, or salesperson and, if so, the status and history of that person's licence; and
 - (ii) choose a suitable agent or salesperson from a list of agents and salespersons; and
 - (iii) know how to contact the agent or salesperson; and
 - (iv) know which licensees have been disciplined within the last 3 years; and
- (b) to facilitate the administrative, disciplinary, and other functions of the Authority, Registrar, and Disciplinary Tribunal under this Act.

66 Matters to be contained in register

- (1) The register must contain all of the following information for each licensee whose name is entered in the register:
 - (a) the full name and business address or, in the case of a company, registered office address;
 - (b) any aliases;
 - (c) the registration number issued by the Registrar;
 - (d) the address for communications under this Act;
 - (e) the name of any company, body corporate, or other agent that is associated with the licensee;
 - (f) any information about the status and history of the person's licence, particularly—
 - (i) the class of licence held by the person; and
 - (ii) the date on which the person's name was entered in the register; and
 - (iii) the date of expiry of the person's licence, or as the case may be, the date of renewal of the licence; and
 - (iv) the date on which the term of renewal of the licence expires; and
 - (v) **any action taken on a disciplinary matter in respect of the person in the last 3 years:** (emphasis added).
 - (g) whether the licensee has completed any continuing education required by practice rules made by the Authority pursuant to section 15;
 - (h) any other information that the Registrar considers necessary for the purposes of the register.
- (2) The register must also show—
 - (a) whether a licence was suspended in the last 3 years; and
 - (b) if paragraph (a) applies,—
 - (i) the ground under this Act for the suspension; and
 - (ii) the period of the suspension; and
 - (iii) any conditions for termination of the suspension.

[12] The relationship between s 66 and the Tribunal's ability to restrict publication has already been considered by this Tribunal in *CAC 10024 v Party Z and Party X* [2010] NZREADT 05. The Tribunal held that ss 64 to 66 are to be read subject to



the implied exception that they do not apply in cases where the Tribunal has made an Order prohibiting the licensee's name from being published at (4.6).

[13] The Tribunal further held that the Tribunal has an unfettered discretion under s 108(1)(c) to make an Order under that section provided it was "*proper to do so*" having regard to the principles in *R v Liddell* [1995] NZLR 538 and *Lewis v Wilson & Horton* [2000] 3 NZLR 548 at (4.9).

[14] It is significant that decision was in the context of charges before the Tribunal and not as in this case an appeal to the Tribunal from a decision of a CAC. The present case is the first case involving an application for an Order prohibiting publication pending the hearing of an appeal.

[15] Section 84 of the Act provides that the CAC may direct publication of its decision:-

84 Procedure of Committee

- (1) A Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice.
- (2) The Committee may, subject to subsection (1), direct such publication of its decisions under sections 80, 89, and 93 as it considers necessary or desirable in the public interest.
- (3) The Committee may regulate its procedure in any manner that it thinks fit as long as it is consistent with this Act and any regulations made under it.

[16] As noted in para 10, s 84(2) does not provide a prohibitive power and does not confer a power of suppression on CACs.

Jurisdiction of Tribunal to make Order prohibiting publication

[17] Mr Akel for the appellant submits that the Tribunal has power to prohibit publication on an appeal on the basis that all appeals are by way of rehearing s 111(3) and on appeal to the Tribunal the Tribunal may confirm, reverse or modify the determination of the CAC s 111(4) and that includes any decision on publication.

[18] The Tribunal does not accept this argument because s 111(5) provides:-

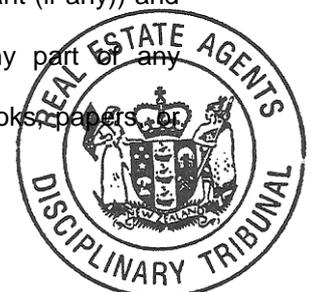
111(5) If the Tribunal reverses or modifies a determination of the Committee it may exercise any of the powers that the Committee could have exercised.

[19] As already stated the CAC does not have a suppression power that the Tribunal could exercise pursuant to s 111(5) so any reversal by the Tribunal of the CAC's determinations cannot achieve the purpose of the present application.

[20] The power of the Tribunal to make such Orders is set out in s 108 of the Act.

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 (if any)) and to the public interest, it may make 1 or more of the following orders:
 - (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
 - (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:



- (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.
- (2) Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 116, an order made under subsection (1) continues in force as specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or of any other person.
- (3) Subsection (1)(c) does not apply to any communications between the Disciplinary Tribunal and the Authority.

[21] Mr Akel submits that s 108(1)(a) applies and that is accepted by Mr Hodge.

[22] Under s 108(1)(a), the Tribunal can make an Order restricting publication of any report or account of any proceeding before it. The CAC's determination is a report of part of the proceeding before the Tribunal.

[23] Neither "*report*" nor "*proceeding*" are defined by the Act.

[24] The High Court Rules 2008 defines proceeding as "*any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application*".

[25] In *Director General of Social Welfare v Christchurch Press Co Ltd* (unreported 29/05/98, Pankhurst J, HC Christchurch) Pankhurst J, in considering the High Court Rules definition of proceeding, stated "*It is beyond question that the concept of proceeding extends to the initiation of a case and throughout its various phases*".

[26] In *Haylock v Patek* [2009] 3 NZLR 55, Hugh Williams J took a more restrictive approach to Pankhurst J in finding that an appeal is a proceeding distinct from that in which the judgment challenged on appeal was given. However, on appeal, the Court of Appeal held that "*an appeal is not a separate right of action: it is merely another step in prosecuting the "action" which was subject to the original leave decision*" [2011] 1 NZLR 100 at [28]).

[27] The Tribunal is accordingly satisfied it has the power to make the Order sought by the applicant.

Principles to consider in present application

[28] The Tribunal can make an Order under s 108 of the Act if it is of the opinion that it is "*proper to do so*". The Oxford English dictionary 11 Ed (2004), defines "*proper*" as meaning "*suitable*" or "*appropriate*".

[29] When considering whether to make an Order under s 108, the Tribunal must have regard to "*the interest of any person, and to the public interest*".

[30] The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 stated that (at 546):

The starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates' of the public.

[31] In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546, Elias C J for the Court stated:



In *R v Liddell* [1995] 1 NZLR 538 at pp 546 – 547 this Court declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by an legislative prescription. But it is recognised that the starting point must always be the importance of freedom of speech recognised by s 14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings: “*What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness*”.

[32] In *Lewis* Elias C J listed the factors which it is usual to take into account:

- (a) the seriousness of the offending;
- (b) the public interest in knowing the character of the person seeking name suppression, an interest which has been acknowledged in cases involving sexual offending, dishonesty, and drug use; and
- (c) circumstances personal to the person appearing before the Court, his family, or those who work with him and the impact upon financial and professional interests.

[33] It is significant that cases coming before this Tribunal are not criminal in nature but are disciplinary proceedings taken to give effect to the Purpose of the Act. These proceedings have been said to be civil in nature see *Director of Proceedings v I*, [2004] NZAR 635.

3. Purpose of Act

- (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.
- (2) The Act achieves its purpose by—
 - (a) regulating agents, branch managers, and salespersons:
 - (b) raising industry standards:
 - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[34] In the context of non publication of name the issue of the distinction if any between disciplinary tribunals and the Court in criminal proceedings was canvassed at length by Frater J in *Director of Proceedings v I*, (Supra).

[35] In *F v Medical Practitioners’ Disciplinary Tribunal*, (AP21-SW01, HC Akld, 5 December 2001) Laurenson J said at para [93]:-

“In the end result both the Tribunal and the Judge accepted that the principles referred to in *Lewis* were applicable in the present case. The question remains whether there is nevertheless a fundamental distinction which should be noted before they are applied in cases involving professional discipline under the new Act”.

[36] But he went on to say at para [94]:-

“In my view there is such a fundamental distinction but on close examination the impact of this is likely to be more apparent than real”.

[37] In *S v Wellington District Law Society* [2001], NZAR 465 a Full Bench of the High Court said at 469:-



“Proceedings before the disciplinary Tribunal are not criminal proceedings. Nor are they punitive. Their purpose is to protect the public, the profession and Court: *Auckland District law Society v Leary* (High Court, Auckland M 1471/84, 12 November 1985, Hardie Boys J). To a similar effect is the decision of the Court of Appeal in *Re Lundon* [1923] NZLR 236, 242. Salmond J, delivering the judgment of the Court, said:

It is well settled by authority that a solicitor is not so dealt with by way of punishment. He is removed from the rolls because he is deemed unfit to be further trusted with the powers, rights and duties attached to the responsible position of a solicitor of the Supreme Court. He is deprived of that position not by way of penal discipline in respect of offences committed by him, but for the purpose of protecting the public and the administration of justice from the danger involved in the continued authority of a solicitor who, by his conduct, has shown that he is not fit to be trusted with the possession of such an office.

We conclude from this approach that the public interest to be considered, when determining whether the Tribunal, or on appeal this Court, should make an order prohibiting the publication of the report of the proceedings, requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication.

The exercise of the discretion should not be fettered by laying down any code or criteria, other than the general approach directed by s 111(2). Thus we do not agree with the approach of the Tribunal that the matters put forward by the practitioner must ‘*justify the exceptional step*’ of prohibiting the publication of the report.”

[38] The Tribunal adopts those observations and reaffirms its view that it has an unfettered discretion under s.108 to make orders under that section provided it is “*proper to do so*” and that discretion extends to both interim and final orders prohibiting publication.

[39] The appellant has been found to have engaged in unsatisfactory conduct and in general this must be a powerful factor against the prohibition of publication of his name.

[40] The Tribunal agrees with Mr Hodge when he says we should “*guard against the appeal process being used to defer the point at which a finding of unsatisfactory conduct is recorded on the public register in circumstances where the appeal has little or no merit*”.

[41] In the present case Mr Hodge accepts that the appellant’s Notice of Appeal discloses arguable grounds for appeal.

[42] It is the view of the Tribunal that while each case must be considered on its merits applying the accepted legal principles; an application pending appeal is more likely to be favourably considered than an application pending the hearing of a charge. A charge once laid simply sets out a series of allegations whereas on appeal facts unfavourable to the appellant have already been established and more often than not a penalty imposed.



[43] The appellant has sworn an affidavit in support of his application as has his wife, setting out in some detail the distress and medical problems arising from the decision of the CAC which would be exacerbated if the decision is published.

[44] The appellant deposes that the stress of potential publication has already affected his business and he may be forced to leave the industry at the age of 50 with no alternative career open to him while the appellant's wife works at XX News paper in its real estate section and she deposes that the shame of publication of her husband's name would force her to resign.

[45] The Tribunal reiterates that each case must be considered on its own facts but non publication Orders will only be granted in circumstances that ensure the consumer protection purposes of the Act are not undermined.

Conclusion

[46] The Tribunal after careful consideration of the facts of this case has concluded that there are features of the case itself which are unusual and that taken with the personal circumstances of the appellant and his wife persuade us to grant the application, but the Tribunal emphasises the interim nature of the Order to be made and nothing should be assumed if the appeal is dismissed.

[47] Accordingly the Tribunal makes an Order prohibiting publication of the determination of the Complaints Assessment Committee CAC 10028 issued on 22 November 2010 pending the determination of the appellant's appeal or further Order of the Tribunal.

DATED at WELLINGTON this 1st day of April 2011

Judge Michael Hobbs
Chairman

K Davenport
Member

G Denley
Member