

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 14

READT 069/15

IN THE MATTER OF

An application for an order prohibiting publication, under s 108(1)(c) of the Real Estate Agents Act 2008

BETWEEN

GASTON COMA
Applicant

AND

REAL ESTATE AGENTS AUTHORITY
First Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Ms N Dangen (Member)
Mr N O'Connor (Member)

Submissions filed by:

Ms Wisniewski, on behalf of the Authority

Date of Ruling:

17 April 2019

RULING OF THE TRIBUNAL
(Application for order prohibiting publication of a Tribunal's decision)

Introduction

[1] In a decision issued on 28 September 2015, Complaints Assessment Committee 403 issued a decision that it would take no further action on a complaint made against the applicant, Mr Coma. The complainants appealed to the Tribunal against the Committee's decision. In a decision issued on 13 March 2017, the Tribunal dismissed the complainants' appeal ("the Tribunal's decision").¹

[2] On 14 December 2018, the Tribunal received the following from Mr Coma

Hi, I found the following pdf which has got my name and is available to the public. It relates to a case which has been resolved. I kindly ask you to remove it off the internet as my clients may find this and could affect my job unnecessarily. Link below, please confirm once this has been deleted.

[3] The link was to the Tribunal's decision.

[4] All Tribunal decisions are published on the Tribunal's website unless an order prohibiting publication is made by the Tribunal. Mr Coma was advised that a decision remains on the website unless the Tribunal makes an order for it to be removed. The applicant was also advised that he would need to make a written application to the Tribunal to have the decision removed.

The application

[5] In an informal application dated 23 January 2019, Mr Coma stated that:

[a] the Tribunal's decision jeopardises his professional reputation as a real estate salesperson;

[b] all potential clients who conduct an online check on him could find the decision;

[c] people who look for the best agent to represent them question his professionalism when they find the decision;

¹ *Holmqvist v Real Estate Agents Authority (CAC 403)* [2017] NZREADT 15.

[d] he is interviewed every time he gets an opportunity to sell a property, and has been asked “too many times” by potential clients about the complaint against him; and

[e] people make judgments based on the fact that there was a complaint against him, not the final outcome, and it is not fair to miss out on a job.

[6] Submissions on behalf of the Real Estate Agents Authority were filed on 25 March 2019. In summary, Ms Wisniewski submitted for the Authority that:

[a] the Tribunal does not have jurisdiction to make the order sought by the applicant; and

[b] if it does have such jurisdiction, the Tribunal should not make the order sought.

[7] Mr Coma did not wish to make submissions in response to those on behalf of the Authority.

Background to the Tribunal’s decision

[8] The complainants entered into a sole agency agreement with the applicant on 17 November 2014 to market their property for sale. The marketing campaign involved open homes, news media and internet advertising, flyers, brochures, and signboards, leading up to an auction on 30 November 2014. The property did not sell either at auction or subsequently, and the sole agency agreement was not renewed.

[9] The complainants set out 14 issues. They summarised their complaint as being that Mr Coma had been neither honest nor fair with them, had shown a remarkable lack of enthusiasm, his contact with them after the auction was minimal, and his conduct was unethical and unprofessional. Mr Coma provided a detailed response to each aspect of the complaint.

[10] Notwithstanding its ultimate decision not to inquire into the complaint, the Committee made findings in favour of Mr Coma. It found no evidence to support the complaints and/or accepted the applicant's responses.

[11] The Tribunal considered the appeal on the papers, on submissions filed by the complainants, and by counsel on behalf of the Authority and on behalf of Mr Coma. As noted earlier, the Tribunal dismissed the complainants' appeal against the Committee's decision. The Tribunal found no error in the Committee's conclusions as to each of the complainants' issues, and upheld the Committee's decision not to inquire into the complaint.

[12] No party made any application to the Tribunal for an order prohibiting publication of the decision, or any reference to any of the parties to the appeal proceeding.

The Tribunal's power to make orders prohibiting publication

[13] Pursuant to s 107(1) of the Real Estate Agents Act 2008, every hearing of the Tribunal must be held in public. Section 108 gives the Tribunal to make orders restricting publication of proceedings:

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 the hearing:
 - (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or of 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. ...

[14] There is no provision in the Act giving the Tribunal the power to remove a decision from the website. This application is therefore treated as an application for an order prohibiting publication.

Does the Tribunal have jurisdiction to make the order sought?

[15] As a statutory tribunal, the Tribunal has only those powers that are conferred by the Act. One of those powers is the power conferred by s 108, to make orders prohibiting publication.

[16] Section 108(1)(a) of the Act provides that the Tribunal may make

...

- (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:

[17] Ms Wisniewski relied on the phrase “of any proceedings before it” in s 108(1)(a) to submit that the Tribunal’s power to make orders prohibiting publication relates only to proceedings “before it”: that is, the power to make non-publication orders (whether in respect of publication of a report or account of a proceeding, or publication of the name or identifying particulars of any party) should be interpreted as restricted to proceedings that are currently before the Tribunal.

[18] She submitted that the applicant’s proceedings ended when the Tribunal’s decision dated 13 March 2017 was sealed, and the appeal period expired on 10 April 2017. She submitted that once the Tribunal’s decision is issued, the Tribunal’s powers in respect of the proceeding are at an end. In the present case, she submitted that the Tribunal has no jurisdiction to make an order prohibiting publication two years after the proceeding before the Tribunal was concluded.

[19] Ms Wisniewski referred to High Court judgments, arising in the context of applications for costs orders, in which it was held that once a tribunal’s decision had been sealed and issued, the Tribunal had no power to consider applications for costs.²

² *Burton v Auckland City Council* [1996] NZRMA 363; *Petone Borough Council v Treadwell* (1986) 11 NZTPA 366.

She submitted that these decisions could be applied by analogy to the present case. could be applied by analogy.

[20] Ms Wisniewski submitted that sub-paragraphs (b) and (c) of s 108(1):

- (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at the hearing:
- (c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or of any other person.

must be interpreted in the same manner as sub-paragraph (a): that is, they should be interpreted as if they contained the phrase “of any proceedings before [the Tribunal]”. She submitted that if it were intended that the Tribunal should have power to make an order prohibiting publication under sub-paragraphs (b) and (c) after proceedings have concluded, it is difficult to see why that power was not made available under sub-paragraph (a). She submitted that clearer words would have been used if Parliament had intended that the Tribunal should have the power to make orders prohibiting publication after proceedings have concluded.

[21] Ms Wisniewski also referred to two recent decisions, in which the Tribunal considered applications for orders prohibiting publication, made some years after the relevant hearing and decision.

[22] In *Complaints Assessment Committee v Mc Donald*, the Tribunal considered an application by the licensee (Ms McDonald) to remove decisions relating to her from the Tribunal’s website.³ Ms McDonald had been found guilty of misconduct, and her licence suspended, in 2014. In late 2018, she sought an order removing the Tribunal decisions from the website, and restraining further publication. The application was declined, but the Tribunal was not asked to (and did not) address the question whether the Tribunal had jurisdiction to make the order.

[23] In its decision in *Egden v Real Estate Agents Authority*,⁴ counsel for the Authority submitted that the Tribunal had no jurisdiction to make an order prohibiting publication of a decision of the Tribunal, in which it dismissed Mr Egden’s appeal

³ *Complaints Assessment Committee v McDonald* [2018] NZREADT 67.[17]

⁴ *Egden v Real Estate Agents Authority* [2019] NZREADT 3.

against an unsatisfactory conduct finding made by a Complaints Assessment Committee. The Tribunal's decision was issued on 12 November 2015. In the course of that decision, the Tribunal considered, and declined, an application for an order prohibiting publication of Mr Egden's name.

[24] On 30 October 2018, Mr Egden made a further application for an order prohibiting publication of the Tribunal's decision. He submitted that enough time had passed for the record of the Tribunal's decision to be removed.

[25] The submissions on behalf of the Authority were similar to those made in the present case: that is, the Tribunal's powers are restricted to those conferred in the Act and the Tribunal has no discretion outside those provisions, the power to order non-publication is limited to proceedings which are currently in existence before the Tribunal. The Tribunal's decision in Mr Egden's case had long been issued, sealed, and the appeal period had expired. It was submitted that there was no extant proceeding before the Tribunal, and the Tribunal does not have a power that could be exercised separately from an extant proceeding.

[26] After referring to the Tribunal's decision in *McDonald*, the Tribunal said:⁵

[17] The Tribunal was not required to, and did not, make a finding that it had a discretionary power to consider an application for a non-publication order after a proceeding has ended. It noted that it might, in some exceptional circumstances, have the power to recall a matter for further consideration where there has been a clear miscarriage of justice.

[18] The Tribunal observed that other than to refer to "any proceedings before the Tribunal" in s 108(1)(a), s 108 does not specify a time limit within which an application for a non-publication order can be made, and that there is no explicit statutory obstacle to making a non-publication order, even a number of years after the original decision.

[19] Sub-paragraphs (b) and (c) of s 108(1) do not refer to "proceedings before the Tribunal". We note the Authority's submission that sub-paragraphs (b) and (c) should be interpreted as being similarly restricted to proceedings currently before the Tribunal. However, in the absence of any limitation to "proceedings before the Tribunal" in the opening words of s 108(1) the difference in the wording of sub-paragraphs (b) and (c), as opposed to that of sub-paragraph (a), may not support the Authority's submission.

[20] The Tribunal accepted in Ms McDonald's case that the general principle of finality of proceedings applies to applications under s 108, and the Tribunal does so in this case, also. If the Tribunal does have a power to entertain an

⁵ *Egden*, at paragraphs [17]–[21].

application for a non-publication order after a proceeding has ended (and we are not required to, and do not, determine the point), then it could only be exercised in truly exceptional circumstances. Such circumstances must, by definition, occur only very rarely. They certainly do not arise in cases based on the passing of time since the original decision, and any effect on a licensee's work or position in the real estate industry.

[21] In the [present] case, as the Tribunal said with respect to Ms McDonald's application, there is no justification for departing from the general principle of finality, even if the Tribunal had a discretion to do so.

[27] We note Ms Wisniewski's submissions in the present case. However, in the absence of full submissions on both sides of the issue, it is not appropriate for the Tribunal to consider and make a ruling on the issue of jurisdiction. The present application can be determined on the same basis as Mr Egden's application was determined.

Irrespective of the issue of jurisdiction, should the applicant's application be granted?

[28] As the Tribunal said in *Egden*, if the Tribunal has jurisdiction to consider an application for an order prohibiting publication after a proceeding has ended, it could only be exercised in exceptional circumstances. By definition, such circumstances must arise only very rarely.

[29] We accept Ms Wisniewski's submission that fundamental importance of the principle of open justice, and the transparency of court proceedings, is highlighted by the consumer-protection focus of the Act, made clear in s 3(1):

3 Purpose of Act

- (1) The purpose of the 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.

...

[30] As the Tribunal said in *Egden*, the passage of time since a proceeding has ended, and any impact on a licensee's work, is not be regarded as a truly exceptional circumstance. Although Mr Coma was made aware of the *Egden* decision, he has not pointed to any other matter that might be considered truly exceptional.

[31] The Tribunal's decision on the complainants' appeal was that there was no error in Committee's decision to take no further action on the complaint. In other words, Mr Coma was found by the Committee not to have breached any provision of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, or any provision of the Act. The complainants' contentions to the opposite effect were rejected.

[32] That outcome can be seen by any person reading the decision. A reader can see that there was nothing in the complaint that justified taking any disciplinary action against Mr Coma.

Decision

[33] Mr Coma's application is declined.

[34] 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Mr N O'Connor
Member