**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2019] NZHRRT 49**

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| | **Reference No. HRRT 018/2017** |
| **UNDER** | **THE PRIVACY ACT 1993** |
| **BETWEEN** | **GRANT TUCKER** |
| | **PLAINTIFF** |
| **AND** | **REAL ESTATE AGENTS AUTHORITY** |
| | **DEFENDANT** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines ONZM QC, Chairperson**
**Ms MG Coleman, Deputy Chairperson**
**Dr SJ Hickey MNZM, Member**
**Hon KL Shirley, Member**

**REPRESENTATION:**
**Mr G Tucker in person**
**Ms E Mok for defendant**

**DATE OF HEARING:** **Heard on the papers**

**DATE OF DECISION:** **1 November 2019**

## DECISION OF TRIBUNAL DECLINING APPLICATION BY PLAINTIFF FOR A CLOSED HEARING[1]

### Background

**[1]** On 20 September 2016 the Real Estate Agents Authority received from Mr Tucker a request under IPP 6 for access to all his personal information then held by the Authority. In these proceedings Mr Tucker alleges the Authority failed to comply with that request within the time mandated by the Privacy Act 1993, s 40. The Authority denies the allegation and further says that pursuant to s 41 of the Act it extended the time limit prescribed by s 40.

[1] [This decision is to be cited as *Tucker v Real Estate Agents Authority (Application for Closed Hearing)* [2019] NZHRRT 49]

**[2]** The claim will be heard at Auckland on Monday 4 November 2017. Two days have been set aside. The disputed facts being within a small compass only two witnesses are to give evidence, being Mr Tucker himself and Mr PD Appleton, General Counsel for the Authority.

## The application for a closed hearing

**[3]** By application dated 25 September 2019 Mr Tucker has applied for an order that the entire hearing be closed to the public and to the media. The grounds for this unusual application are stated to be:

> 2. The plaintiff has previously been the subject of much media hype where the coverage was not balanced or fair. Some media outlets amended their publications upon being advised accordingly. Unfortunately, this was several days later when it was old news and failed to rectify the situation.
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> 3. The plaintiff also wishes to introduce new medical evidence which is both personal and private. It potentially exposes the plaintiff to unnecessary discrimination by members of the public should it become public knowledge.

**[4]** As to the first ground, no particulars have been given of the alleged media hype or of the alleged absence of balanced and fair reporting.

**[5]** As to the second ground, the medical evidence was provided by way of a later memorandum dated 11 October 2019. It comprises a brief single page letter dated 7 October 2019 from Dr David Codyre, consultant psychiatrist practising in Auckland. Attached to the letter is a one page file note by Dr Codyre recording what would appear to be his only meeting with Mr Tucker, a meeting which occurred on 5 August 2019. Also attached is a single page file note by Ms Sue Lawrie, senior psychologist who works in the same practice as Dr Codyre.

**[6]** Dr Codyre offers the opinion that adverse media coverage of Mr Tucker's past court cases has had "a very detrimental impact" on Mr Tucker's depressive illness and that Mr Tucker would be at risk of relapse should such adverse coverage occur again.

**[7]** Dr Codyre does not identify the past court cases to which he refers. The Tribunal assumes the reference is to media coverage relating to the finding of disgraceful conduct made by the Real Estate Agents Disciplinary Tribunal in *Real Estate Agents Authority v Tucker* [2016] NZREADT 65 and *Complaints Assessment Committees 301 and 403 v Tucker* [2017] NZREADT 4. That decision was upheld by the High Court on appeal. See *Tucker v Real Estate Agents Authority* [2017] NZHC 1894. Dr Codyre's evidence about the past impact of these cases on Mr Tucker's mental health appears to be based on a self-report from Mr Tucker during a single consultation on 5 August 2019, some years after the events in question (2014 to 2015).

**[8]** Nor does Dr Codyre provide any detail as to the likely degree of seriousness of any possible relapse by Mr Tucker.

**[9]** The Authority has by memorandum dated 17 October 2019 made submissions as to why the application should be dismissed but the Authority's formal position is that it will abide the decision of the Tribunal.

**[10]** By consent Mr Tucker's application is to be determined on the papers pursuant to HRA, s 104(4A).

**[11]** Prima facie, the closing of a court or tribunal hearing to the public and to the media represents a radical departure from common expectations as to how justice is administered in New Zealand and for that reason reference to principle is required.

## The importance of the open justice principle

**[12]** The fundamental rule of the common law is that the administration of justice must take place in open court. The decision of the Supreme Court in *Erceg v Erceg* [2016] NZSC 135 opens with a strong statement regarding the centrality of the principle of open justice in both civil and criminal contexts. This principle together with the need to secure the proper administration of justice governs the exercise of the discretion to order a closed hearing and to make non-publication orders:

> [2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language. [Footnote citations omitted]

**[13]** The Supreme Court added that while there are circumstances in which the interests of justice require that the general rule of open justice be departed from, such departure is restricted to the extent necessary to serve the ends of justice. See [3].

## The open justice principle and the Tribunal

**[14]** Statutory jurisdiction for the Tribunal to sit in private is conferred by the Human Rights Act 1993, s 107 (HRA) and (where the proceedings are under the Privacy Act 1993) by s 89 of the latter Act. Section 107 of the HRA provides:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
>  (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
>  (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
>  (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

**[15]** The effect of s 107(1) and (3) is that the Tribunal is under a mandatory duty to hold every hearing in public unless the Tribunal is satisfied it is "desirable" to make an order prohibiting publication of any report or account of the evidence.

**[16]** In *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 at [63] (*Waxman*) the Tribunal adopted and applied *Erceg v Erceg* to HRA, s 107 because the principles articulated by the Supreme Court are strikingly congruent with the statutory language of s 107. The Tribunal's approach to s 107 was summarised in the following terms:

> **[66]** In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:
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> > **[66.1]** The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
> >
> > **[66.2]** There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
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> > **[66.3]** The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
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> > **[66.4]** In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
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> > > **[66.4.1]** whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
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> > > **[66.4.2]** whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
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> > > **[66.4.3]** whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

**[17]** The Tribunal in *Waxman* at [63.4] concluded that the phrase in s 107(3) "satisfied that it is desirable to do so" means desirable not from the point of view of the party seeking the suppression order, but desirable from the point of view of the administration of justice. In *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33 at [77] to [86] the Tribunal held that the higher the impact on open justice, the greater the degree of persuasion required to satisfy the desirability threshold:

> **[80]** In our view not all of the many circumstances which might conceivably fit the exceptions permitted by HRA, s 107(3) will have the same significance to the general rule of open justice. Some circumstances will impact on open justice to a greater degree than others. As a consequence the degree of persuasion to satisfy the desirability threshold will vary according to the nature of the order sought, the degree of derogation from the general rule of open justice and the New Zealand Bill of Rights Act and whether the interests of justice require the general rule to be departed from in the particular circumstances of the case. Illustrations follow.

**[18]** The need for a high or "stringent" standard to justify a departure from the fundamental rule was explained in the following terms by Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 (NSWCA) at 142-143:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms: … A significant reason for adhering to a stringent principle, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.

**[19]** The additional point made in *Brooks* at [81] is that because a request that proceedings be heard in camera has a substantial impact not only on the open justice principle but also on the right to freedom of expression in the New Zealand Bill of Rights Act 1990, s 14, a more persuasive case must be made before the Tribunal can be satisfied it is "desirable" that an exception be made.

**Application of the law to the facts**

**[20]** The first ground of the application is that Mr Tucker has previously been the subject of media hype where the coverage was neither balanced nor fair. However, no particulars have been given and no evidence produced in support. The first ground must therefore fail. The requirement that an applicant show specific adverse consequences sufficient to justify an exception to the fundamental rule cannot be simply left out of account.

**[21]** The second ground turns on the medical evidence. We have not found that evidence persuasive.

**[22]** First, the one page letter dated 7 October 2019 from Dr Codyre is a sparse document, comprising seven sentences. It reads more as a letter of support than as a document containing medical evidence of substance. As earlier remarked, Dr Codyre does not provide any detail as to the degree of the risk of any relapse by Mr Tucker should there be further adverse media reporting of his case. Nor does he say anything as to the degree of harm which might accompany any such relapse.

**[23]** Second, the attached file note recording Dr Codyre's only meeting with Mr Tucker (on 5 August 2019) refers to Mr Tucker as having had a one-off therapy consultation (with an unnamed therapist) in July 2019 and that because Mr Tucker and the therapist considered he (Mr Tucker) was doing well, they both concluded there was no indication that further sessions were required. Dr Codyre further records in his file note that Mr Tucker mainly wanted advice as to how long he (Mr Tucker) needed to continue with his current medication. Congruent with Dr Codyre's file note is the file note made by Ms Lawrie following her therapy session with Mr Tucker on 25 June 2019. She records both that Mr Tucker denied any previous therapy and that he did not want further therapy. Ms Lawrie accordingly discharged him.

**[24]** On this evidence it would appear Mr Tucker's medical condition is not serious and that notwithstanding the earlier allegedly unbalanced and unfair media hype he did not require therapy in the period 2014 to 2018.

**[25]** As against the rather thin medical evidence is the principle of open justice so recently affirmed by the Supreme Court in *Erceg v Erceg* and the endorsement by that Court at [17] and [18] of the statement that "the rule can only be departed from where its observance would frustrate the administration of justice or some other public interest for

whose protection Parliament has modified the open justice rule". Mr Tucker has not in any way satisfied this test.

**[26]** There is also the confirmation by the Supreme Court at [2] of the importance of media representatives being free to provide fair and accurate reports of what occurs in courts and tribunals. Mr Tucker has not come even close to demonstrating the order sought is a reasonable limit on freedom of expression which, in terms of the New Zealand Bill of Rights Act, s 5, can be demonstrably justified in a free or democratic society.

**[27]** It is to be noted that should unfair or unbalanced reporting of the present proceedings occur, Mr Tucker is not without remedy. He has a right to complain to the relevant regulatory body such as the Press Council or the Broadcasting Standards Authority. The Tribunal would be overreaching itself were it to order a closed hearing to forestall the bare possibility that media reporting of the proceedings might be considered by one or other of the parties to be either unfair or unbalanced.

**[28]** The earlier decisions of the Real Estate Agents Disciplinary Tribunal and of the High Court have already been widely publicised. By bringing these present proceedings under the Privacy Act Mr Tucker has assumed the risk the background circumstances will once again lead to media and public interest. There has always been such risk because there is a direct link between the earlier proceedings and the present case. As explained by Mr Tucker himself in his intended statement of evidence, the purpose of the IPP 6 request to the Authority was to obtain a full and complete record of its investigation as well as any other information and his complaint is that the alleged failure to comply with the request obstructed the conduct of his High Court appeal.

**[29]** In these circumstances it would be artificial, if not contrary to the interests of justice were the Tribunal to attempt to cloak with complete secrecy this latest chapter of Mr Tucker's dealings with the Authority over matters which have already been widely reported.

**[30]** That Mr Tucker may once again face embarrassment and damage is not enough to justify closing the hearing. See the earlier cited passage from the judgment of Kirby J in *John Fairfax Group v Local Court of New South Wales*, a passage referred to with approval by the Supreme Court in *Erceg v Erceg*.

**Conclusion**

**[31]** For the reasons given we have concluded that by a wide margin Mr Tucker has failed to establish justification for the drastic step of closing the forthcoming Tribunal hearing to the public and to the media.

**[32]** The application is dismissed.

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| **Mr RPG Haines ONZM QC**<br>**Chairperson** | **Ms MG Coleman**<br>**Deputy Chairperson** | **Dr SJ Hickey MNZM**<br>**Member** | **Hon KL Shirley**<br>**Member** |