

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 04

READT 019/18

BETWEEN

COMPLAINTS ASSESSMENT
COMMITTEE (CAC 416)

AND

SAGAR SINGH
Defendant

AND

RAMJI GOVINDARAJAN
Applicant

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Mr G Denley (Member)
Ms C Sandelin (Member)

Submissions filed by:

Ms C Paterson, on behalf of the Committee
Mr A J Woodhouse, on behalf of Mr Singh
Ms J Badenhorst, on behalf of Mr
Govindarajan

Date of Ruling:

20 February 2020

RULING OF THE TRIBUNAL
(Application by Mr Govindarajan for disclosure of the Tribunal's file)

Introduction

[1] The Tribunal is required to consider an application for disclosure of its file relating to a disciplinary proceeding under the Real Estate Agents Act 2008 (“the Act”).

The disciplinary proceeding: charges against Mr Singh

[2] On 30 April 2018, Complaints Assessment Committee 416 (“the Committee”) charged Mr Singh (at the time, a licensed salesperson engaged at Barfoot & Thompson (“the Agency”) with misconduct under s 73(b) of the Real Estate Agents Act 2008. The Committee alleged that his conduct in providing an Agency-branded agreement for sale and purchase to a customer, without having an agency agreement in place, and without informing the Agency, constituted seriously incompetent or seriously negligent real estate agency work.

[3] In the alternative, the Committee submitted that if the Tribunal were not satisfied that Mr Singh’s conduct constituted misconduct, but was unsatisfactory conduct, the Tribunal could make any of the orders a Complaints Assessment Committee could make under s 93 of the Act, following a finding of unsatisfactory conduct.

[4] Put briefly, the Committee alleged that Mr Singh had provided an existing client of his, Mr Murali Kodoor, with an Agency-branded agreement for sale and purchase of a property and business in Tauranga, known as “Trinity Wharf”, in which he had inserted the names of Rosebank Road Medical Services Ltd (“Rosebank”) as vendor, and Mayajaal Holdings Ltd as purchaser, the property address, a purchase price of \$40 million, sale details (including his name and that of the Agency), and a finance condition. Mr Singh did not inform the Agency about the transaction, that he had sent the agreement for sale and purchase to Mr Kodoor, and that he did not have a signed agency agreement with Mr Kodoor for the transaction.

[5] The agreement for sale and purchase was signed by Mr Kodoor and the named purchaser.

[6] The particulars of the charge included the following:

A legal dispute arose in relation to Trinity Wharf, as part of which the genuineness of the transaction was called into question. Irrespective of the accuracy of the questions raised about the genuineness of the transaction, the conduct of Mr Singh in providing an agreement for sale and purchase with the Agency's details included allowed an impression to be created that the transaction was conducted through the agency of the Agency, when it was not, and as a further consequence the usual safeguards and checks and balances in conducting a transaction through an agency did not exist.

[7] In his Response to Charge, dated 11 May 2018, Mr Singh admitted the above facts, but submitted that his conduct amounted to unsatisfactory conduct, not misconduct.

[8] By a joint memorandum of counsel for the Committee and for Mr Singh, dated 21 June 2018, the Tribunal was advised that:

[a] The Committee withdrew the charge of misconduct; and

[b] Mr Singh accepted the alternative charge of unsatisfactory conduct.

[9] The Tribunal was then required to determine whether Mr Singh was guilty of unsatisfactory conduct and, if so, to make appropriate penalty orders. Having received and considered submissions on behalf of the Committee and Mr Singh, the Tribunal issued its decision on 31 July 2018.¹ As the Tribunal had not held a defended hearing of the charge, it set out in its decision the particulars of the charge, as alleged by the Committee and accepted by Mr Singh.

[10] The decision was published on the Tribunal's website on 3 August 2018. It is on the public record and is publicly available, without restriction.

Application

[11] On 10 July 2019 the Tribunal received the following email from Mr J Curtis Edmondson, an attorney practising in the United States of America:

¹ *Complaints Assessment Committee 416 v Singh* [2018] NZREADT 34.

I represent the defendant and respondent Ramji Govindarajan. In 2016, Rosebank Road of which Murali Kodoor is half owner, sued my client for defamation in the San Francisco Superior Court. We had a jury trial in this matter from December 2017 to January 2018. Mr Govindarajan was found not liable but an appeal was taken by Rosebank Road.

I just was made aware of this decision. The facts in your disciplinary case were also part of the record in our case, namely testimony regarding the Trinity Wharf transaction.

I was wondering if I could get a copy of your file so that I may augment and/or review our record in view of oral argument on July 23, 2019.

Thank you in advance for your assistance.

[12] The Tribunal advised counsel for the Committee and Mr Singh of Mr Edmondson's request. Counsel for the Committee advised that it did not wish to comment on it, and would abide the decision of the Tribunal. Counsel for Mr Singh opposed the request.

[13] On 31 July 2019, Mr Edmondson advised the Tribunal that:

There is still a chance for a retrial in our case, so we would still desire the records from your office. If the Plaintiff in our action, who hired Mr Singh, dismisses the appeal with prejudice, then we would not need the records. ...

[14] It appears from a judgment annexed to an affidavit subsequently sworn by Mr Govindarajan that the California Court of Appeal dismissed Rosebank's appeal. On 30 August 2019, Mr Edmondson advised the Tribunal that:

... there are still actions pending where the information provided in your proceeding may be needed in these other matters and likely in future other matters. ...

Approach to application for disclosure of Tribunal documents

Introduction

[15] Access to documents of the High Court, Court of Appeal, and Supreme Court is governed by the Senior Courts (Access to Court Documents) Rules 2017. Access to documents of the District Court is governed by the District Court (Access to Court Documents) Rules 2017 (together, "the courts' access rules"). Neither of the courts' access rules applies to the Tribunal.

[16] There is no provision in the Act, or any rules or regulations made under the Act, providing for access to the Tribunal's documents.

[17] The Tribunal is not listed as being subject to the Official Information Act 1982, either by way of Schedule 1 to that Act, or by way of Part 1 or Part 2 of the Ombudsmen Act 1975. The Tribunal is expressly excluded from the provisions of the Privacy Act 1993 by virtue of s 2(1)(viii) of that Act (definition of "agency").

[18] Counsel for Mr Govindarajan and Mr Singh have made submissions as to the approach the Tribunal should take to the application.

Submissions

[19] Ms Badenhorst referred to the purposes of the Act, as set out in s 3, and the power given to the Tribunal under s 105 to regulate its own procedures as it sees fit, provided such procedures are not contrary to the interests of natural justice. She also referred to Schedule 1 of the Act, as to the protections and privileges of witnesses. She noted that while the Tribunal had the power to do so, it had not made any order as to the confidentiality of any information before it in relation to the hearing of Mr Singh's charges.²

[20] Ms Badenhorst submitted that while the courts' access rules do not apply to the Tribunal, the Tribunal should be guided by those rules. She submitted that while the Tribunal is not "technically" a division of the District Court,³ it "operates at the level of other divisions of the District Court", as is apparent from the following:

[a] appeals from the Tribunal are to the High Court, as are appeals from the District Court;

[b] pursuant to cl 9 of Schedule 1 of the Act, a person giving information or evidence, or producing any document or information to the Tribunal has the same privileges and immunities as witnesses have in a court of law;

² We record that, as is evident from paragraph [10] of this Ruling, no order has been made under s 108 of the Act, restricting publication of the Tribunal's decision.

³ We observe that the Tribunal not a division of the District Court "technically", or otherwise.

- [c] pursuant to s 109(4) of the Act, and subject to subs (1) to (3) of s 109, the Evidence Act 2006 applies to the Tribunal as if were a court of law;
- [d] pursuant to 109(5) of the Act, a hearing before the Tribunal is a judicial proceeding within the meaning of s 108 of the Crimes Act 1961 (which relates to perjury); and
- [e] it makes sense for the Tribunal to rely on established and predictable rules, as this would be in line with the purpose of the Act.

[21] Mr Woodhouse submitted for Mr Singh that under standard interpretation principles, if a statute is enacted or a regulation is promulgated for one purpose (relevantly, access to documents in the courts' access rules), then such rules specifically do not apply in any other situation. He submitted that in the absence of a clearly stated right of access to Tribunal documents, Mr Govindarajan, as a non-party to the disciplinary proceeding, has no right of access to information held by the Tribunal, unless that were possible pursuant to a competent request pursuant to the Official Information Act 1982, a competent request pursuant to the Privacy Act 1993, or an accordant with an order of a Court of competent jurisdiction (that is, an order of a New Zealand court, or an order of an overseas court that has reciprocal enforcement).

[22] Mr Woodhouse submitted that even if the Official Information Act applied to the Tribunal, and a request had been made under that Act, it would not be granted as requests are not available to an individual outside New Zealand or without a place of business in New Zealand. He further submitted that a request under the Privacy Act could not be granted either, as Mr Govindarajan is not seeking information about himself: he is seeking it about others.⁴ Mr Woodhouse further submitted that Mr Govindarajan has not obtained any court order to disclose Tribunal documents.

⁴ We observe that, as noted in paragraph [17] of this Ruling, the Tribunal is not subject to either the Official Information Act or the Privacy Act.

Discussion

[23] The Tribunal is a statutory tribunal established pursuant to s 100 of the Act. It is not governed by the procedural rules of any other Tribunal, or any Court. It has no powers or jurisdiction except as is given in the Act and Rules and Regulations made under the Act. In accordance with s 105 of the Act, it may regulate its procedures as it sees fit. Pursuant to s 115A of the Act,⁵ the Chairperson of the Tribunal may issue practice notes for the guidance of members of the Tribunal, and parties before the Tribunal, which must not be inconsistent with the Act or any regulations made under the Act.

[24] We do not accept that we should approach Mr Govindarajan's application by reference to the courts' access rules. That may have been appropriate, were it the case that the Act contained a provision allowing disclosure of documents, but which did not set out any principles on which such an application should be considered. However, as there is no provision in the Act which would allow disclosure of Tribunal documents, we doubt that there is any basis for following the approach set out in the courts rules rules.

[25] We accept Mr Woodhouse's submission that there is no express general right of access to Tribunal documents, and for that reason, Mr Govindarajan's application should be denied.

Consideration of the courts access rules

[26] In case we are wrong in that conclusion, we consider counsel's submissions as to the application of the courts access rules.

Submissions

[27] Ms Badenhorst submitted that it is important to take into account the background relationship between Mr Govindarajan and Mr Kodoor. Mr Govindarajan was married

⁵ Inserted as from 14 November 2018 by s 248 of the Tribunal Powers and Procedures Legislation Act 2018.

to Mr Kodoor's daughter. They are divorced. Ms Badenhorst submitted that Mr Kodoor's reaction to the divorce was to create an evidentiary "set-up" against Mr Govindarajan, which included a sham real estate transaction (for the sale and purchase of Trinity Wharf), and fake patient complaint reviews on a website about Mr Kodoor's wife, Dr Ganesh (a medical practitioner at Rosebank). He submitted that the "sham transaction" was the subject of the disciplinary proceeding against Mr Singh. Ms Badenhorst further submitted that Mr Kodoor had recently filed a mirror defamation suit against Mr Govindarajan in India.

[28] Ms Badenhorst submitted that "the findings of the [Tribunal] indicate that the [Trinity Wharf] transaction was never valid due to the improper actions of [Mr Singh] and/or Mr Kodoor." She further submitted that "the question of whether the transaction was valid was also litigated in the United States case...". She submitted that Mr Govindarajan's United States attorney wants to "review the transcript of oral evidence given, and affidavit evidence filed in the [Tribunal], in order to ascertain the background facts which resulted in the production of documents which were used against Mr Govindarajan in past litigation, and will likely be used against him in the pending litigation in India."

[29] She submitted that it is "contrary to the principle of open justice that Mr Govindarajan be prevented from defending himself in these new civil proceedings", when there is no claim that commercially sensitive information is at stake, the claim to privacy is vague, ill-articulated, and lacking in credibility, and Mr Singh's private life can be protected by measures such as imposing certain conditions. She further submitted that Mr Kodoor "has a reduced expectation of privacy in relation to evidence surrounding the transaction", when he seeks to rely on the transaction he now claims to be private. She submitted that under the approach of the courts access rules, Mr Govindarajan has made a valid request for access to the Tribunal's documents, for the purpose of the "proceedings currently on foot in India and the possibility of future litigation against Mr Kodoor".

[30] Mr Woodhouse submitted that Ms Badenhorst's submissions contain a number of factual inaccuracies, in that it is vigorously refuted that Mr Kodoor intended to "set-up" Mr Govindarajan for a claim in defamation and it is simply far-fetched to suggest

that Mr Kodoor would publish fake and hurtful reviews about his wife so that she would be forced to spend huge amounts of money in a defamation suit in the the United States.

[31] He also submitted that contrary to Ms Badenhorst's submission, the allegedly sham transaction was not the subject of the Tribunal's disciplinary decision, and the Tribunal had not considered the validity of the transaction, at all. Further, the Tribunal did not make a finding that the Trinity Wharf transaction was not valid; the Tribunal did not make any finding, either way.

[32] He further submitted that Mr Kodoor has not "recently filed a mirror defamation suit" in India. He referred to exhibit "A" of Mr Govindarajan's affidavit sworn on 14 December 2018 and filed in the Tribunal in support of his application, which is a copy of a criminal complaint filed by Dr Ganesh, in Bangalore, India. The complaint is dated 10 February 2016, and the criminal proceedings issued against Mr Govindarajan are registered as *Karnataka State vs Ramji Govindarajan*, Case # 21978/2018, CNR No: KABC03-059337-2018.

[33] Mr Woodhouse submitted that if the Tribunal were to approach the application by reference to the courts access rules, then it should be declined on the grounds that Mr Govindarajan has failed to provide a valid purpose for which access is sought, and there is a real issue as to the enforceability of any of the suggested conditions.

[34] With respect to the purpose for obtaining the documents, Mr Woodhouse submitted that Ms Badenhorst's reference to "recent mirror defamation proceedings" in India is not a valid purpose for disclosure. He submitted that the proceedings are not "recent" (Dr Ganesh's complaint having been filed in February 2016), and Mr Kodoor is not a party to the complaint. He also referred to a letter from the Station House Officer of the Sanjay Nagar Police State of the Karnataka State Police, in which it is stated that:

Prosecutor being Karnataka State will not take any evidence such as Rosebank Road Medical Services Ltd's overseas business dealings and/or any other person's business matters as they are irrelevant in this case and such evidences will not be allowed to be presented. The state and the criminal courts will purely look at the web activity, internet activity as presented to this criminal courts.

[35] Mr Woodhouse submitted that the claim that the Tribunal's documents are relevant to the alleged "mirror" proceeding lacks veracity, as the alleged relevance does not exist. He submitted that Mr Singh's privacy, and that of Mr Kodoor, should be given sufficient weight, against the inadmissibility of any Tribunal documents in the Indian proceeding, and there being no explanation of the nature of any "future litigation against Mr Kodoor".

[36] Mr Woodhouse further submitted that there must be doubt as to whether any conditions suggested by Mr Badenhorst on the release of the Tribunal's documents can be enforced, as they would be outside of New Zealand jurisdiction. Even an undertaking offered by Mr Govindarajan's United States attorney is unlikely to be practicably enforced, except at significant cost.

Discussion

[37] The main purpose of the Act, and the foundation of the Tribunal's jurisdiction, is the promotion and protection of the interests of consumers in respect of transactions that relate to real estate, and the promotion of public confidence in the performance of real estate agency work. The Tribunal is also concerned to ensure that ultimately, justice is done. The principle of open justice is not paramount if it would hinder the proper administration of justice. The proper administration of justice requires not only that proceedings before the Tribunal are fair and transparent, but also that persons who can assist in its administration are encouraged to participate.

[38] In his judgment in *Commerce Commission v Air New Zealand Ltd*,⁶ his Honour Justice Asher considered an application by a non-party to a proceeding for access to documents provided to the Court by parties to the proceeding. As a proceeding in the High Court, the application was governed by the then-applicable provisions of the High Court Rules (Subpart 2 of Part 3 of the Rules). His Honour declined the application. He concluded that open justice was not the paramount consideration in considering the application. He observed that the principle that parties should have freedom to seek and receive information does not exist in a vacuum, and an

⁶ *Commerce Commission v Air New Zealand Ltd* [2012] NZHC 271, at [29]–[41].

understandable and legitimate reason for a request will have more weight than a general wish to fish for information provided to the Court by the requestor's competitors or trade associates.

[39] His Honour also stressed the importance, in a regulatory dispute such as that before him, of the parties being able to provide information without fear of it being disclosed to third parties, or used for purposes ulterior to the hearing. He observed that the parties should be encouraged to achieve the most speedy and cost-effective procedures to resolve the dispute. He considered that an order for access by a non-party might discourage the parties from co-operating in that or any future proceedings.

[40] With respect, Justice Asher's comments are equally relevant to the application of the courts access rules, and provide helpful guidance in respect of applications for access to the record of proceedings before the Tribunal. As a licensee, Mr Singh had a professional obligation to co-operate with the investigation into his conduct, and to provide material when requested. It is relevant to note that the obligation to co-operate is underpinned by s 153 of the Act, which makes it an offence to (among other things) resist or obstruct an investigation.

[41] Further, in the absence of any express right of access by a non-party to the Tribunal's file for the disciplinary proceeding, Mr Singh could reasonably have expected that except for the decision, which is a matter of public record, information he provided to the Tribunal, and any other material on the Tribunal's file, would not be disclosed to a third party.

[42] For the above reasons, and for the reasons set out by Mr Woodhouse, which we need not repeat, if we were to follow the approach of the courts' access rules, we would decline the request for access to the Tribunal's documents.

Outcome

[43] Mr Govindarajan's request for access to the Tribunal's documents concerning the disciplinary proceeding against Mr Singh is declined.

[44] Mr Woodhouse submitted that in the event that Mr Govindarajan's application were denied, an order for costs should be made against him. The Tribunal has the power to make and order as to costs, pursuant to s 110A of the Act. If Mr Woodhouse wishes to pursue an application for an order of costs, then he is to file an application with brief supporting submissions within 15 working days after the date of this Ruling. Ms Badenhorst may file brief submissions in response within a further 15 working days. The Tribunal will determine the matter on the papers.

[45] 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

Mr G Denley
Member

Ms C Sandelin
Member