

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 34

Reference No: READT 004/2023

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

IX
Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 2102)**
Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
P N O'Connor (Member)
F J Mathieson (Member)

Representation:

Counsel for the appellant:
Counsel for the respondent:

K Burkhart, M Russell
S McMullan, L Tuku'aho

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 08 December 2023

INTRODUCTION

[1] The appellant licensee was found guilty of unsatisfactory conduct by a Committee and was censured and ordered to pay a fine of \$7,500. The Committee further decided to publish its penalty decision (and presumably also the liability decision) stating the name of the licensee and the agency for which she worked.

[2] The licensee appeals against the publication order only and seeks the suppression of her name. She relies on fresh medical evidence as to the effect publication would have on her health. The respondent Authority, on behalf of the Committee, does not oppose the appeal.

BACKGROUND

[3] IX is a licensed agent under the Real Estate Agents Act 2008 (the Act) and a principal of the agency engaging her. In November 2019, she advertised a property as being a legal home and income, but the minor dwelling (converted stables) was not legally consented as a dwelling. The complainants were the purchasers of the property. They had bid on the property in November 2019, but settlement did not occur until July 2020.

[4] The licensee was found to be aware that the building involved pre-1991 building work and that neither the council nor the vendor had paperwork to confirm the stables were legally consented as a dwelling. She failed to advise the purchasers of the lack of recorded building permits, nor did she confirm the legality of the construction. Furthermore, the licensee failed to obtain expert evidence to support the vendor's claim that the stables could be rented.

[5] In the Committee's decision on 9 September 2022, the licensee was found to have breached rr 5.1 (exercise skill and care), 6.4 (must not mislead) and 10.7 (obtain expert advice or disclose a defect) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.¹ This amounted to unsatisfactory conduct under s 72(a) and (d) of the Act. The Committee deferred making any decision on publication until it decided the penalty orders.

[6] The Committee issued its decision on the penalty orders on 27 February 2023.² The penalties were censure and a fine of \$7,500. In terms of publication, the Committee

¹ Complaint No: C37350 (9 September 2022).

² Complaint No: C37350 (27 February 2023).

directed publication of its decision, stating the name of the licensee and the agency for which she worked. The Committee said this supported the purpose of the Act by ensuring the disciplinary process remained transparent, independent and effective. It helped to set standards and was in the public interest.

APPEAL

[7] On about 27 March 2023, the licensee appealed to the Tribunal against the publication order. The notice of appeal was amended on 5 April 2023.

[8] The Tribunal issued procedural Minute 1 on 17 April 2023.

[9] The licensee applied on 1 June 2023 to adduce new evidence, being evidence that was not before the Committee. Further submissions (4 September 2023) were filed. It is submitted by Ms Burkhart that the licensee has suffered from serious mental health issues since November 2022, which had only recently been identified as being serious enough to require a non-publication order.

Evidence in support

[10] An affidavit (sworn 30 May 2023) from the licensee was provided in support. She says she suffers from anxiety and depression and is treated with prescribed medication. Her mental health took a sharp turn in November 2022. It became very serious in early December 2022. The licensee says she additionally suffers from chronic pain and has had to deal with family relationship stresses.

[11] The licensee is “frightened and anxious” that if her name is published, she will lose agents and clients. She will be letting the business down. Since November 2022, she started to lose control. She has taken time out from being a real estate agent, has moved out of [city], cannot go to public spaces without support, does not attend social gatherings and cannot cope with communications about this appeal. If the decisions of the Committee are published, the licensee says there is a very real prospect she will suffer more severe depression.

[12] A letter (27 April 2023) has been provided from the licensee’s general practitioner. She says the licensee has a history of anxiety and depression, which worsened in November 2022. Her medication has been increased. In the doctor’s opinion, naming the licensee would place significant stress on her, impact her ability to earn a living and likely be detrimental to her mental health.

[13] There is a psychological assessment report (12 August 2023) from Esther Yong, a registered clinical psychologist. It is Ms Yong's opinion that the licensee meets the diagnosis for Major Depressive Disorder of Moderate Severity. She suffers from a Generalised Anxiety Disorder and a Panic Disorder. The publication of the disciplinary decisions without suppression of her name is likely to have a significant detrimental impact on her immediate mental health. It may lead to an increased level of impulsivity, reduced self-inhibition and elevate the potential safety risk. It may also cause further strain on her marriage. Publication is likely to have a potentially long-lasting negative and irreversible impact on her career, livelihood, self-identity, family and social relationships.

Procedural steps

[14] On 7 September 2023, the Tribunal invited the parties to approach the Committee, so that it might be given the opportunity of revisiting its order on publication in light of the new evidence.

[15] On 11 October 2023, the Authority filed a memorandum in the Tribunal. Mr McMullan submits that it is in the interests of justice to suppress the licensee's name. He advises that the appeal is not opposed by the Authority. As for referring the matter back to the Committee, it is submitted that the Committee is *functus officio*. The Authority's suggested approach is that the evidence sought to be filed is received as fresh evidence and the appeal determined on that basis.

JURISDICTION AND PRINCIPLES

[16] This is an appeal pursuant to s 111 of the Act.

[17] The appeal is by way of a rehearing.³ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁴ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁵ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁶

[18] A hearing may be in person or on the papers.⁷ A hearing in person may be conducted by telephone or audiovisual link.

³ Real Estate Agents Act 2008, s 111(3).

⁴ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

⁵ Real Estate Agents Act, s 111(4).

⁶ Section 111(5).

⁷ Sections 107 and 107A.

[19] This appeal is against the determination of the Committee under s 89(2)(b) that unsatisfactory conduct was proven. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.⁸ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.⁹

DISCUSSION

[20] While we are not persuaded that the Committee has no jurisdiction to revisit its order on publication as a result of new evidence, we accept that we have jurisdiction to consider such an order on appeal. It might be more appropriate for the Committee to be given the opportunity to consider the new evidence, but that would not oust our jurisdiction. The parties have asked the Tribunal to deal with this matter.

[21] The starting point on the public availability of judicial decisions is open justice.¹⁰ There is a presumption that decisions will be made public. It is rare for the Tribunal to restrict publication of the name of a licensee where a complaint is upheld. Whether or not the Committee is regarded as a judicial body, the presumption of openness will apply to a body such as the Committee making decisions in a disciplinary process in accordance with the rules of natural justice.¹¹

[22] The Tribunal may receive fresh evidence if it meets certain criteria, with the overriding test being whether it is in the interests of justice to do so.¹² The Authority agrees with the licensee that this test is met here. We concur. Accordingly, we accept the new evidence.

[23] In assessing whether it is in the public interest to publish the licensee’s name, it is relevant to have regard to the gravity of her wrongdoing.¹³ The greater the seriousness of the wrongdoing, the greater the public interest in knowing of it. This is a case of unsatisfactory conduct, which is less serious than misconduct, and did not involve

⁸ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16]; and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

⁹ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 8, at [4]–[5]; and *Scandrett*, above n 8, at [112].

¹⁰ *LB v Real Estate Agents Authority* [2011] NZREADT 39 at [26]; *Vanderhoof v Real Estate Agents Authority* [2014] NZREADT 49 at [7]–[8] and [11]; and *Complaints Assessment Committee 1907 v Lindsay* [2021] NZREADT 36 at [93].

¹¹ Real Estate Agents Act, s 84(1).

¹² *Moseley v Real Estate Agents Authority (CAC 1907)* [2021] NZREADT 19 at [59].

¹³ *Mr O (also known as X) v Complaints Assessment Committee 10028* [2011] NZREADT 2 at [32]–[33].

dishonesty. It could not be said that the public need protecting from the licensee to the extent that her wellbeing would likely be seriously jeopardised.

[24] On the basis of the new evidence, which was not presented to the Committee, we find the Committee's order to publish its decisions stating the name of the licensee and the agency engaging her, to be wrong. This is a rare case where the privacy of the licensee trumps the public interest in knowing of wrongdoing by licensees.

OUTCOME

[25] The issue next arising is the basis of the Tribunal's power to order suppression of the name of the licensee in the Committee's decisions.

[26] Where the Tribunal modifies the penalty orders of the Committee, it can exercise any of the powers of the Committee.¹⁴ The Tribunal has previously decided that the Committee has no power to order suppression under s 84(2) of the Act.¹⁵ The Registrar's duty to publish the Committee's decisions on the public register under ss 64 (particularly s 64(a)(iv)) and 66 (particularly s 66(1)(f)(v)) remains intact.¹⁶ The only exception to mandatory publication of the decisions with the name of the licensee, is an order by the Tribunal under s 108 of the Act, as requested by the licensee.¹⁷

[27] Accordingly, the Tribunal orders, under s 108(1), that the decisions of the Committee of 9 September 2022 and 27 February 2023 are to be published without stating the names of the licensee or the agency or particulars which identify them.

[28] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[29] Having regard to the interests of the public in knowing of wrongdoing by licensees and the jurisprudence of the Tribunal, as well as the privacy and wellbeing of the licensee, it is appropriate to order publication of the Tribunal's decision without identifying the licensee or the agency.

¹⁴ Real Estate Agents Act, s 111(5).

¹⁵ *Mr O*, above n 13, at [16] and [19]; and *Ms C v Real Estate Agents Authority* (CAC 10036) [2012] NZREADT 53 at [33].

¹⁶ *Ms C*, above n 15, at [33]; and *Vanderhoof*, above n 10, at [6].

¹⁷ *Complaints Assessment Committee v Z* [2010] NZREADT 5 at [4.6]; *Ms C*, above n 15, at [32]–[33] and [35]; and *Vanderhoof*, above n 10, at [6].

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member