

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 35

Reference No: READT 017/2022

**IN THE MATTER OF**

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

**BETWEEN**

**UM**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2103)**  
First Respondent

**AND**

**NED GOW**  
Second Respondent

**AND**

**SU**  
Third Respondent

Tribunal:

D J Plunkett (Chair)  
G J Denley (Member)  
P N O'Connor (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Mortimer-Wang, A Stuart
Counsel for the second respondent:	R M Stewart, R H Anderson
The third respondent:	No appearance

**SUBJECT TO NON-PUBLICATION ORDER**

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**RULING**

**(Applications for publication and non-publication orders)  
Dated 13 December 2023**

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## INTRODUCTION

[1] This matter concerns a complaint by UM, the appellant, against Ned Gow, a licensed salesperson under the Real Estate Agents Act 2008 (the Act) and the second respondent, and against SU, a licensed agent and the third respondent. The appellant was the purchaser of a commercial property (a dairy/superette). Mr Gow was the listing agent and the third respondent was the auctioneer.

[2] In its liability decision, the Tribunal partially upheld the complaint against Mr Gow and dismissed the complaint against the auctioneer.<sup>1</sup> The Tribunal found that Mr Gow innocently made a misleading statement as to the actual rent paid in the immediate past and had failed to review the owner's bank statements and inform the purchaser of the reduced rent paid. This was found to be a breach of rr 5.1 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and to amount to unsatisfactory conduct.

[3] The Tribunal made a non-publication order:

[142] The Tribunal can restrict publication of its decision in accordance with s 108(1) of the Act. In light of the outcome of this appeal and having regard to the interests of the parties and the public, it is appropriate to order publication naming the second respondent licensee, the agency and the Authority, but prohibiting publication of the name of the purchaser, the auctioneer and any third party.

[4] In its penalty decision, the Tribunal censured Mr Gow and ordered him to pay a fine of \$1,500 to the Authority.<sup>2</sup> It made a non-publication order:<sup>3</sup>

[103] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, it is appropriate to order publication of this decision without naming the appellant.

### *Applications to Tribunal*

[5] On 3 November 2023, the purchaser wrote to the Tribunal formally requesting permission to publish materials related to the case:

- All my submissions, including details of the allegations against the respondents
- My responses to the respondents' submissions
- Submissions made by the respondents

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<sup>1</sup> *UM v Real Estate Agents Authority* [2023] NZREADT 17.

<sup>2</sup> *UM v Real Estate Agents Authority* [2023] NZREADT 32.

<sup>3</sup> With the consent of the Chair, the name of the auctioneer was removed from the decision posted to the Tribunal's website.

- Documentary evidence supporting my submissions, such as the Bundle of Documents, correspondence, and records related to the case
- Any witness statements, transcripts, or recordings from the proceedings
- Correspondence with the REA and Tribunal throughout the complaint and disciplinary process

[6] Mr Gow not only opposes the Tribunal granting such permission, but also seeks an order prohibiting the purchaser from publishing the submissions and evidence of the parties.

#### *The Tribunal's power to prohibit publication*

[7] It is helpful to set out the Tribunal's statutory power to prohibit publication of its decisions and other material provided to the Tribunal:<sup>4</sup>

#### **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.

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#### *Submissions of the purchaser*

[8] In her application (3 November 2023), the purchaser contends it is vital for the public to see the full details of the case, including the information relied on by the Tribunal to make its decisions. There is a significant public and educational value in allowing full transparency of the Tribunal's process and the parties' arguments. The purchaser seeks an exception to the restrictions under s 108 of the Act that serves the public interest

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<sup>4</sup> Real Estate Agents Act 2008, s 108.

without breaching privacy or confidentiality. She is prepared to make any necessary redactions.

### *Submissions of the Authority*

[9] In his submissions on behalf of the Committee (23 November 2023), Mr Mortimer-Wang formally abides the Tribunal's decision on publication, but helpfully addresses the principles.

[10] Counsel observes that the current orders under s 108 do not prohibit the purchaser from publishing many of the materials listed by her, if certain names are redacted. They do not appear to have been made under s 108(1)(a) or (b) of the Act. It is noted though that some of the allegations made by the purchaser in her submissions may interface with other legal frameworks if they were to be published outside the absolute privilege of the disciplinary proceedings.

[11] The Tribunal has previously considered belated applications for non-publication orders. It has found that s 108 does not expressly limit the Tribunal's power to make orders in a particular time period. However, recognising the importance of finality in litigation, the Tribunal considered that a late application for a non-publication order might be treated as an application for recall of an original decision. In order to revisit an earlier order, there would therefore need to be exceptional circumstances.

[12] The purchaser's request is different. The Tribunal has made an order and the purchaser is seeking modification of the Tribunal's order under s 108. It is inferred she wants the Tribunal to revoke an order which already exists, which the Tribunal has jurisdiction to do under s 108(2). It is therefore expressly empowered to consider the purchaser's request. The difficult issues of finality or *functus officio* do not apply.

[13] Furthermore, the purchaser never sought a non-publication order in respect of her own name.

[14] The general principles applicable to suppression in a civil context will inform the Tribunal's discretion under s 108. They are set out by the Court of Appeal in *Y v Attorney-General*.<sup>5</sup> The Tribunal summarised their applicability to its work in *Najib v Real Estate Agents Authority*.<sup>6</sup>

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<sup>5</sup> *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [23]–[34].

<sup>6</sup> *Najib v Real Estate Agents Authority* [2016] NZREADT 51 at [22]–[23].

### Principles as to the exercise of the Tribunal's power to restrict publication

[22] In the light of the Act's purposes as to consumer protection and promotion of public confidence, the requirement for a public register, and the fact that Tribunal hearings are in public, there is a presumption in favour of publication. This is consistent with the policy as to publication evident in ss 63 to 66, and the principles of open justice, transparency, and freedom of speech.<sup>11</sup>

[23] As noted earlier, the Tribunal may make an order to restrict publication if it considers it "proper to do so". This will require the Tribunal to weigh the public interest in publication and the presumption of publication against the interests of the licensee seeking an order restricting publication. As the Tribunal said in *Vanderhoof v Real Estate Agents Authority*,<sup>12</sup> compelling reasons are required to outweigh the public interest in publication.

<sup>11</sup> See *Wallace v Real Estate Agents Authority* [2014] NZREADT 9, at [17]; *Wallace v Real Estate Agents Authority* [2014] NZREADT 59, at [17]; and *R v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA), at [41].

<sup>12</sup> *Vanderhoof v Real Estate Agents Authority* [2014] NZREADT 49, at [17].

[15] Finality is an aspect to be weighed in the mix. Parties are entitled to organise their affairs on the understanding that the Tribunal made certain orders. Parties' reliance and the passage of time are relevant considerations.

### Submissions of Mr Gow

[16] In his submissions (23 November 2023), Mr Stewart records that Mr Gow opposes publication and seeks an order prohibiting publication. He notes that there is currently no prohibition on publishing material related to the case.

[17] In her notice of appeal, the purchaser requested "to release the names of Licensees".<sup>7</sup> In the "Publication" section of her submissions in the substantive appeal, she recorded "Requesting Complete Disclosure".<sup>8</sup>

[18] The Tribunal considered publication in both its substantive and penalty decisions. However, this was limited to considering whether the decisions themselves and the names of the parties should be published. It did not consider the purchaser's wider application to publish all materials related to the case.

[19] The principle of *functus officio* provides that a judge's authority is exhausted after a decision has been delivered, since there must be finality to a proceeding.<sup>9</sup> A party cannot seek to vary a judgment, but can seek consequential relief.<sup>10</sup> Accordingly, since the main judgment was silent on the matter and the relief was not considered, the Tribunal is not *functus officio* and retains jurisdiction.

<sup>7</sup> Notice of Appeal (7 June 2022) at Step 6.

<sup>8</sup> Purchaser's reply submissions (17 July 2023) at [265].

<sup>9</sup> *Maehl v Lenihan* [2019] NZHC 1457 at [36].

<sup>10</sup> At [55]; and *B v B* HC, Dunedin CIV-2011-412-328, 26 September 2011 at [43].

[20] The general principles relating to publication provide that the starting point is open justice.<sup>11</sup> There is a clear public interest in disciplinary proceedings being transparent and open to public scrutiny. The Tribunal has an unfettered discretion as to whether to make an order prohibiting publication. The Tribunal should take into account the seriousness of the offending, any circumstances personal to the applicant and the impact on financial and professional interests.

[21] It is also relevant to have regard to legislation in respect of access to documents within court proceedings. The Senior Courts (Access to Court Documents) Rules 2017 identify the factors to be taken into account when deciding whether to grant access to documents beyond the formal court record, including:

The right to bring and defend civil proceedings without the disclosure of any more information about the private lives of individuals, or matters that are commercially sensitive, than is necessary to satisfy the principle of open justice.

[22] The High Court Rules (specifically R 8.30(4)) in relation to discovery limit the use of documents to the purposes of the proceeding. Only documents that are read in open court are able to be made available to other persons.

[23] Mr Gow does not oppose publication of the decisions or of his name.

[24] In making the complaint, the purchaser made highly prejudicial allegations of undue pressure, manipulation and coercion. She made sweeping assertions as to the honesty and integrity of Mr Gow and the auctioneer. The Tribunal set out the main allegations in its decisions and dismissed those of undue pressure, manipulation and coercion. It also found that Mr Gow did not deliberately withhold information from the purchaser or deliberately deceive her. It found no evidence to support the allegations made against the auctioneer.

[25] The scope of the material the purchaser proposes publishing is extensive. It is not accepted there is any public or educational value in publishing the material proposed. Its disclosure goes beyond what is required for open justice. The purchaser's submissions include highly prejudicial allegations.

[26] In responding, the respondents were required to provide the detail of commercial transactions between the purchaser and the owner. The evidence includes documents which are commercially sensitive or contain private information.

[27] Transparency in disciplinary proceedings is important, but this is satisfied by the Tribunal providing a robust decision setting out detailed reasons. By analogy with the

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<sup>11</sup> *Complaints Assessment Committee 1902 v Hanford* [2020] NZREADT 21 at [61]–[63].

principles relating to access to documents and discovery – which ensure that parties can maintain confidence in the process, that confidentiality is protected and that disclosure is limited to what is necessary – it is important to ensure that such information is not published.

[28] Mr Gow's position is supported by the purchaser's recent indication she will be appealing the Tribunal's decision. The proceeding is not at an end and it is appropriate to ensure prejudicial material is not published before a final determination is made.

[29] Mr Gow submits that the Tribunal should make an order under s 108(1)(a) and (b) that material related to the proceeding, beyond the decision itself, cannot be published.

## DISCUSSION

[30] We do not accept the purchaser's contention that there is significant public (including educational) value in permitting the arguments of the parties or the evidence to be made public. We agree with Mr Stewart the transparency of the disciplinary procedure is satisfied by the publication of our reasoned decisions. The legitimate interest of the public lies in knowing of wrongdoing by real estate agents and the Tribunal's jurisprudence and principles in reaching the decision on each complaint. That is set out in our decisions. It does not lie in knowing of the unfounded allegations against Mr Gow and the auctioneer (though the allegations are in fact identified in our decisions).

[31] The respondents both submit that no issue of finality arises and the Tribunal is not *functus officio*. That is correct in relation to any request from the purchaser to lift the prohibition against publishing her name and that of the auctioneer. The Tribunal made an order restricting publication of certain names in its decisions and is expressly empowered to revoke it in s 108(2) of the Act.

[32] However, the purchaser has sought more than just the revocation of the prohibition against publishing certain names. She additionally seeks permission to publish all submissions and supporting evidence filed by any party. While the Tribunal is not expressly empowered to give such consent, it infers that the power to prohibit publication incorporates the power not to prohibit, or in other words to give consent. Furthermore, the Tribunal has the power to regulate its procedures as it sees fit.<sup>12</sup> There is also Mr Gow's application for an extension of the existing order of prohibition, so that it covers all the evidence and submissions. The Tribunal is expressly empowered to make such an order under s 108(1)(a) and (b).

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<sup>12</sup> Real Estate Agents Act, s 105(1).

[33] Like the purchaser's wider prohibition request, Mr Gow's request goes beyond the Tribunal's express power to revoke its existing order. So while the Tribunal had the power to make the wider orders sought by the purchaser and Mr Gow at the time of its decisions, there is an issue as to whether it still has the power, having already published its decisions. This is an issue as to whether the Tribunal is *functus officio* in relation to these requests.

[34] The Tribunal's established jurisprudence is that following publication of its decisions, it is *functus officio* and any request for further orders would involve considering the criteria justifying recall of its earlier decisions.<sup>13</sup> This could be done if there were exceptional circumstances, such as a miscarriage of justice.

[35] Mr Stewart submits that the Tribunal is not *functus officio* in relation to the purchaser's wider application (for permission to publish materials before the Tribunal relating to the case generally) and hence also Mr Gow's application to prohibit such publication, since in its decisions the Tribunal only dealt with the issue of publication of the decisions themselves and certain names. The higher court authorities permit a court to consider consequential relief not dealt with in the original decision of the court.

[36] While the Tribunal did not expressly consider or make any order in its decisions concerning the wider materials, it did make a non-publication order under s 108. In the decisions, the orders were expressed to be made under s 108 or s 108(1). The specific subsection(s) were not specified. We regard the orders as having been made under subsection (c) (prohibiting the publication of "the name" of any person).

[37] The Tribunal's decisions were not therefore silent on the consequential issue of publication. It was dealt with and orders were made. What the purchaser and Mr Gow are now seeking (putting to one side any request by the purchaser to lift the suppression of certain names) is to modify the existing non-publication orders. That infringes the principle of finality. We regard ourselves as *functus officio* in relation to publication.

[38] It is noteworthy that it is the High Court and not the Tribunal which is given the statutory power to modify a non-publication order made by the Tribunal, with the Tribunal limited only to its discretion to revoke the previous orders.<sup>14</sup>

[39] In accordance with the Tribunal's established jurisprudence, the question to be addressed is therefore whether we should recall our earlier decisions.

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<sup>13</sup> *Complaints Assessment Committee 10020 v McDonald* [2018] NZREADT 67 at [19]–[20] and [27]–[28]; *Egden v Real Estate Agents Authority* [2019] NZREADT 3 at [16]–[17]; and *Coma v Real Estate Agents Authority* [2019] NZREADT 14 at [28]–[29].

<sup>14</sup> Real Estate Agents Act, s 108(2).



[40] Mr Stewart points out that the purchaser previously sought the release of the names of the licensees in her notice of appeal. We made an order in each decision in relation to this request. Counsel further notes that the purchaser “Request[ed] Complete Disclosure” in submissions. No particulars were given of this request. It was repeated in the purchaser’s email of 19 May 2023 to the Tribunal, where she requested that “the full proceedings and decisions in this case be made public”. She stated that a broader awareness of her experience could contribute to more informed discussion and possibly assist others who found themselves in similar circumstances.

[41] Having regard to the earlier requests made by the purchaser as well as the current application, we are not prepared to reopen the issue of publication on the basis sought. As found above, there is no public value in disclosure of the submissions and evidence, nor of the purchaser’s claimed experience. Much of the latter was not accepted by us. Mr Gow made no earlier request for a wider non-publication order, though it is appreciated this is explicable on the basis that he was not aware that the purchaser would seek the wider permission now sought.

[42] We decline to recall our decisions. No miscarriage of justice or other exceptional circumstance is made out.

### *Conclusion*

[43] The purchaser’s request for permission to publish all materials related to the appeal before the Tribunal is declined. It is not clear whether she is requesting revocation of the prohibition in respect of the auctioneer’s name, but if she is, it is declined. There is no public interest in knowing of the unsuccessful allegations against him. It would be prejudicial to his professional reputation. If the purchaser seeks revocation of the non-publication order as to her name, it will be granted if expressly requested.

[44] Mr Gow’s request for an extensive non-publication order is also declined.

[45] For the benefit of the purchaser, we observe that both counsel correctly point out that the current orders of the Tribunal do not prohibit the publication of the materials listed by her (if certain names are redacted). However, the purchaser should be mindful of two matters if she embarks on this course:

1. As Mr Mortimer-Wang states, the purchaser’s allegations against the licensees may interface with other legal frameworks. This would include the law of defamation.

2. Mr Stewart correctly notes that access to the documents of other parties in legal proceedings is limited to their use for the purpose of the proceedings only. It may be contrary to law for the purchaser to use the documents for any other purpose.

## **OUTCOME**

[46] In accordance with s 108(2) of the Act, the Tribunal will revoke the non-publication order concerning the purchaser's name and republish its decisions (and this Ruling) naming her, as well as Mr Gow and the agency, if requested by her.

[47] No further order consenting to publication or prohibiting it will be issued by the Tribunal.

## **PUBLICATION**

[48] Having regard to the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees and balancing that with the privacy of the individuals, it is appropriate to order publication of this decision without naming the appellant and the third respondent.

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D J Plunkett  
Chair

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G J Denley  
Member

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P N O'Connor  
Member