

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY
ADMINISTRATIVE DIVISION

X

24/10

A. No. 395/83

No Special
Consideration

IN THE MATTER of Part 1 of the Judicature
Amendment Act 1972

A N D

IN THE MATTER of the Real Estate Agents
Act 1976

688

BETWEEN SCHOLES OAKLEY (PAPATOETOE)
LIMITED a duly incorporated
company having its
registered office at
Auckland and KENNETH
REGINALDHARLEY MILLAR

APPLICANTS

A N D

THE REAL ESTATE AGENTS
LICENSING BOARD constituted
under the Real Estate Agents
Act 1976

FIRST RESPONDENT

A N D

THE REAL ESTATE INSTITUTE
OF NEW ZEALAND INCORPORATED
constituted pursuant to the
Real Estate Agents Act 1976

SECOND RESPONDENT

Hearing : 11th October 1983

Counsel : T.W.H. Kennedy-Grant for Applicants
D.F. Dugdale for First Respondent
R.E. Bartlett for Second Respondent

Judgment : 11th October 1983

ORAL JUDGMENT OF CHILWELL J.

The principal issue in this application for interim relief relates to the balancing of the question of the public interest preserved by the Real Estate Agents Act 1976 and the interests of the applicants in being permitted to defend certain civil proceedings commenced in this Court under A. No. 41/83 by the complainants against

the applicants under the Real Estate Agents Act 1976. Those complainants brought certain matters to the attention of the second respondent which, after an investigation, found certain charges proved against the applicants as set forth in a document dated 8th December 1981 annexed to the statement of claim.

Essentially the second respondent found the applicants guilty of breach of contract, negligence and fraud to an extent warranting the conclusion that they were guilty of the type of misconduct referred to in Section 94(1)(b) of the Act justifying disciplinary action. Because the findings were regarded as serious the second respondent decided not to deal with the question of the applicants' licences but resolved to furnish a full report to the Council of the Institute with a recommendation that the Council place the matter before the Disciplinary Committee of the Institute or the Real Estate Agents Licensing Board. I should say in qualification that the findings to which I have referred were of a judicial committee of the second respondent. That will explain the reference just made to the furnishing of a report and to the particular recommendation.

In its capacity as prosecutor the second respondent then took the matter before the first respondent. There had been delays in having the matter dealt with by the first respondent for good and sufficient reason disclosed in the decision of the first respondent given on the 20th September 1983. The issue before the first respondent at that hearing was whether it ought to stay its hand until the determination by the High Court of the civil proceedings by the complainants to which I have referred. Essentially in those proceedings the complainants allege breach of contract, negligence and fraud. They claim as loss or damages against the applicants \$36,340.

The first respondent listened to argument on the question of stay; was referred to authorities which it discussed in its judgment. After considering submissions the first respondent decided to proceed with the hearing of the disciplinary proceedings notwithstanding that the civil action in the High Court remains undisposed of. A date of hearing before the first respondent has been given for the 13th October 1983, that is to say, the day after tomorrow.

There are three passages in the decision of the first respondent of importance which I now propose to quote:-

"The Institute also applied for cancellation or suspension of the Licence of that agent under Sections 94 and 95 alleging that an officer of the company had been guilty of misconduct in the course of business and that it is in the interest of the public that the licence be cancelled.

The Board ordered an interim suspension of the licence acting pursuant to Section 98 (1). Application was made for lifting the suspension and following a hearing on 25 March 1982 the Board revoked the suspension acting under Section 98 (3). A written decision was issued 13 May 1982." (page 1)

"The essence of the matter was whether or not either of the parties to the action in the Higher Court would be prejudiced by a hearing by the Board preceding the hearing in the High Court. It was implied that a 'fishing expedition' might be indulged in before the Board in order to obtain evidence for use in the High Court.

The fact the Board could hear whatever evidence it chooses (Section 14) was a concern to counsel with regard to the High Court action. The possibility of adverse publicity affecting the other case was canvassed by both counsel." (page 2)

"The Board considered the arguments presented to it and decided that the Section 94 application should proceed to hearing. If one part of the legal system of the country cannot deal reasonably and expeditiously with the matters brought to it then the Board did not feel that it should be, as a consequence, prevented from carrying out its functions when it is readily able to do so. The issues before the two tribunals are seen as quite different and there is no reason why a hearing before the Board should be seen as a possible source of unacceptable evidence. A duty would be on the Board, principally the Chairman, to see that the ordinary rules of evidence are observed." (page 3)

Counsel heard me, during argument, make a critical comment upon what appeared to me to be a deliberate slight directed at the expedition of the work in this Court but, after hearing Mr. Dugdale on the matter and appreciating the difference between the disciplinary element in this case (which is peculiarly the function of the first respondent) and the civil proceedings in this Court (which, by their very nature, require procedures which inevitably lead to justifiable delay) I have come to the conclusion that it was not the intention of the Chairman to criticise the state of the lists in the High Court.

Counsel for the applicants has accepted that he is required to establish an arguable case for relief on the substantive application. The grounds upon which the applicants seek relief are set forth in paragraphs 13 and 14 of the statement of claim. The specific relief sought is set forth in part C of the statement of claim :-

"B. GROUNDS ON WHICH APPLICANTS SEEK RELIEF:

13. THE decision of the First Respondent to refuse the Applicants' application to adjourn the hearing of the Second Respondent's application for cancellation or suspension of the licence of the Applicant Scholes Oakley (Papatoetoe) Limited pursuant to Section 94 or Section 95(1) of the Real Estate Agents Act 1976 was ultra vires First Respondent, alternatively invalid as made without jurisdiction, alternatively unlawful as tending to interfere with the course of justice, by reason of the following matters :

- (a) The First Respondent erred in holding that the issues before it were 'quite different' from the issues before the High Court, as both involved consideration of whether or not the Applicant Scholes Oakley (Papatoetoe) Limited was in breach of its contract with the vendor of the property in question and whether or not the advice given to the vendor was given negligently or fraudulently; and accordingly it failed to take into account a matter it ought to have taken into account or took into account a matter it ought not to have taken into account ;
- (b) The First Respondent erred in holding that there was no reason why a hearing before it should be a possible source of unacceptable evidence, given that there would be a duty on it to see

that the ordinary rules of evidence were observed and given that Counsel could be expected to be alert to the question of admissibility of evidence under Court Rules, when for the First Respondent to limit its powers in this way would be to disregard the provisions of Section 14(1) of the Real Estate Agents Act 1976; and accordingly it failed to take into account a matter it ought to have taken into account or took into account a matter it ought not to have taken into account;

- (c) The First Respondent failed to take into account the possibility of adverse publicity relating to the proceedings before it;
- (d) The First Respondent failed to take into account the effect on the Applicant Scholes Oakley (Papatoetoe) Limited's conduct of its case before the First Respondent of the fact that the civil proceedings in the High Court were pending;
- (e) The First Respondent failed to take into account the effect on the Applicants' conduct of the civil proceedings in the High Court of an adverse decision by the First Respondent on the application by the Second Respondent;
- (f) The First Respondent erred in attaching overriding importance to the view that 'in any legal contest justice is weakened by delay'; and accordingly it took into account a matter it ought not to have taken into account.

14. THE decision of the First Respondent to proceed to a hearing of the Second Respondent's said application for cancellation or suspension of the Applicant Scholes Oakley (Papatoetoe) Limited's licence, being consequential upon the decision referred to in paragraph 11 hereof, is dependent upon the validity of that earlier decision and is therefore invalid for the reasons set out in paragraph 13 hereof.

C. RELIEF SOUGHT:

Wherefore the Applicants pray for the following orders against the First Respondent :

- (a) An Order of or in the nature of Certiorari to quash the decisions of the First Respondent alleged in paragraphs 11 and 12 hereof alternatively a Declaration that the said decisions were ultra vires the First Respondent alternatively invalid as made without jurisdiction, alternatively unlawful as tending to interfere with the course of justice.
- (b) An Order of or in the nature of Prohibition to prohibit the First Respondent from proceeding to a hearing on the application by the Second Respondent for cancellation or suspension of the licence of the Applicant Scholes Oakley (Papatoetoe) Limited alternatively an Injunction to restrain the First Respondent from proceeding to a hearing of the said application, both pending the hearing of the

High Court proceedings referred to in paragraph 9 hereof.

- (c) An Interim Order pursuant to Section 8(1) of the Judicature Amendment Act 1972 prohibiting the First Respondent from taking any further action that is or would be consequential on the decision alleged in paragraph 11 hereof alternatively an Interim Order pursuant to the said section staying the hearing of the Second Respondent's said application pending the hearing of this application for review.
- (d) The costs of and incidental to these proceedings.
- (e) Such further or other relief as this Honourable Court may deem just.

AND FOR THE FOLLOWING ORDERS AGAINST THE SECOND RESPONDENT :

- (a) Costs of and incidental to this action.
- (b) Such further or other relief as this Honourable Court may deem just."

Mr. Dugdale's principal submission in opposition is that it cannot seriously be argued that the first respondent, which is concerned primarily with the matter of public interest, should be obstructed in performing its statutory function because of the existence of civil proceedings. He observed that neither the first nor second respondents have any control over those civil proceedings. His second submission is to the effect that the issues before the first respondent and before the High Court are not the same, that the issue before the Court will be whether the complainants have established an entitlement to monetary relief. By contrast the issues before the first respondent will be whether the facts establish a degree of misconduct which, in the public interest, requires interference with the applicants' licences.

In reply, Mr. Kennedy-Grant referred to the power of suspension vested in the first respondent by Section 98 of the Act. That power of suspension can be exercised in the public interest. Accordingly the first respondent has control over the question of public interest whatever be the position with regard to civil proceedings. I put to Mr. Kennedy-Grant

the analogy between criminal proceedings, such as theft by a servant, in the High Court and civil proceedings based on the same facts. He readily conceded that the criminal proceedings could never be suspended. By contrast he highlighted the distinction between criminal proceedings and disciplinary proceedings before the first respondent because the first respondent has the peculiar power to suspend licences in the public interest.

In this particular case that course was followed but, for what this Court must assume to be for good and sufficient reason, the interim suspension was lifted following an enquiry and delivery of a reserved decision. That aspect of the matter, in my judgment, makes this case different from others and tends to place a gloss upon Mr. Dugdale's first submission. Were it not for that gloss I would find his submission unimpeachable.

With regard to the question of issues I prefer the view of Mr. Kennedy-Grant that, looking at the substance of the matter, the factual issues before the first respondent and the High Court will be the same.

I have come to the conclusion that the substantive application raises arguable issues. The question now is whether the Court ought to exercise its discretion to grant interim relief. The parties are aware, and I am able to confirm, that the substantive application can be heard in November or December of this year upon appropriate application being made to the Senior Deputy Registrar. There is therefore little delay, having regard to the delay which has already occurred, which can be considered prejudicial in my judgment.

I have been referred to the unreported judgment of Barker J. in Thompson v The Commission of Inquiry etc.

(24th November 1982; A.344/82, Wellington). With particular reference to pages 25 and 26 of his judgment, it is my view that there could be prejudice arising from evidence given before the first respondent and from the way in which counsel is obliged to conduct proceedings before the first respondent having regard to the civil proceedings lying over the heads of the applicants. I accept the submission of Mr. Kennedy-Grant that the applicants are entitled to full and complete justice before the first respondent as they are in the civil proceedings before the High Court. The ultimate balancing of that question must be left for determination by the Judge who hears and determines the substantive application.

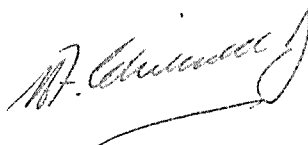
On the motion for interim relief I make an order prohibiting the first respondent from taking any further action that is or would be consequential on its decision referred to in this judgment and in particular from proceeding to a hearing of the application by the second respondent for the cancellation or suspension of the licences of the applicants and I also make an order prohibiting and staying those proceedings. These orders will apply until further order of this Court. The Registrar is instructed to give the substantive application an early priority fixture.

The question of costs is reserved.

I conclude with the observation that had suspension not been effected and then uplifted the result may well have been different.

At the request of Mr. Dugdale I confirm that the orders made relate to the application before the Court and are not intended in any way to affect the rights, if any, of the respondents with regard to suspension under Section 98 of the Act. I also grant all parties liberty to apply for

such further order or direction as may be necessary or expedient, such application to be on 48 hours' notice.

A handwritten signature in cursive script, likely of a legal professional, positioned in the upper right quadrant of the page.

Solicitors :-

Applicants : Simpson Grierson & Co. Auckland.

First Respondent : Kensington, Haynes & White,
Auckland.

Second Respondent : Sheffield, Young & Ellis,
Auckland.