BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 41

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**LEADERS REAL ESTATE (1987) LIMITED**
	Applicant
AND	**REAL ESTATE AGENTS AUTHORITY (per CAC20008)**
	First respondent
AND	**DAVID GRAVES**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS RULING 3 June 2015

COUNSEL

Mr C Matsis for the applicant
Mr M J Hodge for the Authority
At this stage no participation by or for the second respondent

RULING OF THE TRIBUNAL

The Application before Us

[1] The applicant seeks leave to appeal to us a 1 November 2013 decision of a Complaints Assessment Committee 15 months out of time. That decision found it guilty of unsatisfactory conduct as we cover below.

[2] The Authority opposes the application on the basis that there is no jurisdiction under the Real Estate Agents Act 2008 ("the Act") for us to grant leave to file an appeal against a Committee decision outside the statutory time limit of 20 working days from its issue in terms of s.111 of the Act which reads:

*"**111 Appeal to Tribunal against determination by Committee***

(1) A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the date of the notice given under section 81 or 94.

(2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—

(a) a copy of the notice given to the person under section 81 or 94; and

(b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.

(3) The appeal is by way of rehearing.

(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 of the Committee, it may exercise any of the powers that the Committee could have exercised."

Relevant Background

[3] The essence of the initial complaint against the applicant was that it was using a listing agreement form that was unnecessarily onerous and harsh in its terms and in the breach of Rule 9.12 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. That Rule reads:

"9.12 An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent."

[4] In particular, it is put that the applicant's listing agreement form allowed for a compulsory extension of the agency period for a further 30 days, and could run longer if not cancelled in writing by the vendor, with the effect that the sole agency period may run over by 90 days against the wishes of the vendor. The Committee covered those material facts as follows:

"2.1 The listing agreement of the agency states the term of the sole and exclusive agency to be 90 days. The complainant refers to clause 1.A4 of the licensee's listing agreement under the heading "Sole & Exclusive Agency "which states:

> *If the property is not sold by the expiry of the term of this Sole & Exclusive Agency, then unless a renewal of the Sole & Exclusive Agency is agreed for a further term, the agent is from such expiry appointed by the vendor as a general & non exclusive agent on the commission basis as set out in clause 2 for a general agency and otherwise on the terms for a general agency set out in clause 1B except for the different commencement date.*

2.2 Clause 1B is under the heading "general agency" which states:

> *The agent is appointed by the vendor as agent for the sale of the property from the date of this agency contract until this agency is cancelled by notice in writing to the agent, which notice may become effective not earlier than midnight on the 30th day after delivery of the*

notice, but this appointment does not authorise the agent to sign an agreement for the sale of the property.

2.3 The above terms of the listing agreement allows the agency upon expiration of the agency term to automatically obtain an extension of the agency term with the vendor if the sole agency is not renewed. Although the vendor may cancel by notice in writing a further extension of the agency terms, such cancellation will not take effect until 30 days after the notice has been served on the agency. The complainant states that this is restrictive and prevents the vendor from entering into a sole agency agreement with another agent for at least 30 days. Further, there is no reference to statutory rights under section 131 of the Real Estate Agents Act 2008. …"

[5] The Committee found that those conditions were *"not reasonably necessary to protect the interests of the agent"*. On that basis a finding of unsatisfactory conduct was made. The applicant was censured and reprimanded, but no further penalty was imposed.

[6] The appellant did not at that stage intend to take the matter any further.

[7] The complainant, who was himself a real estate agent, had made a similar complaint against Harcourts Group Ltd. That complaint was also upheld, but Harcourts appealed the Committee's finding against it.

[8] Our decision to allow the appeal was released on 22 January 2015 as *Harcourts v REAA & Graves* [2015] NZREADT 7 where we decided to take no further action on the complaint. Mr Matsis puts it that decision makes clear that counsel for the Committee argued that the appeal should be allowed on the basis that Harcourts had reasonably and properly taken legal advice from their legal advisor as to how the relevant clause in its listing agreement should be drafted and it should not be regarded as unsatisfactory conduct for them to have relied upon the accuracy of that advice. He submits that, the present applicant is in an almost identical situation to Harcourts. It had also taken, and relied on, legal advice on the same issue. This was accepted by the Committee in its penalty decision.

[9] The applicant now seeks an order from us that the finding of unsatisfactory conduct made against it by the Committee on 1 November 2013 also be overturned. It submits that it would be unfair, contrary to the interests of justice, and inconsistent with the purposes of the Act to allow the Committee's decision against it to stand in light of our decision in favour of Harcourts.

The Case for the Applicant

[10] Mr Matsis particularly refers to s.111(1) of the Act (set out above) and its use of the words *"may appeal to the Tribunal"* and submits that wording is permissive rather than mandatory. He observed that the Act is otherwise silent as to whether an appeal may be filed outside the 20 working days timeframe of s.111. He also points out that s.105 of the Act states that we may regulate our procedures as we think fit; but subject to the rules of natural justice and any regulations made under the Act.

[11] He submits that provision allows us to accept an appeal out of time where that may be warranted in the particular circumstances.

[12] Mr Matsis then submits that it is important that we have the ability to accept appeals out of time as, otherwise, our ability to deal with a range of valid issues would be dependent on the parties (including lay person consumers) meeting the 20 working day timeframe in all cases. He puts it that such a strict approach would not always provide the *"accountability through a disciplinary process that is independent, transparent, and effective"* as referred to in s.3(2)(c) of the Act which, in turn, would not *"promote public confidence in the performance of real estate agent work"* in terms of s.3(1).

[13] Mr Matsis then submits that, as he puts it, in the somewhat unusual circumstances of this case it is appropriate to grant leave to appeal and he continues:

> *"23. In particular:*
>
> *(a) It is unusual to have such similar complaints from the same complainant against different real estate agencies.*
>
> *(b) The complainant is himself a real estate agent.*
>
> *(c) Although any such appeal will be well outside the usual 20 working days timeframe, it is hard to see how the complainant will be prejudiced by the delay. Clearly he has been dealing with similar issues in respect of the Harcourts appeal in the intervening period.*
>
> *(d) It is in the interests of justice to have consistent decisions at CAC and Tribunal level. The granting of leave to file the appeal out of time will allow the appellant to argue for such consistency here.*
>
> *(e) Given it is clearly recorded in the CAC decision as to penalty that the appellant had taken, and relied on, legal advice in relation to listing agreement, there must be good grounds to expect that any such appeal will be successful."*

[14] In later reply submissions, Mr Matsis again referred to the use of the word *"may"* in s.111(1) of the Act and submitted that in ascertaining the meaning of that provision, we must consider the actual wording of it and the purpose of the Act in terms of s.5(1) of the Interpretation Act 1999. He again submitted that the use of the word *"may"* clearly indicates that the timeframe is permissive and not mandatory. He puts it that if it was intended that appeals must be filed within 20 working days, then s.111 could easily have been drafted to say that. He submits we should conclude that the Legislature did not intend to exclude appeals filed outside the 20 working days timeframe.

[15] Mr Matsis then argued as follows:

> *"Analogy with High Court Rules*
>
> *7. At paragraphs 2.3 and 2.4 of his memorandum, counsel for the first respondent draws an analogy with the provisions of rule 20.4 of the High Court Rules. He notes that the rule provides for a 20 working day time limit for filing an appeal in the High Court and provides the Court with a power to extend the time for filing an appeal. He notes, by way of contrast, that the Act [the Real Estate Agents Act 2008] contains no such provision or power for appeals to the Tribunal.*

8. Whilst that is accepted, it should in my submission be noted that rule 20.4(2) uses mandatory wording, not the permissive wording used in s.111(1).

9. In my submission, therefore, the Tribunal is entitled to conclude that the legislature intended the timeframes arising from section 111 to be different to the mandatory timeframes and appeal rights set out in Rule 20.4(2).”

[16] In those later submissions, Mr Matsis also developed his submission based on the purpose of the Act as follows:

“The purpose of the Act

13. … the purpose of the Act should also be considered when ascertaining the meaning of section 111(1).

14. Section 3 of the Act states:

“(1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

(2) The Act achieves its purpose by –

(a) regulating agents, branch managers, and salespersons;

(b) raising industry standards;

(c) providing accountability through a disciplinary process that is independent, transparent, and effective.”

15 In my submission, it would not “promote and protect the interests of consumers”, who are laypeople and generally unrepresented at the CAC decision stage of the complaint process, to have a strict and inflexible timeframe for the filing of an appeal, and to have no right to file an appeal outside that timeframe.

16. Furthermore, it would not in my submission “promote public confidence in the performance of real estate work” to interpret the timeframes in section 111(1) as mandatory when the actual words used in the section are permissive.

17. Thirdly, it would not in my submission be consistent with the stated aim of “providing accountability through a disciplinary process that is … transparent …” to interpret the timeframes in section 111(1) as mandatory when the actual words used in the section are permissive.”

The Submissions for the Authority in Opposition to the Application

[17] Mr Hodge submits that there is no jurisdiction under the Act for us to grant leave to file an appeal outside the statutory time limit of 20 working days.

[18] He also submits that, even if there were jurisdiction to grant leave under the Act, this is not a suitable case for the granting of leave because:

[a] The long period of delay is not excusable.

[b] There is nothing exceptional about cases which may be seen as having broadly similar facts, or circumstances, having different outcomes as a result of a litigation decision made by the parties involved.

[c] In any event, it is far from certain that the outcome on appeal in this case would be the same as that in *Harcourts v REAA and Graves* [2015] NZREADT 7.

[19] Mr Hodge notes that while the Act expressly provides for a 20 working day time limit for filing appeals, it makes no provision for us to either extend the time period for filing an appeal under s.111 or remedy any failure to comply with the statutory time period.

[20] He observes that, in contrast, the right of a party to appeal to the High Court under s.116 of the Act against a decision of this Tribunal is silent on the time limit for an appeal, which means that the default provision under the High Court Rules applies. While also setting a 20 working day time limit for appeals to the High Court, the High Court Rules expressly confer a power on that Court to extend the time for filing an appeal. The High Court is also given a discretion to cure non-compliance with the High Court Rules.

[21] Mr Hodge referred to *Attorney-General v Howard* [2010] NZCA 58 where the Court of Appeal considered whether the High Court had jurisdiction to hear an appeal from a decision of the Human Rights Review Tribunal when the appeal had not been made strictly in accordance with the statutory procedural requirements of the Human Rights Act 1993. The timeframes for service of the notice of appeal on the respondent and the Human Rights Review Tribunal had not been met. In *Howard*, the High Court endorsed the principle that where timeframes for filing and service are set out in legislation, they are mandatory and cannot be extended by the Courts if there is nothing in the legislation authorising such an extension.

[22] Based on s.111 of the Act and the Court of Appeal's decision in *Howard*, it is submitted by Mr Hodge that the 20 working day time limit prescribed for appeals to us from CAC decisions is mandatory and there is no power to extend it.

[23] Mr Hodge recognises that (as Mr Matsis noted) we have the power to regulate our procedures as we see fit under s.105, which provides:

> *"**105 Proceeding before Tribunal***
> *(1) The Tribunal may regulate its procedures as it thinks fit.*
> *(2) Subsection (1) is subject to the rules of natural justice and to this Act and any regulations made under this Act."*

[24] Mr Hodge acknowledged that is an important provision but submitted that, no matter how wide our power to regulate our procedures, this cannot extend to conferring substantive appeal rights over and above the express provisions of the Act. He added that, furthermore, the power in s.105(1) is expressly subject to the Act by virtue of its sub.(2). So (he submits) the general power to regulate procedure in

s.105(1) must yield to the specific provision in s.111(1) creating a 20 working day time limit for appeals to us from a Committee.

[25] Mr Hodge then put submissions to us that leave should not be granted in any event i.e. even if we consider that we do have the power to extend the statutory time limit. He supports that submission by noting that the delay in this case is approximately 15 months, which is far outside the statutory appeal period. He also submits that such delay is not excusable as the case for the applicant seeking leave comes down to the fact that, prior to the *Harcourts* decision, it had not appreciated that reasonable reliance on legal advice, in the right circumstances, may result in a no further action finding rather than going solely to mitigation of penalty. He submits that the fact that the applicant overlooked an available argument on appeal is not grounds for our granting leave.

[26] Mr Hodge submits that in the context of disciplinary proceedings, which must focus on the conduct of the licensee concerned (being an individual or an agency company), the possibility that reasonable reliance on legal advice may offer an answer to an allegation of unsatisfactory conduct or misconduct, in certain circumstances, should have been readily apparent to the applicant; and, he puts it, is just a particular example of an absence of fault defence.

[27] In final submissions, Mr Hodge focused on the following two points from Mr Matsis:

[a] The argument that the 20 working day time limit in s.111(1) of Act is permissive;

[b] The argument that the appeal provisions operate contrary to the consumer protection purpose of the Act if the 20 working day time limit is applied.

That the 20 Working day Time Limit is Mandatory

[28] Mr Hodge submits that the interpretation of s.111(1) advanced by the appellant is untenable and that the use of the permissive *"may"* is clearly directed at the fact that it is a matter of choice for a person affected by a Committee decision whether they appeal or not. He observes that if the word *"may"* is replaced with the word *"must"*, then the section would operate to compel a person affected by a decision of a Committee to appeal which, he puts it, would plainly be absurd.

[29] Mr Hodge also submits that if the word *"may"* is interpreted as making the 20 working day time limit permissive, then the 20 working day time limit becomes redundant, and it becomes solely a matter of choice for the appellant when to file an appeal. He adds that, in other words, making the 20 working day time limit permissive, as the appellant argues, would not have the effect of turning s.111(1) into a leave to appeal out of time provision; and a leave provision would have to be specifically legislated for; and Parliament chose not to do that.

That the Appeal Provisions are not Contrary to Purposes of the Act

[30] Mr Hodge submits that looked at overall, and in context, the appeal provisions in the Act as presently applied by us are fair to consumers and promote the purposes of the Act. He puts it that appellants are not required to pay any filing fee to bring an appeal, nor is there any difficulty about the form of appeal (when compared, say, to

the requirements of filing a statement of claim in the Courts), and it is relatively easy for a lay litigant to bring an appeal to us under the Act and, in these circumstances, requiring appeals to be brought within 20 working days is not onerous.

[31] Mr Hodge observed that time limits always have the potential to create unfairness in isolated cases (although he submits that this case is not one of them), but that must be weighed against the general unfairness to parties in not having certainty about the finality of the litigation.

[32] Mr Hodge submits that, in any event, the plain statutory language of s.111(1) must be applied, as Parliament could easily have legislated for a leave to appeal out of time provision, but chose not to.

Discussion and Our Views

[33] Broadly, we agree with the submissions of Mr Hodge as counsel for the Real Estate Agents Authority.

[34] We have no jurisdiction to grant the present application. The appeal provision in s.111(1) creates a 20 day window for a party to appeal and that is a mandatory period and is permissive only to the extent that a party may or may not appeal within that 20 day period. The applicant did not appeal so that it no longer can.

[35] If we had such jurisdiction it is possible that we might have granted the application, although it would be very difficult to excuse the long period of delay even if the explanation is that the outcome of the Harcourts' decision was unexpected by the applicant. Litigation must be brought to an end after due process and time limits are important to that concept.

[36] We observe that it does not necessarily follow from the Harcourts' decision that the applicant could succeed on an appeal.

[37] By way of further background, we set out the following extracts from that decision:

> *"[9] … The appeal brought by Harcourts provided three reasons on which the appeal should be allowed:*
>
> *(i) The clause did not breach s 131 because it was properly drafted and in fact did not contravene s 131.*
>
> *(ii) The work the subject of the decision by the CAC was not "real estate agency" work within the meaning of the Act.*
>
> *(iii) Harcourts could not be guilty of unsatisfactory conduct when they had taken appropriate advice from an apparently appropriately qualified and experienced Legal Adviser.*
>
> *[10] Since the appeal has been lodged, counsel have referred to the decision of the High Court in Complaints Assessment Committee 20003 v Jhagroo [2014] NZ HC 2077. In that case the agent had obtained legal advice before inappropriately paying out his own commission from a deposit paid by the purchasers. At paragraph [89] the Court held that the reliance on the legal*

advice meant that there could be no basis for finding that the agent's conduct met the criteria of disgraceful conduct under s 73.

[11] At the hearing before the Tribunal Mr Hodge took the unusual step of arguing that the appeal be allowed. Mr McDonald had concluded that it would not be proper for him to make submissions to the Tribunal. Mr Hodge submitted that having carefully considered the matters the Authority did not consider that the decision of the Complaints Assessment Committee could be upheld. He advised that the Authority now accepted that Harcourts had reasonably and properly taken legal advice from their Legal Adviser as to how the clause should be drafted and it should not be regarded as unsatisfactory conduct for them to have reasonably relied upon the accuracy of that advice. On the basis of the Jhagroo decision Mr Hodge concluded that the appeal ought to be allowed. Mr Graves, the second respondent, did not take part in the conference but filed a memorandum in which he concluded that the appeal should continue because the REAA has taken a strong position on agents exposing clients to the possibility of paying double commission.

…

[13] After consideration, the Tribunal have decided to allow the appeal. Its reasons are as follows:

(i) The Tribunal have concluded that they may have breached s.131. However the decision of Jhagroo makes it clear that the Tribunal must consider that a licensee's reasonable reliance on legal advice can provide a defence to the charge. The Tribunal note that the Court in Jhagroo was at great pains to point out that it must be reasonable reliance on legal advice.

(ii) Mr Hodge submitted, (and we agree), that the real issue was the drafting of a particular clause of an agency agreement by a lawyer who is a specialist in this area. He submits that it was reasonable for Harcourts to rely upon his advice. Mr Hodge rightly noted that while a breach of the Rules appears to amount automatically to unsatisfactory conduct a defence can be made by a licensee if they can be seen to have taken all reasonable steps to prevent/avert a breach. The Tribunal accept that Harcourts did take all reasonable care to see its agency agreements complied with the Act and rules.

(iii) Mr Hodge further submitted that there was no consumer risk as the complainant had had no direct interest in the agency form but rather was in a position of one who worked in the industry.

(iv) Finally the Tribunal acknowledges that the mischief, the subject of this appeal, has been remedied in that all Harcourts agency forms now are in the form which is deemed acceptable to the Real Estate Agents Authority."

[38] As is made clear in *Howard* (supra), the type of timeframe for appeal as contained in s.111(1) is mandatory and cannot be extended by us as there is no power given to us to do so. Section 105 relates to our procedures and not to our jurisdiction. As Mr Hodge explained, it clearly yields to the specific provision in

s.111(1). We do not accept that, in this case, there is any violation of the purposes of the Act.

[39] Accordingly, the application for leave to appeal is dismissed. No issue about costs seems to arise but we reserve leave to apply in that respect for 15 working days from the date of this ruling; although at present it is not clear whether we have power to award costs on this type of application.

[40] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber
Chairperson

_____

Mr G Denley
Member

_____

Ms C Sandelin
Member