BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 40

IN THE MATTER OF	Appeals under s 111 of the Real Estate Agents Act 2008
	READT 021/19
BETWEEN	BRUCE CATLEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	MARGARET and ROBERT FLANAGAN Second Respondents
	READT 022/19
BETWEEN	TIMOTHY JOHN BOYLE Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 521) First Respondent
AND	MARGARET and ROBERT FLANAGAN Second Respondents
On the papers	
Tribunal:	Hon P J Andrews (Chairperson) Mr J Doogue (Member) Mr N O'Connor (Member)
Submissions filed by:	Mr T Rea, for Mr Catley and Mr Boyle Mr M Hodge and Ms E Mok, for the Authority Mr P Wright, for Mr and Mrs Flanagan
Date of Ruling:	24 September 2019

RULING OF THE TRIBUNAL
(As to whether the appellants' appeals are out of time)

Introduction

[1] The Tribunal is required to rule on whether the appeals filed by Mr Catley and Mr Boyle on 16 July 2019 were filed outside the time prescribed in s 111(1) of the Real Estate Agents Act 2008 ("the Act").

Relevant provisions of the Act

[2] S 111 of the Act sets out the right of appeal to the Tribunal against determinations and decisions of a Complaints Assessment Committee. As relevant to the issue before us, s 111 provides:

> **111 Appeal to Tribunal against determination by Committee**
>
> (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.
>
> (1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
>
> …

[3] Section 111(1) and (1A) were enacted in the form set out above by s 245 of the Tribunals Powers and Procedures Act 2018, which came into effect on 14 November 2018 ("the 2018 amendment"). Previously, s 111 did not include any power to accept a late appeal, and s 111(1) provided:

> (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.

[4] Section 81 is concerned with giving notice of a decision where a Committee decides to take no action on a complaint, pursuant to s 80, and is not relevant to the present case. Section 94 provides:

> **94 Notice of determination**
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> (1) When a Committee makes a determination under s 89, the Committee must promptly give written notice of that determination to the complainant and to the licensee.

(2) The notice must–

(a) state the determination and the reasons for it; and

(b) specify any orders made under s 93 and be accompanied by copies of those orders; and

(c) describe the right of appeal conferred by section 111.

Relevant dates

[5] Following a complaint having been made to the Real Estate Agents Authority by Mr and Mrs Flanagan, and investigated by Complaints Assessment Committee 521 ("the Committee"), the Committee issued a decision on 26 April 2019 in which it found, pursuant to s 89(2)(b) of the Act, that Mr Catley and Mr Boyle had engaged in unsatisfactory conduct and requested submissions as to what orders (if any) should be made ("the substantive determination"). The substantive determination was provided to each of Mr Catley and Mr Boyle the same day.

[6] On 21 June 2019, the Committee issued a decision, in which it made penalty orders against Mr Catley and Mr Boyle pursuant to s 93 of the Act ("the penalty decision"). The penalty decision was provided to Mr Catley and Mr Boyle the same day.

Notice of the Committee's substantive determination and penalty decision

[7] The substantive determination, issued to the parties on 26 April 2019, set out the Committee's findings of unsatisfactory conduct against each of Mr Catley and Mr Boyle, and the Committee's reasons for making those findings. It described the right of appeal conferred by s 111 at paragraph 6.1, as follows:

> **6. Your right to appeal**
>
> 6.1 If you are affected by this decision of the Committee, the right of appeal is set out in section 111. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date notice is given of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has a discretion to accept a late appeal filed within 60 working days after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.

The substantive determination did not set out any penalty orders made by the Committee, as the Committee had not made any such orders.

[8] We observe that the substantive decision included an appendix of "relevant provisions". This included a copy of s 111, albeit in its form prior to the 2018 amendment.

[9] The penalty decision was issued to the parties on 21 June 2019. It recorded that the Committee had, on 26 April 2019, found Mr Catley and Mr Boyle guilty of unsatisfactory conduct under s 89(2)(b) of the Act and that the parties had been given the opportunity to make submissions to the Committee as to orders. The penalty decision then set out the Committee's decision as to penalty orders, and the reasons for making those orders.

[10] The Committee set out the parties' right of appeal at paragraph 5.1 of the penalty decision, as follows:

> **5. What happens next**
>
> **Your right to appeal**
>
> 5.1 If you are affected by this decision of the Committee, the right of appeal is set out in section 111. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date notice is given of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has a discretion to accept a late appeal filed within 60 working days after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.

[11] A copy of s 111 was included in the appendix of "relevant provisions", but again in its form prior to the 2018 amendment.

Current practice as to appeals against findings of unsatisfactory conduct

[12] The Tribunal was advised by counsel that typically, where a Committee issues a substantive determination of unsatisfactory conduct, but has not yet made a penalty decision, it will set out the right of appeal in the substantive determination with reference to its penalty decision: that is, it states that the 20 working day appeal period ("the appeal period") will not commence until notice of the penalty decision is given.

This is consistent with the Tribunal's decision in *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)* (*"Edinburgh Realty"*).[1] We observe that, as recorded at paragraph [7], above, the advice as to the appeal period given in the substantive determination in the present case did not follow the "typical" approach. Mr Wright submits for Mr and Mrs Flanagan that the "typical" approach is wrong.

Issue to be determined

[13] If a Complaints Assessment Committee issues a determination finding a licensee guilty of unsatisfactory conduct under s 89(2)(b), then subsequently (after receiving and considering submissions from the parties) issues a penalty decision, does the appeal period for an appeal against the substantive determination run from when notice is given of the substantive determination, or when notice is given of the penalty decision?

[14] Each of Mr Catley's and Mr Boyle's notices of appeal is dated 16 July 2019, and refers only to the substantive determination. Each states that:

> The Complaints Assessment Committee erred in law and/or in fact in relation to its findings of unsatisfactory conduct against [the particular licensee].

[15] If the appeal period ran from the day after notice was given of the substantive determination, it ceased on 24 May 2019 and the appeals filed on 16 July 2019 were more than seven weeks out of time. However, if the appeal period ran from the day after notice was given of the penalty decision, then it ended on 19 July 2019 and the appeals were within time.

Submissions for Mr and Mrs Flanagan

[16] On behalf of Mr and Mrs Flanagan, Mr Wright submitted that the proper interpretation of s 111, in light of the scheme of the Act, its legislative history, and analogous statutes, is that the appeal period for an appeal against a finding of unsatisfactory conduct runs from the day after notice was given of the substantive determination, and that in the present case, both appeals were filed out of time.

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1 *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 16.

[17] Mr Wright submitted that the 2018 amendments were designed to ensure that appeals against decisions of Complaints Assessment Committees are limited, with the aim of ensuring that complaints and appeals are dealt with quickly. He submitted that this is evident from the preclusion of appeals from a decision to refer a complaint to the Tribunal (under s 89(2)(a)), and the requirement for "exceptional circumstances" to exist before a late appeal can be accepted. He submitted that this is in line with the general purpose of statutory tribunals, which exist in order to provide "simpler, speedier, cheaper and more accessible justice").[2]

[18] He submitted that the finding of unsatisfactory conduct under s 89(2)(b) is a "determination", which can be appealed under s 111. He further submitted that s 94 (as to giving notice of the determination) was satisfied: the substantive determination gave notice of the determination of unsatisfactory conduct and the reasons for that determination, and described the right of appeal under s 111, and was given "promptly".

[19] Anticipating a contrary submission, Mr Wright submitted that there was no issue as to compliance with s 94(2)(b) (which provides that the "notice" must "specify any orders made under s 93 and be accompanied by copies of those orders"), as no such orders had been made at the time notice was given of the substantive determination. He submitted that when notice of the substantive determination was given, all of the requirements of s 94 were met when it was provided to the parties. He submitted that the appeal period ran from that time, regardless of any intention by the Committee to determine penalty orders separately.

[20] Mr Wright further submitted that the interpretation he put forward was consistent with the approach taken under the similar legislative provisions of the Lawyers and Conveyancers Act 2006. He submitted that the scheme of that Act was similar in its provisions as to determinations by Standards Committees, orders that may be made by such committees, notice of determinations, and subsequent applications for "review" of committees' determinations by a Legal Complaints Review Officer ("LCRO"). He

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2 Citing *Commissioner of Police v Andrews* [2015] NZHC 745, at [61].

referred to decisions of LCROs that the period within which an application for review must be made runs from the date notice is given of the determination.[3]

[21] Mr Wright also referred to appeals from the Health Practitioners Disciplinary Tribunal, under the provisions of the Health Practitioners Competence Assurance Act Act 2003, where separate appeal periods run from decisions as to conduct and penalty, notwithstanding that separate decisions may be released.

[22] In anticipation of a further contrary submission, Mr Wright submitted that there was nothing to suggest that there should be a presumption for reading a provision that appears, on its face, to provide that time for appeal runs from the date of the substantive determination of unsatisfactory conduct as meaning instead that time should run from the date of subsequent penalty orders. He submitted that there is no reason why appeal periods for determinations of unsatisfactory conduct cannot run separately from appeal periods for decisions on penalty orders made under s 93.

[23] Mr Wright acknowledged that there might be practical consequences of accepting the interpretation he put forward, in that it might result in a need for separate appeal hearings as to substantive unsatisfactory conduct determinations and penalty decisions when, currently, there is only one. He submitted that any inconvenience could be overcome by, where appropriate, making determinations as to conduct and penalty orders at the same time.

Submissions for the appellants

[24] On behalf of Mr Catley and Mr Boyle, Mr Rea submitted that the interpretation advanced by Mr Wright would be contrary to the purposes of the Act, and is inconsistent with the Act's express provisions, in particular, s 94. He submitted that it would result in a significant change to the appeal procedure that has been consistently followed by the Tribunal for almost a decade since the Act came into effect, and would likely result in unnecessary cost and inconvenience to all parties, where appeals would be filed against unsatisfactory conduct determinations, pending receipt of decisions on

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[3] Citing *QT v UF* LCRO 144/2016, 24 August 2018, *Xi v [North Island] Standards Committee* LCRO 77/2013 5 July 2013, and *Lydd v Maryport* LCRO 164/2009, 19 October 2009.

penalty orders, where no appeal may have been filed upon consideration of the penalty decision.

[25] Mr Rea submitted that the Act clearly differentiates between substantive unsatisfactory conduct determinations and penalty orders, and a Committee can only make penalty orders under s 93 if it has first made a substantive determination of unsatisfactory conduct under s 89(2)(b). However, he submitted that whilst the Act makes this distinction, it does not expressly contemplate that a substantive determination and the resulting penalty orders will be made at a different point in time, or that they will attract different rights of appeal.

[26] He submitted that if Parliament intended that the appeal period would run from the date of notification of the substantive unsatisfactory conduct determination, it would, or should, have clearly and unambiguously stated so in s 111. He submitted that, on the contrary, s 111 specifically specifies the appeal period by reference to the day on which notice is given under s 94.

[27] He submitted that the use of the word "must" in s 94 indicates that the Committee does not have a discretion to set out only some or most of the prescribed items (the determination, reasons for the determination, any orders made under s 93, and the right of appeal). He submitted that all must be disclosed. He submitted that if Parliament intended that the appeal period would run from the date of notification of the substantive determination, only, it would have amended s 94 to state specifically that orders made under s 93 need not be specified if not yet made. He further submitted that the Act does not empower the Committee to separately give notice of penalty orders after giving notice of a substantive determination.

[28] Mr Rea also submitted that if a "strict interpretation of the Act" were to be applied, a person affected by a Committee's penalty orders would never have a right of appeal against those penalty orders alone. He submitted that it would be necessary to appeal against the substantive determination, even if such an appeal were not intended, in order to appeal against the penalty orders.

[29] Mr Rea submitted that in *Edinburgh Realty* the Tribunal concluded that the wording of s 94 required that there should be a decision on penalty orders before there can be a "notice of determination" under s 94: that is, until penalty has been dealt with, there has not been such a determination. He submitted that the Tribunal "conclusively held" that where separate substantive and penalty decisions are issued by a Committee, the appeal period does not commence until the penalty decision is issued.

[30] Mr Rea also referred to s 6 of the Bill of Rights Act 1990. He submitted that limiting the right to bring an appeal is a way of encouraging finality and avoids the prolonging of litigation. However, he submitted, any limits must be reasonable and not so restrictive as to render the right to appeal worthless. He further submitted that where the legislature intends to curtail a right of appeal by means of limiting the time from which the appeal period should run, it ought to do so clearly and unambiguously. He submitted that the legislature had not clearly and unambiguously limited the appeal period in s 111 to run from the date of the substantive determination, either in the original section, or in the 2018 amendment. He submitted that the insertion of the word "relevant" did not achieve this.

[31] Finally, Mr Rea submitted that references to other disciplinary provisions were not helpful. He submitted that s 198 of the Lawyers and Conveyancers Act contains an express right of review against a penalty order, and that the disciplinary procedure under the Health Practitioners Competence Assurance Act is very different from the procedure prescribed by the Real Estate Agents Act; in particular in that only the Health Practitioners Disciplinary Tribunal has jurisdiction to impose penalties (under s 101).

Submissions for the Authority

[32] Ms Mok submitted for the Authority that in s 111, the legislature proceeded on the assumption that a Complaints Assessment Committee's determination of unsatisfactory conduct under s 89(2)(b) includes the Committee's decision on orders. She submitted that this is evidenced by the wording of s 94(2)(b) and the fact that s 111 does not expressly refer to penalty decisions.

[33] She submitted that Committees are correct to (regularly, but not inevitably) separate out their liability and penalty decisions, in order that the parties are provided with the determination of unsatisfactory conduct and its reasons, before they are required to make submissions as to penalty. She submitted that it would cause unnecessary expense to licensees if they were required to make penalty submissions before they knew whether or not they were guilty of unsatisfactory conduct. However, she submitted, that did not mean that Parliament's intention in relation to appeal rights should not be respected.

[34] She submitted that the requirements of the notice required to be given under s 94, and the provision of the opportunity to make penalty submissions after a substantive determination is issued, are able to be met if an unsatisfactory conduct determination is only regarded as complete, for the purposes of appeal rights, once the penalty decision has been made.

[35] Ms Mok submitted that this interpretation is supported by the fact that s 111, which creates the right of appeal, does not refer to penalty decisions given under s 93, but refers to notices of decision given under s 81 and 94, neither of which refer to a penalty decision under s 93 as being a "determination". She submitted that this reflects Parliament's assumption that unsatisfactory conduct determinations under s 89(2)(b) and penalty decisions under s 93 would be dealt with together prior to the appeal period being triggered. She submitted that if that were not the case, and the appeal period is triggered after the unsatisfactory conduct determination, then it would follow that there would be no ability to appeal against a penalty decision under s 111. She submitted that that could not be right.

[36] Ms Mok submitted that if the interpretation put forward by Mr and Mrs Flanagan is correct, licensees would be required to file appeals against unsatisfactory conduct determinations within the appeal period, even though in most cases they would not have received a penalty decision. She submitted that this approach is not "impossible", but it is "artificial and impractical". This is because licensees will inevitably file "holding appeals" with the Tribunal against unsatisfactory conduct determinations in order to protect their positions while they engage in the penalty submissions process. While such appeals could be adjourned pending the penalty outcome, such

adjournments may need to be for an extended period. She submitted that this does not sit well alongside the important objectives of the consumer-focused regime of the Act of avoiding unnecessary formality and having expeditious processes wherever possible.

[37] With respect to the references to the provisions of the Lawyers and Conveyancers Act, Ms Mok submitted that that Act provides, in s 198, that there is a right of review by a LCRO of any kind of decision, and the exercise of any kind of function or power, by a Standards Committee. By contrast, she submitted, the Real Estate Agents Act is much more prescriptive, and much more limited, as to what decisions of a Committee may be subject to appeal. She submitted that it is in keeping with the tightly limited appeal rights under the Act, and consistent with s 94(2)(b), to treat a Committee's penalty decision as part of the Committee's determination of unsatisfactory conduct, and that the Tribunal's reasoning in *Edinburgh Realty* should be followed.

Analysis

Interpretation principles

[38] We refer, first, to s 5 of the Interpretation Act 1999 which provides, as relevant:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment. …

[39] In its judgment in *Commerce Commission v Fonterra Co-Operative Group Ltd*, the Supreme Court held that:[4]

> It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have

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4 *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 (SC), at [22] (footnotes omitted).

> regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[40] Counsel also referred us to s 6 of the New Zealand Bill of Rights Act 1990, which provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[41] It is permissible to refer to extrinsic parliamentary materials, including the legislative history, to aid interpretation. That does not assist us here. His Honour Justice Downs stated in *Kumandan v Real Estate Agents Authority*, that legislative history, and extrinsic materials, were silent as to why the original s 111 was framed as it was.[5] The same is true of the 2018 amendments to s 111. It was common ground that the Explanatory Note on introduction of the amendments shed no light on the rationale for the amendments to s 111, and there was no mention of them in parliamentary debates and the Select Committee report.

Purposes of the Act

[42] Section 3 of the Act provides:

> **3 Purpose of Act**
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> (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–
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> (a) regulating agents, branch managers, and salespersons:
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> (b) raising industry standards:
>
> (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

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5 *Kumandan v Real Estate Agents Authority* [2016] NZHC 2545, (2016) 23 PRNZ 759, at [15]–[16]. His Honour was required to decide whether the appeal period ran from the date of the Complaints Assessment Committee's determination, or from the date Mr Kumandan was served with notice of it. His Honour considered that the former interpretation was "more natural linguistically" and "seemingly endorsed by the Legislature", but that it had the potential to give rise to injustice, especially as there was no explicit power to extend time to file an appeal. His Honour concluded that s 111 was better understood as referring to the date the Committee's notice was served on him: see at [21]–[22].

[43] The focus is on the promotion and protection of the interests of consumers; that is, those who use the services of real estate licensees.

[44] In its decision in *Kooiman v Real Estate Agents Authority (CAC 519)*, the Tribunal accepted, albeit in a different context (that of the Tribunal's power to make orders as to costs), that statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts.[6] The Tribunal also accepted that because of the consumer-protection focus of the Act, access to the Tribunal should not be unduly deterred, and there is a need for a flexible approach.

The disciplinary process

[45] Part 4 of the Act (ss 71–120) is headed "Complaints and discipline". It defines "unsatisfactory conduct" (s 72), and "misconduct" (s 73), and provides for complaints to be dealt with by Complaints Assessment Committees (ss 75–99) and establishes the jurisdiction of the Tribunal (ss 100–115).

[46] Pursuant to s 79, "as soon as practicable after receiving a complaint concerning a licensee", a Committee must consider the complaint and determine whether to inquire into it.[7] Section 79(2) sets out five options for Committees, one of which is to inquire into the complaint. Under s 80, a Committee may in its discretion, "decide to take no further action on a complaint". If a Committee exercises that discretion, it must "promptly give written notice of that decision", pursuant to s 81.

[47] Sections 82 to 96 deal generally with Committees' inquiries.

[48] Section 84(1) provides that "a Committee must exercise its powers and perform its duties and functions in a way that is consistent with the rules of natural justice". Section 84(3) provides that "the Committee may regulate its procedure in any manner that it thinks fit, as long as it is consistent with this Act and any regulations made under it". The Tribunal has a similar power to "regulate its procedures as it thinks fit" (subject to the rules of natural justice and to the Act and rules made under the Act)

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6 *Kooiman v Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11, at [63].

7 A Committee also has the power to inquire into and investigate allegations about any licensee, on its own initiative, pursuant to s 78(2).

under s 105. We note that in his judgment in *Wyatt v Real Estate Agents Authority*, his Honour Justice Woodhouse held that s 105 does not enable the Tribunal to give itself a jurisdiction it does not have (in that case, to entertain an "appeal" on a matter on which there was no determination by a Complaints Assessment Committee).[8]

[49] Section 89(1) provides that after both inquiring into a complaint or allegation, and conducting a hearing, a Committee "may make 1 or more of the determinations described in subsection (2)". Those "determinations" are that the complaint or allegations be considered by the Tribunal (s 89(2)(a)), that it has been proved on the balance of probabilities that the licensee has engaged in unsatisfactory conduct (s 89(2)(b)), and that the Committee will take no further action with regard to the complaint (s 89(2)(c)).

[50] If the Committee makes a determination of unsatisfactory conduct under s 89(2)(b) it may, pursuant to s 93(1) of the Act, "do 1 or more of" paragraphs (a) to (i), which set out "orders" that the Committee may make. As already recorded, if a Committee makes a "determination" under s 89, it is required to give written notice of it (including specifying any orders made under s 93) in accordance with s 94.

[51] The Act uses the terms "determinations", "decisions", and "orders". None of these terms is defined in the Act. Section 111 refers to both "determination" and "decision":

> A person affected by a *determination* of a Committee may appeal to the Disciplinary Tribunal against the *determination* within 20 working days after the day on which notice was given of the relevant *decision* was given under section 81 or 94, except that no appeal may be made against a *determination* under s 89(2)(a) that a complaint or allegation be considered by the Disciplinary Tribunal.

Edinburgh Realty

[52] On 18 October 2013, a Complaints Assessment Committee made findings of unsatisfactory conduct against two licensees. They appealed to the Tribunal against those findings, within 20 working days of being given notice of the Committee's determination. The complainant cross-appealed against the Committee's

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8 *Wyatt v Real Estate Agents Authority* [2012] NZHC 2550, at [63]–[65].

determination to dismiss part of the complaint. At the time the appeals were filed, the Committee had not determined what penalty orders, if any, should be made.

[53] The licensees contended that the Committee had failed to comply with s 94 of the Act, by failing to include its penalty decision in its substantive decision. They also contended that as a result of their appeal, the proceedings before the Committee were stayed, and the appeal should be determined before the Committee considered penalty.

[54] The Tribunal concluded that:

[a] It was "elementary" that the Committee needed to deal with liability (that is, whether the licensees had engaged in unsatisfactory conduct) before it could deal with penalties. The Tribunal accepted that licensees need to know the grounds on which a Committee has made a finding of unsatisfactory conduct, and the reasons for that finding, before being required to make penalty submissions.[9]

[b] Generally, a hearing before a Committee will involve two stages: the liability hearing and decision, and later, the penalty hearing and decision. Together, these constitute the Committee's determination for the purposes of s 94.[10]

[c] Until penalty has been dealt with, there has not been a determination as meant in the Act. The licensees' appeal before the Tribunal was premature. The Committee's decision-making process was not complete because there was, as yet, no penalty decision.[11]

[55] The Tribunal commented on s 94 (as to notice) and s 111, as follows:[12]

> [18] It seems to us that s 94 … could have been drafted more clearly. …
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> [19] In terms of the Committee giving notice of its determination under s 94, it seems to us that the words in s 94(2)(b) that the notice must "*specify any orders made under s 93*" could be taken to mean specifying penalty orders if

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9 *Edinburgh Realty*, fn 1, above, at [23].
10 At [25].
11 At [26].
12 At [18]–[19] (emphasis as in original).

> any, or could be inferring that there should be such orders or the addressing of penalty before there can be a notice of determination. We prefer the latter interpretation. As we have already said, it is only a determination of a Committee which can be appealed to us.

Discussion

[56] *Edinburgh Realty* was concerned with the form of s 111 prior to the 2018 amendments. We are concerned with different wording. As did the Tribunal regarding s 94 in *Edinburgh Realty*, we consider that s 111 could have been more clearly worded following the 2018 amendments. However, the amendments to s 111 cannot be ignored. The addition of a reference to notice of a "decision" must be taken as widening the scope of the Tribunal's appeal jurisdiction. It is no longer correct that it is limited to "determinations", as the Tribunal concluded in *Edinburgh Realty*. It includes "decisions" of which notice has been given.

[57] When a Committee first issues a substantive determination, finding a licensee has engaged in unsatisfactory conduct, then issues a separate decision as to penalty orders under s 93, the Committee has issued a "determination" under s 89(2)(b) and a decision as to penalty. A decision by a Committee as to what penalty orders are made following an earlier finding of unsatisfactory conduct is a "decision", which may be appealed to the Tribunal. We reject any suggestion that Parliament has, whether intentionally or inadvertently, failed to provide a right to appeal against penalty, independently of any appeal against the substantive decision. The Act should not be interpreted so as to result in such an outcome.

[58] As Mr Rea submitted, a Committee cannot make penalty orders unless it has first made a determination of unsatisfactory conduct. But that does not change the fact that penalty orders are made by Committees by way of decisions, with reasons supporting those decisions. They are therefore able to be appealed to the Tribunal.

[59] We accept Mr Wright's submission that there is no breach of s 94 if notice is given of the substantive unsatisfactory conduct determination without setting out penalty orders which have not yet been made. Plainly, if an order has not been made, it cannot be set out. The requirement under s 94(2)(b) that a notice must specify "any

orders made under section 93" means that orders which have been made must be specified, but there is no requirement to specify orders which have not been made.

[60] We do not accept that s 94 should be read as not empowering Committees to give separate notice of penalty decisions. Rather, it is consistent with s 94 that Committees are required to give notice of orders made under s 93, when made, and Committees routinely do so.

[61] We have concluded that on its wording, s 111 must be interpreted as providing that both substantive determinations of unsatisfactory conduct and subsequent penalty decisions may be appealed to the Tribunal, and that the appeal period runs from the date notice is given of the "relevant decision": that is, the determination or decision that is being appealed. Thus, if a person affected by an unsatisfactory conduct determination considers that it was wrong and wishes to appeal against it, an appeal must be filed within 20 working days of notice being given of that determination. Likewise, if a person considers that a Committee's penalty decision was wrong, an appeal must be filed within 20 working days of notice being given of the penalty decision.

[62] This interpretation is simpler, and more aligned to the Act's focus on the promotion and protection of the interests of consumers, than that submitted for by Mr Rea and Ms Mok. Consumers (particularly those who do not have legal representation) are more likely to read s 111 in this manner than in a manner which requires them to regard a finding of unsatisfactory conduct as not being "complete" until a penalty decision is issued. Consumers should not be put in the position of being required to be legally represented in relation to appeals, if they do not wish to be. That would not be consistent with the intention of the Tribunal (as a statutory tribunal) of providing a cheaper and more accessible process.[13]

[63] This interpretation is also consistent with the Committees' usual approach of providing parties with a substantive unsatisfactory conduct decision, and seeking further submissions, before considering penalty.

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[13] As her Honour Justice Mallon put it in *Commissioner of Police v Andrews* [2015] NZHC 745, at [61].

[64] We do not consider that our interpretation is impracticable, or that it will lead to any undue inconvenience. The argument that it will lead to "holding" appeals by licensees is not persuasive. Licensees will either accept the Committee's determination of unsatisfactory conduct, in which case they will not appeal it, or they will consider that the Committee was wrong to make a determination of unsatisfactory conduct, in which case an appeal should be filed. In either case, licensees could either file an appeal against penalty after the penalty decision is issued, or amend the appeal already filed to include an appeal against penalty.

[65] Further, it is not uncommon for appeals to be filed by original complainants. These may be against a Committee's unsatisfactory conduct determination or the penalty orders, or both. The Tribunal's experience is that complainants' appeals against unsatisfactory conduct findings are filed within 20 days of the substantive determination. We are not aware of it ever having caused any particular difficulty if such an appeal is adjourned pending determination of penalty.

[66] Nor are we persuaded that our interpretation will result in any additional delay in the process of dealing with complaints. If the penalty process is prolonged (as Ms Mok submitted it could be if issues of loss and damage are involved), then the time taken to deal with the complaint is prolonged whether an appeal against a substantive unsatisfactory conduct determination has been filed, or not.

[67] The submission that the interpretation we prefer would result in "a significant change to the appeal procedure that has been consistently followed" for almost a decade is also not persuasive. If, as a result of the 2018 amendments, that result is found to be incorrect, then it must be changed.

Result

[68] We rule that s 111 provides that both substantive determinations of unsatisfactory conduct and penalty decisions may be appealed to the Tribunal, and that the appeal period in each case runs from the date notice is given of the "relevant decision": that is, the determination or decision that is being appealed.

[69] Accordingly, the appeals filed by Mr Catley and Mr Boyle are out of time.

[70] 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.

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Hon P J Andrews
Chairperson

_____
Mr J Doogue
Member

_____
Mr N O'Connor
Member