BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 57

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 Ms E Mok, for the Authority Mr P Wright and Ms J Storey, for Mr and Mrs Flanagan
Date of Ruling:	10 December 2019

RULING (2) OF THE TRIBUNAL
(Appellants' application to file a late appeal)

Introduction

[1] In a Ruling issued on 24 September 2019, the Tribunal held that appeals filed by Mr Catley and Mr Boyle on 16 July 2019 against a decision issued by Complaints Assessment Committee 521 ("the Committee") on 26 April 2019, in which they were found guilty of unsatisfactory conduct ("the substantive decision") were filed outside the period of 20 working days within which appeals could be filed, pursuant to s 111 of the Real Estate Agents Act 2008 ("the Act").[1]

[2] Mr Catley and Mr Boyle ("the applicants") have now applied to the Tribunal to file a late appeal, pursuant to s 111(1A) of the Act.

The legislation

[3] Section 111(1) and 111(1A) of the Act provide, as relevant:

> **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, …
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> (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.

[4] Section 111(1), in the form set out above, replaced the former s 111(1), as from 14 November 2018, pursuant to s 245 of the Tribunals Powers and Procedures Legislation Act 2018. Section 111(1A) was inserted into the Act as from 14 November 2018, also pursuant to s 245 of the Tribunals Powers and Procedures Legislation Act.

Evidence in support of applications

[5] Mr Catley said in an affidavit affirmed on 23 October 2019 that up until the date of the Tribunal's Ruling of 24 September, he and the agency in which he is engaged had a general understanding that the beginning of the 20 working day appeal period

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[1] *Catley v the Real Estate Agents Authority (CAC 521)* [2019] NZREADT 40. We record that the appellants have filed an appeal against the ruling in the High Court.

was calculated from the date on which the Authority notified the parties of penalty orders made by a Complaints Assessment Committee.[2] He said that neither he nor the agency became aware of the amendment of s 111(1), or that the amendment had brought about a change in the time for lodging an appeal. He said that neither he nor his agency received any updates or newsletters from the Authority, the Real Estate Institute of New Zealand, or the Property Council New Zealand, explaining that the amendment had had the effect of changing his general understanding.

[6] Mr Catley referred to the Committee's substantive decision, which advised him as follows:

> If you are affected by this decision of the Committee, your right of appeal is set out in section 111. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal within 20 working days of the date of this decision.

Mr Catley was certain that he did not notice the reference to the appeal period beginning from the date of "this" decision.

[7] He also referred to an email sent by Mr Gary Powell of the Authority, concerning penalty submissions requested by the Committee in the substantive decision. Mr Powell's email included the following:

> **What if I am unhappy with the Committee's unsatisfactory conduct finding?**
>
> Your submission on orders is not an opportunity to challenge the Committee's unsatisfactory conduct finding. The Committee cannot change its finding once it has issued its unsatisfactory conduct decision.
>
> If you are unhappy with the Committee's unsatisfactory conduct finding you can appeal it to the Real Estate Agents Disciplinary Tribunal after the Committee's orders decision has been issued.

[8] Mr Catley further said that it has recently been brought to his attention that Mr Boyle has discovered additional evidence that may disprove one of the Committee's findings in its substantive decision, regarding backdating of an agency agreement. That advice caused him to conduct his own search of his agency's database, which corroborated Mr Boyle's evidence. Accordingly, if he is granted leave to appeal, Mr

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[2] We observe that this "general understanding" could only apply where a Complaints Assessment Committee made a finding of unsatisfactory conduct against a licensee, then subsequently issued a decision as to penalty orders.

Catley intends to apply to the Tribunal for leave to adduce further evidence in support of his appeal.

[9] Mr Boyle said in an affidavit affirmed on 23 October 2019 that at the time of the conduct complained of by Mr and Mrs Flanagan, in 2015, he was engaged as a licensed salesperson in the same agency as Mr Catley. He ceased being engaged in the real estate industry in 2017 and subsequently surrendered his licence. He said that he had not kept abreast of any developments in the industry since that time.

[10] Mr Boyle said that he had no contact with Mr Catley at the time of Mr and Mrs Flanagan's complaint, in 2018, and did not have access to any of the agency's documents when responding to it. He said that his recollection of events was patchy, and this was reflected in his response.

[11] Mr Boyle said that when he received the Committee's substantive decision, he telephoned the Authority's case administrator, Mr Powell. He said that Mr Powell advised him that the prescribed time for lodging an appeal against the decision would only begin to run after the Committee had made penalty orders. He therefore focussed his attention on preparing a response in mitigation of penalty and awaiting the outcome.

[12] Mr Boyle further said that some time after receiving the Committee's decision, he discovered by chance the signed PDF version of an agency agreement signed by Mr and Mrs Flanagan. He had uploaded the agreement onto his Dropbox account in order to be able to access it when out of the office. Mr Boyle said that this document disproves Mr and Mrs Flanagan's version of events. Mr Boyle said that he emailed the agreement to the Authority on 13 June 2019, but it was not submitted to the Committee as it had already issued its substantive decision. If he is granted leave to appeal, Mr Boyle intends to apply for leave to adduce further evidence in support of the appeal.

[13] Mr Boyle's appeal was filed within 20 days of receiving the Committee's penalty decision. He said that it was only after counsel for Mr and Mrs Flanagan raised an objection that he became aware that s 111(1) provides that the appeal period began to

run from the date of notification of the substantive decision, not notification of penalty orders.

Submissions

[14] On behalf of the applicants, Mr Rea submitted that "exceptional circumstances" should be interpreted to mean "unusual, out of the common run". He referred to the Tribunal's decision in *Matson v the Real Estate Agents Authority (CAC 410)*,[3] and the judgment of the Supreme Court in *Creedy v Commissioner or Police*.[4] He submitted that in *Creedy*, the Supreme Court held that the interpretation of "exceptional circumstances" should not unduly limit the power to extend time, and that the overall justice of the case to the parties must be considered.[5]

[15] Mr Rea further submitted that the provisions as to extensions of time to appeal under r 29A(1) of the Court of Appeal (Civil) Rules 2005 are a helpful reference. He referred to the judgment of the Supreme Court in *Almond v Read*, in which the Court said that the "ultimate question" when considering r 29A(1) is "what the interests of justice require".[6] Mr Rea also referred to s 106(4)(b) of the Health Practitioners Competence Assurance Act 2003, under which the District Court and High Court have a discretion to extend time to file an appeal against a decision of the Health Practitioners Disciplinary Tribunal.

[16] Mr Rea submitted that the circumstances which led to the applicants not filing appeals against the Committee's substantive decision within 20 working days of being notified of the decision were exceptional and out of the ordinary course of events, and in fact unprecedented. The relevant circumstances were:

[a] Mr Boyle's not having practised in real estate since August 2017;

[b] The interpretation of the amended s 111(1) was not determined or published prior to the Tribunal's ruling of 24 September 2019, up to which

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3 *Matson v the Real Estate Agents Authority (CAC 410)* [2019 NZREADT 9.
4 *Creedy v Commissioner of Police* [2008] NZSC 31.
5 *Creedy*, at [32].
6 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801, at [38].

time it was widely understood that the appeal period did not run until a penalty decision was issued;[7]

[c] Neither the applicants and their legal counsel, nor the Authority, was aware that the amendment to s 111(1) had brought about a change in the widely understood interpretation of the appeal period;

[d] The Authority advised both of the applicants that the appeal period did not begin to run until after a penalty decision was issued;

[e] Neither of the applicants was previously aware of the additional evidence subsequently discovered by Mr Boyle, which disproves one of the Committee's findings, and necessitates an appeal against that finding.

[17] Mr Rea submitted that the central theme of comparative legislation and case law is the interests of justice, which requires consideration of all the circumstances. He submitted that the period of delay in filing the appeals was not substantial, and it would be manifestly unjust to deprive the applicants of the opportunity to disprove a finding which goes to the core of their reputations. He submitted that they will suffer material prejudice if they are not given the opportunity to appeal against the finding. He submitted that, in contrast, there is no material prejudice to Mr and Mrs Flanagan in allowing leave for the late appeal. He submitted that any delay in the final determination of their complaint is minimal in comparison to the time between the conduct complained of (late 2015), and their making a complaint to the Authority, in September 2018.

[18] On behalf of Mr and Mrs Flanagan, Mr Wright submitted that the applicants have not met the threshold of establishing that exceptional circumstances prevented them from filing their appeals within time, such that the Tribunal has no jurisdiction to allow them to appeal out of time.

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[7] As set out in the Tribunal's decision in *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 16. This decision was concerned with the form of s 111 prior to its amendment by s 245 of the Tribunals Powers and Procedures Act 2018.

[19] Mr Wright submitted that the wording of s 111(1A) is very restrictive in that, first, leave for a late appeal may only be given within 60 days of notification of a decision, and secondly, leave may only be given where the Tribunal is satisfied that "exceptional circumstances prevented the appeal from being made in time". He submitted that s 111(1A) is intended to provide for a limited and tightly controlled appeal regime, consistent with the Act's purpose of ensuring that complaints are dealt with speedily, simply, and cheaply. He submitted that s 111(1A) creates a two-stage test:

[a] the Tribunal must first be satisfied that exceptional circumstances prevented the appeal from being made in time (the threshold); and secondly

[b] if the Tribunal is so satisfied, it may then decide to allow a late appeal (the discretion).

[20] As to the first stage, Mr Wright accepted that "exceptional circumstances" should be interpreted, as set out by the Supreme Court in *Creedy* as "unusual", and the "exception to the rule". However, he submitted that the existence of exceptional circumstances alone is not enough, as it must also be established that those circumstances "prevented" an appeal being made in time. He submitted that the ordinary meaning of "prevented" requires a person to be precluded or stopped from doing something, with a degree of either inability or intervention, and that practical considerations that make a course of action undesirable will not mean that a person is "prevented" from that course of action.[8]

[21] Mr Wright further submitted that the wording of s 111(1A) is much more restrictive than comparable statutes. Unlike r 20.3(5) of the High Court Rules, and r 29A of the Court of Appeal (Civil) Rules, the Tribunal has not been given a general discretion to extend time. He submitted that Parliament must have made a deliberate decision to adopt a more stringent test under the Act. He submitted that the result of the more restrictive wording of the Act is that the Tribunal can only take into account

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[8] Citing *Islington Park v Ace Insurance Ltd* [2013] NZHC 2983, and *Wellington City Corporation v Wellington Milk Vendors Association* [1923] NZLR 305 (CA).

factors such as the interests of justice and the merits of the proposed appeal if the threshold has been met.

[22] Mr Wright referred to s 114(4) of the Employment Relations Act 2000, pursuant to which the Employment Relations Authority may grant leave to an employee to raise a personal grievance out of time, if satisfied that the delay was "occasioned by exceptional circumstances". He submitted that in the context of the Employment Relations Act, ignorance of a change in the law does not constitute exceptional circumstances.[9]

[23] Mr Wright submitted that the submissions for the applicants primarily revolved around the test of whether allowing an appeal out of time would be in the interests of justice. He submitted that this is not the correct test. The Tribunal must first decide the threshold issue of whether exceptional circumstances prevented an appeal within time. In the present case, he submitted, the applicants were not "prevented" from filing an appeal.

[24] He submitted that both were aware that appeal was an option, and there was nothing stopping them from filing an appeal – the advice from the Authority did not suggest that the Authority would stop them from filing an appeal at an earlier date. He also submitted that the Committee's substantive decision clearly advised them that they were entitled to appeal within 20 working days of that decision.

[25] Mr Wright submitted that while the applicants, or their legal counsel, may have believed that they would be able to file an appeal against the substantive decision at a later date, that belief did not prevent them from filing earlier, and it was clearly open to them to do so. They could have filed notices of appeal and withdrawn them later, if they no longer wished to appeal after receiving the Committee's penalty decision. He submitted that Parliament must be taken to have intentionally chosen to use the word "prevented" in enacting s 111(1A), in particular as that term is unusual: he submitted that other legislation used "occasioned", or "caused". He submitted that the use of the word "prevented" should not be ignored.

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9 Citing *Muggeridge v Miden Construction Co Ltd* [1992] 1 ERNZ 232 (EmpT).

[26] Mr Wright further submitted that in any event, the reasons proffered by the applicants do not amount to "exceptional circumstances". He submitted that neither the fact that Mr Boyle was not practising in the industry, and did not keep abreast of changes, nor that he now wished to adduce further evidence, is relevant. He also submitted that it is not unusual or out of the ordinary for there to be different available interpretations of the law, nor for courts or tribunals to alter existing interpretations of the law. He submitted that even if the applicants were justified in relying on their understanding of the law, that does not amount to an exceptional circumstance.

[27] For the Authority, Ms Mok advised the Tribunal that the Authority abides the Tribunal's decision. Ms Mok further advised the Tribunal:

> In terms of the specific circumstances relied on by the [applicants], the Authority confirms that the [applicants] were informed by an Authority employee after the Committee's unsatisfactory conduct finding was issued that this finding could be appealed after the Committee's orders decision had been issued. This was based on the law as the Authority understood it to be at the time. The Authority accepts that this is a factor that will be relevant to the Tribunal's determination as to whether there were exceptional circumstances preventing the [applicants'] appeal from being brought in time.

[28] Mr Rea filed submissions in reply to Mr Wright's submissions. He referred the Tribunal to the provisions of s 53(2) of the Legal Services Act 2011, pursuant to which a late application for review of a decision of the Legal Services Commissioner may be accepted if the chairperson of the Legal Aid Tribunal is satisfied that "exceptional circumstances prevented the application being made within 20 working days". He noted that the wording of s 53(2) is almost identical to that of s 111(1A) of the Act. He submitted that when the Legal Services Bill was presented to Parliament, it was accompanied by the Justice and Electoral Committee's commentary on the Bill, in which it was said that providing a power to extend time "would improve the review process by ensuring that applicants were not penalised by circumstances beyond their control".[10]

[29] Mr Rea also referred to two decisions of the Legal Aid Tribunal. He submitted that the Legal Aid Tribunal had not applied a strict interpretation of the word

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[10] Commentary of the Justice and Electoral Committee on the Legal Services Bill (2010), at 4.

"prevented", and had not required an elevated threshold for the exercise of its discretion to accept a late application.

[30] He submitted that Mr Wright's submission that the merits of the case and the interests of justice should not be considered by the Tribunal in the present case "unless and until" it is established that exceptional circumstances prevented an appeal being filed in time is incorrect, and the Tribunal should not be expected to adopt a stricter approach to the exercise of its discretion under s 111(1A) than any other tribunal or court.

[31] Mr Rea submitted that a "strict and isolated" interpretation of the word "prevented" is contrary to the intention of Parliament, and renders s 111(1A) unworkable. He submitted that if it can be shown that a person was "factually" precluded from bringing an appeal on time, then leave to file a late appeal ought to be granted as a matter of course. He submitted that the need for "exceptional circumstances" to be present is rendered moot, because whether or not the circumstances were "exceptional", the person could not appeal, and "such an absurd and unworkable outcome" could not have been intended by Parliament. He submitted that s 111(1A) must be read as a whole as providing the Tribunal with a discretion to be exercised when the circumstances are an exception which is out of the ordinary course, unusual, special, or uncommon.

[32] In the alternative, Mr Rea submitted that the applicants were in fact "prevented" from filing their appeals in time, in exceptional circumstances. He submitted that the impediment which caused them to be "prevented" was a combination of the incorrect advice of the Authority concerning the time for filing an appeal, and the change of interpretation of s 111 by the Tribunal in its 24 September 2019 ruling. He submitted that a combination of those circumstances is neither routine nor ordinary.

[33] Mr Rea submitted that the Tribunal's interpretation of s 111 of the Act changed after the 20 working day appeal period had expired, and the applicants and their advisors could not reasonably be expected to have anticipated that change when they received notification of the Committee's substantive decision. Accordingly, he submitted, they were not "ignorant of the law", but rather under a mistake of law which

had not yet been clearly interpreted by the Tribunal by the time the appeals were filed. He submitted that neither of the applicants was in control of those circumstances, and therefore were "prevented" from filing their appeals in time.

[34] Mr Rea submitted that the Tribunal's previous decisions in relation to applications to file late appeals are distinguishable on their facts, and do not assist in this case.

[35] Finally, Mr Rea submitted that it cannot be a coincidence that the Act was amended to mirror the provisions of the Legal Services Act, and Parliament must have intended s 111(1A) of the Act to have the same meaning and application as s 53(2) of the Legal Services Act. He submitted that the interpretation put forward for Mr and Mrs Flanagan risks injustice by elevating the "threshold" beyond that applying to any other court or tribunal. He submitted that the requirement that the circumstances must be "exceptional" imposes an adequate limitation on the Tribunal's discretion. He further submitted that there has been no allegation, whatsoever, of any prejudice to Mr and Mrs Flanagan if the applicants' appeals are accepted for filing.

Discussion

Approach to interpretation of s 111(1A)

[36] The Interpretation Act 1999 provides that the meaning of an enactment must be ascertained from its text and in the light of its purpose.[11]

[37] The purpose of the Act is set out in s 3(1) of the Act:

> **3 Purpose of Act**
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> (1) The purpose of the 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.

[38] As set out in s 3(2)(c) of the Act, the way in which the Act achieves its purpose include:

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[11] Interpretation Act 1999, s 5(1)

> Providing accountability through a disciplinary process that is independent, transparent, and effective.

[39] As the Tribunal said in its decision in *Kooiman v The Real Estate Agents Authority (CAC 519)*, statutory tribunals exist in order to provide simpler, speedier, cheaper, and more accessible justice than do the ordinary courts.[12] Consistent with that objective, in order for the disciplinary process to be "effective", appeals from decisions should be disposed of promptly. That objective will in general not be achieved if appeals can be brought long after the conclusion of the primary proceeding. But neither should the appeal provisions in the Act be interpreted so restrictively that a significant number of litigants are shut out from appeal rights.

[40] The Act seeks to harmonise these various provisions by making it clear that in general, appeals brought more than 20 working days after the date of the decision appealed against will not be accepted. The exclusion of late appeals, while it deprives some litigants of access to appeal rights, is the price of achieving the expeditious and economical disposition of proceedings under the Act.

[41] But the provisions of section 111 also reflect an appreciation that too stringent a prohibition of late appeals may unjustly defeat the access to justice objective. There will be cases where to decline an appeal which is brought outside the 20 working day period will potentially cause injustice. Because of the very wide range of circumstances which may lead to an intending appellant failing to observe the time limit, it is impossible to lay down hard and fast rules with general application. The exceptional circumstances the Tribunal can take into account when deciding whether it is appropriate to accept a late appeal are not defined other than they must be such that they prevented an appeal brought within time.

[42] As recorded earlier, counsel referred us to provisions as to filing appeals under other legislation. The regime applicable to appeals in the civil courts, under the High Court Rules 2016 and the Court of Appeal (Civil) Rules 2005, does not assist us, as there is no reference to "exceptional circumstances" in the relevant provisions. Nor do the provisions as to appeals against a decision of the Health Practitioners

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[12] *Kooiman v The Real Estate Agents Authority (CAC 519)* [2019] NZREADT 11, at [63][b], citing *Commissioner or Police v Andrews* [2015] NZHC 745, at [61].

Disciplinary Tribunal, under the Health Practitioners Competence Assurance Act 2003. The provisions of the Employment Relations Act 2000 (as to applications to the Employment Relations Authority to raise a grievance out of time) and the Legal Services Act 2011 (as to appeals against decisions of the Legal Services Commissioner) are closer to those of the Real Estate Agents Act, but cases decided under those provisions, referred to by counsel, are not sufficiently factually analogous to the present case.

Are the circumstances in this case exceptional?

[43] The applicant bears the onus of persuading the Tribunal that the "circumstances" were "exceptional". As the Tribunal said in its decision in *Matson v The Real Estate Agents Authority (CAC410)*, the word "exceptional" creates a high threshold. To be "exceptional", the circumstances must be able to be properly described as unusual, uncommon, special, or rare. They must be out of the ordinary course of events as to filing a notice of appeal. However, the circumstances need not be very rare, unique, or unprecedented.[13]

[44] Some limitations on what amount to "exceptional circumstances" suggest themselves. To take an example, it would seem likely that reaching an erroneous conclusion as to what the time limits require is hardly likely on its own to be an exceptional circumstance. Such occurrences are far from unusual. Further, it is unlikely that Parliament intended that there should be a dispensing provision which excuses a party who had not acted reasonably assiduously in ascertaining the correct position. After all, it is always open to a party in doubt about the meaning of s 111(1A) to obtain legal advice.

[45] The exceptional circumstances that are relied upon in this case are set out in the affidavits of Mr Catley and Mr Boyle, referred to earlier. They say that their mistaken view as to the time in which they could file their appeals originated from what they thought were authoritative sources. The first was that the Authority gave them incorrect information about the appeal period. The second was that they relied on an

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13 *Matson v The Real Estate Agents Authority (CAC410)*, fn 3, above, at [18][e].

understanding of the law that was based on the Tribunal's decision in *Edinburgh Realty v Real Estate Agents Authority (CAC 2004)*.[14]

[46] As set out in paragraphs [3] and [4], above, the Act's provisions as to the time limits for filing appeals was altered by the Tribunals Powers and Procedures Legislation Act in 2018. The Tribunal's ruling of 24 September 2019 made it clear that the statutory amendment brought about substantial changes to the rules governing the time for appeals under the Act.[15]

[47] That being so, this was not a case in which there was an unexplained failure on the part of the parties to acquaint themselves with the appeal time limits. It is apparent that the changes that came about as a result of the amendment to the Act were not initially appreciated by the Authority, the real estate industry, and legal advisors generally. It is understandable that awareness of the changes has only come about gradually. Indeed, for some time after the amendment to the Act, the Authority continued to explain the appeal period on the old (superseded) basis.

[48] For the reasons set out above, we accept that the circumstances which led to the applicants not filing their appeals within the 20 working day period were "exceptional" within the meaning of s 111(1A).

Did the exceptional circumstances prevent the appeals being filed within time

[49] The substance of Mr Wright's submissions was that the applicants were never prevented from filing their appeals – they could have done so at any time. That submission rests on the opportunity and ability that they had, as people of free will, to file an appeal at any time. There was no external factor which prevented them from doing so.

[50] If accepted, this submission would have the effect that it would only be if an applicant were prevented by physical inability (caused perhaps by illness or accident) that they could avail themselves of an extension of time. We do not consider that such

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14 *Edinburgh Realty v Real Estate Agents Authority (CAC 2004)*, fn 7, above.
15 *Catley v The Real Estate Agents Authority*, above, fn 1.

a restricted outcome is required by the words of the subsection and the context in which the legislature would have expected it to operate.

[51] It is our view that the legislative objective in adding this requirement to the subsection was to address the need for any exceptional circumstances to be material to, and causative of, a failure to bring an appeal in time. The purpose was to impose a requirement on the applicant to demonstrate a causal connection between the alleged exceptional circumstances and the applicant's failure to file the appeal in time.

[52] While the section uses the passive voice when describing the prevention ("exceptional circumstances prevented the appeal") it is plainly intended to direct attention to any factor causally connected to the applicant's not filing an appeal in time.

[53] While the wording of the section suggests that an applicant can rely on any factor that causally contributed to the failure to bring an appeal in time, some factors would be seen as being too distant from, or patently unconnected with, the failure of the applicant to apply in time and they should be disregarded. Further, it is unlikely that the correct balance of policy factors that underlies the power to extend time was intended to operate to excuse delays which could easily have been avoided, or circumstances which arose from an applicant's avoidable actions or inactions. An applicant who relies on such matters is unlikely to be able to establish that compliance with the appeal time limits was "prevented".[16]

[54] Obviously it is not enough for an applicant to say that the passing of the appeal time limit of itself "prevented" the bringing of a timely appeal. It is matters which led to that state of affairs which must be examined.

[55] What happened in this case was that the expiry of time occurred because the applicants, and their legal advisors, did not appreciate that the time to appeal was running out. Their misunderstanding was a causative factor that brought about the

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16 Factors of this kind may also be relevant to whether there are "exceptional circumstances" present. It is questionable whether the legislative requirement will be satisfied where the cause of the failure to comply with the time limit is the inattentiveness or carelessness of the appellant.

situation where an appeal was no longer available. It is not to misunderstand or misapply the language of the section to say that in such circumstances they were "prevented" from bringing the appeal.

[56] Consistent with that approach we consider in the present case that the applicants' belief that they had additional time within which to bring the appeal arose from their being understandably misled by the circumstantial factors that we have mentioned. Their lack of clarity about these matters, resulting from the recent amendments to the Act, was something which led to them failing to bring an appeal, or another words, had the effect of preventing an appeal within time.

Should the Tribunal exercise its discretion to allow the late appeals?

[57] It does not necessarily follow that in all cases where an applicant is prevented from bringing an appeal that the discretion to extend time ought to be exercised. In other words, establishing that the applicant was prevented from bringing the appeal is a necessary but not sufficient condition to the granting of leave. It is only once that requirement has been satisfied, that the Tribunal "may accept a late appeal". The Tribunal must be satisfied that this is a proper case in which to make such an order.

[58] In determining whether to allow an appeal the Tribunal must consider, amongst other things, the extent of the delay on the part of the applicants. This is relevant because an applicant who at one point was deserving of a dispensation of the time limits may lose that status by further unnecessary delays. That is because granting an extension in such circumstances would cut across the policy of the Act to ensure that appeals do not lead to unjustified delays.

[59] In this particular case, we do not consider that this falls into such a category. The applicants' appeals were filed on 16 July 2019, within 20 working days of the Committee's penalty decision, and within 60 working days of the date of the Committee's substantive decision. Their application to apply to file late appeals was made on 23 October 2019, one month after the Tribunal's ruling that their appeals were out of time. We do not consider that it could be said that there was any unnecessary delay in seeking leave to file late appeals.

[60] There is no other countervailing consideration that we are aware of which would justify declining leave. The justice of the case and the need to ensure the fullest possible access to justice by way of the right to appeal weighs the balance in favour of accepting the late appeals.

Result

[61] The Tribunal directs that Mr Catley's and Mr Boyle's appeals are accepted for filing.

[62] The Case Manager is to schedule a telephone directions conference in order to make timetable directions to progress the appeals.

[63] 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

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Mr J Doogue
Member

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Mr N O'Connor
Member