

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 9

READT 058/18

IN THE MATTER OF

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

BETWEEN

JOHN BERNARD and BEVERLEY JOAN
MATSON
Appellants

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 410)
First Respondent

AND

MEGAN NEWLOVE
Second Respondent

AND

GORDON STEWART
Third Respondent

AND

EVES REALTY LIMITED t/a Eves Realty
Limited Cherrywood
Fourth Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)
Ms N Dangen (Member)
Ms C Sandelin (Member)

Submissions filed by:

Mr K Perry, on behalf of the 2nd to 4th
Respondents (Applicants)
Mr M Ward-Johnson, on behalf of the
Appellants
Mr R Belcher, on behalf of the 1st
Respondent

Date of Ruling:

4 March 2019

RULING OF THE TRIBUNAL
(Application by 2nd to 4th Respondents regarding late appeal)

Introduction

[1] On 17 December 2018 the Tribunal received a notice of appeal by the appellants (Mr and Mrs Matson) against the decision of Complaints Assessment Committee 410, dated 28 August 2018, in which the Committee found that each of the second, third, and fourth respondents (the licensees) had engaged in unsatisfactory conduct in relation to Mr and Mrs Matson's purchase of a property at Tauranga. The second respondent was the listing and selling agent, the third respondent was her supervisor. And the fourth respondent is the agency at which they are engaged.

[2] Mr and Mrs Matson have also appealed against the Committee's decision dated 19 November 2018, in which the Committee made penalty orders against the licensees, being orders for censure, and fine of \$7,500 against each of the second and third respondents, and \$15,000 against the fourth respondent.

[3] On 25 January 2019, the Tribunal received a notice of appeal by the licensees, against the penalty orders made by the Committee.

[4] Mr and Mrs Matson's notice of appeal was received by the Tribunal within the 20 working days appeal period specified in s 111(1) of the Real Estate Agents Act 2008 ("the appeal period"), which in this case expired on 17 December 2018. The licensees' notice of appeal was received outside the specified appeal period.

Issue for determination

[5] The Tribunal is required to decide whether the licensees' appeal may be accepted pursuant to s 111(1A) of the Act, which provides that:

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 being made in time.

[6] Section 111(1A) is a new provision, having been inserted, as from 14 November 2018, by s 244 of the Tribunal's Powers and Procedures Legislation Act 2018. Prior to s 111(1A) being enacted, the Act did not contain any provision allowing the

Tribunal to accept an appeal filed outside the appeal period. This is the first occasion on which the Tribunal has been required to consider s 111(1A).

Submissions

[7] Mr Perry submitted for the licensees that their late appeal should be accepted on the ground of “exceptional circumstances”. They rely on the following:

- [a] The licensees were prepared to accept the level of the fines imposed, provided that Mr and Mrs Matson did not appeal against the Committee’s decisions.
- [b] The licensees’ solicitors received a copy of Mr and Mrs Matson’s appeal at 4.26 pm on 17 December 2018, which was the last day of the appeal period.
- [c] The solicitors advised the Tribunal, the Authority, and Mr and Mrs Matson on 19 December 2018 that an appeal was being considered, but they were waiting on final instructions.
- [d] The person from whom the solicitors were awaiting instructions was away on annual leave from 17 December 2018 to 22 January 2019.
- [e] Having received instructions, the licensees’ appeal was filed and served on 25 January 2019.

[8] Mr Perry also submitted that the licensees’ appeal is effectively a cross-appeal: that is, an appeal of a decision where the other party (in this case, Mr and Mrs Matson) have already filed an appeal (“the primary appeal”). He submitted that in contrast to the primary appeal, a cross-appeal is not required to be filed within the appeal period. He submitted that an extension of time is not required, and the licensees do not have to establish exceptional circumstances.

[9] Mr Perry pointed to the provisions of the High Court and District Courts Rules, which provide that if a party intends to file a cross-appeal, the party must do so no later

than two working days before the case management conference for the appeal.¹ He submitted that the Tribunal should apply the terms of the High Court and District Courts Rules in the present case. The directions conference for Mr and Mrs Matson's appeal was originally scheduled for 1 February 2019 (although later adjourned pending determination of the licensees' status as appellants) so the licensees' cross-appeal was filed and served well within the extended appeal period of 60 working days.

[10] Mr Belcher submitted for the Authority that the matters relied on by the licensees as exceptional circumstances are not "exceptional". He submitted that "exceptional" creates a high threshold: the circumstances relied on must be truly an exception to the normal course of an appeal, and must be unusual, special, uncommon, or rare (although need not be very rare, unique, or unprecedented). He submitted that the circumstances that led to the licensees' late appeal – their willingness to accept the Committee's decision if Mr and Mrs Matson did not appeal, and their solicitors' inability to obtain instructions due to annual leave – can potentially arise in many appeals, and cannot be described as unusual, special, uncommon or rare.

[11] Mr Belcher submitted that if the Tribunal were to accept the circumstances of the licensees' late appeal satisfied the "exceptional circumstances" test, that would "create a de facto extension of time for filing cross appeals where the initial appeal has been filed close to, or on, the last day for filing (when obtaining instructions would always present a challenge)". He submitted that the scheme of the Act is that if a party wishes to challenge an aspect of a Complaints Assessment Committee's decision, a notice of appeal must be filed within 20 working days, regardless of the actions taken by any of the other parties to the proceeding before the Committee.

[12] Mr Belcher further submitted that, in any event, the appeal filed by Mr and Mrs Matson put the Committee's penalty orders at issue. Accordingly, the licensees will have the opportunity to make submissions as to those orders, and the Tribunal will not be restricted to either affirming the Committee's decisions, or accepting the submissions made by Mr and Mrs Matson.

¹ R 20.11(2) of the High Court Rules; r 18.11(2) of the District Courts Rules.

[13] Mr Ward-Johnson submitted for Mr and Mrs Matson that the licensees have not established that exceptional circumstances prevented their appeal being filed in time, and that the Tribunal should not accept it as a late appeal.

Discussion

Applications to the Tribunal in respect of late appeals

[14] Any person affected by a determination of a Complaints Assessment Committee has a right to appeal to the Tribunal, under s 111(1) of the Act. Each person has an independent right of appeal, irrespective of what any other person may choose to do.

[15] Section 111 provides that an appeal is required to be filed within 20 working days after notice is given of the Committee's determination. This requirement applies equally to each person affected by the Committee's determination.

[16] Accordingly, if the licensees wished to appeal against the Committee's determination, they were required to file a Notice of Appeal within the period of 20 working days from the date they were notified of the Committee's determination. They were notified of the determination on 19 November 2018, so the period within which they could appeal expired on 17 December 2018. It is common ground that the licensees did not file a Notice of Appeal within the appeal period.

[17] Pursuant to s 111(1A), the Tribunal may accept a late appeal if the Tribunal is satisfied that "exceptional circumstances" prevented a person from filing the appeal in time. Section 111(1A) applies to any person exercising an independent right of appeal.

[18] The Authority submitted that the Tribunal should set out the procedure to be followed in a request that the Tribunal accept a late appeal. As this is the first occasion on which the Tribunal has considered a late appeal under s 111(1A) of the Act, it is appropriate to do so:

- [a] At the time that a late appeal against a determination of a Complaints Assessment Committee is filed in the Tribunal (or when the proposed appellant has been advised by the Tribunal registry that an appeal has not

been filed in time), the proposed appellant (applicant) must make an application to the Tribunal for it to be accepted as a late appeal.

- [b] There is no particular form, or format, for an application, but the applicant must specify the circumstances that prevented the appeal being filed in time, and satisfy the Tribunal that those circumstances were exceptional.
- [c] The applicant must provide evidence in support of the contention that the circumstances were exceptional.
- [d] The application must be served on all parties to the appeal: that is, the Real Estate Authority (on behalf of the Complaints Assessment Committee), and any other party to the proceeding before the Committee.
- [e] The applicant bears the onus of persuading the Tribunal that the “circumstances” were “exceptional”. 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.

The licensees’ application

[19] We have set out the matters relied on by the licensees at paragraph [7], above. We accept the Authority’s submission that they do not reach the “exceptional” threshold. In particular:

- [a] The licensees’ right of appeal, as persons affected by the Committee’s determination, is independent of Mr and Mrs Matson’s right of appeal. They cannot rely on, as an exceptional circumstance, the fact that they waited to see if Mr and Mrs Matson appealed.
- [b] For the same reason, the fact that Mr and Mrs Matson’s appeal was filed on the last day of the appeal period is irrelevant. If the licensees had any

thought of appealing if Mr and Mrs Matson appealed, it was open to them to protect their right of appeal by filing a Notice of Appeal, which could be withdrawn later.

[c] While the licensees' solicitors advised the Tribunal, the Authority, and Mr and Mrs Matson on 19 December 2018 that an appeal was being considered, that was not a Notice of Appeal, and it was already out of time. It is not an "exceptional" occurrence for a party to be seeking to obtain instructions as to whether to file a Notice of Appeal close to, or on, the day on which the appeal period is due to expire. We would not accept the Authority's submission that this will *always* present a challenge as it cannot be uncommon for it to be difficult to obtain instructions as to an appeal in such circumstances.

[d] The fact that the person from whom the solicitors were awaiting instructions was away on annual leave from 17 December 2018 to 22 January 2019 does not create an exceptional circumstance. Given the time of the year when the appeal period was due to expire, it cannot be seen as being an unusual occurrence.

[20] We find that the licensees have not satisfied us that exceptional circumstances prevented them from filing an appeal in time.

Cross-appeals

[21] We accept Mr Perry's submission that the submissions for Mr and Mrs Matson and the Authority refer to the licensees having "cross-appealed", rather than "appealed". We are not persuaded that this changes the position.

[22] We do not accept that the Tribunal should adopt the approach set out in r 20.11 of the High Court Rules (and r 18.11 of the District Court Rules), under which a respondent to an appeal who wishes "to contend at the hearing of an appeal that the decision appealed against should be varied" must file a notice of cross-appeal (HCR

20.11(1)), “no later than 2 working days before the case management conference relating to the appeal” (HCR 20.11(2)).

[23] Mr Perry submitted that we should exercise the Tribunal’s power under s 105 of the Act, to “regulate its procedures as it thinks fit” (s 105(1)), “subject to the rules of natural justice, this Act, any regulations made under this Act, and any practice notes issued under s 115A [of the Act]” (s 105(2)).

[24] When Parliament recently considered and amended the Act so as to insert s 111(1A), it did not insert into the Act a provision dealing specifically with cross-appeals, such as is in the High Court and District Court Rules. Nor was any equivalent provision added to r 9 of the Real Estate Agents (Complaints and Discipline) Regulations 2009, which deals with Notices of Appeal. It is apparent that Parliament did not intend there to be such a provision.

[25] In the circumstances, even if it could be said that s 105 of the Act gives the Tribunal power to “regulate its procedures” to the extent put forward for the licensees (which we doubt), we would not be prepared to exercise that power in this case.

Submissions may be made at the hearing of the appeal

[26] The licensees are parties to the appeal. They are entitled to appear and be heard at the appeal hearing. They may make submissions as to the penalty orders made by the Committee. There is nothing preventing them from doing so.

[27] Subsections (4) and (5) of s 111 of the Act provide that:

- (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.

[28] In considering an appeal, other than as set out in Subsection (4), the Tribunal is not confined in the orders it may make to either accepting or rejecting the submissions made by or on behalf of the appellants.

Outcome

[29] The Tribunal will not accept the late appeal filed by the licensees. The Tribunal notes that as parties to the appeal, the licensees may appear and be heard at the appeal hearing, and participate in any pre-hearing procedures.

[30] The Case Manager should now re-schedule a telephone Directions Conference.

[31] 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.

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member