

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2022] NZREADT 3

Reference No: READT 032/2021

**IN THE MATTER OF**

An application for review under s 112 of the  
Real Estate Agents Act 2008

**BETWEEN**

**IE**  
Applicant

**AND**

**THE REGISTRAR OF THE REAL ESTATE  
AGENTS AUTHORITY**  
Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)  
G Denley (Member)  
N O'Connor (Member)

Representation:

The applicant:  
Counsel for the respondent:

Self-represented  
P Appleton

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**DECISION**  
**Dated 15 March 2022**

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## **INTRODUCTION**

[1] IE (the applicant) filed an application with the Tribunal under s 112 of the Real Estate Agents Act 2008 (the Act) for review of the email communication of the regulatory services manager (the manager) of the Real Estate Agents Authority (the Authority) of 10 November 2021.

[2] A complaint had been made by IE against LE, a real estate licensee with TS Ltd, trading as C. According to the manager's email, a decision on his complaint had been sent to the applicant on 7 May 2021 stating that there were no breaches of the Act or the professional rules and no further action would be taken.

[3] There is a preliminary jurisdictional issue as to whether the email of 10 November 2021 is capable of being reviewed by the Tribunal.

## **BACKGROUND**

[4] The applicant has testamentary proceedings underway in the High Court in relation to an estate. We have been sent documents concerning these proceedings, but have not considered them. Nor have we considered the substance of the complaint.

[5] On about 14 September 2020, the applicant filed a complaint against the licensee with the Authority.

[6] There followed communications between the Authority and the applicant.

[7] On 7 May 2021, a manager from the Authority (acting under delegated authority from the Authority's Registrar) issued a formal determination under s 74(3)(a) of the Act, advising the applicant that the complaint disclosed only an inconsequential matter and did not need to be pursued. Her reasons were set out in the letter.

[8] The applicant disputed the manager's decision.

[9] On 1 June 2021, the manager sent an email to the applicant stating that he had not provided any new information requiring reconsideration of the determination. The complaint file remained closed and the Authority would not be taking any further action.

[10] The applicant continued to dispute the decision.

[11] On 9 June 2021, the manager sent an email to IE noting that the letter of 7 May 2021 explained that his complaint did not raise any issues justifying intervention through the Authority's disciplinary process.

[12] Communications from the applicant continued.

[13] On 21 June 2021, the manager sent an email to the applicant referring to her decision of 7 May 2021 which had explained why the Authority was not considering his complaint further. The 7 May decision was the end of the complaint process. The Authority would not be taking any further action and would not reply to his correspondence.

[14] On 22 June 2021, the manager sent an email to the applicant stating that she had decided under s 74(3)(a) of the Act not to pursue his complaint as it disclosed an inconsequential matter. She advised that this was the final email he would receive.

[15] On 6 October 2021, the applicant filed a further complaint form with the Authority (unseen by the Tribunal). It did not particularise the grounds of complaint but referred to a bundle of documents annexed. That bundle comprised materials already provided by him to the Authority in the course of his earlier complaint.

[16] On 10 November 2021, the manager advised the applicant by email that the Authority would no longer be responding to his emails or posted correspondence in relation to his complaint. A decision had been made on 7 May 2021 that the Authority could not see any breaches of the Act or the professional rules and it would be taking no further action.

[17] The applicant then filed this review application in the Tribunal on 19 November 2021, against the email of 10 November 2021.

## **REVIEW APPLICATION**

[18] There is a preliminary issue as to the Tribunal's jurisdiction and that is whether the email of 10 November 2021 being challenged is a "determination" of the Registrar which is capable of being reviewed by the Tribunal under s 112(1) of the Act. A subsidiary issue is whether the application made to the Tribunal on 19 November 2021 was too late to seek review of any substantive determination of the Registrar.

[19] At a telephone conference on 10 December 2021, the Tribunal directed that the preliminary issue as to jurisdiction would be decided on the papers. A Minute (No. 1) was issued on 14 December 2021 setting out the preliminary issue and a timetable for submissions.

### *Submissions of the applicant*

[20] On the day the applicant's submissions were due, 9 February 2022, he sent an email to the Tribunal at 8:57 am (*verbatim* in its entirety):

Good morning I agree with the decision of out of time for my complaint

Covid did play a part in this, my mistake thought things be closed

Could all hard copies of evidence be returned to [address] please?

I wish to retain the option to re submit with newly discovered evidence in the near future

[21] The Tribunal replied stating that it had not made a decision as to whether the review application was out of time. The applicant was asked whether he was withdrawing the application.

[22] The applicant then sent another email to the Tribunal at 2:33 pm on 9 February 2022 (*verbatim* in its entirety):

Hi ok then I choose to wait to see outcome then

Will I be able to resubmitt evidence not allowed by register early?

Many proof of theft by agent?

[23] The Tribunal replied on the same day stating that it had timetabled submissions regarding the preliminary issue of jurisdiction. It was further noted that the applicant's submissions were due that day.

[24] No submissions were filed by the applicant, as the Tribunal noted in its email to the parties on 16 February 2022.

### *Submissions of the Registrar*

[25] Counsel for the Registrar is Ms Appleton. In her submissions of 28 January 2022, she noted that the word "determination" in s 112 is undefined in the Act. The High Court has found that the Act uses the words "decision" and "determination" interchangeably.<sup>1</sup>

[26] According to Ms Appleton, the Tribunal has held that decisions by the Registrar under s 74(3) are determinations for the purpose of s 112(1).<sup>2</sup> Counsel acknowledges that the Registrar's decision of 7 May 2021 is a determination of the Registrar under that section and is capable of review under s 112(1).

<sup>1</sup> *Real Estate Agents Authority v Catley* [2020] NZHC 1904 at [37] & [39].

<sup>2</sup> *Lawrence v Registrar of the Real Estate Authority* [2021] NZREADT 44 at [55].

[27] It is contended that the email of 10 November 2021 by contrast is not a determination and did no more than restate the contents of the earlier 7 May 2021 decision and advise that the Authority would no longer be responding to his communication. It contains no further decision under s 74(3) which might constitute a fresh determination capable of review.

[28] The applicant had a right of review of the determination of 7 May 2021, but such a review had to be made within 20 working days of notification of the determination.

[29] The issue next arising is whether the Tribunal has the power to extend time for filing an application for review. There is no express power for the Tribunal to do so. Nor has counsel been able to locate any case law specifically dealing with the Tribunal's ability to do so.

[30] Some guidance might be taken from the Tribunal's express power in s 111(1A) to extend the time for certain appeals. When Parliament amended the Act in 2018, it turned its mind to the Tribunal's ability to accept appeals out of time under s 111, but made no such amendment to s 112. The Tribunal has previously held, prior to the amendment, that the timeframe in s 111 was mandatory and could not be extended in the absence of a clear statutory power.<sup>3</sup>

[31] It is a question for the Tribunal as to whether it has the power to extend time, having regard to its statutory powers to regulate its own procedure under s 105 of the Act and the scheme of the Act.

## JURISDICTION

[32] This is an application for review under s 112 of the Act:

### **112 Application to Tribunal to review determination by Registrar**

- (1) An applicant may apply to the Tribunal against a determination of the Registrar that adversely affects the applicant within 20 working days after the date the applicant is notified of the determination.
- (2) The application must be made by way of written notice to the Tribunal of the applicant's intention to apply, accompanied by—
  - (a) a copy of the notification; and
  - (ab) the prescribed fee, if any; and

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<sup>3</sup> *Leaders Real Estate (1987) Ltd v Real Estate Agents Authority* [2015] NZREADT 41 at [38], cited approvingly in *Kumandan v Real Estate Agents Authority* [2016] NZHC 2545 at [21]–[22].

- (b) any other information that the applicant wishes the Tribunal to consider in relation to the appeal.
- (3) The review must be conducted on the papers unless the applicant requests to be heard in his or her application.
- (4) After conducting the review, the Tribunal may confirm, reverse, or modify the decision of the Registrar.
- (5) If the Tribunal reverses or modifies a determination of the Registrar, it may exercise any of the powers that the Registrar could have exercised.

[33] The primary jurisdictional issue is whether the manager's email of 10 November 2021 is a "determination" or decision under s 112(1) of the Act.

[34] The email of 10 November is, self-evidently, not a determination. It makes no findings or decisions concerning the applicant's rights. It merely advises him that a decision had earlier been made and the Authority would no longer be replying to his communications. Parliament cannot have intended that the Tribunal could review each and every written communication for or on behalf of the Registrar. The applicant does not argue otherwise.

[35] There is a subsidiary issue and that is whether the review application filed on 19 November 2021 is, in effect, a review of the 7 May 2021 determination and whether a review of that determination could be accepted by the Tribunal.

[36] It could not be doubted that the applicant is, in substance, seeking review of the 7 May 2021 determination. However, such an application had to be made within 20 working days of the date he was notified of that determination. It is apparent from the chain of communications between him and the manager that he received the determination on or about its date. As the Tribunal has no express power to extend time, it cannot accept the current application which is well out of time.<sup>4</sup>

[37] The Tribunal's general statutory discretion to regulate its own procedure does not permit it to assume powers not provided by Parliament.<sup>5</sup> If Parliament intended the Tribunal to have a power to extend the time for review applications, it would have added it when s 111(1A) was amended in respect of appeals.

## **OUTCOME**

[38] The Tribunal has no jurisdiction to review the Registrar's communication of 10 November 2021. The application is dismissed.

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<sup>4</sup> *Leaders Real Estate (1987) Ltd v Real Estate Agents Authority*, above n 3.

<sup>5</sup> Real Estate Agents Act 2008, s 105.

**PUBLICATION**

[39] In light of the outcome of this application and having regard to the interests of the parties and the public, it is appropriate to order publication without identifying the applicant, the licensee or the agency.

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D J Plunkett  
Chair

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G Denley  
Member

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N O'Connor  
Member