

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 12

READT 036/16

IN THE MATTER OF

An Appeal under Section 111 of the Real Estate Agents Act 2008

BETWEEN

JEFFREY BRILL
Appellant

AND

COMPLAINTS ASSESSMENT
COMMITTEE (CAC 409)
First Respondent

AND

BRIAN DIXON AND JUDITH ARNOLD
Second Respondents

On the papers:

Tribunal:

Hon P J Andrews (Chairperson)
Mr J Gaukrodger (Member)
Ms N Dangen(Member)

Submissions received from:

Mr N Kearney, on behalf of the Appellant
Mr M Mortimer, on behalf of the First Respondent
Mr B Dixon, on behalf of the Second Respondents, in person

Date of Ruling:

6 March 2017

**RULING OF THE TRIBUNAL
(Whether appeal filed out of time)**

Introduction

[1] On 4 August 2016, Mr Brill filed a Notice of Appeal against two decisions of Complaints Assessment Committee 409 (“the Committee”). In the first decision, dated 27 May 2016, the Committee found that he had engaged in unsatisfactory conduct (“the liability finding”). In its second decision, dated 21 July 2016, the Committee made penalty orders by which he was censured, ordered to undergo further training, and ordered to pay a fine of \$7,000.00 (“the penalty orders”). A hearing date for the appeal has been reserved on 3 April 2017, at Auckland.

[2] Mr Brill has abandoned his appeal against the liability finding. On behalf of Mr Brill, Mr Kearney has submitted that the appeal against the penalty orders may be determined on the papers. Mr Dixon contends that Mr Brill’s appeal (in its entirety) should be struck out on the grounds that he has not complied with requirements as to service and/or that it was filed out of time and that, if Mr Brill’s appeal is allowed to proceed, he and Ms Arnold should be given leave to appeal against the Committee’s liability decision.

[3] The parties have agreed that the issues as to whether Mr Brill’s appeal should be struck out, and whether Mr Dixon, and Ms Arnold should be given leave to appeal against the Committee’s liability decision, may be determined on the papers as preliminary issues. The Tribunal has received submissions by and on behalf of all parties.

First issue: should Mr Brill’s appeal be struck out?

[4] There was some ambiguity in the submission received by the Tribunal, as to whether it was contended that Mr Brill’s appeal should be struck out on the grounds that it was filed out of time, or that the requirements as to serving notice of an appeal had not been complied with. The Tribunal has considered both issues.

(a) *Was Mr Brill's appeal filed out of time?*

[5] Section 111 of the Real Estate Agents Act 2008 (“the Act”) provides, as relevant:

111 Appeal to Tribunal against determination by Committee

- (1) A person affected by a determination of a Committee may appeal to the Tribunal against a determination of the Committee within 20 working days after the notice given under section 81 or 94.
- (2) The appeal is by way of written notice to the Tribunal of the appellant’s intention to appeal, accompanied by–
 - (a) a copy of the notice given to the person under section 81 or 94; and
 - (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal. ...

[6] In the present case, the phrase “within 20 working days of the notice given to the person under section 81 and section 94” refers to the date the Committee’s penalty orders, being the Committee’s final determination as to the complaint by Mr Dixon and Ms Arnold, were served on Mr Brill.¹ In accordance with its standard practice, the Authority sent a copy of the Committee’s penalty orders to Mr Brill by email on 21 July 2016. Therefore, an appeal was required to be filed by 18 August 2016.

[7] The Act’s requirements as to filing an appeal are reflected in reg 9 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 (“the Regulations”) which provides (as relevant to filing a notice of appeal):

9 Appeal against determination of Complaints Assessment Committee

- (1) A notice of appeal under s 111 of the Act by an appellant against the determination of a Complaints Assessment Committee notified under section 81 or 94 of the Act must be–
 - (a) in the form approved by the chairperson; and
 - (b) accompanied by the notice of determination of the Complaints Assessment Committee and any other document required by the form to be attached; and
 - (c) filed with the Disciplinary Tribunal.
- (2) The notice of appeal must state–

¹ See *Kumandan v Real Estate Agents Authority (CAC 404)* [2016] NZHC 2545, at [22].

- (a) the name of the appellant; and
- (b) the name of the licensee to whom the appeal relates; and
- (c) the ground of the appeal. ...

[8] Mr Brill's notice of appeal was signed and dated 3 August 2016, and was date-stamped by the Tribunal registry as having been received on 4 August 2016. His appeal was clearly filed within time.

[9] Mr Brill's notice of appeal was in writing and it was accompanied by a copy of the Committee's liability decision and penalty orders. While it was not accompanied by "any other information [Mr Brill wished] the Tribunal to consider in relation to the appeal", that was not a mandatory requirement of s 111(2)(b) of the Act.

[10] There can be no doubt that Mr Brill complied with all the requirements under the Act and the Regulations for filing an appeal.

(b) Were requirements as to service complied with?

[11] Mr Dixon submitted that he and Ms Arnold "did not and still have not received a copy of the Appeal Notice at the specified address". He further said "we now have some doubts that we have ever seen an actual true copy of what was signed".

[12] At the time Mr Brill's appeal was filed, the Tribunal's Practice Note provided at clause 2.2 that Mr Brill was required to serve a copy of his appeal on Mr Dixon and Ms Arnold, and to provide proof of service.² There is no evidence that Mr Brill or his solicitors served a copy of his notice of appeal on Mr Dixon and Ms Arnold, as required by the Practice Note.

[13] In this respect, while it appears that a copy of a notice of appeal was sent to the solicitor who had acted for Mr Dixon and Ms Arnold on a separate occasion (but had not been involved in the complaint process), there was no indication that that document had been filed, and it was neither signed nor dated, and no proof of service was provided to the Tribunal. We accept Mr Dixon's submission that sending

² The Practice Note is in the course of review. The version that was current at the time of Mr Brill's appeal has been removed from the Tribunal's website.

documents to their solicitors would not have constituted service pursuant to the Practice Note.

[14] Mr Dixon submitted that:

... it is clear that the Brill appeal was not properly lodged within the time period allowed. When it was sent to us, some weeks after being sent to the REAA it was not even sent to our address as recorded in all REAA correspondence. Therefore, we have NEVER been properly served notice of the appeal.

...

The time delay in serving notice on us was ... extended to several days after the final deadline for appeals to be lodged. Had we been served notice of the appeal on the the date the REAA received theirs, we would have objected to the inadequacy of the content.

(emphasis as in Mr Dixon's submissions)

[15] While acknowledging that Mr Brill had not complied with clause 2.2 of the Practice Note Mr Mortimer, on behalf of the Authority, submitted that Mr Brill had complied with all of the requirements for filing an appeal, as set out in the Act, and should, therefore, be allowed to continue his appeal.

[16] However, reg 9 of the Regulations provides, as relevant to service of a notice of appeal:

...

- (3) A copy of the notice of appeal must be given, without delay, by the Disciplinary Tribunal to—
 - (a) the Complaints Assessment Committee that made the determination; and
 - (b) any other person who has been notified under section 81 or 94 of the Act of the determination appealed against.

[17] As noted above, the Regulations do not require Mr Brill to serve copies of his appeal on other parties. The Tribunal is required to give copies of a notice of appeal to other parties. Whether or not Mr Brill did so is not, therefore, relevant to the issue as to whether his appeal was lodged in time.

[18] Pursuant to its obligation under reg 9(3), the Tribunal emailed a copy of Mr Brill's notice of appeal and supporting documents to Mr Dixon, at the email address provided by him to the Authority (briandixon@clear.net.nz), on 12 August 2016. We note that this is the email address given by Mr Dixon in his submissions relating to the preliminary issues.

[19] Another copy was emailed to Mr Dixon on 4 November 2016, after Mr Dixon provided the Tribunal's case manager with a different email address. A further copy was emailed to Mr Dixon on 7 November 2016, after Mr Dixon provided a further email address. The Tribunal experienced difficulties in providing copies of Mr Brill's appeal to Mr Dixon, but that does not affect the issue as to whether his appeal is within time. We find that Mr Brill's appeal is not out of time.

Are Mr Dixon and Ms Arnold out of time to file a cross-appeal?

[20] Mr Dixon and Ms Arnold have submitted that they wish to cross-appeal against the Committee's decision to find that Mr Brill had engaged in unsatisfactory conduct rather than refer their complaint to the Tribunal for consideration.

[21] As "a person affected by a determination of a Committee", Mr Dixon and Ms Arnold had the right, under s 111 of the Act, to appeal to the Tribunal against the Committee's determination of their complaint. If they wished to do so, they were required to do so within 20 working days of being provided with a copy of the Committee's penalty orders.

[22] As Mr Dixon acknowledged in his submissions, they did not do so. He commented that they contemplated lodging an appeal but did not do so as they were largely satisfied with the Committee's findings and conclusions.

[23] The time within which Mr Dixon and Ms Arnold could file an appeal expired on 18 August 2016. The Tribunal does not have jurisdiction to allow an extension of time to file an appeal.³ That is so whether a party is seeking to file an appeal or a

³ See *Leaders Real Estate (1987) Ltd v Real Estate Agents Authority* (CAC 20008) [2015] NZREADT 41, and See *Kumandan v Real Estate Agents Authority* (CAC 404), above n 1, at [21].

cross-appeal. Mr Dixon and Ms Arnold may, of course, make submissions in respect of Mr Brill's appeal.

Outcome

[24] The Tribunal rules that Mr Brill's appeal may proceed, and that Mr Dixon and Ms Arnold are out of time to file an appeal or cross appeal. In the light of this ruling, the parties are requested to advise the Tribunal by **17 March 2017** whether the reserved date for the appeal hearing is required, or whether Mr Brill's appeal may be determined on the papers.

[25] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr J Gaukrodger
Member

Ms N Dangen
Member