

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 68**

**READT 027/17**

IN THE MATTER OF

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

BETWEEN

JAMIESON FEAR  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 411)  
First Respondent

AND

JAMES and NICOLA SUTTON  
Second Respondents

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Mr G Denley (Member)  
Ms C Sandelin (Member)

Submissions received from:

Mr J Fear  
Mr J Simpson, on behalf of the Authority  
Mr D Rooke, on behalf of the Second  
Respondents

Date of Ruling:

24 November 2017

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**RULING OF THE TRIBUNAL**  
**(Application for leave to appeal)**

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## Introduction

[1] Mr Fear has applied for leave to appeal against a decision of Complaints Assessment Committee 411 (“the Committee”) dated 10 May 2016 (“the substantive decision”)<sup>1</sup>, and for leave to admit new evidence and question witnesses.

## Background

[2] The substantive decision was in respect of a complaint made by the second respondents, Mr and Mrs Sutton. The Committee found that Mr Fear had engaged in unsatisfactory conduct in the course of marketing Mr and Mrs Sutton’s property for sale. In a decision issued on 21 July 2016, the Committee made penalty orders against Mr Fear (“the first penalty decision”).

[3] Mr and Mrs Sutton appealed against the substantive decision and the first penalty decision. The appeal was heard on 5 April 2017. Mr Fear did not appeal against either the substantive decision or the first penalty decision, but appeared and made submissions at the appeal hearing. In a decision issued on 18 April 2017, the Tribunal dismissed Mr and Mrs Sutton’s appeal against the substantive decision but allowed their appeal against the first penalty decision.<sup>2</sup> The matter was remitted to the Committee to reconsider the orders made in the first penalty decision.

[4] The Committee issued a further penalty decision on 4 August 2017 (“the second penalty decision”).<sup>3</sup> Mr Fear was ordered to refund commission of \$10,150.64 (plus GST) to Mr and Mrs Sutton by 4 October 2017, and to pay a fine of \$6,000 to the Real Estate Agents Authority (“the Authority”) by 4 September 2016. The orders made in the first penalty decision (for censure, and for Mr Fear to undergo specified training), were not amended and remain on foot.

[5] On 1 September 2017, the Tribunal received a notice of appeal filed by Mr Fear, against the second penalty decision. The grounds of appeal set out in his notice of

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<sup>1</sup> Re Jamieson Fear, Complaint No C11489, Decision finding unsatisfactory conduct, 10 May 2016.

<sup>2</sup> *Sutton v The Real Estate Agents Authority (CAC 411)* [2017] NZREADT 27.

<sup>3</sup> Re Jamieson Fear, Complaint No C11489, Decision on Orders, 4 August 2017.

appeal indicated that in addition to an appeal against the second penalty decision, he intended to challenge the Committee's substantive decision.

[6] The time for filing an appeal against the Committee's substantive decision and its first penalty decision expired 20 working days after the first penalty decision was provided to Mr Fear. As recorded earlier, Mr Fear did not appeal against either the substantive decision, or the first penalty decision.

[7] In a memorandum provided to the Tribunal before a directions conference held on 15 September 2017, Mr Fear recorded an intention to apply for "new evidence" to be admitted on his appeal, and for Mr and Mrs Sutton and one other person to be questioned. It was evident that the "new evidence" and the questioning related to the substantive decision.

[8] Mr Fear and the other parties to the appeal were advised that neither an application to admit "new evidence", nor an application for witnesses to be questioned, could be considered until a determination had been made as to whether his appeal against the substantive decision is time-barred, pursuant to s 111(1) of the Real Estate Agents Act 2008 ("the Act").

[9] On 13 October 2017 Mr Fear filed an application for an extension of time to appeal against the substantive decision. Although not expressly identified as such, the application for leave to appeal referred to "evidence that may alter the [Committee's] view on balance of probabilities", and an application to question Mr and Mrs Sutton, and one of the eventual purchasers of the property, Mr Jenks.

### **Application for extension of time to appeal to the Tribunal**

#### *Section 111(1) of the Act*

[10] Section 111 of the Act sets out the right to appeal to the Tribunal against a determination by a Complaints Assessment Committee. Section 111(1) sets out the time limit within which an appeal may be made:

### **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 date of the notice given under s 81 or 94.

...

[11] Section 81 of the Act relates to a Committee's decision to take no action on a complaint, pursuant to s 80, and provides, as relevant:

#### **81 Notice of decision**

- (1) In any case where a Committee decides to take no action on a complaint, the Committee must promptly give written notice of that decision to—
  - (a) the complainant; and
  - (b) the person complained about.

[12] Section 94 relates to a Committee's decision pursuant to s 89, after inquiring into a complaint and conducting a hearing and provides, as relevant:

#### **94 Notice of determination**

- (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.

...

[13] In his judgment in *Kumandan v Real Estate Agents Authority (CAC 404)*,<sup>4</sup> his Honour Justice Downs held that the Tribunal has no power to extend time to file an appeal,<sup>5</sup> and that the time limit runs from the date that the decision appealed from was communicated to the party wishing to appeal.<sup>6</sup>

[14] In its decision in *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)*,<sup>7</sup> the Tribunal stated that where separate substantive and penalty decisions are issued by a Committee, the appeal period does not commence until the penalty decision is issued.

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<sup>4</sup> *Kumandan v Real Estate Agents Authority (CAC 404)* [2016] NZHC 2545.

<sup>5</sup> At [21], citing *Leaders Real Estate (1987) Ltd v Real Estate Agents Authority* [2015] NZREADT 41.

<sup>6</sup> At [22].

<sup>7</sup> *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 16, at [25]-[26].

### *Submissions*

[15] Mr Fear submitted that the present case differs substantively from *Kumandan*, and is not governed by that judgment. He submitted that *Kumandan* examined whether the balance of probabilities test had been met, and that there had been no “new evidence” put forward that would have persuaded the Committee to reconsider the balance of probabilities. He submitted that there is such evidence in the present case.

[16] Mr Fear referred to r 29(A) of the Court of Appeal (Civil) Rules 2005, which allows a party to apply for an extension of time to appeal from a judgment of the High Court. He submitted that this supported his application for extension of the time to appeal in the present case.

[17] Mr Rooke submitted on behalf of Mr and Mrs Sutton that the Tribunal has no power to extend time to file an appeal against a Committee’s decision. He submitted that in this case, the time within which Mr Fear could appeal against the substantive decision ran from on or about 10 May 2016 (when the substantive decision was communicated to the parties), and expired on or about 7 June 2016. On that basis, he submitted that Mr Fear’s application has been filed well out of time and is time-barred.

[18] Mr Simpson submitted on behalf of the Authority that the time within which Mr Fear could file an appeal to the Tribunal ran from the date of the Committee’s first penalty decision, and therefore expired on or about 18 August 2016. He also submitted that Mr Fear did not appeal within that time, and that the Tribunal has no jurisdiction to extend time to do so.

### *Discussion*

[19] The Tribunal has only such powers as are set out in the Act. There is no provision which gives the Tribunal a discretionary power to extend the time within which an appeal may be made against a decision of a Complaints Assessment Committee.

[20] Whether time runs from the date the substantive decision was communicated to Mr Fear, or the date the first penalty decision was communicated to him, the appeal

period expired in mid-2016. As Mr Fear's notice of appeal (which was against the second penalty decision, only), was filed in September 2017, any appeal against the substantive decision was more than 12 months out of time, and the Tribunal has no power to extend it.

[21] We do not accept Mr Fear's submission that *Kumandan* may be distinguished. The judgment of his Honour Justice Downs concerned the interpretation of s 111(1) of the Act, which is the issue to be determined here.

[22] Nor do we accept that the provisions of the Court of Appeal (Civil) Rules assist Mr Fear's argument. Patently, those Rules specifically provide the Court with the power to extend time to appeal. Neither the Act nor the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 provide the Tribunal with such a power.

### *Ruling*

[23] Mr Fear's application for leave to appeal against the substantive decision is declined.

### **Appeal issues**

[24] In the light of the Ruling set out above, the Tribunal can only be concerned with Mr Fear's appeal against the second penalty decision.

[25] The issues to be determined on the appeal will be:

[a] Whether the Committee erred in ordering a refund of commission paid by Mr and Mrs Sutton on the sale of the property; and

[b] Whether the Committee erred in ordering Mr Fear to pay a fine of \$6,000.

### **Application to admit "new evidence"**

[26] Mr Fear has applied for leave to admit the following:

- [a] A telephone conversation with Mr Jenks regarding his statements to the Committee (which, he submitted, directly contradicted his statements to the Authority during its investigation of the complaint);
- [b] Documentation regarding recording conversations on smartphones;
- [c] A telephone conversation with the Authority regarding the legalities of recording conversations; and
- [d] Whether the Committee actually listened to the recordings or relied on a transcript.

[27] Mr Fear has also applied to question:

- [a] Mr and Mrs Sutton, with regard to methods of recording, what was recorded, and what portion or conversations were recorded; and
- [b] Mr Jenks with regard to who disclosed financial information about Mr and Mrs Sutton's financial position.

### *Submissions*

[28] Mr Fear set out paragraphs 3.8 to 3.11 of the substantive decision. These paragraphs comprise some (but not all) of the Committee's reasoning as to Mr and Mrs Sutton's complaints that Mr Fear had disclosed confidential information as to Mr and Mrs Sutton's financial position, and that he had placed undue pressure on them to accept an offer on the property.

[29] Mr Fear's submission appears to be that the "new evidence" and questioning will relate to a meeting between himself and Mr and Mrs Sutton:

- [a] Why only parts of recordings were made available, if in fact Mr and Mrs Suttons had recorded "the full meeting";

[b] How Mr Fear was recorded when Mr and Mrs Sutton were out of earshot; and

[c] How, if Mr and Mrs Sutton attended the meeting with the intention to record, the Committee could find “on the balance of probabilities” that the recording was non-prejudicial.

[30] Mr Rooke submitted that Mr Fear had not identified any material that might be called as “new evidence”, or any basis on which he could be given leave to question Mr and Mrs Sutton, and Mr Jenks. He submitted that Mr Fear had had the opportunity to raise the matters referred to by Mr Fear when he responded to Mr and Mrs Suttons’ complaint. He also submitted that the matters set out by Mr Fear are speculative, and of no relevance to the issues before the Tribunal.

[31] Mr Simpson submitted that Mr Fear had had the opportunity, when Mr and Mrs Suttons’ complaint was before the Committee when first considering the complaint, and when the Committee reconsidered the orders set out in the first penalty decision, to make submissions on the matters raised in his application for leave to appeal and for leave to question witnesses.

[32] Mr Simpson further submitted that as Mr Fear’s applications for leave to admit “new evidence”, and for leave to question Mr and Mrs Sutton and Mr Jenks are addressed at challenging the substantive decision, issues related to the legalities of telephone recordings, and disclosure of information, are not relevant to the appeal against the second penalty decision.

### *Discussion*

[33] In his response to the complaint, Mr Fear stated that telephone recordings had been made of telephone conversations and meetings without his consent. The investigator referred to both issues in his report to the Committee. The Committee referred to both issues in the substantive decision. Mr Fear again referred to the issues in his submissions to the Committee before its first penalty decision.



[34] Pursuant to s 111(3) of the Act, an appeal is by way of rehearing. Accordingly, the appeal is determined by reference to the material that was before the Committee, the Committee's decision or decisions appealed against, and submissions made by or on behalf of the parties. The Tribunal may, on application, give leave to a party to present material (evidence or documents) to the Tribunal that was not provided to the Committee, if it is in the interests of justice that it be considered by the Tribunal.

[35] Mr Fear must establish that the "new evidence" he seeks to have admitted is relevant to the issues to be determined on his appeal, that it was not provided to the Committee, and could not reasonably have been provided to the Committee.<sup>8</sup>

[36] The "new evidence" Mr Fear seeks to have admitted was clearly before the Committee. It is not "new evidence". Further, it relates to issues which were considered in the substantive decision, and is not relevant to the issue to be determined on the present appeal, which relates only to the second penalty decision. There are no grounds on which it could be admitted.

[37] The Tribunal may also, if it considers it to be in the interests of justice to do so, give leave for a party to cross-examine another party and/or other persons, based on any information the party and/or other persons provided to the Committee.

[38] The issues in respect of which Mr Fear seeks leave to question Mr and Mrs Sutton and Mrs Jenks were considered in the substantive decision, and are not relevant to the issue to be determined on the present appeal. It would not be in the interests of justice for leave to be given to Mr Fear to question Mr and Mrs Sutton and Mr Jenks.

### *Ruling*

[39] Mr Fear's applications for leave to admit "new evidence" and to question witnesses are both declined.

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<sup>8</sup> See *Comalco NZ Ltd v TVNZ Ltd* [1997] NZAR 97, at [25]. See also, for example, *Wouters v Real Estate Agents Authority* (CAC 412), [2017] NZREADT 60, at [9]–[11], and *Wouldes v Real Estate Agents Authority* (CAC 409) [2017] NZREADT 36, at [21].

## **Outcome**

[40] Mr Fear’s applications for leave to appeal against the substantive decision, to admit “new evidence”, and to question witnesses are declined.

[41] A directions conference is to be convened for the purposes of making directions relating to Mr Fear’s appeal against the second penalty decision.

[42] 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.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms C Sandelin  
Member