

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 39**

**READT 020/19**

IN THE MATTER OF An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN BORIS FESCHIEV  
Appellant

AND THE REAL ESTATE AGENTS  
AUTHORITY (CAC 1901)  
First Respondent

AND NICOLA CRUICKSHANK and  
TOMMY'S REAL ESTATE LIMITED  
WELLINGTON  
Second Respondents

On the papers

Tribunal: Hon P J Andrews (Chairperson)  
Mr J Doogue (Member)  
Mr N O'Connor (Member)

Submissions filed by: Mr Feschiev, Appellant  
Ms E Woolley, on behalf of the Authority  
Ms S Baigent, on behalf of Ms Cruickshank  
and Tommy's Real Estate Limited  
Wellington

Date of Ruling: 9 September 2019

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**RULINGS OF THE TRIBUNAL  
(Pre-hearing applications)**

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## **Introduction**

[1] On 14 July 2019, Mr Feschiev filed an appeal against the decision of Complaints Assessment Committee 1901, issued on 8 April 2019, in relation to his complaints against Ms Cruickshank and Tommy's Real Estate Limited Wellington ("the Agency"), where she is engaged as a licensed salesperson. He also appealed against the Committee's penalty decision, issued on 18 June 2019, in which it decided not to impose any penalty orders on Ms Cruickshank.

[2] On 22 July 2019, Ms Cruickshank filed an appeal against the Committee's finding of unsatisfactory conduct, and its decision to refuse her application for an order prohibiting publication of her name.

[3] An appeal hearing has been scheduled for 8 October 2019, in Wellington. A bundle of the documents that were before the Committee has been filed in the Tribunal. We record that the Tribunal has been advised that when the Bundle was being prepared, the Authority noticed that as a result of an administrative oversight, Mr Feschiev's closing statement and submissions (dated 10 February 2019) had not been placed before the Committee, and were not therefore considered by the Committee. By consent, Mr Feschiev's submissions have been provided to the Tribunal.

[4] The Tribunal is now required to make rulings on the following matters:

- [a] whether Mr Feschiev's appeal, insofar as it relates to the Committee's decision to take no further action against the Agency ("the Agency decision"), is out of time and, if so, whether he should be given leave to file a late appeal;
- [b] whether Ms Cruickshank should be given leave to file a late appeal;
- [c] whether Ms Cruickshank should be directed to provide further evidence with regard to her application for leave to file a late appeal;
- [d] whether the Tribunal should give leave to Mr Feschiev to submit further evidence at the appeal hearing (from Mr Blagoy Zlatkov), and/or to cross-

examine Ms Cruickshank and Mr Mathieson at the hearing as to statements provided to the Committee; and

- [e] whether the Tribunal should direct the members of the Committee to provide statements that they had no conflict of interest when considering Mr Feschiev's complaints.

### **Factual background**

[5] Mr Feschiev immigrated to New Zealand from Bulgaria in February 2017. On or about 27 February, he viewed a property in Central Terrace, Wellington, with Ms Cruickshank. The property had been subdivided into two units and was for sale by tender, either as a two-unit property, or with the units being sold separately.

[6] Mr Feschiev submitted a tender on 2 March. He offered to buy either of the two units, but expressed a preference for the upper floor unit. Ms Cruickshank advised him on 7 March that the vendors had decided not to accept any tenders.

[7] On 8 March, Mr Feschiev emailed Ms Cruickshank asking her to present a second offer (set out in the email) to purchase the entire property. The terms of the offer involved the transfer of a property in Sofia, Bulgaria, as part satisfaction of the purchase price. Ms Cruickshank put this offer to the vendors, but it was rejected on 8 March 2017.

[8] On 6 April, Mr Feschiev emailed Ms Cruickshank asking her to advise the vendors of his third offer to purchase the upper floor unit of the property, together with a garage, ground floor space, and garden area. Ms Cruickshank forwarded the offer to the vendors, but advised Ms Cruickshank that she did not think the vendors would "go for it".

[9] On 29 June, Mr Feschiev made a fourth offer to buy the entire property, which was accepted by the vendors. This offer was not made through Ms Cruickshank, but through another salesperson engaged by the Agency, Ms Adgo. The sale and purchase was settled on 31 August.

[10] In January 2018, Mr Feschiev's wife, Ms Ivanova, asked Ms Adgo to obtain a copy of the body corporate rules for the property. Ms Adgo enquired of Ms Cruickshank, but was told that the body corporate rules had not been provided by the vendors when the property was sold. Mr Feschiev asked Ms Adgo to follow the matter up with the vendors.

[11] Ms Cruickshank then emailed the vendors, asking for a copy of the body corporate rules. The vendors provided a copy. Ms Cruickshank then forwarded the vendors' email to Mr Feschiev. The forwarded email included Ms Cruickshank's email to the vendors.

### **Complaint**

[12] Mr Feschiev made a complaint to the Authority against both Ms Cruickshank and the Agency, submitted to the Authority on 7 June 2018. His complaint was that

- [a] Ms Cruickshank did not disclose to him that the roof contained asbestos;
- [b] Ms Cruickshank made derogatory comments about him;
- [c] Ms Cruickshank breached his confidentiality by telling the vendors that he intended to sell the lower floor unit; and
- [d] The Agency did not adequately supervise Ms Cruickshank.

[13] In its decision issued on 8 April 2019, the Committee upheld Mr Feschiev's complaint that Ms Cruickshank made derogatory comments about him. It decided to take no further action on his complaints that Ms Cruickshank failed to disclose that there was asbestos in the ceiling, and that she breached his confidentiality. It also decided to take no further action on his complaint that the Agency failed to supervise Ms Cruickshank adequately.

## **The time period for appeals against Complaints Assessment Committees' decisions**

[14] We are required to make rulings as to whether Mr Feschiev's appeal (insofar as it relates to the Agency decision) is out of time, and as to whether Ms Cruickshank should be given leave to file a late appeal against the Committee's finding of unsatisfactory conduct and its refusal to order that her name not be published. We set out the relevant provisions of the Act as to filing appeals, and the advice given by the Committee in its decision.

[15] Section 111(1) and (1A) of the Act provides (as relevant to this proceeding):

### **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, ...
- (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.

[16] Section 6 of the Committee's decision is headed "Your right to appeal". The Committee stated:

6.1 In the matter of [Ms Cruickshank], the Committee considers that the 20-working day appeal period does not commence until it has finally determined the complaint by deciding what orders should be made, if any.

6.2 In the matter of [the Agency], if you are affected by this decision you may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date of notice of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. Refer to Appendix Section 111.

6.3 For further information on filing an appeal, read **Guide to Filing an Appeal** at Ministry of Justice-Tribunals ([www.justice.govt.nz/tribunals](http://www.justice.govt.nz/tribunals)).

[17] A copy of s 111 of the Act was included in the Appendix of "Relevant provisions" included with the Committee's decision. This did not include s 111(1A), which was inserted into the Act as from 14 November 2018.

### **Is Mr Feschiev's appeal against the Agency decision out of time?**

[18] Ms Woolley advised that Mr Feschiev was given notice of the Agency decision by the Authority, by email, on the day the decision was issued (8 April 2019).

[19] Accordingly, Mr Feschiev could file an appeal against the Agency decision within the appeal period of 20 working days, up to 9 May 2019. Pursuant to s 111(1A), he could apply to the Tribunal to accept a late appeal up to 60 working days of the date of the Agency decision, that is, up to 5 July 2019.

#### *Submissions*

[20] Ms Woolley submitted that as Mr Feschiev's appeal was not filed until 14 July 2019, it was outside both the appeal period of 20 working days, and the period within which the Tribunal could accept a late appeal, the Tribunal has no ability to accept his appeal against the Agency decision. Ms Baigent submitted on behalf of Ms Cruickshank that Mr Feschiev had been properly advised of his appeal rights, and the relevant time periods. She submitted that the Tribunal has no jurisdiction to allow Mr Feschiev to appeal against the Agency decision.

[21] Mr Feschiev submitted that his appeal should be accepted, regardless of "benign technicalities" referred to in the submissions for the Authority and Ms Cruickshank. He submitted that the Committee had failed to take into account his final submission so that it had not (contrary to its assertion in the decision) considered all the information gathered in the inquiry. He submitted that it was not his fault that the Committee did not receive his final submission.

#### *Discussion*

[22] We accept that the Tribunal does not have jurisdiction to accept Mr Feschiev's appeal against the Agency decision. He was clearly advised as to his appeal rights, and the relevant time period for appealing. He did not appeal within the 20 working day appeal period, and he did not apply to file a late appeal within the 60 working day period.

[23] The Tribunal's jurisdiction is limited to the provisions of the Act. It has no inherent jurisdiction. Mr Feschiev's appeal against the Agency decision was filed out of time, and cannot be considered by the Tribunal.

**Should Ms Cruickshank be given leave to file a late appeal, and should Ms Cruickshank be directed to file further evidence in support of the application?**

[24] We deal with these two issues together.

[25] In the absence of argument to the contrary, we will accept for the purposes of this ruling that the Committee's statement that the appeal period for the finding of unsatisfactory conduct against Ms Cruickshank started from the date of the penalty decision was correct.

[26] The Committee's final decision, in which it decided not to make any penalty orders following its finding that Ms Cruickshank had engaged in unsatisfactory conduct, and declined her request for an order that her name not be published, was issued on 18 June 2019. Ms Cruickshank was given notice of the decision that day. Accordingly, the 20 working day appeal period ended on 16 July 2019. She did not file an appeal within that period.

[27] The 60 working day period, during which Ms Cruickshank could apply for leave to file a late appeal, ends on 10 September 2019. Ms Cruickshank filed a notice of appeal, and application for leave to file a late appeal, on 22 July 2019, well within the 60 working day period.

*Submissions*

[28] Ms Baigent set out the grounds for there being "exceptional circumstances", such that leave for a late appeal should be given, as being that Ms Cruickshank had been unable to properly consider her position regarding an appeal owing to suffering delayed concussion following a head injury. She submitted that Ms Cruickshank had been given medical advice that she should not engage in work for three weeks, and to avoid the use of screens. She submitted that Ms Cruickshank's injury had impacted significantly on her energy levels and her ability to concentrate, and caused her to

suffer headaches. Ms Baigent also submitted that Ms Cruickshank became aware that Mr Feschiev had filed an appeal to the Tribunal.

[29] A medical certificate was subsequently provided, dated 26 July 2019. This stated:

I am writing to confirm that [Ms Cruickshank] has received a minor head injury and has seen me for the minor head injury and the following concussion on the 13<sup>th</sup> of June 2019. I have strongly advised her to stop working for 2-4 weeks, also not to seek strenuous exercise and no ethanol consumption, to provide for speedy recovery.

[30] The Tribunal has also received a statement affirmed by Ms Cruickshank on 21 August 2019. She stated that on the evening of 15 May 2019 she had slipped on wet concrete steps and landed with her head on the concrete pathway. She also injured her shin, hip and elbow, with bruising and bleeding.

[31] She said that over the following few days, everything was sore and bruised. When she exercised, her head hurt a great deal. She was unable to concentrate and was very tired most of the time. After a few days, she noticed that she was forgetting things, uncharacteristically grumpy and short-tempered, and unable to hold more than one idea in her mind at a time. She had some preliminary discussions around an appeal with her counsel on at least two occasions, but was unable to follow carefully what she was required to understand. She then realised that she might have a head injury, so consulted her doctor.

[32] Ms Cruickshank said that as from the time she saw the doctor, she changed what she would normally do: she went to the office in the mornings, only, and managed listings with the assistance of her support team. She used the telephone and avoided screens. She slept at home in the afternoons.

[33] All of her listings were shared jointly with another salesperson in the office. Following the injury, they did all of the ground-work for the listings. She did not attend any open homes. Her assistant dealt with emails on her behalf. Ms Cruickshank said that she worked notwithstanding her doctor's strong recommendation that she not do so, but for only very limited hours, with a lot of help and support from her salespersons and management, and understanding from vendors.

[34] Ms Cruickshank said she was frequently unable to respond to calls from her counsel to obtain instructions, then forgot to return calls. When she did speak with counsel, she was too tired to concentrate and unable to process concepts adequately. She said that when she was able to instruct counsel, the appeal was filed the same day, together with an application for leave to file a late appeal.

[35] Mr Feschiev submitted that Ms Cruickshank has not established “exceptional circumstances”. He submitted that she should be required to submit to the Tribunal:

- [a] the total number of emails received, read and sent from Ms Cruickshank between 18 June and 16 July 2019;
- [b] the total number of active listings (quiet and public) where Ms Cruickshank is listed as an agent, between 18 June and 16 July 2019;
- [c] the total number of new property listings on-boarded by Ms Cruickshank, between 18 June and 16 July 2019;
- [d] the total number of property tenders, auctions and other sales forms that were conducted, where Ms Cruickshank was listed as an agent, between 18 June and 16 July 2019;
- [e] the total number of properties sold (sale and purchase agreements signed) where Ms Cruickshank was listed as an agent, over the period 18 June to 16 July 2019; and
- [f] the total number of flights (domestic and international) over the period 18 June to 16 July 2019, including a print-screen of her Air New Zealand Airpoints balance.

[36] Mr Feschiev submitted that during the time she had been advised not to work, Ms Cruickshank had performed property appraisals, originated contracts with new clients, conducted complex anti money-laundering reviews and compliance checks, drafted on-line and off-line marketing materials, arranged photo-shoots, attended viewings of active listings, conducted tenders and auctions, closed property sales deals,

and communicated by email and phone with clients, solicitors, etc. He submitted that her professional routine seems not to have been changed at all, based on publicly available data from the internet. He also submitted that she had embarked on long-haul international travel, and long-distance domestic travel in the North Island. He submitted that all of these actions are inconsistent with Ms Cruickshank being temporarily mentally incapacitated and thus unable to appeal in time.

[37] Mr Feschiev further submitted that Ms Cruickshank had not addressed the point that the prescribed (but not followed) period during which Ms Cruickshank was advised not to work ended on 11 July 2019. He submitted that this was five days before the 20 working day appeal period expired, but neither Ms Cruickshank nor the Authority had given an explanation as to why Ms Cruickshank could not have filed a Notice of Appeal within time.

[38] Ms Woolley did not take issue with the fact that the Committee said in its decision that the appeal period in respect of the finding of unsatisfactory conduct against Ms Cruickshank would not begin until the date of its penalty decision.

[39] She submitted that the relevant issue for the Tribunal in this case is whether the circumstances given for an appeal not being filed within the 20 working day period are “exceptional”. She submitted that there was no justifiable reason to go behind the medical certificate provided to the Tribunal and “second-guessing” its contents and/or veracity. She further submitted that the fact of emails having been sent, or telephone calls having been made, would not assist the Tribunal to determine whether Ms Cruickshank was unable to instruct counsel to file an appeal and whether that amounted to exceptional circumstances. She submitted that the fact that Ms Cruickshank had suffered a head injury, which had caused her to suffer concussion, should meet the test for exceptional circumstances.

### *Discussion*

[40] The Tribunal considered the provisions of s 111(1A) in its ruling in *Matson v Real Estate Agents Authority (CAC 410)*.<sup>1</sup> In that case, the appellants (Mr and Mrs

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<sup>1</sup> *Matson v Real Estate Agents Authority (CAC 410)* [2019] NZREADT 9.

Matson) had appealed (on the last day of the 20 working day period) against a Complaints Assessment Committee’s findings in respect of their complaints against three licensees. After the Matsons’ appeal was filed, the licensees filed appeals against penalty orders made by the Committee. The Tribunal said:<sup>2</sup>

[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]

...

[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.

[41] The Tribunal found in *Matson* that the fact that the licensees had waited to see if the Matsons filed an appeal before filing an appeal did not amount to exceptional circumstances.

[42] As we said in *Matson*, the circumstances must be able to be described as “unusual, uncommon, special, or rare”, “out of the ordinary course of events as to filing a notice of appeal”, but “need not be very rare, unique, or unprecedented”.

[43] Exercising the discretion to give leave to file a late appeal involves balancing the requirement that proceedings not be unduly delayed, against the justice of the case and the particular circumstances which are relied on as the grounds for an order extending time to appeal. The maximum period for which time may be extended is 60 working days from the date of the relevant decision. However, while time may be extended for the period within which “exceptional circumstances prevented the appeal from being made on time”, it should not be extended beyond that period.

[44] It is incumbent on Ms Cruickshank to put before the Tribunal evidence which establishes the period during which the “exceptional circumstances” were in effect.

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<sup>2</sup> At [17]–[18].

[45] We accept that Ms Cruickshank suffered a head injury on 15 May 2019 when she slipped and fell on concrete steps. We also accept that she suffered from concussion after that injury. While the medical certificate omitted to describe the likely symptoms and effects of concussion, it is well-recognised that they can include headaches, loss of concentration, effects on mood, and tiredness. We accept that these effects could have had an impact on Ms Cruickshank's capacity to take advice and give instructions as to an appeal. We accept that suffering such an injury and its after-effects may be described as unusual, uncommon, special, or rare, and out of the ordinary course of events as to filing a notice of appeal.

[46] However, the only independent evidence as to the actual effects of the "minor head injury" (as described by Ms Cruickshank's doctor) was that she was advised not to work for two to four weeks after 13 June 2019, not to seek strenuous exercise, and not to consume "ethanol". It may be assumed that at the end of that period she would have been expected to have recovered from the effects of concussion. No medical evidence was presented as to the effects continuing after that period (or, indeed, as to whether she may have recovered within a shorter period, or suffered from the effects of concussion to a lesser extent). The four week period of recovery ended on or about 11 July 2019, five days before the 20 working day appeal period expired on 16 July 2019.

[47] In balancing the interests of proceedings not being unduly delayed against the factual circumstances of this case, we take into account what was required to instigate an appeal in this case. The factual background to Ms Cruickshank's appeal is not complex: her case is that she drafted the email to the vendors, using the language she did, because the vendors were friends of hers, and that a copy was inadvertently sent to Mr Feschiev. Preparing an appeal would not appear to have been a complex matter, that would have required prolonged or detailed investigation by Ms Cruickshank or her legal counsel, or lengthy briefing of evidence in order to lodge the appeal.

[48] In the circumstances where Ms Cruickshank's doctor described the injury as a "minor head injury", and where the period of recovery envisaged by the doctor ended before the 20 working day appeal period ended, we cannot be satisfied that the effects of the injury were sufficiently serious as to prevent Ms Cruickshank from

understanding that an adverse decision had been made against her that she wanted to appeal against, and prevented her from taking the minimum necessary steps to get the appeal lodged. Accordingly, we are not persuaded that there were exceptional circumstances that prevented her from filing an appeal in time.

[49] Given that conclusion, we are not required to consider Mr Feschiev's request that we should require Ms Cruickshank to provide further evidence.

[50] However, we observe that we do not consider that we would have been assisted by receiving further evidence as sought by Mr Feschiev. We accept Ms Woolley's submission that it is not the volume of emails or telephone calls or number of listings that would assist in determining whether Ms Cruickshank was truly unable to instruct counsel. Rather, a more qualitative assessment of her abilities while she was suffering from the effects of the injury and concussion that is required. Information as to that is provided by Ms Cruickshank's statement.

[51] We therefore decline to grant Ms Cruickshank leave for her to file a late appeal, and decline Mr Feschiev's request that she be directed to file further evidence.

**Should Mr Feschiev be given leave to cross-examine witnesses and adduce new evidence?**

*Submissions*

[52] Mr Feschiev submitted that he should be permitted to cross-examine Ms Cruickshank and Mr Mathieson. He submitted that their written statements to the Committee contained materially false statements, and were in seven cases unequivocally contradictory. He submitted that evidence should be received by the Tribunal from Mr Blagoy Zlatkov, to refute false statements made by Ms Cruickshank.

[53] Ms Baigent submitted that the intended cross-examination of Ms Cruickshank and Mr Mathieson is unnecessary, and would prolong the hearing, without benefit to the Tribunal's task of determining the appeal. She submitted that both Ms Cruickshank and Mr Mathieson had provided extensive statements to the Tribunal, and that Mr Feschiev has had the opportunity to respond and to provide his own evidence. Ms

Baigent further submitted that Mr Zlatkov's evidence was available to Mr Feschiev when the matter was before the Committee, but he chose not to adduce it.

[54] Ms Baigent also submitted that it appears that Mr Zlatkov's evidence relates to an alleged statement about repair to a Butynol-covered surface. As such, she submitted, it is irrelevant to the appeal, as Mr Feschiev's complaint did not refer to any issue as to Butynol, there was therefore no Committee finding on the point, and it does not appear as a ground of appeal. She submitted that Mr Zlatkov's evidence would not assist the Tribunal on any of the primary issues on appeal.

[55] Ms Woolley also submitted that oral evidence from any of Ms Cruickshank, Mr Mathieson, or Mr Zlatkov is unnecessary. She submitted that Mr Feschiev has not identified any particular statement by Ms Cruickshank or Mr Mathieson that was untrue or incorrect, and he has not explained by he did not, or could not, arrange for Mr Zlatkov to give a statement to the Committee.

[56] She submitted that a central issue on appeal is whether Ms Cruickshank knew about asbestos in the roof at the property, or ought to have taken steps to ascertain if it was present, and ought to have disclosed to Mr Feschiev. She submitted that Mr Feschiev contends that Mr Zlatkov can confirm facts alleged to have been misstated by Ms Cruickshank. However, on Mr Feschiev's description of his involvement in the inspection of property, Mr Zlatkov would not be able to provide any evidence on the key issue of Ms Cruickshank's knowledge or lack of knowledge about asbestos. Therefore, she submitted, Mr Zlatkov's evidence would not have had an important influence on the outcome of the complaint.

### *Discussion*

#### *(a) Evidence by Mr Zlatkov*

[57] Mr Feschiev referred to Mr Zlatkov in a communication with the Authority on 4 September 2018, in relation to a submission by counsel for Ms Cruickshank that Mr Feschiev's statement that Ms Cruickshank had told him that Butynol at the property was going to be replaced by the vendors was disputed by Ms Cruickshank. Mr

Feschiev said “I have a witness ready to testify (Mr Blag Zlatkov) to the explicit verbal promise and commitment by [Ms Cruickshank] that at or prior to Closing the Butynol shall be repaired by the Vendors, at their expense”. Mr Feschiev did not provide a statement from Mr Zlatkov.

[58] Appeals to the Tribunal are re-hearings of the material that was before the Committee. Further evidence will not be admitted on appeal unless it can be established that it was not reasonably available when the matter was before the Committee, and could not reasonably have been obtained, and that the evidence is relevant to an appeal issue.<sup>3</sup>

[59] Mr Feschiev had the onus, as complainant, to establish his complaint. If he considered that a statement by Mr Zlatkov was relevant to the Committee’s consideration of his complaint, and would assist in establishing the complaint, he should have ensured that a statement was provided to the Committee. He did not do so.

[60] Further, we accept the submissions by Ms Baigent and Ms Woolley that Mr Zlatkov’s evidence has no relevance to the issues on appeal. There are no grounds on which we should allow evidence from Mr Zlatkov to be given at the appeal hearing.

*(b) Cross-examination of Ms Cruickshank and Mr Mathieson*

[61] We do not accept that it is necessary to give leave for Ms Cruickshank and Mr Mathieson to be cross-examined at the appeal hearing. It is evident from the material that was before the Committee that throughout the time that his complaint was before the Committee (both in the period before that Committee decided to undertake an investigation and during the course of the investigation), Mr Feschiev pointed out what he said were untrue statements, and set out what he said was evidence of the untruthfulness. In large part, his responses referred to email communications.

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<sup>3</sup> See *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3.

[62] We do not consider that we would be assisted by hearing oral cross-examination. Accordingly, we decline leave for evidence to be given by Mr Zlatkov, and for cross-examination of Ms Cruickshank and Mr Mathieson.

**Should members of the Committee be directed to provide statements that they had no conflict of interest?**

*Submissions*

[63] Mr Feschiev submitted that the Agency claims on its website to sell “1 in every 3 houses consistently” in the Wellington area, and that its City Office “consistently maintain an average monthly market share of 35% – 40% more than any other Wellington City agencies”. He submitted that it is reasonable to assume that there is at least a 25 percent chance that the Agency may have acted in some form or another in a transaction in which a Committee member, or a related party to a member, was involved. He submitted that legal doctrines mandate a lack of judicial bias, and that he only seeks a confirmation of objectivity and lack of bias by the Committee’s members.

[64] Ms Baigent submitted that the members of Complaints Assessment Committees sit as a judicial body and must be assumed to be properly exercising their duty without bias. She submitted that Mr Feschiev was alleging potential bias without an evidential basis to do so. She further submitted that Mr Feschiev had been aware of the members of the Committee prior to the decision-making process, and did not take objection to the Committee members once they were identified.

[65] Ms Baigent also submitted that Ms Cruickshank was given the names of the Committee members before their deliberations. She instructed Ms Baigent that she had no knowledge of any of the names, and therefore took no objection to their membership of the Committee deciding her case.

[66] Ms Woolley submitted that it is not necessary to require a “no conflict” statement. She advised that Mr Feschiev’s complaint was originally considered by Complaints Assessment Committee 416. The Chairperson of that Committee and one other person were Wellington-based. The complaint was transferred to Complaints

Assessment Committee 1901 on 15 January 2019. Only the Chairperson of the Committee (Ms Schmidt-McCleave) is Wellington-based.

### *Discussion*

[67] Complaints Assessment Committees are judicial bodies, and are presumed to act without bias. Mr Feschiev has presented no evidence of any actual bias. His concern is based solely on the fact that the Agency is Wellington-based and that the Committee included one member (not two members, as he asserted) who was Wellington-based.

[68] That is not a sufficient basis to challenge the presumption of a lack of bias, such as might require members of the Committee to provide statements confirming that they had no conflict of interest in considering Mr Feschiev's complaint. Mr Feschiev's request is declined.

### **Rulings**

[69] Mr Feschiev's appeal against the Committee's decision to take no further action on his complaint against the Agency is out of time and cannot be considered by the Tribunal.

[70] Ms Cruickshank's application for leave to file a late appeal is declined.

[71] Mr Feschiev's request that Ms Cruickshank be directed to provide further evidence in support of her application to file a late appeal is declined.

[72] Mr Feschiev's application for leave to call evidence on appeal from Mr Blagoy Zlatkov, and to cross-examine Ms Cruickshank and Mr Mathieson, is declined.

[73] Mr Feschiev's request for a direction that the members of the Committee file statements that they had no conflict of interest when considering Mr Feschiev's complaint is declined.

[74] 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