

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 23

Reference No: READT 012/2023

IN THE MATTER OF

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

BETWEEN

ZI
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2107)**
First Respondent

AND

ANDREW MILLER
Second Respondent

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
F J Mathieson (Member)

Representation:

The appellant:	Self-represented
The first respondent:	G Maslin
The second respondent:	K Burkhart

SUBJECT TO NON-PUBLICATION ORDER

RULING ON WHETHER TO ACCEPT OUT OF TIME APPEAL
Dated 17 August 2023

INTRODUCTION

[1] The appellant, ZI, was the purchaser of a property. The licensees were the second respondent, Andrew Miller, and another person against whom there is no appeal (the other licensee).

[2] The second respondent is a licensed salesperson under the Real Estate Agents Act 2008 (the Act). The other licensee was at the relevant time also a licensed salesperson under the Act. They were engaged by CR Marketing North Shore Ltd, trading as Central Realty.

[3] A complaint by the appellant to the first respondent, the Real Estate Agents Authority (the Authority), against both licensees was referred to Complaints Assessment Committee 2107 (the Committee).

[4] On 10 October 2022, the Committee issued a determination which found that the second respondent and the other licensee had engaged in unsatisfactory conduct. The licensees had marketed a property (sold to the appellant in November 2019) as having four bedrooms when two of the rooms did not comply with the requirements for a bedroom under the Housing Improvement Regulations 1947.

[5] On 12 May 2023, the Committee issued its decision on the penalty orders. It reprimanded both the licensees and ordered the second respondent to pay a fine of \$2,000. As for the appellant's claim for compensation of more than \$240,000, the Committee found it had no power to award compensation and it declined to refer the issue of compensation to the Tribunal as the unsatisfactory conduct was at the lower end of the scale and referral was not therefore appropriate.

[6] The appellant's then lawyer sent an email to her on 12 May 2023, attaching the decision. He advised he did not think there was any merit in an appeal, but it might be an option to consider a claim in the Disputes Tribunal against the second respondent in respect of her losses. He concluded his email:

I will talk to you about the possibility of a claim in the Disputes Tribunal.

[7] On 15 May 2023, the appellant replied to the lawyer by email describing the result as disappointing and concluding:

Yes, I'll consider the dispute tribunal.

[8] The next communication between the two of them was on 17 June 2023 when the appellant sent an email to the lawyer stating she had not heard from him and asking

for a discussion about the possibility of a claim in the Disputes Tribunal. She wanted to know if the claim could be for higher than \$30,000.

APPEAL FILED

[9] On 2 July 2023, the appellant filed in the Tribunal a Notice of Appeal (signed and dated 2 July 2023) against the decision of 12 May 2023. It was against the second respondent. In the appeal form, the appellant acknowledged being outside the appeal period of 20 working days.

[10] At the same time, the appellant filed a "Request for Extension to Appeal Deadline" (undated). She relevantly states:

Upon receiving the decision from the CAC, I wrote to my lawyer to guide me through the appeal process. However, despite multiple attempts to contact my lawyer via email, I did not receive any response. As a result, I was left uncertain about the appropriate course of action and whether I should wait for my lawyer to complete the necessary forms.

As time passed without any communication from my lawyer, I began to consider seeking alternative legal representation. During this period of uncertainty, I realised I might be able to submit the appeal form myself. This realisation prompted me to research the process further and understand my options.

... I believe that the lack of response from my lawyer, coupled with the confusion and delay it caused, hindered my ability to meet the initial deadline.

[11] There was a telephone conference on 8 August 2023 at which the appellant was invited to expand on her request for an extension. She said she did not know the process and did not know the difference between the Disputes Tribunal and this Tribunal. She had no idea how to come to this Tribunal. Ms Maslin for the Authority did not oppose acceptance of the appeal. Ms Burkhart for the second respondent opposes acceptance of the appeal on the basis that the high threshold for exceptional circumstances required to bring an appeal out of time is not met.

Legal Principles

[12] An appeal against a decision of a Committee is filed in accordance with s 111 of the Act.

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, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.

- (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.

[13] The acceptance of a late appeal has been considered by the Tribunal in *Catley v Real Estate Agents Authority*:¹

Are the circumstances in this case exceptional?

[43] The applicant bears the onus of persuading the Tribunal that the “circumstances” were “exceptional”. As the Tribunal said in its decision in *Matson v The Real Estate Agents Authority* (CAC410), 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.¹³

¹³ *Matson v the Real Estate Agents Authority* (CAC 410) [2019 NZREADT 9, at [18][e].

[44] Some limitations on what amount to “exceptional circumstances” suggest themselves. To take an example, it would seem likely that reaching an erroneous conclusion as to what the time limits require is hardly likely on its own to be an exceptional circumstance. Such occurrences are far from unusual. Further, it is unlikely that Parliament intended that there should be a dispensing provision which excuses a party who had not acted reasonably assiduously in ascertaining the correct position. After all, it is always open to a party in doubt about the meaning of s 111(1A) to obtain legal advice.

Discussion

[14] The appellant says in her Request she wrote to her lawyer seeking guidance as to the appeal process. She did not. It is apparent from her emails of 15 May and 17 June that she was considering an appeal to the Disputes Tribunal, but at no time did she request advice as to appealing to this Tribunal.

[15] The appellant further says she made multiple attempts to contact him. She did not. On 15 May, she merely acknowledged his email. Then on 17 June, she did seek a discussion with him, but it was about the Disputes Tribunal, not this Tribunal. Furthermore, her email of 17 June was after the expiry of the primary appeal period for an appeal to this Tribunal. By then, she was already out of time (without acceptance by the Tribunal).

[16] To the extent that the appellant seeks to blame her former lawyer, that is unfair. At no time before 17 June did she expressly request any advice or discussion, let alone for an appeal to this Tribunal.

¹ *Catley v Real Estate Agents Authority* [2019] NZREADT 57. See also *Beckett v Real Estate Agents Authority* [2019] NZREADT 58 at [14], [29] and [36]–[38].

[17] The appeal, filed on 2 July 2023, should have been filed no later than 12 June 2023. It was 15 working days (three weeks) late. This is not a short delay. Moreover, the appellant was not assiduous in seeking information on her rights. She was informed in both of the Committee's decisions of the right to appeal to this Tribunal within 20 working days. The decision of 12 May 2023 even gives the website address for downloading the Tribunal's appeal form. The research she apparently did between about 17 June and 2 July could have been done earlier. Apart from expressly requesting advice from her lawyer as to her appeal rights, she could have contacted the Authority or this Tribunal.

Conclusion

[18] The high threshold for acceptance of a late appeal has not been met. There are no exceptional circumstances.

OUTCOME

[19] The appeal is not accepted.

PUBLICATION

[20] Having regard to the interests of the public in the transparency of the Tribunal and the privacy of the parties, it is appropriate to direct publication of this Ruling without naming the appellant.²

D J Plunkett
Chair

G J Denley
Member

F J Mathieson
Member

² Real Estate Agents Act 2008, s 108.