

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 22**

**READT 021/19 and 022/19**

IN THE MATTER OF

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

BETWEEN

BRUCE RAYMOND CATLEY AND  
TIMOTHY JOHN BOYLE  
Appellants

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 521)  
First Respondent

AND

MARGARET and ROBERT FLANAGAN  
Second Respondents

On the papers

Tribunal:

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

Submissions filed by:

Mr T Rea, on behalf of Mr Catley and Mr  
Boyle  
Ms E Mok, on behalf of the Authority  
Ms J Storey, on behalf of Mr and Mrs  
Flanagan

Date of Ruling:

26 May 2020

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**RULING (4) OF THE TRIBUNAL**  
**(Appellants' request to remit matter to the Committee)**

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## Introduction

[1] On 10 March 2020, the Tribunal issued a Ruling in which it declined the application by Mr Catley and Mr Boyle to adduce further evidence in support of their appeal against the decision of Complaints Assessment Committee 521, finding that they had engaged in unsatisfactory conduct (“the Ruling”).<sup>1</sup>

[2] The Committee found that Mr Catley and Mr Boyle had breached rr 5.1, 6.3, and 10.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) when acting on behalf of prospective purchasers of a property owned by Mr and Mrs Flanagan. In respect of the finding that they had breached r 6.3, the Committee found that Mr Catley and Mr Boyle had brought the real estate industry into disrepute by falsely recording the commencement date of an agency agreement with Mr and Mrs Flanagan, and backdating the date on which the agreement was signed.

[3] The further evidence comprised a chain of emails between Mr Catley and Mr Boyle, a photograph of the index of the deal file for the transaction with Mr and Mrs Flanagan kept by the Agency at which Mr Catley and Mr Boyle were engaged, and an email from Mr Boyle to the Authority, to which was attached a screenshot of a signed agency agreement with Mr and Mrs Flanagan.

[4] In the Ruling, the Tribunal found that the further evidence appeared to be cogent, and relevant to the Committee’s finding that Mr Catley and Mr Boyle falsely backdated the agency agreement. It also found that if it had been provided to and accepted by the Committee, it was at least possible that the Committee would not have made an adverse finding that the signature on the agency agreement was backdated.<sup>2</sup>

[5] The Tribunal’s decision not to give leave for the further evidence to be adduced was based on the following findings:

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<sup>1</sup> *Catley & Boyle v The Real Estate Agents Authority (CAC 521)* [2020] NZREADT 11.

<sup>2</sup> At [43].

[a] The further evidence was available, and could with reasonable diligence have been provided to the Committee;<sup>3</sup>

[b] If the further evidence were to be admitted on appeal, Mr and Mrs Flanagan should be given the opportunity to respond and, as the further evidence raised issues as to credibility, it was likely that leave to cross-examine would be sought. Accordingly, allowing the further evidence to be adduced on appeal risked turning the appeal into a “first instance” hearing, when the Tribunal’s function is to determine appeals against decisions of Complaints Assessment Committees.<sup>4</sup>

[c] It was not in the interests of justice that the further evidence be considered by the Tribunal at a “first instance” hearing.<sup>5</sup>

[6] However, the Tribunal referred to the possibility of the Tribunal exercising its jurisdiction under s 111(4) of the Real Estate Agents Act 2008 (“the Act”), with the consent of the parties, to reverse the Committee’s decision and remit the matter back to the Committee to consider the further evidence, and any other evidence relevant to the appeal issues.<sup>6</sup>

[7] On 17 April 2020, Mr Rea filed a memorandum of counsel in which he recorded that Mr Catley and Mr Boyle consented to the Tribunal modifying the Committee’s decision and remitting the matter back for consideration of the further evidence. He invited other parties to consent.

### **Submissions**

[8] On behalf of Mr Catley and Mr Boyle, Mr Rea submitted that in the event that the other parties did not consent, the Tribunal should nevertheless modify the Committee’s decision and remit the matter back to the Committee. He submitted that the Tribunal had accepted that the further evidence appeared to be cogent, and relevant

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<sup>3</sup> At [45]–[50].

<sup>4</sup> At [51]–[53].

<sup>5</sup> At [55]–[59].

<sup>6</sup> At [61].

to the Committee's finding that Mr Catley and Mr Boyle had falsely backdated the agency agreement. He also submitted that the Tribunal had found that if the further evidence had been provided to the Committee, it was at least possible that the Committee would not have made that finding.

[9] He also submitted that counsel for Mr and Mrs Flanagan had submitted that if the further evidence were to be admitted, it would be appropriate for the Tribunal to remit the matter back to the Committee.

[10] Mr Rea submitted that it is within the Tribunal's jurisdiction under s 114(4) and/or s 105(1) of the Act to modify the Committee's decision and remit the matter to the Committee for reconsideration, without the consent of one or more of the parties. He submitted that it is in the interests of justice to do so, so that the Committee can reconsider its finding that Mr Catley and Mr Boyle falsely backdated the agency agreement, and that there would be no prejudice suffered by any party if that were to occur.

[11] Ms Storey submitted that the Tribunal has ruled that it would remit the matter back to the Committee if the parties consented. Mr and Mrs Flanagan do not consent, and Mr Catley and Mr Boyle had not sought their consent. She submitted that they were in effect seeking to re-open the Tribunal's ruling.

[12] She further submitted that it is not clear that the Tribunal has jurisdiction to remit a matter prior to considering an appeal, or where it is not necessary to give effect to a decision to reverse a Committee's determination. She also submitted that generally, decisions should not be remitted because parties did not provide evidence in their possession, and this was not a rare or exceptional case where it should occur.

[13] Ms Storey also submitted that any rehearing of Mr and Mrs Flanagan's complaint cannot be limited to the issue of backdating of the agency agreement, because the further evidence affects the appellants' overall narrative. She submitted that any rehearing by the Committee could be extensive, and would cause considerable additional cost and delay to Mr and Mrs Flanagan.

[14] Ms Storey also clarified her submission that it would be appropriate to remit the matter back to the Committee, in the event that the Tribunal considered it appropriate for further evidence to be adduced. She submitted that Mr and Mrs Flanagan’s primary position was that the evidence should not be admitted.

[15] Ms Mok submitted that the Authority does not oppose the Tribunal exercising its jurisdiction to reverse the Committee’s decision finding unsatisfactory conduct, and to remit the matter back to the Committee in the circumstances of this case. However, in the light of Mr and Mrs Flanagan’s opposition, she made submissions as to the Tribunal’s jurisdiction and the scope of any reconsideration by the Committee.

[16] Ms Mok submitted that s 111(4) of the Act gives the Tribunal power to “confirm, reverse, or modify” a Committee’s determination “after considering” an appeal. She submitted that while the Act is silent as to the manner in which the Tribunal must undertake consideration of the appeal (other than to specify that the appeal is by way of re-hearing (s 111(3)), the majority of cases are considered at an in-person hearing which proceeds on the record of the evidence that was before the Committee.

[17] Ms Mok also referred to s 105 of the Act, which provides that the Tribunal may regulate its procedures as it thinks fit, subject to the rules of natural justice and any other provisions of the Act.

[18] Ms Mok submitted that the Tribunal may properly consider an appeal and exercise its jurisdiction to “confirm, reverse, or modify” a Committee’s decision either:

- [a] by consent of the parties, at any time, if the Tribunal is satisfied that the proposed consent order is appropriate in the circumstances of the case; or
- [b] after hearing the appeal.

[19] She submitted that in the absence of consent by all parties, the Tribunal does not have jurisdiction to exercise its powers under s 111(4) until it has considered the appeal at a hearing, whether in person or on the papers. She submitted that in the present

case, as Mr and Mrs Flanagan do not consent to the matter being remitted to the Committee, it is now for Mr Catley and Mr Boyle to decide whether they wish to proceed with their appeal in the absence of the further evidence.

[20] Finally, Ms Mok submitted that if this matter is remitted back to the Committee, whether by consent or after a hearing, the Committee will undertake a reconsideration of the evidence, including any further evidence provided to it, and arrive at a fresh determination of Mr and Mrs Flanagan's complaint.

## **Discussion**

[21] Section 111 of the Act sets out the Tribunal's jurisdiction on appeal:

### **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.
- (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
  - (ab) the prescribed fee, if any; and
  - (c) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
- (3) The appeal is by way of rehearing.
- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

[22] Section 105 of the Act sets out the Tribunal's power to regulate its procedures:

### **105 Proceeding before Tribunal**

- (1) The Tribunal may regulate its procedures as it thinks fit.

- (2) Subsection (1) is subject to the rules of natural justice, this Act, any regulations made under this Act, and any practice notes issued under section 115A.

[23] The jurisdiction to remit a matter back to a Committee can be exercised if the Tribunal has considered an appeal, and concluded that the Committee's decision must be reversed, and that the Committee must reconsider the original complaint or allegation. The Tribunal's consideration of a complaint is generally undertaken by the Tribunal by considering the Committee's decision, the evidence and submissions provided to the Committee, any further evidence the Tribunal allows to be adduced, and the submissions by or on behalf of the parties to the appeal.<sup>7</sup> While appeals are generally heard in oral hearings, the Tribunal may determine a proceeding on the papers, pursuant to s 107A of the Act.

[24] The Tribunal has not yet considered the appellants' appeal, and it is not in a position to do so, as it has not received submissions on the appeal by or on behalf of the parties.

[25] We accept Ms Mok's submission that the Tribunal's consideration of an appeal may be abbreviated, if the parties to the appeal consent to (or do not oppose) the appeal being allowed, the relevant Committee decision being reversed, and the matter remitted back to the Committee for reconsideration. That course was followed in *Baker v The Real Estate Agents Authority (CAC 413)*, which was referred to in the Ruling,<sup>8</sup> and more recently in *Beath v The Real Estate Agents Authority (CAC 409)*.<sup>9</sup> The abbreviated consideration procedure has been followed when the parties have consented to (or not opposed) it, and the Tribunal agrees that it is appropriate to allow the appeal and remit the matter back to the Committee.

[26] As Mr and Mrs Flanagan do not consent to the appeal being allowed and the matter remitted back to the Committee, the Tribunal's consideration of their appeal cannot be abbreviated.

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<sup>7</sup> See *Eichelbaum v The Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, affirmed by the Court of Appeal in *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

<sup>8</sup> *Baker v The Real Estate Agents Authority (CAC 413)* [2018] NZREADT 64.

<sup>9</sup> *Beath v The Real Estate Agents Authority (CAC 409)* [2020] NZREADT 16.

[27] It is now for Mr Catley and Mr Boyle to decide whether they wish to pursue their appeal. In the event that they advise the Tribunal that they intend to pursue the appeal, the case manager is to schedule a telephone conference for the purpose of making directions as to the appeal hearing and filing of submissions.

### **Outcome**

[28] The appellants' request that the Tribunal remit their appeal back to the Committee for reconsideration, in the absence of consent by Mr and Mrs Flanagan, is declined.

[29] 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