

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 73

IN THE MATTER OF

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

BETWEEN

RICHARD MAYER
Applicant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 304)
First Respondent

AND

DEAN FILE AND IAN BARNS
Second Respondents

On the papers

Tribunal:

Hon P J Andrews, Chairperson
Mr J Gaukrodger, Member
Ms N Dangen, Member

Date of Ruling:

8 November 2016

RULING OF THE TRIBUNAL
(Application for leave to file appeal out of time)

Background

[1] On 14 July 2016 the Tribunal issued a Minute regarding a Notice of Appeal submitted by Mr Mayer on 18 May 2016, against a decision of Complaints Assessment Committee 304 (“the Committee), issued on 4 February 2015. In that decision the Committee determined to take no further action in respect of Mr Mayer’s complaint against the second respondents.

[2] The Minute noted that s 111(1) of the Real Estate Agents Act 2008 (“the Act”), requires a Notice of Appeal to be filed “within 20 working days after the date of the

notice given under s 81 or 94”. On its face, the Notice of Appeal appeared to have been submitted some 14 months out of time.

[3] The Minute further noted that the Committee accepted that, due to an error on its part, Mr Mayer did not receive notice of the Committee’s determination until 27 April 2016. It was also noted that in another case, which had some factual similarity to Mr Mayer’s, an appeal had been made to the High Court at Auckland against the Tribunal’s determination that a Notice of Appeal was out of time, and should not be received. Consideration of whether Mr Mayer’s appeal was out of time, and should not be received, was deferred pending the judgment of the High Court.

The *Kumandan* judgment

[4] The judgment of the High Court in *Kumandan v Real Estate Agents Authority* has now been delivered.¹ In that case, the party seeking to appeal was a licensee (referred to in the judgment as “the agent”) in respect of whom the Complaints Assessment Committee had determined that a charge of misconduct should be laid. His Honour Downs J referred to s 94(1) of the Act², which provides:

When a Committee makes a determination ... the Committee must promptly give written notice of that determination to the complainant and to the licensee.

Section 94(2) then specifies what must be set out in the “written notice”.

[5] His Honour then referred to s 111(1) which specifies the time within which an appeal may be filed.³ As noted earlier, the specified time is “within 20 working days after the date of the notice given under s 81 or 94”. His Honour also referred to s 154 of the Act, which specifies the manner in which notice “is sufficiently given or served”.⁴

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

² At [8].

³ At [9].

⁴ At [10].

[6] His Honour discussed two possible interpretations of “the date of the notice given”.⁵ These may be summarised as being (a) the date of the Committee’s decision, and (b), the date on which the Committee’s decision is served on the affected person.

[7] His Honour preferred the second possible interpretation and held that the period of “within 20 working days after the date of the notice given under s 81 or 94” referred to “the date on which the Committee’s notice is served on the agent”.⁶

[8] Applying his Honour’s finding to the present circumstances, the period within which an appeal may be filed is 20 days after the date on which the Committee’s notice was served on Mr Mayer.

Further submissions

[9] In a memorandum dated 28 October 2016 counsel for the Authority submitted that in light of the *Kumandan* judgment, and the Committee’s acknowledgement that Mr Mayer had submitted his Notice of Appeal within 20 working days of receiving the Committee’s decision, his appeal should be accepted for filing and progressed in the usual way.

[10] On 2 November 2016 the Tribunal received a letter from Ms Anderson, legal counsel for Bayley Corporation Ltd (the second respondents are licenses at Coast to Coast Ltd, trading as Bayleys). Ms Anderson submitted that Mr Mayer had in fact received the Committee’s decision on 2 June 2015, and that his appeal is out of time. It is helpful to set out the timeline of events referred to by Ms Anderson:

4 February 2015	Committee’s decision issued
22 May 2015	Bayleys advised Mr Mayer’s solicitors that his complaint had been dismissed
2 June 2015	Mr Mayer’s solicitors asked Bayleys for a copy of the Committee’s decision
2 June 2015	Bayleys emailed a copy of the Committee’s

⁵ At [11]–[22].

⁶ At [22].

	decision to Mr Mayer's solicitors
2 June 2015	Mr Mayer's solicitors advised Bayleys: "Thank you for your email and a copy of the REAA decision. We have contacted our client who has advised that he had not received the decision, and now having the outcome, intends to file an appeal. We note that this will be an appeal out of time, but that is a matter for him and the REAA to resolve."
28 March 2016	Mr Mayer contacted the case administrator about the Committee's determination
27 April 2016	Mr Mayer received the Committee's determination from the Authority
18 May 2016	Mr Mayer submitted a Notice of Appeal

[11] Ms Anderson submitted that while Mr Mayer may not have received a copy of the decision from the Committee itself, he was aware of the outcome by 2 June 2015 (at the latest). She also submitted that Mr Mayer may have been provided with a copy of the decision. She further submitted that given Mr Mayer's interest in the Committee's determination (referred to in an earlier memorandum filed by counsel for the Committee), and his knowledge of the outcome on 2 June 2015, the period of ten months before he made enquiries was "inordinately long".

Assessment

[12] While it appears to be the case, as Ms Anderson submitted, that he knew the outcome of the Committee's decision by 2 June 2015, s 81 of the Act required that "the Committee must promptly give written notice of that decision" to Mr Mayer. The Committee did not give Mr Mayer written notice until 27 April 2016.

[13] We have concluded that in the light of:

- [a] the Committee's obligation to give prompt written notice of the Decision (s 81 and 94);

[b] the requirement that a Notice of Appeal is filed within 20 working days after the date of the notice given under ss 81 or 94 (s 111(1)); and

[c] Downs J's finding that the time limit specified in s 111(1) runs from the date on which the Committee's notice is served on the affected party;

the period within which Mr Mayer could submit a Notice of Appeal ran from 27 April 2016. Accordingly, his Notice of Appeal submitted on 18 May 2016 was filed within time, and may be received by the Tribunal.

Outcome

[14] Mr Mayer's appeal will be received by the Tribunal. The Tribunal will deal with Mr Mayer's appeal in the usual manner. The Case Officer is to schedule a telephone conference so that appropriate timetable orders can be made. As noted in the Minute of 14 July 2016, an appeal is determined on the material that was before the Committee. That determination may be "on the papers" (that is, the material before the Committee together with written submissions from the parties), or at an oral hearing (that is, the material before the Committee, together with the parties' written and oral submissions).

[15] 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 procedures to be followed are set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr J Gaukrodger
Member

Ms N Dangen
Member