

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 77**

**READT 044/16**

IN THE MATTER OF

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

BETWEEN

CHRISTOPHER O'NEILL  
Appellant

AND

REAL ESTATE AGENTS AUTHORITY  
(CAC 411)  
First Respondent

AND

SY (BRENDON) BOUNTHEUNG  
Second Respondent

AND

V & B REALTY LIMITED  
Third Respondent

On the papers

Tribunal:

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

Date of Ruling:

6 December 2016

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**RULING OF THE TRIBUNAL**  
**(Second and third respondents' challenge to appeal as out of time)**

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[1] In accordance with the Chairperson’s Minute of 21 November 2016, Mr O’Neill’s Notice of Appeal has been accepted for filing.

[2] In a memorandum dated 22 November 2016, counsel for the second and third respondents challenged the Chairperson’s direction that the Notice of Appeal should be accepted for filing.

[3] Decisions as to whether a Notice of Appeal should be accepted for filing are dealt with by way of a Chairperson’s direction, without submissions from any of the parties. If a party subsequently wishes to challenge that direction, then it is customary for an application to be made to strike out the appeal. The memorandum on behalf of the second and third respondents will be considered as an application to strike out Mr O’Neill’s Notice of Appeal as being out of time.

[4] The Tribunal notes as follows:

[a] The decision against which Mr O’Neill wishes to appeal was made on 23 August 2016, and received by Mr O’Neill by courier on 25 August. In accordance with the Judgment of the High Court at Auckland in *Kumandan v Real Estate Agents Authority*<sup>1</sup> the period within which Mr O’Neill could appeal expired on 22 September 2016.

[b] Mr O’Neill’s “Notice of Intention to Appeal” was received by the Real Estate Agents Authority (“the Authority”) on 1 September 2016. It was not filed in the Tribunal, as is required under s 111 of the Real Estate Agents Act 2008 (“the Act”), and it was not in the form prescribed under reg 9 of the Real Estate (Complaints and Discipline) Regulations 2009 (“the Regulations”).

[c] The Authority forwarded Mr O’Neill’s “Notice of Intention to Appeal” to the Tribunals Unit on 13 September 2016. The Tribunals Unit advised Mr O’Neill by letter dated 21 September 2016 that his “Notice of

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<sup>1</sup> *Kumandan v Real Estate Agents Authority* [2016] NZHC 2545.

Intention to Appeal” was not in the prescribed form. A Notice of Appeal form and an Appeal Guide were enclosed. The Tribunals Unit’s letter noted that Mr O’Neill was required to complete the form and return it to the Tribunals Unit by 12 October 2016.

[d] Mr O’Neill’s completed Notice of Appeal (dated 26 September 2016) was received by the Tribunals Unit on 29 September 2016. It was thus seven days out of time.

[5] Prior to issuing the Chairperson’s Minute, counsel for the Authority was asked to provide information as to the timeline of relevant events. Counsel did so by way of a Memorandum dated 14 November 2016.

[6] In the Chairperson’s Minute it was noted that Mr O’Neill does not have an email account, and it was unlikely that he would have received the Notice of Appeal form in sufficient time for him to file it before the expiry of the time to appeal.

[7] Counsel for the second and third respondent has submitted that the Tribunal has no power to receive Mr O’Neill’s Notice of Appeal for filing. In particular, it is submitted that:

[a] The Act does not provide for a “two-stage process” for filing appeals, such that Mr O’Neill’s Notice of Appeal did not remedy the invalidity of the “Notice of Intention to Appeal” sent earlier to the Authority;

[b] The Authority acted ultra vires in forwarding Mr O’Neill’s “Notice of Intention to Appeal” to the Tribunals Unit, it being outside the Authority’s functions and powers under s 12 of the Act to act as his agent in filing an appeal on his behalf, and the Authority should have returned the document to Mr O’Neill;

[c] It is not relevant (at law) to compliance with the requirements for filing a Notice of Appeal that Mr O’Neill does not have an email account; and

[d] The Tribunal had no power to extend time for an appeal, as the 20-day limit prescribed by s 111 of the Act is mandatory.

[8] Mr O'Neill responded to the second and third respondents' application by a memorandum dated 25 November 2016. In essence, he submits that his "Notice of Intention to Appeal" was properly filed, within time, and there was no invalidity.

[9] Counsel for the Authority filed a further Memorandum, dated 28 November 2016, responding to the assertion that the Authority had acted ultra vires in forwarding Mr O'Neill's Notice of Intention to Appeal to the Tribunals Unit.

[10] The Tribunal notes and accepts the submission for the Authority that it did not act ultra vires in forwarding Mr O'Neill's Notice of Intention to Appeal to the Tribunals Unit. The Authority acted properly in doing so.

[11] With respect to the submission that it is not relevant (at law) that Mr O'Neill does not have an email account, the Tribunal notes that advice as to the right of appeal set out in a decision of a Complaints Assessment Committee refers the parties to a website for information as to lodging.

[12] However, notwithstanding the above comments, the time limit of 20 days within which an appeal may be filed in the Tribunal is mandatory, as is the requirement for a Notice of Appeal to be in the prescribed form. Having further considered this matter, the Tribunal has concluded that:

[a] Mr O'Neill's Notice of Appeal, received on 29 September 2016, was outside the time for filing under s 111 of the Act, and cannot therefore be accepted for filing.

[b] Mr O'Neill's Notice of Intention to Appeal was not in the proper form, and was sent to the Authority, rather than being filed in the Tribunal, as is required by s 111 of the Act and reg 9 of the Regulations. It could not therefore be accepted for filing.

[13] Accordingly, the direction set out in the Chairperson's Minute of 21 November 2016 is reversed. The Tribunal directs that Mr O'Neill's Notice of Appeal cannot be accepted for filing.

[14] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, 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 J Gaukrodger  
Member

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Ms C Sandelin  
Member