

**IN A MATTER BEFORE  
THE AGENTS LICENSING BOARD  
OF THE NORTHERN TERRITORY**

**APPLICATION FOR DISCIPLINARY ACTION**

**BETWEEN:** **PHILIP BUTLER**

Applicant

**AND** **WHITTLES BODY CORPORATE  
MANAGEMENT PTY LTD trading as  
WHITTLES BODY CORPORATE  
MANAGEMENT**

Respondent

Date of hearing: **24<sup>th</sup>, 25<sup>th</sup> February 2014**

Chairperson: Suzanne Philip  
Industry Member: Diane Davis  
Industry Member: Jo-Anne Pulsford  
Consumer Representative: Lea Aitken

Appearances:

Counsel Assisting the Board: Mark Thomas  
Respondent: Paul Maher

**STATEMENT OF REASONS FOR DECISION**

**Background**

1. On the 15<sup>th</sup> August 2012, the Applicant, Philip Butler, made application to the Board under 68(3) Agents Licensing Act (hereinafter called "ALA") for Disciplinary Action against the Respondent, Whittles Body Corporate Management Pty Ltd, trading as Whittles Body Corporate Management, on the ground set out in Section 67(1)(c) ALA of breach of the rules of conduct for agents, such rules being contained in Section 65 ALA.

2. The application alleged that the Respondent had breached Section 65(1)(da) of the ALA in that it had failed to exercise due skill, care and diligence in dealing with the Applicant, in the course of conducting business as an agent .

3. Following receipt of the application, the Registrar of Land, Business and Conveyancing Agents caused an Investigation Report to be prepared. That report was tabled and considered by the Agents' Licensing Board (hereinafter called "the Board") at its meeting held on 11<sup>th</sup> September 2013 and the Board determined that there might be grounds for disciplinary action. As required by Section 68(4) of the ALA, the matter was set down for an Inquiry.

### **The Issues**

4. The issues in this Inquiry were:
- a. the meaning and effect of Section 65(1)(da)
  - b. a consideration by the Board as to whether the Respondent's actions amounted to a breach of the rules of conduct as contemplated by the terms of Section 65(1)(da) ALA;
  - c. if so, the appropriate disciplinary sanction.

### **Relevant Legislation**

5. Disciplinary action may be taken against a licensed agent on the grounds provided in Section 67 ALA.

#### **67. Grounds for disciplinary action**

*(1) Subject to this Part, the Board may take disciplinary action in accordance with this Part against a licensed agent on one or more of the following grounds:*

*(c) the licensed agent has been guilty of a breach of the rules of conduct for agents;*

6. Applications for such action are made under Section 68 ALA.

#### **68. Applications for disciplinary action**

*(3) Any person may apply, by notice in writing lodged with the Registrar, for disciplinary action to be taken against a licensed agent on one or more of the grounds referred to in Section 67.*

*(4) Where –*

*(b) the Board considers that there may be grounds under Section 67 for disciplinary action to be taken against a licensed agent, the Board shall hold an inquiry.*

7. In this case, the Board relied on Section 65(1)(da) ALA to ground the application for disciplinary action.

**65. Rules of conduct**

- (1) *A licensed agent who –*

*(da) fails to exercise due skill, care or diligence when dealing with any person whomsoever in the course of conducting business as an agent; or is guilty of a breach of the rules of conduct for agents.*

8. Where the Board grants an application, the Respondent may be dealt with as provided in Section 69 of the ALA.

**69. Powers of Board after inquiry**

- (1) *Where, at the conclusion of an inquiry conducted pursuant to Section 68(4), the Board is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may –*

- (a) *reprimand or caution the agent;*
- (b) *by notice in writing, impose a fine not exceeding 50 penalty units on the agent;*
- (c) *by notice in writing, suspend the licence of the agent until the expiration of the period, or the fulfilment of a condition, specified in the notice; or*
- (d) *by notice in writing, revoke the licence of the agent.*

**Conduct of the Matter**

9. The central issue to be determined under Section 65(1)(da) ALA was whether the Respondent had, through its course of dealings as Body Corporate Manager with the Applicant, failed to exercise due skill, care and diligence as required by Section 65(1)(da).

10. The Applicant, being resident interstate and employed offshore, was unable to travel to Darwin but gave evidence through a video conference link. The Board was assisted by Mark Thomas who called witnesses to present evidence throughout the Inquiry. Paul Maher, Counsel for the Respondent was able to cross examine the Applicant and other witnesses, present evidence and make submissions.

11. Proceedings were conducted on the basis that there were six grounds of inquiry against the Respondent as follows -

Ground 1: that the Respondent failed to exercise due skill, care or diligence through the failure to promptly attend to the fixing of the problem affecting the Applicant's Unit;

Ground 2: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant, when on 28<sup>th</sup> February 2012, in an email from Deborah Moyle (an employee of the Respondent ) to the Applicant, the contents of Mr Patrick Whitehead's (of NT Plumbing) report regarding the source of the damp issue was not stated with fairness and accuracy to the Applicant, which had the effect of not presenting to the Applicant a true picture of what Mr Whitehead had said in this report regarding the source of the leak/dampness problem affecting the Applicant's Unit;

Ground 3: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant, when Ms Moyle said, in her email to the Applicant dated 28<sup>th</sup> February 2012, that "The Body Corporate believe it to be unreasonable to be asked to compensate your losses when it appears that neither you as the owner nor your agent acted in a speedy manner to (a) alert the Body Corporate and/or (b) fix the problem totally so that the property is habitable";

Ground 4: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant at or about February 2012, when it failed to convey to the Applicant that the difficulties in fixing the problem were being caused by the Chairperson of the Body Corporate who was delaying the fixing of the problem;

Ground 5: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant on 15<sup>th</sup> February 2012, by misrepresenting the report of Mr Johns in an email sent by Ms Moyle to Mr Butler on 15<sup>th</sup> February 2012;

Ground 6: That the Respondent, failed to exercise due skill, care or diligence in relation to the Applicant by failing to deal honestly and fairly with the Applicant as regards the fixing of the problem affecting his Unit.

12. The Board was provided with an Inquiry Book which was supplemented by bundles of email correspondence tendered by Counsel Assisting and Counsel for the Respondent. Evidence was heard from Philip Butler, Mary Hamilton, Deborah Moyle, Jason Jones, Daniel Bree, Paul Johns, Louise Trimble, Julie Loynes, Jacqui Cavenagh and Matthew Amber.

13. Following the conclusion of oral evidence, the Board requested that the parties provide written submissions including the meaning and effect of Section 65(1)(da). Such submissions were subsequently received from Mr Thomas on 28<sup>th</sup> March 2014 and Mr Maher on 8<sup>th</sup> April 2014 and were duly considered by the members of the Board before making a determination.

## **The Facts - The Body Corporate Management Agreement**

14. The Respondent holds an unrestricted Real Estate and Business Agent's Licence, AL462, and at all material times conducted business under that licence. However, its Business Manager, Matthew Amber, appointed pursuant to Section 1110A ALA, holds a Body Corporate Management Agent's Restricted Licence, AL820. This, in effect, restricts the company activities to body corporate management.

15. At all relevant times, the Applicant was the registered proprietor of Unit 2108 at 43E Knuckey St, Darwin (hereinafter called "the Unit"). The Unit is subject to the Unit Titles Act (hereinafter called "UTA"), the relevant plan having been registered in 2008. Part V of that Act creates a Body Corporate on the registration of a Units Plan, which Body Corporate is constituted by the proprietors for the time being of the units subject to the Plan. At all relevant times the Applicant was a member of the Body Corporate.

16. A corporation under the UTA acts through its Committee (Section 32 UTA). Section 58 UTA provides that the Regulations can proscribe Management Modules governing decision-making and management requirements for the corporation. The Unit Titles (Management Modules) Regulations (hereafter UTMM regulations) contain the relevant Management Modules. Section 29 UTA provides that the Body Corporate may appoint a representative who must act in accordance with the Management Module and whilst this appointment is in force, Part V of the Act applies to the representative as if the representative were the proprietor.

17. At all relevant times the Body Corporate had entered an agreement with the Respondent as Manager. The delegated powers of the Manager were specified as follows: "The Body Corporate delegates to the Manager all of the powers of the executive and ordinary members of the Committee of the Body Corporate to the full extent permitted by law (including the Act)." Under the heading "Services to be provided" the Manager must supply the agreed services to the Body Corporate. The Manager must supply the Additional services to the Body Corporate at the Body Corporate's request. The list of agreed services include "to arrange for normal and everyday maintenance, repair and replacement of the common property and personal property vested in the Body Corporate". "Additional services" are defined to include, " to arrange maintenance, repair, and replacement of common property and personal property vested in the Body Corporate, which is not normal or everyday maintenance , repair and replacement and to liaise with architects, engineers, surveyors , builders, loss adjustors and assessors and the like in relation to any such work".

## The Facts

18. In December 2009, the Applicant purchased the Unit 2108 which was subsequently leased and Colliers International was appointed by the Applicant as his property managers. In or about October 2011, water began leaking from inside the wall between the living room and the second bedroom of the Unit and the tenant reported such leak to Louise Trimble at Colliers. The problem was finally resolved in March 2012 by repairs carried out by the building's developer, Gwelo Developments Pty Ltd, under the instructions of the construction foreman, Mr Jason Jones. During that period extensive damage was caused to the Unit and it became untenable until the repairs were effected.

19. The leak arose out of problems with the air-conditioning unit, the actual source of which may or may not have been on common property. When the tenant reported the leak to Louise Trimble she obtained a report from Paul Johns of Darwin Plumbing Electrical Gasfitting estimating repairs at \$570. Arrangements were made by Whittles through its employee, Ms Jacqui Cavenagh, to hire a contractor, CTM, to fix the work. The date of the work order was 24<sup>th</sup> October 2011. Ms Cavenagh indicated that on receipt of the invoice and report from CTM she would advise Louise Trimble at Colliers who was responsible for the cost. However, CTM was unable to commence work for five or six weeks. On 26<sup>th</sup> October 2011, Ms Trimble forwarded an email to Ms Cavenagh requesting another contractor conduct the repairs as the delay was too long. Ms Trimble then supplied a quote from Hire a Hubby for \$2,189 to fix the air-conditioning leak and repair damage to the apartment. At that point, because repairs were now over \$1000, Ms Cavenagh decided, according to a pre-existing practice, that further quotes were needed and that she would have to present them to the Body Corporate for instructions. Some further delays occurred in this regard until late November when an estimate of \$1500 to \$2000 from Darwin Plumbing Electrical Gasfitting was supplied by Ms Trimble to Ms Cavenagh. On or about 25<sup>th</sup> November 2011, Ms Cavenagh sought specific instructions from the committee chair, Ms Mary Hamilton, who indicated that she would speak to Jason Jones of Gwelo Developments Pty Ltd. Ms Cavenagh was not prepared to act other than on Mary Hamilton's instructions and understood that Ms Hamilton was going to initiate some action with Mr Jones. Ms Cavenagh sent an email to Mr Jones in early December 2011, but she did not see a response from him. A further quote was obtained by Colliers from The Total Group of \$5,175 (plus GST) and forwarded to Ms Cavenagh on 5<sup>th</sup> December 2011. No further activity occurred in December except that the tenant vacated the Unit. Ms Cavenagh then had a meeting with Ms Hamilton in 16<sup>th</sup> January 2012, at which Ms Hamilton advised that for all correspondence was to be forwarded to her so that she could review it. Ms Cavenagh had no further involvement with regard to the Unit in January and then went on maternity leave on 3<sup>rd</sup> February 2012.

20. Following Ms Cavenagh's departure, Ms Deborah Moyle took over her responsibilities with the Respondent. On 7<sup>th</sup> February 2012, Colliers forwarded an email to the Respondent advising that CTM inspected the Unit, could undertake the repairs and requesting approval to get this repair underway ASAP. On 15<sup>th</sup> February 2012, an email was forwarded from the Applicant to Ms Moyle detailing his concerns and requesting a response by COB Friday 17 February. Ms Moyle responded by email on the 15<sup>th</sup> February 2012, advising that she would issue a work order for a plumber to visit the Unit to report on the cause of the leak. Indicating that she had read the Darwin Plumbing Electrical Gasfitting Report, Ms Moyle then averred that the Report *"does not state that this is a Body Corporate issue. It identifies the symptom; not the cause. If the Tradesperson had categorically stated that the common condensate pipe was the cause, no delay would have occurred."*

21. On 24<sup>th</sup> February 2012, Ms Moyle advised the Applicant by email that she was awaiting a report from a plumber whom she had been present with at the time of inspection. That report was prepared by Mr Patrick Whitehead of NT Plumbing Services and emailed to Ms Moyle. On 28<sup>th</sup> February 2012, Ms Moyle informed the Applicant of the status of repairs advising that Whittles engaged an independent contractor, NT Plumbing Services, and that the report advised *"that there was no leak coming from Unit 2208. The leak is in 2108; this may be attributed to faulty workmanship by contractor's that Colliers had in and nothing to do with the original builder at all, which seems likely."* She further stated *"In summary: The Body Corporate believe it to be unreasonable to be asked to compensate your losses when it appears that neither you or the owner, nor your agent acted in a speedy manner to (a) alert the Body Corporate and/or (b) fix the problem totally so that the property is habitable."* On 29<sup>th</sup> February 2012, the Applicant forwarded an email to Ms Moyle advising her not to proceed with repairs to the damage Unit wall until the actual leak was located and repaired and requesting a copy of the report from NT Plumbing Service.

22. On 2<sup>nd</sup> March 2012, the Applicant emailed Mr Matthew Amber, the licensed Business Manager of the Respondent detailing his frustration at the situation. On 5<sup>th</sup> March 2012, Mr Amber replied to the Applicant by email indicating that he would call to discuss the problem. No contact was made.

23. On 9<sup>th</sup> March 2012, Ms Moyle forwarded an email and a NT Plumbing Service Report, dated 23<sup>rd</sup> February 2012, to the Applicant, stating *"Once again, the Body Corporate extends to you the opportunity to have you're A/C's re-installed and operational, the gyprock repaired and painted - all by appropriately licensed contractors. This cost will be covered by the Body Corporate on the understanding that we use our nominated contractors and that we are not taking any liability for what has occurred in your property. This is done in good faith because of so many conflicting reports. This offer is on the table until close of business on Wednesday 14 March 2012."* A further email was forwarded on 13<sup>th</sup> March 2012, by Ms Moyle to Colliers advising that the Gwelo Development Pty Ltd Builder/Project Manager agreed *"that the 'leak' ironically, is in fact a result of condensation due to the hole in*

*the wall. The builder will add extra insulation for everybody's piece of mind and continue to rectify the hole in the wall."*

24. On 8<sup>th</sup> May 2012, the Applicant again emailed Mr Amber advising him that he still had not received a response in relation to his emails, updating him with the status of the repairs and seeking reimbursement from the Respondent in the form of lost rent of \$6,045.00, an acknowledgement that the water damage was caused by a leaking pipe in the common property and a guarantee if the leak recurred, the Respondent would assist and contact the builder immediately. He requested a response by close of business Friday 11<sup>th</sup> May 2012. None was received.

### **Meaning of Section 65(1)(da) ALA**

25. Section 65 ALA sets out the rules of conduct for agents, a failure to comply amounting to a breach which may result in disciplinary action. Section 65(da) was introduced to extend the actionable rules of conduct under the ALA to people outside the immediate agency relationship. For example, in a lease situation, the usual agency relationship is between the lessor and the property manager. However Section 65(da) means that the property manager must also act with due skill, care or diligence towards the lessee as well or be liable to disciplinary sanction. The nature and content of this duty will vary according to the circumstances of each case including the identity of the third party and their proximity, if any, to an existing agency relationship. There is no case law dealing directly with this provision.

26. On the facts in this Inquiry, the primary agency relationship was between the Body Corporate and the Manager (the Respondent) and was governed by the terms of the agreement between those parties and the further requirements imposed by the UTA and UTMM Regulations. The Applicant as a unit owner was clearly closely connected to that relationship. The Respondent was obliged by Section 65(da) to act with due skill, care and diligence in the course of undertaking the management duties accepted by them under the Management Agreement, in their dealings with anyone whomsoever. The Applicant being a registered proprietor holding an interest in the relevant Plan was clearly a person in proximity to the discharge of the duties under the Management Agreement and someone clearly encompassed by the duty to act with due skill, care and diligence.

27. The content of the duty required by the Respondent in dealing with the Applicant must be considered in the light of the particular circumstances. The Respondent's primary obligation was to its principal – the Body Corporate. Particularly the Respondent would breach the rules of conduct in Section 65 if it failed to perform its duties to its principal or carry out the lawful instructions of its principal. The Respondent was required to also exercise due skill, care or diligence in carrying out his duties on behalf of his principal. Nevertheless the statutory scheme also required the exercise of due skill, care or diligence in dealing with third parties. The Board considered that agents are required to strike a balance between the duties owed to their principals and their obligations to third parties.



28. In considering the content of the duty imposed by Section 65(1)(da) the content of the UTMM Regulations which specify the Code of Conduct for the Manager of a corporation for a plan were relevant in the present matter. The relevant Plan was categorised as a “standard plan” for the purposes of the Regulations and the relevant Code of Conduct for managers of such plans appear in Part 7. That Code required that the Manager act honestly, fairly and professionally in relation to the Plan (Regulation 52), act with reasonable skill, care and diligence in relation to the Plan (Regulation 53) and not engage in either misleading conduct (Regulation 57) nor unconscionable conduct (Regulation 58) in relation to the Plan. The meaning of “the Plan” in this context was clarified by Regulation 58 which specifically included as unconscionable conduct in relation to the Plan “exerting undue influence on the corporation or the proprietor or occupier of a unit” and “using unfair tactics against the corporation or the proprietor or occupier of a unit”. These inclusions were expressed to be inclusive only and demonstrate the intention of the Code of Conduct to extend such duties as to act honestly and not mislead in relation to the plan to encompass the interests of proprietors and occupiers of a unit.

The obligation to act with due skill, care or diligence imposed by Section 65(da) in this case encompassed the obligations imposed by the UTMM Regulations as to honesty and misleading conduct. Those obligations have to be balanced against the duties owed to the principal, the Body Corporate.

### **Application of Section 65(1)(da) to the Grounds of the Inquiry**

29. The Board, having considered the evidence before it and the submissions of Counsel, then examined each of the Grounds of the Inquiry as follows:

**Ground 1: that the Respondent failed to exercise due skill, care or diligence through the failure to promptly attend to the fixing of the problem affecting the Applicant’s unit.**

The Board accepted as justified by the provisions of the Management Agreement the Respondent’s position that it could only act with, and upon the instruction of, the Body Corporate. The agreement provided that, while every-day maintenance was to be undertaken by the Respondent as an “agreed service”, “additional services” pursuant to Clause 4.2 were to be supplied only at the request of the Body Corporate. Ms Cavenagh utilised the sum of \$1000 as a cut-off point above which further quotes were required. This was reasonable and the quotes received in respect of the Unit that were above that amount indicated a problem which probably fell outside an “every-day maintenance” matter. As an “additional service” under the Management Agreement, Ms Cavenagh was correct in approaching the Body Corporate Chairperson, Ms Hamilton for instructions. From that point onward, the Respondent acted in accordance with the instructions of Mary Hamilton. It appeared clear from the evidence presented to the Board that the person directly responsible for the failure to fix the problem, in the period from early

November through to March 2012, was Ms Mary Hamilton, who refused to accept that the Body Corporate should fix it.

In light of Whittles responsibilities under the Management Agreement, the Management Modules, the UTA, the Regulations, and in particular that the obligation under Clause 66 of the UTMM Regulations for the Manager to act in the best interests of the corporation, it could not be said that Whittles failed to exercise due skill, care or diligence in the failure to arrange for a contractor to fix the problems in the Unit. There was neither power nor obligation permitting or requiring the Respondent to effectively fix the problem of its own volition.

**Ground 2: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant, when on 28 February 2012 in an email from Deborah Moyle (an employee of the Respondent ) to the Applicant, the contents of Mr Patrick Whitehead’s (of NT Plumbing) report regarding the source of the damp issue was not stated with fairness and accuracy to the Applicant, which had the effect of not presenting to the Applicant a true picture of what Mr Whitehead had said in this report regarding the source of the leak/dampness problem affecting the Applicant’s Unit**

Mr Patrick Whitehead, of NT Plumbing Maintenance Services, was hired by the Respondent to provide a report on the problem affecting the Unit. He sent an email to Ms Moyle dated 23<sup>rd</sup> February 2012, stating

*“In my opinion the damp issue in 2108 is from a slow but continuous leak on the communal air con that runs through all the units in the building and it picks up all air cons and this water backed up into unit 2108 and over a period of time and leaked into the cavity wall and as it may not have been a large amount of water leaking into wall but it was certainly enough to cause extensive damage and allow the infestation of the damp to occur, and it would not have been noticed till (sic) the damp and mould was appearing in the bedroom walls and lounge walls and by this time the damage would already have been done.”*

Mr Whitehead added that he could not say what caused the blockage. In Ms Moyle’s email to the Applicant she represented that

*“Whittles engaged an independent contractor (NT Plumbing Service) who noted in their report that he gained entrance to the unit above (2208) – which other contractors that Colliers employed did- and advised that there is no leak coming from unit 2208. The leak is in 2108; this may be ascribed to faulty workmanship by contractors that Collier’s had in and nothing to do with the original builder at all, which seems likely”.*

Ms Moyle erred in representing that Mr Whitehead's report identified the leak as being in 2108. This was incorrect and misrepresented in a fundamental way a critical aspect of Mr Whitehead's report. Further, Ms Moyle claimed that the problem was ascribed to faulty workmanship by contractors hired by Colliers. Mr Whitehead said no such thing. Ms Moyle also implicitly represented that the report said that the problem had nothing to do with the original builders. Again, this misrepresented Mr Whitehead's report.

Pursuant to the UTM Regulations the Respondent was required to act in accordance, inter alia, with the Code of Conduct for the Body Corporate Manager, which specified at Clause 64, that the person must act honestly, fairly and professionally in relation to the plan" and, at Clause 69, that the person must not engage in misleading conduct in relation to the plan. The Board considered that the Respondent, through Ms Moyle, failed to act honestly and fairly and, therefore, professionally.

The fact that the comments in Ms Moyle's email mirror those provided to her by Ms Hamilton, in an email to her dated 28<sup>th</sup> February 2012, in no way ameliorated this conduct. Her response to the Applicant was in no way couched in terms suggesting the comments were other than a statement of the content of the Report. Nor can the excuse of acting on instructions of the Body Corporate suffice. By misrepresenting the contents of Mr Whitehead's report, the Respondent failed to exercise due skill, care or diligence in its dealings with the Applicant pursuant to Section 65 (1)(da) of the ALA.

**Ground 3: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant, when Ms Moyle said, in her email to the Applicant dated 28 February 2012 that "The Body Corporate believe it to be unreasonable to be asked to compensate your losses when it appears that neither you as the owner nor your agent acted in a speedy manner to (a) alert the Body Corporate and/or (b) fix the problem totally so that the property is habitable"**

In the email of 28<sup>th</sup> February 2012, Ms Moyle sought to ascribe fault to the Applicant for failing to act in a speedy manner to alert the Body Corporate of the problem. The Board noted that the very significant quantity of emails from the Applicant over the course of the period commencing in October 2011 and other actions by him pointed to a concerned owner who was endeavouring to actively pursue his rights. While the Respondent's action in blaming him in this fashion was unnecessary, however, the Board did not believe that it amounted to anything other than a statement of the Respondent's opinion. Even if misguided, it was not sufficiently serious to amount to a breach of the duty of care skill and diligence contained in Section 65 (1)(da) of the ALA.

**Ground 4: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant at or about February 2012, when it failed to convey to the Applicant that the difficulties in fixing the problem were being caused by the Chairperson of the Body Corporate who was delaying the fixing of the problem**

On 29<sup>th</sup> February 2012, the Applicant emailed Ms Moyle detailing his urgent concerns and frustrations and it was clear that he was not properly informed as to the difficulties in resolving repairs to the Unit. His specific request for the NT Plumbing report was never met by Ms Moyle. It was clear from the evidence given by Ms Moyle that she made no decisions without the instructions of the Chair of the Body Corporate, Ms Hamilton, indicating that she was relying heavily upon the Chair and would not act until the Chair decided that the problem affecting the Unit was to be fixed. The Chair's role was illustrated in the email dated 9<sup>th</sup> March 2012, wherein she instructed Ms Moyle to remove any reference to NT Plumbing.

The Respondent sought to avoid any responsibility for its actions and inactions in dealing with the increasingly urgent problems stemming from the leak affecting the Unit by claiming it acted simply on instructions from Ms Hamilton. However, the correspondence directed to the Applicant by Ms Moyle made no mention of the role of the Body Corporate Chair and for all intents and purposes appeared to originate from the Respondent. Ms Moyle acted in an obstructive and uncooperative fashion with the Applicant as illustrated by her email of 28<sup>th</sup> February 2012. It was apparent that the Applicant was becoming increasingly desperate and his financial situation was deteriorating as a result of the ongoing failure to repair the Unit. Rather than assisting the Applicant by advising him there was a problem with the Chair and resolution of the problem lay with her, nothing was said and the Applicant was left in the dark. The Board accepted that this demonstrated a fundamental absence of frankness amounting to a lack of care, in dealing with the Applicant as required by Section 65 (1)(da) of the ALA.

**Ground 5: That the Respondent failed to exercise due skill, care or diligence when dealing with the Applicant on 15 February 2012, by misrepresenting the report of Mr Johns in an email sent by Ms Moyle to Mr Butler on 15 February 2012**

Mr Johns of Darwin Plumbing Electrical Gasfitting prepared a report on 17<sup>th</sup> October 2011, identifying the common condensate pipe as being either partially or fully blocked or having sustained a fracture within the wall space. Repair of the problem required access to the common condensate pipe indicating that he believed that the common condensate pipe was the cause of the problem. However, Ms Moyle averred in her email of 15<sup>th</sup> February to the Applicant that Mr Johns merely identified a symptom and not a cause and claimed that if Mr Johns had identified it as the cause no delay would have

occurred. Again this is fundamental misrepresentation amounting to a lack of care, in dealing with the Applicant as required by Section 65 (1)(da) of the ALA.

**Ground 6: That the Respondent, failed to exercise due skill, care or diligence in relation to the Applicant by failing to deal honestly and fairly with the Applicant as regards the fixing of the problem affecting his unit.**

As this is a general ground covering material largely dealt with in the specific grounds already dealt with, the Board regarded as an alternate to those grounds and not relevant.

### **Determination**

30. The Board having considered the Investigation Report, the Inquiry Book, further materials tendered during the Inquiry, the evidence of the witnesses and the submissions of Counsel, found that the Respondent had committed breaches of the rules of conduct in Section 65(1)(da) of the ALA, in that, it failed to exercise due skill, care and diligence in its dealings with the Applicant . Those breaches were constituted by Grounds 2, 4 and 5 of the Grounds of Inquiry.

31. In considering the nature of the disciplinary action to be taken against the Respondent, the Board noted both parties' submissions and, in particular, the Respondent's failure to acknowledge any breach of the rules in its dealing with the Applicant. In particular, the licensed Business Manager of the Respondent, Mr Matthew Amber testified that there was no aspect of Ms Moyle's evidence that he found troubling in her dealings with Mr Butler; nor was he "...concerned that we'd ignore anything and the duration didn't concern me". Despite the Applicant's email to Mr Amber, forwarded on 2<sup>nd</sup> March 2012, seeking his assistance "as a last resort", no serious attempt was made by Mr Amber to contact the Applicant, and that failure, together with Mr Amber's evidence, was indicative of the Respondent's failure to act fairly and appropriately with him and further that nothing was learnt by the Respondent from this matter.

32. The Board noted the importance of Licensed Agents, acting as Corporation Manager or Body Corporate Manager for the purposes of the ALA, recognising their duties to act with due care skill and diligence in dealing with unit proprietors and the public in general by ensuring that they act appropriately and fairly with such persons. However, the Board also noted that Ground 1 of the Inquiry, the most serious of the grounds, was not made out. Despite that, the Applicant was entitled to be treated fairly and honestly by the Respondent and the failure to meet that standard was clearly demonstrated by Grounds 2, 4 and 5 which were established.

## Action

1. The Board determined following the Inquiry held on 24<sup>th</sup> and 25<sup>th</sup> of February 2014 that the Respondent, Whittles Body Corporate Management Pty Ltd, trading as Whittles Body Corporate Management, had breached the rules of conduct for agents, in particular Section 65(1)(da) ALA by failing to exercise due skill, care and diligence in dealing with the Applicant, Philip Butler.
2. As a result, the Board determined that it was authorised to take disciplinary action against the Respondent under Section 69(1) of the ALA as the ground in Section 67(1)(c) of the ALA was satisfied.
3. In the circumstances, pursuant to Section 69(1)(b) of the ALA, the Board determined to fine the Respondent for these breaches of the rule of conduct in Section 65(1)(da) of the ALA, in the amount of \$3000.
4. Pursuant to its power under Section 69(3) ALA the Board further directed that the Respondent, within two weeks of the date of service on it of a copy of this Statement of Reasons for Decision, provide a letter of apology to the Applicant and a copy thereof to the Board.

For the Board

Suzanne Philip  
Chairperson