

**Agents Licensing Board of the
Northern Territory**

**IN THE MATTER OF A DISCIPLINARY
INQUIRY PURSUANT TO THE
*AGENTS LICENSING ACT 1979 (NT)***

BETWEEN

KATHLEEN AND VINCE LUPPINO

Applicants

AND:

**JEREMY O'DONOGHUE, TRADING AS MOLARA PTY
LTD; FIRST NATIONAL REAL ESTATE O'DONOGHUES,
FIRST NATIONAL COMMERCIAL DARWIN**

Agents

Date of hearing: 22 March 2023

Acting Deputy Chair Robert Bradshaw
Consumer representative: Lea Aitken
Real estate representative: Michael Bongiorno

Appearances:

Counsel for
Mr O'Donoghue/Molara Pty Ltd: Peter Maley, solicitor

Counsel Assisting: Mellissa Yates, barrister

Date of decision: 12 April 2023

STATEMENT OF REASONS FOR DECISION

PART A: INTRODUCTION

1. On 29 June 2021 Kathleen Luppino and Vince Luppino (the applicants) lodged an application for disciplinary action against O'Donoghue's First National (the application).
2. The application has been taken to be an application under section 68(3) of the *Agents Licensing Act 1979* ("the Act"), for disciplinary action to be taken against licensed real estate agent Jeremy Donoghue, (the agent), who holds a licence in his name, that licence being real estate agents licence number 795/RBL and Molara Pty Ltd (Licence number 692/RBL), trading under the business names of First National Real Estate O'Donoghues and First National Commercial Darwin, carrying on business under the supervision and control of Jeremy O'Donoghue at 141 Mitchell St, Larrakeyah NT

0820. Both the individual and corporate licences expire on the same date: 28 November 2023.

3. The application contained complaints relating to a number of matters, broadly summarised these related to:
 - Failure to comply with instructions in respect of property inspections
 - Failure to account or to properly account, and breach of fiduciary duty to account
 - Failure to pay outgoing expenses
 - Failure to exercise due care and skill
 - Failure to act honestly and breach of fiduciary duty to act honestly
4. At all material times:
 - Molara Pty Ltd (ACN 128 259 861) trading as First National Real Estate O'Donoghues (O'Donoghues) was the holder of licence number RBL692 and was licensed to carry on business as an agent under the Act;
 - Jeremy John O'Donoghue was:
 1. the sole director of O'Donoghues;
 2. the holder of licence number RBL792;
 3. was licensed to carry on business as an agent under the Act; and
 4. was the nominated manager of O'Donoghues for the purposes of the Act.
 - One of the complainants, Kathleen Gail Luppino (Owner) was the registered proprietor of 5 Christie Street, Fannie Bay, in the Northern Territory (Property).
5. On 7 July 2021, a copy of the Complaint was provided by email to Jeremy O'Donoghue by the Senior Compliance Officer, Licensing NT and requested a response pursuant to section 68(6) of the Act.
6. On 28 July 2021, Monika Stenberg, Officer Manager of O'Donoghues, provided an email response to the Complaint and attaching several documents (the Response).¹
7. On 12 November 2021, the Board considered the Complaint and the Response with the outcomes being:
 - A decision that there may be grounds for disciplinary action to be taken pursuant to section 67(1)(c) of the Act (i.e., *the licensed agent has been guilty of a breach of the rules of conduct for agents*); and
 - A decision to hold an Inquiry.
8. By letter dated 23 December 2022 the Chairperson of the Board advised the Agents that the Board had determined to hold an inquiry under section 68(1)(c) regarding both of the Agents breaching the rules of conduct. The Chairperson's letter set out that the rules of conduct that may have been breached as being:

¹ Document 33 - Book of Documents

- Rule 10 – *An agent must perform the agent’s duties to a client and carry out the lawful instructions of the client.*²
 - Rule 11 – *An agent must exercise due skill, care and diligence when carrying out the agent’s duties on behalf of a client.*⁶
9. The material accompanying the Chairperson’s letter set out the material facts. These were largely consistent with the agreed facts as set in paragraphs [16] to [33] of this decision.
10. Additionally, the material accompanying the Chairperson’s letter amplified the details of the alleged breaches as being:
- A failure by O’Donoghues and Jeremy O’Donoghue to perform their duties to their client and carry out the lawful instructions of their client contrary to section 65 of the Act and regulation 25 and Part 1, Schedule 4, rule 10 of the Agents Licensing Regulations 1979 (the Regulations); and
 - A failure by O’Donoghues and Jeremy O’Donoghue to exercise due skill, care and diligence in carrying out their duties on behalf of their client contrary to section 65 of the Act and regulation 25 and Part 1, Schedule 4, rule 11 of the Regulations.

PART B: HEARING

11. The hearing for this matter took place on 22 March 2022. The Board was constituted by:
- Robert Bradshaw (Deputy Chairperson (under section 14(4)(b) of the Act);
 - Lea Aitkin (Consumer representative)
 - Michael Bongiorno (Alternate real estate member)
12. At the hearing:
- Mr O’Donoghue attended along with Mr Peter Maley, solicitor, acting for both Agents and Ms Sarah Chou (supervising property manager)
 - Ms Melissa Yates, barrister, attended as Counsel Assisting.
13. The Board had before it an inquiry book containing materials provided by the applicants and the agents concerning the events that are the subject of the inquiry. The Board was also provided with a draft of the proposed agreed facts and Ms Yates’ submission on penalty.
14. The facts and breaches set out in paragraphs [16] to [33] were agreed to Ms Yates, Counsel assisting and Mr Maley (on behalf the Agents).
15. The Board accepted the agreement concerning the facts and the breaches.

² See Regulation 25, Rule 10, Schedule 4 (Part 1 – General Rules) *Agents Licensing Regulations 1979* (NT) ⁶ See Regulation 25, Rule 11, Schedule 4 (Part 1 – General Rules) *Agents Licensing Regulations 1979* (NT)

PART C: AGREED FACTS AND BREACHES

16. On 20 June 2019, Donoghue's entered into a residential management agreement (the Agreement) with the Owner in relation to the Property.

17. It was a condition of the Agreement that:

- Inspections were conducted on 12 weekly basis (Clause 4.1(b)(j) and Item 5 Reference Schedule)
- The Agent would pay all expenses and charges [specifically, Council Rates; Water & Sewerage Rates and Landlord Protection Insurance] from monies held on behalf of the Owner as per the Schedule (Clause 4.1(b)(h) and Item 9 Reference Schedule)
- The Agent would pay to the Owner any money received which is not required for disbursements in connection with the management of the Property (Clause 4.1(b)(d))
- The Agent would provide Monthly Statements of Account itemizing rentals received, and all outgoings paid by the Agent (Clause 4.1(b)(e))

18. It was a special condition of the Agreement that the tenant was responsible for water consumption over and above 100kL per annum.

19. A residential tenancy agreement was entered into with a tenant (the Tenant) on 10 July 2019 in relation to the Property.

20. The Tenant commenced occupation of the property on 10 July 2019 and continued in occupation of the Property until the Agreement was terminated on 17 June 2021, with management of the Property being transferred to another real estate agency after that date.

Admitted facts relating to Allegation 1 – Failure to Conduct Property Inspections:

21. Inspections of the Property were carried out on the following dates:

- 24 January 2020
- 24 June 2020
- 6 November 2020

22. The Agreement stipulated that inspections were to be carried out in 12 weekly intervals.

23. Had inspections taken place at regular and timely 12 week intervals, inspections *should* have taken place on or about the following:

Inspection Number	Date Inspection <i>should</i> have been carried out in ordinary course	Date inspection carried out
1	2 October 2019	Not undertaken
2	25 December 2019	24 January 2020
3	18 March 2020	
4	10 June 2020	24 June 2020
5	2 September 2020	
6	25 November 2020	6 November 2020
7	17 February 2021	
8	12 May 2021	

24. Inspections were not carried out in 12 weekly intervals in accordance with the Agreement.

Admitted facts Relating to Allegation 2 – Failure to Pay Water & Rates on Time:

25. A review of the tenancy ledger and the water invoices confirms water accounts were due and paid as follows:

Dates	Due Date	Date Payment made	Days overdue
01/05/2019 – 31/07/2019	06/09/2019	14/09/2019	8
01/08/2019 – 30/10/2019	25/11/2019	22/01/2020	58
31/10/2019 – 29/01/2020	24/02/2020	02/06/2020	99
30/01/2020 – 29/04/2020	26/05/2020	02/06/2020	7

30/04/2020 – 30/07/2020	26/08/2020	\$460.37 paid in error on 18/06/2020. \$140.93 paid on 08/09/2020	13
31/07/2020 – 29/10/2020	24/11/2020	05/03/2021	101
30/10/2020 – 29/01/2021	24/02/2021	25/02/2021	1
30/01/2021 – 04/05/2021	31/05/2021	02/06/2021	2

26. A review of the trust ledger for the Property indicates that the Owner incurred penalties for late payment of rates in relation to late payment of the following Rates Instalments:

- April to June 2020 Quarter - \$3.44
- April to June 2021 Quarter - \$6.64

27. The Agent has reimbursed the Owner the amount of \$6.64 being the late fees incurred for the April to June 2021 Quarter.

Admitted facts relating to Allegation 3 – Failure to Charge Tenant for Excess Water

28. A review of the Power & Water Invoices for the relevant period and the tenancy ledger provided by the Agent state the following:

Dates	Usage	Amount of Bill	Date Payment made	Amount Recovered from Tenant
01/05/2019 – 31/07/2019	287kL (tenant's pro-rated portion 71kL)	\$844.22	14/09/2019	\$312.98 on 14/09/2019
01/08/2019 – 30/10/2019	257kL	\$786.23	22/01/2020	\$255.02 on 13/01/2020 (130 kill @ \$1.9613)
31/10/2019 – 29/01/2020	92kL	\$460.37	02/06/2020	

Dates	Usage	Amount of Bill	Date Payment made	Amount Recovered from Tenant
30/01/2020 – 29/04/2020	130kL	\$534.90	02/06/2020	Owner said do not charge excess water due to leak.
30/04/2020 – 30/07/2020	162kL	\$601.30	\$460.37 paid in error on 18/06/2020 \$140.93 paid on 08/09/2020	
31/07/2020 – 29/10/2020	109kL	\$496.53	05/03/2021	
30/10/2020 – 29/01/2021	45kL	\$367.31	25/02/2021	
30/01/2021 – 04/05/2021	26kL	\$334.76	02/06/2021	

29. The total water consumption for the period was 892 kill. Of this, 130kL is to be excluded because of a water leak. 200kL (2 x 100kL per annum) also to be excluded for water allowance as per tenancy agreement:

- 892kL less (130kL + 200kL) = 562kL
- 562kL @ \$1.9613 per kill = \$1,102.25
- \$1,102.25 less amount received from tenant over life of tenancy (\$312.98 + \$255.02 = \$568.00) = \$534.25 in total which has **not** been recovered by Agent on behalf of Owner, which should have been recovered by the Agent during the relevant period.

30. This was admitted by Sarah Chau of the Agent on 25 June 2021 by email to the new property manager where she says: *“As per the tenants ledger no water charges have been invoices [sic] since January 2020?? – this is correct!! I’m sorry this has been overlooked over time...”*

Admitted facts regarding Allegation 4 – Failure to Account in Timely Manner:

31. It is the Agent’s usual practice to send out monthly statements using their automatic computing system on the last day of each month.

32. The following statements were not received by the Owner on the last day of the relevant month:

- February 2020
- March 2020
- December 2020
- May 2021

33. It is the Agent's usual practice to send out copies of invoices paid on behalf of the Owner by the end of the relevant month in which that invoice was paid.

34. The following documents were not provided to the Owner within a reasonable period of the monthly statement being provided for the relevant month in which that invoice was paid:

- All supporting documents for expenses paid from July 2019 to 31 March 2020. These were provided 3 working days after a request from the Owner on 14 April 2020, following receipt of the March 2020 monthly statement;
- Copy of water bill for \$496.53 on or about February 2021 which was missed and not paid on time that remained unpaid until 4 March 2021. A copy of the invoice was not provided until 11 March 2021;
- Copies of accounts paid for Council Rates and repairs performed by a plumber associated with the December 2020 statement. The Owner had to follow up again in relation to the Rates invoice on 1 April 2021 and again on 7 April 2021 and 9 June 2021.

35. The major additional fact related to the excess water charges that had not been paid for by the tenant. Following a suggestion by O'Donoghues that the tenant be asked to pay the outstanding amount the applicant's husband instructed that the tenant not be asked to pay.

PART D: THE BOARD'S FINDINGS REGARDING THE ALLEDGED BREACHES

36. Following the Board's acceptance of the facts and the breaches, Mr Maley asked the Board to make a decision that the facts as agreed did not justify the taking of any disciplinary action. The basic argument for this position was that the breaches were relatively minor and had not resulted in any significant harm to the applicant.

37. Mr Maley noted:

- The Code of conduct is very broad - and rules 10 and 11 are in the nature of catch all motherhood statements;

- Property management is a difficult area often dealing with demanding clients, demanding tenants and dispute resolution.

Failure to conduct property inspections.

- There were in fact 6 inspection but only 3 reports forwarded to the landlord;
- Problems arising out of COVID. These were explained as relating to staff issues (sicknesses) and the general reluctance of some tenants to permit inspections (because of COVID fears);³
- Turnover of staff;
- Gold star tenant - no damage to the property, in pristine condition, always paid rent on time, good rapport with the tenant;
- Failure to have strict compliance with contractual arrangements, resulted in no loss;
- Overreach to say that the failure to inspect constituted a quasi criminal offence and a breach of conduct – perhaps more to do with internal management of the business.

Failure to pay water rates on time

- \$6 paid small fry, not out of pocket, not penalized financially;
- Does this really constitute quasi criminal conduct if bills are paid late – more a matter for the internal running of the business. Accepted risk of water being cut off (but it didn't);
- Excess water – email from Sarah Chau of 25/6/22 - \$568 which could have been invoiced to the tenant, usual course was that the tenant would be asked to reimburse – as part of the handover the owners husband directed that the agents was not to charge the tenant for the outstanding amount - is this really a breach sufficient to justify intervention of the board.

Failure to account in a timely manner

- Good tenant/bad tenant may affect the way the agents deal with them.

38. In response Ms Yates submitted that rule 10 is a strict liability obligation – they either have or have not done what was required.

39. In respect of rule 11 Ms Yates referred to a previous decision of the Board which, in quoting a decision of Walters J in *Georgieff v Athans*⁴ the Chairperson explained the concept of the obligations of *due skill, care and diligence* for agents for reward *the agent was bound:*

“to exercise such skill, care and diligence in the performance of [the agents]

³ There was no evidence that this particular tenant had caused any issue regarding inspections

⁴ (1981) 26 SASR 412

undertaking as [was] usual or necessary for the ordinary or proper conduct of the business or profession in which [the agent] was employed or was reasonably necessary for the proper performance of the duties undertaken by [the agent].⁵

40. Applying this principle Ms Yates submitted that whether or not business failures were applicable the agents in this case did not exercise the level that is sufficient to meet the standard.

41. Ms Yates also:

- Noted there was no evidence provided regarding the 3 inspection reported to have been done but not provided to the applicants and that, consequently, not much weight can be given to this aspect of Mr Maley's submission;
- Noted some of the events took place before the operation of the COVID Modification notices under the *Residential Tenancies Act 1999*;
- Submitted that it is largely irrelevant that the tenant was a gold star tenant;
- Accepted turnover of staff is a factor.

42. The Board took a short adjournment to consider the issues raised by Mr Maley and the views of Ms Yates.

43. The Board decided that the breaches justified the taking of disciplinary action. The Board accepted that as a generality (and particularly during COVID period) there are various operational issues for property management relating to staff shortages, sickness and industry wide inexperience of persons engaged in property management. These issues mean that will be some problems in complying with the exact requirements of management agreements.

44. For the management of this property the Board noted that there may have been particular difficulties arising from the fact that the Agent had accepted a version of its standard form management agreement regarding which the owner had been various handwritten changes that meant that the arrangements differed from the standard ones used by O'Donoghues.

45. The Board accepted that it might be correct that the applicant had not suffered any significant harm and that they had asked the agent not to seek payment of the outstanding water charges.

46. However, each of the breaches could have resulted in significant potential harm to the applicant as might have been the case if the tenant had not been a good tenant.

⁵ Decision dated 5 May 2021 Isabel Ordogh, Dani Delev & Tode Delev v Whittles Body Corporate Management Pty Ltd.

Additionally, all of the complaints involved a relatively sustained series of breaches of the agent's specific contractual obligations.

47. On this basis, the Board decided that the Agents had breached rules 10 and 11.

PART D: SUBMISSIONS AND EVIDENCE REGARDING SANCTIONS

48. Section 69(1) of the Act provides that where the Board at the conclusion of an inquiry is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may do one or more of the following:

- a. reprimand or caution the agent;
- b. by notice in writing, impose a fine not exceeding 50 penalty units on the agent;⁶
- 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;
- d. by notice in writing, revoke the licence of the agent.

49. Mr Maley and Ms Yates were asked to address the Board regarding what might be the appropriate penalty.

50. Mr Maley noted that Mr O'Donoghue has been an Agent for 22 years, that the business has operated as an entity since 2008 (15 years), 500 properties are being managed at any particular time (up to 7500 overall), that dealing with complaints was a bread and butter activity for the Agents and that this was the "first time" a complaint of this nature has come before the Board.

51. Mr Maley also referred to the Agents' good citizenship role in the community. Mr Maley also referred to the agents good citizen work regarding charity auctions and the provision of water bubblers, televisions, lounges and money to various charities and non-government bodies.

52. Mr Maley also referred to the agents' significant efforts in putting in new systems and improving staffing numbers in respect of property management.

53. Sarah Chau give evidence about an upgraded management system (Property Tree) which provides automated triggers for communications reminders and inspections as well as an increase in staffing levels (with the long term intention of decreasing properties managed per person from 100 to 80).

⁶ The value of a penalty unit is \$162 for 1 July 2022 to 30 June 2023 – *Penalty Unit Regulations 2010*

54. Mr Maley submitted that the penalty should be a reprimand as the breaches were appropriate to a penalty at the absolute lower end of the penalties spectrum set out in section 69 of the Act. Mr Maley highlighted the insignificant financial loss and the small number of problems in the context of the overall business of the agents, the agent's acceptance of the allegations and the steps taken by the agents to ensure that the problems would not happen again.
55. Ms Yates submitted that the breaches were sufficiently significant so as to warrant a sanction greater than that of a reprimand. Ms Yates recommended a penalty of 10 penalty units (\$1620). In making this submission, Ms Yates emphasized that the allegation did not involve just a single incident but a course of incidents, which showed no sign of improvement in the period up to when the tenancy ended. Whilst some of the problems (such as the late provision of inspection reports) were relatively insignificant other breaches could have led to the applicants suffering substantive financial loss.
56. In making this submission Ms Yates noted that the Agents had been cooperative during the proceedings and had implemented new computer systems to address many of the matters raised but also noted that the agent still tends to 'blame' other things like COVID (which doesn't really stack up under any close scrutiny) and the owners as to why the agent's duties were not complied with rather than accepting responsibility. Ms Yates also noted that the Agents had, in the course of the proceeding continued to make errors about what were the key obligations. For example, errors in the inspection period (they said 4 months – it is 3) and errors in the calculation of excess water (they said 100kL per quarter – it's per annum).
57. In her written materials Ms Yates suggested that but for the Agent's apparent lack of 'taking responsibility' and 'contrition') and for the Agent's continued errors in understanding the issues and the detail regarding this matter a public reprimand would have been appropriate. However in light of these matters and the fact that the Owner has suffered a more than nominal loss (the loss of reimbursement for the excess water) a fine was more appropriate.
58. Since hearing the submissions of Ms Yates and Mr Maley the Board has noted that the agent has previously been found by the Board to have breached the rules of conduct. In *Marchant and Frost v Molara Pty Ltd trading as First National Estate O'Donoghues* (decision date 20 November 2014) the Board found that the Agent had breached the following rules of conduct:
- Rule in former section 65(1)(a) of the Act (now rule 8);
 - Rule in former section 65((1)(c) (now rule 10).
59. The breach of the former rule in section 65(1)(a) related to the employment of an

unregistered person as an agents representative. The penalty imposed was \$3000.

60. The breach of the former rule in section 65(1)(c) appears to have been related to inspection fees charged that were not in accordance with the management agreement. The overcharged amount was \$55. The penalty imposed was \$500.

61. In its 2014 decision the Board highlighted that the problems arose from lack of oversight of the internal management procedures of O'Donoghues and the lack of appropriate supervision of the person acting as an agents representative.

62. This 2014 decision is relevant because:

- it somewhat negates the proposition that the agent had not been involved in disciplinary proceedings in the past;
- the root problem (management issues) is the similar to the problems in this matter.

PART E: SANCTIONS

63. Further to the finding in paragraph [47] the Board imposes a penalty of 15 penalty units (\$2430) to be jointly paid by Mr O'Donoghue and Molara Pty Ltd.

64. In coming to this decision, the Board has considered the potential seriousness of the consequences of the failing of the Agents to meet the basic standards set by rules 10 and 11. At the very least clients of real estate agents have a right to expect that agents have a high level of compliance with their contractual obligations. They'd also expect that once problems were identified that a successful effort would be made to make sure that the problems did not re-occur.

65. This penalty is at the lower end of the scale of penalties (which potentially range from cancellation, suspension, fine of \$16,200) or reprimand/warning). The Board took into account:

- the fact that the Agents acknowledged the breaches and have taken strong systemic steps to ensure that, as best possible, the problems do not re-occur;
- the fact that the Agents cooperated in the Board's hearing of the complaint;
- the fact that the applicants did not suffer significant financial loss arising from the breaches.

PART F: RIGHT OF APPEAL

Provides that

65. Section 85 of the Act provides that a person aggrieved by a decision of the Board can appeal to the Local Court.

66. An appeal application must be made within 21 days of the date of this decision.

Dated: 12 April 2023 at Darwin

Robert Bradshaw

Robert Bradshaw
Acting Deputy Chairperson
AGENTS LICENSING BOARD OF THE NORTHERN TERRITORY