

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

APPLICATION FOR DISCIPLINARY ACTION

BETWEEN: **MARGARET ARBON**
Applicant

AND **CATE KILLINER**
Respondent

Date of hearing: **17th June, 2014**

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

Appearances:

Counsel Assisting the Board: Bronwyn Haack
The Applicant appeared in person.
Respondent: Tass Liveris

STATEMENT OF REASONS FOR DECISION

Background

1. On the 19th March 2013, the Applicant, Margaret Arbon, made application to the Board under Section 68(3) *Agents Licensing Act* (hereinafter called "ALA") for Disciplinary Action against the Respondent, Cate Killiner, on the ground set out in Section 67(1)(c) of the ALA of breach of the rules of conduct for agents, such rules being contained in Section 65 of the ALA.

2. The application alleged that the Respondent had breached Sections 65(1)(c) and (d) of the ALA in that she had failed to perform duties on behalf of, or carry out instructions of, her principal and that she had failed to exercise due skill, care and diligence on behalf of her principal.

3. Following receipt of the application, the Registrar of Land, Business and Conveyancing Agents caused an Investigation Report to be prepared. That report, dated 21st February 2014, was tabled and considered by the Agents' Licensing Board (hereinafter called "the Board") at its meeting held on 11th March 2014. The Board accepted the Investigation Report recommendation that there was sufficient evidence to suggest an alleged breach of Section 65(1)(c), particularised as failure by the agent to perform her duties to her principal by

amending a contract of sale dated 13th December 2013, relating to the Applicant's house property at 5 Bleeser Street Fannie Bay, Darwin (hereinafter called "the Contract") without the consent of, or in consultation with, the Applicant. The Board further accepted the Investigation Report recommendation that it reject a claim based on breach of Section 65(1)(d), alleging failure to exercise due skill, care or diligence arising out of the amendment of the contract. The Board accordingly determined that there might be grounds for disciplinary action. As required by Section 68(4) of the ALA, the matter was set down for Inquiry

The Issues

4. The issues in this Inquiry were:
 - a. 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)(c) of the ALA;
 - b. 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 Sections 65(1)(c) of the ALA to ground the application for disciplinary action.

65. Rules of conduct

(1) *A licensed agent who –*

(c) *fails to perform his duties to his principal or to carry out the lawful instructions of his principal;*

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.*

(3) *Where the Board decides to take action of a kind specified in subsection (1)(a), (b) or (c), the Board may, by notice in writing, direct the licensed agent to take, or to refrain from taking, a specified action within such time as the Board shall in that notice specify.*

Conduct of the Matter

9. The central issue to be determined under Section 65(1)(c) of the ALA was whether the Respondent, through her course of dealings as agent for sale of the Applicant's house property at 5 Bleeser Street Fannie Bay, Darwin (hereinafter called "Bleeser Street"), had failed to perform her duties to, or carry out instructions of the Applicant as required by the ALA .

10. The Board was assisted by Bronwyn Haack throughout the Inquiry who called the applicant and her conveyancer, Naomi Irvine, to present evidence on behalf of the Applicant. Tass Liveris, Counsel for the Respondent was able to cross examine the Applicant and Ms Irvine, lead evidence from the Respondent and make submissions.

11. The Board was provided with an Inquiry Book which was accepted into evidence with the agreement of the Respondent.

The Facts

12. The Respondent holds an unrestricted Real Estate Agent's Licence, AL689, and all material times was the Business Manager of Cate Killiner Real Estate Pty Ltd trading as Cate Killiner Real Estate, the holder of Real Estate Agent's Licence AL690.

13. The Applicant, having decided to sell her home and relocate to a villa she had agreed to purchase at Pearl Retirement Resort, Fannie Bay, entered into an agreement, on 10th April 2012, appointing Cate Killiner Real Estate Pty Ltd, trading as Cate Killiner Real Estate as agent for sale of Bleeser Street. The Professional Fee section of the standard agreement was deleted and replaced with a hand-written notation "Fair Fee". No definition of "Fair Fee" was included; nor was a formal indication of the amount of such fee ever given to the Applicant by the Respondent, despite requests for such particularisation.

14. Bleeser Street remained unsold and, on 7th November 2012, the Respondent met with the Applicant to review two offers. The Applicant chose to proceed with the higher offer of \$1,030,000 made by Nigel and Jacinta Doyle (hereinafter called "the Purchasers"), giving instructions to the Respondent by email dated 8th November 2012, that she would accept that offer. The Applicant was disappointed with the amount of the offer, having hoped to secure a greater price, but decided to proceed as the property had been on the market for some time.

15. On the 10th November 2012, the Respondent brought a document, entitled "Contract of Sale", to the Respondent's house. The Respondent signed that document. During the parties' evidence it became apparent that the Applicant understood and believed, at all material times, that upon signing the document or shortly thereafter, she had entered into a binding contract of sale with the Purchasers on terms that they would purchase Bleeser Street for \$1,030,000, pay a deposit of \$100,000 with finance to be arranged by 30th November 2012 and settlement on 14th December 2012, such terms being recorded by handwritten insertions in the document as signed. The Applicant further believed that all purchasers introduced through the Respondent were "pre-approved" for finance so that any finance clause was a formality. In fact, no contract was formed on those terms as the Purchasers neither signed the document nor paid the deposit. The Applicant, however, believed that a binding contract of sale existed and had been forwarded by the Respondent to her conveyancer, Naomi Irvine. From that point in time, the Applicant acted upon that belief by, inter alia, making arrangements for her move to Pearl Retirement Resort. The Respondent ceased to advertise or otherwise offer the property for sale.

16. The Purchasers, in fact, were not in a position to buy Bleeser Street without finance for the whole amount of the purchase price or the sale of one of their other properties. The Applicant's evidence and email correspondence indicated that she was unaware of or did not understand that state of affairs and, by email to the Respondent on 21st November 2012, requested an extension of the date for settlement to 17th December 2012, to enable her to move her possessions.

17. The Respondent met with the Applicant on 12th December 2012 and advised her that the Purchasers could not proceed without an extension of the finance date or sale of another property. On 13th December 2012, a further copy of the contract was hand delivered to the Applicant with hand-written amendments. Those amendments were not initialled. The contract so amended and dated 13th December 2012, was duly exchanged. It provided for a purchase price of \$1,030,000, pay a deposit of "\$100,000 (\$10,000 to be paid on 13th December 2012, remainder on settlement)" with finance of \$1,030,000 to be arranged by 7th January 2013 and completion date "31st January 2013 on or before".

18. It was apparent from the Applicant's evidence that she remained confused as to the date on which a binding contract came into effect and eventually agreed on cross-examination that she had given instructions or at least consented to the handwritten amendments to the dates for completion and finance that formed part of the Contract as exchanged. The Applicant, however, remained adamant that at no point had she agreed to an amendment to the deposit conditions. The Respondent gave evidence referring to her handwritten notes recording details of her various meetings with the Applicant and averred that the Applicant had agreed to all of the amended terms of the Contract including the deposit. When questioned as to the unusual arrangement in respect of the deposit, the majority being paid at settlement, she insisted that it was a commonplace arrangement.

19. On 17th December 2012, the Purchasers' conveyancer contacted Naomi Irvine, requesting further amendments to the Contract including an increase to the amount of finance to \$1,050,000 and the inclusion of a clause making the contract further conditional on the prior sale of a Mt Isa property owned by the Purchasers. This request shocked the Applicant but by this stage she felt unable to do anything but agree to the majority of changes requested.

20. The Purchasers' prior sale of the Mt Isa property fell over and, on 7th January 2013, they rescinded the Contract. Relations between the Applicant and the Respondent had become extremely strained and on 8th January 2013, the Applicant terminated the Listing Agreement by email, denying some adverse comments that had been made by the Respondent as to the state of her mental health.

Determination

21. The Board, having considered the Investigation Report, the Inquiry Book, the evidence of the witnesses, and the submissions of both Counsel Assisting and Counsel for the Respondent, found that the Respondent had committed a breach of the rules of conduct in Section 65(1)(c) of the ALA, in that, she failed to perform her duties to her principal and/or carry out the lawful instructions of her principal, such failure consisting of alteration to the terms of the Contract by inserting without proper instructions the words "*\$10,000 to be paid on 13th December 2012, remainder on settlement*" into the deposit clause, contrary to Section 65(1)(c) of the ALA. The Board determined that it was authorised to take disciplinary action under Section 67(1)(c).

22. In reaching its conclusion, the Board accepted the evidence of the Applicant who was open and forthcoming about her confusion with the protracted and difficult nature of the negotiation and contract stages of the transaction the subject of this Inquiry. It was apparent that many of the problems that arose between the parties were caused by miscommunication and failure by the Respondent to ensure that her principal, the Applicant, was fully and properly informed. The Applicant's misconception as to the status of the document she signed on 10th November 2012 was apparent from her email correspondence with the Respondent and the Respondent's failure to ensure that her principal understood the exact nature of the transaction placed the Applicant in an untenable position. In those circumstances the Board accepted that the Applicant did not authorise the amendment to the terms of the deposit. The extent of the deterioration of the relationship between the parties was exemplified by the reference to abusive comments made by the Respondent about the state of the Applicant's mental in the email terminating the listing agreement. Such behaviour is unacceptable by an agent to her principal.

23. In considering the nature of the disciplinary action to be taken against the Respondent, the Board noted the Respondent had no previous complaints before the Board and the problems that arose in this matter were not the result of a wilful attempt to mislead the Applicant but rather the product of poor practices, exemplified by the use of "Fair Fee" to describe the Professional fees chargeable on the transaction.

24. The obligation placed on agents by Section 65(1)(c) of the ALA, to perform their duties to their principals and to follow their instructions to a large extent encapsulate the foundation of the agency relationship. These are fundamental obligations and failure to comply is a serious breach of the ALA.

Action

1. The Board determined at the Inquiry held on 17th June 2014. that the Respondent, Cate Killiner, had breached the rules of conduct for agents, in particular Section 65(1)(c) of the ALA by failing to perform her duties to her principal and/or carry out the lawful instructions of her principal by altering the terms of the Contract without proper instruction from the Applicant.
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)(a) of the ALA the Board determined to reprimand the Respondent for this breach of the rule of conduct in Section 65(1)(c) of the ALA.
4. Pursuant to its power under Section 69(3) of the 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, Mrs Margaret Arbon and a copy thereof to the Board.

For the Board

Suzanne Philip
Chairperson

/ / 2014