

**In a matter before
The Agents Licensing Board
of the Northern Territory**

Application for Disciplinary Action

Between: **Peter Roe**
Applicant

And **Whittles Body Corporate Management Pty Ltd**
Respondent

Date of hearing: **20 October 2014**

Alternate Chairperson: Tom Berkley
Industry Member: Diane Davis
Industry Member: Jo-Anne Pulsford
Consumer Representative: Lea Aitken
Departmental Member: Gareth James

Appearances:

Counsel Assisting the Board: Mark Thomas
Respondent: Paul Maher and Wade Roper

Statement of Reasons for Decision

In these reasons:

- a. the "Act" means the *Agents Licensing Act*; and
- b. the "Board" means the *Agents Licensing Board* as constituted by the Act and performing its duties under the Act.

Introduction

1. Following application for disciplinary action by the Applicant against the Respondent, dated 9 January 2013, the Board determined, on 11 March 2014, to conduct an inquiry in relation to 3 grounds for disciplinary action that were referred to it alleging that the Respondent had been guilty of breaches of the rules of conduct for agents (s 67(1)(c) of the Act), specifically:
 - (i) Contrary to s 65(1)(c) of the Act, the Respondent, by its servant Mr Sun Limin, failed to carry out the duties to, or lawful instructions of its principal, by walking out of the AGM of the Body Corporate of Unit Plan 86/06 4 Makagon Road, Berrimah which was being held on 6 December 2012 without delivering notice, in writing, of his departure;

- (ii) Contrary to s 65(1)(c) of the Act, the Respondent failed to carry out the duties to, or lawful instructions of its principal the Body Corporate of Unit Plan 86/06 4 Makagon Road, Berrimah, during 2012, transferring moneys raised to fix the driveway to pay for water expenses without notifying and obtaining the consent of its principal;
 - (iii) Contrary to s 67(1)(d) of the Act, the Respondent failed to exercise due skill, care and diligence in carrying out the duties to, or lawful instructions of its principal the Body Corporate of Unit Plan 86/06 4 Makagon Road, Berrimah, by failing, during the period May to October 2012, to notify the principal in a timely fashion of the steady increase in water bills incurred by the principal during that period.
2. The hearing was conducted at the Supreme Court at Darwin on 20 October 2014. The Board was assisted by Mr Mark Thomas of counsel, and the Respondent was represented by Mr Paul Maher, Solicitor, and Mr Wade Roper of counsel.

Exhibits

- 3. The Inquiry Book containing the Investigation Report of Mr Jeff Paul and other relevant documents was admitted as Exhibit 1.
- 4. A written statement of Mr Sun Limin, signed on 17 October 2014, was admitted as Exhibit 2. An annexure to that statement, "SL7", was replaced during the hearing with a two page invoice funding report also marked "SL7".

Legislation Considered

Agents Licensing Act

Unit Titles Act

Unit Titles Schemes Act

Unit Titles (Management Modules) Regulations

Background to Application for Disciplinary Action

- 5. In August 2012 the Applicant purchased unit 9 in a block of 10 commercial units at 4 Makagon Road, Berrimah and thereby became a member of the Body Corporate of Unit Plan 86/06 4 Makagon Road, Berrimah. The chairman of that body corporate was Mr Glen Henning, about whom the Applicant described Mr Henning's performance as chairman as:
*"He did an excellent job. He was a very personable sort of bloke, and he managed his own business with, say, seven or eight or nine employees, depending on workload, and you know, I think he was the man for the job at the time."*¹
- 6. The Respondent was the body corporate manager, pursuant to a contract called a Management Agreement that commenced on 1 September 2010.²
- 7. During 2010, and before the Applicant became a member of it, the body corporate had resolved to repair and reseal the driveway at 4 Makagon Road. Levies were to be raised to obtain sufficient funds for that purpose, and the work was to be done by Territory Bitumen Services.

¹ T.10

² Ex 1 pp 51-64

8. Some tenants also had, in 2012, expressed disquiet about possible water leakages and it had come to the notice of the Respondent that water utility charges were rising.
9. There is no doubt that the Respondent had alerted the body corporate to the rising water costs. On 11 April 2012, a servant of the Respondent, Mr Sun Limin, had written to the chairman of the body corporate attaching Power and Water charges for the preceding 24 months. Mr Sun Limin asked, amongst other things;

“The water usages in the last three months were quite higher than normal. Have you noticed any leaks?”
10. There was no reply from the body corporate to that e-mail, but correspondence between the chairman of the body corporate, Mr Henning, various tenants and the Respondent is helpfully set out in the Correspondence Matrix³ contained in the Inquiry Book, which lists relevant correspondence discovered by the investigator for the period 6 January 2010 to 18 February 2013.
11. That correspondence reveals a growing disquiet amongst the tenants as to delay in having the driveway repaired and the costs of rectifying the water leakage and the PAWA accounts for water usage. It also reveals a misunderstanding on the part of some tenants as to the various roles of the body corporate and the Respondent in relation to the management of the body corporate and the common property. Notwithstanding the Applicant’s view of the capabilities of the chairman of the body corporate noted in paragraph 5 hereof, nothing seemed to have been done by the body corporate between April 2012 and December 2012 to address the water usage issues.
12. An AGM was listed for 6 December 2012 at 4pm presided over by the chairman Mr Henning, and assisted by Mr Sun Limin for the Respondent. Agenda Item 3 was the resolution of re-appointment of the Respondent as manager of the body corporate. There is an intractable difference in the evidence of the Applicant and Mr Sun Limin as to what exactly went on in that meeting, however, it appears from the evidence that control of the meeting had broken down and that in the absence of agreement to the continued appointment of the Respondent as manager, Mr Sun Limin left the meeting before all of the agenda items had been dealt with by the meeting.
13. This action seemed to increase the disquiet of the tenants and prompted a letter of complaint from the Applicant, and Ms Sue Woodhouse, to the Respondent on 12 December 2012, which the Respondent was still investigating when the application for disciplinary action was made by the Applicant on 9 January 2013.
14. At all material times in this investigation Mr Henning was the manager of the body corporate. He had died before the present inquiry took place. The investigator conducted a record of interview with Mr Henning on 2 April 2013 and notes (at page 10 of his report) that the interview was 49 minutes and 50 seconds duration, and a copy of the recording was on file. Counsel Assisting and Mr Roper agreed that the evidence would not further progress the resolution of the issues in this matter, so it was not read onto the record. It forms no part of the consideration of the Board, although it is noted that there is now no evidence from Mr Henning to refute what

³ *op cit* 2 pp 65 - 79

Mr Sun Limin had to say about the events leading up to and including the AGM on 6 December 2012, save that of the Applicant.

The Issues

15. The issues in this inquiry are what were the duties to, or lawful instructions of the body corporate, and whether the Respondent failed to comply with them, or in the case of the third allegation, did not attend to them with sufficient care, skill and diligence.
16. As will become apparent from the proper concessions of counsel assisting, the only issue after the evidence was whether the Respondent failed to exercise due skill, care and diligence in carrying out the duties to, or lawful instructions of its principal the Body Corporate of Unit Plan 86/06 4 Makagon Road, Berrimah, contrary to s 65(1)(d) of the Act.
17. Notwithstanding those concessions, the Board will deal with each complaint in turn.

The Evidence

18. Counsel assisting the Board called five witnesses. They were the Applicant, Mr Peter Roe, Mr Sun Limin, an employee and servant of the Respondent, Ms Jacqui Cavanagh, an employee and servant of the Respondent, Mr Matthew Amber, the managing director of the Respondent, and Ms Wendy Lewis, an employee and servant of the Respondent.
19. These witnesses gave evidence that traversed all of the allegations against the Respondent to varying degrees.

The First Complaint

20. In relation to the first allegation, and in summary, Mr Roe gave sworn evidence that he attended the AGM on 6 December 2012. From the evidence of Mr Roe and Mr Sun Limin it can reasonably be inferred that the atmosphere of the meeting was, for want of a better word, belligerent and that when it came to agenda item 3, i.e. the re-appointment of the Respondent as manager of the body corporate that the meeting requested 10 minutes to consider that question. Mr Roe says that Mr Sun Limin then picked up his books and left the meeting, and saying that "*Whittles no longer represents you*". Mr Roe says that the attendees at the meeting were stunned, and that no resolution was made to terminate the Respondent as body corporate manager.
21. Mr Sun Limin said that he attended the meeting on time and most of the body corporate membership was late. The meeting was difficult to conduct because of the attitude of some of the participants. Mr Sun Limin said generally the owners were very angry, and that the Applicant was particularly upset about the water invoices⁴. He also said that the meeting abstained from re-appointing the Respondent, and that accordingly his involvement with the body corporate was at an end and he left the meeting.

⁴ Ex 2 paragraph 36

22. It is interesting that neither counsel addressed the fact that the chairman of the body corporate was still present and that the AGM could have gone on without the Respondent in any event.
23. In his very helpful submissions to the Board, Mr Thomas of counsel assisting argued that the first two complaints were not made out on the evidence. In relation to the first allegation Mr Thomas points out that it is uncertain what the intention of the parties was in relation to renewal of the Management Agreement. It may be that it was continued on a month to month basis with the intention that it be extended for the full 12 month term by a motion at the AGM. This is an interpretation that is also consistent with Mr Roper's submissions to the Board on 20 October 2014.⁵
24. If that was the case, then it is agreed between the parties that no re-appointment took place. The question is whether a technical failure by both parties to precisely follow the terms of their contract can amount to a breach of duty by the Respondent to the body corporate. In this regard the Board has given great weight to the submissions of counsel assisting set out below:

"25. However, from a position of natural justice it is difficult not to accept the fundamental proposition that a technical breach of the contractual obligation in this area does not necessarily mean that a failure to perform a duty to the principal is enlivened. For example, if it were the case that an AGM descended into a chaos, with the Manager being roundly abused by the Body Corporate proprietors, and yet no decision made by the Body Corporate at that time to terminate the relationship, it would be entirely understandable why a person in the position of the Body Corporate Manager would state that the relationship was over and leave without having provided written notice in advance. It should be emphasised, of course, that this was not of course the case in this matter; however, the example serves as a reminder of the importance of the application of fundamental principles of natural justice. It is submitted that in the circumstances as far as they can be understood in this case, which would appear to suggest a position of close to a complete breakdown of trust between the parties at or about the time of the cessation of Mr Sun Limin's presence in the meeting, that the position adopted by the Whittles Manager, whilst not desirable, was explicable. Accordingly, whilst a technical breach of Whittles' contractual obligation pursuant to clause 14.1 (d) occurred, it is submitted that no breach of his duties to his principal, at the particular time of the breach, occurred. Furthermore, there was no breach of the alternative basis of liability that is specified in s 65 (1) (c), which refers to the failure to carry out the lawful instructions of the principal. It simply cannot be determined what those instructions were at the time of the departure of Mr Sun Limin. Therefore, this basis of liability had no foundation. In summary, it is submitted that there is no grounds established for disciplinary action in regard to Ground 1."

25. The Board finds that the belligerent attitude at the AGM, contributed to in part by the Applicant and other members of the body corporate⁶, was not appropriate to the resolution of the issues facing the body corporate. In the circumstances the Board agrees with the submissions of counsel assisting that it was entirely understandable that Mr Sun Limin left the meeting. There was, in short, nothing he could do. No-one has to put up with belligerent behaviour in the performance of their duties.

⁵ T.99

⁶ Ex 2 paragraph 36

26. The Board dismisses the first complaint and finds that there are no grounds to take disciplinary action.

The Second Complaint

27. The nub of this complaint is that the Respondent transferred money from the sinking fund, intended by the membership of the body corporate to pay for the driveway renovations, and applied them to the payment of the water invoices *without authority to do so* (emphasis added). As explained by counsel assisting at paragraphs 26-31 of his submissions, and by reference to the *Unit Titles (Management Modules) Regulations*, the person able to give that instruction or prohibition may have been Mr Henning, if he were nominated to do so by the body corporate. No evidence was brought by counsel assisting of any such authority at the hearing before the Board, which no doubt prompted counsel assisting's concession as to a technical lack of authority. It not having been raised for the Board's decision, the Board has not considered whether any authority was implied by the deceased's chairmanship of the body corporate.

28. In addition, counsel assisting now points out that strictly speaking, there is a complete absence of available evidence of any such authority, actual or implied (Mr Henning being dead) and that:

"31. Accordingly, it cannot, on the available materials, be accepted that the then Chairmen, Mr Glen Henning,⁷ had authority to act as a representative of the committee in 2012."

29. Whilst this is a technical point, it has some force. It is strictly unnecessary to deal with the evidence concerning this complaint any further for the reasons set out in Mr Thomas's helpful submissions. In particular, he points out that there was a transfer of money to pay the water bills, and that there was no prohibition as to where that money was to come from.

Notwithstanding that position, the Board accepts the evidence of Ms Cavanagh that the system in place at the Respondent's office was that invoices were paid as they came in and that if there were funds available the invoices would be paid. Sometimes those invoices would be referred to the particular body corporate manager, but there was no guarantee of that happening.

30. Such a system of work in the Respondent's office may have created a situation not intended by either the body corporate or the Respondent, but that is not the issue here. The issue is whether the Respondent failed to carry out its duties to, or failed to follow the instructions of, its principal.

31. The duties of the Respondent to the body corporate are a duty to use care, skill and diligence in carrying out its management function⁸. Not every mistake or failure will find an agent in breach of that duty. Whether an agent's breach of such a duty is a ground for disciplinary action depends on the circumstances of the particular case.

⁷ Mr Henning subsequently passed away in about September 2013.

⁸ S 65(d) of the Act

32. The Board accepts and gives great weight to the submission of counsel assisting that:
- “39. *The predicate for proof of Ground 2 is a lawful instruction, at the applicable time, by the principal, prohibiting transfer of money from the driveway levy/levies to pay for the water expenses. There is none. Nor is there anything in the Management Agreement that prohibits this. Nor is there a financial record documenting such a transfer during the relevant time period. Accordingly in reference to Ground 2, as a consequence of these matters, a breach of s 65 (1)(c) of the ALA cannot be made out.*”
33. The Board finds that the practice of the parties was that normally the Respondent would deal with the chairman of the body corporate in relation to the affairs of the body corporate (although in this case the chairman had on at least 2 occasions encouraged tenants to deal directly with the respondent). The chairman (Mr Henning) was fully aware of the rising water bills and it can be inferred that he was also aware of the water leaks. It was up to the body corporate to instruct the Respondent on how it wanted to handle these matters.
34. The Board acknowledges that an application for disciplinary action is an application for the imposition of a penalty if the grounds for disciplinary action are made out. Accordingly, the Board follows convention and interprets the words of the statute strictly, even though the proceedings are an application for the imposition of a civil penalty.
35. A strict interpretation requires proof of what instructions were given, and the authority to give such instructions.
36. Mr Henning was, according to the Applicant, an active chairman of the body corporate (see paragraph 5 hereof). Ms Lewis e-mailed Mr Henning on 19 July 2012, and proposed that \$3,000.00 be transferred from the sinking fund to the administration fund to pay the outstanding arrears in the water bills. Mr Henning did not agree with that course of action. The complaint before the Board arises from what happened next when sinking fund money reserved for the driveway repairs were used to pay water bills that could not be paid out of the administration fund.
37. As to the difference between a sinking fund and an administration fund, Mr Sun Limin in his evidence to the Board on 20 October 2014, stated that the separation between the sinking fund and the administrative fund was a paper division and that he thought that there was only one account.⁹ He said that he thought that the sinking fund was set aside “...for any major expenses and unforeseen expenses.”¹⁰
38. It can be inferred that, at least according to Mr Sun Limin, all moneys could be applied to the just debts of the body corporate regardless of whether the intention of the body corporate was that some moneys be set aside for approved projects.

⁹ T.22 - 23

¹⁰ T.24

39. The Board finds that Mr Henning was well aware of the fact that there were insufficient moneys to pay the water bills in the administration fund. Mr Henning did not approve that plan proffered by Ms Lewis and instead suggested that she approach the owners for a special levy to pay those bills. The matter appeared to have been left in limbo, with the administration of the body corporate's bills being left entirely to the Respondent without formal direction.¹¹ When Mr Sun Limin returned to his duties, he did not seek to raise funds by way of a special levy.
40. Meanwhile, the Respondent's accounts department was paying the water bills as they fell due, as it was required to do. In the absence of specific instructions not to do so, the Respondent was complying with its obligations under the Management agreement. The Board notes that clause 7.2 of the Management Agreement authorises the Respondent to access the body corporate's bank account to pay all invoices, accounts, expenses and liabilities properly incurred by the body corporate.
41. Whatever the functional utility of separating moneys into an administration fund or a sinking fund, there is no contractual obligation on the Respondent to do anything other than as expressly or impliedly provided in its management agreement with the body corporate. The separation of the body corporate's money into funds is simply a management tool, although it can indicate the intention of the body corporate as to what to do with its funds, but such an inferred intention must give way to the clearly expressed contractual obligations of the management agreement.
42. In this case, the body corporate was totally ineffective in responding to the water issue. The fact that it did not take any action to fix leaks, or to contact PAWA (as it then was), or to give firm instruction to the Respondent to do anything, does not make the Respondent guilty of the misconduct complained of by the Applicant.
43. The Board finds that the Respondent could have done more than it did to resolve the issue, but that what it did was not a failure to follow any clear instructions of the body corporate.
44. Mr Henning was in a position to call on the members of the body corporate for a decision as to what to do. Nothing was done. The situation with the water bills was not even an agenda item for the 6 December 2012 meeting, it being left to "*General Discussion*". As counsel assisting points out, there simply was no direction. Even if Mr Henning did have the authority of the body corporate to give lawful directions, for the reasons foregoing, this grounds for disciplinary action must fail.
45. The Board dismisses the second complaint and finds that there are no grounds to take disciplinary action.

The Third Complaint

46. The issue here is whether the Respondent has failed to exercise due skill, care or diligence in carrying out his duties on behalf of his principal. The specific questions are what were the Respondent's duties, and whether the Respondent's performance in advising the body corporate about the increasing water invoices was such a failure?

¹¹ Ex 2 paragraphs 23 and 25

47. Counsel assisting has argued strongly in his written submissions that there was a failure by the Respondent to exercise due skill, care or diligence in carrying out the respondent's duties to the body corporate. Counsel assisting says that the facts of the second complaint should be considered by the Board in determining whether there are grounds for disciplinary action in the third complaint.
48. Mr Thomas points out that the period relevant to the complaint is confined to May to October 2012, and that the water bills for that period had increased 500% over the corresponding period in the year before.
49. Inferentially, says counsel assisting, it should have been obvious to any diligent manager that something was wrong. Mr Thomas argues that a duty existed to bring the increasing water invoices to the attention of the body corporate. As detailed above, the Board notes, however, that the rising invoices were brought to the attention of Mr Henning by Mr Sun Limin.
50. Counsel assisting the Board devoted some time to the internal management of the Respondent to allow the Board to determine whether there was any inherent weakness in the management system that the Respondent knew of, and whether any inherent weakness lead to a failure of a duty owed to the body corporate which adversely affected the body corporate. Counsel assisting took the Board to electronically recorded record of interview (EROI) with Jeff Paul and Don Lawless on 16 April 2013, wherein Ms Cavanagh and Mr Sun Limin were asked questions about whether the Respondent has altered its internal management procedures as a result of the Applicant's complaint, in recognition of any inherent weakness in the Respondent's systems.
51. Ms Cavanagh observed that at the time period in question the invoices came in and were automatically processed and filed.¹² She added "*...since this, ah, since case we have put in some extra steps now, um to ensure that the same thing doesn't happen again*".¹³ She also disclosed that the Managers are now checking the financial statements quarterly.¹⁴
52. Furthermore, she said that now the managers receive a hard copy to do a review.¹⁵ She said that the problem would be picked up now.¹⁶ Counsel assisting urges the Board to consider these statements as evidence that there was a failing by the Respondent in the administration of the affairs of the principal, and accordingly, to find that the Respondent did not exercise due skill, care, or diligence in carrying out its duties to the body corporate.
53. In the EROI, Mr Sun Limin accepted that the bills did not go to the body corporate, so that there was no external checking.¹⁷ Mr Sun Limin also stated that he was unaware of the high water bills until November 2012¹⁸ when he was reviewing the financial material for the AGM. This statement is, however, inconsistent with his e-mail of 11 April 2012, alerting the body corporate to the rising water invoices.

¹² A 151, Ex 1 page 166

¹³ A 164, Ex 1 page 167

¹⁴ A 165, Ex 1 page 168

¹⁵ A 170, Ex 1 page 168

¹⁶ A 172, Ex 1 page 168

¹⁷ A 185, Ex 1 page 170

¹⁸ A 283, Ex 1 page 183

54. In his EROI with the investigator he said that he felt *“astonished and I feel surprised and ah I check the record first, confirm it was correct because it looked abnormal to me, why it’s so high”*¹⁹ He said that he telephoned Power and Water a couple of days after noticing the bills.²⁰ He agreed that he felt a sense of responsibility, although this was clearly in response to the way that the question was framed.²¹ He also said that it was a *“very abnormal cost”*.²² He said, in effect, that steps had been taken since this to ensure that it would not happen again.²³
55. Because of the leading nature of the questions, the answers could be taken as either an admission that the Respondent’s response to the information could have been better, or alternatively, that Mr Sun Limin and the Respondent will be better equipped in the future to advise the client’s so as to prevent a situation like this happening in the future.
56. It appears that both Ms Cavanagh and Mr Sun Limin recognised that there was a deficiency in the Respondent’s management system in that the invoices would go to the accounts section for payment, and that they may or may not be brought to the attention of the assigned manager, and that the present situation could occur because no alerts were built in to the system. There was an acknowledgement that every invoice was not sent to the chairman of the body corporate for checking.
57. This concession is found in the following passage of evidence of Ms Cavanagh in response to questions from counsel assisting²⁴:

“And the Power and Water Invoices came in on a monthly basis as opposed to a quarterly basis at that time?---Not for all properties.

Not for all properties, but in relation to this particular property-monthly?---Without looking at the books, I couldn’t say for sure.

You don’t recall. Okay. Well look, you can take it that in this particular case that it was monthly basis. Okay, now in relation to the question of some sort of process that Whittles to initiate action by the manager of the property-the Body Corporate Manager-if there was an increase in bills-invoices, from say Power and Water. Was there anything in place at that time in relation to that?---Only the funding reports.

And that’s it?---That’s it.

And when you say the funding report, what do you mean exactly?---So each week a report is emailed to the manager - - -

Yes?---- - - -which shows if there are any properties in their portfolio with insufficient funds to pay for bills that have been approved for payment - - -

Yes?---- - - -and that have been allocated to that plan.

¹⁹ A 288, Ex 1 page 183

²⁰ A 290, Ex 1 page 183

²¹ A 292, Ex 1 page 184

²² A 294, Ex 1 page 184

²³ See A 297 and 298, Ex 1 page 184

²⁴ T. 62 - 63

Alright. So if there was, say for example, significant deficit in the admin fund-administrative fund, would that be relayed through to the manager in the funding report?---Correct.

Okay. So would it be expected that the manager would do something in relation to that?---Yes.

Alright. Now in relation to this particular case, is it the case-at answer 164, which is on page 167 of the inquiry book in front of you. If you have a look at that there, right down the bottom, it's down the bottom of the page?---Mm mm.

Do you see there that you refer to, in this case, you took extra steps now to ensure that the same thing doesn't happen again. Is that right?---Mm mm.

Now what did you mean by the 'extra steps'?---We have a couple of things that we do every six months - - -

Yes?--- - - -a financial statement year-to-date is presented for each manager to review.

Yes?---At which time it's a simple process of going through the budget amounts verses the actuals to see if there's any problems with any of the expenditure there. To make sure that they're on track and that further funds aren't required. And also the water bills are all sighted by each manager now.

How frequently?---As they are tendered.

So as they're actually sent in, so on a monthly basis. Is that right?---For the ones that are invoiced monthly, that's correct.

Okay. So in this case now the water bills would simply go through to the manager-the relevant body corporate manger, if it's on a monthly basis. Is that right?---

Okay. And was that process initiated as the consequences of this particular matter or this and other matters?---Yes."

58. The review of the Respondent's procedures arising from this particular case was confirmed by Mr Amber, who gave the following evidence:²⁵

"Did Whittles have in place at that time, that is in 2012 any protocol or procedure concerning high water notifications? That is, to be precise, if there was a water usage continually occurring, was there anything in place that Whittles had to alert the body corporate manager and the body corporate owners of that particular factor?---At that time we would quite often consider the water that is noted on the statement if it is in complete contrast to a budget figure. So we consider that, we consider total expenditure at the end of the financial year which is when we get our comparison. If nothing is provided to us throughout a financial year, then we are unable to determine that. Our software isn't capably of determining any variable change like the usage or costs of the water (inaudible).

²⁵ T. 66-67

Was there any review of Whittles procedures in that regard after this matter occurred, that is was there a change in the procedures dealing with this problem after this matter occurred?---Yes, after we were made aware. All processes are in place until such time as an event is determined or is discovered. In this instance, we sought to see what ability we had within our software to look at variation. Whilst it's not been required in the past, different utilities companies provide us difference mechanisms of a variation. So we sought to see if we could provide that within our own internal systems.

So what did you do?---I spoke to my software provider and asked if they could write an exception report against usage to budget.

And did that happen?---Yes.

So in terms of what that actually means, would you be able to explain to the Board about how that practically works?---Practically it works, and I'm not sure what's been tendered into evidence by way of our accounts system. But it will look at now, actual payments made verses predicted expenses to be incurred throughout the year. And it will make a comparison by way of percentage of overrun."

59. As to the question of the exercise of due skill, care or diligence the Board was not assisted by any evidence that the Respondent was using other than industry standard procedures and accounting systems. Nor is there any allegation that the Respondent's clients generally had suffered by any systemic failure of the Respondent to properly manage their bodies corporate.
60. The Board would normally give great weight to these factors when considering whether the Respondent failed to exercise "...*due skill, care or diligence in carrying out...*" it's duties on behalf of the body corporate. In the absence of any evidence of industry standards, the Board is left to come to its own view, if it can, of whether the acts of the Respondent amounted to a failure to exercise due skill, care or diligence. The evidence excepted above simply shows that the Respondent's systems were not suited to timely alerts to clients as to increasing water bills.
61. Counsel for the Respondent filed submissions to assist the Board in the resolution of this question. The Respondent argued that at most, its actions could be seen as a negligent failure to perform a contractual duty. This submission was contrary to the factual submission that there was no failing on behalf of the Respondent because Mr Sun Limin had informed the body corporate of his observations about rising water usage and costs as early as April 2012.
62. In addition the Respondent submits that the Board's disciplinary role "*exists only to ensure the promotion of an environment conducive to the maintenance of a suitably qualified licensed profession, comporting themselves in accordance with a standard of professionalism commensurate with the criterion for eligibility provided for in s22 of the Act.*"²⁶ In other words, the Board is only to be concerned with the behaviour of agents as that behaviour relates to the eligibility of licensing set out in s 22 of the Act.

²⁶ Respondent's submissions paragraph 16

63. The Board rejects that submission. It would be wrong to construe the Act and to limit the powers of the Board in this way. The Board not only has the power to set the eligibility of persons to become an agent under the Act, but also to discipline them and revoke any license given to them, including the imposition of substantial fines. Where appropriate, the Board has a duty to decide if an agent has failed to exercise due skill, care or diligence if that question arises in a proceeding before it. The Board has the power to punish the agent if it sees fit to do so.
64. The Board agrees with the Respondent that the Act is to be construed purposively. However the Board does not agree with the Respondent's assertion that any construction of s 65(1)(d) and s 67(1)(c), which equates a negligent breach of a purely contractual duty with grounds for disciplinary action, is untenable or inconsistent with the language and objects of the Act as a whole. That is because the statutory duty of care contained in s 65(1)(d) of the Act is included in the code of conduct for agents, and 67(1)(c) of the Act makes a determination of a breach of the code of conduct by an agent a matter for the determination of the Board.
65. An allegation that an agent has failed to exercise due skill, care or diligence in carrying out his duties on behalf of his principal is simply an allegation of a negligent performance of a duty by that agent, which arises either contractually or is implied in the relationship between the agent and the principal. The issue is only whether it is a failure that constitutes a breach of the code of conduct by that agent.
66. The duty of skill, care or diligence upon an agent is a statutory duty imposed by the Act to regulate the performance of agents. The Board notes that the language and rules of conduct for agents contained in the Act is *in pari material* with many other statutes through Australia regulating the conduct of tradesmen and professionals.
67. The word "due" imports a standard of care, which is not further defined, but it must relate to the extant standards of profession. The Respondent at least concedes that it owed a general duty of care to the body corporate to inform the body corporate of matters of importance that come to the Respondent's notice by virtue of the management agreement²⁷. The Board agrees with that proposition. The Respondent asserts that it has discharged that obligation in notifying the body corporate of the issues surrounding water usage.
68. The Board cannot find that the agent failed, negligently or otherwise, to inform the body corporate of the issues surrounding the water invoices. It is clear that the issue was raised at least twice with the body corporate, once by Mr Sun Limin in April 2012 and once by Ms Lewis in July 2012. Given that the temporal limitation of the complaint is between May and October 2012, it could not be said that the Respondent failed to notify the body corporate in a timely fashion. There is no evidence before the Board of any industry standard or practice that would make what the Respondent did contrary to or not up to industry standard or practice.
69. The Board also considers its finding in paragraphs 42, 43 and 44 hereof to be relevant to the determination of whether the Respondent has failed in its duty of care to the body corporate.

²⁷ *ibid* paragraph 50.

70. The Board dismisses the third complaint and finds that there are no grounds for disciplinary action.

For the Board

Tom Berkley
Alternate Chairman

24 February 2015