

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

APPLICATION FOR DISCIPLINARY ACTION

BETWEEN: **AGENTS LICENSING BOARD OF THE
NORTHERN TERRITORY**

AND **PETER NORTON REAL ESTATE PTY LTD**
trading as **FIRST NATIONAL REAL ESTATE**
FRAMPTONS
Respondent

Date of hearing: **11th September, 2013**

Chairperson: Suzanne Philip
Agent's Representative: Diane Davis
Departmental Member: Gareth James

Appearances:

Counsel Assisting the Board: Alistair Wyvill
Respondent: Peer Schroter

STATEMENT OF REASONS FOR DECISION

Background

1. During 2010, 2011 and 2012 the Agents Licensing Board ("the Board") received five applications under section 68(3) of the *Agents Licensing Act* ("ALA") for Disciplinary Action against Peter Norton Real Estate Pty Ltd trading as First National Real Estate Framptons ("Framptons"), as follows:

- (i) Blythe Stafford, dated 10th June 2010;
- (ii) Trent and Amanda Abbott, dated 13th April 2011;
- (iii) David and Marieta Ives, dated 21st April 2011;
- (iv) Alan Fisher and Denyse Thornton, dated 29th April 2011;
- (v) Danny and Sarah Dick, dated 10th November 2012

("the Complainants").

2. All applications by the Complainants were made on the grounds of breaches of the rules of conduct for agents as set out in Section 67(1) (c) ALA, such rules being contained in Section 65 ALA.

All arose out of a scheme promoted by Framptons as "Framptons New Homes" and the subsequent entry into various building contracts by the complainants with Carey Builders Pty Ltd. Following the collapse of Carey Builders Pty Ltd, the complainants suffered substantial and even devastating financial losses.

3. Following the tabling and consideration of an initial Investigation Report relating to the applications listed at paragraph 1(i)-(iv) at its meeting on 15th August 2011, the Board sought legal opinion as to jurisdiction in relation to the applications. It was advised that the relationship between Framptons and the complainants, which was the subject of the applications, fell outside the type of agency contemplated by the ALA and, in consequence, the Board would not have jurisdiction. The Board, however, on its own motion under Section 68 (4)(b) ALA, directed the Registrar to conduct further investigations to determine whether there were grounds under 67 to conduct an Inquiry on the basis of a possible breach of Section 65(1)(j), the terms of that provision not being dependent on a relationship of principal and real estate agent.

4. A further Investigation Report was tabled at the Board's meeting on 12th November 2012 and the Board formally determined under section 68(5)(c) that there was insufficient evidence to hold an Inquiry in relation to the applications listed in paragraph 1 (i) –(iv). The Investigation Report into Danny and Sarah Dick's application, listed at paragraph 1(v) above, having been received after the Board's meeting, was dealt with out of session in the same manner. The Board did, however, determine at its meeting on 12th November 2012 to hold an Inquiry on its own motion into an alleged breach of Section 65(1)(j) by Framptons.

The Issues

5. 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)(j) ALA;
 - b. if so, the appropriate disciplinary sanction.

Relevant Legislation

6. 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;

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

68. Applications for disciplinary action

(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.

8. In this case, the Board relied on paragraphs 65(1)(j) ALA to ground the application for disciplinary action.

65. Rules of conduct

(1) *A licensed agent who –*

(j) publishes, or causes to be published an advertisement or other statement that is false, misleading or likely to deceive a person;

is guilty of a breach of the rules of conduct for agents.

9. Where the Board grants an application, the Respondent may be dealt with as provided in section 69 of the Act.

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 fulfillment of a condition, specified in the notice; or

(d) by notice in writing, revoke the licence of the agent.

Conduct of the Matter

10. The central issue to be determined under Section 65(1)(j) ALA was whether Framptons, by its advertisements and other statements (“the Subject Publications”) published in 2008 and early 2009 with respect to “Framptons New Homes”, did publish or cause to be published an advertisement or other statement which was false, misleading or likely to deceive a person contrary to the rule of conduct in s.65(1)(j) of the Act?

11. Counsel Assisting tendered various documents including a Document List, Sentencing Remarks of Blokland J in the Supreme Court of the Northern Territory in R v Randal Carey and a statement of facts and matters which were conditionally accepted by Framptons (the “Statement”). The Statement was tendered on the condition that, if once the Board had considered the various materials before it and submissions from Counsel, including submissions as to penalty, the Board indicated that it would not make a finding of wider scope than that Framptons had published a misleading advertisement or statement contrary to s.65(1)(j) of the ALA and would not impose a penalty of greater severity than a reprimand, Framptons would accept the statement of facts and matters as accurate and would not actively seek to contest a finding in the terms indicated. If the Board was not prepared to give those indications, Framptons was not prepared to proceed on the basis of the Statement but instead wished to fully contest the Inquiry. In that event, the Board would adjourn the Inquiry to give Framptons an opportunity to prepare and present its case.

12. The Board received submissions from Counsel Assisting concerning the facts as revealed in the various documents tendered, the meaning of “false, misleading or likely to deceive” as used in Section 65(1)(j) and appropriate penalties. The Board also accepted submissions from Counsel for the Respondent as to the good character and service records of Framptons and its Directors.

The Facts as accepted by Framptons

13. Framptons holds an unrestricted Real Estate and Business Agent’s Licence, AL159, and all material times conducted business under that licence in Alice Springs.

14. As part of its business, in 2008 and 2009, Framptons advertised to the public a new product under the name “Framptons New Homes”. This new product involved Framptons assisting the owners or purchasers of undeveloped residential land with the design and construction of new homes on their land, including the tender of final plans to available and interested builders actively and consistently operating building activities in Alice Springs for quoting on the costs of construction. In return, Framptons was to be paid a disclosed commission by the builder from the construction price agreed by the customer. The commission was \$8,800 per house or 3.3% of the contract price whichever was greater.

15. As part of the promotion of “Framptons New Homes”, Framptons produced and published brochures to the public which said Framptons would “take care of... tendering (the construction work) to our panel of builders” and “work closely with you to finalise the design plan for quoting by our selected panel of builders”.

16. This marketing was successful and a number of customers selected the Frampton New Homes product. The builder from its selected panel whose competitive building quotes Framptons presented to the great majority of its customers was Randal Carey, who held himself out as managing Carey Builders Pty Ltd. Most of these customers, including the Complainants, subsequently entered into building contracts with Carey Builders Pty Ltd.

17. From the contents of the “Framptons New Homes” brochures, some customers believed that Framptons had undertaken appropriate background checks to confirm that Randal Carey/Carey Builders Pty Ltd was a competent and trust-worthy builder.

18. Whilst Randal Carey presented as a competent and trust-worthy builder, throughout this period he was in fact an undischarged bankrupt. Although initially he personally was registered with the NT Building Practitioners Board (from 15 December 2006 for a period of two years) and a member of the Housing Industry Association, his registration lapsed and was not renewed in 2009 due to his failure to disclose in 2006 his status as an undischarged bankrupt to the NT Building Practitioners Board. The company which entered into the contracts with Frampton’s customers, Carey Builders Pty Ltd, was never registered with NT Building Practitioners Board.

19. Carey Builders Pty Ltd went into liquidation in March 2010 and a number of the Framptons New Homes customers, including the Complainants, suffered substantial losses as a result because their homes were not completed.

20. Randal Carey was subsequently convicted in the Supreme Court of the Northern Territory on his guilty plea of 9 counts of obtaining monetary benefits for himself by deception, and sentenced to a 3 year term of imprisonment, suspended after 12 months, on the 13th May 2013.

21. Thereafter, on 11 July 2013 Randal Carey was further sentenced to 3 months jail after pleading guilty to a charge brought by the Australian Securities and Investments Commission of managing Carey Builders Pty Ltd whilst a disqualified undischarged bankrupt.

Determination

22. The Board having considered submissions by Counsel Assisting in relation to the meaning and scope of Section 65(1)(j) ALA, determined that breach of that provision required proof of two elements, firstly, *publication* of an advertisement or statement and, secondly, that the advertisement or statement be *false, misleading or likely to deceive*.

The Board considered that the element of publication was met by the printing and distribution of the Subject Publications including brochures and other advertisements by Framptons.

23. In relation to the element of *false, misleading or likely to deceive*, the Board accepted Counsel's submissions that the phrase is analogous to the provisions of section 18(1) of schedule 2 of the Competition and Consumer Act 2010 (Cth) and its predecessors in Section 52 of the Trade Practices Act 1974 (Cth) and section 42 of the Consumer Affairs and Fair Trading Act (NT). Accordingly, authorities on those provisions could be considered in determining the meaning of Section 65(1)(j). The Board determined that an advertisement or statement was misleading within the terms of section 65(1)(j) if it tended to induce error in the reader and that it was not necessary to show moral "turpitude or trickery" or any intention to mislead for a breach to have incurred. The test to be applied was that of reasonableness and the Board should consider the sense in which the ordinary and reasonable reader would understand the advertisement.

24. In the present Inquiry, the Board had before it five Statutory Declarations from the Complainants, detailing their various beliefs, arising out of the Subject Publications, and, in particular, that Framptons had conducted the necessary background checks on Carey Builders Pty Ltd and Randal Carey. Further, in the Statement, Framptons accepted, "with hindsight", that the statements in the Subject Publications including, "take care of... tendering (the construction work) to our panel of builders" and "work closely with you to finalise the design plan for quoting by our selected panel of builders", "may have led customers into thinking that Framptons had undertaken the sort of background checks which a prudent homebuilder would have undertaken to confirm the builder with whom a building contract was to be entered into was competent and trust-worthy". In fact, the checks Framptons had made in respect of Carey Builders Pty Ltd, the party which entered into the building contracts, were seriously incomplete. Framptons relied upon Randal Carey's registration with the NT Building Practitioners Board and membership of the Housing Industry Association. However, Carey Builders Pty Ltd itself was not a registered builder and Randal Carey was neither a shareholder nor director of that company. Further from December 2001, Carey had been an undischarged bankrupt.

25. On the basis of the materials before it, the Board determined that Framptons had committed a breach of the rules of conduct in section 65(1)(j), in that it had published misleading advertisements or statements and that the Board was authorised to take disciplinary action under section 67(1)(c).

26. In considering the nature of the disciplinary action to be taken against the Respondent, the Board noted Framptons' assertion in the Statement that it had expected its customers to make their inquiries and satisfy themselves of the competence and trustworthiness of the builder before signing any contract. Further, in relation to Randal Carey and Carey Builders Pty Ltd, Framptons stated their belief, on the basis of the building work undertaken in Alice Springs in 2008, Randal Carey's then current builders registration (which was confirmed by Framptons with a search of the NT Building Practitioners Board website), and then current membership of the Housing Industry

Association, that they were competent and trustworthy. The Board further considered Mr Schroter's submissions in relation the good character and service records of Framptons and its Directors.

27. The collapse of Carey Builders Pty Ltd and the associated criminal activities of Randal Carey resulted in enormous financial loss and personal suffering for many of those people who entered into building contracts with that company, including the Complainants. The publication of the misleading material by the Respondent in connection with Framptons New Homes helped to create an environment in which the complainants and others felt reassured that Carey Builders Pty Ltd was a reputable builder who could properly undertake the building work and, as a result, they entered into those building contracts. However, the Board accepted there were other factors that came into play between the publication of the misleading material and entry into the building contracts. Those matters fell beyond the limited scope of this Inquiry and were not relevant to the determination of penalty under section 69(1) ALA. Further, they prevented the necessary connection between the breach of the rules of conduct and the making of a profit, if any, by Framptons which would be required to trigger the Board's powers under section 69A to order repayment of any such profit. The material before the Board suggested that a failure of management and systems lead to the breach of section 67(1)(j) by the Respondent. In the Statement, Framptons specifically apologised to any of its customers who failed to undertake background checks on the basis of the misleading publications and further undertook to the Board to take greater care in these respects in the future and to implement a quality review process to target improvements in its internal processes to address these issues. The Board also noted that Framptons relied, at least in part, on the builder's registration held by Randal Carey. Those factors, together with the protracted nature of the matter, led the Board to conclude that a reprimand was the appropriate sanction under section 69(1).

Action

1. The Board determined at the Inquiry held on 11th September 2013 that the Respondent, Peter Norton Real Estate Pty Ltd trading as First National Real Estate Framptons, had breached the rules of conduct for agents, in particular section 65(1)(j) ALA by publishing an advertisement or other statement that was misleading.
2. The particulars of that breach were that:
 - (i) the publications in 2008 and 2009, extracts of which are contained in paragraph 15 above, suggested that from making reasonable inquiries Framptons had satisfied itself that each of the builders on its panel could reasonably be relied upon to undertake and complete, properly and honestly, building work of the kind which these publications contemplated. As a result, it was likely that Frampton's customers would conclude that Framptons had taken on this responsibility and that it was not necessary to make these inquiries themselves;

- (ii) this was misleading in that Framptons in fact expected its customers to make those inquiries themselves and further, in relation to Carey Builders Pty Ltd, Framptons had not in fact made such inquiries.
- 3. As a result, the Board determined that it was authorised to take disciplinary action against Framptons under section 69(1) of the Act as the ground in section 67(1)(c) of the Act was satisfied.
- 4. In the circumstances, pursuant to section 69(1)(a) of the Act the Board determined to reprimand Framptons for this breach of the rule of conduct in section 65(1)(j) of the Act.
- 5. Pursuant to its power under section 69(3) ALA the Board further directed that Framptons, within two months of the date of service on them of a copy of this Statement of Reasons for Decision, provide to the Board written evidence of the quality review process undertaken to target improvements in its internal processes and steps taken by it to implement such improvements to ensure that such a breach of the rules of conduct for agents does not occur again.

For the Board



Suzanne Philip
Chairperson

25 September 2013