

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

**Application for Disciplinary Action**

**Between:** **Paul Marchant and Jillian Frost**  
Applicants

**And** **Molara Pty Ltd trading as First National Real  
Estate O'Donoghues**  
Respondent

Date of hearing: **20 November 2014**

Alternate Chairperson: Tom Berkley  
Alternate Industry Member: Denise Meeking  
Departmental Member: Gareth James

Appearances:

Counsel Assisting the Board: Bronwyn Haack  
Respondent: Cassandra Ellis

**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; and
- c. "the premises" is 2/27 Lakes Crescent, Marrara.

**INTRODUCTION**

1. Following application for disciplinary action by the Applicants against the Respondent, dated 1 October 2013, the Board determined, on 18 August 2014, pursuant to s68(4) of the Act, to conduct an inquiry in relation to 2 grounds for disciplinary action that were referred to it alleging:
  - a. that the Respondent had been guilty of breaching s35 of the Act by employing in early 2011 an unregistered agent's representative, namely Kelly Simmons; and

- b. that the Respondent has been guilty of breaching of the rules of conduct for agents (s65(1)(c) & s67(1)(c) of the Act), specifically that the Respondent failed to perform its duties to its principal or to carry out the lawful instructions of its principal.
2. Pursuant to s68(5) of the Act, the following complaints under s65(1)(c) of the Act by the Applicants were not referred to the Board for inquiry:
  - a. failure of the Respondent to lodge the RT8 form; and
  - b. failing to have the premises cleaned to the applicants' standard; and
  - c. altering ongoing inspection reports; and
  - d. allowing pets on the premises.
3. The relevant time for the complaints of the Applicants is from the entry into a management agreement with the Respondent on 23 December 2011, until the termination of the tenancy on 2 May 2013.
4. The hearing was conducted at Darwin on 20 November 2014. The Board was assisted by Ms Bronwyn Haack of counsel, and the Respondent was represented by Ms Cassandra Ellis, Solicitor, of De Silva Hebron, Barristers and Solicitors.

## **EXHIBITS**

5. The Inquiry Book containing the Investigation Report of Mr Paul Mitchener and other relevant documents was admitted as Exhibit 1.
6. A "Draft Agreed Statement of Facts" was tendered and admitted as Exhibit 2. The offending behaviour of the Respondents was admitted in relation to both matters under inquiry by the Board.
7. A comprehensive set of submissions relevant to the imposition of a penalty were tendered by the Respondent and marked as Exhibit 3.

## **LEGISLATION CONSIDERED**

*Agents Licensing Act s 35, 65, 67, 69*  
*Sentencing Act s 5, 6*

## **FACTS**

8. The relevant facts are set out in Exhibit 2. They need not be repeated in full in these reasons. In essence, they are that since January 2012, Ms Kelly Simmons (now Turner) was the manager of the premises. She managed the premises throughout 2012 and into 2013. During that entire period she was not registered as an agent's representative.

9. The Respondent knew, during the entire period set out above, that Kelly Simmons was managing the premises, and that she was not registered as an agent's representative, even on an interim basis.

## RELEVANT LEGISLATION

10. In relation to the employment of an unregistered agent's representative, the Act provides:

### **35 Licensed agents not to employ unregistered representatives**

A licensed agent shall not engage as an agent's representative, or permit to carry out in the business of the agent any of the functions of an agent's representative, any person, other than a licensed agent, unless that other person is a registered agent's representative.

Maximum penalty: If the offender is a natural person – 500 penalty units.

If the offender is a body corporate – 2 500 penalty units.<sup>1</sup>

11. In relation to the rules of conduct for agents, the Act provides:

### **65 Rules of conduct**

(1) A licensed agent who:

- (a) breaches this Act or the regulations, whether or not the licensed agent is found guilty of an offence in respect of the breach; or
- (b) .....
- (c) fails to perform his duties to his principal or to carry out the lawful instructions of his principal; or

12. In relation to the taking of disciplinary action, the Act provides

### **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:

- (a) .....
- (b) .....
- (c) the licensed agent has been guilty of a breach of the rules of conduct for agents; or

13. In relation to the powers of the Board after inquiry, the Act provides:

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<sup>1</sup> These penalties are only available to a court. The maximum fine that the Board can impose is limited to 50 penalty units vide s69 (b) 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; or
  - (b) by notice in writing, impose a fine not exceeding 50 penalty units on the agent; or
  - (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.

## **FINDINGS OF THE BOARD**

14. Consequent upon the admissions made by the Respondent (Exhibit 2) and the submissions of the Respondent (Exhibit 3), the Board concluded that:
  - a. the Respondent was guilty of a breach of s65(1)(a) of the Act because, contrary to s35 of the Act, the Respondent permitted a person, namely Kelly Simmons, who was not a registered agent's representative, to carry out the business of the Respondent under an agreement to manage the Applicants' premises at 2/27 Lakes Crescent, Marrara: and
  - b. that the Respondent was guilty of a breach of s65(1)(c) of the Act (the rules of conduct for agents) because the Respondent, through Kelly Simmons, charged money for 2 inspections of the premises without any fee being specified in the management agreement between the Applicants and the Respondent. This represented an overpayment to the Respondent of \$55.00 (including GST).


## **REASONS FOR IMPOSING PENALTY**

15. The Board was satisfied pursuant to s68(4) and s69 of the Act that it was authorised to take disciplinary action against the Respondent, a licensed agent. In determining what the appropriate penalty should be the Board took into account the objective facts in Exhibit 2 and the written submissions of the Respondent at Exhibit 3, and the oral submissions of counsel assisting and counsel for the Respondent.
16. Even though the *Sentencing Act* is only applicable to courts, the Board considered that the *Sentencing Act* gives appropriate guidance on the principles to be applied, and the factors to be considered, in taking action to impose a penalty, if any, pursuant to s69 of the Act.

17. In determining an appropriate penalty, the Board had to keep firmly in mind that the registration of agent's representatives is one of the prime purposes of the Act, as explained in the Act's preamble. The legislative intent is clearly to protect the citizens of the Northern Territory by regulating the conduct of licensed agents and their registered representatives, and by imposing conditions upon their licensing and registration, and by providing for offences and penalties if the provisions of the Act are not complied with.
18. The Board gave great weight to the fact that it was within the Respondent's knowledge that Ms Simmons was not a registered agent's representative, and yet that she was managing the Applicants' property for over one year. Considerations of general and specific deterrence were given great weight in consideration of the appropriate penalty given the circumstances of this case.
19. The Board considered, however, that such employment on those terms was related to, and resulted in, a lack of oversight in the Respondent's internal management procedures as explained in paragraphs 25 - 32 of Exhibit 3. The Board also notes that Ms Simmons had advised the Respondent upon her employment that she held interim legislation, as explained in paragraphs 33 - 36 of Exhibit 3. The review of tightening of the Respondent's internal management procedures gives the Board confidence that the Respondent should not appear before it again for this type of complaint. Notwithstanding those matters, the Board expects that all licensed agents will thoroughly check claims of prior registration before employing an agent's representative, and adequately supervise those that it does employ.
20. In relation to the character of the Respondent the Board also noted that there have been no prior findings of the Board concerning the Respondent and that the Respondent had promptly responded to the Board and had made comprehensive submissions on the report of Paul Mitchener, which forms part of Exhibit 1.
21. The Board considered that the objecting offending was too serious for the imposition of a caution or reprimand. This is because of the trust bestowed by the Territory community in real estate agents to properly manage their properties, most of which, as in this case, represented the single biggest financial investment outside the purchase of their own home. The Applicant's had gone to considerable effort to take their complaint up to the Board because of the understandable disquiet they felt in discovering that their trust had been misplaced and that their major investment was not being properly managed.
22. The Board notes that the breach of the rule of conduct in s65(1)(c) of the Act was the result of a lack of appropriate supervision of Ms Simmons, and was entirely preventable by the Respondent.
23. The Board considered, however, that suspension or revocation of the Respondent's license would be out of proportion to its offending. The Board, having regard to recent past decisions, considered that the most appropriate penalty was the imposition of a fine. The Board felt that the imposition of a fine would be adequate to deter other agents from conduct that might lead them into the same position of the Respondent, and to remind the Respondent of its own responsibilities as a licensed agent under the Act.

24. The maximum fine available to the Board in respect of each breach of the rules of conduct is \$7,450.00. The Board considered that the appropriate fines should not be crushing to the Respondent or pose difficulties in its continued operation. No submissions were received on that point.
25. Having regard to the foregoing matters the Board resolved to impose the following penalties.
25. In relation to the breach of the rule of conduct in s65(1)(a) of the Act - a fine of \$3,000.00.
26. In relation to the breach of the rule of conduct in s65(c) of the Act - a fine of \$500.00

For the Board



Tom Berkley  
Alternate Chairman

23 March 2015