

PROPERTY AGENTS TRIBUNAL

No 2021-0073T

In the Matter of the *Property Agent and Land Transactions Act 2016* (the Act)

Ms Rochelle Davenport
(Appellant)

and

Property Agents Board
(Respondent and Board)

DETERMINATION

Background

1. A complaint (the complaint) made by the Appellant against a property agent was received by the Property Agents Board (the Respondent) on 16 September 2021.
2. The conduct the subject of the complaint was alleged to have occurred between February 2017 and May 2017.
3. The complaint was accordingly made in excess of 4 years after the conduct was alleged to have occurred.
4. The Respondent was accordingly required to consider and apply the provisions of s.88 *Property Agent and Land Transactions Act 2016* (the Act) as part of its determination of the complaint. That section reads:

Time limits for complaints

1. *A complaint cannot be dealt with (otherwise than to dismiss it) if the complaint is made more than 12 months after the conduct complained about is alleged to have occurred unless the Board determines that –*
 - a) *it would not cause injustice to deal with the complaint; or*
 - b) *it is in the public interest to deal with the complaint.*
 2. *Subject to subsection (1), the Board may deal with a conduct complaint although the conduct complained about is alleged to have occurred before the commencement of this section.*
5. As part of its consideration of s.88 of the Act, the Respondent sent a letter to the Appellant on 20 September 2021, inviting the Appellant to provide submissions as to why:

- a) *it would not cause an injustice to now deal with the complaint; and/or*
- b) *why it was in the public interest to deal with the complaint.*

6. The Appellant provided those submissions on 30 September 2021.

7. The Board on 20 October 2021 dismissed the complaint, stating:

The Board having considered the provisions of s.88 of the Act, has determined that it is not in the public interest to deal with the complaint and therefore dismisses it.

8. On 8 November 2021, pursuant to s116 of the Act, the Respondent appealed to the Tribunal against the Board's decision to dismiss the complaint.

Nature of the Appeal

9. In accordance with the Tribunal's 2021 decision in the matter of *Noisier -v- PAB*, appeals to the Tribunal against the decision of the Board are heard on a "de novo" basis; that is, the Tribunal hears the matter afresh.

10. S116(5) of the Act provides that at the hearing of an appeal, the Tribunal may confirm the decision under appeal or set aside the decision and direct the Board to take such action as the Tribunal considers necessary.

Appellant's Submissions – Public Interest

11. The Appellant relied upon her submissions to the Board and also provided further submissions to the Tribunal. The Appellant's submissions to the Board potentially relevant to her contention that it was in the public interest to deal with the complaint, were in summary as follows:

a) The Property Agent presented false and misleading figures when a particular business was advertised and she and her husband **"relied upon what was presented to us by the agent"** (emphasis added by the Appellant);

b) They were *"rushed into the purchase by the agent who suggested that other buyers were interested in the business and if it wasn't sold soon, it would be withdrawn from sale..."*;

c) *"The course of conduct the agent followed in 'selling the business at all costs' is completely against the public's interest"*;

d) When contacted by the complainant's Barrister in September 2021 requesting substantiation of the figures contained in the Property Agent's correspondence to the Complainant and the Prospectus, the Property Agent did not respond, implying that he was unable or unwilling to do so;

e) The Appellant could not afford to pay the full asking price and was unable to secure finance for the full funds, so the Property Agent negotiated a vendor finance arrangement, which the Complainant stated was in breach of section 19(1)(h) of the Code of Conduct, relating to

property agents refraining from encouraging clients, customers or colleagues to give, lend or bequeath money, gifts or property;

- f) The Appellant allegedly told the Property Agent that they had never purchased a business before and that they had never lived or worked in Tasmania; and
- g) *"... If the Property Agent is allowed to get away with it on this occasion, what is there to say that other well-intentioned members of the community will not suffer the same fate as we have?"*

12. In addition to relying upon her original grounds of complaint to the Board, the Appellant's submissions to the Tribunal were contained in her appeal. The matters relied upon are considered in the following paragraphs.

13. The Appellant relied upon the strength of her appeal, detailing the allegations that she and her husband were rushed into the purchase by the agent, that the viability and profitability of the business was far less than represented, and that they had suffered significant loss on a forced sale of the business.

14. So far as the strength of the complaint is concerned, for the purposes of this determination only and without making any determination as to the accuracy or truth of the complaints, it is assumed in favour of the Appellant that there were strong grounds for her complaint.

15. The term *"public interest"* is not defined in s.88 nor otherwise in the Act; however, has been considered by courts. In the Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63, at p75, Kaye, Fullagar and Ormiston of the judgment stated:

"The interest is therefore the interest of the public as distinct from the interest of an individual or individuals."

16. In *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142, His Honour Justice Tamberlin said at 245:

"The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation, and its content will depend on each particular set of circumstances..."

"The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest."

17. Accordingly, the Tribunal must consider whether the interest in pursuing a complaint against the property agent is a public interest or a personal or individual interest, noting that sometimes an individual interest can also be a public interest if it could impact society as a whole depending on the particular circumstances of the matter.

18. The Appellant submitted: "... *If the Property Agent is allowed to get away with it on this occasion, what is there to say that other well-intentioned members of the community will not suffer the same fate as we have?*" As noted above, however, the interest is principally one personal to the complainant, and if the complainant can establish her allegations, she will have private remedies against the property agent. The success or otherwise of the property agent in resisting any private action is unlikely to reflect upon the vulnerability of the public at large.
19. As to the assumption made by the Board for present purposes that there may be a strong case, the likelihood of success, however, does not demonstrate that entertaining the complaint would be in the public interest. If it were otherwise, then every potentially successful complaint would be characterised as in the public interest. More is necessary, for example establishing some general principle, or addressing some prevalent default. Misrepresentation of the value of the business does not, in the opinion of the Tribunal, have that quality. The Appellant submitted that the public was entitled to the accurate and realistic portrayal of the profitability of a business; however, in the opinion of the Tribunal that is more an entitlement of the specific persons involved in a transaction.
20. The Appellant also produced extensive authority upon the proposition that deceptive and misleading conduct, including making misleading statements, was in contravention of the common law and the Australian Consumer Law. That proposition may be correct but does not answer the question of whether any particular instance, the public as opposed to the individual, private, interest is involved. In the present case, in the view of the Tribunal, the conduct alleged does not have that additional quality.
21. Similarly, with the Appellant's allegations that the property agent lied to the vendor's solicitor and enticed the vendors to provide vendor finance; these have potential individual significance but no greater public significance than the majority of other kinds of infractions of the Code.
22. The Tribunal accordingly considers that the Board was correct in its conclusion that public interest did not require that the complaint be entertained.

The explanation for the delay in making the complaint

23. The time frame between the conduct complained of and lodging the complaint was from May 2017, when the Appellant and her husband purchased the business following the agent's alleged representations, and its forced sale about a year later, until lodging the complaint on 16 September 2021, some 3 years later than the sale. The 12 months provided for in s 88 of the Act accordingly expired some two years prior to lodging the complaint.
24. The Appellant's explanation for the delay in submitting the complaint was in part that the shock at the aftermath of the claimed deception was "paralysing to say the least" and that the property agent's acts had caused serious personal stresses to her husband and herself. These were, however, not accompanied by any evidence that the claimed mental state was such as to preclude consideration of any remedy by way of complaint to a professional association.
25. The second aspect of the Appellant's explanation for the delay in submitting the complaint was that she stated she had never been made aware of the avenue of lodging a complaint with the Board.

26. With respect to the fact that she was not made aware of the possibility of complaint, there is no obligation upon the agent in the Act or Regulations or Code of Conduct to advise clients of the possibility of complaint.
27. With respect to the fact that she was unaware, the Tribunal notes from the legal material presented to the Tribunal by the Appellant for the purposes of the appeal that her level of information literacy demonstrates that had she wished to make some kind of professional complaint, it would have been well within her capacity to ascertain what venues were open and pursue them.

Conclusion

28. The Tribunal, having regard to the above matters, considers that the Board was correct in finding that it was not in the public interest to entertain the complaint and in dismissing it.
29. The Tribunal accordingly confirms the decision of the Board, appealed from.

Dated 15 February 2022

A handwritten signature in black ink, appearing to read 'Keyran Pitt', with a large, stylized flourish at the end.

Keyran Pitt QC
President