

PROPERTY AGENTS BOARD

Rochelle Davenport

Complainant

Quinten Villanueva

Property Agent

Complaint Reference

2021-0130

Decision & Reasons for Decision

Background

Rochelle Davenport (the Complainant) lodged a complaint with the Board on 16 September 2021 (the Complaint). The Complaint was against real estate agent Quinten Villanueva (the Property Agent), who was employed at the time of the alleged conduct by Sydney Brokerage Pty Ltd trading as Link New South Wales. He is now employed by Qapital Investments Pty Ltd trading as Qapital Investments.

In May 2017 the Complainant and her husband purchased a wholesale oyster growing business on Bruny Island (the Business) which was listed by the Property Agent. The Business was owned and operated by Benjamin Dreimann (the Vendor).

The Complainant alleged that the Property Agent *"... engaged in misleading and deceptive conduct and behaved in an aggressive, opportunistic and unethical manner in his dealings with us..."* on the basis that he represented the Business *"...in a very positive position of profitability... reinforced by the assertion that the Vendor would remain in the business as a Farm manager for a period of 18 months at a salary of \$100,000 per annum with a further 10% share of the profits."*

After taking over the business the Complainant's turn-over was reportedly nowhere near sufficient to cover the expense of keeping the Vendor employed and she claimed that, if anything, the Business was running at a loss.

The Complainant subsequently sold the Business for an undisclosed price on an undisclosed date to a neighbouring oyster farmer.

Further allegations made by the Complainant included:

- That there were environmental and stock trading constraints of which they were not made aware, including but not limited to the frequency of extreme weather conditions;
- The value attributed to the stock was misleading on the basis that a substantial quantity was of poor quality and had to be discarded because it was unsaleable;
- The claim that the machinery included in the sale was maintained in good working order was incorrect; and
- They were not made aware of the *"substantial annual levy payable by all oyster growers in the region"*.

To support the Complaint the Complainant provided the Board with information and marketing material that had been given to her by the Property Agent.

The Board noted that the Prospectus provided to the Complainant by the Property Agent contained two disclaimers, indicating that all information contained in the document was provided by the Vendor verbally and in the form of books, records and accounts relating to the Business and that such information had been accepted in good faith, however no warranty was given as to its accuracy or otherwise and the onus was with any prospective purchaser to verify the accuracy of the information.

The Prospectus also contained the following declaration signed by the Vendor:

"I/We hereby state and declare that I/we have instructed Sydney Brokerage Pty Ltd T/as LINK to prepare this profile and its contents from information that I/we have provided. I/we furthermore state that the information contained here-in to my knowledge is correct and a fair indication of the proposal and its offerings. I would expect any prospective purchaser to seek their own professional advice before making any decision.

X Ben Dreimann (signature) 23/10/2016"

The Complainant did not indicate on the Complaint Form how she believed the Complaint could be reasonably resolved. The Board notes the Complainant's claim that she sustained a financial loss in excess of \$400,000 in respect to the purchase, ownership and subsequent sale of the Business. It also notes submissions provided by the Complainant's Barrister, which indicates that attempts may be made to recover the alleged financial loss.

Legislation

The Board must consider Section 88 of the *Property Agents and Land Transactions Act 2016* (the Act) in relation to time limits for complaints. Section 88 of the Act provides:

(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.

The relevant time is considered to be between February 2017 and May 2017, more than four years before the Complaint was made to the Board.

Submissions – Public Interest

The Complainant was asked to provide submissions detailing why it would not cause injustice to deal with the Complaint and/or why it is in the public interest to deal with the Complaint.

The information subsequently provided by the Complainant included but was not limited to the following:

- The Property Agent presented false and misleading figures when the Business was advertised and she and her husband “relied upon what was presented to us by the agent” (emphasis added by the Complainant);
- 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...”;
- “The course of conduct the agent followed in ‘selling the business at all costs’ is completely against the public’s interest”;
- When contacted by her 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;
- The Complainant 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, which relates to property agents refraining from encouraging clients, customers or colleagues to give, lend or bequeath money, gifts or property;
- The Complainant allegedly told the Property Agent that they had never purchased a business before and that they had never lived or worked in Tasmania; and
- “... 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?”

What is in the Public Interest?

The term public interest is not defined in the Act. Reference is accordingly made to common law definitions which are based on the generally accepted concept that the ‘public interest’ is that which provides benefit to society, the public and the community as a whole.

This meaning has been considered by the Australian law courts on many occasions. In the Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63, Kaye, Fullagar and Ormiston JJJ at p75 of the judgment stated:

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

In the Full Court of the Federal Court of Australia case of *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142, His Honour Justice Tamberlin said at 245:

9. 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...

10. 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.

Therefore, the Board must consider whether the interest 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.

Consideration as to whether public interest has been establishedTiming

The Board does not consider any relevant information was provided to support the claim that it should accept this complaint outside the statutory timeframe of 12 months, nor has the Complainant provided any explanation as to why she did not submit a complaint earlier.

The Complainant 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?"*

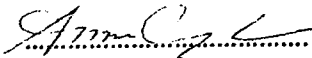
Summary

The Board accepts that consumer confidence in the property agents industry is a public interest consideration. However in considering all of the circumstances of the matter, the Board concludes that the Complainant has not provided sufficient evidence to demonstrate that it is in the public interest for the Board to accept this complaint.

Decision

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

Decision dated the 20th day of October 2021.



Ann Cunningham
Chair