

PROPERTY AGENTS TRIBUNAL

No 2022-0083T

In the matter of the *Property Agent and Land
Transactions Act 2016 (Tas)*(‘the Act’)

Mr Mark Pegg (Appellant)

and

Property Agents Board (Board)

And

Mr John Loveluck (Respondent – Property Agent)

NOTICE OF DECISION and DECISION

UPON APPEAL FROM A DECISION OF THE PROPERTY AGENTS BOARD

Hearing Date: Written Submissions

Tribunal:

Mr K A M Pitt KC	President
Ms P Corkhill	Member
Dr E Histed	Member

Delivered on: 26 September 2023

Representation:

Appellant: Self-represented and written submissions

Board: No representation as leave granted to withdraw from proceedings

Respondent: Self-represented and written Submissions

Background

1. In late 2021 and early 2022, the appellant was the tenant of premises at 1 Acushla Court Sandy Bay (the property).
2. The residential tenancy agreement signed by the appellant on 16 April 2021 provided that for all electrical plumbing glass and maintenance matters the tenant was to contact Mr. Mark Loveluck.
3. At the relevant times, the respondent property agent (the property agent) was employed by Area Specialist Northern Suburbs (Area Specialist).
4. On 26 October 2021, the property agent became the manager of the property but advised the appellant that the owner of the property had transferred the property management to Area Specialist.
5. Differences arose between the appellant and the property agent, and the appellant complained to the Property Agents Board (the Board).
6. The complaint was that between 26 October 2021 and 16 February 2022 the property agent failed to act in a fair, honest and reasonable manner (the complaint).

The Board's decision and the appeal

7. The Board after considering the complaint, published its decision on 19 April 2023.
8. The decision stated that the Board was satisfied that the property agent's conduct fell short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent, and that the complaint was substantiated. The Board, pursuant to section 101 (6) of the Act, cautioned the property agent.
9. The appellant brought the present appeal to the Tribunal, pursuant to section 116 of the Act. The grounds of the appeal and the issues in the appeal, together with the relevant facts, are addressed below.

Law as to the Appeal

10. The appeal is pursuant to section 116 of the Act, and is a rehearing on the material before the Board when it made its decision: *Real Estate institute of Tasmania v Property Agents Board and Graeme Lawler* [2022] TASC [15]-[21] (*Lawler*). The Tribunal must consider whether the decision of the Board was reasonably open to it on that material. The Tribunal does not receive fresh evidence.

The material before the Board

11. The material before the Board when it reached its decision consisted of the complaint documents, copies of the relevant correspondence and lease documents, submissions of the parties and an investigator's report.

Consideration

12. The Tribunal has considered the material which was before the Board together with the written submissions made for the Tribunal by the appellant and the property agent.

The law relating to professional conduct standards

13. The law as to the process the Board was required to undertake was summarised by Magistrate Daly in *Lawler* (supra) at [24]-[30]:

24. The Board resolved to investigate whether the property agent's conduct involved unsatisfactory professional conduct or professional misconduct under the Act Part 7, Div 4. Having concluded its investigation, the Board was required to exercise its powers under s 100. That step involved the Board determining one of the three powers in s 100 should be exercised. In error, the Board determined there was insufficient evidence to substantiate the complaint and dismissed it.

25. The Board was required to apply the relevant statutory test relating to the property agent's conduct. That task involved firstly determining whether the conduct constituted unsatisfactory professional conduct. The Act, s83 contains the following inclusionary definition:

unsatisfactory professional conduct includes conduct of a property agent when acting as a property agent that falls short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent.

26. This step required an evaluative assessment of the property agent's conduct, measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian property agent.¹ The standard of competence and diligence required of a property agent is to be evaluated on the basis of what a reasonable member of the public would be entitled to expect of the property agent.².....

27. It appears as though that at this stage, under s100, the Board may determine whether, if the evidence appears to indicate that the conduct complained about only amounts to minor misconduct, that can adequately be dealt with by the Board. 'Minor misconduct' is not defined.

14. The Board had to decide whether it found the conduct constituted '*unsatisfactory professional conduct*', which is defined in section 83 of the Act to include "*conduct of a property agent when acting as a property agent that falls short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent*".

15. The required standard is not one of perfection, but *reasonable* expectation and *reasonable* competence. As with the standard expected of legal practitioners, it is not every departure from perfect competence and perfect diligence, that constitutes unsatisfactory professional conduct. Conduct such as carelessness may be classified as negligence, without necessarily reaching the necessary standard of seriousness to constitute unsatisfactory professional conduct, 'an isolated instance of incompetence or lack of diligence will not necessarily meet the statutory threshold'. He continues: 'A concern is that, should every negligent act or error be categorised as unsatisfactory professional conduct, the distinction between the

¹ See *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14 at [11] per Brett J.

² See *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14 at [11] per Brett J.

professional disciplinary and the civil law jurisdictions' prosecutions may illegitimately converge. This explains why, in the words of a Queensland judge, a finding of unsatisfactory professional conduct usually involves 'repeated errors or a significant departure from accepted standards of competence': G E Dal Pont, *'Concepts of Misconduct' in Lawyer Discipline* (LexisNexis, 1st ed, 2020) 40-41).

Appeal grounds and submissions

16. The grounds of the appeal to the Tribunal were set out in detail in the written submissions of the appellant. The issues arising from the appeal are considered in the following passages.

Omitted complaint details and irrelevant comments

17. It was contended by the appellant that the Board's Reasons for Decision omitted various details of the complaint and included various irrelevant comments about the appellant. Save as addressed below, these were not identified.

The investigator's report to the Board

18. The appellant contended that the Board investigator's report to the Board was not fair and balanced, and portrayed the property agent in an unduly positive light.

19. Whether the statement of facts in the report was fair and balanced, or whether the Board should have treated it as not so, can be assessed by the Tribunal by referring to the materials before the Board. The materials consisted of the documentation, including the emails correspondences between the parties, and to the Board by the parties. The statement of facts in the report was, in the opinion of the Tribunal, not inconsistent with the documentation referred to in the report and before the Board.

20. It was also contended by the appellant that the investigator's report "facts glossed over the persistent, deliberate and drawn out nature of (the property agent's) conduct towards me." The inferences as to the characterisation of the property agent's conduct towards the appellant which might be drawn from the facts were matters of opinion, and the Board was not bound by any opinions expressed by the investigator. It is clear that subjectively the appellant regarded the nature of the property agents conduct as "persistent, deliberate and drawn out". However, on all of the material before the Board, the Tribunal considers that it was open to the Board not to characterise the nature of the conduct in that way.
21. Taking into account all the material before the Board, and having regard to the further consideration of the appeal in this decision, the Tribunal considers that the Board investigator's report including its statement of facts, could reasonably have been treated by the Board as fair and balanced, and relied upon by the Board.

Misleading conduct by the property agent

22. The appellant contends that the Property Agent attended the property from the outset as an agent of Area Specialist, and that the Board erred in finding that the Property Agent attended and managed the property in a private capacity.
23. The appellant further contended that the Property Agent's statements that he attended and managed the property in a private capacity were a deliberate fabrication. Accordingly, that the Board erred by finding that overall, the property agent's conduct was fair and reasonable. The appellant invited the Tribunal to find that Area Specialist in fact took over management of the property from the property agent in October 2021. The appellant further contended that the property agent should be subject to sanctions of 'medium severity'.

24. The appellant relied upon the fact that when the property agent first attended the property, the photos were taken by his two colleagues from Area Specialist. It is also relevant in this respect that the emails from the property agent to the appellant, treated the property agent as representing Area Specialist.

25. As the Board found, the property agent advised the appellant the owner of the property had transferred the property management to Area Specialist. In the property agent's email dated 26 October 2021 to the appellant, it stated:

"This is a quick message to let you know that the owner of your rental property has transferred the management of 1 Acushla Court at Sandy Bay Tasmania to Area Specialist, effective immediately.

What this means is that moving forward I will be your property manager and you can reach me on the below details for anything including rent payments, maintenance, general inquiries and much more. All such communications regarding the property must be directed through myself. Please note that payments of rent can continue to be paid to the existing account....."

26. The Board found this was misleading in that it would have led the Appellant to believe the property was being managed by Area Specialist. The finding that the conduct was misleading is not challenged by the property agent, but he contended it was inadvertent, and *'not with the intention to mislead or deceive, and had no bearing on any interaction during this time'*.

27. The Board found that it "does not consider it to be adequate for the property agent to say that he did this inadvertently". That was not an explicit finding that the misrepresentation was or was not inadvertent, but it appears to be directed to the adequacy of the reason.

28. The words used in the property agent's email of 26 October 2021 were "*.....transferred the management of 1 Acushla Court at Sandy Bay Tasmania to Area Specialist, effective immediately.*"
29. The Tribunal considers that because the words used were quite specific the statement was deliberate. While on appeal, the test is not whether the Tribunal would have taken a different view but rather whether the finding the Board made was open to it, the Tribunal is not taking a different view to that apparently expressed by the Board, but rather completing the relevant findings of fact.
30. On the material before the Board, it was not unreasonable to take the view that the property agent did take over management in a private capacity, having regard to the relationship between him and the owners. It is accepted by the appellant that the property agent was the brother of Mr Mark Loveluck, who was the father of the owner of the property. It was stated in the Appellant's application with respect to the rent review as "*took over (from his brother, and the owner's father) as agent in November 2021*". The documentation shows that the relevant time was October 2021, however that error does not appear to be significant.
31. By a document entitled 'Exclusive Property Management Agreement', dated 16 February 2022, the owners gave authority to Area Specialist Northern Suburbs Real Estate, to act as managing agent of the property. That being significantly later than the property agent's involvement in October 2021, did not retrospectively affect the character of that involvement. However, the fact that an agreement was required at that time is consistent with the position that there had not previously been such an agreement between the owners and Area Specialist; and accordingly with the proposition that the Property Agent had initially been managing the property privately, as the Board found.

32. There was no factual material by way of any document or statement from any officer or employee of Area Specialist other than the actions of the property agent in bringing with him the agency's photographers, and his use of the agency's emails, which support the proposition that it was Area Specialist, rather than the property agent, that took over management of the property from Mr Mark Loveluck in October 2021.
33. The misleading statement was misleading for the appellant, but in addition the property agent failed to advise or obtain permission from his employer to act privately (he referred to this in his explanation to the Board). While not a specific subject of the complaint, it demonstrates an inappropriate attitude.
34. The admission of the property agent to the Board, that he had been wrong in stating in his email dated 26 October 2021 that management of the property had been transferred to Area Specialist, could only have been damaging to him; there was no apparent advantage to him in misrepresenting that fact, which had not previously been identified to the Board. It was an admission against interest for which it is difficult to see any motive. That makes a deliberate misrepresentation less likely, but for the reasons stated above in para. 29 the Tribunal finds the misrepresentation deliberate.

The Entry Condition Report

35. It was contended by the appellant that the "purported condition report of November 2021 (which was just a large number of photos)" was in breach of the "residential tenancy legislation", which the Tribunal treats as an allegation of unsatisfactory professional conduct.
36. The Entry Condition Report was amongst the documents before the Board. On the 9 November 2021 it was attached to an email from the property agent to the appellant, which relevantly included the statement "*condition report attached. If you could go through, make any notes etc., sign and scan back I'd appreciate it*".

37. In addition to a large number of photographs, the forwarded report included a list of all of the rooms and structures, over 100 items, with boxes in which to enter the letter Y for 'yes' or N for 'no' in respect of whether the item was clean, undamaged, working. All of which were marked with the letter "Y". There was an adjacent box entitled '*tenant agrees*' left blank, and a larger box for "comments (if any)" which afforded an opportunity for the appellant to signify agreement or otherwise. Some comments had already been entered into the letter boxes. There was no completed document or evidence before the Board, as to whether that document was completed by the appellant as tenant or returned to the property agent.

38. Irrespective of whether the document was completed or returned, on the evidence before the Board the document was one involving contribution by both the property agent and the appellant, and appeared to be adequate so far as the property agent's initial entries were concerned. It was open to the appellant to have entered any disagreement or additional matter. Accordingly, it would not have been appropriate for the Board to conclude that what was provided to the appellant as tenant, was deficient.

The requirement to trim hedges

39. It was contended by the appellant that the property agent had improperly refused to arrange the trimming of some hedges and other vegetation on the property, asserting it was the responsibility of the appellant as tenant. It was common ground that this was the position of the property agent.

40. The Board found the property agent was incorrect in stating that trimming hedges and large trees was the responsibility of the tenant, but stated that the property agent had remained respectful in his dealings with Complainant.

41. The appellant contended that it was improper of the property agent to have required that of the appellant.
42. By email dated 28 January 2022, the complainant stated “just to flag, some of the larger plants on the lower boundary [Birngana] need a good cut back. I can’t really do that myself, too high and not safe. If we can agree a plan, perhaps share costs.”
43. By email dated 2 February 2022, the property agent advised the complainant that clause 18 (2) h of his lease required that he ensure gardens and grounds were kept neat and tidy and in the same order as at the time of the lease signing; and stated he would be happy to refer a gardener to assist if that would help.
44. The clause in the tenancy agreement, which was before the Board, reads “18(2)(h) Keep the garden and grounds belonging to or surrounding the premises neat and tidy and in the same order and condition as they were in at the start date.”
45. In the opinion of the Tribunal, it was not unreasonable for the property agent to take the view that this clause included trimming hedges. The fact that the office of the Residential Tenancy Commissioner took a different view, does not mean that the property agent’s view was unreasonable or unarguable. There was nothing before the Board which would lead inevitably to the conclusion that the Commissioner’s view displaced such contractual obligations as existed under the lease.
46. Accordingly, neither on its own nor as part of the larger picture, did this aspect justify forming the conclusion that the property agent had acted unreasonably or unfairly.

The rental increase

47. The appellant further contended that the immediate notice of an increase in rental was an example of the property agent vindictively pursuing the appellant. The appellant stated:

“When (on 28 January 2022) Mr Loveluck received that advice (about the hedges), he immediately escalated his harassment with a notice to increase the rent by 15%. That was within thirty minutes of receiving my email about the hedges, so it was a direct response.”

48. The email from the appellant to the property agent notifying that he had taken the advice from the office of the Residential Tenancy Commissioner as to the responsibility for pruning trees and bushes, was sent on 11 February 22 at 09:08. The property agent’s email attaching the rental review was dated 11 February 2022 at 09:16.
49. On application made on 2 March 2022 by the appellant, the Residential Tenancy Commissioner by order dated 23 March 2022 ordered an increase of from \$750 per week, to \$775 per week, significantly less than the \$865 per week notified by the property agent.
50. There was nothing before the Board to indicate whether the increase in the rental notified by the property agent, had been instructed or authorised by the owners. There was nothing before the Board which would support the conclusion that the property agent giving the notice was acting improperly, other than inference from the fact that the notice, according to the complainant, followed within a few minutes the receipt of advice from the Residential Tenancy Commissioner.
51. The Tribunal considers that absent some more persuasive basis for concluding that the rent increase notice was improperly vindictively given, the Board would not have been justified in so finding. The finding which the Board made was open to it.

Inviting harassment by Mr. Montenegro

52. The appellant contends that in February 2022, the property agent after refusing to repair the main toilet, passed over responsibility for the property to Mr Montenegro of Area Specialists, confirming this with an email whose ‘intention was that Mr Montenegro should continue to harass and intimidate me’. Specifically, that by his email communication to Mr

Montenegro of 17 February 2022, the property agent invited Mr Montenegro to continue to harass and intimidate him.

53. The email dated 17 February 2022 from the property agent to Mr. Montenegro relevantly stated:

“Here it is mate and thank you so much for your help with this one. Couple of key facts:

- *Owners do not want lease renewed once this expires i.e. they want him out ASAP]*
- *I have sent a letter to tenant advising rent will increase in April [copy forwarded to you].
I’ll bring in the CMA I did to justify the increase to \$865 today.*
- *Contact details for him are Mark a pegg@gmail.com and 0413458010.*

Yell out if any questions etc.”

54. There was no evidence before the Board which would indicate that the statement that the owners did not want to lease renewed and wanted the tenant ‘out ASAP’, did not accurately reflect the owner’s views or that it was a fabrication or misrepresentation by the property agent.

55. It appears from the material before the Board that the property agent was the uncle of the owner, and the brother of the previous managing agent, Mr Mark Loveluck. Therefore, direct communication between the property agent and the owner with respect to renewal of the lease, continuation with the appellant as tenant, and rental increase, could reasonably be expected.

56. The reference in the email to the owners not wanting to renew the lease and wanting the appellant out ASAP, could reasonably have been construed by the Board as statements of fact rather than an invitation to harass.

Failure to provide a written policy and procedure document.

57. It was common ground that the property agent failed to supply a written policy and procedure for complaints, which had been requested by the appellant by email dated 11 February 2022. In the same email to the property agent, which was headed “unsatisfactory professional conduct/professional misconduct” the appellant stated that he was “concerned you breached your professional obligations under the Act” and referred specifically to the ‘Code of Conduct (February 2022)’. The property agent responded to the Board that in any event he did not have a complaint policy at the start of February 2022 as he was managing the property privately.
58. As observed by the appellant in his submissions, there is no evidence whether there was a written policy and procedure for complaints in existence at or about the date of the request. Absent evidence before the Board of the existence of such a policy, it would not be reasonable for the Board to find that there was a culpable failure for not supplying an existing policy. Nevertheless, as he was managing the property privately, he was obliged by clause 7 of the *Property Agents Board Code of Conduct* (the Code) to have a policy of his own, so he either failed to provide an existing policy or failed to have one at all; in either event he thereby contravened the Code.
59. By clause 4 of the Code, a contravention of the Code may constitute unsatisfactory professional conduct or professional misconduct. It was open to the Board to find the failure to have or to provide a complaints policy was unsatisfactory professional conduct.
60. The Tribunal, for the purpose of considering the action taken by the Board, finds this aspect of the complaint substantiated.

Actions of Mr Montenegro and other staff of Area Specialist

61. The appellant contended in his submissions that actions of Mr Montenegro and other staff of Area Specialists which did not involve the property agent, were improper. Those matters do not constitute actions or failures of the property agent, and therefore lie outside the scope of the complaint and consequently of the present appeal.

The penalty of a caution

62. The Board having considered that the conduct of the property agent may amount to minor misconduct that could be adequately dealt with by the Board under section 100 of the Act, wrote to the property agent for a written explanation of the conduct.

63. The property agent responded, in summary acknowledging that he may have given the impression that the real estate agency was managing the property. He was mistaken in his belief that he could operate in a private capacity in that manner, confirming that he now understood, and undertook that it would not happen again. He suggested that despite the initial correspondence, the appellant subsequently became aware that the property was being managed in a private capacity. The property agent also re-stated his belief (considered above) that trimming the hedges was the responsibility of the tenant.

64. Had there been a finding that the property agent acted deliberately in advising the appellant that management of the property had been transferred to Area Specialist whereas he was in fact managing it privately, it would have been necessary for the Board to regard the misleading conduct as more than minor misconduct; and more significant action would have been appropriate. That however was not the Board's finding, it made no specific finding on this. Further, the Tribunal considers that it was open to the Board to regard the failure to provide a complaint policy as no more than minor misconduct, although again, had the matter

been before the Tribunal at first instance it would have found it was more than minor misconduct.

Conclusion

65. In all of the circumstances, the Tribunal considers that the Board, having found that it was satisfied that the property agent's conduct fell short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent and that the complaint was substantiated, should have reprimanded rather than cautioned the property agent pursuant to section 101 (6) of the Act; it was not reasonably open to the Board to simply administer a caution.

66. The Tribunal also considers that the conduct of the property agent displayed a careless approach to the ethical standards required, and that reinforcement of his understanding of and adherence to those standards is appropriate.

67. Accordingly, in addition to a reprimand, the Board should direct that the property agent undertakes to write and provide to the Board a reflective paper of at least 1000 words demonstrating that he has considered and understood the ethical and practical importance of not misleading others in the course of his agency activities, and of compliance with the Code.

68. The result is that the appeal is allowed.

Orders

69. The decision of the Board to caution the property agent is set aside, and in lieu thereof the Board is directed pursuant to sections 116 and 101(7) of the Act:

(i) To reprimand the property agent; and

(ii) to require the property agent to give an undertaking to the Board to within 21 days write and provide to the Board a paper of at least 1000 words demonstrating that he has considered and understood the ethical and practical importance of not misleading others in the course of his agency activities; and of compliance with the Code.

Dated: 26 September 2023

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

Keyran Pitt KC, President

RIGHT TO APPEAL DECISIONS OF THE TRIBUNAL

TAKE NOTICE that a person subject to the decision of this Tribunal may appeal under the *Magistrates Court (Administrative Appeals Division) Act 2001* against this decision of the Tribunal; and

An appeal is to be made within 28 days after notice of the Tribunal's decision is given to the Agent or the Board, or within such further period as a magistrate considers is appropriate in the interests of justice.

Also take notice that an appeal to the Magistrates Court (Administrative Appeals Division) **DOES NOT**

- (a) affect the operation of the Tribunal's decision; or
- (b) prevent the taking of action to implement the decision

An order of the Magistrates Court would be necessary to stay an order of the Tribunal.