

Property Agents Tribunal

In the matter of the

**Property Agents and Land Transaction
Act 2016 (the Act)**

and

In the matter of
Jason Peter Andrikonis (a Property Agent)

PROPERTY AGENTS BOARD

Applicant

JASON PETER ANDRIKONIS

Respondent

DECISION AND REASONS FOR DECISION

Hearing Date: 8 November 2023

Tribunal:

Mr K A M Pitt KC, President
Ms R Yeoland, Member
Mr D Paton, Member

Representation:

Applicant: Mr N Readett of Simmons Wolfhagen
Respondent: Mr J Zeeman of Counsel and Mr J McMullen of McMullen Lawyers

DECISION

1. The matter before this Tribunal is a complaint made by Nicholas Paine and Kyla Paine (“the Paines”) concerning the conduct of a property agent, Jason Peter Andrikonis (“the property agent”). The complaint has been referred to the Tribunal pursuant to section 100(c) of the *Property Agents and Land Transactions Act 2016* (Tas) (“the Act”).

Background and agreed relevant facts

2. The parties agreed the facts, relevantly as follows (renumbered):
 - 1) At all material times Mr Andrikonis was employed by Fall and Associates Pty Ltd, trading as Fall Real Estate, as a real estate agent within the meaning of section 3 of the *Property Agents and Land Transactions Act 2016*.
 - 2) In August 2020 Ian James Porter and Karyn Jane Porter entered into a sole agency agreement for Fall Real Estate to sell their property at 5 Kythera Place, Acton Park in Tasmania (**Kythera Place**).
 - 3) The Porters were very motivated to sell Kythera Place. They required a fast and uncomplicated sale for the following reasons:
 - a) Mr Porter had moved to New South Wales for work and was paying rent for accommodation;
 - b) Mrs Porter planned to relocate to New South Wales with her husband but was remaining in Tasmania to finalise their affairs;
 - c) Mrs Porter could not move to New South Wales to finalise permanent accommodation until Kythera Place had been sold; and
 - d) Mrs Porter did not wish to give notice of resignation from her employment, or finalise moving arrangements, until she knew, with sufficient certainty, that she had an unconditional sale of the Kythera Place; and
 - e) The Covid-19 pandemic had created significant uncertainty and impacted freedom of movement, giving rise to logistical difficulties in moving between States at that time.

21 August 2020

- 4) On 21 August 2020, Mr Paine contacted Mr Andrikonis and expressed an interest in purchasing Kythera Place. Mr Paine told Mr Andrikonis that any offer made for Kythera Place would be subject to the sale of the Complainants' property at 5 Biarri Court, Howrah (**Biarri Court**).
- 5) Later on Friday, 21 August 2020, Mr Andrikonis met with the Complainants at Biarri Court (**the 21 August 2020 meeting**), during which:

- a) the Complainants discussed their interest in Kythera Place;
 - b) Mr Andrikonis provided the Complainants, at their request, with a market value estimate of Biarri Court;
 - c) Mr Andrikonis provided the Complainants with marketing information relating to Fall Real Estate and the likely costs of sale if the Complainants engaged Fall Real Estate to sell Biarri Court.
- 6) During the 21 August 2020 meeting the Complainants told Mr Andrikonis that they wanted to advertise their home as a five-bedroom and three-bathroom house and unit. Mr Andrikonis was concerned that Biarri Court was more properly described as four-bedroom and two-bathroom house and that it could not be marketed in the manner suggested by the Complainants and that to do so may amount to a misrepresentation of the property.
- 7) During the 21 August 2020 meeting the Complainants did not tell Mr Andrikonis that they intended to engage him to sell Biarri Court.
- 8) Following the 21 August 2020 meeting Mr Andrikonis spoke to Mrs Porter and told her of his concerns about the proposed marketing of Biarri Court, as set out in paragraph 6) above.
- 9) In response to Mr Andrikonis' concerns Mrs Porter told him:
- a. That she was not keen to sign a subject to sale contract, if an offer was made on that basis;
 - b. That she would not want the Complainants to market Biarri Court as a five-bedroom and three-bathroom house and unit, in the event that she and her husband ultimately agreed to a subject to sale contract;
 - c. That her and her husband would await until the completion of the second open home scheduled for 22 August 2022 before making any decision; and
 - d. That she would seek advice from McMullen Lawyers, her conveyancing solicitors, before accepting any offer in respect to the sale of Kythera Place.

22 August 2020

- 10) On 22 August 2020, Mr Andrikonis conducted an open home at Kythera Place, during which the Complainants inspected the property and were provided by Mr Andrikonis with a draft contract of sale and a document entitled "Multiple Offer" ("**MO**").
- 11) By text message on 22 August 2020, the property agent advised all persons that had expressed an interest in purchasing Kythera Place, including the Complainants, that the Porters had requested that all offers be submitted by 5:00 pm the following day, Sunday 23 August 2020.

23 August 2020

- 12) On 23 August 2020, the Complainants sent Mr Andrikonis an email, attaching:
- a) a partially completed Standard Form Contract for Sale of Real Estate in Tasmania (2018) The Particulars of Sale (2018) to purchase Kythera Place ("**Complainants' Offer**"); and
 - b) a completed MO.
- 13) The Porters received two offers for the sale of Kythera Place. One offer was withdrawn, resulting in the Complainants' Offer being the only offer.

24 August 2020

- 14) During the morning on Monday, 24th of August 2020, Mr Andrikonis spoke by telephone with Mrs Porter in respect to the Complainants' Offer. Mr Andrikonis recommended to Mrs Porter that she speak to her solicitor about the Complainants' Offer, in particular he suggested that:
- a) The time for payment of a deposit appeared too great;
 - b) The time for settlement appeared too great;
 - c) The time for confirmation of finance needed clarification; and
 - d) The inclusion of a "Shorter Period Clause" should be shorter, given the conditional nature of the proposed contract.
- 15) During Mrs Porter's telephone conversation with Mr Andrikonis she said that she would only be comfortable with signing the Complainant's Offer if she could be comfortable that Biarri Court be marketed without any misrepresentation. Mr Andrikonis suggested to Mrs Porter that if he was the selling agent for the Complainants' property it would be

advantageous to the Porters because he would not sell the property with misleading information and as a result there was less likely to be interruption to the sales transaction. Further, as the agent of both sales, the Porters would be better informed about the progress of the Complainants' sale. Mrs Porter said that she would be content to sign the Complainants' Offer if the Complainants appointed Mr Andrikonis as their selling agent.

16) Mrs Porter told Mr Andrikonis that she and her husband would seek legal advice about the Complainant's Offer. To assist the Porters to seek legal advice, Mr Andrikonis prepared a clause for them to provide to their solicitor for discussion and sent it to them by email at 12.28pm on 24 August 2020 ("**Draft Clause**").

17) The Draft Clause was in the following terms:

"This offer is conditional upon the Purchasers Nicholas Jack Paine and Kyla Louise Paine 5 Biarri Court, Howrah listing their home for sale with Jason Andrikonis at Fall Real Estate."

18) Mrs Porter emailed the Complainants' Offer and the Draft Clause to McMullens Lawyers. Mrs Porter sent an email to Mr Andrikonis at 1.54pm 24 August 2020 confirming that she had done so. Mr Andrikonis sent a text message to the Complainants advising them that their offer had been sent to the Porter's solicitors.

19) Mrs Porter obtained advice from her solicitor on Monday afternoon, 24 August 2020, in respect to the Draft Clause and the discussion points raised by Mr Andrikonis with Mrs Porter during their telephone conversation earlier that morning. Following receipt of legal advice, Mrs Porter made alterations to and signed the Complainants' Offer, which included the Draft Clause ("**Counteroffer**").

20) On Monday 24 August 2020, Mr Andrikonis telephoned Mr Paine and advised that the Porters had received legal advice in respect to the Complainants' Offer. Mr Andrikonis arranged to meet the Complainants at 3.30pm on Tuesday 25 August 2020 at Biarri Court.

21) Mrs Porter emailed the Counter Offer to Mrs Jenny Porteus at McMullen Lawyers at 8.55am on Tuesday 25 August 2020 for the purpose of having it checked by Ms Porteus

to ensure that she had amended it correctly. Mrs Porter then sent the Counter Offer to Mr Porter to sign. Mr Porter signed the Counter Offer and emailed it back to Mrs Porter.

22) At 10.50 am on Tuesday 25 August 2020 Mrs Porter emailed the Counteroffer, signed by both Mr and Mrs Porter, to Mr Andrikonis for presentation to the Complainants at the meeting proposed for 3.30 pm on 25 August 2020.

25 August 2020

23) The Complainants and Mr Andrikonis met at approximately 3.30pm on Tuesday 25 August 2020 at Biarri Court ("**the 25 August 2020 meeting**"). During that meeting Mr Andrikonis gave the Complainants a copy of the Counteroffer.

24) During the 25 August 2020 meeting the Complainants advised Mr Andrikonis that they wished to list Biarri Court for sale through another agent, namely, Petrusma Property Howrah. This was the first occasion that the Complainants advised Mr Andrikonis that they intended to sell Biarri Court with another real estate agent. The Complainants had not at any time intended to list Biarri Court for sale with Mr Andrikonis or Fall Real Estate.

25) During the 25 August 2020 meeting the Complainants told Mr Andrikonis that they intended to sell Biarri Court as a five-bedroom, three-bathroom home ("**the proposed marketing campaign**"). Mr Andrikonis said that his research and suspicion was that Biarri Court was not approved as a 5 bedroom, 3 bathroom home. Mr Andrikonis told the Complainants that if their selected property agent was to market Biarri Court as they intended, he would probably make a report of that behaviour to the Property Agent's Board.

26) The Complainants told Mr Andrikonis that they were going to seek advice about the Counteroffer from their solicitor and that they would follow up with the Clarence City Council in respect to Biarri Court in order to prove his concerns with the proposed marketing campaign were unfounded.

27) Following the 25 August 2020 meeting Mr Andrikonis telephoned Mrs Porter and told her about the proposed marketing campaign. Mrs Porter indicated she was not willing to proceed if the Complainants persisted with the proposed marketing campaign.

28) The Complainants instructed their solicitors, Wallace Wilkinson & Webster, to negotiate with the Porter's solicitor in respect to the Counteroffer. The negotiations were not successful and Kythera Place was sold to a third party.

3. The Tribunal finds in accordance with those facts.

The Law

4. Section 83 of the Act contains the relevant definitions and relevantly provides as follows;

83. Interpretation of Part 7

(1) In this Part –

conduct means conduct whether consisting of an act or an omission;

conduct complaint means a complaint that appears to involve an issue of unsatisfactory professional conduct or professional misconduct or a conviction for a serious offence;

professional misconduct includes –

(a) unsatisfactory professional conduct of a property agent, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of a property agent whether occurring when acting as a property agent or occurring otherwise than when acting as a property agent, that would, if established, justify a finding that the property agent is not a fit and proper person to continue to act as a property agent;

(c)

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.

5. In *Legal Profession Board v. Barclay*¹, Brett J said of wording in the *Legal Profession Act* 2007 that is similar to section 83 of the Act:

¹ *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14, [11]; adopted with approval by Estcourt J in *Legal Profession Board of Tasmania v W* [2023] TASFC 1, [14].

*"Although the matter was not the subject of extensive argument before me, I think it is clear that these statutory definitions provide the relevant basis upon which the Court must characterise the practitioner's conduct. It is clear, in my view, that the definitions are intended to replace any notions of what amounts to unsatisfactory professional conduct or professional misconduct, formulated under the common law and statutory schemes which are no longer in effect. Under the legislative definitions, the first step is to determine whether the conduct amounts to unsatisfactory professional conduct. This involves an evaluative assessment of the conduct, measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The second step is to determine whether the unsatisfactory professional conduct amounts to professional misconduct. In making this determination, an assessment must be made as to whether the conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. It is the finding that the relevant failure has been substantial or consistent which is critical to this determination. A further observation which can be made about the legislative scheme incorporated into this legislation is that the standard of competence and diligence required of a legal practitioner is to be evaluated on the basis of what a reasonable member of the public would be entitled to expect of the practitioner. I think that this results in an important shift of emphasis away from the formulation which preceded this legislation, which depended upon what practitioners of good repute and competency would reasonably consider to be conduct which could be described as disgraceful or dishonourable. See for example, *A Legal Practitioner v Law Society of Tasmania* [2005] TASSC 28, 13 Tas R 448. This change of emphasis in favour of the expectation of a reasonable member of the public, as opposed to other practitioners, is, in my view, entirely consistent with the primary purpose of disciplinary proceedings, which is the 'protection of the public, the preservation of the reputation of the legal profession and the proper administration of justice'. See my comments at [41] of *Legal Profession Board of Tasmania v Lester* [2021] TASSC 41. "*

6. In *Real Estate Institute of Tasmania v Property Agents Board and Lawler* or No 2019-0064T, dated 2 October 2020, the Tribunal said the following at [78]:

“While the authorities cited on behalf of the appellant apply with full force to the legal profession, the duties of property agents to the community, and to their regulating authorities, are not necessarily the same. Conduct which constitutes unsatisfactory professional conduct in the case of a legal practitioner, will not necessarily do so in the case of a property agent. In particular, the duties of a legal practitioner, as an officer of a Court require an unusually high standard of conduct.”²

7. Notwithstanding that this reservation is to be observed, the interpretation of Brett J as to the substitution of the expectation of a member of the public is still relevant. As submitted for the Board, the principles to be extracted from the judgment of Brett J are as follows:
- (a) The statutory definitions have replaced common law notions;
 - (b) The first step is to determine if the conduct amounts to unsatisfactory professional conduct;
 - (c) That requires an evaluative assessment of the conduct measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian “legal practitioner” or “property agent” as the case may be;
 - (d) The second step is to determine whether the unsatisfactory professional conduct amounts to professional misconduct.
 - (e) The standard of competence and diligence required is to be evaluated on the basis of what a reasonable member of the public would be entitled to expect of the practitioner or “property agent” as the case may be.
8. It was contended for the property agent that there was no evidence of what a reasonable member of the public was or would be entitled to expect, and that absent authority the Tribunal had no basis upon which to assess the issue. The Tribunal is comprised of a legal, a property agency and a community member, and must and has the capacity to apply its own

² *Real Estate Institute of Tasmania v Property Agents Board and Graeme Lawler (Decision)* (Property Agents Tribunal, No 2019-0064T, 2 October 2020) [78].

perception of what a reasonable member of the public is entitled to expect. A relevant parallel is the task of a court in determining what a reasonable man would do. In either case there may or may not be external evidence or authority on the issue, and the adjudicating body must in any event apply its own qualifications and experience.

9. Whether or not the facts agreed constituted unsatisfactory professional conduct or, more, needs to be assessed having regard to the law and the surrounding facts and circumstances. Those circumstances include particularly the potential for conflict of interest between vendor and purchaser, and between the vendor and purchaser and the property agent.
10. The conduct of a property agent is to be assessed against the provisions of section 83 of the Act and the Code of Conduct, having regard not only to the expectations of “*a reasonable member of the public*” but also to the primary purposes of the Act and Code being protection of the public and the maintenance of proper standards in the profession of property agents.
11. Consistently with that approach, paragraph 2 of the *Code of Conduct* provides:

2. Object of Code of Conduct

(1) The object of this Code of Conduct is to increase the accountability of property agents to his or her clients, customers and colleagues.

12. Paragraph 4 of the *Code of Conduct* provides:

4. Contravention of Act, regulations or Code

Without limiting what may constitute unsatisfactory professional conduct or professional misconduct, if a property agent contravenes a provision of the Act, the regulations or this Code of Conduct, that contravention may constitute unsatisfactory professional conduct or professional misconduct.

13. Paragraph 8 of the *Code of Conduct* provides:

“8 Responsibility of property agent to client and customer

A property agent must at all times –

(a) accept that his or her first responsibility is to serve the interests of a client and, while serving the interests of the client, to act fairly, honestly and in a reasonable manner towards all customers; and

(b) do everything that can be reasonably expected to obtain the best price and conditions for the sale or lease of a client's property or business;"

14. Paragraph 12(5) of the *Code of Conduct* provides:

(5) A property agent –

(a) must not accept an appointment to act, or continue to act, for a client or prospective client where to do so would place the property agent's interests in conflict with the interests of the client or prospective client;

15. Paragraph 5 of the *Code of Conduct* provides:

5. Attempt to do an act

If a property agent attempts to do an act which, if successfully completed, would constitute a contravention of a provision of the Act, the regulations or this Code of Conduct, that attempt may constitute unsatisfactory professional conduct or professional misconduct.

16. The presently relevant provisions of the *Property Agents and Land Transactions Act* and the *Code of Conduct* are properly considered as beneficial legislation in so far as they are intended to provide protection to members of the public and consumers of the services provided by Property Agents. A purposive approach requires a wide meaning be given to the category of persons who are sought to be protected not a narrow one.³

Standard and Onus of Proof in Disciplinary Proceedings

17. As submitted for the property agent, the civil standard of proof applies. It is well recognised that in proceedings of a disciplinary nature, whilst civil proceedings, the requisite civil standard of proof is that required to meet the standards of the

³ *Acts Interpretation Act 1931 (Tas) s8A.*

Briginshaw principle.⁴ Given the characterisation by the Board of the seriousness of the allegations,⁵ which the Tribunal accepts, and the possible consequences of a finding being made against the property agent, “the Tribunal will need to feel an actual persuasion of the occurrence or existence of the relevant facts before being satisfied that an allegation has been made out”.⁶ As noted, the Tribunal has found according to the agreed facts.

The Complaint

18. An issue between the parties was the extent of the complaint. In its referral document the Board describes the Complaint in the following terms:

“15. By complaint to the Property Agents Board dated 26 August 2020, the complainants complained that ‘the agent should have allowed us to list our property through our chosen agency’.”

19. It was contended for the property agent that the complaint refers to the Tribunal consisted only of this allegation. The words were however a brief summary of the allegations which were fully set out in the document attached to the Statement of Agreed Facts (“SOAF”).

20. Also on the first page, in response to the question as to “on or between which date(s) does your complaint or concerns relate to?” the entry was “From 25/08/2022 25/08/2020”. It was however clear from the remainder of the complaint that the relevant dates extended over several days prior to that date; consistently, the Statement of Agreed Facts also related to those prior dates.

21. On the second page of that document, there is a question; “*What matters does your complaint relate to and why? In this section give details of the conduct complained about etc*”. The complainants provided that information on a typed page comprising 10 dot points. The information provided in those dot points amplifies and forms part of the complaint and is properly considered by the Tribunal.

⁴ *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at [362] per Dixon J.

⁵ Board’s submissions, para. [59]

⁶ *Medical Board of Australia v Dr Reinhard Ernst Moritz Hemm* [2023] TASCAT 82 at [63] per A. Clues, Deputy President

22. It is important to be clear that the complaint contains *allegations* of fact, as distinct from *evidence* of fact. The facts which have been agreed are set out in the SOAF, and it is those agreed facts which the Tribunal has found and which it takes into account in determining this complaint referral.
23. The primary issue of fact is whether the Property Agent allowed the complainants to list their property through their chosen agency. In the ultimate of course he could not prevent them from doing so; the question is whether in the circumstances what he did amounted to an attempt to do so.
24. In essence, the complainants wished to purchase the Kythera Place property; they required that any offer made all the property would be subject to sale of their property at Biarra Court.
25. The Property Agent advised the Porters as to the inclusion of, drafted, and presented to the complainants, a counteroffer which included a clause conditional upon his appointment as the selling agent for the complainants' Biarra Court property.
26. This placed the complainants in the position of having to appoint the property agent for the sale, thereby preventing them from appointing any other property agent, if they were to be able to obtain the Kythera Place property which they wanted.
27. The Tribunal considers that this clearly amounted to an attempt to prevent the appointment of any property agent other than himself, as the selling agent for their Biarra Court property.
28. It was of no consequence that the complainants never intended to engage the property agent for the sale. An attempt to carry out an action can be culpable irrespective of whether the action is possible. For example, offering a bribe to a person to carry out an action when that person never had the capacity to carry out the action, is still an attempt.
29. Nor, the Tribunal considers, does the fact that the property agent contemplated that the Porters would obtain legal advice on the relevant clause favourably affect his position. The advice to be obtained by them could be expected to be with respect to their position, not the ethical obligations of the agent.

30. Whether this amounted to unsatisfactory professional conduct, or more, depends upon the factual and legal consequences of doing so, in all the circumstances. Those circumstances, the relevant facts, are set out in the Statement of Agreed Facts.

Conflict of interest between the Porters and the complainants.

31. The Board submits that one of the overarching obligations on a property agent (and an expectation of a reasonable member of the public) is to avoid allowing themselves to be put in a position of conflict. Conflict can arise between the agent's own interests and those of clients or potential clients. The position is exacerbated if the property agent allows himself or herself to be in a position where he owes conflicting duties to two or more clients or potential or prospective clients. The Tribunal considers that is an accurate statement of the law.

32. There was a clear conflict between the interests of the Porters and those of the complainants. The Porters wished the sale of Kythera Place to be fast and uncomplicated, for reasons stated to the property agent. On 21 August 2020 the complainants told the property agent that they wanted to advertise their home as a 5 bedroom and 3 bathroom house and unit, and the property agent considered it was more properly described as 4 bedroom and 2 bathroom house and that it could not properly be marketed on the basis suggested by the complainants.

33. The condition making the proposed contract of sale to the complainants subject to the sale of the complainants' property when there was a disagreement as to the proper description of the complainant's property, meant that there would be potential delay and complication. There was accordingly a conflict between the interests of the Porters and those of the complainants.

Conflict of interest between the property agent and the complainants

34. By attempting to have himself made the agent for the sale of the complainants' property, when he knew of this conflict, the property agent was attempting to place himself in a position where he would owe conflicting duties to the Porters on the one hand and the complainants on the other. The duty to the Porters was to bring about a fast and uncomplicated sale of the property. The duty to the complainants had he been appointed as agent, would have been to market their property on the basis upon which they wished.

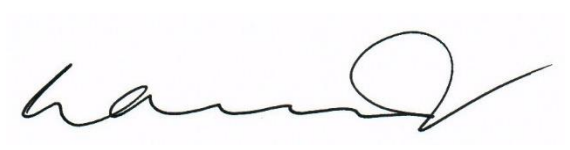
The Porters had indicated they were not prepared to continue with the sale and if the complainants persisted with the proposed marketing campaign.

35. The suggestions by the property agent to Mrs. Porter that if also appointed as the complainants' agent he would not sell the complainants' property in certain circumstances, and would be in a position to keep her better informed about the progress of the complainants' sale, clearly involved that he would advantage the Porters to the disadvantage of the complainants, there being a clear conflict of interest between the two.
36. Clause 8 (a) of the *Code of Conduct* states that it is the duty of a property agent to "accept that his or her first responsibility is to serve the interests of the client and, while serving the interests of the client, to act fairly, honestly and in a reasonable manner towards all customers". 'Customers' are defined in the Code as persons who interact with the property agent in the course of his business, and who are not clients of the property agent.
37. It was contended for the property agent that because the complainants did not intend to list their property for sale with the property agent, they were never "prospective clients"; and were never 'clients'. Reliance was placed on the definition of "prospective client" found elsewhere. For example, in the New Zealand *Real Estate Agents Act (Professional Conduct and Client Care) Rules 2020*, s 4, the expression "prospective client" is defined to mean "a person who is considering or intending to enter into an agency agreement with an agent to carry out real estate agency work". There is no corresponding definition in the Tasmanian Code.
38. On this issue, the property agent clearly considered that the complainants might become clients and was responsible for the clause requiring that. He had appraised their property. He had provided marketing materials. If he had no expectation that they might engage him, then those actions and his drafted clause were pointless, as was the arrangement of the appointment with the complainants scheduled for 25 August 2020 and the presentation of the counteroffer.
39. Absent a definition which looks only to the intent of the property owner, the Tribunal considers that it would be reasonable to consider the complainants prospective clients of the property agent. Against the event that conclusion is incorrect, even if the complainants

were not 'prospective clients', they were 'customers' as they were persons who interacted with the property agent in the course of his business. Clause 8 (a) of the *Code of Conduct* accordingly applied.

40. if the property agent had been successful in becoming the selling agent for the complainants, he would have been faced with a conflict between his interest in the benefits arising from being the complainants' selling agent on the one hand, and the duty which he already owed to the Porters on the other hand. He had already stated to Mrs. Porter that to her advantage she would be better informed of the course of the complainant's prospective sale.
41. The Tribunal considers that a reasonable member of the public would expect that the property agent would not attempt to place himself in a position where he could not properly represent the interests of his clients. Similarly, that a reasonable member of the public would expect that the property agent would not attempt to place himself in a position where he would benefit from his appointment as selling agent for the complainants, when he could not represent their interests without compromising the interests of the Porters. The Tribunal is satisfied to the requisite standard that the property agent attempted to place himself in each of those positions.
42. A relevant consideration is that rather than drafting and suggesting a clause appointing himself as the complainants' selling agent, he could have avoided all the potential conflict by for example suggesting a clause in the counteroffer which required that the complainants' property be marketed as a 4-bedroom, 2 bathroom, house. It should have been obvious to him that to suggest that he became the complainant's selling agent would give rise to conflict between the two property owners.
43. The complaint is accordingly substantiated. The Tribunal considers that the level of seriousness, having regard to all the agreed facts, is that of unsatisfactory professional conduct rather than professional misconduct; the Tribunal finds accordingly.
44. The parties have an opportunity to make submissions with respect to the action to be taken by the Tribunal. Any submissions on behalf of the Board are to be made within 10 days of publication of this decision. Any responding submissions on behalf of the property agent are to be made within a further 10 days.

Dated the 28 November 2023

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

Keyran Pitt KC
President