

# PROPERTY AGENTS TRIBUNAL

No 2021-0077T

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

Mr Phillip Caddy (Appellant)

and

Property Agents Board (Board)

and

Ms Trindy Hogan (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 R Yeoland, Member  
Ms J Cranston, Member

**Delivered on:** 14 November 2022

**Representation:**

Appellant: Self-represented and written submissions

Board: No representation as leave granted to withdraw from proceedings

Second Respondent: self-represented and written Submissions

## Background

1. In the first half of 2021 the property agent (the property agent) was the managing agent with respect to leasing Mr Caddy's (the complainant)'s property at 60 Clark Street Mowbray (the property).
2. The tenants to whom the property had been leased, extended that lease and then broke the extended lease. The property agent obtained new tenants who signed a fresh lease for the property.
3. The complainant lodged a complaint with the Property Agents Board (the Board), alleging that the property agent was guilty of unsatisfactory professional conduct or professional misconduct, alleging in essence as follows:
  - The property agent did not explain the options arising from the breaking of the lease.
  - The complainant told the property agent during a phone call on 26 February 2021, that he wished to upgrade before releasing, and that the property was not to be re-let until upgrades had taken place, but the property agent re-leased the property on about 2 March 2021 contrary to the complainant's wishes.
  - The property agent told the complainant during an inspection of the property, that she had friends in mind as substitute tenants.
  - The property agent lied to the complainant by not disclosing the fact she had re-leased the property, intending to deceive him and to advantage her friends.
  - The property agent failed to inform the complainant that the property had been re-leased, at any time prior to 10 March 2021 when the complainant deduced that fact from the fortnightly rental statement.
4. The Board dismissed the complaint, and the complainant appealed to the Tribunal. The grounds of appeal as elaborated by the complainant's submissions, were in essence that the Board erred in its decision and should have found the complainant's above allegations proven.

## Law as to the Appeal

5. The appeal is pursuant to section 116 of the Act, which as previously identified by the Tribunal and the Court 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] TASMC [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

6. The material before the Board when it reached its decision consisted of the complaint documents, copies of the relevant correspondence and lease documents, two statutory declarations, submissions of the parties and an investigator's report.
7. Relevant to this appeal, that material is summarised in chronological order and where appropriate reproduced, as follows.

8. 28 January 2021 – The property agent wrote to the complainant as to renewing an existing lease expiring on 26 April 2021, and enclosing renewal documents with a suggested increased rental of \$300 per week for a further 12 months.
9. 20 February 2021 – The then tenants signed the renewed lease agreement; and shortly thereafter advised the property agent they intended to break it.
10. 26 February 2021 – In a telephone conversation the property agent notified the complainant of the tenant's intention to break the lease.
11. The complainant contended *"and a discussion ensued in relation to its current low rental and my desire to upgrade before releasing"*.
12. The Property agent contended to the Board: *"during this phone call I explained in detail and at length the processes that are required under the current legislation. I explained and discussed with him that under a lease break situation, the legislation requires an agent to make every attempt to mitigate costs and loss to the existing tenant, and also protecting an owner's interest and ensuring that an owner is not subject to any legal action that may arise within a break lease situation."*
13. The complainant responded *"any conversation to this effect simply did not take place between myself and the property manager. In fact just the opposite happened. I was deceived from the time advice was given to me of the lease break. It was not until March 9 when on receiving a fortnightly rental statement that I found that the property had in fact been re let to Clayton and Doherty."* The *"property agent was advised by myself as acknowledged by Mr Bushby that the property was not to be re let until upgrades had taken place."*
14. 1 March 2021 – An email from the property agent to the complainant advised of a change in vacating date from 12 to 19 March.
15. 1 March 2021 – An email from the complainant to the property agent asked *"does the breaking of the lease means replacement tenant goes into the property at the same rent for the remainder of the lease?"*
16. 2 March 2021 – An email from the property agent to the complainant advised *"No the replacement tenant will be paying \$300 per week."*
17. 2 March 2021– Clayton and Doherty signed a fresh lease as tenants – the complainant alleged he was unaware of this.
18. The Property agent however said she told the complainant that Clayton and Doherty had signed the *"lease agreement"*.
19. 5 March 2021 - At an inspection by the complainant, the complainant said he indicated \$300 per week was well below market value *"I asked the property manager on March 5 that as a consequence of the lease break could I lease the property at a higher value. She said no."*
20. The complainant alleged the property agent *"said she had some friends of hers in mind"*; and that at no time prior to the inspection or after the inspection did the property manager indicate that the property had already been re-leased.
21. 5 March 2021 - Jeff Burleigh, a home maintenance man, stated (in an email of 8 November 2021), that on 5 March 2021 he attended with Mr Caddy and the property manager *"I had quite a detailed discussion with Mr Caddy in relation to the replacement of the shower and the options"*

*available for materials et cetera. I advised Mr Caddy at the time that due to my current workload that the replacement of the shower could not be started for at least 12 weeks."*

22. 9 March 2021 – The complainant found from a fortnightly rental statement that new tenants had signed a fresh lease and had paid in advance.
23. 10 March 2021 - The complainant alleged he telephoned the property agent and asked *"why had the property been re-leased without consultation with me. She stated she had released the property to friends of hers but gave no explanation as to why I was not consulted. I stated I should have been consulted especially in relation to my health situation which the property manager was aware of as to which direction I intended to proceed, either sale or release. The property manager stated they may be able to place the incoming tenants into another property. I stated I needed time to think through what had occurred and would email her the following day. In fact I was so distressed at the time that the property manager later stated Bushby's had contemplated phoning my son's next of kin."*
24. 11 March 2021 8:31 AM –the complainant emailed the property agent:

*"Hi Trindy*

*Further to our conversation yesterday, I would like to continue leasing the property after the expiry of the current lease agreement of April 26 2022, and then take the property back over for myself. Prospective current tenants Clayton and Dopherty (sic) may wish to reconsider their lease option on the property as it will only be available for 13 months. At a rental of \$300 per week the property is well under the current median rental value for Mowbray \$340 per week so hopefully the property should lease at this rate.*

*The items listed for upgrade in my email of March 6 will now be deferred until the property is vacated. Namely the shower, stove, carpet and curtains in the lounge. Perhaps we can discuss what remedial work may be needed to be done to these items when we next meet. As discussed in our email of March 9 compensation from the tenants of the lounge room carpet would be appreciated.*

*As regards the final inspection. Any time on Monday afternoon March 22 would be good for me.*

*Many thanks Trindy regards Phil Caddy "*

25. 11 March 2021 at 2:53p.m. the property agent emailed the complainant advising of a maintenance request for the carpet in the lounge room and asking for instructions whether to proceed.
26. 12 March 2021 the complainant emailed the property agent *"just to be more specific please proceed with the carpet quotes as listed however I would like to view and make a selection on the proposed quoted carpets.*  
  
*I was intending to locate to the property late on Friday afternoon and spend the weekend and the following week bringing it up to scratch. Is Monday still okay to meet or would Friday PM be better."*
27. On 25 March 2021 the original tenants vacated, and the complainant and property agent attended the property.

28. The complainant stated *"On March 25 a maintenance contractor was in attendance with myself doing repairs to the property prior to the new tenants moving in on March 26. The property manager arrived and we had a brief discussion about the property and I asked her what would the property in its current condition lease for in normal circumstances. Her answer was \$330 per week."*
29. The complainant contends this demonstrates the property agent knew this all along, and had deceived him by her earlier statement of \$300 per week.
30. 26 March 2021 – The new tenants moved in.
31. 30 March 21 – 7 April 2021 – Work was carried out by *Handy Badger* on doors, fly screen, bathroom, kitchen, and bedroom.
32. 8 April 2021 – The complainant emailed the property agent and in return obtained a copy of the lease agreement for the new tenants; it showed the new tenants signed the lease agreement on 2 March, with a term from 26 March 2021 to 25 March 2022.
33. 27 April 2021 the complainant emailed the property agent "thank you for the copy of the new lease agreement" and asking about a condition report.
34. 9 May 2021 the complainant wrote to the property agent's employer principal Mr Bushby alleging the property manager deliberately misled him on whether the property had been re-leased, alleging she had a conflict of interest in re-leasing the property to her friends at a cheap rental rate. He alleged she misled him on the recoverable rental level because she needed to in order to conceal the fact that she had re-leased the property.
35. 13 May 2021 the complainant emailed Mr Bushby explaining he had accepted a lower rent from the original tenants because of their relatively long tenancy and that since they were leaving, he hoped to achieve a more realistic rental for the property.
36. 3 June 2021 – Mr Bushby responded by letter to complainant.
37. There was no evidence the property owner was told of options arising from the breaking of the lease.
38. The complainant submitted to the Board the 'whole crux of the complaint' is that the property manager deliberately did not tell him that the property had already been re-leased, and misled him about the rental increase possible because she had already re-leased the property against his stated wishes to hold off until the upgrades had taken place. And that the *agent "had a conflict of interest in pre-emptively leasing the property to friends of hers to take advantage of its cheap rental rate"*.
39. The complainant submitted to the Board that he only became aware when he obtained a copy of the lease agreement on or after 8 April 2021, that the property had been re-leased from 26 March 2021 to 25 March 2022.
40. The Board, having partially concluded its investigation, required a written explanation from the property agent of:

- (1) Failing to fully explain the options available to the complainant when the original tenant broke the lease agreement; and
  - (2) Incorrectly advising the complainant that he was unable to relet the property the new tenants at a higher rent than that which would have been paid by the original tenants, pursuant to their lease rental.
41. The property agent gave a written response stating that she explained to the complainant: "... *That under a break lease situation, the legislation requires an agent to make every attempt to mitigate costs and loss to the existing tenant, and also protecting an owner's interests and ensuring that an owner is not subject to any legal action that may arise within a break lease situation. This means that it is our obligation to secure a suitable tenant for the property a (sic) soon as possible. My motivation was centred on ensuring the legislative requirements were maintained and that there was every possible opportunity made in securing a suitable tenant, in a timely manner to the property.*"
42. She further stated: "*Given that I had met with Mr Caddy at the property on several occasions and had also had several lengthy telephone calls with him in regards to the rental market, one of which included providing explanations as to how the mean and median prices for rental properties is ascertained, if Mr Caddy had any concern or did not understand what the processes and his options were, he had many opportunities to seek advice or clarification. I believed that there was a good working relationship between us and that the lines of communication between us were always open.*
- It is my belief that I should not be made responsible for an owner who refuses to take the professional advice provided to him by a Property Portfolio Manager of approximately 16 years experience.*"
43. The property agent further stated to the Board that this was not the complainant's first experience with a break lease situation. She stated that the tenants who occupied the property between 2016 and 2017 had also broken their lease, and that she was managing the property at that time; and that the complainant appeared to fully comprehend the process on that occasion as he did when the original tenant broke the lease some three years and four months later.

#### **The Board's decision and the appeal**

44. On 18 May 2022, the Board published its determination and reasons.
45. The Board stated it was persuaded that the property agent had acted reasonably in regard to the advice she had provided the complainant when the original tenants gave notice that they were breaking the lease, that there was insufficient evidence to substantiate the complaint, and dismissed the complaint pursuant to section 100 (h) of the Act.
46. The complainant appealed to the Tribunal against that determination.

#### **Consideration**

47. The Tribunal has considered the material which was before the Board together with the written submissions by the appellant and the agent.

## The law relating to professional conduct standards

48. The law as to the process the Board was required to undertake was summarised by Magistrate Daley 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.<sup>11</sup> 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.<sup>12</sup> .....

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.

28. The next step required a determination whether any unsatisfactory professional conduct amounts to professional misconduct. The Act, s 83 provides an inclusionary meaning of *professional misconduct*:

***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;

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

<sup>12</sup> See *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14 at [11] per Brett J. "

29. The Board had to decide whether the conduct it found constituted *“unsatisfactory professional conduct”* which is defined in section 7 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”*.
30. 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’<sup>16</sup>. He continues: ‘A concern is that, should every negligent act or error be categorised as unsatisfactory professional conduct, the distinction between the 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).

### Consideration

49. The issues arising from the appeal are considered as follows.

#### ***Knowingly re-let the property against the property owners wishes.***

50. The complainant alleged the agent was told by him that the property was not to be re-let until upgrades had taken place. The complainant’s statement to the Board was *“I asked the property manager not to relet the property before upgrades had taken place. This was acknowledged by Mr Bushby in paragraph 7 of his letter dated June 3, 2021.”* Further, *“the property manager breached the understanding that the property was not to be released prior to upgrades taking place”*.
51. In the letter of 9 May 2021 to Bushy Property Group the complainant said *“the property manager rang me to advise of the break and a discussion insured in relation to its current low rental and my desire to upgrade the property before releasing.”* The Board was not given particulars of how this was stated or the words used other than that it was in the course of a discussion. In that letter, he also stated that *“On March 1 I emailed the property manager... querying the rental valuation for a future tenant. On March 2nd the property manager replied that any replacement tenant would be paying the leasing agreement amount of \$300 a week.”*
52. The property agent submitted to the Board that the complainant indicated he wanted the property rented until the end of the new lease in April 2022; and that at that time, he had already agreed to renew the lease with the original tenants until after 26 April 2022, a full month after the new tenants vacated on 25 March 2022.
53. This allegation was not specifically determined by the Board, but on the issue of whether the Board was obliged to find that there had been such an instruction and that it had been breached by the agent, the Tribunal considers upon the following reasoning that it was reasonably open to the Board to find that it was not satisfied that such an instruction was given.



54. The Board noted that this alleged instruction was apparently inconsistent with the contents of the complainant's letter of 11 March, which adopts the position that the upgrades would be deferred. The complainant explained that inconsistency by stating that the letter of 11 March was written in the belief that he had no other option; if correct, that would be a sufficient explanation.
55. If the complainant had instructed on 26 February that there was to be no re-letting, that instruction was inconsistent with the following emails, which demonstrate that as at 1 and 2 March the complainant contemplated there would be replacement tenants for the remainder of the lease term:
- 1 March 2021 – An email from the complainant to the property agent asking *“does the breaking of the lease means replacement tenant goes into the property at the same rent for the remainder of the lease?”*;
  - 2 March 2021 – An email from the property agent to the complainant advised *“no the replacement tenant will be paying \$300 per week.”*
56. Further, prior to 26 February 2021 the property agent had written on 28 January 2021 to the complainant advising of the expiring lease and enclosing renewal documents with the suggested increase rental of \$300 per week for a further 12 months, and asking if he agreed with that course. It was open to the Board to find as it did, that the complainant agreed with that course, given that the renewed lease agreement was signed on 20 February 2021; it was not until 26 February 2021 that the break-lease situation arose.
57. As the complainant had the option to not extend the lease so as to undertake renovations, but agreed on or shortly after 28 January 2021 that there should be an extension of lease for over 12 months, a change of mind to the situation that he would not re-lease and instead renovate, was unexplained and inconsistent with the position that the property was not to continue to be leased.
58. The complainant contends that Mr Bushby, the property agent's principal, confirmed in paragraph 7 (actually in paragraph 8) of his letter of 3 June 2021 to the complainant, that the complainant instructed the property agent not to re-lease the property prior to upgrades taking place.
59. Mr Bushby however did **not** confirm that the complainant had asked or instructed the property manager not to release the property prior to upgrades taking place. What the letter of 3 June 2021 stated was to ask *“can you confirm that upon the meeting at the property with your property manager, that you had decided not to proceed with any works and that you were wanting to move into the property when the new tenants vacated in or around March 2022”*. It was a question not a confirmation; and the occasion being referred to was a meeting at the property on 5 March 2021. Other than the complainant's assertion in his letter of 9 May 2021, there was no material before the Board evidencing any instruction being given at or about the meeting on the 26 February; the question was apparently related to the complainant's references in paragraph 1 of his letter of 9 May 2021, to *“a discussion ensued in relation to its current low rental and my desire to upgrade the property before releasing”*, and in paragraph 5 to *“she had already leased the property against my stated wishes to hold off until upgrades had taken place”*. It did not apparently relate to information given by the property agent.

60. Having that information before it, it was open to the Board not to be satisfied that prior to the actual re-leasing there had been a request or instruction by the complainant to the property agent, not to re-lease the property before upgrades had taken place, as asserted by the complainant.

***Failing to advise of the fact the property had been re-leased by way of a fresh lease.***

61. It was conceded by the property agent before the Board that she did not tell the complainant that there was a fresh lease, and it is apparent that the complainant only found this out when he later saw the rental receipt.
62. Having regard to the circumstances that the complainant had only just agreed to an extension of the previous lease for over 12 months with an increased rental, and that as a result of the broken lease any tenants would be new tenants, it is difficult to see any appreciable consequence arising from the fact of a fresh lease as opposed to a takeover of the existing extended prior lease.
63. It is also relevant in assessing the level of seriousness of the property agent's conduct, that in January 2021 the complainant had agreed that the existing tenants of the property should be granted an extension of the original lease for a period of a year at an increased rental; and that the property was re-leased to the new tenants for within a month of the same term and at the same increased rent. The Board would have been entitled to take into account that had the complainant wished to defer a further period of lease until some improvements were carried out in order to increase rental, it could be expected that he would express that when communicating with the property agent about the extension of the initial lease; the fact that it was not expressed until after the re-lease was consistent with the property agent considering that it was proper to re-lease as she did.
64. In those circumstances, the failure of the property agent to advise that there was a fresh lease rather than a takeover of the existing extended prior lease, does not appear to the Tribunal to reach the level of unsatisfactory professional conduct.
65. Accordingly, in the opinion of the Tribunal, a finding was open to the Board that it was not satisfied that there been unsatisfactory professional conduct in this respect.

***Failing to properly explain to the complainant his rights arising from the breaking of the lease***

66. The Board found that a conversation should have taken place where the property agent fully explained all the options to the complainant, with a tension between the complainant not being compelled to find a new tenant immediately, but if he did not do so being unable to pursue the vacating tenants for failing to pay the rent. The Board found the complainant was confused about his rights in that respect, referring to his letter of 1 March 2021 querying whether the *breaking of the lease meant a replacement tenant would go into the property at the same rent for the remainder of the lease.*
67. The Board noted that the communication between complainant and property agent was largely verbal, and that there was no 'material' evidence to verify whether the property agent advised the complainant that he was not compelled to allow the new tenants to rent the property for the same rent and timeframe as in the original tenants' lease.
68. The Board found, consistent with the evidence, that as at 11 March 2021 the Complainant was incorrectly of the view that the incoming tenants were taking over the lease that existed with

the outgoing tenants and that therefore he was compelled to allow the new tenants to rent the property for the same rented same time-frame as had been set out in the lease that the outgoing tenants (the original tenants) had signed in February 2021. The Board noted this belief was incorrect.

69. The Board acknowledged that had the complainant understood that he was not obliged to do so he may instead have allowed the existing tenants to “walk away” and undertake the upgrades and re-let the property at a higher rental. The Board found in summary *"to conclude this point, the evidence suggests that the complainant "accepted" the lease when he did because he believed he was bound to accept rent of \$300 per week and new tenants were taking over the lease provide the outgoing tenants."*
70. The property agent had also stated to the Board that this was not the complainant's first experience with a break lease situation. She stated that when the tenants who occupied the property between 2016 and 2017 had also broken the lease, she was managing the property at that time; and that the complainant appeared to fully comprehend the process on that occasion as he did when the original tenants broke their lease some three years and four months later.
71. The Tribunal considers that all of these findings and observations were consistent with the material before the Board and open to the Board.
72. The relevant issue here is whether the property agent was entitled in February 2021 to rely upon knowledge of the complainant's previous experience with a break lease situation, rather than giving a specific explanation of the complainant's rights to him at that time. The Tribunal considers that this is an issue which could be determined against the property agent. The test on this appeal however is not whether the Tribunal hearing the matter at first instance could have found differently, but rather whether the Board's decision was reasonably open to it. It appears to the Tribunal that while this is a borderline question, it was open to the Board to find that it was not satisfied that the property agent had acted unreasonably in the advice she had given in this respect, which included relying upon the complainant's previous experience rather than giving a further specific explanation.

***Misleading as to the reasonably recoverable rental***

73. There are two aspects to this. The first is the allegation that the agent lied when stating this, and the second is the allegation that the advice itself was incorrect.
74. With respect to the alleged lying, it is not clear to the Tribunal from the information before the Board, that the property agent was referring to the legal possibility of letting at a higher rental, rather than to what was reasonably obtainable. That lack of clarity affects the ability to be satisfied as to what is a serious allegation.
75. The property agent submitted to the Board that the reasonably obtainable weekly rental was \$300, noting it was an increase of \$20 per week from the previous rent. She stated she did so on the basis of her experience and expertise in the property market over 16 years and managing over 40 properties in the Mowbray area alone.
76. The property agent had stated to the complainant on 5 March that the property in normal circumstances would rent for \$330 per week. Before the Board at the time it made its decision, there was a dispute between the complainant and the property agent as to whether “in its (the

property's) current condition under normal circumstances" meant with the upgrades on the one hand, or without the upgrades on the other.

77. The property agent submitted to the Board that the statement was made at the time of the rent review for the property and given the condition of the property and using the comparable rental prices and properties in the area at that time. *"Mr Caddy was explained this in our numerous conversations and I believe Mr Caddy understood that a significant rental increase would only be available on the property had some refurbishment and refreshment to the property taken place."*
78. Also, with respect to the appropriate level of rental, the Board had before it the submission of the property agent:  
*"given that I had met with Mr Caddy at the property on several occasions and had also had several lengthy telephone calls with him in regards to the rental market, one of which included providing explanations as to how the mean and median prices for rental properties is ascertained, if Mr Caddy had any concerns or did not understand what the process and his options were, he had many opportunities to seek advice or clarification. I believed that there was a good working relationship between us and that the lines of communication between us were always open."*

This was denied by the complainant.

79. The issue before the Board was whether it was persuaded to the necessary high degree that the property agent was not telling the truth. The non-verbal material before the Board was not inconsistent with the property agent's submitted explanation. The evidence as to the conversations was one version against the other. In those circumstances it was open to the Board not to find against the property agent.
80. In the opinion of the Tribunal, it was open to the Board to accept the statements of the property agent of her belief that the rental level of \$300 per week was reasonable with respect to the condition of the property at the time the statement was made; that is having regard particularly to the fact that on the recent renewal of the original lease the rental had been increased from \$280-\$300 per week, and that there was no evidence that the complainant had insisted upon a higher rental level in the context of that renewal. It follows that it was reasonable for the Board to have not been satisfied that the property agent was lying in this respect.

**Misleading as to having friends in mind, while secretly intending to benefit them**

81. It was alleged by the complainant that the property agent was secretly intending to benefit her friends by effecting a re-lease of the property to them at a low rental, at the time she represented to the complainant that the proper rental value of the property was \$300 per week.
82. The Property agent stated, and new tenants confirmed, that they did not know each other prior to 18 February when they viewed a property in Ravenswood. She stated to the Board:  
*"Mr Caddy contends that the tenants Maisy Clayton and Travis Dougherty were friends of mine. Ms Clayton and Mr Dougherty were applicants for another property of which I manage, 6 Cavell Place Ravenswood, that they attended the viewing of previously on 16 February 2021 and which their application past the Bushby Property Group office processing procedure, the owner of the property had several applications to select from and he chose another applicant for his property."*

*Ms Clayton requested that they be contacted if other possibly suitable properties became available. When I was advised of the break lease situation at 60 Clark Street Mowbray, I made contact and was advised that they were still looking for a property and I suggested this one to them. I categorically deny that I knew them until I met them at the viewing at 6 Cavell Place Ravenswood..."*

83. Ms Clayton and Mr Doherty in separate statutory declarations each confirmed these statements.
84. In the presence of that material, the Board was justified in not finding that the new tenants were friends of, or otherwise associated with, the property agent in a way which would reasonably allow the inference that the property agent had a motive of favourable treatment.
85. As further matters, the tenor and tone of the emails of 11 March 2021 and 8 April 2021 were inconsistent with the allegations of misleading and lying. There was no suggestion in them of dissatisfaction with what had occurred, or that the property agent had not done what was requested, let alone had lied.
86. The allegations of misleading were made upon the premise that there was deliberate misleading by the property agent with a motive to benefit her friends.
87. Had deliberate misleading, and/or a conflict of interest been established, that would have indicated that the agent's conduct had risen to or above the level of unsatisfactory professional conduct. The inference that the failure to advise of the re-leasing was deliberate would have arisen had a relationship of friendship or perhaps even familiarity between the property agent and the tenants been established; that could also have established the existence of a conflict of interest. The basic premise of a friendship was however denied by the property agent, and that denial was supported by the tenants in statutory declarations. There was no other evidence than the assertion by the complainant, that the property agent had referred to having 'friends in mind'.
88. In those circumstances, as considered above, it was reasonable for the Board not to have been satisfied of the existence of any relationship between the property agent and the new tenants other than their involvement in the leasing process, and for the Board not to have been satisfied that there was any improper motive or intent to mislead for such a reason. No other reason for the property agent to fail to properly inform the complainant, other than perhaps carelessness, appears from the material before the Board.
89. The Tribunal notes that the transaction undertaken by the property agent was conducted with considerable speed. The property agent's signing of the fresh lease in circumstances where the identity of the new tenants and the term of the new lease had not been clearly explained to the complainant, the failure to ensure the complainant's understanding as to his rights upon the breaking of the old lease, and the failure to document any of the explanations or instructions, were not in the opinion of the Tribunal, consistent with good practice.
90. That failure to document with respect to the fresh lease was also inconsistent with the course which had previously been adopted, and what might be considered good practice. The extension of the original lease was made the subject of a written request for instructions (the letter of 28 January 2021), but there was no such written record of enquiry and instructions with respect to the fresh lease to the new tenants. Nor was there any written record of any explanation given to the complainant by the property agent with respect to his rights upon the

breaking of the lease. To have documentation of these matters would have gone far to avoid the conflicts and ambiguities which transpired.

91. Again, had the Tribunal been hearing and determining this matter at first instance, it was open to it to find that the property agent was guilty of minor misconduct. As stated above however that is not the test to be applied in determining this appeal; the test is whether the conclusion which the Board reached, was open to it.

#### **Conclusion**

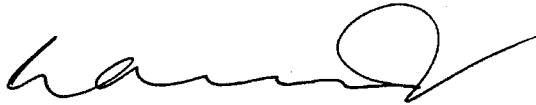
92. In those circumstances, the Tribunal considers that it was open to the Board not to be satisfied that the conduct of the property agent had risen to the levels of minor misconduct or unsatisfactory professional conduct or professional misconduct.

93. The result is that the appeal must be dismissed.

#### **Orders**

94. The appeal is dismissed.

Dated: 14 November 2022



**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.