

THE PROPERTY AGENTS TRIBUNAL

In the matter of an Appeal against the decision of
the Property Agents Board pursuant to section
127 of the *Property & Land Transactions Act 2016*

NOTICE AND REASONS FOR DECISION

No 2022-0081T

Mary Goldsack

V

Property Agents Board and Ms Maureen Lacey

Decision on: 14 April 2023

Tribunal:
Mr K Pitt President
Mr David Paton and Ms Pam Corkhill, Members

Representation: The property agent and the Board did not take part in the appeal. The complainant was self-represented.

1. Background:

At all material times the complainant owned a residential property at Low Head (the property). The property agent was the managing agent and property agent for the rental of the complainant's residential property at Low Head, from the first letting in 2014 until 2022. Complaints were made to the Board against the property agent, that in essence the managing agent had failed to properly supervise the property agent(s) responsible for the management of the property.

The particulars of the complaint extended to several matters, but relevant to this appeal was that two dining chairs were missing at the conclusion of the rentals in 2022, and that the property agent had failed to take appropriate steps to ensure the complainant's interest in respect of the chairs was protected.

The board dismissed the complaint, and the complainant brought the present appeal.

2. Law as to the Appeal

The appeal is pursuant to section 116 of the Act, which as previously identified by the Tribunal is a rehearing on the material before the Board when it made its decision; the appeal is to be determined on the material which was before the Board (together with the written submissions of the complainant): *Real Estate Institute of Tasmania v Property Agents Board and Graeme Lawler* [2022] TASMIC [15]-[21] (*Lawler*).

The law as to the process the Board was required to undertake was summarised by Magistrate Daley M 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. 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.

It appears that at this stage, under s100, the Board may determine whether the evidence appears to indicate that the conduct complained about only amounts to minor misconduct, in which case it 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;

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 fall 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.: *JW v Legal Practitioner 2* [2019] TASPDT at 58; also, *Spero Pitsikas* (1995) 1 LPDR (No 1) 5, at 10; and *G E Dal Pont*, 'Concepts of Misconduct' in *Lawyer Discipline* (LexisNexis, 1st ed, 2020) 40-41."

3. The Tribunal must consider whether the decision of the Board was reasonably open to it on the material before it. There is no power to receive fresh evidence.
4. Accordingly, the issue before the Tribunal is whether the evidence before the Board established that the property agent was required to withhold the cost of repairing or replacing the chairs from the bond monies returned to the outgoing tenants; or to have taken steps to recover the chairs or have them repaired.

5. The material before the Board

The material before the Board when it reached its decision consisted of the complaint documents, copies of the relevant correspondence and an investigator's report. As previously stated, the complaints were of matters extending beyond the matters pursued by the complainant in this appeal. Relevantly to this appeal, that material is summarised and where appropriate reproduced, as follows.

6. It was uncontested that 2 of 6 dining chairs were missing at the time of the final return of the property to her in early February 2022.
7. The complainant contended the property agent should not have returned the bond to the tenants in those circumstances, and/or have taken other unspecified necessary action to protect the complainant's interests.
8. The property agent submitted to the Board that the chairs had broken. There was evidence before the Board that the chairs had broken; the property agent stated that *"1 (one) was noted as damaged in the very first inventory report in 2014 and the other noted in 2017."* Those reports were not given to the complainant, so she had no opportunity to address them at the times they were fresh. There was a change of tenants in November 2020. Whether the two chairs noted as damaged were still present at that time was not apparent from the evidence. There was no other evidence before the Board as to what had happened to the chairs. The complainant was never informed that the chairs were missing, only discovering that at the conclusion of the last tenancy.
9. The complainant contended the chairs were "extremely well made, sturdy and solid" unlikely to have broken. She provided photos of the remaining chairs which showed them in apparently good condition and of solid construction.
10. While it could be inferred that it would be unlikely for the chairs to be damaged without substantial force, whether the damage had occurred in a manner for which the tenants at the time would have been responsible to reimburse the complainant for their repair cost, or if lost their loss value, was not apparent from the evidence before the Board.
11. In particular, the evidence did not include any term of any rental agreement which set out the responsibility of the tenants for accidental or careless or deliberate damage occurring during the rental periods. Such a term would have been relevant in determining the responsibilities of the property agents with respect to the loss or damage.

12. The Board's decision and the appeal

On 24 October 2022, the Board published its determination and reasons. The Board stated it was satisfied that there was insufficient evidence to substantiate the complaint, and dismissed the complaint pursuant to section 100 (a) of the Act. The complainant appealed to the Tribunal against that determination.

13. Consideration

The question for the Tribunal is whether it was reasonably open for the Board, given the evidence before it, to find that the property agent was not guilty of unsatisfactory professional conduct in not pursuing the repair or recovery of the chairs, or absent that in returning the bond.

14. There was no evidence sufficient to justify a finding that the chairs were damaged as a result of mistreatment by the tenant; there was no evidence that would justify a finding that there was any term of the lease which held tenants responsible for damage however occurring. In those circumstances the Board could not have reasonably found that the damage to or subsequent loss of the chairs was something which the property agent could have compelled the tenants to make good.
15. It may be that further information as to the circumstances of the damage to or loss of the chairs would enable a finding that the property agent could have taken steps to remedy the loss, but that information was not before the Board.
16. In those circumstances it was not reasonably open to the Board to find that the property agent had caused loss to the complainant. It might be said that the property agent should have caused further enquiries to be made, but in the opinion of the tribunal that failure, if it had occurred, could not amount to unsatisfactory professional conduct. As instanced in Lawler (above) 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.

17. Conclusion

In consequence, the Tribunal considers that it was open to the Board to find that it was not satisfied that the conduct of the property agent had risen to the level of unsatisfactory professional conduct. The finding of the Board that there was insufficient evidence to substantiate the complaint was reasonable.

18. Order

The appeal is dismissed. The decision of the Board is affirmed.

DATED the 13th day of April 2023.



Keyran Pitt KC,
President, for The Tribunal