

**IN A MATTER BEFORE
THE AGENTS LICENSING BOARD
OF THE NORTHERN TERRITORY**

APPLICATION FOR DISCIPLINARY ACTION

BETWEEN: **MATT ADAMSON**
Applicant

AND **TSCHIRPIG PROPERTIES PTY TLD**
TRADING AS TREVOR TSCHIRPIG
CONVEYANCING SERVICES
First Respondent

TREVOR TSCHIRPIG
Second Respondent

Date of hearing: **12 October, 2011**

Chairperson: Sue Philip
Conveyancing Member: Trish McIntyre
Conveyancing Member: Dianne Jarrett

Appearances:

Counsel assisting the Board Applicant: Sonia Brownhill
In Person by video and telephone conferencing
Respondent: Nikolai Christrup

STATEMENT OF REASONS FOR DECISION

Background

1. On the 23 June 2010 the Applicant, Matt Adamson, made application to the Board under 68(3) *Agents Licensing Act* (hereinafter called "ALA") for Disciplinary Action against the Respondents, Tschirpig Properties Pty Ltd trading as Trevor Tschirpig Conveyancing Services (hereinafter called "TTCS") and Trevor Tschirpig on the ground set out in Section 67(1) (c) ALA of breaches of the rules of conduct for agents, such rules being contained in Section 65 ALA. The Respondents are licensed Conveyancing Agents, the First Respondent, TTCS, holding licence number CAL28, and the Second Respondent, Trevor Tschirpig, holding CAL13.

2. Following consideration of the Application, the Board set the matter down for hearing on 12 October 2011, at which time the Board was assisted by Counsel, Ms Sonia Brownhill; Mr Peter Adamson appeared for himself through video and telephone links. The Respondents were represented by Counsel, Mr Nikolai Christrup.

3. As a preliminary matter, Mr Christrup indicated that the Second Respondent was acquainted with one of the Board Members, Ms Trish McIntyre, and the parties were members of a syndicate which owned racehorses. The Applicant agreed that he was prepared for the Board to continue with the Inquiry despite the relationship declared between the Second Respondent and Ms McIntyre.

The Issues

4. The issues in this Inquiry were:
- a. a consideration by the Board as to whether the Respondents' actions amounted to a breach of the rules of conduct as contemplated by the terms of Section 65 ALA;
 - b. if so, the appropriate disciplinary sanction.

Relevant Legislation

5. Disciplinary action may be taken against a licensed agent on the grounds provided in section 67 of the Act.

67. Grounds for disciplinary action

(1) Subject to this Part, the Board may take disciplinary action in accordance with this Part against a licensed agent on one or more of the following grounds:

(c) the licensed agent has been guilty of a breach of the rules of conduct for agents;

6 Applications for such action are made under Section 68

68. Applications for disciplinary action

(3) Any person may apply, by notice in writing lodged with the Registrar, for disciplinary action to be taken against a licensed agent on one or more of the grounds referred to in section 67.

(4) Where –

(a) subject to subsection (5), an application for disciplinary action to be taken against a licensed agent is lodged in accordance with this section; or

(b) the Board considers that there may be grounds under section 67 for disciplinary action to be taken against a licensed agent,

the Board shall hold an inquiry.

7. The Applicant relied on Sections 65(1) (c), (d) (e) and (f) of the Act to ground the Application.

65. Rules of conduct

(1) A licensed agent who –

(c) fails to perform his duties to his principal or to carry out the lawful instructions of his principal; or

(d) fails to exercise due skill, care or diligence in carrying out his duties on behalf of his principal; or

(e) having an interest in, or being likely to obtain an interest in, a transaction entered into on behalf of his principal, fails to disclose to his principal the exact nature of his interest or of the interest that he is likely to obtain; or

(f) fails to make to his principal a full disclosure of all material facts and circumstances and of everything known to the licensed agent regarding the matter in respect of which he is authorised to act as agent; or

is guilty of a breach of the rules of conduct for agents.

8. In the event of the Board granting the applications, the Respondent may be dealt with as provided in section 69 of the Act.

69. Powers of Board after inquiry

(1) Where, at the conclusion of an inquiry conducted pursuant to section 68(4), the Board is satisfied that it is authorised to take disciplinary action against a licensed agent, the Board may –

(a) reprimand or caution the agent;

(b) by notice in writing, impose a fine not exceeding 50 penalty units on the agent;

(c) by notice in writing, suspend the licence of the agent until the expiration of the period, or the fulfillment of a condition, specified in the notice; or

(d) by notice in writing, revoke the licence of the agent.

Conduct of the Matter

9. The Board was provided with Briefing Papers including the Investigation Reports and various correspondence between the Applicants, Respondents and the Registrar of Land, Business and Conveyancing Agents. The Applicant, being resident in New South Wales and unable to travel to Darwin, attended, gave evidence and asked questions of the Respondents' witnesses, firstly, through a video conference link established with the Local Court in Nowra and, later, through telephone conferencing. The Respondents were represented by Counsel and were able to cross examine the Applicant as well as present their own evidence. The parties, with the aid of Counsel assisting the Board, had reached a Statement of Agreed Facts and all parties indicated their willingness to proceed on the basis of those facts.

10. As a result of reaching such agreement, the parties further agreed that the matters to be inquired into by the Board at the hearing were limited to whether the Respondents were guilty of breach of the rules of conduct for agents within s65(1)(c), (d), (e) or (f) of the ALA as follows:

(i) Whether the applicant and his wife, Judy Boynton, (hereinafter jointly referred to as "the purchasers") informed TTCS, prior to completion of the sale and purchase of Unit 77, 14 Salonika Street, Parap (hereinafter called "Unit 77") that:

- (a) they had paid the sum of \$3,400 to Hammer JV Pty Ltd, the vendor of Unit 77 (hereinafter called 'the vendor') in accordance with an agreed term permitting them to enter into occupation of Unit 77 prior to settlement;
 - (b) the vendor had agreed to repair certain defects in Unit 77 (in the kitchen and the bi-fold doors) prior to settlement; and
 - (c) they had agreed with the vendor to purchase the furniture in Unit 77 at the time they entered into occupation.
- (ii) If the purchasers did inform TTCS as set out in paragraph (i), whether the proper performance of TTCS's and/or Trevor Tschirpig's duties to the purchasers required them to
- (a) seek reimbursement of the sum of \$3,400 from the vendor at settlement;
 - (b) advise the purchasers that the TIO Building Certification Fund would not apply to Unit 77;
 - (c) advise the purchasers to obtain an engineer's report or any other available report;
 - (d) ensure that the contract of sale contained a term or terms reflecting the additional term or terms; or
 - (e) do any other thing in the performance of its and / or his duties to the purchasers which were not done.
- (iii) Whether the failure to settle on the date for completion of 16 October 2009 was caused by any failure by TTCS's and/or Trevor Tschirpig in the performance of its and / or his duties to the purchasers.
- (iv) Whether, at any time relevant to the performance of his duties to the purchasers, Trevor Tschirpig was engaged in negotiations to purchase a unit in "The Avenue" (another complex being developed by the vendor).
- (v) Whether any of the following comprises a failure on the part of TTCS and/or Trevor Tschirpig to make proper disclosure to the purchasers in the performance of its and/or his duties to them:
- (a) that Trevor Tschirpig owned a unit in the development at 14 Salonika Street Parap, known as Hastings on Mindil, and the purchasers were aware of this fact prior to engaging TTCS as conveyancer;

- (b) that Trevor Tschirpig was a member of the body corporate for Hastings on Mindil, and disclosed this fact to the purchasers after they engaged TTCS as conveyancer, and prior to settlement;
- (c) that Trevor Tschirpig was acquainted with Dean Osborne, one of the directors and shareholders of the vendor, and did not disclose this fact to the purchasers;
- (d) if Trevor Tschirpig was engaged as described in paragraph (iv), and did not disclose this fact to the purchasers.

The determination of these matters to be inquired into involved resolution of conflicting statements by the parties and the Board proceeded to hear evidence from the parties in order to settle the facts.

The Facts

11. The Applicant and his wife, Judy Boynton, entered into a contract dated 18 September 2009 to purchase Unit 77 from the vendor (hereinafter called "the Contract"). Following negotiations to purchase Unit 77, on or around 8 September 2009, the purchasers signed a form headed "Purchase Details for Contract" and, on the recommendation of the vendor's agent, Ms Katie Ryan-Brookhouse, the purchasers instructed TTCS to act on their behalf on the 9 September 2009. At all material times both Respondents were licensed Conveyancing Agents.

12. Prior to exchange of the contract, the purchasers attended a meeting on 9 September 2009 with Ben Tschirpig, an employee of TTCS, to discuss the terms of the contract and the process to complete settlement. At the meeting the purchasers were handed documents entitled "Information Sheet for Buyer" and an authority to act, those documents containing a list of searches that could be undertaken in respect of the property and a statement that "if you have had any discussions with the Vendor or the Real Estate Agent in relation to something "special" about the property, I will not be able to protect your interests unless you let me know about it." Ben Tschirpig testified that although he did not take the purchasers through the information sheet, he did explain the terms of the contract including clause 14 which provided an acknowledgement that the purchasers had not relied on any representation of the vendor, at which time any matters not covered by the draft terms of the contract should have been canvassed. Further both the Applicant and Ben Tschirpig attested that the purchasers had elected not to have any searches listed in the authority to act carried out apart from a Body Corporate Levy Search. After hearing the evidence of the parties and considering the documents, the Board was satisfied that neither of the purchasers raised the matters referred to in paragraph 10(i) (a), (b)

and (c), being the agreement for refundable occupation rent of \$3400, the defects to bi-fold doors and the kitchen, and the purchase of furniture, with Ben Tschirpig at that meeting. The Board found, on the basis of the evidence given by Mr Adamson, that the purchasers had a close relationship with the agent, Ms Katie Ryan-Brookhouse, and that they relied on her assurances in respect of those matters.

13. The contract as exchanged on the 18 September 2009 provided a hand-written amendment at item H of the reference schedule making the date for settlement 28 days from exchange rather than the 21 days contained in the original draft. Settlement was due on 16 October 2009 but was not effected until 20 October 2009. This had the result of rendering the purchasers liable for various penalties under the contract, including liability under Special Condition R4 of the Reference Schedule to pay occupation rent back-dated to the date of possession. The purchasers had taken possession of Unit 77 on 9 September 2009 some 9 days prior to exchange of contracts. Further the undisclosed agreement between the vendor and purchasers for payment of a refundable fee of \$3400 for occupation depended on settlement by the 16th.

14. Mr Adamson testified that instructions were given at the meeting with Ben Tschirpig on 9 September 2009 that settlement should be 30 days from the date of exchange. Ben Tschirpig attested that 28 days was inserted as the vendor had already had exchange delayed for 9 days and was not prepared to wait for 30 days for settlement. Following exchange, the purchasers were notified by letter dated 21 September 2009 that exchange had been effected and settlement was due on 16 October 2009.

15. The delay in settlement was the result of a number of factors including delay in returning documentation relating to an extra car-parking space for Unit 77 which required consent from the Body Corporate for 14 Salonika Street, Parap. The lease for the car-parking space also delayed stamping of the documents as it prevented the transaction being stamped on a self-assessment basis and required lodgement with the Commissioner of Stamps. The documents were lodged on 14th and assessment granted on the afternoon of the 16 October 2009, too late to arrange settlement on that day. Furthermore, the purchasers had arranged finance for the purchase through their bank in New South Wales and the bank was not in a position to settle until 20 October 2009. The Bank did not execute the mortgage documents until 20 October 2009. No evidence was given to suggest the bank's delay in settlement was in anyway attributable to failure or error on the part of the Respondents.

16. Mr Tschirpig, the Second Respondent, owned a Unit in the development at 14 Salonika Street known as Hastings on Mindil. Mr Adamson acknowledged during his evidence that he was aware of that fact prior to engaging the Respondents. Further, Mr Tschirpig testified that he subsequently agreed to purchase a unit in another neighbouring property, known as "The Avenue", to be developed by the vendor but no negotiations for such purchase were commenced until December 2009, well after engagement of his and TTCS's services by Mr Adamson in September and subsequent settlement of Unit 77. That evidence was uncontested as was the Second Respondent's evidence that, while he was a member of the Body Corporate for Hastings on Mindil, he had no part in consenting to the car park lease which was responsible for delaying settlement.

Determination

17. In considering whether the Respondents were guilty of breach of the rules of conduct for agents within s65(1)(c) and (d), the primary issue was to determine whether the purchasers informed TTCS of various matters, prior to completion of the sale and purchase of Unit 77. The meeting between the Purchasers and Ben Tschirpig on 9 September 2009 was of key importance in determining the Respondents' duties under Section 65. In considering Mr Adamson's evidence of that meeting, both his demeanour and the inconsistency of his statements as reflected in the documentary evidence were relevant. The Board was satisfied that the purchasers relied heavily on the vendor's agent rather than the Respondents and did not consider the legal consequences of their dealings with the agent and vendor. In doing so, they failed to inform Ben Tschirpig of the relevant matters. Without instructions from the purchasers, Mr Adamson's expressed expectations of the Respondents were unrealistic. In particular, the Board found that the Applicant failed to inform the Respondents at the meeting on 9 September 2009 or at any other time prior to settlement that they had paid the sum of \$3,400 to the vendor of Unit 77 in order to secure early occupation of the Unit. The fact that the special conditions of the contract did not reflect the actual agreement with the vendor was disregarded by the purchasers and not communicated to the Respondents. Failure to do so made it impossible for the Respondents to collect \$3400 at settlement, even if the purchasers were entitled to it, as they had no instructions in that regard. Further, the Board did not accept the evidence of Mr Adamson that he contacted the Second Respondent prior to settlement to express concerns that the \$3400 might not be refunded. His testimony of communications with the vendor's agent was inconsistent and the Board preferred the evidence of Mr Trevor Tschirpig.

18. In respect of the defects in the unit, namely in the kitchen and the bi-fold doors, the Board again preferred the evidence of Ben Tschirpig in respect of the meeting held on 9 September 2009 and accepted that no instructions were given

at that time in regard to the defects or any obligation on the vendor to repair. Further the Applicant admitted in evidence that no mention was made of an agreement with the vendor to purchase the furniture in Unit 77 at the time they entered into occupation.

19. Further in relation to alleged breach of the rules of conduct for agents within s65(1)(c) and (d), the Board considered whether the failure to settle on the date for completion of 16 October 2009 was caused by any failure by TTCS's and/or Trevor Tschirpig in the performance of its and/or his duties to the purchasers. The Board found that the delay in settlement was a direct result of the failure of the purchasers' bank to execute the mortgage until 20 October 2009 combined with difficulties in stamping the transfer documents arising out of the leasing agreement for an extra car parking space. Without the bank, settlement could not proceed and no evidence was produced to show any failure by the Respondents that contributed to the late settlement.

20. In relation to breach of the rules of conduct for agents within s65 (1)(e) and (f), the Board was required to consider the statutory expression of an agent's general fiduciary duty. Because agency is a relationship of trust, the agent must act in the principal's interests and must ensure that there is no conflict between his own interests or other private interests and that duty to his principal. Section 65 (1)(e) requires disclosure of any interest of an agent in a transaction entered into on behalf of his principal, in this case any interest of Trevor Tschirpig in the purchase of Unit 77 . The Board considered that the term "interest" in Section 65(1)(e) must be read as disclosing any personal or pecuniary gain which the agent might secure as a result of the transaction. Section 65(1)(f) is couched in very wide terms to require full disclosure to the principal of all material facts and circumstances and of everything known to the agent in respect of the matter in which he is authorised to act as agent. For present purposes, Trevor Tschirpig was required to disclose to the purchasers all material facts and circumstances and everything known to him about the purchase of Unit 77. However, such an obligation would be nonsensical without restriction and the Board considered that what should be disclosed is what a "reasonable person" would consider material in the ordinary course of business. Such an interpretation is supported by the use of phrase "regarding the matter" in Section 65(1)(f) and the general nature of the fiduciary duty of agent to principal.

21. The settled matters to be inquired into, set out in paragraph 10, required the Board to consider whether Trevor Tschirpig failed to make proper disclosure of his ownership of a unit in the development at 14 Salonika Street Parap, his membership of the development's Body Corporate and his acquaintance with Dean Osborne, one of the directors and shareholders of the vendor. The Board found that on the Applicant's admission that the purchasers were aware of the

ownership of the unit prior to engaging TTCS. The Applicant also stated during his evidence that he was aware prior to settlement that Mr Tschirpig was a member of the Body Corporate and acquainted with Dean Osborne. Those matters complained of by the Applicant were all disclosed to the purchasers before or during the course of the transaction and further no evidence was adduced suggesting any personal or pecuniary gain to Mr Tschirpig was produced by those matters. Additionally the Applicant complained that Trevor Tschirpig was engaged in negotiations to purchase a unit in "The Avenue" (another complex being developed by the vendor) and did not disclose this fact to the purchasers. The Board found that Mr Tschirpig's evidence that such negotiations did not commence until December 2009 was uncontested and as such negotiations had no relevance to the transaction in question.

Action

The Board determined as a result of the Inquiry held on 12 October 2011, that the matters to be inquired into should be answered as follows-

- (i) Whether the purchasers informed TTCS, prior to completion of the sale and purchase of Unit 77 that:
 - (a) they had paid the sum of \$3,400 to the vendor in accordance with an agreed term permitting them to enter into occupation of Unit 77 prior to settlement;

Board's Determination – NO

- (b) the vendor had agreed to repair certain defects in Unit 77 (in the kitchen and the bi-fold doors) prior to settlement;

Board's Determination - NO

and

- (c) they had agreed with the vendor to purchase the furniture in Unit 77 at the time they entered into occupation.

Board's Determination - NO

- (ii) If the purchasers did inform TTCS as set out in paragraph (i), whether the proper performance of TTCS's and/or Trevor Tschirpig's duties to the purchasers required them to
 - (a) seek reimbursement of the sum of \$3,400 from the vendor at settlement;

- (b) advise the purchasers that the TIO Building Certification Fund would not apply to Unit 77;
- (c) advise the purchasers to obtain an engineer's report or any other available report;
- (d) ensure that the contract of sale contained a term or terms reflecting the additional term or terms; or
- (e) do any other thing in the performance of its and / or his duties to the purchasers which was not done.

Board's Determination – Irrelevant as the matters were not disclosed

- (iii) Whether the failure to settle on the date for completion of 16 October 2009 was caused by any failure by TTCS's and/or Trevor Tschirpig in the performance of its and / or his duties to the purchasers.

Board's Determination - NO

- (iv) Whether, at any time relevant to the performance of his duties to the purchasers, Trevor Tschirpig was engaged in negotiations to purchase a unit in "The Avenue" (another complex being developed by the vendor).

Board's Determination - NO

- (v) Whether any of the following comprises a failure on the part of TTCS and/or Trevor Tschirpig to make proper disclosure to the purchasers in the performance of its and/or his duties to them:
 - (a) that Trevor Tschirpig owned a unit in the development at 14 Salonika Street Parap, known as Hastings on Mindil, and the purchasers were aware of this fact prior to engaging TTCS as conveyancer;
 - (b) that Trevor Tschirpig was a member of the body corporate for Hastings on Mindil, and disclosed this fact to the purchasers after they engaged TTCS as conveyancer, and prior to settlement;
 - (c) that Trevor Tschirpig was acquainted with Dean Osborne, one of the directors and shareholders of the vendor, and did not disclose this fact to the purchasers;
 - (d) if Trevor Tschirpig was engaged as described in paragraph (iv), and did not disclose this fact to the purchasers.

Board's Determination - NO

The Board was satisfied that neither the First nor Second Respondents had committed any breaches of the rules of conduct for agents. There were no grounds for disciplinary action against either Respondent.

For the Board



Suzanne Philip
Chairman

19/10/2011