

**In a matter before
The Agents Licensing Board
Of the Northern Territory**

Application for Disciplinary Action

Between: **Registrar of Land, Business and
Conveyancing Agents**
Applicant

And **BRENDA KULATUNGA trading as MBA
CONVEYANCING SERVICES**
Respondent

Date of hearing: **25 November 2016**

Chairperson: John Tsoukalis
Consumer Representative: Lea Aitken
Industry Member: Rosie Sullivan
Departmental Member: Katrina Martin

Appearances:

Counsel Assisting the Applicant: Joshua Ingrames
Counsel for the Respondent: Rachel Gleeson

Statement of Reasons for Decision

1. On 25 November 2016, the Agents Licensing Board met to hold a Disciplinary Inquiry into an application made by the Registrar of Land, Business and Conveyancing Agents, pursuant to section 68(2) of the *Agents Licensing Act* (the Act) for disciplinary action to be taken against licensed conveyancing agent, Brenda Kulatunga trading as MBA Conveyancing Services (*Respondent*), Licence No. 75/CAL (*the Licence*).
2. At the conclusion of the Disciplinary Inquiry the Board revoked the licence of Mrs Kulatunga trading as MBA Conveyancing Services (*Respondent*), licence No. 75/CAL.
3. These are the reasons for the Board's decision.

Particulars of Allegations Against Respondent

4. Mrs Kulatunga was at all relevant times a sole trader trading as MBA Conveyancing Services. As sole trader of MBA Conveyancing Services she is responsible for each of the acts or omissions alleged against her and MBA Conveyancing Services.
5. The Registrar alleged:
 - a. On or about 12 May 2009, the Respondent entered into an arrangement with the Commissioner of Territory Revenue (the TRO) to remit stamp duty, collected over a calendar month for the transfer of properties on behalf of the Respondent's principals, by way of a monthly lump sum payment to be made within 15 days of the end of the relevant month (*Conveyance by Return*).
 - b. For the month of January 2016 the stamp duty to be remitted by the Respondent under the Conveyance by Return arrangement was to be remitted by 15 February 2016.
 - c. Following enquiries made by the TRO in relation to the late remittal, the stamp duty for January 2016 was ultimately remitted by the Respondent on 4 May 2016.
 - d. The Respondent has not remitted the total stamp duty due under the Conveyance by Return arrangement for the months of February, March and April 2016.
 - e. Failure to remit stamp duty on behalf of the Respondent's principals exposed them to the payment of the duty despite them having paid the Respondent the relevant amount and exposed them to a risk of having to pay interest and penalty tax on that amount.

The Powers of the Board

6. Pursuant to section 67(1)(m) of the Act, the Board may take disciplinary action against a licensed agent for any other reasonable ground which, in the opinion of the Board, is sufficient to warrant revocation of the licence of the agent.
7. The disciplinary powers of the Board are found in section 69(1) of the Act, and provide, that where 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; or*
 - (b) *by notice in writing, impose a fine not exceeding 50 penalty units on the agent; or*
 - (c) *by notice in writing, suspend the licence of the agent until the expiration of the period, or the fulfilment of a condition, specified in the notice; or*
 - (d) *by notice in writing, revoke the licence of the agent.*

8. Both the Respondent and the Registrar were represented by counsel at the Disciplinary Inquiry.
9. The following documents were tendered and accepted as Exhibits:
 - a. Document List marked as Exhibit A;
 - b. Statement of Agreed Facts marked as Exhibit B;
 - c. A copy of the original licence dated 28 August 2006 marked as Exhibit C.
 - d. A copy of the current licence dated 8 January 2016 marked as Exhibit D.
 - e. References as to the Respondent's character, were bundled together and marked as Exhibit E.
 - f. A copy of the Board's decision dated 20 October 2015 in the matter of Deputy Registrar of Lands, Business and Conveyancing Agents v Your Real Estate Pty Ltd was marked as Exhibit F.
10. The Statement of Agreed Facts is reproduced below:
 1. *The Respondent is a licensed conveyancing agent under the Agents licensing Act (licence number 75/CAL) and at all relevant times was trading as MBA Conveyancing Services (ABN 32 975 971194).*
 2. *On 12 May 2009, the Respondent entered into an arrangement with the Commissioner of Territory Revenue under the Conveyance by Return scheme pursuant to s.49 Taxation Administration Act.*
 3. *That scheme permitted the Respondent to remit stamp duty, calculated and collected by her over a calendar month for the stamping and transfer of properties on behalf of her principals under the Stamp Duty Act, by way of a monthly lump sum payment to be made within 15 days of the end of the relevant month ("Conveyance by Return").*
 4. *From the date of the Conveyance by Return arrangement the Respondent regularly remitted stamp duty amounts to the Territory Revenue Office ("TRO") on a monthly basis.*
 5. *In April 2016, as part of a quarterly TRO reconciliation of the Respondent's accounts, it was discovered that the Respondent had failed to remit stamp duty for the first quarter of 2016, namely:*
 - a. *For the month of January 2016 the Respondent had stamped 25 transactions and had failed to remit \$327,354.55 in stamp duty;*
 - b. *For the month of February 2016 the Respondent had stamped 7 transactions and had failed to remit \$121,433.50 in stamp duty;*
 - c. *For the month of March 2016 the Respondent had stamped 8 transactions and had failed to remit \$134,215.15 in stamp duty.*
 - d. *It was noted by the TRO as part of the quarterly reconciliation in April 2016 that the Respondent had stamped a further 4 transactions in the month of April and had failed to remit \$54,354.75 in stamp duty under her Conveyance by Return arrangement.*

- e. *The Respondent was contacted by a TRO officer on 4 May 2016 in relation to the late remittals for the previous quarter, as well as the April remittal. As a result, the stamp duty for January 2016 was ultimately remitted by the Respondent on 4 May 2016.*
- f. *On 5 May 2016 the Respondent sought an extension of time from the TRO to remit the remainder of the stamp duty outstanding.*
- g. *For each of the transactions stamped by the Respondent noted above, her principals had deposited the relevant stamp duty amount into the Respondent's business account.*
- h. *The Respondent's business account was not a "trust account" for the purposes of the Agents Licensing Act.*
- i. *On 6 May 2016 the Respondent's Conveyance by Return approval was suspended by the Commissioner of Territory Revenue and her stamp was returned.*
- j. *The Respondent has not remitted the stamp duty due under the Conveyance by Return arrangement for the months of February, March and April 2016 to a total value of \$310,003.40 ("stamp duty debt").*
- k. *The Respondent has acknowledged the full amount of the stamp duty debt owed to the TRO and has acted in good faith in her efforts to repay the debt.*
- l. *Failure by the Respondent to remit stamp duty on behalf of her principals exposed them to a risk of having to pay the duty to the TRO despite them having already deposited the relevant amount with the Respondent. It also exposed them to a risk of having to pay interest and penalty tax on those amounts.*
- m. *Despite this, the TRO has made a decision not to pursue any outstanding stamp duty from the Respondent's principals and is seeking the payment of the stamp duty debt from the Respondent.*
- n. *On 13 October 2016 Merit Partners Pty Ltd (ACN 107 240 522) were appointed as a registered company auditor to be the receiver of trust monies for the Respondent. The Respondent is in the process of selling assets in order to pay the stamp duty debt.*

11. Ms Gleeson, counsel for the Respondent informed the Board that the Respondent did not oppose the revocation of her licence and in addition to the Statement of Agreed Facts and made the following submissions by way of mitigation:

- a. The Respondent admitted that she had failed to remit stamp duty on behalf of her principals and that she had exposed them to the payment of the duty despite her principals having paid the Respondent the relevant amount and also exposed them to a risk of having to pay interest and penalty tax on those amounts.
- b. The Respondent had worked as a conveyancing agent for 10 years having three or four employees during that time. She found it very satisfying to help people through that exciting but daunting experience of purchasing a property. One of the Respondent's downfalls was that she often undercharged her clients out of a sense of goodwill, making it at times quite difficult to meet her expenses.

- c. Her actions were not motivated by personal greed or malice, rather it was a situation of financial mismanagement and mismanagement of records at a time when she was dealing with some fairly difficult personal circumstances.
- d. Four years prior to these events, the Respondent's husband was made redundant, making her the sole bread winner. He then developed severe depression and subsequently Alzheimer's. In December of 2014 he was diagnosed with multiple sclerosis and was given months to live. He passed away in January of 2015. All of this added to the pressures and stress on the Respondent.
- e. In addition to her personal problems, the business also started to suffer as there was a major slump in Darwin during this period, so the level of income that the Respondent was used to was no longer there. By that point she had merged her business and trust accounts because she was also having issues keeping up with all of the financial accounting.
- f. In early 2016 the Respondent realised that the business debts had accumulated to a much greater extent than what she had previously been aware. The Respondent had also invested all of her superannuation funds into the business.
- g. The Respondent has paid as many of her business debts and then realised the massive shortfall to the TRO as the account had also contained the stamp duty money that was due to be remitted to the TRO.
- h. When contacted in early May of 2016 by the TRO, the Respondent immediately acknowledged that these remittances had not been made and undertook to pay them back as soon as possible. The Respondent has acknowledged the full amount of the stamp duty debt owed to the TRO and has acted in good faith in her efforts to repay the debt. As a result the Respondent is going to lose her family home of 19 years, her business property and most likely her car.
- i. The Respondent is entering into a deed with the TRO that will formally confirm that she intends for the proceeds of the sale of these properties to go to the TRO to repay this debt.
- j. The Respondent has lived in Darwin for 41 years and is of good character and with a high standing in the community. The Respondent undertakes volunteer work with the Buddhist Association and the Sri Lankan Association. Counsel provided a number of character references from some of the members of the associations whom Mrs Kulatunga has worked with for some time.
- k. Mrs Kulatunga is 70 years old, she has no superannuation or other income, no family support in Australia other than her son who's in Melbourne. She's most likely going to be forced to subsist on a pension or return to Sri Lanka and rely on her extended family there after having lived in Australia for 41 years.
- l. In conclusion, no fines or penalties are warranted given the Respondent's immediate admission of wrongdoing, her remorse and her efforts in good faith to repay the stamp duty debts.

12. Mr Ingrames, counsel assisting submitted:
 - a. Revocation of the Respondent's licence without any condition or time period imposed, is the only appropriate approach for the Board.
 - b. Even though the Respondent has acknowledged her wrongdoing, the fiduciary duty owed by agents is one of the highest duties a person owes to another person. It is a relationship of trust and confidence where the agent undertakes to act for or on behalf of another person.
 - c. In this case the breach of trust by the Respondent was not only in relation to the Respondent's principals but also in relation to the Commissioner under the Conveyance by Return arrangement that was entered into between that entity and the Respondent.
13. Mr Ingrames also referred the Board to the Board's decision of 20 October 2015 in the matter of Deputy Registrar of Lands, Business and Conveyancing Agents v Your Real Estate Pty Ltd, and submitted that the principal aims of disciplinary action by bodies such as the Board are the protection of the public and the maintenance of public confidence in the real estate industry. The Board accepted these aims as appropriate and binding on the Board.

Reasons for Decision

18. The Board reasoned that the protection of the public and the maintenance of public confidence in the conveyancing industry, could be achieved by the imposition of sanctions designed to deter conveyancing agents from breaching the fundamental trust that members of the community are entitled to when dealing with conveyancing agents.
19. The Board noted that the conveying of real estate is vital to the Darwin community's economy. Parliament has determined to regulate that industry for the protection of the public and the promotion of confidence in the industry by the introduction of the Act, and in particular by establishing the Board with powers, amongst other things, to discipline conveyancing agents.
20. The Board was also aware that a decision likely to deny a person of their income or livelihood should only be made where there was no other lesser but appropriate sanction available.
21. In this case Mrs Kulatunga had behaved in a manner that amounted to a most serious defalcation of her obligation of trust and a breach of her fiduciary duties that did disentitle her to hold a conveyancing licence.
22. In arriving at its decision the Board took into account all of the matters raised by the Respondent's counsel in her submissions. In particular, the Board noted that Mrs Kulatunga had admitted to her wrongdoing and the consequent saving of expense in running a longer inquiry, the good character of Mrs Kulatunga, the fact that Mrs Kulatunga has agreed to repay her debt to the TRO. The Board also noted that revocation of her licence would cause Mrs Kulatunga financial hardship.

23. The Board had the power, pursuant to section 69(5) of the Act to specify a period that shall elapse or impose a condition that shall be fulfilled before the person formerly licensed may apply again for a licence.
24. The Board decided to not specify such a period or impose any such condition. Instead, the Board determined that the provisions of section 69(7) of the Act should apply. That subsection provides:
- “(7) Where the Board revokes a licence under subsection (1)(d) and does not specify a period that shall elapse or impose a condition that shall be fulfilled under subsection (5), the person formerly licensed is not, without the approval of the Board, eligible to apply for a licence.”*
25. The Board was concerned not to set an arbitrary period after which Mrs Kulatunga could apply for another conveyancing licence. Instead, the Board was of the view that Mrs Kulatunga’s failures were so fundamentally inconsistent with the trust obligations of a conveyancing agent that she should bear the onus of re-establishing her fitness to hold a licence at some future time and to seek the Board’s approval to apply for such a licence.
26. In coming to its decision the Board considered the seriousness of Mrs Kulatunga’s actions and the need to deter other agents from acting in the same or similar manner, as the most weighty matters in formulating a sanction that would further the aims of community protection and maintaining confidence in the real estate industry.

For the Board



Lea Aitken
Member

17 August 2017