

**IN THE MATTER OF A DISCIPLINARY
INQUIRY PURSUANT TO THE
AGENTS LICENSING ACT 1979, NT**

BETWEEN: **ISABEL ORDOGH, DANI DELEV & TODE DELEV**

Applicant

AND: **WHITTLES BODY CORPORATE MANAGEMENT
PTY LTD**

Respondent

Date of Hearing: **12 December 2019**

Chairperson: Mark Thomas

Consumer Representative: Lea Aitken

Industry Representative: Carol Need

Departmental Representative: Hannah Clee

Appearances:

Counsel Assisting the Board: Tass Liveris

Counsel for the Respondent: Paul Maher

STATEMENT OF REASONS FOR DECISION

1. On 12 December 2019 the Agents Licensing Board (the Board) met to hold a Disciplinary Inquiry into an application made by Isabel Ordogh, Dani Delev and Tode Delev (the Applicants), pursuant to section 77 of the *Agents Licensing Act 1979* (the Act) for disciplinary action to be taken against licensed real estate agent Whittles Body Corporate Management (the Respondent).
2. The Board has determined that in relation to Allegation 1 that the Respondent failed to perform duties to its principal in the course of conducting business as an agent and failed to exercise due, skill care or diligence in carrying out its duties on behalf of the principal; and thereby committed a breach of the rules of conduct for an agent.

3. The Board has further determined that in relation to Allegation 2 that the conduct of the Respondent constituted a failure to exercise due skill, care or diligence in carrying out its duties on behalf of the principal and thereby committed a breach of the rule of conduct for an agent.
4. These are the reasons for the Board's decision.

Part A: INTRODUCTION

Particulars of Allegations against the Respondent

5. At all material times it is alleged that:
 - a. The complainant, Isabel Ordogh, was the registered proprietor of unit 1/15 Reynolds Court, Coconut Grove in the Northern Territory and a member of Unit Plan 85/39, the body corporate constituted by the unit owners located at 15 Reynolds Court, Coconut Grove (the Corporation);
 - b. The complainants Dani and Tode Delev were the registered proprietors of Unit 4/15 Reynolds Court, Coconut Grove and a member of the Corporation;
 - c. The respondent, Whittles Body Corporate management Pty Ltd ("Whittles"), was licensed to carry on business as a real estate agent and body corporate manager under the *Agents Licensing Act 1979*, the *Unit Titles Schemes Act 2009* and the *Unit Titles Act 1975*; and
 - d. Whittles was the body corporate manager of the Corporation.
6. The matters inquired into were set out by way of letter dated 13 November 2019 from the Chairperson of the Board to the parties. The alleged breaches of conduct were in relation to the rules of conduct in section 65 of the Act in force at the relevant times.¹

Allegation 1

7. It is alleged that between 25 January 2018 and 30 March 2018 Whittles failed to perform duties to its principal and/or failed to exercise due skill, care or diligence in carrying out duties on behalf of its principal and/or failed to exercise due skill, care or diligence when dealing with any person in the course of conducting business as an agent.
8. The particulars of Allegation 1 are that:
 - a. By e-mail dated 25 January 2018, Whittles' strata manager Hayley Maher (Ms Maher) notified the complainants that a Pet Application form made by

¹ S65 Rules of Conduct was amended by s10 *Statute Law Revision and Repeals Act 2019*, No. 33 which commenced on 11 December 2019.

or on behalf of the registered proprietors of Unit 3 (sic) ²of the Corporation (Pet Application) had been received and had already been approved.

- b. Article 2(4)(f) of Schedule 1 of the *Unit Titles Act 1975* provides that a member of a corporation shall not, except in accordance with permission given by a majority resolution of the corporation, keep any animals or birds in or on his unit or the common property.
 - c. Whittles failed to promptly convene a general meeting of the Corporation upon receipt of the Pet Application.
 - d. By e-mail dated 7 March 2018, Whittles gave notice of a general meeting of the Corporation in respect of the Pet Application to be held on 27 March 2018. It did so only after it had advised the Pet Application had been approved and only after objection was taken by the complainants to Whittles' lack of due process.
 - e. Whittles failed to provide members of the Corporation with relevant documents to the Pet Application for the purpose of the general meeting in a timely fashion or at all, including, inter alia, the lease agreement for unit 3 (sic) ³and a copy of the Pet Application.
 - f. Shortly after the making of the complaint objecting to the pet, Whittles removed Corporation documents from the Whittles online member portal and/or removed member access to Corporation documents on the Whittles online portal, in respect of the Pet Application.
9. It is alleged that this constituted a failure by Whittles to perform duties to its principal and/or a failure to exercise due skill, care or diligence in carrying out duties on behalf of its principal and/or a failure to exercise due skill, care or diligence when dealing with any person in the course of conducting business as an agent, for the purposes of subsections 65(1)(c), 65(1)(d) and/or 65(1)(da) of the Act.⁴
10. If proved, the Board may take disciplinary action against Whittles on the grounds that the licensed agent is guilty of a breach of the rules of conduct for agents.

Allegation 2

11. It is further alleged that between 5 March 2017 and 12 July 2017, Whittles failed to ensure the Corporation was insured and thereby failed to perform duties to its principal and/or failed to exercise due skill, care or diligence in carrying out duties on behalf of its principal and/or failed to exercise due skill, care of diligence when dealing with any person in the course of conducting business as an agent.

² This is an error. It should be unit 2.

³ This is again an error. It should be unit 2.

⁴ The offence provisions of the Act were those in force at the time of the alleged offending conduct

12. The particulars of Allegation 2 are that:

- a. On 6 March 2017, Whittles was notified by the Corporation's insurer, TIO, that it was required to appoint an insurance broker for its insurance policy that was scheduled to fall due on 21 May 2017.
- b. On or about 9 March 2017, Casey Bruton (Ms Bruton), Whittles' strata manager, sent members of the Corporation an e-mail seeking instructions in respect of TIO's correspondence.
- c. The Corporation members did not reply to Bruton's e-mail dated 9 March 2017 to provide instructions and thereafter the insurance policy lapsed.
- d. On 11 July 2017, Ms Bruton sent an e-mail to the Corporation members seeking their instructions to approve immediate insurance cover for the Corporation with MGA because the Corporation was not currently insured.

13. It was alleged that this constituted a failure by Whittles to perform duties to its principal and/or a failure to exercise due skill, care or diligence in carrying out duties on behalf of its principal and/or a failure to exercise due skill, care or diligence when dealing with any person in the course of conducting business as an agent, for the purposes of subsections 65(1)(c), 65(1)(d) and/or 65(1)(da) of the Act.

14. If proved, the Board may take disciplinary action against Whittles on the grounds that the licensed agent is guilty of a breach of the rules of conduct for agents.

Part B: THE POWERS OF THE BOARD

15. If the allegations are proved, the Board may take disciplinary action against the agent. Central to that consideration is that in disciplinary matters, an issue needs to be proven to the reasonable satisfaction of the decision-making body, having regard to the seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description (or the inherent improbability of an explanation), or the gravity of the consequences flowing from a particular finding: **Briginshaw v Briginshaw**⁵.

16. The grounds for disciplinary action are found in section 67(1) of the Act:

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.*

⁵ (1938) 60 CLR 336 per Dixon J at 361-362.

17. The powers of the Board after Inquiry are provided at section 69(1) of the Act, which states :

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; 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.*

Part C: THE CONDUCT OF THE DISCIPLINARY INQUIRY

18. Mr Tass Liveris acted as counsel assisting the Board in respect of this matter, with the Respondent represented at the hearing by Mr Paul Maher, legal practitioner.

19. No objections were made to the Board's composition.

20. No witnesses were called to give evidence. The Inquiry Book was tendered along with additional exhibits.

Part D: ISSUES CONSIDERED

21. ALLEGATION 1: Did Whittles fail in the performance of its duties as required by section 65 of the Act in handling an application to keep a pet?

22. It is necessary at the outset to describe the units, their unit entitlement value and their owners. Firstly, there were only four units in this unit plan (85/39)⁶. Together, they constituted the Corporation. It is located at 15 Reynolds Court, Coconut Grove. Ms Isabel Ordogh is the owner of unit 1. Mr and Mrs Dani and Tode Delev are the owners of Unit 4. Units 2 & 3 are owned by Ms Michelle Roberts⁷. The unit entitlements are not equal. Units 2 and 3 together have a greater entitlement than unit 1 and 4 together. To be precise, the unit entitlement of Units 1 & 4 was 49 units each; whereas Units 2 & 4 had an entitlement of 51 units each.⁸ Thus, at any body corporate meeting, should there be a difference of opinion, the decision of Ms Roberts would prevail. A tenant lived at Unit 2 and the pet application for a dog to live there was made by that tenant.

⁶ See the floor plan specified in Attachment R of the Inquiry Book (page 46-49)

⁷ To be precise, Ms Roberts would appear to be the sole owner of unit 3 and the joint owner- with Mr J Roberts- of unit 2. See exhibit 2, page 2.

⁸ Page 49 Inquiry Book

CHRONOLOGY OF EVENTS

23. A pet application form was completed and submitted by Ms Roberts' tenant at unit 2. It was dated 16 March 2018⁹. It was not in the pro forma format that had been previously available on the owner's portal.¹⁰ Ms Roberts sent this application to Ms Ordogh.¹¹
24. On 25 January 2018 Ms Maher of Whittles sent an email¹² to Dani Delev and Isabel Ordogh in which she stated that Ms Michelle Roberts had received a pet application, and that approval for the pet would be subject to three conditions, which she specified.¹³ The Board notes that the date on the pet application form was 16 March 2018, which was almost 2 months after the email specifying that an application to keep a pet had been "approved" (25 January 2018).
25. Ms Maher's 25 January email stated that the owner of Unit 3 had already approved the pet application and as they¹⁴ had the "majority UEV"¹⁵ the "application has technically been approved by the Body Corporate". The email also included reference to three conditions to which the approval was subject.
26. Following the email of 25 January 2018, emails were sent from the complainants objecting to the dog. Most relevantly, an email from the complainant Isabel Ordogh on 28 January 2018, queried why the correct legal process was not followed, and referred to the failure to hold either an EGM¹⁶ or an AGM¹⁷.
27. Ms Cavanagh of Whittles, sent an email dated 31 January 2018,¹⁸ which stated that an EGM would be called in the coming weeks to formally approve the pet. This email also noted that given the number of unit entitlements held by the owner of the unit making the pet application, this meant that the motion would pass. It noted that a suggestion had been made that given that additional fees would be required for an additional general meeting, that the motion be put to the members for formal adoption at the next AGM in order to save costs.
28. A further email was sent to Whittles by Ms Isabel Ordogh, on 4 February 2018 querying the process.¹⁹ This email also sought a copy of the 'Application to Keep an Animal' as well as querying the removal of 'Owner News'

⁹ Page 38 & 39 of Inquiry Book. The date is almost 2 months ahead of the email of 25 Jan.

¹⁰ See p 16, Inquiry Book

¹¹ The date of the sending of this email is not specified in the Inquiry Book

¹² Page 37, Inquiry book

¹³ Page 37, Inquiry Book

¹⁴ Reference was made to the owners being Michelle and John

¹⁵ The unit entitlement value

¹⁶ EGM appears to have meant Extraordinary General Meeting

¹⁷ Page 6, Inquiry Book

¹⁸ Page 6, Inquiry Book

¹⁹ Page 7, Inquiry Book

and documents from the Whittles online member portal (relevant to particulars (e) and (f) of Allegation 1).

29. A notice for an EGM was subsequently emailed by Whittles on 7 March²⁰ advising of the EGM on 27 March 2018. This included a package of documents for the EGM.
30. On 21 March Ms Isabel Ordogh sent an email to Ms Roberts seeking that the meeting be re-scheduled as Dani and Todi would be away on 27 March and that Ms Roberts could also not attend the meeting due to work commitments.²¹
31. On 26 March Ms Isabel Ordogh send an email to Ms Cavanagh of Whittles²² in which she again sought to re-schedule the EGM and drew attention to Ms Bruton's email, dated the same day.²³ Ms Bruton had said in her email that moving the meeting back will disadvantage the owner and the tenant. Ms Ordogh disputed this.
32. On 27 March Ms Cavanagh (of Whittles) send an email to Ms Ordogh, in which she declined to adjourn the meeting, and said "appropriate notice was given to all owners along with voting papers and proxy forms for those unable to attend the meeting".²⁴ She added that " we have received sufficient voting papers from other members who were unable to attend the meeting, who collectively hold sufficient votes to pass the motion. Minutes of the meeting are to follow"
33. The EGM was held on 27 March 2018. None of the members of the corporation were personally in attendance. The minutes of the meeting²⁵ reveal that the EGM proceeded with voting papers lodged by the owners of Units 2 and 3, both of which supported the pet application. No voting papers and no proxies from Units 1 and 4 were received. A majority resolution approving the Pet Application was passed.

FINDINGS

34. Article 2(4)(f) of Schedule 1 of the *Unit Title Act 1975* required a majority resolution of the corporation to permit the keeping of a pet at a unit or on the common property. The key question before the Board is whether Whittles, on receiving the pet application, proceeded in accordance with the requirements of the Act and performed its duties to its principal with the required due skill, care and diligence.

²⁰ Page 9, Inquiry Book

²¹ Page 11, Inquiry Book

²² Exhibit 4

²³ Exhibit 4

²⁴ Exhibit 4

²⁵ Exhibit 2

35. Whittles, in its written submission submitted by counsel to the Board acknowledged:
- a. Article 2 (4)(f) and its application to the proprietors of UP 85/39
 - b. Whittles was bound by the terms of the service agreement with the proprietors of UP 85/39
 - c. That the Service Agreement provided that Whittles must supply the Agreed Services.
36. The Service Agreement (at Clause 3.1 & 3.2) specifies that Whittles must supply the Agreed Services and may, but is not obliged, to supply the Additional Services.
37. “Agreed Services” are set out in Schedule A to the Service Agreement.²⁶ Clause 1.2 refers to convening and attending the AGM. The Board accepts that the Agreed Services do not include an obligation to convene and attend an EGM.
38. Schedule D to the Services Agreement sets out the “Additional Services”.²⁷ Clause 3.1 relevantly provides that Additional Services includes “arranging and attending at any meeting other than those provided as Agreed Services”. Clause 3.2 specifically refers to disbursement costs (that Whittles could charge) associated with arranging and attending an extraordinary meeting.²⁸ The Board accepts that Additional Services would include arranging an EGM.
39. The Board accepts that when Whittles received an application to keep a pet at unit 2, Whittles was not obliged by the terms of the Service Agreement to arrange or attend an EGM.

Particulars a & b

40. However, Ms Maher’s email dated 25 January 2018, in which she stated that the owners of Unit 2 and 3 have already approved the pet application and “as they have majority UEV the application has technically been approved by the Body Corporate” constituted a clear attempt to avoid the point of Article 2 (4)(f) of Sch. 1 of the UTA, namely that permission to keep a pet only occur by majority resolution of the corporation. The terms of the email in no way contemplated a majority resolution occurring, but instead constituted a decision not to offer an EGM at all. Whittles, through their counsel, have admitted that Ms Maher’s email was in error and furthermore that this meant that Whittles exceeded their authority under the Services Agreement. By this it is understood by the Board that Whittles had no power under the Services Agreement to engage in such an action. Hence, as counsel for Whittles has stated,²⁹ Whittles failed to perform its duties to its principal and to exercise due skill, care or diligence, in breach of

²⁶ Page 54, Inquiry book

²⁷ Page 55, Inquiry book

²⁸ Page 55, Inquiry book

²⁹ At page 2 of Mr Maher’s written submission

section 65(1)(c) and (d) of the Act. This finding deals directly with particular (a) & (b) of Allegation 1. It is this conduct that constitutes the breach of Allegation 1.

Particulars c & d

41. Whittles' subsequent activities in proceeding down the path to organising an EGM occurred after pressure had been brought to bear upon them. Nevertheless, this does not of itself constitute a further breach of their obligations to the principal. Particular (d) in fact does not specify further conduct constituting a breach but merely is descriptive of what occurred, namely that an EGM was called and the reason why. As to an argument of lateness (particular c), proof of this is rather nebulous; a further factor is that the complainants sought that the EGM be adjourned, (which did not occur). Whilst greater timeliness was desirable, the evidence is not such as to demonstrate a breach of the agent's duties in the particular circumstances of this case.

Particulars e & f

42. Dealing firstly with Particular (f), Whittles did not have an obligation under the Services Agreement (or otherwise) to maintain an online members' portal as part of its duties to the Corporation. Hence, removal, if it occurred, (the Board makes no finding in this particular regard) could not constitute a breach of Whittles' duty.

43. Particular (e) alleges a failure to supply the lease agreement for unit 3³⁰ and a copy of the pet application- either at all, or alternatively not in a timely fashion. Regarding the lease, an undated email from Ms Roberts ³¹refers to an extract of the lease being supplied- at least in relation to pets. ³² This appears to replicate an email from Ms Roberts to the complainants, dated 16 March, which is in exhibit 4. This rebuts any argument that it was not supplied by Whittles -as reference is made to this by Ms Bruton ³³ on 21 March. It is not clear when exactly it was first supplied; the evidence is not sufficiently clear to prove an allegation of untimeliness.

44. Regarding the formal pet application, emails sent by Ms Cavanagh (on 8 February) and Ms Ordogh on (17 February) -to each other- refer to an absence of a formal pet application at that time. Emails from Ms Ordogh on 12 March refer to her waiting on an Application to Keep an animal. On 13 March Ms Ordogh refers to a failure by Whittles to supply a completed form that refers to four conditions not three. It is not clear what exactly she is referring to. It could not be the signed Pet Application Form ³⁴ as, assuming that this was dated correctly, this was provided

³⁰ This is an error. It should be unit 2

³¹ Page 40, Inquiry Book

³² See page 41 of the Inquiry Book

³³ Page 40, Inquiry Book

³⁴ Page 38 & 39 Inquiry Book

no earlier than 16 March 2018. An email from Ms Bruton on 14 March ³⁵ does not make it clear that a pet application has been supplied- at that point- indeed the dispute at that time, from Ms Odogh's perspective, is whether any pet application is deficient in failing to address a 4th condition. By 21 March, an email from Ms Odogh refers again to 4 not 3 conditions being necessary but does not state definitively that a pet application has not been received. The tenor of her email would suggest that it had. The question is whether this was so untimely as to constitute a breach of Whittles' duties. The evidence is simply too uncertain as to reach a concluded view in this regard.

ALLEGATION 2: It is further alleged that between 5 March 2017 and 12 July 2017, Whittles failed to ensure the Corporation was insured and thereby failed to perform duties to its Principal and/or failed to exercise due skill, care or diligence in carrying out duties on behalf of its Principal and/or failed to exercise due skill, care or diligence when dealing with any person in the course of conducting business as an agent (ss 65(1) (c), s 65(1)(d) and/or s 65(1)(da) of the *Agents Licensing Act 1979*.)

THE EMAIL MESSAGES

45. On 9 March 2017, Ms Bruton of Whittles wrote to the members of the Corporation to seek instructions in relation to Strata insurance for the Corporation^{36,37} The initial correspondence was as follows ³⁸:

"Hi all, please see attached the important information regarding your insurance. Please discuss on a committee level and the (sic) please let me know what you would like to do by the end of April."

This email followed correspondence from the Corporation's insurer, TIO, that it was required to appoint an insurance broker for its insurance policy scheduled to fall due on 21 May 2017. The attachment that Ms Bruton referred to was a single page letter from TIO to the proprietors of UP 85/39, dated 2 March 2017, together with two pages listing insurance brokers.³⁹ The letter stated that the renewal was due on 21 May 2016, which was an obvious error.

³⁵ Page 10, Inquiry Book

³⁶ Exhibit 6 contains the certificate of currency for the insurance policy, which was due to expire on 21 May 2017

³⁷ Page 42 Inquiry Book (attachment 6)

³⁸ The time is specified as 3.23pm

³⁹ Exhibit 5

46. Ms Michelle Roberts responded on 9 March⁴⁰ as follows⁴¹:

Hi Casey,

Whittles can provide this brokerage service, can't they? Whittles did this previously before we started going to TIO direct.

That would be my preferred approach going forward.

Thanks,

Michelle

Sent from my Iphone

47. Ms Bruton responded in a further email, again on 9 March 2017, at 3.14pm, as follows⁴²:

Hi Michelle, yes we can. Being unbiased, TIO are the best for the Territory. However, you are free to choose, if you wish to speak to anyone you can call Jackson⁴³ on 8943 1256.

Kind regards,

Casey Bruton

48. There is no evidence that any instructions were received in reply to the email from the owner of Unit 1 (Isabel) or owner of unit 4 (Dani & Tode). The only response was the query specified above from Ms Roberts. With no further correspondence or instructions received, the insurance policy lapsed.

49. On 11 July 2017, Ms Bruton sent an e-mail to Corporation members⁴⁴ seeking their urgent instructions, as follows⁴⁵:

Hi all, Can I please ask you to reply to this email if you are happy for MGA to provide cover as a broker alongside with TIO for your insurance as you are not currently insured.

A broker is required for your strata cover as Whittles work alongside we suggest to go with MGA, however, it is up to you who you choose, however you are not currently insured as there is no broker selected.

⁴⁰ The time is specified as 3.10pm. As Ms Roberts's message is in response to Ms Bruton's message one of the times must be incorrect.

⁴¹ Page 42, Inquiry Book

⁴² She cced Dani, John and Isabel

⁴³ Jackson was a colleague of Casey Bruton at Whittles

⁴⁴ Dani, Isabel, Michelle Roberts and John Roberts.

⁴⁵ Page 11 & 12, Inquiry Book

Please reply with your approval to go with MGA, or your thoughts.

Casey Bruton (who noted that she was away for the rest of the week from tomorrow)

50. Whittles immediately obtained insurance cover for the Corporation.

THE SERVICE AGREEMENT

51. Whittles was a party to the Services Agreement, which has previously been referred to. There are several key clauses of relevance. They are as follows. Clause 3.6 states that the Manager (Whittles) is only authorised to give general advice about insurance relating to the Body Corporate.⁴⁶ It states that if the Body Corporate requires specialist insurance advice the Manager can refer the Body Corporate to an insurance advisor⁴⁷.

Authorised powers of the Manager

52. Clause 4.1 states that the Body Corporate authorises the Manager to exercise all of the powers of the Executive and committee members to the full extent permitted by law in performing services set out in this agreement. Clause 4.2 states that the Manager must only use authorised powers pursuant to Clause 4.1. Clause 4.3 states that the authorisation granted to the Manager does not make the Manager responsible for performing any of the powers that the Body Corporate or the Committee is required to perform under the Act, nor does the authorisation relieve the Body Corporate or the Committee of those powers.⁴⁸

Liability⁴⁹

53. Clause 10.1 states that the Body Corporate is solely liable for all claims brought against it, and all actions taken against it, and it will maintain public liability insurance cover of an appropriate level and such other insurance that a reasonably prudent person would do.

54. Clause 10.2 states that the Manager will at all times maintain professional indemnity insurance of sufficient level, and in accordance with the specific requirements of the Act.

⁴⁶ Body Corporate and Corporation are used interchangeably.- as per the Unit Titles Act 1975. The Services Agreement refers to Body Corporate, whereas the allegations and particulars refer to Corporation.

⁴⁷ Page 51, Inquiry Book

⁴⁸ Page 51, Inquiry Book

⁴⁹ Page 52, Inquiry Book

55. Clause 10.6.1 states that the Manager will not be liable to the Body Corporate for any claim loss or damage suffered due to – 10.6.1- a failure of the Manager to perform the Services as set out in this Agreement, because the Body Corporate or Committee fails to make an appropriate decision in relation to the provision of such services or does not have sufficient funds to allow the Manager to carry out its functions.

Schedule A- Agreed Services- two key clauses

Clause 1.4

56. To ensure that insurances are renewed in accordance with resolutions of the Committee and Body Corporate and the terms of this Engagement

Clause 1.9

57. To deal with inward and outward correspondence that can be reasonably expected in the normal managing of the Body Corporate and to inform the Committee Nominee of its nature and importance wherever necessary.

ANALYSIS & FINDINGS

58. There are two potential bases of liability, which are:
- a. A failure to perform a duty to the principal, (s 65(1)(c) and/or
 - b. A failure to exercise due skill, care and diligence in carrying out duties on behalf of the principal. (s 65(1) (d)

Section 65(1)(c)

59. When examined carefully the bases of liability are quite different. Turning firstly to a purported failure to perform a duty to its principal, what is alleged against Whittles is that it had a duty to ensure that the Body Corporate's insurance cover (essentially public liability insurance) was renewed on time.⁵⁰ The case against it principally rests upon an interpretation of Clause 1.4.⁵¹, which states that the Manager (Whittles) is to "ensure that the insurances are renewed in accordance with resolutions of the committee and the Body Corporate and the terms of this engagement". The word "ensure" is not without significance. However, the difficulty here for the argument against Whittles is that there is no evidence provided to the Board of a resolution of the Committee and/or the Body Corporate- with regard to the renewal of the particular insurance policy or indeed any other insurance policy. It is reasonable to assume that proper business practice is that the old insurance policy is not to be renewed unless there is a

⁵⁰ There was no temporal reference in Clause 1.4. It does not for example say that insurances are to be renewed in a timely manner. Arguably, Whittles did in fact renew insurance but not in a timely manner.

⁵¹ Of the Services Agreement

resolution from the Committee in this regard. This accords with a common-sense interpretation of Clause 1.4. In the absence of such a resolution, Whittles' argument that it had neither a duty to ensure that the corporation renew its insurance policy, nor the power to do so, has merit. Accordingly, the argument against Whittles on this ground must fail. It is not necessary to turn to an argument concerning failure to carry out lawful instruction, which has not been alleged in the case against Whittles, and which is, in any event, without foundation.

Section 65(1)(d)

60. It is the second ground, namely that which concerns an allegation of failure to exercise due skill, care or diligence in carrying out its duties on behalf of its principal, which provides greater difficulty for Whittles. As counsel for Whittles accepts,⁵² the extent of the duty depends on the terms and limits of the retainer and any duty of care to be implied must be related to what the [agent]⁵³ was instructed to do: **Midland Bank Trust Co. Ltd and Anor. V Hett Stubbs & Kemp (a firm)**⁵⁴ ⁵⁵ Mr Maher accepted that the same principle applies to agents generally.
61. The parameters of the retainer include Clause 1.9 of the Services Agreement. This refers to correspondence that can be reasonably be expected in managing a body corporate and to inform the Committee nominee of its nature and importance wherever necessary. The case against Whittles on this point is that it should have done more than send the 2 emails, namely, it should have followed up with the Body Corporate by the end of April, or at least at some point before 21 May 2017. Not to do so, it is alleged, constituted a breach of the standards of due skill, care or diligence. The correspondence on 9 March was left on the basis that a formal decision was required by the Body Corporate. An initial indication for Whittles to be the Broker was stated (by Ms Roberts). The argument against Whittles is that it needed to chase this up- and to do so before the insurance policy lapsed. The fact that it ultimately did chase the problem up in July, (by taking out a cover note impromptu) suggests that the problem would not otherwise have been attended to, which would have exposed the Body Corporate to ongoing risk of a claim being made against it- without any insurance to cover it.
62. The Act does not define "due skill, care or diligence". Whittles argues that it discharged its obligations - in dealing with internal correspondence and fully informing members of the body corporate in a timely manner of the nature and importance of the matter. It says that as no resolution was made no duty under Clause 1.4 arose for the reasons previously outlined. It adds that the TIO correspondence was sent to all members. It had no obligation to go any further, it

⁵² Para. 19 of Mr Maher's submission. Later in his submission, at para. 29 he denies any duty under s 65(1)(d) was owed.

⁵³ In that case, a solicitor

⁵⁴ [1978] 2 All ER 571 at 583

⁵⁵ Paragraph 19 of Mr Maher's written submission

argues. Finally, Whittles adds that there is a fatal flaw in the argument that it should have done more- this flaw it argues is that it must be capable of precise articulation- which it was not. It is not enough, it argues, to speak of a range of possible things it could have done. Consequently Mr Maher argues that there was not a duty imposed on Whittles at all (to do anything more than it had done)⁵⁶

63. An additional matter is that arguably the members of the Body Corporate were deficient in not responding to the matter of what to do regarding selection of a broker. A formal decision was needed and they had considerable time to make it and they did not. Clause 10.1 refers to their obligation to maintain public liability insurance cover and any other insurance that a reasonably prudent person would do. Their failure to respond was not reasonably prudent. However, this matter would not appear to excuse a breach of section 65. This is because Clause 10.1 is concerned with liability.

Further Legal Principles

64. Mr Maher has supplied a helpful extract from **Halsbury's Laws of Australia, "Duties of Agent to Principal"**, by Professor Dal Pont. The following are useful quotes from this paper⁵⁷:

*"Where no definite instructions have been given to the agent, or where the instructions leave a discretion to him or her, the agent must be guided by the honest exercise of his or her judgement and the interest of the principal"*⁵⁸

And

"Where the agent is a professional agent, he or she must follow the ordinary course of business⁵⁹ which includes the ordinary course of any previous business as between the principal and the agent⁶⁰ and any special usages applicable to the particular case."⁶¹

65. Whilst section 65(1)(d) does not incorporate the word "reasonable", Professor Dal Pont at [15-170] states a core principle, which is that "an agent for reward is required to exercise the degree of care, skill and diligence which is *reasonably*

⁵⁶ Paragraph 29 of Mr Maher's written submission

⁵⁷ Para 15-165

⁵⁸ Chown v Parrot (1863) 14 CBNS 74; 143 ER 372; Re M (a debtor); Ex parte Dalgety & Co Ltd (1909) 10 SR (NSW) 175 are, inter alia some of the authorised referenced by Professor Dal Pont in support of this principle.

⁵⁹ Russell v Hankey (1794) 6 Term Re 12; 101 ER 409 and Mallough v Barber (1815) 4 Camp 150; 171 ER 49; Pape v Westacott [1894] 1 QB 272 at 279 ; (1893) 70 LT 18 CA

⁶⁰ World Transport Agency Ltd v Royte (England) Ltd [1957] 1 Lloyd's REP 381.

⁶¹ Farrer v Lacy; Hartland & Co (1885) 31 Ch D 42; 55 LJ Ch 149; 53 LT 515, CA; Solomon v Barker (1862) 2 & F 726; 175 ER 1258

necessary for the due performance of the undertaking.”⁶² Additionally, “ the agent must show at least the level of diligence in conducting the principal’s business that the principal would *reasonably* have been able to display if the principal had undertaken the business personally.⁶³ The Professor adds “The agent is not responsible for the failure to go beyond his or her *reasonable* duty, even though a loss is occasioned thereby which might have been avoided by extra care, skill or diligence.⁶⁴ (italics added)

66. Consistent with these principles, in **Georgieff v Athans**⁶⁵ a decision of Walters J in the South Australian Supreme Court his Honour stated ⁶⁶that licensed land agents⁶⁷ as an agent for reward he was bound to “exercise such skill, care and diligence in the performance of his undertaking as [was] usual or necessary for the ordinary or proper conduct of the business or profession in which he was employed or was reasonably necessary for the proper performance of the duties undertaken by him” (Lunghi v Sinclair⁶⁸, per Virtue J at 176 citing Bowstead on Agency, Art.46)

67. Professor Dal Pont also stated the following⁶⁹:

“Expert evidence may be adduced to ascertain how an ordinarily skilled and competent professional agent would have behaved in the circumstances.⁷⁰ Yet, if the default in question is ‘so rudimentary and obvious’ such expert evidence will be unnecessary.⁷¹ The failure of an agent to take a step which was obviously necessary and prudent will entitle the Court to reach its own conclusion of negligence.⁷² A professional agent who holds himself or herself out as possessing special expertise in a particular field is likely to be subject to a higher standard of care”.⁷³ The agent must

⁶²Professor Dal Pont cites the seminal case of *Beal v South Devon Railway Co* (1864) 3 H & C 337 at 341 and many other cases in support of this principle.

⁶³ *B Davis Lt v Tooth & Co Ltd* [1937]4 All ER 118 at 128, PC

⁶⁴ *Commonwealth Portland Cement Co Ltd v Weber Lohmann & co Ltd* [1905] AC 66, PC
World Transport Agency Ltd v Royte (England) Ltd [1957] 1 Lloyd’s Rep 381

⁶⁵ (1981) 26 SASR 412

⁶⁶ *Supra*, p 413

⁶⁷ The SA equivalent of a real estate agent

⁶⁸ [1966] W. A. R. 172

⁶⁹ At [15.170]

⁷⁰ *Stafford v Conti Commodity Services Ltd* [1981] 1 All ER 691 at 698 is one of numerous authorities cited by Professor Dal Pont on this point.

⁷¹ *Geoffrey W Hill & Assocs (Insurance Brokers) Ltd Ltd v Squash Centre (Allawah North) Pty Ltd* (1990) 6 ANZ Ins Ca 61-102 at 76-768 per Kirby P; *Provincial Insurance Australia Pty Ltd v Consolidate Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 556 6 ANZ Ins Cas 61-066

⁷² The Learned author cites, inter alia to *Geoffrey W Hill & Assocs supra*, as well as *Provincial Insurance Australia supra*.

⁷³ Professor Dal Pont cites: *Yates Property Corp Pty Ltd (in liq) v Boland* (1998) 85 FCR 84 ; 157 ALR 30; BC 9803621 at 65, 348.9 (reversed on appeal without casting doubt on this point *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575; 74 ALJR 209; (2000) AnZ ConvR 1919; (2000) Aust Tort Reports 81-538); *Palios Meegan & Nicholson Holdings Pty Ltd*

not be guilty of unreasonable delay in carrying out his or her instructions⁷⁴ or in communicating to the principal any material information.⁷⁵

The wording of Clause 1.9

68. In considering whether Whittles has breached section 65(1)(d) the precise terms of Clause 1.9 are important. It states that the Manager was required to deal with inward and outward *correspondence* that can be *reasonably* be expected in the *normal managing* of the Body Corporate and to inform the committee nominee⁷⁶ of its nature and *importance* wherever necessary. The importance of Strata public liability insurance is obvious. Failure to have it in place could be potentially devastating for a Body Corporate. In this case that failure lasted from 21 May 2017 to 11 July- a period of 51 days or 7 weeks and 2 days. Professor Dal Pont's extract refers to the importance of the avoidance of unreasonable delay in carrying out instructions. The importance of attending to the problem- via correspondence issued in a timely fashion- is underscored by the fact that the follow up on 11 July led to insurance cover; but for this, it would appear likely to have remained outstanding. This elevates the importance of the Manager in this instance to follow up with the Body Corporate in a timely fashion. There was no reason indicated as to why the follow up on 11 July occurred. Nor was there evidence adduced as to whether there was any system in place, either computer-based or otherwise, that was operating at the time that might have prompted a reminder to Whittles to follow up the Body Corporate regarding its response. The very late response by Whittles combined with the absence of a timely follow up is suggestive of a simple oversight by Whittles.
69. The reference to "normal managing" in Clause 1.9 suggests an on-going process in terms of dealing with correspondence- which was concerned with dealing with normal problems- as opposed to abnormal ones. There is nothing to suggest that the problem at hand, namely clarifying the terms of insurance renewal, was anything other than a normal matter arising in the day-to-day course of business. The ongoing nature of the process is important, as follow up correspondence is a standard part of "normal managing".
70. Whittles' argument, in which it denies any duty to remind members of the body corporate (due to purported incapacity to precisely inarticulate what more was required), is met with the reality of what Ms Bruton did on 11 July- namely sending correspondence in the form of an email, which promptly attended to the problem.

v Shore (2010) 108 SASR 31; 271 LSJS 414; [2010] SASFC 21; BC201006247 at [39]-[41] per Gray J; Goddard Elliott (a firm) v Fritsch [2012] VSC 87; BC 201201151 at [412]-[417] per Bell J

⁷⁴ Turpin v Bilton (1843) 5 Man & G 455; 134 ER 641

⁷⁵ Howell v Bennet & Fisher Ltd [1966] SASR 188 ; Greenwood v Harvey [1965] NSWLR 1489; Proudfoot v Montefiore (1867) LR 2 QB 511.; Havas v Cornish and Co Pty Ltd [1985] 2 Qd 353

⁷⁶ There is no evidence of a committee nominee

What actually occurred was thus the reverse of vague or nebulous. It was a simple, practical response, the nature of which was entirely “normal”. Sending an email is a standard form of correspondence in the contemporary business world. Whittles’ argument on this point, that the question of what more could be done is so vague and nebulous as to be incapable of proper articulation, is therefore rejected. It is important to note that Whittles had used this argument in support of the proposition that it could not have a duty to/on behalf of the Body Corporate. This is rejected. Additionally, the quotation above ⁷⁷from Professor Dal Pont is of core relevance- where no definite instructions have been given to the agent or where the instructions leave a discretion to him or her, the agent must be guided by his/her own judgement and the interest of the principal. It was fundamentally in the interests of the principal that this matter be followed up promptly before the insurance policy lapsed. Clearly, when Ms Bruton acted in July she appreciated the principal’s interests -at this point -and acted urgently to do with it. This illustrates not merely the existence of the duty but its importance. The Board finds that Whittle had a duty to the principal.

Failure to use due skill, care or diligence

71. The final question for the Board is having found that Whittles had a duty on behalf of its principal whether it had failed to use due skill, care, or diligence in carrying out its duty.

72. The Board notes that the wording of section 65(1)(d) employs the word “diligence” as well as “skill” and “care”. They are employed disjunctively- given the use of the word “or” between “care” and “diligence”. “Diligence” is defined in the Oxford English Dictionary as “careful and persistent work or effort”⁷⁸. “Skill” is defined in the same dictionary as “the ability to do something well; expertise”. The most relevant definition of “care”⁷⁹ is “serious attention or consideration applied to doing something correctly or to avoid damage or risk”. The word “due” immediately precedes “skill, care or diligence” and applies to each of the three key words that immediately follow it. “Due” is not defined in the Act and is used traditionally as part of the key phraseology in regard to standard of care. It is equivalent to the word “reasonable” given its contextual deployment in combination with skill, care and diligence. Two previous references to para. 15.170 of the text extract from Halsburys are illuminative: “an agent for reward it required to exercise the degree of care, skill and diligence which is reasonably necessary for the due performance of the undertaking” and “the agent is not responsible for the failure to go beyond his reasonable duty”. Not to incorporate the word “reasonable” in terms of the breach would not be consistent with the common law on the topic and would also impose an unfair burden on any agent. Hence it is appropriate for “due” to, contextually, be afforded the same meaning as “reasonable”.

⁷⁷ Para. 64.

⁷⁸ Oxford English Dictionary On Line version (2021)

⁷⁹ Ibid

73. The Board finds, firstly, that a Manager exercising due skill, care and diligence in the position of Ms Bruton would have noted the initial email response from Ms Roberts, which favoured Whittles as providing the brokerage service.⁸⁰ Secondly, the Board finds that Ms Bruton ought to have then noted, after her second email (on 9 March in which she left the matter open (“you are free to choose”)) that there was then the absence of any formal response from the Committee after a reasonable amount of time had passed. Thirdly, given that Ms Bruton said to Ms Roberts that a formal response was required and specified (in her first email on 9 March) an end date, namely the end of April, for a response, the Board finds that a Manager exercising due skill, care and diligence would have sent follow up correspondence to the body corporate in a timely manner requesting a formal response as to its position regarding insurance renewal- and that this ought to have been attended to at least prior to the expiration of the policy on 21 May. Fourthly, the Board finds that Whittles is a specialist in the body corporate management business. Apposite to this finding is the quotation (previously referred to) from Professor Dal Pont – that a professional agent who holds himself (or herself) out as possessing special expertise in a particular field is likely to be subject to a higher standard of care. Fifthly, the Board makes a finding of fact that the problem at hand was a rudimentary one that ought to have been a bread-and-butter part of Whittle’s business as a specialist body corporate manager. Expert evidence is therefore unnecessary. Sixthly, the Board finds that the importance of Whittles taking the additional step of follow up correspondence was, to use the language employed above by Professor Dal Pont, “obviously necessary and prudent” given, in particular, the potentially devastating consequences to the body corporate of being uninsured. Finally, the Board’s ultimate finding (consequent upon the previous findings) is that Whittles failed to exercise due skill, care or diligence in carrying out its duty on behalf of the Body Corporate. It thereby breached section 65(1)(d), which constituted a breach of rules of conduct for agents.

PART E: CONCLUSION- SANCTION

74. Under section 67 of the Act the Board may take disciplinary action if, relevantly pursuant to section 67(1)(c), the licensed agent has been guilty of a breach of the rules of conduct for agents. For the reasons specified above in relation to Allegation 1 the Board is satisfied that it is authorised to take disciplinary action due to the finding of a breach of section 65(1)(c) & (d) of the Act. For the reasons specified in relation to Allegation 2, the Board is satisfied that it is authorised to take disciplinary action due to the finding of a breach of section 65(1)(d) of the Act.

75. Under section 69 of the Act, if the Board is, at the conclusion of the Inquiry conducted pursuant to section 68(4) of the Act, satisfied that it is authorised to take disciplinary action, it may deal with a licensed agent in a number of ways that are specified at section 69(1)(a)-(d).

⁸⁰ Inquiry Book, p 42 (at 3.10pm)

Allegation 1

76. The Board takes into account the written submissions (p 2&3) as well as the oral submissions made to the Board. The key component of the breach was the failure to adhere to due process regarding the pet application. Whilst Ms Roberts held the majority of the UEV, this did not mean that a properly convened EGM ought not be held. Ms Maher's decision, stated in an email, to effectively bypass the meeting was clearly in breach of the law – it sought to bypass the voice of the other Corporation members. In Ms Maher's favour it is accepted by the Board that she did this because she thought an EGM would be a waste of time and money - with an inevitable result. This however, missed the point. Whilst Whittles was not obliged under the terms of the Service Agreement to hold an EGM it is important to recognise that meetings of this nature serve to give voice in an open fashion to the expression of genuine disputation. Regarding penalty, taking into account that the Breach is acknowledged by Whittles, as well as taking into account the facts & circumstances and all submissions made by Mr Liveris and Mr Maher, the Board has determined that a Caution is the appropriate penalty.

Allegation 2

77. The nature and circumstances of this breach is important. The Body Corporate was without insurance to cover itself, in particular it was without Public Liability insurance for a considerable time, namely from 21 May 2017 to 11 July 2017, a period of 51 days or 7 weeks and 2 days. The Body Corporate was fortunate to suffer no loss in consequence of this. Whittles had denied this breach and denied even owing a duty in relation to this matter. In accordance with the proper running of its business it was vital that Whittles complied fully with the terms of Clause 1.9 of the Agreed Services of the Services Agreement. A Manager exercising due skill, care or diligence would have followed up on the absence of a formal response and done so in a timely manner. There remains no explanation as to why there was no timely follow up- rather a denial that it was even required. There was also no explanation as to how or why Ms Bruton eventually was alerted to this problem and dealt with it, albeit almost 2 months late. The matter is a serious one and Whittles' culpability is not reduced given its denial of any responsibility. Body Corporate proprietors need to know that they are to be kept up to date via correspondence from their agents, and followed up on important matters such as this. The fact this Whittles is a specialist in this area is important. It ought to have known better. It was not an ingenuer, nor a novice in the field of body corporate management but rather has very considerable experience in this field. The problem in question was not unusual but rather, standard.

78. It is vital that the Board emphasise the protective aspect of disciplinary action. There is, to be clear, no element of punishment in this disciplinary action, rather it constitutes a form of disciplinary action to protect the public.

79. The matter is too serious for a caution. The next most serious punishment in the ascending scale of penalties outlined in section 69 is a fine. This is the appropriate penalty in this case. The maximum fine is 50 penalty units (a penalty unit being \$154 at the date of the offending conduct). The maximum penalty serves as a general guide as to the seriousness that the legislature views a breach of this section. Whittles is a corporate entity itself. It is considered in all the circumstances that a fine of 20 penalty units be imposed upon Whittles.

80. In coming to its decision in all matters the Board has considered the seriousness of Whittles' actions and the need to deter other real estate 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.

NOTICE OF RIGHTS

81. Section 85 of the Act provides that a person aggrieved by a decision of the Board can appeal to the Local Court.

82. An appeal application must be made within 21 days of the date of this decision.

For the Board.



MARK THOMAS
Chairperson
Agents Licensing Board of the Northern Territory

Dated 5 May 2021 at Darwin