

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Chief Executive, Department of Justice and Attorney-General v Penney-Filippini* [2018] QCAT 262

PARTIES: **CHIEF EXECUTIVE, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL**  
(applicant)  
v  
**SARAH LOUISE PENNEY-FILIPPINI**  
(respondent)

APPLICATION NO/S: OCR237-14

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 7 August 2018

HEARING DATE: 10 April 2017

HEARD AT: Brisbane

DECISION OF: Senior Member Guthrie

ORDERS:

- 1. Sarah Louise Penney-Filippini is disqualified for a period of three years from holding a registration certificate or licence under the *Property Occupations Act 2014 (Qld)* with effect from 8 October 2018.**
- 2. Sarah Louise Penney-Filippini must pay a penalty to the Chief Executive in the amount of \$3,000 by 8 October 2018.**
- 3. Each party will bear their own costs of the proceedings.**

CATCHWORDS: PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – whether the respondent should be disqualified from holding a real estate licence for employing a person who did not hold a registration certificate as a real estate person – whether the prior conduct of the respondent should be taken into account in determining sanction – whether there are mitigating factors present – where the consumer did not suffer any loss as a result of the conduct – where the consequences of disqualifying the respondent are significant – where public interest considerations were accorded significant weight – where determination of the appropriate sanction is a balancing exercise – where the respondent was disqualified from holding a real estate licence – whether

the tribunal should make a costs order – where a fine was issued for unsatisfactory trust accounting – where the parties must bear their own costs.

*Property Agents and Motor Dealers Act 2000 (Qld)*, s 164(1), s 496(1)(b)(i), s 496(1)(g)(iii), s 497, s 529  
*Property Occupations Act 2014 (Qld)*, s 239, s 258(3), s 258(4)

*Chief Executive, Department of Justice and Attorney-General v Smart Real Estate (Qld) Pty Ltd & Anor* [2013] QCAT 58

*Chief Executive, Department of Justice and Attorney-General v Penney-Filippini* [2016] QCAT 253

*The Chief Executive, DTFTWID v Cumerford, G.* [2005] QCCTPAMD 14

*The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51

*Porter v Department of Finance and Services* [2014] NSWCATOD 93

APPEARANCES &  
 REPRESENTATION:

Applicant: R Vize, legal counsel of Department of Justice and Attorney-General

Respondent: C Nyst, solicitor of Nyst Legal

**REASONS FOR DECISION**

- [1] Ms Penney-Filippini is the holder of a real estate licence. Her licence was current until 7 February 2018. On 19 July 2016, I determined that grounds existed under s 497 of the *Property Agents and Motor Dealers Act 2000 (Qld)* ('PAMDA') for taking disciplinary action against Ms Penney-Filippini pursuant to s 496(1)(b)(i) and s 496(1)(g)(iii) namely that:
- (a) Ms Penney-Filippini employed as a real estate salesperson, a person she knew or ought to have known did not hold a registration certificate as a real estate sales person, namely her mother Ms Heather Filippini, in breach of s 164(1) of PAMDA; and
  - (b) in relation to her business trust accounts she failed to comply with certain trust account obligations.
- [2] I further directed that the parties exchange written submissions in relation to the orders the Tribunal may make pursuant to s 529 of PAMDA or any other relevant legislation. I conducted an oral hearing in relation to the issue of sanction on 10 April 2017. The parties made oral submissions in relation to the issue of sanction.
- [3] The Chief Executive, Department of Justice and Attorney-General ('the applicant') relies on written submissions filed in the Tribunal on 16 August 2016 and

30 November 2016. The later submissions were filed in response to Ms Penney-Filippini's ('the respondent') filed written submissions.

- [4] Since the decision of 19 July 2016, the respondent has changed legal representatives. At the hearing the respondent's representative indicated that the respondent wished to rely on the written submissions filed 7 April 2017 and certain parts of the material filed in the Tribunal with the submissions prepared by the respondent's previous legal representative filed on 30 November 2016. That information includes:
- (a) A number of testimonials written by former clients and solicitors who have professionally dealt with Ms Penney-Filippini;
  - (b) Statements of Mr Aaron Street of KPMG and Mr Scott Wix of Archer Gowland, both accountants who have previously been engaged by Ms Penney-Filippini in preparing her business accounts; and
  - (c) A testimonial from Mr Ken Illich which is both a personal and professional reference.
- [5] In addition, the respondent tendered affidavits of:
- (a) Ms Penney-Filippini, sworn 6 April 2017;
  - (b) Mr Aaron Street, sworn 6 April 2017.
- [6] Those documents were tendered without objection by the applicant. In addition, the applicant indicated that although the submissions of the respondent were filed late on Friday, 7 April 2017, that he was in a position to respond by way of oral submissions to the material, and that the submissions were not so different from the original submissions filed on the behalf of the applicant on 30 November 2016, that he did not require any extra time to adequately respond.

### **Submissions of the parties**

- [7] The applicant submits that as the PAMDA has been repealed, under s 239 of the *Property Occupations Act 2014 (Qld)* ('POA') Ms Penney-Filippini's PAMDA licence has transitioned to a real estate licence under the POA. Section 258(3) of the POA provides that disciplinary action commenced under PAMDA may be 'finished under PAMDA as if that Act had not been repealed'. Under s 258(4), a decision of QCAT affecting the transitioning licence is to be given effect under the relevant Act, which is in this case the POA.
- [8] I accept those submissions so that I must consider what appropriate penalty, if any, should be made pursuant to s 529 of PAMDA which provides:

#### **529 Orders tribunal may make on disciplinary hearing**

- (1) The tribunal may make 1 or more of the following orders against a person in relation to whom the tribunal finds grounds exist to take disciplinary action under this Act—
  - (a) an order reprimanding the person;

- (b) an order that the person pay to the chief executive, within the time stated in the order, a fine of not more than—
    - (i) for an individual—200 penalty units; or
    - (ii) for a corporation—1000 penalty units;
  - (ba) an order that the person pay compensation (inclusive of any commission to which the person is not entitled) to someone else who has suffered loss or damage because of the act or omission that resulted in the finding;
  - (c) an order that the person’s licence or registration certificate be suspended for the period stated in the order;
  - (d) an order—
    - (i) if the person is the holder of a licence or registration certificate at the time the order is made—that the licence or registration certificate be cancelled; or
    - (ii) whether or not the person is the holder of a licence or registration certificate at the time the order is made—that the person be disqualified permanently, or for the period stated in the order, from holding a licence or registration certificate;
  - (e) an order, for a licensed individual who is an executive officer of a corporation, that the individual be disqualified permanently, or for the period stated in the order, from being an executive officer of a corporation that holds a licence;
  - (f) an order imposing conditions on, or amending or revoking the conditions of, the person’s licence or registration certificate;
  - (g) another order the tribunal considers appropriate to ensure the person complies with this Act.
- (2) The tribunal may not make an order under subsection (1)(d)(ii) disqualifying the person from holding a licence or registration certificate if the tribunal is satisfied that a court has, in relation to the matter giving rise to the disciplinary proceeding—
- (a) been asked to make an order under section 592(2) disqualifying the person from holding a licence or registration certificate; and
  - (b) declined to do so.
- (3) The chief executive may recover a fine, ordered by the tribunal to be paid by the person to the chief executive, as a debt owing to the chief executive in a court with jurisdiction to recover debts up to the amount of the fine.

[9] The applicant submits that the appropriate penalty in this case is as follows:

- (a) That the respondent be disqualified for a period of five years from holding a licence or registration certificate under the *Property Occupations Act 2014* (Qld);

- (b) That the respondent pay a fine of \$13,000.00;
  - (c) That the respondent pay costs of \$13,491.32, the costs have been calculated on the basis of the Magistrates Court Scale G.
- [10] The respondent submits that the appropriate penalty is as follows:
- (a) A reprimand;
  - (b) fine of \$1,320 for the use of Heather Filippini's services;
  - (c) Ms Penney-Filippini undertakes to pursuant to s 186(1)(e) of the *Property Occupations Act 2014 (Qld)* complete the Finance Block Course within five months.
- [11] Ms Penney-Filippini has confirmed in her affidavit that she is prepared to comply with certain conditions including:
- (a) That she not permit Heather Filippini to attend upon any open house or other inspection being conducted by Island Realty;
  - (b) That she not permit Heather Filippini to conduct any business on behalf of Island Realty;
  - (c) That she continue to perform regular professional development including, but not limited to:
  - (d) Completion of the Tom Panos Total Real Estate training course in 2017;
  - (e) Attendance upon the Australian Real Estate Total Real State training conference at the Gold Coast in May 2017; and
  - (f) Within six months of the Tribunal's decision, enrolment in, and thereafter satisfactory completion of Module CPPDSM4008A from the Property Services Training Package CPP07 dealing with legal and ethical requirements of property sales.
- [12] It is further submitted by the respondent that if the Tribunal was minded to impose a period of disqualification, that that period be wholly suspended.
- [13] The respondent argues that a costs order should not be made in this case.
- [14] The parties' submissions in relation to the appropriate sanction for the breach by the respondent of s 164(1), employing her mother, Ms Heather Filippini as a real estate salesperson differ significantly. The applicant seeks a period of disqualification from holding a licence and the respondent argues for a reprimand. The basis for each party's submissions rest on two key differences.
- [15] Firstly, whether I should regard the decision of the Commercial and Consumer Tribunal ('CCT') and its reasons for decision in *The Chief Executive, Office of Fair Trading v Filippini, Penney also known as Filippini* [2009] QCCTPAMD 51 (29

October 2009),<sup>1</sup> as prior conduct which should be taken into account in determining the sanction. The respondent argues that it should not. Secondly, whether my findings in relation to how the respondent engaged her mother make her actions less culpable in terms of determining a sanction.

- [16] The respondent also argues that there are a number of mitigating factors in the case that I should consider. Firstly, the offending conduct occurred in July and October 2012 on two discrete occasions, three months apart. It is submitted that a disqualification of five years is disproportionate to the offending conduct which occurred so long ago and over two weekends. It is agreed that no further complaints have arisen since that conduct. It is further submitted that since the conduct, Ms Penney-Filippini has taken active steps to ensure Ms Heather Filippini's involvement around the business has ceased, reducing her contact with her mother to outside business hours. Further, she has been covertly investigated by the respondent with no adverse finding against her. She has not been the subject of any proper complaint that her mother has acted as a salesperson and she has taken positive steps to prevent her mother attending open homes.<sup>2</sup>
- [17] The respondent further submits that the Tribunal should give consideration to the active steps taken by Ms Penney-Filippini to limit her mother's role and the significant time lapse since the conduct. Further that the ongoing investigation and proceedings have acted as a deterrent in Ms Penney-Filippini's case.<sup>3</sup>
- [18] Further, it is submitted that there was no dishonesty on the part of Ms Penney-Filippini based on my finding that she had tacitly accepted her mother's involvement but had not done so wilfully or in any deceitful way. I accept that I found that "It may be that Ms Filippini has, at times, attended or involved herself in her daughter's business without specific invitation".<sup>4</sup> However, I also found that Ms Penney-Filippini was present when her mother engaged with the prospective purchasers namely, the Fitzpatricks and Ms Jacomas.<sup>5</sup> I concluded that Ms Penney-Filippini had breached s 164(1) of the Act.
- [19] The respondent also submits that in this case no consumer suffered any loss. Mr and Mrs Fitzpatrick did not suffer any loss and I found that "there is clear evidence now that Ms Jacomas had no intention of purchasing the property."<sup>6</sup> It is submitted that in the circumstances where there is no need for consumers to be protected, a disqualification would be superfluous to achieving the Act's objectives.
- [20] In addition, it is argued that she co-operated with the applicant on numerous occasions providing written responses to the queries raised.
- [21] In relation to the trust account matters, the applicant argues that Ms Penney-Filippini did not make any admissions to those matters, whereas the respondent argues that, in fact, she did make admissions in relation to those matters and that should be taken

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<sup>1</sup> Cited as *The Chief Executive, Office of Fair Trading, Department of Employment, Economic Development & Innovation v Filippini & Penney* [2009] CCT PD001-09.

<sup>2</sup> Submissions on behalf of Sarah Penney-Filippini [17]-[20].

<sup>3</sup> Ibid at [21].

<sup>4</sup> *Chief Executive, Department of Justice and Attorney-General v Penney-Filippini* [2016] QCAT 253 at [148].

<sup>5</sup> Ibid at [150] and [151].

<sup>6</sup> Ibid at [151].

into account in determining the appropriate sanction. The respondent argues that she has consistently shown remorse for the technical breaches of the trust account issues identified by the audit and she accepts the fines for the infringement notices of \$1,324.

- [22] It is argued that when Ms Penney-Filippini responded to the matters raised by the audit she was of the view that they had been resolved. Further, it is submitted that this is the first occasion that she has committed trust account breaches. It is further argued that they are trivial in nature and do not involve any misuse or unauthorised payments of trust fund monies. They do not involve dishonesty or incompetence and are isolated incidents. Further, there was no resulting deficiency in the trust account at any time.
- [23] It is submitted that Ms Penney-Filippini has taken the following steps to ensure that she will not re-offend, effectively demonstrating remorse and professionalism:
- (a) She is currently enrolled in Certificate IV in Property Services which includes units relating to managing trust accounts to enhance her knowledge with dealing with Trust Accounts with in the business;
  - (b) She has appointed a new auditor;
  - (c) She has appointed a new accountant.
- [24] Further it is submitted that the audit for the period ending 31 October 2015 was compliant with the Act.
- [25] It is further submitted that a breach of section 164(1) has a maximum penalty of 200 penalty units so that it follows that for using Heather Filippini's services, a fine is appropriate. Further, it is submitted by the respondent that as Ms Penney-Filippini has not previously breached s 164(1) of the PAMDA her conduct cannot be classified as a "re-offence".<sup>7</sup>The maximum penalty for each ground is \$22,000.00 (200 penalty units) and disqualification for a period or permanently. There is also power for QCAT to suspend a licence for a period.
- [26] The respondent identifies as relevant a number of consequences should the tribunal disqualify her from holding a licence. These include that her business will have to be sold or placed in liquidation. Six employees would lose their jobs. Active listings would not be able to continue. There would be a default in the lease. Contracts with suppliers and service providers would need to be terminated.<sup>8</sup>
- [27] Further, the business is Ms Penney-Filippini's sole source of income. If this source of income ceased she would be unable to comply with her financial obligations including meeting mortgage repayments, financial support of family members, a payment plan to the ATO outstanding legal fees and credit card expenses. She would therefore be exposed to legal and financial risk.<sup>9</sup>
- [28] In relation to the claim for costs, the applicant says that it is in the interests of justice for the Tribunal to award it with a costs order, relying primarily on the history of the respondent's appearances before the tribunal, the applicant also argues that the matter was complex and that its claim was strengthened by the former proceeding in the

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<sup>7</sup> Submissions on behalf of Sarah Penney-Filippini [29]-[30].

<sup>8</sup> Ibid at [51]-[57].

<sup>9</sup> Ibid at [58]-[60].

Magistrate Court. The respondent argues that the Magistrate's Court proceeding related to Ms Heather Filippini's conduct and not that of Ms Penney-Filippini. The respondent rejects the applicant's claim that Ms Penney-Filippini is not impecunious as there is no basis for that claim. The respondent conceded that a fine is appropriate for the trust account breaches and the other findings against her, but says an award of costs against her would be an unnecessary and unfounded punishment for the proceeding. The respondent also submits that Ms Penney-Filippini has her own legal costs to bear.

- [29] The applicant does not seek a permanent disqualification due to its view that the conduct was not of such seriousness as to warrant a permanent disqualification. The applicant submits that it is rare for a person to come before the Tribunal on a second occasion. It was submitted that usually a person either leaves the industry or learns their lesson, complies with the relevant law and does not find themselves back before the Tribunal.
- [30] The applicant submitted that it is in the public interest that Ms Penney-Filippini's contravention of the provisions of the PAMDA receive a significant penalty despite no particular person having suffered any consequential financial loss. It was submitted that Ms Penney-Filippini's personal circumstances must be weighed against the broader public interest. The applicant submits that when there has been a repetition of offending conduct the public interest should outweigh the private interest.
- [31] The applicant further submitted that Ms Penney-Filippini's business could continue to operate during the term of any disqualification because a locum could be engaged. She is able to own the business but cannot work as a salesperson. This is disputed by the respondent.

### Consideration

- [32] In *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini*,<sup>10</sup> Ms Penney-Filippini was the second respondent in the proceeding before the CCT, which determined on 29 October 2009 that Ms Penney-Filippini be reprimanded, that she pay a fine in the sum of \$6,000.00 and both Ms Heather Filippini and the respondent were ordered to pay the Chief Executive's costs fixed at \$6,715.00. Ms Heather Filippini was permanently disqualified from holding a licence or registration certificate by the CCT at that same time.
- [33] As the respondent was a party to those proceedings and orders were made which related to her it is appropriate, in my view, that the matters dealt with by the CCT, so far as they are relevant to these proceedings, be considered in determining the sanction that I should now impose.
- [34] The CCT made its orders having considered agreed facts in the case. Those agreed facts included that Ms Penney-Filippini admitted that she had carried on business under a licence with someone who was not suitable to hold a licence pursuant to s 496(1)(g) of the PAMDA.
- [35] In its reasons the CCT expressed its concern that, in the absence of oral evidence to flesh out the agreed facts, a meaningful appreciation of the circumstances might be

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<sup>10</sup> [2009] QCCTPAMD 51

very difficult. However, it is clear that neither party gave any further evidence and the CCT was therefore left to make what it could of the agreed facts.<sup>11</sup>

[36] The CCT set out the following relevant facts and circumstances:<sup>12</sup>

When departmental officers spoke to the respondents shortly after that date, the position taken by them was that Sarah was now the principal of the business and that Heather would be involved in the business only “in an administrative capacity” (see exhibit 2 para 10).

The acts now admitted show that Heather did indeed “act as a real estate agent” during that period, and that she was not a purely administrative assistant. They fall into seven categories –

- (a) display of window advertisements (“listing cards”) of properties for sale, containing Heathers photograph;
- (b) kerbside advertisements asserting or implying Heather’s involvement in the HFIR business;
- (c) HFIR signs on various properties asserting or implying Heather’s involvement in the business;
- (d) continued registration of Heather as proprietor of the business HFIR, accompanied by attempts to amend that registration to show the persons carrying on the business as Heather and Sarah;
- (e) continued use of Heather’s trust account which remained at material times the only trust account of the business;
- (f) Heather’s involvement in sales by Hill and Keep;
- (g) Heather’s attendance on “open house ” days and her involvement in the negotiation process.

Overall the evidence shows a range of matters in which Heather seems to have maintained a presence and involvement in the conduct of the business. The main difficulty lies in evaluating the extent of her involvement when no evidence has been provided of the financial arrangements that existed between Heather and Sarah. No information is available concerning the manner in which profits of HFIR were distributed or how either respondent was remunerated.

Without discussing the evidence at length, it is clear that Heather continued to act as a real estate agent after 24 April 2009. At the same time it is fair to say that the conduct of the respective respondents reflected some attempt to limit Heather’s involvement, and that an effort was made, albeit an ineffectual one, to limit her role in the business and increase Sarah’s. What was done however did not even come close to an observance of the tribunal’s order of disqualification.

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<sup>11</sup> *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51, [10].

<sup>12</sup> *Ibid* [16]-[20].

The most difficult task confronting me is to determine the extent to which Heather continued to perform real estate agent activities of the kind recognised in the PAMD Act.

[37] There is little further discussion about matters such as Ms Heather Filippini's involvement in the sales by Hill and Keep, her attendance on open house days and her involvement in the negotiation process. I could identify only a few relevant paragraphs of the decision.

[38] At paragraph [45] the CCT said:

Counsel for the respondents submitted that the course of action followed by the respondents was influenced by advice from investigators or agents of the Office of Fair Trading whom had had conversations with the respondents on 30 April 2008 and 29 May 2008, relevant transcripts of these interviews are included in the admitted facts showing that inter alia Sarah was advised that mere attendance of Heather at an open house was not of itself a breach of the Act and that she could for example "open the door and allow somebody in". Discussion touched upon whether Heather might be performing in an "administrative position" in various circumstances, but I do not think that the investigator's comments can be regarded as misleading or as capable of inducing the course of conduct which the respondents chose to follow. There was an express statement to Sarah that "the person who carries on the business needs to be you" but further statements by Sarah in this rather confusing conversation suggest a degree of confused thought on her part as to how that might be achieved.

[39] The CCT went on to say:<sup>13</sup>

I do not think it can be fairly suggested that the subsequent actions of the respondents were contributed to in any material way by any advice given by these officers. The comments appear to have been offered in a friendly fashion, and it is possible that the respondents did not see them as contradicting the course that they proposed to follow. But the point is that at no stage did they make any clear disclosure to those officers of their business arrangements or how they intended to proceed. They did little more than assert generalities such as that Sarah would be carrying on the business and that Heather would only be doing things in an administrative capacity.

[40] The conduct which gave rise to my findings in relation to unprofessional conduct included Heather Filippini attending at open houses and being involved in the subsequent sale of a property to Mr and Mrs Fitzpatrick. The events occurred in 2012, approximately three years after the decision of the CCT. Similarly, in this case, the respondent sought to argue that Ms Heather Filippini had been involved in the business only in an administrative capacity, that she attended at open houses to open prepare houses for the open house, and was not otherwise involved in dealing with prospective purchasers, or in negotiating with prospective purchasers with a view to obtaining a sale of the property. However, I found that Ms Heather Filippini's actions went further than opening the door and allowing somebody in and that Ms Penney-Filippini was aware that that was the case.

[41] In my view, whilst there may have been some confusion on the part of Ms Penney-Filippini as to the extent to which her mother might be involved on open house days

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<sup>13</sup> *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51, [46].

or in the negotiation process, that confusion should not have remained post-decision of the CCT. Clearly, she agreed to the facts which included that her mother had engaged in conduct including involvement in sales, attendance at open houses, and involvement in the negotiation process. Given the orders made by the CCT I would have thought that Ms Penney-Filippini would have been extremely reluctant to have her mother subsequently involved in any way in open houses, despite any information she may have sought and obtained from the Office of Fair Trading.

[42] I made findings that Ms Penney-Filippini was present at the open houses when her mother engaged prospective purchasers and was also present at meetings with prospective purchasers which formed part of the negotiation process. I formed that view while accepting that the CCT perhaps had given more weight to other matters in forming the view that Heather Filippini was still operating the business.<sup>14</sup>

[43] The CCT found:<sup>15</sup>

It seems to me that Heather was having her cake while pretending not to eat it, and of Sarah knowingly co-operated in circumstances where she obtained an increased part of it.

[44] I also found that Ms Penney-Filippini received a financial benefit from her mother's involvement in the sale to the Fitzpatricks.<sup>16</sup>

[45] However, I accept that there are some differences between the decision of the CCT in relation to the business and the business that Ms Penney-Filippini was operating in 2012. Ms Penney-Filippini has sought to remove her mother from the business in terms of the name of the business and completed the relevant paperwork so that she is the sole proprietor of the business. I also note the following passages of the CCT decision:<sup>17</sup>

Counsel for the respondents submitted that the factual matrix was identical in relation to both respondents, and broadly speaking I think that it correct. He pointed out in every situation Heather was accompanied by Sarah who was dually licensed, that she never identified herself to potential vendors as an agent, or sought authority to act for a vendor or claim commission on any sale.

He further submitted, in my view quite correctly, that there was no dishonesty involved in the course of conduct, no dealing in money or misrepresentations and that no member of the public was shown to have suffered by reason of the actions by either respondent.

Counsel further indicated that although Heather attended a number of open houses the evidence suggests that a relatively early stage of contact with interested parties she would refer the enquiry to Sarah.

The essence of the submissions for the respondents is that they took significant, albeit insufficient steps to adjust the business to the disqualification of Heather. Their counsel submitted that both respondents "are deeply remorseful" but I

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<sup>14</sup> See para [38] of these reasons matters listed (a) to (e).

<sup>15</sup> *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51, [42].

<sup>16</sup> *Chief Executive, Department of Justice and Attorney-General v Penney-Filippini* [2016] QCAT 253 (OCR 237-14) at [150].

<sup>17</sup> *Ibid* [47]-[51].

take this as an assertion by counsel which is not supported by the admitted facts or by evidence. The respondents certainly acted responsibly in retaining their present solicitors and in agreeing to the admitted facts and admitting the charges they have admitted. That is itself a mitigating factor. However in the absence of actual evidence I am not prepared to accept counsel's assertion that (Heather) deeply regrets her actions and assures the tribunal that she will in the future disassociate herself from any open houses or intentional client contact for the duration of her disqualification". This seems to imply that she still has some intention of remaining associated with the business and maintaining a presence under the banner of "mere administrative activity". In the light of past events that course seems fraught with risk.

By contrast, counsel for the Chief Executive submitted that the respondents had adequate time to put in place a detailed strategy to remove Heather from the business following the court decision, and failed to do so. He pointed out that Heather continued to attend open houses, meet with vendors and purchasers in a capacity beyond that of administration and that penalties should be imposed that encourage the maintenance of standards in the real estate profession by other licensees. He submitted that the offending by Heather was contemptuous of the court's decision.

[46] Of those submissions the CCT said:<sup>18</sup>

I do not accept either ultimate submission, that is to say the applicant's submission that the respondent's actions reflect contempt of the court order, or the respondent's submissions that their actions were basically an error of judgement. In my view Heather's original disqualification was for misconduct displaying a degree of greed, and her actions following disqualification show an intention to retain control of the ongoing real estate business. At best the conduct of both respondents could be described as pachydermatous and reckless. There was no attempt to obtain reputable legal advice and superficial adjustments were made that were little more than a pretence of obeying the Tribunal's order.

[47] In relation to Ms Penney-Filippini, the CCT in determining the orders against her stated:<sup>19</sup>

Sarah was fully aware of the Court of Appeal's decision, and was under a duty to reassess her business relationship with her mother, in whose business she had been working. She obtained her own real estate agents licence on 7 February 2006, only a few months before the Court of Appeal decision. Obviously both respondents were fully aware of the need to comply with the court's order but did nothing responsible to find out how this should be done.

Sarah's Counsel submitted that she was probably to some extent dominated by her Mother. In the absence of oral evidence in cross-examination, I am not in a position to know that this is so, but accept that from the given circumstances it is likely that some leading came from Heather and that some degree of influence was exerted upon Sarah.

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<sup>18</sup> *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51, [52].

<sup>19</sup> *The Chief Executive, Office of Fair Trading v Filippini, Penny also known as Filippini* [2009] QCCTPAMD 51, [59]-[63].

Counsel for the applicant drew attention to the fact that Sarah told the inspector on 29 May 2008 that Heather did not attend open houses, stating *"It is me. I do everything"*. He submitted that this was misleading. I see it as glib hyperbole. Counsel's submission is correct, but this is only a minor detail in the overall picture.

In the event Counsel for the applicant, having regard to the fact that this is the first occasion in which Sarah has come before the Tribunal on a disciplinary charge, did not seek any order of disqualification against Sarah. In my view her conduct was serious enough to call for serious consideration of an order for disqualification for a period. However, in the circumstances I will not impose a disqualification that the Chief Executive does not seek. Counsel's submission was that the appropriate order would be a fine in the range between \$5,000.00 and \$7,000.00.

I am prepared to accept that submission, and will impose a fine of \$6,000.00, along with an order for the costs of these proceedings. I also consider that there should be a reprimand.

- [48] The respondent submits that following the decision of the CCT the respondent took active steps to ensure that she was not conducting business with her mother and there had been no complaint that she had reoffended in that way at any time since. The respondent submits that she has not failed to take heed of the Tribunal's decision, or failed to remediate her behaviour accordingly.
- [49] In my view, the respondent has again been ineffectual in limiting her mother's involvement in her business. I consider that the previous Tribunal decision and the findings made in that decision are relevant to my consideration of the appropriate sanction in this case.
- [50] Whilst I accept that the CCT did not have all the relevant personal circumstances relating to the respondent and her mother before them, in particular as outlined in the respondent's affidavit that she took over the business from her mother in somewhat tragic and distressing circumstances, having not had prior experience in carrying on a business herself, I do not consider that that can be the answer for why in 2012, some three years later, similar conduct occurred. Further, I do not consider that it is correct to say that the CCT failed to take into account the influence exerted over Ms Penney-Filippini by her mother. The words of the second paragraph of the passage from the decision of the CCT set out above indicates that it did.
- [51] I consider it relevant to the imposition of any sanction that this is now the second time Ms Penney-Filippini has been before a Tribunal on a disciplinary related matter, and that to the extent that the facts related to the involvement of Ms Penney-Filippini's mother in attendances at open houses and in negotiations of sales this Tribunal and the CCT has considered similar conduct.
- [52] I accept as submitted by the respondent that Ms Penney-Filippini is now six years since the relevant contraventions and Ms Penney-Filippin was then 33 years of age. I also accept that she has a very close relationship with her mother and continues to reside with her. I also accept that in her business she manages six employees and is currently operating the business with 50 active listings of properties for sale. I also accept that in 2015 she subscribed to the Tom Panos Real Estate Training & Mentoring program, and she has attended the annual real estate training conference in 2015 and 2016; and that in 2015 she enrolled in and completed a Certificate IV

Property Services Course and also successfully completed the Real Estate Institute of Queensland CPPDSM4006A Establish and Manage Agency Trust course.<sup>20</sup>

- [53] I note that these subsequent training courses and programs were enrolled in after the disciplinary action was commenced against Ms Penney-Filippini in 2014. I also consider it relevant that Ms Penney-Filippini did not at any earlier time admit the matters argued before the Tribunal. However, I also accept that there has been no previous decision in relation s 164(1) of PAMDA and that a legal argument was run by the respondent's representative as to the interpretation as to the words of s 164(1). I also accept that no member of the public has been financially disadvantaged by the actions of Ms Penney-Filippini. I also accept that there has been no further complaint made to the applicant in relation to any conduct by the respondent since the disciplinary action raised by the applicant the subject of these proceedings.
- [54] I acknowledge the remorse expressed by Ms Penney-Filippini to the Tribunal, which is set out in her affidavit:<sup>21</sup>

...

Following my mother's disqualification, I did various things in an endeavour to ensure I complied with my licence requirement. I changed the name of the business from Heather Filippini Island Realty to Sarah Filippini Island Realty and amended office logos, signage, for sale signs, websites, window cards, window displays, marketing material (i.e. flags and banners), stationary and other documentation accordingly.

However, my mother and I continued to be very close as we still are. We continued to live together. We have always spent a lot of time together, and we still do, ...

...I always welcome her to my office whenever she chose to come there, and to join me at open houses from time to time. I did not employ her as a salesperson, and I have never intended to use her services as such. To the contrary particularly after her absolute disqualification I consistently try to impress on her that she must not intrude into or participate in my work as an agent or in running the business, and must not engage people in sales discussion. But she is a naturally gregarious and sometimes loquacious person, and I accept that at times I failed to do enough to ensure she remained completely out of and away from all sales discussion. I believe at least part of my fault in that regard arose from my continuing eagerness to see her recover and regain her enthusiasm and vigour for life. I never wanted to be cruel to her in any way, but I accept that, as a result, at times I was too soft with her, and in so doing, I failed to live up to my responsibilities as a licensee to protect the public. I deeply regret having failed in that duty, because I love my work, and I am deeply committed to it. I have always tried to be a good agent, and have intended to do my work honestly, scrupulously and ethically.

...

I deeply regret my failure to meeting my full responsibilities as a licensee, but I feel that I am now a much more capable and competent agent. I feel that I have

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<sup>20</sup> Respondent's outline of submissions on penalty filed 6 April 2017, [4.2], [4.4] and [4.5]; Exhibit 1, Affidavit of Sarah Louise Penney-Filippini dated 6 April 2017, [25]-[26].

<sup>21</sup> Exhibit 1, [16], [17], [20], [21], [22], [28].

matured as a business person, and with the assistance of my professional advisors, gained substantial knowledge and experience over the past several years. I am confident that I have not further offended in any way, and I have received no official complaints of any kind. I am determined that I will never reoffend. I love my work and I want to continue in it. I have goals to expand the business, adding additional related services, and believe that I have a team that can successfully achieve this. If I were to lose my licence, I would have close my business, and terminate the employment of my six employees, as well as terminate ongoing contracts with other businesses.

- [55] I also accept Ms Penney-Filippini's evidence that she has no other source of income other than her business, and that she has fixed monthly obligations including: wages, internet, website memberships, commercial cleaning contracts, telephone and telephone equipment contracts, printing contracts, advertising contracts, PAYG instalments, ATO monthly payments due to a debt owed to the ATO, business loan repayments and home loan repayments.<sup>22</sup>
- [56] I have also taken into account the affidavit of Mr Street in support of Ms Penney-Filippini's ability to maintain her accounts appropriately in the future as well as the other testimonials.<sup>23</sup>
- [57] There is dispute about whether Ms Penney-Filippini can continue to own the business during the period of her disqualification but I accept that her disqualification and inability to work as a salesperson in the business will impact on the operations of her business and there will be adverse flow on consequences for her currently employed staff members as well as her own financial obligations. Against that I have weighed that she has a range of transferable skills and a law degree.
- [58] However, given my findings in relation to previous conduct by Ms Penney-Filippini and taking into account the various contraventions of the PAMDA, I consider that public interest considerations are deserving of significant weight. There is a public interest in the public being confident that the regulatory system is effective to afford protection to the public from contravening conduct by agents.
- [59] The respondent relies on the Tribunal's decision in *Chief Executive, Department of Justice and Attorney-General v Smart Real Estate (Qld) Pty Ltd & Anor* (Smart Real Estate).<sup>24</sup> In that case, the Tribunal reprimanded both the company and the agent and sole director running the business, fined him \$5,000.00 and also fined the company \$5,000.00 and disqualified the company from holding a licence for a period of five years. The Tribunal suspended the disqualification on particular conditions, including: that if a penalty is imposed against the company in respect of a disciplinary proceeding under the Act during the suspension period, the suspension would be revoked and the disqualification would come into effect from that date. Similar conditions, and the suspension of disqualification, were imposed on the real estate agent as an individual.
- [60] It is argued by the respondent, that the conduct of the agent in the Smart Real Estate case was more serious than that in the current case. In that case, Mr Scott was found to have engaged in a deliberate course of conduct, making 13 separate withdrawals from the trust account of amounts in the sum of \$5,500.00 or less, many relatively

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<sup>22</sup> Exhibit 1, [30].

<sup>23</sup> Affidavit of Aaron Street sworn 6 April 2017.

<sup>24</sup> [2013] QCAT 58.

small. Further, it was found that the rental bond money he was depositing into his trust account should not have been so deposited. Rather, the monies should have been provided to the Residential Tenancies Authority.

- [61] In determining the appropriate sanction, the Tribunal weighed certain matters including that the offences committed by Mr Scott were serious, and that in other comparable cases such behaviour had resulted in disqualification periods ranging between two and ten years. It was also noted that Mr Scott was not a naïve man and had a tertiary degree in finance, had worked as a business banker for a major bank and had built up a substantial business. It was also stated that his actions were deliberate and methodical and that he had completed training in the industry and in trust account management, and that it was not believable given his background that he would not have had an apprehension that what he was doing was wrong.
- [62] The Tribunal said that in the absence of mitigating factors he would have had no hesitation in imposing an absolute period of disqualification on Mr Scott and the company. However, the member weighed the consequences of the disqualification period. The learned member noted that if both Mr Scott and the company were disqualified that the business would have to be sold quickly which might result in a fire sale and substantial detriment and that he would have difficulty retrieving the business later if he could perhaps transfer the licence to another person; that the disqualification would be devastating to him; that he was a relatively young man of 31 years at the time of the offending and had only been a real estate agent for three years, and had a wife and child to support. It was also taken into account that he had made full confessions and expressed strong remorse and obtained good character references from his accountant and solicitor; and had undergone further training since the offences were committed.<sup>25</sup>
- [63] The Tribunal noted that it was prepared to give Mr Scott a second chance in those circumstances. The seriousness of the offences and the deliberate nature of them warranted the disqualification period, but the mitigating circumstances set out by the Tribunal led the Tribunal to wholly suspend the imposition of the disqualification period.
- [64] The applicant sought to distinguish this case on the basis that in Mr Scott's case, he had contacted the Office of Fair Trading, the day after his accountant spoke to him about the trust account matters and he cooperated with the investigator and made full admissions. I accept this submission.
- [65] For that reason and for the reasons I have already outlined in relation to the history of this proceeding and Ms Penney-Filippini's involvement in the proceedings before the CCT, I consider that the Smart Real Estate decision is distinguishable and not comparable to the present case.
- [66] The respondent has also drawn my attention to a decision of the Civil and Administrative Tribunal of NSW ('NCAT') dated 19 August 2014, in *Porter v Department of Finance and Services* (Porter).<sup>26</sup> In Porter, amongst other things, the agent was found not to have intentionally breached s 43 of the relevant Act by employing her mother, Mrs Campbell. For although she was aware that she was not

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<sup>25</sup> *Chief Executive, Department of Justice and Attorney-General v Smart Real Estate (Qld) Pty Ltd and Anor* [2013] QCAT 58 at [59] to [69].

<sup>26</sup> [2014] NSWCATOD 93.

permitted to employ her as a real estate agent, she believed that she was able to employ her in an administrative capacity given that the appointed manager of PMD had employed Mrs Campbell as a book keeper while she was a disqualified person.

- [67] However, the relevant New South Wales legislation appears to provide that a licensee must not employ a person in any capacity in connection with the carrying on of the business conducted by the licensee, if the person is a disqualified person or has had his/her licence or certificate of registration suspended or cancelled. That section is quite different from the relevant section of Queensland PAMDA in respect of which I made findings. Further, in the decision of Porter it does not appear that the real estate agent in question had been the subject of any prior disciplinary proceedings which involved similar circumstances. In Porter, the agent was cautioned.
- [68] The respondent says that with regards to the trust account matters, a global fine reflecting the standard infringement notices of \$440.00 for the late audit, and \$220.00 for each of the remaining breaches, a total of \$1,320.00 is an appropriate penalty, particularly given the lack of any previous breaches of this type, and further given the substantial steps since taken by the respondent to ensure strict future compliance, including the employment of a new accountant and auditor.<sup>27</sup>
- [69] The applicant relies on the decision of *The Chief Executive, DTFTWID v Cumerford, G.*,<sup>28</sup> and submits that in that case there was a late audit, by about nine months, and some other matters to which the agent pleaded guilty and he was fined \$1,500.00. The applicant submits that the fine reflects that the matter is now 11 years old and so submits that having regard to the five breaches for the respondent, her disciplinary history and the fact that there was no acceptance by her that these breaches occurred, that a single fine of \$3,000.00 would be appropriate and incorporated into one fine to cover the entirety of the unprofessional conduct. The fine sought is, in total, \$13,000.00. The balance of \$10,000.00 being a reflection that the behaviour in relation to the employment of her mother as an agent was so serious that a significant fine was warranted.
- [70] While I accept that Ms Penney-Filippini took a number of steps to ensure future compliance with the audit requirements, I also take into account that the matter proceeded before the Tribunal and the auditor gave evidence and was cross-examined.
- [71] I considered each of the alleged trust account breaches in my decision.<sup>29</sup> Despite Ms Penney-Filippini's responses in her evidence to each of the trust account breaches, it remained unclear to me why she only became aware in July 2013 that the 2011/2012 audit had not been completed. I found that her only explanation appeared to be that she says it was for the auditor to complete the report and that she was not always present when the auditor visited. I found that the obligation in s 402 of the PAMDA was on the licensee to have the trust accounts audited by the licensee's auditor to file the original report with the Chief Executive. It is required to be done by the same time each year.<sup>30</sup> I did however acknowledge that she made efforts to have the audit report completed by another auditor and had engaged a new auditor.

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<sup>27</sup> Respondent's submissions on penalty, [6.1].

<sup>28</sup> [2005] QCCTPAMD 14 (5 May 2005).

<sup>29</sup> Ibid at [153] - [185].

<sup>30</sup> Ibid at [160] - [164].

- [72] In relation to the issue with the trust account receipt forms, I found that the reason the year was omitted from the receipts was due to a formatting issue with the software. That said, it was unclear why the problem with the software was not picked up at the time of the printing the receipts or why Ms Penney-Filippini had not been aware of the issue despite having the software for many years. I also found that she failed to explain why duplicate trust account receipts were not signed at the relevant time.<sup>31</sup>
- [73] In relation to the misfiled trust account receipts, I accepted her evidence that they were subsequently found and that they were located and correctly filed. In making that finding I accepted that it was common ground that for the 2011/2012 audit two receipts were missing at the date of the auditor's inspection.
- [74] I found that Ms Penney-Filippini had not complied with the relevant regulation for the receipts identified in the audits.
- [75] I also found that reconciliations throughout the relevant period were out by 10c or 11c and that she had only ascertained the reason for this after she had engaged new auditors and I found that she is responsible for ensuring that her trust account cashbook is reconciled.

### **The appropriate sanction**

- [76] While I have considered and can take some guidance from the authorities provided to me by the parties, there does not appear to be any clear comparable decision in relation to the appropriate sanction. In reaching my decision on the appropriate sanction I have weighed the private interests of Ms Penney-Filippini including all the circumstances I have already outlined as well as the public interest considerations in line with the objects of the PAMDA. I have also taken into account the various findings I made in determining that there were grounds for disciplinary action which I have also outlined in these reasons.
- [77] I have reached the conclusion that the appropriate sanction in this case is that Ms Penney-Filippini is disqualified, for a period of three years, from holding a registration certificate or licence under the POA, such period of disqualification to take effect from the date that is two months from the date of this order, 8 October 2018. This will also enable Ms Penney-Filippini and her staff time to get their financial affairs in order. In determining that a three year period is appropriate rather than the longer period of five years sought by the applicant, I acknowledge the length of time since the conduct occurred and the absence of other complaints in the period since as well as Ms Penney-Filippini's remorse and other personal circumstances which I have previously outlined. However, I do not consider that a reprimand or wholly suspending any period of disqualification would properly reflect the seriousness of the conduct, in light of the earlier proceedings in the CCT and that she was the operator of the business. I do not consider that a reprimand or wholly suspended period of disqualification would promote public confidence in the effectiveness of the regulatory system.
- [78] I further order that Ms Penney-Filippini pay a fine of \$3,000 also by 8 October 2018. That amount reflects fines for the various audit offences. I accept that most of the matters were relatively minor in nature. In settling on this amount, I have taken into

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<sup>31</sup> Ibid at [169] - [175].

account that I have imposed a period of disqualification for the contravention of s 164(1) of the PAMDA. Further, I acknowledge the steps Ms Penney-Filippini subsequently took to ensure that such breaches did not happen again. However, as I found in relation to the grounds for disciplinary action, Ms Penney-Filippini's response to the applicant in relation to the late audits was unsatisfactory. Her response reflected a failure to appreciate the importance of compliance with the trust account requirements.

[79] In relation to the applicant's claim for costs, s 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) essentially provides that in matters such as this one each party to a proceeding must usually bear the party's own costs for the proceeding. Section 102 of the QCAT Act provides the Tribunal with a discretion to make an order requiring a party to a proceeding to pay all or a stated part of the costs of another party to the proceeding if the tribunal considers the interests of justice require it to make the order. Section 102(3) sets out the matters the tribunal may have regard to in deciding whether to award costs. These include:

- (a) Whether a party to a proceeding is acting in a way that unnecessarily disadvantages another party to a proceeding;
- (b) The nature and complexity of the dispute the subject of the proceeding;
- (c) The relative strengths of the claims made by each of the parties to the proceeding;
- (d) The financial circumstances of the parties to the proceeding;
- (e) Anything else the tribunal considers to be relevant.

[80] In this case, I do not accept that Ms Penney-Filippini acted in a way that unnecessarily disadvantaged the applicant. The proceeding took considerable time to come to a hearing. The Tribunal was required to deal with an application in relation to the admissibility of evidence, prior to the hearing in respect of whether grounds for disciplinary action were established. However, the proceeding was a very serious one for Ms Penney-Filippini. She was legally represented and was no doubt guided by her legal representatives in respect of the tribunal process.

[81] Ms Penney-Filippini had a right to be legally represented in the tribunal without leave.<sup>32</sup> This recognises the seriousness of the proceeding. The hearing ran for four days and involved argument in relation to the interpretation of the s 164 of the PAMDA. I accept that the proceedings were complex. I do not consider that my findings reflect that Ms Penney-Filippini's case was weak. Ms Penney-Filippini's level of income will likely be adversely impacted by my findings in relation to the appropriate sanction. This will impact her ability to pay any costs order. I have also determined that Ms Penney-Filippini should pay a fine of \$3,000. I consider that a costs order in the circumstances of this case will effectively be a further penalty which, given my other findings on penalty, would be excessive.

[82] Each party should bear their own costs.

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<sup>32</sup> QCAT Act s 43(2)(b)(ii).

