
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : KING -v- COMMISSIONER FOR CONSUMER PROTECTION [2018] WASCA 194

CORAM : MURPHY JA
MITCHELL JA
PRITCHARD JA

HEARD : 16 MAY 2018

DELIVERED : 31 OCTOBER 2018

FILE NO/S : CACV 114 of 2016

BETWEEN : PAUL ANTHONY KING
Appellant

AND

COMMISSIONER FOR CONSUMER PROTECTION
Respondent

ON APPEAL FROM:

Jurisdiction : STATE ADMINISTRATIVE TRIBUNAL

Coram : JUSTICE J C CURTHOYS (PRESIDENT)
MS D QUINLAN (MEMBER)
MR R ADAMS (SESSIONAL MEMBER)

Citation : COMMISSIONER FOR CONSUMER PROTECTION
and THE KING AND I PTY LTD (ACN 060968809)
[2016] WASAT 125

File Number : VR 125 of 2014, VR 112 of 2014

Catchwords:

Real estate and business agents – Appeal against finding of proper cause for disciplinary action – Whether error of law in finding proper cause for disciplinary action – Where finding based on inferences – Whether the tribunal felt an actual persuasion that the evidence supported an inference

Legislation:

Real Estate and Business Agents Act 1978 (WA), s 103

State Administrative Tribunal Act 2004 (WA), s 105(1), s 105(13)

Result:

Leave to appeal refused

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant : Mr G M Abbott

Respondent : Mr J L Derby

Solicitors:

Appellant : Williams & Hughes

Respondent : Legal Services, Consumer Protection Division, Department of Mines, Industry Regulation and Safety

Case(s) referred to in decision(s):

Armstrong v Commissioner for Consumer Protection [2014] WASCA 71

Briginshaw v Briginshaw (1938) 60 CLR 336

Centex Australasia Pty Ltd v Commissioner for Consumer Protection [2017] WASCA 79

Chamberlain v The Queen (No 2) [1984] HCA 7; (1984) 153 CLR 521
Chin v Legal Practice Board Western Australia [2009] WASCA 117
E & J Gallo Winery v Lion Nathan Australia Pty Ltd [2010] HCA 15; (2010)
241 CLR 144
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Lourey v Legal Profession Complaints Committee [2012] WASCA 112
Lunt v New Resource Holdings Pty Ltd [No 3] [2011] WASCA 45
Luxton v Vines (1952) 85 CLR 352
Mavaddat v Real Estate & Business Agents Supervisory Board [2009] WASCA
179
Medical Board of Australia v Woollard [2017] WASCA 64; (2017) 51 WAR 32
Paradis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33
WAR 361
R v Baden-Clay [2016] HCA 35; (2016) 258 CLR 308
R v Hillier [2007] HCA 13; (2007) 228 CLR 618

JUDGMENT OF THE COURT:

1 This appeal arises from disciplinary proceedings brought in the State Administrative Tribunal by the Commissioner for Consumer Protection (Commissioner) against The King and I Pty Ltd (TKAI), Mr Colin King and the appellant (together, the King parties) pursuant to the *Real Estate and Business Agents Act 1978* (WA) (REBA Act). Those proceedings arose from the circumstances surrounding the purchase and on-sale of six properties (referred to herein individually as Property 1, 2, 3, 4, 5 or 6¹ respectively, and collectively as the Properties).

2 On 20 October 2016, the Tribunal ordered that proper cause existed for disciplinary action against the appellant, pursuant to s 103 of the REBA Act, in that the appellant had had engaged in conduct which contravened a number of clauses of the *Code of Conduct for Agents and Sales Representatives 1993* (Code) published by the Commissioner under s 101 of the REBA Act (Decision).²

3 The Tribunal dismissed the disciplinary proceedings brought against TKAI and Mr Colin King. It held that there was no jurisdiction to pursue disciplinary proceedings against those parties because the licences issued to them under the REBA Act had expired.³

4 In the same proceedings, the Tribunal also reviewed a decision by the Commissioner to refuse an application by Mr Colin King to renew his triennial real estate and business agent's licence. The Tribunal dismissed that application, after finding that Mr Colin King was not a fit and proper person to hold a real estate agent's licence.⁴

5 Following the Decision, the Tribunal received submissions on the penalty which should be imposed, and made an order disqualifying the appellant from applying for a sales representative's licence for 15 years (penalty order).⁵

¹ Property 1 was located at Lot 5 Henry Road, Greenough. Property 2 was located at Lot 6 Henry Road, Greenough. Property 3 was located at Lot 10 Brand Highway, South Greenough. Property 4 was located at Lot 733 Mundijong Road, Baldivis. Property 5 was located at Lot 15 Mt Horner Road, West Bookara. Property 6 was located at Lot 20 Yarra Road, Bowes.

² Blue AB 1.

³ *Commissioner for Consumer Protection and The King and I Pty Ltd* [2016] WASAT 125 (Reasons) [310] - [316].

⁴ Reasons [302] - [305], [320].

⁵ Blue AB 56.

6 This appeal pertains only to the Decision. The appeal does not concern the penalty order, nor does it concern the Tribunal's conclusion that it did not have jurisdiction in respect of the disciplinary proceedings concerning TKAI and Mr Colin King, or the Tribunal's review of the refusal of Mr Colin King's licence renewal.

7 The appellant appeals against the Decision pursuant to s 105 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). He contends that the Tribunal made errors of law in finding that the evidence adduced in the proceedings before the Tribunal supported the inference that he knew of the intended on-selling of four of the Properties.

8 The appellant requires leave to appeal.⁶

9 For the reasons which follow, we would refuse leave to appeal and dismiss the appeal.

10 It is convenient to commence by outlining the factual and legal basis for the disciplinary proceedings the Commissioner pursued against the King parties, before setting out a summary of the Tribunal's detailed factual findings concerning the sales of each of the Properties, and the conduct of the King parties in respect of those sales.

(a) **The factual and legal basis for the disciplinary proceedings in the Tribunal**

11 At all relevant times, the appellant held a certificate of registration as a real estate and business sales representative (sales representative), issued under the REBA Act. He was employed as a sales representative by TKAI. Mr Colin King, the appellant's father, was the director of TKAI and controlled that company. At all relevant times until 27 August 2014, TKAI held a real estate and business agents' licence, and operated under the business name Colin King Real Estate. Until 15 April 2014, Mr Colin King held a real estate and business agents' licence. He was the person in control of Colin King Real Estate.

12 The Commissioner alleged that the King parties each knew of, and facilitated, a scheme (to which we will refer herein as the on-sale scheme) by which each of the Properties was purchased from the original seller by one of a number of companies (to which we will refer as a Palumbo company) established by another of Mr Colin King's sons, Mr Michael King,⁷ and then re-sold a short time later, for a

⁶ *State Administrative Tribunal Act 2004* (WA) s 105(1).

⁷ Mr Michael King was not a real estate agent or sales representative.

significantly higher price, to another party who was associated with a Mr Wong (to which we will refer as a Wong Syndicate purchaser).⁸ In each case, the original seller and the ultimate Wong Syndicate purchaser were not told about the intervening sale to the Palumbo company.⁹

13 The Tribunal found that Mr Wong acted for the Wong Syndicate purchasers in each case.¹⁰ Mr Wong dealt principally with Mr Michael King, but he had had business dealings with Mr Colin King and TKAI from 2007 or 2008, and had also had dealings with the appellant, and with another of Mr Colin King's sons, Mr Darren King.¹¹

14 Mr Mark Palumbo was the sole director and shareholder of each of the Palumbo companies. He was a friend of Mr Michael King. The Tribunal found that Mr Palumbo simply acted on Mr Michael King's direction throughout the various transactions pertaining to the Properties.¹²

15 Across all of the Properties, there was a combined mark-up of about \$6 million between the original purchase price and the subsequent on-sale price.¹³

16 In each case, the settlement of the original sale, and the on-sale, of each Property occurred on the same day. That allowed the funds derived from the on-sale to be used to fund the Palumbo company's purchase of the Property.

The provisions of the Code relied upon by the Commissioner in the disciplinary proceedings in the Tribunal

17 The REBA Act provides that there shall be proper cause for disciplinary action against a sales representative if the sales representative has acted in breach of the Code.¹⁴

18 The Code sets out various obligations which apply to an 'agent' (which means an agent or a sales representative¹⁵). The provisions of

⁸ Reasons [41] - [43].

⁹ Applicant's Minute of Proposed Further Amended Statement of Issues Facts and Contentions at [10] - [21], Blue AB 60 - 62.

¹⁰ Reasons [64].

¹¹ Reasons [61] - [62].

¹² Reasons [42].

¹³ Reasons [7].

¹⁴ REBA Act s 103(4)(c)(iii).

¹⁵ Code cl 1.

the Code which the Commissioner alleged were breached by the King parties were as follows:

- an agent 'must act in the best interests of his or her principal except where it would be unreasonable or improper to do so' (cl 2);
- an agent 'must act fairly and honestly' (cl 5(1));
- an agent 'must not knowingly mislead or deceive any parties in negotiations or a transaction' (cl 5(2));
- 'if an agent ascertains a fact which is material to a transaction in which the agent's principal is involved the agent must promptly communicate that fact to any person who may be affected by it unless it is clear that person was already aware of that fact' (cl 8(2));
- an agent 'must not accept an engagement to act, or continue to act, where to do so would place his or her interest in conflict with that of the principal' (cl 10(1)).

19 In respect of Properties 1, 2 and 3, the Commissioner alleged that the King parties failed to disclose to their principal (the original seller), or to the Wong Syndicate purchaser, with whom they were dealing, that the Palumbo company was not a bona fide purchaser of the Property, that there was a potential alternative purchaser, apart from the Palumbo company, willing to pay a higher price for the Property, and that the Palumbo company would immediately on-sell the Property to that purchaser for a higher selling price. The Commissioner alleged that in failing to disclose that information, and in acting for the original seller in those circumstances, the King parties breached clauses 2, 5(1), 5(2), 8(2) and 10(1) of the Code¹⁶ in that they:

- (i) Failed to act in the best interests of their principal;
- (ii) Failed to act fairly and honestly towards their principal;
- (iii) Misled or deceived their principal;

¹⁶ Applicant's Minute of Proposed Further Amended Statement of Issues Facts and Contentions, [104] - [118], Blue AB 68 - 83.

- (iv) Failed to disclose material facts to their principal, or alternatively to their principal and to the Wong Syndicate purchaser; and
- (v) Acted for their principal while they were subject to a conflict of interest.

20 In respect of Properties 4, 5 and 6, the Commissioner alleged that the King parties acted unfairly or dishonestly, and thereby breached clause 5(1) of the Code, in that they knew that the Palumbo company was not a bona fide purchaser of the Property, they knew that there was a buyer willing to pay substantially more than the Palumbo company, and they knew that the Palumbo company would immediately sell the Property for a higher price to that buyer, yet they failed to disclose that information to the original seller or to the Wong Syndicate purchaser, and they facilitated the on-sale scheme.¹⁷

21 At the heart of each of the alleged breaches of the Code, therefore, was the contention that the King parties knew of the intended on-sale of each Property by the Palumbo company to the Wong Syndicate purchaser, for a substantially higher price than the Palumbo company paid the original seller for the Property.

22 The proceedings in the Tribunal proceeded largely on the basis of a statement of agreed facts. However, the Tribunal received evidence from a number of witnesses, including some of the original sellers and from Mr Palumbo and Mr Wong. The appellant provided a witness statement and was cross-examined at the hearing.

23 It was not in dispute, and the Tribunal acknowledged,¹⁸ that in disciplinary proceedings under the REBA Act, to which the civil standard of proof applies, it is necessary that the Tribunal feel an 'actual persuasion' of the occurrence or existence of the relevant facts.¹⁹ Accordingly, in so far as the Commissioner's case was that the appellant knew of the intended on-sale of each of the Properties, the Tribunal needed to feel an actual persuasion that the appellant had that knowledge.

¹⁷ Applicant's Minute of Proposed Further Amended Statement of Issues Facts and Contentions, [119], [120] and [121], Blue AB 83 ff.

¹⁸ Reasons [36].

¹⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361; *Mavaddat v Real Estate & Business Agents Supervisory Board* [2009] WASCA 179 [55].

(b) **The Tribunal's findings with respect to the conduct of the appellant concerning the Properties**

24 In so far as they concerned the appellant, the reasons for the Tribunal's Decision are summarised below.

25 Although no challenge is made to the Tribunal's findings concerning Property 1 and Property 6, it is appropriate to set out the Tribunal's findings in respect of those Properties, as well as Properties, 2, 3, 4 and 5. The Tribunal's findings in respect of Property 1 assist in understanding the on-sale scheme. More directly relevant for present purposes are the Tribunal's findings in respect of Property 6. That is because none of the Tribunal's factual findings, nor its findings of the appellant's knowledge, nor its finding that the appellant breached cl 5(1) of the Code, in relation to Property 6 are challenged. As we explain below, those unchallenged findings are of significance in assessing whether there existed a sufficient foundation for the inferences drawn by the Tribunal in respect of the appellant's knowledge of the on-sale scheme in respect of Properties 2, 3, 4 and 5.

Property 1

26 The Tribunal's findings in respect of Property 1 were as follows.

27 Property 1 was owned by the Royces. In July 2006, they listed Property 1 with a real estate agent for \$1,500,000.²⁰

28 On 24 January 2008, a company called International Land Guru Pty Ltd (ILG) was incorporated.²¹ The Tribunal found that ILG was a company established by Mr Palumbo but controlled by Mr Michael King,²² and that Mr Colin King knew that Mr Palumbo was the sole director of ILG.²³

29 In March 2008, TKAI approached Mr Royce with an offer to locate a buyer for Property 1.²⁴ It was not in dispute that it was Mr Colin King who approached Mr Royce.²⁵ The Tribunal found that at that stage, Mr Colin King believed that Wong Syndicate purchasers had an interest in purchasing Property 1,²⁶ and that Mr Colin King

²⁰ Reasons [68].

²¹ Reasons [75].

²² Reasons [75].

²³ Reasons [75].

²⁴ Reasons [67] - [69].

²⁵ Reasons [69].

²⁶ Reasons [73].

approached Mr Royce because Wong Syndicate purchasers already owned land in the area.²⁷

30 Mr Colin King, and separately, Mr Michael King, showed Property 1 to Mr Wong. The Tribunal found that they were successful in interesting Wong Syndicate purchasers in purchasing Property 1,²⁸ and that Mr Colin King then believed that the Wong Syndicate purchasers would purchase Property 1.²⁹ The Tribunal rejected Mr Colin King's claim that at that stage Mr Wong told him that he was not interested in Property 1. The Tribunal concluded that the more probable inference was that Mr Colin King made that claim to conceal his knowledge of the intended on-sale of Property 1 and as an explanation for why he failed to inform the Royces of the existence of another potential buyer.³⁰

31 On about 17 March 2008, Mr Colin King presented an offer from ILG to the Royces to purchase Property 1. That offer was rejected.³¹

32 On 18 March 2008, the Royces appointed TKAI as the exclusive agent to sell Property 1.³²

33 The Royces made a counter-offer to sell Property 1 to ILG for \$1,250,000, which ILG accepted.³³ The contract was signed on 19 March 2008. Mr Michael King witnessed Mr Palumbo's signature on the contract.³⁴

34 On 20 March 2008, ILG appointed TKAI as its agent to sell Property 1.³⁵

35 On 28 March 2008, Mr Michael King sent a facsimile to an unidentified party, seeking confirmation of the names of the Wong Syndicate purchasers and the provision of funds for a deposit.³⁶

36 On 31 March 2008, ILG and the Wong Syndicate purchasers entered into a contract for the sale of Property 1 for \$1,845,375. Mr Colin King witnessed ILG's execution of the contract.³⁷

²⁷ Reasons [70].

²⁸ Reasons [74].

²⁹ Reasons [74].

³⁰ Reasons [77], [79].

³¹ Reasons [86].

³² Reasons [88].

³³ Reasons [87].

³⁴ Reasons [89].

³⁵ Reasons [92].

³⁶ Reasons [93].

37 The Tribunal found that TKAI, by Colin King and/or the appellant, acted for the Royces as sellers, and for ILG as the seller, of Property 1.³⁸

38 Both sales of Property 1 were settled simultaneously on 21 May 2008.³⁹ The purchase price paid by ILG to the Royces was financed by the proceeds of ILG's sale of Property 1 to the Wong Syndicate purchasers. The Tribunal found that the profit from the latter sale was divided between Mr Michael King, a company controlled by Mr Wong, and a company controlled by Mr Michael King.⁴⁰

39 TKAI received a commission from the Royces on the sale of Property 1 but no commission was paid by ILG to TKAI on the sale of Property 1.⁴¹

40 The Tribunal found that at the time the contract between the Royces and ILG was entered into, Mr Colin King was aware that the Wong Syndicate purchasers were interested in buying Property 1, that he was aware of the association between Mr Michael King and Mr Palumbo, and that he had informed Mr Palumbo or Mr Michael King of the availability of Property 1.⁴²

41 The Tribunal found that by the time the Royces contracted with ILG to purchase Property 1, and throughout their dealings with Mr Royce, TKAI and Mr Colin King were aware of the intended on-sale of Property 1 through ILG and acted to facilitate that sale.⁴³ In reaching that view, the Tribunal also relied on the fact that there was no evidence of any interest by ILG in the purchase of Property 1 prior to its offer to purchase. Mr Palumbo never viewed Property 1. In contrast, Mr Colin King and Mr Michael King had showed Property 1 to Mr Wong.⁴⁴

42 The Tribunal found that Mr Colin King did not inform the Royces that there were two potential purchasers for Property 1 - namely, ILG and the Wong Syndicate purchasers.⁴⁵ The Tribunal inferred that the reason why he did not disclose to the Royces that the Wong Syndicate

³⁷ Reasons [95].

³⁸ Reasons [100].

³⁹ Reasons [97].

⁴⁰ Reasons [97] - [100].

⁴¹ Reasons [101].

⁴² Reasons [90].

⁴³ Reasons [104].

⁴⁴ Reasons [103] - [104].

⁴⁵ Reasons [82].

purchasers were interested in purchasing Property 1 was because he knew of the intended on-sale of Property 1 by ILG to the Wong Syndicate purchasers, and did not want the Royces to become aware of the interest of the Wong Syndicate purchasers.⁴⁶ The Tribunal reasoned that had TKAI and Mr Colin King not been acting to facilitate the on-sale scheme, then once they became aware that another purchaser was interested in purchasing Property 1, they would have disclosed that information to the Royces.

43 The Tribunal found that as Mr Colin King, and TKAI, were aware of the on-sale of Property 1, an inference could be drawn that in each of the subsequent transactions, it was more probable that they were aware of the on-sale scheme.⁴⁷

The Tribunal's findings of breaches of the Code in respect of Property 1

44 The Tribunal found that because TKAI, acting through Mr Colin King, was acting for the Royces in respect of Property 1, TKAI and Mr Colin King had an obligation to act in the best interests of the Royces, which included an obligation to attempt to secure the best sale price for Property 1, and that it was a breach of that duty to fail to inform the Royces of the existence of a potential alternative purchaser willing to pay a higher price.⁴⁸ The Tribunal found that by deliberately withholding that information from the Royces, TKAI and Mr Colin King engaged in conduct which was dishonest and unfair, and a breach of cl 5(1) of the Code.⁴⁹ The Tribunal also found that TKAI and Mr Colin King led the Royces to believe that the offer presented was the best offer which could be obtained for the Property, when they knew that was not the case, and that they thus knowingly misled the seller, in breach of cl 5(2) of the Code.⁵⁰ The same conduct was also found to constitute a failure to disclose material facts to their principal, which constituted a breach of cl 8(2) of the Code.⁵¹ Finally, because TKAI and Mr Colin King knew of the on-sale scheme, in which they potentially would obtain a commission from both the Royces and the Palumbo company, they were acting for their principal while subject to a conflict of interest, contrary to cl 10(1) of the Code.

⁴⁶ Reasons [82].

⁴⁷ Reasons [105].

⁴⁸ Reasons [275] - [276], [279].

⁴⁹ Reasons [283].

⁵⁰ Reasons [290] - [291].

⁵¹ Reasons [292] - [295].

45 However, the Tribunal's other findings in respect of Property 1 are not, with respect, expressed entirely clearly. While the Tribunal found that TKAI, through Mr Colin King, 'was involved in the conduct which constituted a breach of clause 2 of the Code',⁵² it concluded that '[t]here is no evidence that [the appellant] was involved in this transaction'.⁵³ That appears to be intended to summarise the position that the Tribunal did not make any finding that the appellant had any dealings with either the original seller, the Palumbo company, or the Wong Syndicate purchasers in relation to Property 1.

46 However, in expressing its findings concerning other breaches of the Code in relation to Property 1, the Tribunal found that 'the respondents' (that is, all of the King parties, including the appellant) engaged in conduct in relation to Property 1 which constituted a breach of other provisions of the Code, namely cl 5(1), 5(2), 8(2) and 10(1).⁵⁴

47 In view of the Tribunal's factual findings, it appears that when it made findings of breaches of the Code by 'the respondents' in relation to Property 1, the Tribunal in fact intended to refer only to TKAI and to Mr Colin King. That is certainly how counsel understood the Tribunal's reasons.⁵⁵ We have proceeded on that basis. In any event, the grounds of appeal pertain only to the Tribunal's findings concerning the appellant's conduct in relation to Properties 2, 3, 4 and 5.

Property 2

48 The Tribunal's findings in respect of the transactions concerning Property 2 were as follows.

49 On 15 June 2008, the owners of Property 2, the Hammarquists, appointed a real estate agent to sell Property 2 at a listing price of \$1,150,000.⁵⁶

50 The Tribunal appears to have accepted the evidence of Mr Hammarquist, which was that in late June 2008, he was contacted by a person from TKAI. The King parties accepted that it was Mr Colin King who made that contact. Mr Hammarquist's evidence was that the caller told him he was working for an 'overseas interest'

⁵² Reasons [279].

⁵³ Reasons [279].

⁵⁴ Reasons [283]; [290] - [291]; [294] - [295]; [297] and [300] - [301].

⁵⁵ Appellant's submissions [5] - [6], Respondent's submissions [21] - [22].

⁵⁶ Reasons [108].

and represented a potential buyer.⁵⁷ The Tribunal concluded that the 'overseas interest' was a Wong Syndicate purchaser.⁵⁸

51 Mr Hammarquist's evidence, which the Tribunal appears to have accepted, was that he referred the caller from TKAI to the real estate agent he had engaged to sell Property 2.⁵⁹

52 On 2 July 2008, a company called WA Pastoral Company Pty Ltd (WA Pastoral) was incorporated. Mr Palumbo was the sole director and shareholder.⁶⁰

53 Around 4 July 2008, the appellant contacted the listed selling agent for Property 2 and negotiated a conjunctional selling agency agreement, pursuant to which TKAI would receive 50% of the commission for selling Property 2.⁶¹

54 On 7 July 2008, the Hammarquists and WA Pastoral entered into a contract for the sale of Property 2 for \$1,125,000.⁶²

55 The appellant witnessed Mr Palumbo's signature on the contract.⁶³

56 Mr Palumbo did not view Property 2 prior to WA Pastoral's offer to purchase it.⁶⁴

57 On 21 July 2008, Mr Colin King negotiated variations to the contract, including to extend the settlement period. He witnessed Mr Palumbo's signature on the variations to the contract.⁶⁵

58 On 7 August 2008, the Hammarquists and WA Pastoral agreed to a further variation to the contract, which increased the deposit, and released the deposit to the Hammarquists. Mr Michael King witnessed Mr Palumbo's signature on the variations.⁶⁶ The Tribunal concluded that the inference to be drawn from the early release of the deposit was that Mr Michael King was confident that an on-sale would proceed.⁶⁷

59 On 9 August 2008, WA Pastoral engaged TKAI to sell Property 2.

⁵⁷ Reasons [111].

⁵⁸ Reasons [111].

⁵⁹ Reasons [111].

⁶⁰ Reasons [110].

⁶¹ Reasons [113].

⁶² Reasons [114].

⁶³ Reasons [114].

⁶⁴ Reasons [129].

⁶⁵ Reasons [115].

⁶⁶ Reasons [115].

⁶⁷ Reasons [116].

60 Also on 9 August 2008, WA Pastoral entered into a contract to sell Property 2 to a Wong Syndicate purchaser. The sale price was \$2,212,500.⁶⁸ The appellant and Mr Michael King witnessed Mr Palumbo's signature on the contract.⁶⁹

61 On 15 December 2008, both sales of Property 2 settled simultaneously.⁷⁰

62 There was no dispute that TKAI, by Mr Colin King and/or the appellant, acted as agent for the Hammarquists as sellers of Property 2, and for WA Pastoral as the subsequent seller of Property 2.

63 TKAI received a very low commission on the latter sale. Mr Colin King was unable to explain why that was the case.⁷¹

64 It was an agreed fact, and the Tribunal found, that Mr Colin King offered Property 2 to a member of Mr Wong's family.⁷² The Tribunal did not make a finding as to when that occurred, but it appears that that offer was made prior to the first contract for the sale of Property 2.

65 In the proceedings before the Tribunal, Mr Colin King admitted that Wong Syndicate purchasers were interested in Property 2 because it adjoined other land they owned.⁷³ However, he claimed that the Wong Syndicate purchasers were not interested in purchasing Property 2 for the price at which it was sold to WA Pastoral. The Tribunal rejected that claim, having regard to the fact that the ultimate Wong Syndicate purchaser was subsequently willing to purchase Property 2 for a higher amount than that paid by WA Pastoral.⁷⁴

66 The Tribunal found that the more probable inference was that the Wong Syndicate purchaser was interested in Property 2 but Mr Colin King intentionally did not tell the Hammarquists that that was so, so that a further sale could be effected, as had occurred with Property 1.⁷⁵

67 The Tribunal found that the appellant was involved in the sale and on-sale of Property 2.⁷⁶

⁶⁸ Reasons [119].

⁶⁹ Reasons [119].

⁷⁰ Reasons [124].

⁷¹ Reasons [122].

⁷² Reasons [109].

⁷³ Reasons [112].

⁷⁴ Reasons [112].

⁷⁵ Reasons [112].

⁷⁶ Reasons [128].

68 The Tribunal found that neither Mr Colin King, nor the appellant, informed the Hammarquists that the purchaser of Property 2 (WA Pastoral) was a Palumbo company, and not the 'overseas interest' to whom Mr Colin King had referred in his initial conversation with Mr Hammarquist.

69 The Tribunal also found that neither Mr Colin King, nor the appellant, told the Hammarquists of the Wong Syndicate purchaser's interest in Property 2 at any stage. The Tribunal inferred that that was because they knew of the intended on-sale of Property 2 by WA Pastoral to the Wong Syndicate purchaser. The Tribunal reasoned that had they not known that that was the case, it was highly likely that they would have told the Hammarquists of that interest.⁷⁷

70 The Tribunal found that the on-sale of Property 2 to the Wong Syndicate purchaser was not a complete coincidence. It found that at the time of Mr Colin King's first contact with Mr Hammarquist, and subsequently throughout the dealings between Mr Colin King and the appellant, on the one hand, and Mr Hammarquist on the other hand, both Mr Colin King and the appellant were aware of the intended on-sale of Property 2, which was being perpetrated by Mr Michael King, and they acted to facilitate that on-sale.⁷⁸

71 The Tribunal relied on its finding that Mr Colin King and the appellant knew of the on-sale of Property 2, to support the inference that they were aware of what was occurring in the subsequent transactions concerning Properties 3 to 6 also.⁷⁹

Property 3

72 The Tribunal's findings in respect of Property 3 were as follows.

73 On 20 January 2008, the owners of Property 3, Mr Le and others (Mr Le), appointed a real estate agent to sell Property 3 for a listing price of \$1,900,000.⁸⁰

74 On 9 March 2009, the appellant approached that real estate agent to negotiate a conjunctional selling agreement for TKAI. Under that

⁷⁷ Reasons [128].

⁷⁸ Reasons [130].

⁷⁹ Reasons [131].

⁸⁰ Reasons [134].

agreement, TKAI was to receive a very small commission (1%) on any sale of Property 3.⁸¹

75 On 8 April 2009, Mr Le and WA Pastoral entered into a contract for the sale of Property 3 for \$1,340,000. The appellant witnessed Mr Palumbo's signature on the contract.⁸²

76 On 1 June 2009, WA Pastoral appointed TKAI to sell Property 3. The appellant witnessed Mr Palumbo's signature on the selling agency agreement.⁸³

77 On 8 June 2009, WA Pastoral and a Wong Syndicate purchaser entered into a contract for the sale of Property 3 for \$1,866,250.⁸⁴

78 The selling fee TKAI earned on the sale was very low - 0.01% of the sale price.⁸⁵ The Tribunal noted that Mr Colin King's 'explanation was that he knew that [TKAI] had sold it twice and that [he] might have taken [that] into consideration'.⁸⁶

79 TKAI, by Mr Colin King and/or the appellant, acted as agent for both Mr Le as the original seller and WA Pastoral as the seller in the subsequent sale.⁸⁷

80 On 10 August 2009, both sales of Property 3 were settled simultaneously.⁸⁸

81 The Tribunal found that the profit made by WA Pastoral from the second sale was divided between Mr Michael King and a company controlled by Mr Wong.⁸⁹

82 In the proceedings before the Tribunal, the Commissioner did not lead any evidence from Mr Le. However, the Tribunal accepted the evidence of the real estate agent initially engaged by Mr Le, which was that he was unaware of the on-sale of Property 3.⁹⁰

⁸¹ Reasons [135].

⁸² Reasons [136].

⁸³ Reasons [138].

⁸⁴ Reasons [139].

⁸⁵ Reasons [141].

⁸⁶ Reasons [141].

⁸⁷ Reasons [144].

⁸⁸ Reasons [142].

⁸⁹ Reasons [143].

⁹⁰ Reasons [146].

83 The Tribunal found that the on-sale to the Wong Syndicate purchaser was not a complete coincidence. The Tribunal found that throughout their dealings with Mr Le, TKAI, Mr Colin King and the appellant, knew of the intended on-sale.⁹¹ In reaching that conclusion, the Tribunal reasoned that Mr Colin King and the appellant must have known about the intended on-sale, because if they did not, it was highly likely that they would have informed Mr Le of that fact.⁹² In addition, the Tribunal also relied on its finding that Mr Palumbo did not view Property 3 at any time prior to the offer by WA Pastoral to purchase Property 3.⁹³

84 The Tribunal also relied on its previous findings as to the knowledge of the King parties about the earlier on-sales to support its conclusion that the King parties knew about the subsequent on-sales.⁹⁴

The Tribunal's findings of breaches of the Code in respect of Properties 2 and 3

85 The Tribunal found that TKAI, through Colin King and the appellant, had an obligation to act in the best interests of the original sellers, which included an obligation to attempt to secure the best sale price for the Property, and that it was a breach of that duty to fail to inform the sellers of the existence of a potential alternative purchaser willing to pay a higher price. That conduct was found to constitute a breach of cl 2 of the Code.⁹⁵

86 The Tribunal also found that the appellant, and each of the other King parties, deliberately withheld, from the original owners of Properties 2 and 3, the information that there was potentially another buyer who was willing to pay an amount higher than the offers presented for Properties 2 and 3. The Tribunal found that that conduct was dishonest and unfair, and a breach of cl 5(1) of the Code.⁹⁶

87 The Tribunal found that each of the King parties led the original sellers of Properties 2 and 3 to believe that they were presenting the best offers which could be obtained for those Properties, when in each case they knew that there was another buyer who would be able to

⁹¹ Reasons [147] - [149].

⁹² Reasons [147].

⁹³ Reasons [148].

⁹⁴ Reasons [131].

⁹⁵ Reasons [280] - [281].

⁹⁶ Reasons [283].

make a substantially higher offer, and that they thus knowingly misled the sellers, in breach of cl 5(2) of the Code.⁹⁷

88 The Tribunal also found that in relation to Properties 2 and 3, the failure by the appellant, and each of the other King parties, to disclose that there was another buyer willing to pay a higher sum for the land constituted a failure to disclose material facts to the original owner, who was their principal, and that that conduct constituted a breach of cl 8(2) of the Code.⁹⁸

89 Finally, the Tribunal found that in relation to Properties 2 and 3, the appellant, and each of the other King parties, knew, from the outset of their contact with the original seller, that TKAI would become the selling agent for the Palumbo company, and that TKAI would be entitled to a commission from both the original seller and the Palumbo company. The Tribunal found that that knowledge - that an on-sale would occur - thereby raised the prospect of a double commission, which placed the interests of each of the King parties in conflict with the interests of each of their principals, contrary to cl 10(1) of the Code. The Tribunal found that a conflict of interest would arise whenever an agent acted in such a way as to benefit a third party, which would in turn benefit the agent.⁹⁹

Property 4

90 On 3 October 2008, another Palumbo company, Kwinana Ranges Pty Ltd (Kwinana) was incorporated.¹⁰⁰

91 At some point prior to August 2009, the owner of Property 4, Mr Teissier, appointed two real estate agents to sell Property 4.¹⁰¹

92 Mr Colin King admitted that at the time he had Malaysian buyers looking for properties with subdivision potential, and that he knew that Property 4 had subdivision potential.¹⁰²

93 On or around 6 August 2009, Mr Michael King approached one of Mr Teissier's real estate agents, seeking information about properties for sale in the area where Property 4 was located.¹⁰³

⁹⁷ Reasons [288] - [291].

⁹⁸ Reasons [292] - [295].

⁹⁹ Reasons [300] - [301].

¹⁰⁰ Reasons [156].

¹⁰¹ Reasons [151].

¹⁰² Reasons [152].

94 On about 7 August 2009, Mr Colin King called the other of Mr Teissier's real estate agents and told him he had a potential buyer for Property 4.¹⁰⁴ Mr Colin King then negotiated a conjunctional arrangement pursuant to which TKAI would receive a 1% commission for selling Property 4.¹⁰⁵ Negotiations for the sale of Property 4 then proceeded. Mr Teissier's agent dealt initially with Mr Michael King, and subsequently with Mr Michael King and the appellant.¹⁰⁶

95 On 18 August 2009, Mr Teissier and Kwinana entered into a contract for the sale of Property 4 for \$3,250,000. The appellant witnessed Mr Palumbo's signature on the contract.¹⁰⁷

96 On 28 August 2009, Kwinana appointed TKAI to sell Property 4. The appellant witnessed Mr Palumbo's signature on the selling agency agreement.¹⁰⁸

97 On 2 September 2009, Kwinana and a Wong Syndicate purchaser entered into a contract for the sale of Property 4 for \$5,040,000.¹⁰⁹

98 On 15 December 2009, both sales of Property 4 were settled simultaneously.¹¹⁰

99 The Tribunal rejected Mr Colin King's attempt to explain that the significant difference between the first and subsequent sale prices was attributable to subdivision approval for Property 4.¹¹¹

100 The Tribunal accepted Mr Teissier's evidence that he had no knowledge of the Wong Syndicate purchaser or of the on-sale of Property 4.¹¹²

101 The Tribunal relied on its previous findings of knowledge on the part of the King parties in relation to the transactions, to conclude that they were aware of the intended on-sale of Property 4.¹¹³

¹⁰³ Reasons [153].

¹⁰⁴ Reasons [154].

¹⁰⁵ Reasons [155].

¹⁰⁶ Reasons [154].

¹⁰⁷ Reasons [157].

¹⁰⁸ Reasons [159].

¹⁰⁹ Reasons [160].

¹¹⁰ Reasons [163].

¹¹¹ Reasons [165].

¹¹² Reasons [168].

¹¹³ Reasons [169].

Property 5

102 The Tribunal's factual findings in respect of Property 5 were as follows.

103 On 29 August 2008, the owner of Property 5, Mr Lundy, appointed a real estate agent to sell Property 5.¹¹⁴

104 On 4 September 2009, another Palumbo company, Z Farms Pty Ltd (Z Farms) was incorporated.¹¹⁵

105 On about 10 or 11 November 2009, another of Mr Colin King's sons, Mr Darren King, telephoned Mr Lundy's real estate agent to advise that he had a buyer for Property 5.¹¹⁶

106 On 15 January 2010, Mr Lundy and Z Farms entered into a contract for the sale of Property 5 for \$1,150,000.¹¹⁷ The Tribunal accepted that Mr Darren King negotiated the sale, and the exchange of documents concerning the sale, of Property 5.¹¹⁸

107 On 2 February 2010, Z Farms appointed TKAI to sell Property 5. The appellant witnessed Mr Palumbo's signature on the selling agreement.¹¹⁹ The Tribunal found that TKAI, by Mr Colin King and/or the appellant, acted as agent for Z Farms as the seller of Property 5.¹²⁰

108 On 3 February 2010, Z Farms and a Wong Syndicate purchaser entered into a contract for the sale of Property 5 for \$2,380,000.¹²¹

109 On 6 April 2010, both sales of Property 5 settled simultaneously.¹²²

110 The profit that Z Farms made from the sale of Property 5 was distributed to Mr King, and to two other Palumbo companies.¹²³

111 There was no finding by the Tribunal that TKAI was appointed by Mr Lundy to sell Property 5. Mr Colin King claimed that TKAI had no

¹¹⁴ Reasons [171].

¹¹⁵ Reasons [172].

¹¹⁶ Mr Darren King was not a licensed real estate agent or sales representative, but instead was employed by a company operated by Mr Michael King: Reasons [4].

¹¹⁷ Reasons [175].

¹¹⁸ Reasons [173].

¹¹⁹ Reasons [176].

¹²⁰ Reasons [183].

¹²¹ Reasons [178].

¹²² Reasons [181].

¹²³ Reasons [182].

involvement in the sale of Property 5 by Mr Lundy to Z Farms. However, the Tribunal clearly rejected that claim. It found that TKAI's facsimile was used to send documents to Mr Lundy's real estate agent in relation to the sale.¹²⁴ In addition, the Tribunal relied on Mr Colin King's acknowledgment that the appellant knew of Property 5.¹²⁵

112 In the case of Property 5, therefore, TKAI only acted as the selling agent for the on-sale from Z Farms to the Wong Syndicate purchaser.¹²⁶

113 The Tribunal clearly accepted Mr Lundy's evidence that he was not aware of any on-sale of Property 5, and his evidence that had he known another buyer was willing to purchase the property for \$2,380,000, he would never have accepted the offer from Z Farms.¹²⁷

114 The Tribunal found that the King parties were aware of Z Farms' intended on-sale of Property 5. In reaching that conclusion, it relied on its previous findings in relation to their knowledge and involvement in the other transactions.¹²⁸

Property 6

115 The Tribunal's findings of fact in respect of Property 6 were as follows.

116 On 8 September 2009, another Palumbo company called Monash and Melba Investments Pty Ltd (Monash) was incorporated.¹²⁹

117 On 9 August 2010, the owner of Property 6, OE (LT) Pty Ltd (OE) appointed a real estate agent to sell Property 6.¹³⁰ In the course of marketing the property, that agent approached the appellant to see if he had any clients who would be interested in buying Property 6.¹³¹

118 The Tribunal apparently accepted that on 7 September 2010, OE's agent received an email from the appellant, advising that he was acting for a buyer with an interest in the property.¹³² No conjunctive selling

¹²⁴ Reasons [174].

¹²⁵ Reasons [174].

¹²⁶ Reasons [177].

¹²⁷ Reasons [185].

¹²⁸ Reasons [186].

¹²⁹ Reasons [199].

¹³⁰ Reasons [188].

¹³¹ Reasons [189].

¹³² Reasons [191].

arrangement was sought between TKAI and OE's appointed selling agent.¹³³

119 On 8 September 2010, Mr Colin King and the appellant viewed Property 6.¹³⁴ Shortly afterwards, the appellant and a member of Mr Wong's family viewed Property 6. The Tribunal accepted the evidence of OE's real estate agent, which was that the appellant and his brother attended Property 6 and told him that they acted for a buyer who would be on-selling the Property and that they did not seek a conjunctional sale arrangement because they represented the buyer.¹³⁵

120 On 17 September 2010, OE and Monash entered into a contract for the sale of Property 6 for \$2,675,000. The appellant witnessed Mr Palumbo's signature on the contract.¹³⁶

121 On 31 October 2010, Monash appointed TKAI as its agent to sell Property 6. The appellant witnessed Mr Palumbo's signature on the selling agency agreement.¹³⁷ TKAI, by Mr Colin King and/or the appellant, acted as the selling agent for Monash.¹³⁸

122 On 1 November 2010, Monash entered into a contract for the sale of Property 6 to Wong Syndicate purchasers for \$3,700,000. The appellant witnessed Mr Palumbo's signature on the contract.¹³⁹

123 On 28 January 2011, both sales of Property 6 settled simultaneously.¹⁴⁰

124 Mr Michael King received a share in Monash's profit from the sale of Property 6.¹⁴¹

125 The Tribunal clearly accepted evidence given by two of OE's shareholders, to the effect that they were unaware of the on-sale, and that had they known of the second, and higher, offer, OE would not have accepted the offer made by Monash for Property 6.¹⁴²

¹³³ Reasons [195].

¹³⁴ Reasons [192].

¹³⁵ Reasons [193].

¹³⁶ Reasons [200].

¹³⁷ Reasons [201].

¹³⁸ Reasons [207].

¹³⁹ Reasons [203].

¹⁴⁰ Reasons [206].

¹⁴¹ Reasons [206].

¹⁴² Reasons [209] - [210].

126 The Tribunal found that each of the King parties were aware of the intended on-sale of Property 6. In so finding, the Tribunal relied on its other findings that TKAI, Mr Colin King and the appellant had knowledge of, and were involved in, the previous transactions.¹⁴³

127 In addition, the Tribunal also relied on the evidence given by the appellant in cross examination, by way of explanation as to why TKAI did not seek a conjunctual arrangement for OE's sale of Property 6. The appellant's evidence, initially, was that 'I knew that I would get an exclusive listing on that property to resell'.¹⁴⁴ When counsel for the Commissioner sought to clarify that the appellant knew that Monash would immediately engage him to on-sell the Property, the appellant's evidence was 'I didn't know that. I would hope that it would do so'.¹⁴⁵ The Tribunal rejected the appellant's attempt to downplay his knowledge. The Tribunal concluded:¹⁴⁶

[The appellant's] statement that he 'knew' that he would get an exclusive listing on the property to resell was made very firmly. It was obvious from his subsequent answer that he 'hoped' that he would do so, that he was trying to back away from the firmness of his previous answer.

128 The Tribunal also rejected Mr Colin King's claim that he was convinced that Mr Wong was not going to buy Property 6, and that that explained why he did not seek a conjunctual sale of Property 6. The Tribunal concluded that the most probable inference was that Mr Colin King saw the opportunity for an on-sale of the Property.¹⁴⁷

The Tribunal's findings of breaches of the Code in respect of Properties 4, 5 and 6

129 In respect of Properties 4, 5 and 6, the Tribunal found that the appellant (in conjunction with the other King parties and with Mr Michael King) had cultivated the Wong Syndicate purchasers as potential purchasers of land from the original land owners, and not from an intermediate purchaser. The Tribunal found that by facilitating the on-sale from the Palumbo company to the Wong Syndicate purchaser, and concealing from the Wong Syndicate purchaser that they were buying the land at a premium from an intermediary company and not the original seller, in circumstances where the King parties would profit from that intermediate sale, the appellant engaged in conduct

¹⁴³ Reasons [211].

¹⁴⁴ Reasons [197].

¹⁴⁵ Reasons [197].

¹⁴⁶ Reasons [198].

¹⁴⁷ Reasons [194].

which was unfair and dishonest, and thus constituted a breach of cl 5(1) of the Code.¹⁴⁸

130 In addition, the Tribunal found that it was unfair and dishonest for the King parties to act for the original seller (in the case of Property 4), knowing that another potential purchaser, apart from the Palumbo company, existed, and to act so as to make a profit from an intermediate sale to that Palumbo company.¹⁴⁹

(c) **The nature of the appeal against the Decision, and the grounds of appeal**

131 We turn now to the grounds of appeal. There are four grounds. Each one relates to the Tribunal's finding that the appellant breached the Code by his conduct in relation to Properties 2, 3, 4 or 5 respectively. The grounds are in almost identical terms. Each ground contends that the Tribunal erred in fact and law in finding that the appellant knew of the intended on-sale and, in the case of Properties 4 and 5, facilitated the on-sale of the Property in question, and thereby breached the Code.

132 Before turning to consider the grounds of appeal, it is convenient to make some observations about the nature of this appeal.

133 Both parties proceeded on the basis that this appeal was subject to s 105(13) of the SAT Act.¹⁵⁰ That subsection provides that if the decision of the Tribunal which is under appeal is made under a 'relevant Act' or was made in a proceeding for a review of a decision made under a 'relevant Act', and has the effect of depriving a person of the person's capacity to lawfully pursue a vocation, an appeal under s 105 may be brought on any ground, whether it involves a question of law or of fact or both. In contrast, an appeal under s 105(1) of the SAT Act may only be brought on a question of law.

134 There may be room for argument as to whether a decision by the Tribunal that proper cause exists for disciplinary action is subject to s 105(13) of the SAT Act, and if so, at what point.¹⁵¹

135 That issue was not the subject of submissions by counsel and it is unnecessary to express any view on it in this case. That is for the reason

¹⁴⁸ Reasons [284] - [287].

¹⁴⁹ Reasons [284].

¹⁵⁰ Appellant's submissions [14]; Respondent's submissions [6].

¹⁵¹ Cf *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192 [23] (Buss P), [150] - [153] (Murphy and Beech JJA).

that while the grounds of appeal alleged that the Tribunal had erred in fact and law, counsel for the appellant submitted that the errors allegedly made by the Tribunal constituted errors of law. The appellant does not dispute any of the findings of fact upon which the Tribunal relied for drawing the inference of the appellant's knowledge of the intended on-selling of each of the properties.¹⁵² The appellant accepts that if he is unsuccessful in his contention that the evidence was inadequate to found an inference of knowledge, the Tribunal's findings that he acted in breach of the Code should stand.¹⁵³

136 The question at the heart of the appeal is whether the Tribunal's findings of fact are capable of supporting the inference drawn by the Tribunal that the appellant knew of the intended on-sale of each of Properties 2, 3, 4 and 5, at the time when he acted for the original seller, or when he was dealing with the Wong Syndicate purchaser, and that he failed to disclose that information and engaged in conduct to facilitate the on-sale.¹⁵⁴ The question whether a particular inference of fact is open to be drawn from other facts which are found or agreed is a question of law.¹⁵⁵ Counsel for the appellant acknowledged that the appeal was an appeal on a question of law.¹⁵⁶ Counsel for the Commissioner also proceeded on the basis that this was an appeal on a question of law.¹⁵⁷

(d) **Drawing an inference of knowledge from the facts found**

137 The Commissioner's case was that the appellant, together with the other King parties, acted over many months to facilitate the on-sale scheme for the purchase and on-sale of all six Properties. The Commissioner contended that throughout their dealings with the original sellers, and the Wong Syndicate purchasers, the King parties knew of the intended on-sales by the Palumbo companies, within a short period of time, and for higher prices, to Wong Syndicate purchasers, and acted to facilitate the on-sale scheme.

138 The Commissioner's case was that the knowledge of the King parties, including the appellant, could be inferred from the facts relating to the particular transactions concerning each Property, and from the

¹⁵² Appellant's submissions [17].

¹⁵³ ts 6, 11.

¹⁵⁴ Appellant's submissions [8], [17].

¹⁵⁵ *Medical Board of Australia v Woollard* [2017] WASCA 64; (2017) 51 WAR 32 [154].

¹⁵⁶ Appellant's submissions [17].

¹⁵⁷ Respondent's submissions [6].

facts relating to all of the transactions concerning the other Properties, which had taken place earlier in time.¹⁵⁸

139 Counsel for the appellant approached the appeal on the basis that any inference as to the appellant's knowledge of the intended on-sale of each Property could be drawn by reference only to the facts concerning the sale and on-sale of that particular Property, and to the facts concerning earlier events pertaining to other Properties, but without reference to the facts occurring later in time, in respect of other Properties.¹⁵⁹

140 The approach advanced by counsel for the appellant must be rejected. There is no warrant for taking such a restrictive approach to the evidence, as a matter of principle.

141 The question for the Tribunal was whether the objective facts it had found to be proven gave rise to a more probable inference that the appellant acted with knowledge of the intended on-sale of each of the Properties.¹⁶⁰ In considering whether that inference could be drawn, the Tribunal was required to consider all of the circumstances relating to the sale and on-sale of all of the Properties, rather than individual parts of the evidence in isolation, or in a piecemeal fashion.¹⁶¹

142 The Tribunal was not limited to assessing the appellant's knowledge at any point in time by reference to the facts then pertaining, and any earlier facts, as found by the Tribunal, and without reference to later facts. That is because circumstantial evidence may include retrospectant circumstantial evidence. That is, evidence of a subsequent state of mind may be relied upon to support an inference that the state of mind existed at an earlier point in time.¹⁶²

143 Accordingly, in assessing the question of the appellant's knowledge, the Tribunal was entitled to consider the totality of the evidence, and the agreed facts, as to the appellant's involvement in

¹⁵⁸ Applicant's Minute of Proposed Further Amended Statement of Issues Facts and Contentions, Blue AB, 57.

¹⁵⁹ ts 30.

¹⁶⁰ *Chamberlain v The Queen (No 2)* [1984] HCA 7; (1984) 153 CLR 521, 536 (Gibbs CJ and Mason J); *Luxton v Vines* (1952) 85 CLR 352, 358 (Dixon, Fullagar and Kitto JJ).

¹⁶¹ Cf *Chamberlain v The Queen (No 2)* [1984] HCA 7; (1984) 153 CLR 521, 535 - 536 (Gibbs CJ and Mason J); *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 [47] (French CJ, Kiefel, Bell, Keane and Gordon JJ), quoting *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 [46] (Gleeson CJ).

¹⁶² J D Heydon, *Cross on Evidence* (LexisNexis Butterworths Australia, 2017, 11th ed) [1170]; see for example, *E & J Gallo Winery v Lion Nathan Australia Pty Ltd* [2010] HCA 15; (2010) 241 CLR 144 [55] - [59] (French CJ, Gummow, Crennan & Bell JJ) and [76] - [77] (Heydon J); *Lunt v New Resource Holdings Pty Ltd [No 3]* [2011] WASCA 45 [56] (the Court).

respect of Properties 2 to 6, to determine whether that evidence permitted an inference to be drawn that the appellant knew of the on-sale scheme.

(e) **The Tribunal's findings of fact clearly supported the inference that the appellant knew of the on-sale scheme in relation to Properties 2, 3, 4 and 5**

144 Counsel for the appellant submitted that the evidence did not support the inference that, in respect of either Properties 2, 3, 4 or 5, the appellant knew of the intended on-sale by the Palumbo company to a Wong Syndicate purchaser, for a higher price, within a short time after the Palumbo company's purchase of each Property from the original sellers. He submitted that the evidence merely established that the appellant presented documents to Mr Palumbo, asked him to sign them, that Mr Palumbo did so, and that the appellant witnessed the documents.¹⁶³ He submitted that those facts did not support a finding that it was 'more probable than not that [the appellant] was embarking on a process where he knew that there was another buyer in the wings'.¹⁶⁴ He submitted that there was no evidence to establish that Mr Michael King had passed on any of his knowledge to the appellant.¹⁶⁵

145 The appellant has not demonstrated that the Tribunal erred in law in reaching the conclusion that it could be satisfied, to the point of actual persuasion, that its factual findings supported the inference that the appellant knew of the on-sale scheme when he acted for the original seller (in respect of Properties 2 and 3), and when he dealt with the original seller or the Wong Syndicate purchaser (in respect of Properties 4 and 5). For the reasons set out below, the Tribunal's factual findings clearly supported the inference of the appellant's knowledge being drawn.

146 **First**, the unchallenged finding of the Tribunal is that TKAI and Mr Colin King, together with Mr Michael King, acted to facilitate the on-sale scheme in respect of all 6 Properties. The only question is whether the appellant himself knew of the on-sale scheme when he was dealing with Properties 2, 3, 4 and 5.

147 **Secondly**, the persons involved in facilitating the on-sale scheme were members of the appellant's immediate family. That, of itself, does

¹⁶³ ts 6-7.

¹⁶⁴ ts 7.

¹⁶⁵ ts 7.

not support the inference that the appellant had knowledge of the on-sale scheme. However, the family relationship between the appellant and the participants in the on-sale scheme means that the inference of his knowledge of the scheme may be more easily drawn than if the other participants in the scheme were strangers. In so far as Mr Palumbo was concerned, he was not a stranger, or a client without any relationship to the appellant's family. He was a friend of Mr Michael King, and did work for him, and the Tribunal found that the appellant knew that that was so.¹⁶⁶

148 **Thirdly**, the persons involved in facilitating the on-sale scheme worked in close physical proximity to the appellant. The unchallenged findings of the Tribunal were that the appellant was employed by Colin King Real Estate,¹⁶⁷ and he worked in the same office as his father.¹⁶⁸ Furthermore, Mr Michael King's business operated from the same building as TKAI, and for some of the relevant period, Mr Michael King used the same office premises as TKAI.¹⁶⁹ The appellant's physical proximity, in his workplace, to the other participants in the on-sale scheme does not, of itself, support the inference that he knew of the on-sale scheme. However, the appellant's physical proximity to the other participants in the on-sale scheme means that the inference of his knowledge of the scheme may be more easily drawn, than if he did not work in the same office.

149 **Fourthly**, the unchallenged finding of the Tribunal is that the appellant had a central role in carrying the transactions concerning the Properties (apart from Property 1) into effect.¹⁷⁰ The Tribunal concluded that the appellant was an 'active participant' in the transactions pertaining to four of the other Properties,¹⁷¹ and that he 'regularly conducted negotiations and witnessed documents in each transaction subsequent to the first'.¹⁷² The extent of the appellant's involvement in the transactions pertaining to Properties 2, 3, 4 and 5 is apparent from the Tribunal's findings (summarised at [48] - [84] and [90] - [114] above), in which it identified his involvement on various occasions. The appellant was also involved in generating interest in the Properties among the Wong Syndicate purchasers. The unchallenged finding of the Tribunal was that while the King parties were not

¹⁶⁶ Reasons [212].

¹⁶⁷ Reasons [52].

¹⁶⁸ Reasons [53].

¹⁶⁹ Reasons [55] - [56].

¹⁷⁰ Reasons [234].

¹⁷¹ Reasons [228].

¹⁷² Reasons [228].

formally appointed buyers' agents for the Wong Syndicate purchasers, TKAI, acting through Mr Colin King or the appellant, advised Mr Wong (who acted for the Wong Syndicate purchasers) of the existence of suitable properties.¹⁷³

150 As the Tribunal reasoned,¹⁷⁴ it is highly unlikely that Mr Colin King and Mr Michael King would have given the appellant such a central role in carrying the various transactions into effect if it was the case that he was not aware of, and party to, the on-sale scheme.

151 **Fifthly**, the unchallenged findings of the Tribunal in respect of Property 6 demonstrate just how closely involved the appellant was in the purchase of Property 6 from the original seller, and in the on-sale of Property 6 to the Wong Syndicate purchaser. The Tribunal's unchallenged findings in respect of Property 6 also include its rejection of what it regarded as the appellant's attempt to downplay his knowledge of the intended on-sale of Property 6 at the time that he commenced dealing with the agents for the original seller.¹⁷⁵

152 In light of those unchallenged findings, it is of some considerable significance that there was no evidence before the Tribunal which could have explained how it was that in the case of Property 6, the appellant was aware, from the outset, of the intended on-sale of the Property by the Palumbo company, for a substantially higher price than it had paid for that Property, but had no such knowledge of the on-sale scheme at any time in the course of his earlier dealings with Properties 2, 3, 4 or 5. There was also no evidence to suggest that the appellant only became aware of the on-sale scheme immediately prior to his involvement in the transactions concerning Property 6. The appellant's knowledge of, and participation in, the on-sale scheme in relation to Property 6, provides a compelling basis for the inference that he knew of the intended on-sale in the case of the other Properties also.

153 **Sixthly**, the Tribunal's findings as to the conduct of the appellant, and the other members of the King family, in their dealings with Property 6, very closely reflected the manner in which members of the King Family facilitated the on-sale scheme in respect of Properties 2, 3, 4 and 5. In short, in the case of each Property, the position was that soon after the initial contact by a member of the King family with the agent for the original seller, a Palumbo company entered into a contract

¹⁷³ Reasons [66].

¹⁷⁴ Reasons [234].

¹⁷⁵ Reasons [198].

to purchase the Property. Shortly thereafter, that Palumbo company appointed TKAI as its agent to sell the Property. Within a very short space of time, the Palumbo company then entered into a contract for the sale of the Property to a Wong Syndicate purchaser for a significantly higher amount than the purchase price paid by the Palumbo company. Finally, each sale was subject to a simultaneous settlement, with funds obtained by the Palumbo company in the on-sale being used for the purchase of the Property from the original owner. The remarkable symmetry in the conduct by which the on-sale scheme was effected in each case, provides compelling support for the inference that when the appellant engaged in that very same conduct, which had the effect of facilitating the on-sale scheme in relation to each Property, he, like Mr Colin King and Mr Michael King, knew of the intended on-sale of each Property.

154 **Seventhly**, Mr Palumbo's evidence, which the Tribunal clearly accepted, was that he did not have discussions with Mr Colin King or with the appellant about finding a buyer or setting a price in relation to any of the Properties, and that all negotiations concerning price were undertaken by Mr Michael King.¹⁷⁶ It is wholly implausible that a sales representative in the appellant's position would have simply provided documents to Mr Palumbo to sign, and would not have engaged in any discussion about the content of those documents, or the implications of entering into the transactions concerned. The only plausible explanation is that there was no need to enter into discussions because the appellant was aware of the on-sale scheme, and was aware that Mr Palumbo was simply acting at the behest of Mr Michael King.

155 **Eighthly**, the Tribunal rejected the appellant's evidence in which he explained his involvement in the various transactions concerning the Properties. The appellant provided a witness statement to the Tribunal. It was extremely brief, comprising 18 paragraphs in total. In it, the appellant stated that Mr Palumbo never told him that he was acting on Mr Michael King's instructions, that he had never had any discussions with Mr Palumbo or with Mr Michael King about Mr Michael King's involvement in the purchase and sale of the Properties, that his own involvement with Mr Palumbo was merely to introduce him to real estate agents for him to purchase properties, and to provide him with documents and to witness his signature, that he was 'effectively an unpaid secretary'¹⁷⁷ for Mr Palumbo, and that he was never aware that

¹⁷⁶ Reasons [246] - [248].

¹⁷⁷ Green AB 88.

Mr Palumbo had another purchaser ready to purchase each property at a higher price after the Palumbo company purchased the property. Counsel for the appellant emphasised that the appellant was not cross examined on this aspect of the evidence in his witness statement,¹⁷⁸ and that the failure to cross examine meant that it was more difficult for the Tribunal to draw an inference, adverse to the appellant, that he had knowledge of the on-sale scheme.¹⁷⁹

156 While that may be so, it does not advance the appellant's case here. The Tribunal found that the appellant was deliberately untruthful, and that his evidence, in its entirety, was not credible.¹⁸⁰ The Tribunal rejected the appellant's evidence in its totality. The appellant does not challenge that finding as to credibility. The rejection of the appellant's evidence, however, meant that there was no credible evidence to counter the other evidence, to which we have referred, which supported the inference that the appellant knew of the on-sale scheme in relation to Properties 2, 3, 4 and 5.

157 **Ninthly**, as the Tribunal concluded,¹⁸¹ the appellant's untruthful attempt to downplay his involvement in the transactions concerning Properties 2 to 6, itself supports the inference that he knew of the on-sale scheme, and that he lied in an attempt to avoid the Tribunal discovering his actual involvement.

158 **Tenthly**, leaving the appellant's evidence to one side, there is no reasonable explanation for the appellant's conduct, when viewed in all of the circumstances, other than that he knew of the intended on-sale of each Property.

159 Starting first with the Tribunal's unchallenged findings as to the appellant's involvement in respect of Property 2, it is quite implausible that if the appellant in fact had no knowledge of the on-sale scheme, he would negotiate a conjunctional selling agreement pursuant to which TKAI would act for the Hammarquists; then three days later, would witness Mr Palumbo's signature on the contract for the purchase of Property 2 by the Palumbo company, in circumstances where Mr Palumbo had not viewed the Property; then less than five weeks later, would witness Mr Palumbo's signature on a contract for the sale by the Palumbo company of that Property to another purchaser for a

¹⁷⁸ ts 11-12.

¹⁷⁹ ts 30.

¹⁸⁰ Reasons [229].

¹⁸¹ Reasons [230].

substantially higher amount; and yet would not, at any time prior to settlement, consider that the existence of that subsequent purchaser, for a much higher price, was a fact which should be disclosed to his principals, the Hammarquists, or raised with Mr Colin King or Mr Palumbo. The appellant's failure to disclose that information to the Hammarquists is all the more significant given that such information may have been especially material to the Hammarquists in circumstances where the Palumbo company had requested them to agree to variations of the contract for the sale of Property 2.

160 It is even more implausible that if the appellant had no knowledge of the on-sale scheme, he would be a participant in that chain of events in respect of Property 2, and then, within six months of the settlement of both contracts for the sale of Property 2, would be a participant in a strikingly similar chain of transactions in respect of Property 3, and yet would still not consider the existence of another purchaser, for Property 3, for a significantly higher price, to warrant disclosure to his principal, Mr Le, or to warrant discussion with Mr Colin King or with Mr Palumbo.

161 Further, it is quite implausible that if the appellant had no knowledge of the on-sale scheme, he would be privy to that chain of transactions in respect of Properties 2 and 3, and then, within less than six months of the settlement of both contracts for the sale of Property 3, would be a participant in a strikingly similar chain of transactions in respect of both Properties 4 and 5, and yet would not consider the Palumbo companies' purchase of those Properties, or the existence of subsequent purchasers for those Properties, for a significantly higher price, to be sufficiently unusual as to warrant discussion with the Wong Syndicate purchasers in either case, or with Mr Colin King or Mr Palumbo.

162 Furthermore, when the appellant's involvement in all of the transactions concerning Properties 2 to 6 is taken into account, it is wholly implausible that he would not have appreciated that the transactions to which he was party were out of the ordinary, that they formed a pattern of events, and that the repetition of that pattern of events was so unusual as to warrant comment or discussion with his principal (in the case of Properties 2 and 3) or with the other parties to the transactions (in the case of Properties 4 and 5). By way of example, in relation to Properties 2, 3, 4 and 6, the appellant witnessed Mr Palumbo's signature on the contract to purchase the Property from the original seller, in circumstances where Mr Palumbo had not viewed

the Property. In the case of each of Properties 3, 4, 5 and 6, the Tribunal found that very soon after the Palumbo company contracted to purchase each of those Properties, the appellant witnessed Mr Palumbo's signature on the selling agency agreement by which TKAI was appointed the selling agent for the Palumbo company for an intended on-sale. Further, within days of that selling agency agreement being entered into in each case, the Palumbo company contracted with a Wong Syndicate purchaser to purchase the Property. In the case of Property 6, the appellant witnessed Mr Palumbo's signature on the contract. The only reasonable explanation for the appellant's failure to raise the repetition of this unusual pattern of events with either the original sellers, or with Mr Palumbo, or with the Wong Syndicate purchasers, in respect of any of the Properties, is that the appellant knew of the on-sale scheme.

163 Counsel for the appellant submitted that in the case of each Property, while the appellant's previous dealings may have been sufficient to give rise to a suspicion on his part about what was occurring, that was not sufficient to amount to knowledge that what had occurred before was going to happen again.¹⁸² With respect, that submission has no merit. The repetition of a strikingly similar chain of very unusual events, on repeated occasions, over many months, which did not warrant any comment or discussion by the appellant with any of the parties involved, is a compelling basis for the inference that the appellant knew of the on-sale scheme in the case of each of Properties 2, 3, 4 and 5.

164 The Tribunal's factual findings clearly supported the inference that the appellant knew of the on-sale scheme in relation to each of Properties 2, 3, 4 and 5. No error was made by the Tribunal in that conclusion.

Why leave should be refused

165 We return now to the question of the grant of leave to appeal.

166 Leave to appeal should be granted if, in all the circumstances, it is in the interests of justice to do so.¹⁸³ Whether it is in the interests of justice to grant leave to appeal will be informed by a variety of

¹⁸² ts 29.

¹⁸³ *Lourey v Legal Profession Complaints Committee* [2012] WASCA 112 [28] (Murphy JA); *Chin v Legal Practice Board Western Australia* [2009] WASCA 117 [12] (Pullin and Newnes JJA); *Paradis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361, 372 [16] (Buss JA, Wheeler and Pullin JJA agreeing).

considerations, and there are no rigid or exhaustive guidelines governing the grant of leave.¹⁸⁴ In an appeal on a question of law, considerations which may be relevant to that question include the importance of the question of law, whether there is sufficient doubt about the question of law to justify the grant of leave, and whether substantial injustice would result if the error of law were not corrected.¹⁸⁵ Generally, an applicant for leave must demonstrate that there is sufficient doubt in respect of an alleged error by the Tribunal, and that if that error is not corrected, a substantial injustice would occur.¹⁸⁶

167 As the appellant has not demonstrated that the Decision was attended by doubt, leave to appeal should be refused, and the appeal should therefore be dismissed.

¹⁸⁴ *Armstrong v Commissioner for Consumer Protection* [2014] WASCA 71 [27] (Martin CJ).

¹⁸⁵ *Paradis v Settlement Agents Supervisory Board* [2007] WASCA 97; (2007) 33 WAR 361, 372 [17] - [18] (Buss JA, Wheeler and Pullin JJA agreeing).

¹⁸⁶ *Centex Australasia Pty Ltd v Commissioner for Consumer Protection* [2017] WASCA 79 [106].

JUDGMENT OF THE COURT

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

LF

ASSOCIATE TO THE HONOURABLE JUSTICE PRITCHARD

31 OCTOBER 2018