

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT

Not Restricted

List B
No. SCI 4660 of 2010

DR CLAIRE NOONE, DIRECTOR OF
CONSUMER AFFAIRS VICTORIA

Plaintiff

v

PETER MERICKA & ORS

Defendants

JUDGE: SIFRIS J
WHERE HELD: Melbourne
DATE OF HEARING: 6 and 7 December 2011
DATE OF JUDGMENT: 27 March 2012
CASE MAY BE CITED AS: Noone v Mericka & Ors
MEDIUM NEUTRAL CITATION: [2012] VSC 101

ESTATE AGENTS ACT 1980 (VIC) – Whether defendants carrying on business as estate agents – Whether defendants required to hold estate agents licence under s 12.

ESTATE AGENTS ACT 1980 (VIC) - Whether first and second defendants fall within the exemption granted to Australian legal practitioners under s 5(2)(e).

ESTATE AGENTS ACT 1980 (VIC) – Exemption under s 5(2)(e) – Whether carrying on business as an estate agent falls within the ordinary function of an Australian legal practitioner.

LEGAL PROFESSION ACT 2004 (VIC) – Whether Australian legal practitioner referred to in s 5(2)(e) of the *Estate Agents Act* includes an incorporated legal practice.

FAIR TRADING ACT 1999 (VIC) – Whether statements made by the defendants to the effect that registration as an estate agent is not required were misleading or deceptive: s 9.

<u>APPEARANCES:</u>	<u>Senior counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr P D Crutchfield SC with Mr R Knowles	Consumer Affairs Victoria
For the Defendants	Mr P N Wikramanayake SC with Mr W Rimmer	Stynes Dixon Lawyers

HIS HONOUR:

A. Introduction

- 1 The plaintiff, Dr Claire Noone is the Director of Consumer Affairs Victoria (the 'Director').
- 2 The first defendant, Peter Mericka is the sole director and secretary of the second defendant, Lawyers Real Estate Pty Ltd ('Lawyers Real Estate') and the third defendant, Slod Pty Ltd ('SLOD'). Mr Mericka is also the sole shareholder of Lawyers Real Estate which is, in turn, the sole shareholder of SLOD.
- 3 The Director alleges that the defendants have contravened the *Estate Agents Act 1980* (Vic) (the '*Estate Agents Act*') by, among other things, carrying on the business of an estate agent without the necessary licence. The Director also contends that the defendants have engaged in misleading and deceptive conduct in contravention of the *Fair Trading Act 1999* (Vic) ('FTA'). The defendants contend that they are not carrying on the business of an estate agent and, in any event, that Mr Mericka and Lawyers Real Estate do not require a licence as they are covered by an exemption.

B. Background

Mr Mericka

- 4 Mr Mericka is, and at all relevant times has been, an Australian Legal Practitioner within the meaning of the *Legal Profession Act 2004* (Vic) (the '*Legal Profession Act*'). Prior to 30 November 2010, he did not hold an estate agent's licence under the *Estate Agents Act* ('estate agent's licence').
- 5 Mr Mericka has exercised direct and personal control over Lawyers Real Estate and SLOD at all relevant times.

Lawyers Real Estate

- 6 Lawyers Real Estate was incorporated on 1 November 2004. It has never held an

estate agent's licence.¹ It is however, an incorporated legal practice and it produced to the Court a notice given under s 2.7.7 of the *Legal Profession Act* advising the Legal Services Board of its intention to commence providing legal services.

7 The offices of Lawyers Real Estate are, and at all relevant times have been, situated at Suite 6, Hewmart Arcade, 3-5 Hewish Road, Croydon (the 'Croydon premises'). The Croydon premises are located in a shopping arcade. According to the Director, they outwardly resemble the offices of a real estate agent in that:

- (a) they have large windows which display flyers showing photographs of properties for sale, a description of the property and a sale price range;
- (b) the flyers have also been displayed on sandwich boards placed immediately outside the Croydon premises;
- (c) red 'SOLD' stickers have been attached to some flyers displayed in the windows and on the sandwich boards; and
- (d) signage on the Croydon premises has prominently displayed the words 'Lawyers Real Estate...the new direction in real estate' and 'Fixed Fee Real Estate Sales \$4,400.'

8 Lawyers Real Estate has promoted its services on the internet website www.lawyersrealestate.com.au (the 'Lawyers Real Estate website'), which is registered to Mr Mericka and can be accessed throughout Victoria. The parties do not dispute that the following statements, or words to similar effect, have been published on the Lawyers Real Estate website:

- (a) 'No commission real estate sales.'
- (b) 'Why is a law firm selling real estate? - The simple answer is that consumers want a one-stop-shop for real estate matters, and lawyers are the only

¹ On or about 17 December 2010, Lawyers Real Estate applied for an estate agent's licence. The application was refused.

professionals who can provide that service. Of all the service-providers in the real estate sales industry, only lawyers possess the skills and qualifications to perform every role from the very start to the very end of a real estate sale.'

- (c) 'Negotiation and sale closure - All real estate negotiations are dealt with personally by a qualified legal practitioner.'
- (d) 'Negotiating the sale - The lawyer is the only person qualified to provide a vendor with both the legal advice and agent representation needed to legally and effectively negotiate the sale on the vendor's behalf. We handle all negotiations, from the first offer to the closure of the sale.'
- (e) 'Our fixed fee - We charge a fixed fee of \$4,400 (incl. GST) for the services we provide for a standard real estate sale over a period of three months. Our fee also covers the cost of signage, document preparation and internet advertising for the property.'
- (f) Half of the fixed fee of Lawyers Real Estate is payable when a property is listed for sale and the remaining half at settlement. Customers are not invoiced for the remaining half unless the property is sold.
- (g) 'Costs - The costs of our [Lawyers Real Estate] negotiating the sale of your property are included in our fixed-fee.'
- (h) 'Of course, if you [a potential purchaser] are interested in making an offer you will be referred to us. We handle all negotiations on behalf of the vendor.'
- (i) 'How bids are made - Receiving bids through Lawyers Real Estate is easy and safe. In most cases a bid is made online at www.SLOD.com.au. However, bids may also be submitted by email, fax or delivered to our office in person. The vendor is always notified immediately a bid is received, and instructions sought as to how negotiations are to proceed.'
- (j) Services included in the sale package offered by Lawyers Real Estate consist

of, among other things, (the 'Lawyers Real Estate Services'):

- (i) 'High quality digital photographs provided by an independent, professional real estate photographer';
- (ii) 'Photography and selection of photographs for use on the internet and display card. Digital images available to the client upon request';
- (iii) 'Professional installation and removal of the "For Sale" sign at the property by fully insured contractors';
- (iv) 'Use of our online purchaser bidding facility www.SLOD.com.au';
- (v) 'Hand-outs for prospective purchasers, to inform them about our sale procedure';
- (vi) 'Listing of property on www.realestate.com.au and www.domain.com.au';
- (vii) 'Upgrading of internet listing to high-profile "Feature Listing"';
- (viii) 'Preparation and uploading of internet listing';
- (ix) 'Preparation of digital disclosure documents for downloading from internet';
- (x) 'Uploading and maintenance of PDF digital disclosure documents on the www.SLOD.com.au website for internet access by prospective purchasers';
- (xi) 'Negotiation of sale by an experienced and legally qualified lawyer; including price and contract conditions, and consideration of any special conditions that may be required';
- (xii) 'Finalisation and completion of the sale transaction on settlement day, and collection of the balance of sale funds';

(k) 'Does a lawyer need an Estate Agent's Licence to sell real estate? No. A lawyer's Practising Certificate issued pursuant to the *Legal Profession Act* allows a lawyer to operate a trust account, and to perform all aspects of the real estate sale transaction, including the preparation of sale documents, negotiation and closure of the sale, and all legal and conveyancing work associated with the completion of the matter.'

9 These statements from the Lawyers Real Estate website provide an insight into the services and activities performed by the company. Lawyers Real Estate has acted for clients who are vendors of real estate. It has entered into contracts to provide the Lawyers Real Estate services to each of these clients and has then provided the services. No complaint is made in the present proceeding about the quality of the services. As the statement on the Lawyers Real Estate website suggests, Lawyers Real Estate charged these clients a fee of \$2,200 upon retainer and a further fee of \$2,200 upon settlement of the sale of the property.²

10 As part of the Lawyers Real Estate services, clients were sent various correspondence and provided with various documents by Lawyers Real Estate. Standard correspondence sent to clients soon after they retained Lawyers Real Estate stated:

Refer all questions regarding price, contracts and offers to us.

11 Similarly, a standard document prepared by Lawyers Real Estate for clients to hand to prospective purchasers stated that:

Formal offers and sale negotiations will be handled on behalf of the vendor by a representative of Lawyers Real Estate.

12 A "Bid to Buy" form attached to this document stated that:

... we [Lawyers Real Estate] may contact you or your lawyer to negotiate the sale on behalf of the vendor.

13 At all relevant times, Lawyers Real Estate has been listed as a real estate agent on the internet websites www.domain.com.au and www.realestate.com.au. While the

² The fees have now increased.

defendants accept that this has occurred, they say it was done by the web portals and that Mr Mericka actively opposed the description of Lawyers Real Estate as a real estate agent.

SLOD

- 14 SLOD was incorporated on 19 June 2003. The company changed its name to "Slod Pty Ltd" on 4 January 2008. Mr Mericka has been the sole director and secretary of SLOD since 22 November 2007. Lawyers Real Estate has been the sole shareholder since 2007.
- 15 SLOD was not, and never has been, an Australian legal practitioner or Australian lawyer within the meaning of the *Legal Profession Act*. Further, SLOD has never held an estate agent's licence.
- 16 According to Mr Mericka, SLOD was registered as a company purely to enable exclusive use of the name on a national basis. He says SLOD is not an active entity. According to the Lawyers Real Estate website, SLOD is an anagram of 'sold' and stands for 'Sale by Lawyer Online Direct'.
- 17 One or more of the defendants has owned and operated the website www.slod.com.au (the 'SLOD website'), which is generally accessible to internet users in Victoria.
- 18 The SLOD website describes itself as 'a real estate sale negotiation facility' developed 'for the purpose of negotiating the sale and purchase of real estate.' The website has, at all relevant times, contained listings of properties for sale and the contact details for Lawyers Real Estate. The SLOD website has also contained details of properties which have been sold through Lawyers Real Estate.
- 19 Mr Mericka gave evidence that the SLOD website is 'a set of pigeon holes in cyberspace'. Lawyers Real Estate 'slot[s] the section 32 and the vendor's contact details into it. Interested purchasers visit, identify the property that they are interested in, take out the section 32 and the vendor's contact details.'

20 The following statements, which the parties agree were published on the SLOD website,³ provide further insight into the role and function of the SLOD website:

- (a) 'SLOD! and Lawyers Real Estate Pty Ltd - SLOD! is a real estate sale negotiation facility developed for Lawyers Real Estate Pty Ltd, and is used by all Lawyers Real Estate franchisees for the sale of clients' properties. The name SLOD! is not just an anagram of the word SOLD!, it also stands for "Sale by Lawyer Online Direct"';
- (b) 'SLOD! is an online real estate bidding facility - Sale by Lawyer Online Direct (SLOD!) is the means by which Lawyers Real Estate markets and negotiates the sale of clients' properties';
- (c) 'Is SLOD! an online auction? Yes, SLOD! can be regarded as a real estate auction because it allows purchasers to place competing bids, so that the purchaser who submits the highest bid takes priority over other bidders. SLOD! is also similar to other real estate auction processes insofar as that the property is not finally sold unless and until both the purchaser and the vendor have signed a formal Contract of Sale of Real Estate';
- (d) 'Who can us (sic) SLOD! to sell their property? SLOD! has been established for the exclusive use of Lawyers Real Estate. If you would like to sell your property using the superior methods offered by SLOD!, contact a Lawyers Real Estate lawyer';
- (e) 'SLOD! - Sale By Lawyer Online Direct SLOD! is a communication tool developed by Lawyers Real Estate to bring buyers and sellers into contact with each other for the purpose of negotiating the sale and purchase of real estate'; and
- (f) 'As a law firm, Lawyers Real Estate does not rely on the *Estate Agents Act 1980* for authority to represent its clients in real estate sales, and is not required to

³ Or words to similar effect.

hold an estate agent's licence under that Act.'

- 21 It is unclear precisely which defendant was responsible for the SLOD website. Although the website has been registered to Lawyers Real Estate, the bottom of each page states:

SLOD Pty Ltd and Lawyers Real Estate Pty Ltd, their directors, staff and private contractors, strive to ensure that all information appearing on this website is current and accurate. However, neither SLOD Pty Ltd nor Lawyers Real Estate Pty Ltd can guarantee the accuracy of the information contained within this site.

- 22 The SLOD website also contains the following:

The copyright in this website is owned or licensed by SLOD Pty Ltd and Lawyers Real Estate Pty Ltd, unless otherwise stated.

C. Issues in dispute

- 23 The critical issues in dispute between the parties are essentially legal questions and are as follows:
- (a) whether one or more of the defendants exercised or carried on the business of an estate agent within the meaning of the *Estate Agents Act*, or otherwise engaged in conduct covered by s 12 of the *Estate Agents Act*;
 - (b) if yes to (a), whether the activities conducted by the relevant defendant were 'for the purpose only of carrying out the ordinary functions of an Australian legal practitioner' and therefore covered by the exemption in s 5(2)(e) of the *Estate Agents Act* from the requirement to hold an estate agent's licence;⁴ and
 - (c) whether one or more of the defendants engaged in misleading or deceptive conduct, or conduct likely to mislead or deceive, by reason of statements made on the Lawyers Real Estate website or SLOD website to the effect that a lawyer does not need an estate agent's licence to sell real estate.

⁴ See subsection 5 (2) of the *Estate Agents Act*.

D. Were the defendants required to hold an estate agent's licence?

Regulation of estate agents

24 Section 12 (1) of the *Estate Agents Act* provides that:

Subject to this Act an individual shall not either by himself or as a member of a partnership—

- (a) exercise or carry on or advertise notify or state that he exercises or carries on or is willing to exercise or carry on the business of an estate agent; or
- (b) act as an estate agent; or
- (c) in any way hold himself out to the public as ready to undertake for payment or other remuneration (whether monetary or otherwise) any of the functions of an estate agent—

unless he is a licensed estate agent.

Penalty: 500 penalty units or imprisonment for 12 months.

25 Subsection 12 (2) of the *Estate Agents Act* applies to corporations and is otherwise identical to s 12 (1), except that the maximum penalty is 1,000 penalty units for corporations.

26 The definition of estate agent is contained in subsection 4 (1) of the *Estate Agents Act*. It provides:

estate agent or *agent* means any person (whether or not he carries on any other business) who exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on or in any way holds himself out to the public as ready to undertake the business of—

- (a) selling buying exchanging letting or taking on lease of or otherwise dealing with or disposing of;
- (b) negotiating for the sale purchase exchange letting or taking on lease of or any other dealing with or disposition of;
- (c) collecting rents for—

any real estate or business on behalf of any other person ...⁵

⁵ Pursuant to subsection 4 (1) of the Act, the term "real estate" relevantly includes any estate or interest in land or buildings. The term "business" is also defined in that provision to include "any ... service

- 27 The Director submits that each of the defendants is and, at all relevant times, has been, an estate agent for the purposes of the *Estate Agents Act*.
- 28 The defendants contend that the services they provided to clients can be divided into three categories:
- (a) those which are not functions restricted to licensed real estate agents by the *Estate Agents Act* and may thus be provided lawfully by anyone without an estate agent's licence;
 - (b) those which are legal services and may only be provided by an Australian legal practitioner; and
 - (c) those which are functions that might otherwise be restricted to licensed real estate agents under the *Estate Agent's Act*, but which are ordinary functions of a legal practitioner and may therefore be provided lawfully by a legal practitioner without an estate agent's licence.
- 29 The defendants submit that performing the services which fall within category (a), including arranging for the production of marketing materials, arranging for clients' details to be uploaded on popular real estate websites and providing the SLOD website, does not render them estate agents. They submit that these activities cannot be characterised as selling or negotiating the sale of properties.
- 30 The defendants submit further that the second category of services include:
- (a) advice on the content of marketing material to ensure it complies with laws, particularly those regulating misleading and deceptive conduct;
 - (b) advice on legal issues arising from any special conditions proposed by purchasers in the course of negotiations;
 - (c) preparation of vendors' statements and contract documentation; and

business”.

(d) conveyancing services to complete a sale.

31 As these services can only be performed by an Australian legal practitioner, the defendants submit that they do not support the Director's argument that they were carrying on, or engaging in the business of, an estate agent.

32 The defendants accept that the third category of services might be characterised as services ordinarily restricted to real estate agents, however they contend that the exemption in s 5(2)(e) applies.

Lawyers Real Estate

33 The evidence before the Court, for the most part common ground, overwhelmingly supports the conclusion that Lawyers Real Estate was involved in selling and negotiating the sale of real estate on behalf of clients. Not surprisingly, this was essentially admitted at least in respect of some services.

34 The evidence relied on by the Director – largely documentary – was very helpfully summarised in a table. The documents referred to in the table (including the Lawyers Real Estate website), which are all in evidence, explain and emphasise the sale system and 'superior negotiating' method used by Lawyers Real Estate. The method or approach – specifically directed to selling real estate on behalf of others – is described as 'innovative' and as a 'one-stop-shop' that includes the role of real estate agent. The approach is not simply to give a vendor a do-it-yourself negotiating and sales kit and therefore remain passive. Rather, Lawyers Real Estate retains an active role in the sale and negotiation process.

35 The agreed facts referred to in paragraph 8 provide a sufficient evidential foundation for the conclusion that Lawyers Real Estate was selling and negotiating the sale of real estate on behalf of its clients. The following statements on the Lawyers Real Estate website are in my opinion conclusive:

- (a) "This innovative approach allows us to negotiate the best possible price, through effective marketing and a totally transparent sale process."

- (b) "Where more than one bid is received we will commence negotiations with all interested parties, to ensure that the property is sold on the best terms."
- (c) "negotiation of sale by an experienced and legally qualified lawyer; including price and contract conditions."
- (d) "Full representation is the term we use to describe a service where the lawyer actually represents the client through all stages of the sale process, providing legal services and representation from the first listing of the property for sale, through the sale negotiation stages, and all the way through the conveyancing process until final settlement."
- (e) "We handle all negotiations, from the first offer to the closure of the sale."
- (f) "We handle all offers and sale negotiations on behalf of our vendor clients. Of course, if the vendor client wishes to have personal involvement in the sale negotiations they are free to do so."
- (g) "If, during an inspection, a visitor indicates that they would like to make an offer on the property, they should be invited to contact the Lawyers Real Estate contact lawyer."

36 In support of the contention that Lawyers Real Estate (and indeed, the other defendants) does not provide the services of an estate agent, the defendants relied on the fact that any client who wished to use the SLOD concept was required to engage Lawyers Real Estate and sign a costs agreement. The costs agreement stated that Lawyers Real Estate would provide legal and other services as a legal practice and not in any other capacity. The defendants argue that the fee structure also differed from the commission model used by estate agents. These features of the arrangement are said to preclude the conclusion that Lawyers Real Estate was carrying on the business of an estate agent.

37 Senior counsel for the defendants further submitted that the Court should take

judicial notice of the functions of an estate agent. He referred to eight such functions, including persuading a purchaser to buy a vendor's property, persuading the vendor client to accept the purchaser's bid and advising on property values. He submitted that since Lawyers Real Estate (and the other defendants) do not and did not perform these eight functions, they could not be carrying on the business of an estate agent.

38 In my opinion, the activities undertaken by Lawyers Real Estate fall within the definition contained in section 4 of the *Estate Agents Act*. They do not cease to fall within the definition because of the characteristics and identity of the person performing the services, namely that the person is an Australian legal practitioner or an incorporated legal practice, although in such case the exemption may apply. Further, they do not lose their character because the activities differ from the activities or approach traditionally adopted by estate agents (if this be the case and I am not persuaded that this is so despite, it must be acknowledged, some differences). The fact that no inspections were done and no valuations obtained is not to the point. Both matters are irrelevant to the present enquiry. The only relevant enquiry is whether Lawyers Real Estate falls within the definition of estate agent in section 4(1) of the *Estate Agents Act*. For the reasons given it does so in spades.

39 Finally, the use by senior counsel for the defendants of the words "conduit", "facilitator" and "providing assistance" in describing the nature and extent of the activities and conduct undertaken by Lawyers Real Estate is potentially misleading and unhelpful. The actual conduct as referred to above, was systematic, ongoing and repetitive. Lawyers Real Estate was actively and directly involved in selling and negotiating the sale of real estate on behalf of clients. As such it was carrying on business as an estate agent within the definition referred to.

Mr Mericka

40 The Director submits that Mr Mericka also exercises or carries on the business of

selling or negotiating the sale of real estate on behalf of other people.

- 41 Mr Mericka acts as a representative of clients of Lawyers Real Estate who are selling their properties. He regularly represents them in their dealings with prospective purchasers, including sending email correspondence and negotiating price and other matters on their behalf. Even if, as Mr Mericka claims, he only engages in these activities in accordance with the instructions provided by his clients, this does not change the proper characterisation of the activities. I find that he exercises or carries on the business of selling or negotiating for the sale of real estate on behalf of other people.

SLOD

- 42 The position in relation to SLOD is less clear. SLOD is, according to Mr Mericka, an inactive company which owns no assets. Despite this, the statement on the SLOD website extracted above suggests that SLOD has a role in determining what information appears on the website. The website also suggest that SLOD otherwise owns intellectual property rights connected with the SLOD website.
- 43 Given that the SLOD website provides a mechanism for selling and negotiating the sale of property, SLOD is inextricably and visibly involved in the sales process. In my opinion, SLOD is therefore either carrying on the business of an estate agent (or at the very least some of the functions of an estate agent) or is assisting Mr Mericka and Lawyers Real Estate to do so.

The defendants' representation about their activities

- 44 The primary focus of the trial was the Director's allegation that the defendants were carrying on the business of an estate agent. However, the Director also alleged that the defendants had each:
- (a) advertised, notified or stated that they exercise or carry on, or are willing to exercise or carry on, the business of selling or negotiating the sale of real estate on behalf of other people; or

- (b) held themselves out to the public as ready to undertake the business of selling or negotiating the sale of real estate on behalf of other people.

45 The Director contends that as s 12 refers to 'any of the functions of an estate agent,' it applies to a person who holds themselves out to the public as ready to undertake for payment or other remuneration 'one or some' of the functions of an estate agent. The Director contends that the defendants did this.

46 I consider that the Director's allegation is established by reference to the Lawyers Real Estate website and the SLOD website. The statements on the websites represent to the public that Lawyers Real Estate is available to sell and negotiate the sale of property using the SLOD method. Some examples are set out above in paragraph 35. Further, the websites hold out Mr Mericka as ready to undertake the business of selling or negotiating the sale of real estate on behalf of others. In addition to the websites, standard form correspondence sent by Lawyers Real Estate to prospective clients, such as that referred to in paragraph 10 above, also conveys the impression that the defendants are available to negotiate the sale of real estate for clients.

Conclusion

47 In my opinion, in the circumstances, each of the defendants is and at all relevant times has been carrying on or exercising the business of an estate agent. The defendants have also advertised or held themselves out as carrying on and being available to carry on the business of selling and negotiating the sale of real estate for clients.

48 As such, each defendant has been obliged to hold an estate agents licence. As all parties accept, this has not occurred. Mr Mericka has only held an estate agents licence since 30 November 2010 and neither of the other defendants has ever held such a licence. Accordingly, unless an exemption applies, the defendants will have breached s 12 of the *Estate Agents Act*.

E. The exemption in s 5(2)(e) of the Estate Agents Act

49 Section 5(2)(e) of the *Estate Agents Act* relevantly states that:

This Act shall not be construed as requiring—

...

- (e) any Australian legal practitioner (within the meaning of the **Legal Profession Act 2004**) for the purpose only of carrying out the ordinary functions of an Australian legal practitioner;

...

to hold a licence under or (except in respect of any provision of this Act which is specifically expressed to apply to any class of persons referred to in this subsection) to observe the requirements of this Act.

50 The Director submits that this provision cannot apply to Lawyers Real Estate because, among other things, the company is not an Australian legal practitioner within the meaning of the Legal Profession Act. Further, the Director contends that the conduct of each of the defendants does not involve and has not involved 'only' carrying out the ordinary functions of an Australian legal practitioner.

51 Accordingly, two matters must be resolved. First, does an Australian legal practitioner include an incorporated legal practice and secondly, what comprises the ordinary functions of an Australian legal practitioner. I will deal with the second matter first.

Ordinary functions of an Australian legal practitioner

52 The phrase 'ordinary functions of an Australian legal practitioner' is not defined in the *Estate Agents Act*. The Director referred to *Law Institute of Victoria v Maric and Another*,⁶ which approved the following statement from *Cornall v Nagle*⁷ as to the meaning of the words 'act or practice as a solicitor' in the *Legal Profession Practice Act 1958*:

In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very

⁶ (2008) 21 VR 1 ('Maric').

⁷ [1995] 2 VR 188.

centre of the practice of the law, and hence of the notion of acting or practising as a solicitor, which is itself central to s 90...⁸

- 53 On this basis, the Director submits that the 'ordinary functions of an Australian legal practitioner' are the provision of legal advice and legal services.
- 54 The Director submits further that some meaning or effect must be given to the word 'ordinary'. The word 'ordinary' is defined in the Australian Oxford Dictionary to mean 'regular, normal, customary, usual' and in the Macquarie Dictionary to mean 'of the usual kind ... customary, normal ... something regular, customary, or usual'. On the basis of these definitions, the Director submits that the 'ordinary' functions of a lawyer cannot include the carrying on of a systematic and promoted business of selling and negotiating the sale of real estate on behalf of other people. The Director contends that the functions of a legal practitioner and in particular the ordinary functions are much narrower.
- 55 The defendants submit that in determining the scope of the exemption in s 5(2)(e), the Court should adopt a broad construction. They submit that the policy of the *Estate Agents Act* is to protect the public from unscrupulous and unqualified persons engaging in business as an estate agent. It does so by restricting the people entitled to engage in the business of selling or negotiating the sale of real estate to qualified and licensed estate agents. The defendants contend that the policy of the *Legal Profession Act* is similarly protective of the public interest. Accordingly, they submit it is unnecessary for the protection of the public interest under the *Estate Agents Act* that an Australian legal practitioner, regulated under the *Legal Profession Act*, should require an estate agent's licence when that practitioner is engaged only in providing professional services of a kind which are controlled and regulated under the *Legal Profession Act*.
- 56 The defendants submit that a further consideration relevant to the Court's construction of the phrase 'ordinary functions of an Australian legal practitioner' is

⁸ *Maric* (2008) 21 VR 1, 7 citing *Cornall v Nagle* [1995] 2 VR 188, 208.

that the exemption is remedial in nature. In this regard, the defendants place reliance on the following passage from Hollingworth J in *Estate of Peter Brock, Re; Chambers v Dowker*:⁹

Where legislation is remedial, it should be given a broad as opposed to a narrow construction, one which will serve to achieve the broad objects and purposes which parliament had in mind.¹⁰

57 Senior counsel for the defendants contended that the word 'ordinary' is equivalent to normal and as such, the exemption covers the normal or not unusual functions of an Australian lawyer. Senior counsel contended that the exclusive business of buying and selling property could be part of the ordinary functions of an Australian lawyer.

58 The defendants relied on a number of authorities in support of this submission, in particular *Nova Scotia Real Estate Commission v Lorway*¹¹ and *Leary v Federal Commissioner of Taxation*¹². In *Leary*, the Court said:

...the field of professional activity is co-extensive with a lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client.¹³

59 The Director contends that this passage, in fact supports her construction of the phrase 'ordinary functions of an Australian legal practitioner.'

60 In my opinion, the ordinary functions of a lawyer include the provision of legal advice and services in connection with the sale of a client's property. Selling, or negotiating the sale of real estate on behalf of a particular client might constitute an

⁹ [2007] VSC 415.

¹⁰ At [19].

¹¹ [2006] NSSC 76.

¹² (1980) 32 ALR 221 ('Leary').

¹³ Ibid 240.

aspect of or arise out of the ordinary functions of a lawyer where it is required or is incidental to the provision of legal services to a particular client.¹⁴ Further, I would not adopt the highly restrictive construction of the ordinary functions of an Australian legal practitioner contended for by the Director. The nature and scope of work undertaken by lawyers has expanded considerably in recent times.

61 However, in my opinion, and whatever the precise parameters of the concept, the circumstances of the present case do not fall within the description of 'ordinary functions of an Australian legal practitioner'. The activities of the defendants demonstrate an ongoing involvement in a business directed to the sale of clients' properties. These activities extend well beyond the mere provision of legal advice and legal services in connection with the sale of a particular client's property.¹⁵ The defendants are involved in or responsible for the ongoing and systematic marketing and advertising in connection with the sale of clients' properties. This is not the ordinary function of a lawyer. Rather, it is engaging in the business of a real estate agent.

62 In the circumstances, it cannot be said that all of the activities undertaken by Mr Mericka in his work for clients of Lawyers Real Estate who are selling property falls within the terms of subsection 5 (2)(e) of the *Estate Agents Act*. It is not enough that some of his activities might involve the ordinary functions of an Australian legal practitioner. Given the use of the word 'only' in subsection 5 (2)(e), if some of the activities performed by the defendants are functions of an estate agent, but are not also activities within the ordinary functions of a lawyer, the exemption does not apply.

63 I accept the Director's submission that this construction of s 5 (2)(e) accords with the purpose of the *Estate Agents Act*.¹⁶ Although the Act does not contain a provision setting out its objective or purpose, the scheme is clearly intended to regulate estate

¹⁴ *Lewis v Real Estate Institute of New Zealand Inc.* [1995] 3 NZLR 385 at 393-394.

¹⁵ *Garbett v Rosemen Investments Pty Ltd* [2002] VSC 575.

¹⁶ See s 35 of the *Interpretation of Legislation Act 1984* (Vic).

agents and their activities.

Does an Australian legal practitioner include an incorporated legal practice?

64 Even if the defendants were performing the ordinary functions of an Australian legal practitioner, the exemption in s 5(2)(e) will only extend to Australian legal practitioners. In this regard, it is not in dispute that Mr Mericka is an Australian legal practitioner within the meaning of the *Legal Profession Act*. However, the defendants argue that Lawyers Real Estate is covered by the exemption because an incorporated legal practice is an Australian legal practitioner.

65 Section 1.2.1 of the *Legal Profession Act* states that the term 'Australian legal practitioner' has the meaning given in paragraph 1.2.3 (a). That paragraph states that:

... an *Australian legal practitioner* is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate ...

66 Section 1.2.1 of the *Legal Profession Act* states that the term 'Australian lawyer' has the meaning given in paragraph 1.2.2 (a). That paragraph states that:

... an *Australian lawyer* is a person who is admitted to the legal profession under this Act or a corresponding law ...

67 The defendants contend that the exemption must extend to incorporated legal practices within the meaning of the *Legal Profession Act*, to the extent that those incorporated legal practices are carrying out the functions of an Australian legal practitioner through the agency of their legal practitioner directors, who themselves are Australian legal practitioners. Were this not so, the amendment to the *Estate Agents Act* introduced by the *Legal Profession (Consequential Amendments) Act 2005* would have created an anomaly and an absurdity.

68 In my opinion, the definition of an Australian legal practitioner excludes an incorporated legal practice. The exemption attaches to individual practitioners who have been admitted to the legal profession.

Conclusion

69 In my opinion, the conduct of the defendants does not fall within the exemption in s 5(2)(e) of the *Estate Agents Act*. Consequently, Lawyers Real Estate and SLOD are and, at all relevant times, have been in contravention of section 12 of the *Estate Agents Act*. Mr Mericka has, at all relevant times prior to 30 November 2010, personally been in contravention of section 12 of the *Estate Agents Act*.

70 Further, given that Mr Mericka is and, at all relevant times, has been the sole director, secretary and (directly or indirectly) the sole shareholder of Lawyers Real Estate and SLOD, I find that he knowingly authorised or permitted the contravention of s 12 of the *Estate Agents Act* by those companies.

71 Further, Mr Mericka has aided, abetted, counselled or procured, or been, directly or indirectly, knowingly concerned in or party to the contravention by Lawyers Real Estate and SLOD of section 12 of the *Estate Agents Act*.

G. Did the defendants engage in misleading or deceptive conduct?

72 The Director submits that, by reason of:

- (a) the statement appearing on the Lawyers Real Estate website, which is set out at subparagraph 8 (k) above; and
- (b) the statement appearing on the SLOD website, which is set out at subparagraph 20 (f) above;

one or both of Lawyers Real Estate and SLOD has engaged in misleading or deceptive conduct or conduct likely to mislead or deceive in contravention of section 9 of the *FTA*. While the defendants accept that these statements appeared on the websites, they do not accept that they have contravened section 9.

73 Section 9 of the *FTA* stated at the relevant time that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead

or deceive.¹⁷

74 Section 143 of the *FTA* states that:

- (1) If a body corporate contravenes or commits an offence against any provision of this Act, each officer of the body corporate is deemed to have contravened the same provision if the officer knowingly authorised or permitted the contravention.
- (2) A person may be proceeded against and, in the case of an offence, convicted under a provision in accordance with subsection (1) whether or not the body corporate has been proceeded against under that provision.¹⁸

75 Division 2 of Part 11 of the *FTA* contains sections 145 to 160. Section 145 states that:

A reference in this Division to a person involved in a contravention of this Act means a reference to a person who—

- (a) has aided, abetted, senior counselled or procured the contravention;
- (b) has induced, whether by threats or promises or otherwise, the contravention;
- (c) has been in any way, directly or indirectly, knowingly concerned in or party to, the contravention;
- (d) has conspired with others to effect the contravention.

76 The statements appearing on the websites suggest that neither Mr Mericka nor Lawyers Real Estate is or has been required to be a licensed estate agent to sell property. For the reasons set out above, these statements are false and misleading. There does not appear to be any dispute that these statements have been made in trade or commerce. Moreover, the publication of a statement on the Lawyers Real Estate website is conduct engaged in by Lawyers Real Estate. The publication of a statement on the SLOD website is conduct engaged in by one or both of Lawyers

¹⁷ Section 9 of the *Fair Trading Act* was amended with effect from 1 January 2011. See sections 3 and 9 of the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic.) and *Victoria Government Gazette* S402 (20 December 2010). Section 18 of the *Australian Consumer Law (Victoria)* is equivalent to the former section 9 of the *Fair Trading Act*.

¹⁸ Section 143 of the *Fair Trading Act* was amended with effect from 1 November 2010. See sections 3 and 68 of the *Consumer Affairs Legislation Amendment (Reform) Act 2010* (Vic.) and *Victoria Government Gazette* G41 2404 (14 October 2010).

Real Estate and SLOD. Even if the defendants assert that, at the time of their publication, the statements were innocently regarded as being truthful, it does not follow that contravention of section 9 of the *FTA* has not occurred. It is well established that a person may engage in conduct which is in breach of section 9 of the *FTA* even if the person acts honestly and reasonably.¹⁹ Accordingly, in my opinion, the defendants have also contravened section 9 of the *FTA*.

77 As Mr Mericka is and, at all relevant times, has been the sole director and secretary of these companies, I find that he has:

- (a) knowingly authorised or permitted;
 - (b) aided, abetted, counselled or procured; or
 - (c) been, directly or indirectly, knowingly concerned in or party to;
- such conduct.

H. Disposition and Orders

78 It follows from the foregoing reasons that in my opinion, the Director has made out her claim against each of the defendants.

79 The Director seeks declaratory relief, injunctive relief and corrective advertising under s 153 of the *FTA*. During closing submissions, senior counsel for the Director provided the Court with proposed orders. Senior counsel for the defendants did not address the Court fully on those orders. Accordingly, I will hear from the parties as to the precise form of relief and costs.

¹⁹ See, for example, *Blackman & Ors v Gant & Anor* [2010] VSC 229 at [114] and [131].

CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for Judgment of Sifris J of the Supreme Court of Victoria delivered on 27 March 2012.

DATED this twenty seventh day of March 2012.



