SUPREME COURT OF QUEENSLAND

CITATION:	*Peterson Management Services Pty Ltd v Chief Executive, Department of Justice and Attorney-General* [2017] QCA 89
PARTIES:	**PETERSON MANAGEMENT SERVICES PTY LTD** ACN 094 234 474 (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (respondent)
FILE NO/S:	Appeal No 12100 of 2016 QCATA No 527 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Appeal Tribunal at Brisbane – [2016] QCATA 163
DELIVERED ON:	12 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2017
JUDGES:	Fraser and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal allowed.** **3. The orders made by the Appeal Tribunal on 24 October 2016 are set aside.** **4. The respondent pay the applicant's costs of the appeal to be assessed on the standard basis.**
CATCHWORDS:	PROFESSIONS AND TRADES – LICENSING OR REGULATION OF OTHER PROFESSIONS, TRADES OR CALLINGS – OTHER PROFESSIONS, TRADES AND CALLINGS – where a licensed agent charges a fixed dollar amount for the provision of a service – whether stating a fixed dollar amount in the appointment form as the reward for service complies with s 133 of the *Property Agents and Motor Dealers Act* 2000 (Qld) – whether the Appeal Tribunal misconstrued s 133 ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – where the Appeal Tribunal

failed to give reasons for finding a contravention of s 139 of the *Property Agents and Motor Dealers Act* 2000 (Qld) – where the respondent concedes that the appeal should be granted in part because of the failure to give reasons – whether the amount collected by a booking agent from a tenant is the "amount collected" within the meaning of s 139(2) of the *Property Agents and Motor Dealers Act* 2000 (Qld)

Appeal Costs Fund Act 1973 (Qld), s 15
Property Agents and Motor Dealers Act 2000 (Qld) (repealed), s 10, s 133, s 139, s 140, s 141, s 589
Property Occupations Act 2014 (Qld)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102

Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47, cited
Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd (1936) 57 CLR 610; [1936] HCA 64, cited
Grain Elevators Board (Vic) v Dunmunkle Corporation (1946) 73 CLR 70; [1946] HCA 13, cited
Jomal Pty Ltd v Commercial and Consumer Tribunal [2010] 2 Qd R 409; [2009] QCA 326, cited
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
Tabcorp Holdings Ltd v Victoria (2016) 90 ALJR 376; [2016] HCA 4, cited

COUNSEL: D A Savage QC, with B W Kidston, for the applicant
A C Freeman for the respondent

SOLICITORS: Mahoneys for the applicant
Crown Law for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Applegarth J and the orders proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** The applicant is a licensed real estate agent. It conducts a caretaking and letting business at a resort, where owners of units appoint it in writing. As is a common practice in the letting industry, the form of appointment states a single sum for certain fees or charges, for example, a single sum for the service of cleaning a one-bedroom unit. Its written appointment does not break down the expenses it incurs in providing that service.

[4] The respondent took the view that this practice did not accord with the requirements of the now repealed *Property Agents and Motor Dealers Act* 2000 (Qld) ("*PAMDA*"), and commenced a disciplinary proceeding in the Queensland Civil and Administrative Tribunal, alleging four separate contraventions. The first was in relation to general cleaning services. The relevant form of appointment had a schedule detailing the agreed fees and charges for a number of services. The

cleaning fees or charges were for a stated amount, for instance, $64.90 to clean a one-bedroom unit. This ground alleged a contravention of s 141(6) and involved the proper interpretation of s 133 of *PAMDA*. The second alleged contravention concerned window cleaning services. This contravention was conceded because the relevant form did not state any specific fee or charge for the provision of window cleaning services. The third ground concerned the provision of Foxtel services. Like the first disciplinary ground, the essential complaint was that the schedule to the form had an agreed dollar charge. The charge was more than the sum Foxtel charged the applicant each month per unit. As with the first disciplinary ground, the alleged contravention was of s 141(6) and the matter turned upon the proper interpretation of s 133.

[5] The fourth disciplinary ground, which related to Wotif bookings, was different. It alleged a contravention of s 139(2). In essence, the respondent argued that the applicant breached s 139 because the commission it charged was calculated on the amount of rent that Wotif collected by way of rent paid by the tenant, not the amount of rent that the applicant received from Wotif.

[6] The Tribunal, constituted by Member Paratz, on the basis of an agreed statement of facts, considered the proper construction of s 133 in relation to the first and third disciplinary grounds and the proper construction of s 139(2) in relation to the fourth ground. As conceded, the Tribunal found that a disciplinary ground had been established as to the second ground (window cleaning services) in that the applicant contravened s 140(2) of the Act. The Tribunal found that the remaining three grounds were not established.[1]

[7] The respondent appealed to the Appeal Tribunal of QCAT on questions of law. The first five grounds of appeal related to the general cleaning services and the Foxtel services. The final ground of appeal related to Wotif bookings and asserted that the learned Member erred in not finding that the applicant breached s 139 of the Act.

[8] The Appeal Tribunal, constituted by Carmody J and a Member, Dr J R Forbes, took a different, and not altogether clear, interpretation of the meaning of s 133 of the Act. It concluded that the primary Tribunal's dismissal of the charges in relation to the general cleaning services and the Foxtel service was erroneous in point of law. Unfortunately, the Appeal Tribunal did not address the proper interpretation of s 139 of the Act at all. It gave no reasons to overturn the primary Tribunal's interpretation of s 139 in relation to the alleged contravention of that section.

[9] The application to this Court concerns two issues:

(a) The proper interpretation of s 133 of the Act; and

(b) The failure of the Appeal Tribunal to give any adequate reasons concerning the disciplinary ground under s 139(2) in relation to the Wotif bookings.

[10] The appeal in relation to the second matter is not contested, since the respondent concedes that an error of law was made by the failure of the Appeal Tribunal to give sufficient reasons in relation to the disciplinary ground concerning s 139(2).

The interpretation of s 133

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[1] *Chief Executive, Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2015] QCAT 473.

[11] Section 133 of *PAMDA*[2] provides what a real estate agent's written appointment must state for each service to be performed. Amongst other things, it must state:

> "(i) the fees, charges and any commission payable for the service; and
>
> (ii) the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service;"

Those requirements appear in s 133(3)(c)(i) and (ii) in the following context:

> "**Appointment of real estate agent—general**
>
> 133(1) A real estate agent must not act as a real estate agent for a person (***client***) to perform an activity (***service***) for the client unless—
>
> (a) the client first appoints the real estate agent in writing; or
>
> (b) a previous appointment by the client is assigned to the real estate agent under the terms of that appointment or under section 135A and the appointment is in force.
>
> Maximum penalty—200 penalty units.
>
> (2) The appointment may be for the performance of—
>
> (a) a particular service (***single appointment***); or
>
> (b) a number of services over a period (***continuing appointment***).
>
> (3) The appointment must, for each service—
>
> (a) state the service to be performed by the real estate agent and how it is to be performed; and
>
> (b) state, in the way prescribed under a regulation, that fees, charges and commission payable for the service are negotiable up to any amount that may be prescribed under a regulation; and
>
> (c) state—
>
> (i) the fees, charges and any commission payable for the service; and
>
> (ii) the expenses, including advertising and marketing expenses, the agent is authorised to incur in connection with the performance of each service or category of service; and
>
> (iii) the source and the estimated amount or value of any rebate, discount, commission or benefit that the agent may receive in relation to any expenses

[2] Reprint 5B of *PAMDA*, since repealed, applied at the relevant time.

that the agent may incur in connection with the performance of the service; and

(iv) any condition, limitation or restriction on the performance of the service; and

(d) state when the fees, charges and any commission for the service become payable; …" (emphasis in original)

[12] For the purpose of the alleged contraventions in relation to general cleaning services and Foxtel services, there was no dispute that the applicant's form of appointment stated the "fees" or "charges" payable for the service. This was the amount that the applicant would charge the client each time the unit was cleaned and the amount it would charge to provide the Foxtel service each month. Each was a dollar amount.

[13] The contravention alleged in Ground 1 (general cleaning services) and in Ground 3 (Foxtel services) was of s 141(6). In its appeal to the Appeal Tribunal the respondent, without any amendment, sought to argue that a different section, namely s 140(2), was contravened. Despite this procedural course being debated in submissions before the Appeal Tribunal, the Appeal Tribunal said nothing about fresh breaches being alleged, without amendment, in the course of an appeal on a question of law. Ultimately, nothing turns on this procedural course. In any case, it is appropriate to set out both s 140 and s 141. They provide:

"**Restriction on recovery of reward or expense—no proper authorisation etc.**

140(1) A person is not entitled to sue for, or recover or retain, a reward or expense for the performance of an activity as a real estate agent unless, at the time the activity was performed, the person—

(a) held a real estate agent's licence; and

(b) was authorised under the person's licence to perform the activity; and

(c) had been properly appointed under division 2 by the person to be charged with the reward or expense.

(2) A person who sues for, or recovers or retains, a reward or expense for the performance of an activity as a real estate agent other than as provided by subsection (1) commits an offence."

"**Restriction on recovery of reward or expense above amount allowed**

141(1) A person is not entitled to sue for, or recover or retain, a reward or expense for the performance of an activity as a real estate agent that is more than the amount of the reward stated in the appointment given under section 133.

(2) However, if the reward for the performance of the activity is limited under a regulation, the person is not entitled to sue for, or recover or retain, a reward more than the amount allowed under the regulation.

(3) A person is not entitled to sue for, or recover or retain, expenses for the performance of an activity as a real estate agent that are more than the amount of the expenses stated in the appointment given under section 133 and actually expended.

(4) However, if the amount of expenses that may be incurred in relation to the performance of the activity is limited under a regulation, the person is not entitled to sue for, or recover or retain, an amount more than the amount allowed under the regulation.

(5) Subsection (2) does not prevent the person suing for, recovering or retaining, in addition to the amount allowed under a regulation for the reward, an amount for GST payable for a supply.

(6) A person who sues for, or recovers or retains, a reward or expense for the performance of an activity as a real estate agent, other than as provided by this section commits an offence."

[14] The Act defines reward as follows:

> "***reward*** includes remuneration of any kind including, for example, any fee, commission or gain."[3]

[15] The present respondent's case before the primary Tribunal and before the Appeal Tribunal was, in essence, that:

(a) the applicant charged owners a cleaning fee that was more than the cost the applicant expended in engaging a cleaner to clean each unit;

(b) the applicant did not disclose the amount it paid to a third party to perform this service;

(c) the difference between what it charged an owner as a cleaning fee and what it paid a third party to perform this service amounted to a reward which was not disclosed. Further, the applicant was also required to disclose as an expense the cost it incurred to engage the third party to perform the service;

(d) the same position applied in relation to the provision of Foxtel services: the applicant did not disclose the amount it was charged by Foxtel for each monthly subscription and, according to the respondent, thereby did not disclose relevant difference in amounts as a reward or expense.

[16] The contraventions alleged at first instance and the additional contraventions alleged in the proceeding before the Appeal Tribunal turned upon the proper interpretation of s 133: specifically, whether the form of appointment did not state the reward the applicant recovered for the performance of the relevant service, or did not state an expense which s 133(3)(c)(ii) required to be stated. If the form of appointment did not state the "reward" then s 140(1) disentitled the applicant from suing for, recovering or retaining the reward. If the form did not state an expense,

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3 *PAMDA* sch 2 (definition of 'reward').

as required by s 133(3)(c)(ii), then s 140(1) disentitled the applicant from recovering the expense.

The decision of the primary Tribunal

[17] The Tribunal Member identified the issues, the applicable law and the parties' submissions. Consideration was given to the meaning of "expense" and "reward" in its statutory context. In the context of the general cleaning service, the Member noted that the service the respondent company provided was the cleaning of the unit and that it would not be expected that the manager would personally do the physical cleaning, but rather that employees or contractors of the company would. The conclusion was reached that the company had not breached s 141(1) as to recovery of a "reward" because it had not sought an amount for a "reward" greater than the amount stated in the appointment under s 133 as a "reward". Nor had the company breached s 141(3) as to recovery of "expenses" because it had not sought an amount for "expenses" greater than an amount stated in the appointment under s 133 as an "expense". The company had provided a service of cleaning, and in so doing had incurred expenses. The fee or charge for performing the service was the agreed price and that amount was stated in the form of appointment in compliance with s 133. The company was entitled to recover the fee or charge for the service stated in the appointment.

[18] The same approach was taken concerning the alleged contravention of s 141 in respect of the Foxtel services. There was a disclosed, agreed price for the provision of the service. The form of appointment stated an agreed fee or charge for the service. The company was entitled to recover the fee or charge and the alleged contravention was not established.

[19] As noted, the fourth disciplinary ground did not concern the interpretation of s 133. It alleged a contravention of s 139(2). The Appeal Tribunal neglected to give any reasons for overturning the primary Tribunal in relation to that disciplinary ground. Therefore, it will be necessary to return to s 139 in deciding what should flow from the concession of the Appeal Tribunal's error. First, I shall consider the Appeal Tribunal's reasons in relation to the proper interpretation of s 133 and the contraventions which were alleged against the applicant in respect of the general cleaning and the Foxtel services.

The reasons of the Appeal Tribunal

[20] By the time the matter reached the Appeal Tribunal, the issue had been confused by the present respondent's reliance on the notion of "a reward component of the expense". Its grounds of appeal alleged that the primary Tribunal erred in not concluding that there was a "reward component of the expense", which was not authorised by the appointment. This notion confused the idea of a reward and an expense. Faced with this ground of appeal, the Appeal Tribunal was required to give close attention to, and analyse, the terms of the Act, and, in particular the requirements of s 133(3)(c)(i) and (ii) about what must be stated in an appointment. These sections require the appointment to state:

> "(i) the fees, charges and any commission payable for the service; and
>
> (ii) the expenses, including advertising and marketing expenses, **the agent is authorised to incur** in connection with the

> performance of each service or category of service;" (emphasis added)

[21] The presiding Member of the Appeal Tribunal set out the relevant parts of s 133 and summarised the effect of other provisions of *PAMDA*. He then sought to summarise the three contested disciplinary grounds before concluding:

> "In my respectful opinion, on Dr Forbes' detailed analysis, and for the reasons he gives, the respondent clearly retained undisclosed receipts in each alleged instance contrary to ss 139, 140 and 141 PAMDA and, as a result, is liable to disciplinary action. The matter is remitted to the tribunal for reconsideration."[4]

As will appear, the issue was not about "undisclosed receipts", and Dr Forbes gave no consideration to the proper construction of s 139 in respect of the fourth disciplinary ground.

[22] I turn to Dr Forbes' analysis of the contraventions alleged in relation to the general cleaning service and the Foxtel services. After a summary of the facts and quoting the terms of s 133(3)(c)(i) and (ii), Dr Forbes referred to the definition of "reward". He then turned to what he perceived to be the purpose of the relevant provisions. It is appropriate to set out the paragraphs of his reasons in which he justified findings of disciplinary breaches by discerning the policy of the statutory provisions.

> "[14] No doubt the relevant provisions are aimed, *inter alia*, at the mischief of 'kickbacks' or secret commissions. But that does not exhaust their effect. In my view, the consumer-protection policy of the Act[5] extends to separate disclosure of just how much the agent charges for his services, as distinct from any payment to a third party. Fees may be fair, but nevertheless substantial and worthy of scrutiny. Here, while the respondent's payment to the cleaner of a 1 bedroom unit was $30, the total charge to the client was $64.90 – more than twice the cleaner's remuneration. No doubt part of the increment of $34.90 may represent business overheads rather than profit, but it is a policy of the Act that clients should have ready access to such information, however indifferent some of them may be to Parliament's solicitude, and however cheerfully they pay. At common law a one-figure price may suffice, but it would be surprising if this elaborate legislation gave consumers no better access to price signals than if it had never been enacted.
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> [15] In analysing and interpreting s 133 as above, its context, policy and a sense of fairness appear to be surer guides to its meaning than exquisite semantic dissection.[6] Section 133 is not arcane; it deserves to be free from obfuscation. There is no inconvenience or logical improbability to forestall the conclusion that the Act seeks to achieve a clear statement of a letting agent's personal

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4 *Chief Executive, Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2016] QCATA 163 at [13].

5 *PAMDA* s 10(1)(a).

6 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

fees, as distinct from external expenses.[7] That interpretation best promotes a purpose of the Act.[8] The very absence of direct authority suggests that, hitherto, the interpretation of s 133 has not given rise to the obscurities or complexities suggested by this respondent. Another possibility is that, hitherto, officialdom has been less vigilant than in this case.

[16] There is no such ambiguity in the subject provisions as to attract the principle that penal statutes are to be interpreted in favour of the subject.[9] Besides, these proceedings are disciplinary, not criminal in character. As such, they involve a different standard of proof[10] and legal policy[11].

[17] Queensland's s 133 is not unique. Similar provisions, requiring a dissection of fees or commissions from expenses paid to others, exist in several other Australian States.[12] None of them appears to have raised difficulties of interpretation that are reflected in judicial decisions.

[18] Before the primary tribunal, counsel for the responded submitted: 'All [the client] needs to know is "How much do I have to pay?"'[13] regardless of the profit taken.[14] This broad-brush approach is reflected in the Member's comment that it suffices if the client knows that he has to pay 'whatever [is] set out in the [Form 20a] schedule] .'[15] But with respect, the purpose of the Act is more aptly described in the Member's reasons for decision: 'The intent is that a consumer is *fully* aware of the *nature* and amount of the charge.'[16] Here the word 'nature' presumably refers to something more informative than a bald total price, namely a 'distinct separation … between an expense and an amount received as a personal payment to the agent.'[17] This policy reappears in the new Act[18] and in recent amendments to the UK *Consumer Rights Act 2015*.[19] No doubt a diligent consumer, given only a global price, is free to shop around,[20] but the Act demands more. Whether or not a particular customer wants more, the Act insists that he have it.

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7 As observed in *CIC Insurance Ltd v Bankstown Football Club* (1997) 187 CLR 384 at 408.
8 *Acts Interpretation Act* 1954 s 14A.
9 cf *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139; *Murphy v Farmer* (1988) 165 CLR 19 at 28-29.
10 *Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498; *Re Bowen* [1996] 2 Qd R 8 at 11.
11 Protective of public and profession, rather than punitive or retributive: *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-184; *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 286 per Dixon CJ; *Police Service Board v Morris* (1985) 156 CLR 397 at 412.
12 *Real Estate and Business Agents Act* 1978 (WA) s 60(2); *Real Estate and Business Agents (General) Regulations 1978* (WA) s 6BA; *Property Agents and Land Transactions Act* 2005 (Tas) s 18(2); *Estate Agents Act* 1980 (Vic) s 49A(1).
13 Transcript of hearing 6 July 2015, page 82 line 43.
14 Ibid page 2 line 34.
15 Ibid page 108 lines 7-8.
16 Reasons for decision at [55], emphases added.
17 Ibid at [74].
18 *Property Occupations Act* 2014 s 104(3)(c)(ii) and (iv).
19 *Consumer Rights Act* 2015 (UK) s 83.
20 As suggested in Reasons for decision at [58].

Perhaps some consumer protection laws are overweening, but that is beside the point.

[19] In the premises, the primary tribunal's dismissal of the charges [in] relation to general cleaning services, the Foxtel service and the charging of commission on Wotif bookings is erroneous in point of law. Those findings should be set aside, and in lieu thereof findings of disciplinary breaches in those three cases should be entered."

The application to this Court

[23] The applicant in this Court contends that the Appeal Tribunal erred in law by misconstruing s 133. Its submissions direct attention to the fact that the "expenses" in s 133(3)(c)(ii) are those that accord with the statutory wording, namely expenses that the agent "is authorised to incur" in connection with the performance of each service. As illustrated in the example contained in s 133(3)(c)(ii) of advertising and marketing expenses, the applicant submits that "the expenses" to which s 133(3)(c)(ii) refers are expenses which the agent *is authorised* to incur in connection with the performance of the relevant service, and should not be confused with "the costs" that the agent may be put to in performing a service. Section 133(c)(ii) is concerned with the expenses the agent "is authorised to incur" in connection with the performance of a service. By contrast, s 133(3)(c)(i) in referring to "the fees, charges and any commission payable for the service" is concerned with a statement of the agent's reward.

[24] The respondent in this Court argues that, properly construed, s 133(3)(c)(ii) required the disclosure of any expenses actually incurred in connection with the provision of services to an owner. In this case it required the disclosure of the cost of engaging a contract cleaner and the subscription costs the real estate agent incurred in connection with the Foxtel services.

[25] It argues that as a result of failing to specify "what component of the cleaning and Foxtel charges were actual expenses incurred and what component was a reward for the provision or arrangement of the cleaning services and Foxtel, the consumer was not fully aware of the nature of the charge, even if they were aware of the total amount they had to pay". According to the respondent, the legislature intended that "what the agent charges for their services should be distinct from any payment to a third party so that the consumer has the opportunity to negotiate or decline the services offered."

[26] The respondent accepts that the description of the costs in the schedule to the appointment form was accurate and the full amount payable was disclosed. It argues that the statute requires the disclosure of amounts expended and that, in this case, the applicant knew the costs that would be incurred by engaging the third parties to perform services, and should have disclosed them to the owners.

The terms of s 133 and their interpretation

[27] The respondent's principal submission about s 133(3)(c)(ii) overlooks the statutory text. The subsection does not refer to "expenses actually incurred". It is about the expenses the agent is "authorised to incur" on behalf of the client in connection with the performance of the service.

[28] I shall assume in the respondent's favour that there are cases in which an agent is able to dissect the expenses it incurs in providing a service such as cleaning, for example, the cost of employing staff, the cost of cleaning contractors, the cost of cleaning materials, the cost of supervision and the cost of an appropriate share of business overheads. However, the Act's operation is not confined to cases in which the expenses incurred in providing a service can be dissected. In any event, in a case such as the present, the agent may not seek to obtain the client's authority to incur specific expenses, such as wages or the cost of a cleaning contractor. The agent in this case agreed to provide a cleaning service for an agreed price, and it fell to the agent to decide whether it provided that service by having its directors do the cleaning, by employing cleaners, by engaging a cleaning contractor or by a combination of those activities.

[29] The respondent's attempt to characterise the cleaning charge as an expense, which had a component of "actual expenses" and a reward component, invited confusion. Section 133(3)(c)(i) concerns the reward which must be stated in the form. Sections 140 and 141 use the term "reward", the definition of which is anchored in the notion of remuneration. When ss 140 or 141 refer to a reward it relates to the "fees, charges and any commission" which s 133(3)(c)(i) require to be stated.

[30] The Act relevantly distinguishes between a "reward" for the performance of a service and an "expense" which the agent is authorised to incur on its client's behalf and recover from its client. The former is the subject of the disclosure requirement in s 133(3)(c)(i), and s 140 precludes an agent from suing for, recovering or retaining a reward unless the agent has been properly appointed by the person to be charged with the reward. This includes the reward being stated in the form of appointment. Section 141 precludes recovery of more than the stated reward.

[31] The disclosure of certain expenses is the subject of s 133(3)(c)(ii). Sections 140 and 141 preclude recovery of an expense which is required to be stated in accordance with s 133(3)(c)(ii) if it is not stated in the form.

[32] An agent may seek to be remunerated (and thereby rewarded) for performing a service on the basis of a fixed sum, an hourly rate, a commission or on some other stated basis. In doing so, it may hope to make a profit after absorbing expenses. An agent also may seek to make its client responsible for expenses, for example, advertising and marketing expenses, rather than absorb those expenses. If it does, then the appointment form must state the expenses it is authorised to incur in connection with the performance of the service.

[33] The problem at which s 133(3)(c)(ii) was directed was stated by the Minister in the second reading speech on the Bill which became *PAMDA*:

> "Many complaints are made about the expenses incurred by the agent and billed to the vendor. Accordingly, the amount an agent is permitted to expend for expenses on the client's behalf will be clearly set out in the approved form."[21]

In construing s 133 by reference to the purpose of the Act, the Appeal Tribunal did not refer to this passage, preferring instead to discern some broader purpose.

[34] The Appeal Tribunal, without close attention to the text of s 133(3)(c)(ii), interpreted s 133 as requiring the form to state the expenses the agent in fact incurs

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[21] *Queensland Parliamentary Debates*, 7 September 2000, 3105.

as a means of ascertaining what the Appeal Tribunal referred to as "a letting agent's personal fees, as distinct from external expenses". What was meant by "personal fees" and "external expenses" was not explained. Neither term is used in the Act. The Appeal Tribunal's resort to these terms begs the question of whether, for example, an employed cleaner's wage is an "external expense".

[35] The "expense" to which s 133(3)(c)(ii) refers, and to which s 140 and s 141 relate, is not any cost or expense incurred in performing the service. It is an expense which the agent is "authorised to incur" in connection with the performance of each service. Whereas under the general law of agency or the terms of a particular contract, such an expense, incurred on behalf of the principal, may be recovered from the principal, under the statute recovery depends on the expense being stated in accordance with s 133 in the form prescribed by s 134.

[36] The present case is not about the recovery of such an authorised expense. It is about a *reward* for service. The applicant's appointment stated, by reference to a Schedule, the fixed dollar amount it was to be remunerated for providing the relevant service. The appointment form did not authorise the applicant to incur expenses in connection with the provision of the cleaning service. The nature and expense of the labour, materials and other things the applicant obtained to provide the service was a matter for it to arrange. Unit owners were not "billed" (to use the Minister's expression) for the cleaning expenses which the agent incurred. Unit owners were not "charged" (to use the language of s 140(1)(c)) with those expenses. The agent was rewarded by a fixed dollar amount.

[37] The Appeal Tribunal, at the encouragement of the present respondent:

- re-characterised the reward (i.e. the fee or charge for the general cleaning service or the Foxtel service) as an expense;
- attempted to separate out some of the costs associated with providing the service ("external expenses", "a payment to a 'third party'"); and then
- characterised the balance of the amount as a reward that required separate disclosure.

The Appeal Tribunal's adoption of the vague term "external expenses" for the purpose of dissecting expenses and arriving at the agent's "personal fee" derives no support from the terms of the Act or the apparent purpose of s 133, s 140 and s 141.

[38] Section 133(3)(c)(iii) should be mentioned. Unlike s 133(3)(c)(ii), it is not limited to expenses that the agent is "authorised to incur". It has different work to do, being concerned with undisclosed rebates, discounts, commissions or benefits. No such issue arises in this case. There is no allegation that the applicant received any such benefit, let alone a "secret commission" or "kickback". Each subsection of s 133(3)(c) addresses a different matter. The mischief at which s 133(3)(c)(iii) is directed concerns benefits that the agent may receive in relation to "any expenses that the agent may incur in connection with the performance of the service". Section 133(3)(c)(ii) is concerned with a more limited category of expenses, namely the expenses the agent is "authorised to incur" in connection with the performance of each service or category of service.

[39] The essential fact in this case is that the client received the service it contracted for at the price it contracted to pay, being the fee or charge stated in the schedule to the

appointment form for the "clean and service" of a unit and the monthly Foxtel services. The applicant did not seek to recover or retain more than the reward stated in the appointment form for providing those services.

[40] The applicant did not seek authorisation to incur the cost of an employed cleaner, cleaning contractors or other expenses, with a view to seeking reimbursement of those expenses. Therefore it was not required to state those expenses in accordance with s 133(3)(c)(ii). It stated a reward for the service it agreed to provide. Obviously, it would incur expenses, including liabilities to third parties, in providing the relevant service. Section 133(3)(c)(ii) is not concerned with all the expenses the agent actually incurs. It is concerned with expenses "the agent is authorised to incur" in connection with the performance of the service. The Appeal Tribunal's failure to recognise this in the wording of the section led it into error.

The purpose of the relevant provision

[41] Whilst it is appropriate to have regard to the statutory context in which the relevant provision appears and its apparent purpose in the context of the Act as a whole and the Act's objects, the essential point of reference is to the statutory text. The issue of the correct interpretation of s 133 which the Appeal Tribunal was required to decide was not resolved by immediate reference to one of the Act's many objects, namely protection for consumers in their dealings with licensees and their employees.[22] The Act sought to achieve an appropriate balance between the need to regulate for the protection of consumers and the need to promote freedom of enterprise in the market place.[23] As for the object of consumer protection, it is an error to construe the Act as though it pursued that purpose to the fullest possible extent. Gleeson CJ stated in *Carr v Western Australia*:

> "In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object … That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose."[24]

[42] Clearly, one of the purposes or objects of the Act was consumer protection. The question is "how far does the legislation go in pursuit of that purpose or object?"[25] Where, as here, legislation seeks to strike a balance between the pursuit of differing

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22 *PAMDA*, s 10(2)(b)(ii).
23 *PAMDA*, s 10(1), and *Queensland Parliamentary Debates*, 7 September 2000, 3101.
24 (2007) 232 CLR 138 at 142 [5] to 143 [5].
25 *Carr v Western Australia* at 143 [7].

objectives, it is "to the text of the legislation that the court must look for instruction".[26]

[43] The extent to which the legislature intended to protect consumers by providing what the form of appointment must state, and preventing recovery of rewards or expenses which are not so stated, is to be found in the terms of the statute, not its general objects. The legislature chose not to pursue consumer protection to the fullest extent by requiring disclosure of all of the expenses which the agent incurs in connection with the performance of a service. A tribunal or a court is not entitled to adopt a construction of the legislation that leads to a result which is contrary to the manifest intention of the legislation.[27]

[44] The Appeal Tribunal thought that the consumer policy of the Act required that clients "should have ready access to such information"[28] without identifying where in the Act such a kind of information is described. It adopted terms such as "personal fees", "external expenses" and "payments to third parties". Those terms do not appear in the Act and were ill-defined by the Appeal Tribunal's decision for the purpose of their future application by licensees, consumers and regulators.

[45] To expect the Appeal Tribunal to carefully analyse the terms of the relevant provisions and to note the distinction between a reward and the kind of expenses at which s 133(3)(c)(ii) is directed was not to require "exquisite semantic dissection".[29] It required a conventional approach to statutory interpretation. The process of construction involves examining the text of the provision in its context.[30] By resorting to the object of consumer protection without sufficient analysis of the terms of the Act and regard to the apparent purpose of s 133(3)(c)(ii)[31], the Appeal Tribunal did not properly interpret the statutory provision which was to be construed.

Other aspects of the Appeal Tribunal's reasons

[46] The Appeal Tribunal at paragraph [17] referred to similar provisions in some other Australian States which were said to require "a dissection of fees or commissions from expenses paid to others". However, the Appeal Tribunal did not give attention to the specific terms of the legislation and how they differed between States. Further, even if the provisions were regarded as identical or were assumed, in the absence of any evidence, to form part of a uniform legislative scheme, this did not aid the issue of construction. This is because, as the present respondent noted in its submissions to the Appeal Tribunal, it could find no published decisions on those specific sections so as to assist the Tribunal in its interpretation.

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26 *Jomal Pty Ltd v Commercial and Consumer Tribunal* [2010] 2 Qd R 409 at 425 [29].

27 At 440 [50].

28 *Chief Executive, Department of Justice and Attorney general v Peterson Management Services Pty Ltd* [2016] QCATA 163 at [14].

29 At [15].

30 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381and see *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376; [2016] HCA 4 at [65].

31 In the event of any ambiguity in the meaning of that provision reference might be had to extrinsic materials in the form of the Minister's second reading speech. See *Queensland Parliamentary Debates*, 7 September 2000, 3105.

[47] The terms of the Act did not support the conclusion that the relevant provisions required "a distinct separation … between an expense and an amount received as a personal payment to the agent".[32]

[48] It is unnecessary to dwell on the practical difficulty or the utility of the Appeal Tribunal's interpretation because its interpretation is not sustained by the terms of ss 133, 140 or 141 or the language of the Act as a whole. Without some definition of what the Appeal Tribunal intended by a term such as "external expenses" it is hard to assess what information would be provided to a client and what use it would be in the absence of knowing what internal expenses or opportunity costs were incurred by the agent, for example, by its manager personally attending to cleaning in conjunction with a cleaning contractor.

Conclusion: the Appeal Tribunal misconstrued s 133

[49] The Appeal Tribunal was required to decide a question of statutory interpretation in relation to s 133 in the context of s 140 and s 141. The interpretation which it adopted was not supported by the text of those provisions or their context.

[50] The Appeal Tribunal confused concepts of "reward" and "expense". It embraced an argument that s 133(3)(c) required the disclosure of expenses incurred in connection with the provision of services to the owners, at least to the uncertain extent of suggesting that "external expenses" be disclosed so as to thereby disclose the agent's "personal fees". In doing so, it did not pay sufficient regard to the terms of the section it was required to construe.

[51] The purpose of the provision, as appears from its terms and its statutory context, may be simply stated as follows: subsections 133(3)(c)(i) and (ii) enable a client to know the fees, charges and any commission payable for a service. They also enable the client to know the expenses, if any, which the agent is authorised to incur and which the agent will seek to recover from the client. Taken together, the provisions allow a client to know whether expenses which the agent is authorised to incur will be charged to it or whether, instead, the agent will absorb those expenses along with any other expenses it incurs in performing the service. The statutory examples of advertising and marketing expenses illustrate the point. The appointment form should enable the client to know whether the agent or the client will be responsible for those expenses. If the agent seeks to make the client responsible for them, then the agent must obtain authorisation and state the expense in the appointment form.

[52] In this case the agent did not charge the client, and recover from the client, the expenses it incurred in performing the required services, such as the expense of engaging a cleaning contractor. The reward which the applicant was to receive by way of fees or charges was stated in the appointment form. As a result there was no breach of s 140 or s 141.

[53] The Appeal Tribunal misconstrued s 133 and thereby erred in law. The appeal should be allowed and the decision of the Appeal Tribunal set aside.

The s 139 issue – Wotif bookings

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[32] *Chief Executive, Department of Justice and Attorney General v Peterson Management Services Pty Ltd* [2016] QCATA 163 at [18].

[54] The fourth disciplinary ground before the Tribunal alleged a contravention of s 139(2) because the applicant's commission was worked out on the amount collected by Wotif from the tenant, not the amount remitted by Wotif to the applicant. The primary Tribunal identified the central issue as one of statutory interpretation: the true meaning of "the amount collected" in s 139(2) of *PAMDA*.

[55] Section 139 provides:

> "**Commission may be claimed only in relation to actual amounts**
>
> 139(1) This section applies to a real estate agent who performs, for the payment of a commission, a service of selling or letting property or collecting rents.
>
> (2) The real estate agent must not claim commission worked out on an amount more than the actual sale price of the property or the amount collected."

The facts and the decision of the primary Tribunal

[56] The primary Tribunal found, and these findings are uncontested, that:

(a) The applicant was authorised to charge a commission of "12% of Gross Received + GST";

(b) The term "Gross Received" was the equivalent of the expression "the amount collected" as used in the Act;

(c) The applicant had been authorised by the unit owners to engage Wotif;

(d) Wotif acted as agent of the applicant, which in turn acted as agent of the unit owner;

(e) Wotif charged a commission of 10 per cent;

(f) Wotif collected the total rent as agent for the applicant.

[57] Based on these findings the primary Tribunal concluded that:

- the gross amount received by Wotif from the tenant was "the amount collected" as those words are used in s 139(2);
- the applicant was authorised to claim commission worked out on the gross amount received by Wotif from the tenant; and
- the disciplinary ground alleged, namely a contravention of s 139(2), in respect of commission claimed on Wotif bookings was not established.

The appeal to the Appeal Tribunal

[58] The respondent in this Court appealed to the Appeal Tribunal on a question of law, contending that the primary Tribunal erred in relation to s 139(2). Its argument was that the primary Tribunal should have held that the commission charged by the applicant should be claimed on the amount that the applicant received from Wotif, not the amount of rent paid by the tenant. This argument, and the present applicant's competing argument, concerned the proper interpretation of s 139(2). Unfortunately, the Appeal Tribunal did not deal with the argument. The respondent accepts that the Appeal Tribunal's failure to give sufficient reasons in relation to the

fourth disciplinary ground concerning s 139(2) involves an error of law which necessitates the granting of the appeal, at least in relation to the fourth alleged contravention and the s 139(2) issue.

[59] The issue then is the appropriate consequential orders. The applicant sought an order setting aside the orders made by the Appeal Tribunal on 24 October 2016, thereby reinstating the decision of the primary Tribunal, which was said to have been correct on the issue of statutory interpretation. The respondent initially submitted that this aspect of the Appeal Tribunal's decision should be set aside, and the matter remitted to the Appeal Tribunal to be dealt with according to law. However, in the course of argument the parties accepted that it was appropriate for this Court to decide the issue. The issue is a question of law only. No disputed factual matters were involved, including matters within an area of specialised expertise. In the circumstances it is appropriate to decide the question of law, rather than remit it to an Appeal Tribunal to decide. Such a course also will save the parties additional costs and delay. This Court was invited to have regard to the submissions made to the Appeal Tribunal on the s 139 issue, as well as the brief oral submissions made to the Court on the point of construction.

The parties' contentions

[60] The respondent's submissions accept that the primary Tribunal correctly identified the central issue as "What is the true meaning of the expression 'the amount collected' in s 139(2)". It invited reference to the successor to *PAMDA*, the *Property Occupations Act* 2014 ("*POA*") on the basis that in some circumstances a court is entitled to examine a later statute to interpret an earlier version of it.[33]

[61] In support of the argument that the applicant could claim commission only on the net amount collected by it, not the total amount collected by Wotif on its behalf, the respondent contended that the applicant was entitled to charge for its involvement in the collection of rent, not someone else's involvement. This was because, from the unit owners' point of view, what had been collected was only the net amount, rather than the gross amount.

[62] The applicant supported the interpretation adopted by the primary Tribunal. In essence, the argument before the Appeal Tribunal, as adopted in this Court, relies upon the undisputed finding that the relationship between itself and Wotif was one of principal and agent. It submits that the total rent payment received by Wotif in respect of bookings is received by Wotif as agent and for the benefit of the applicant. As an agent with actual title to property (the rent paid to Wotif) Wotif was a trustee, albeit one who was bound to follow the directions of the principal with respect to the property. As a result, the total rent payment was trust money held for the benefit of the respondent. In short, the rent had been collected on the applicant's behalf.

[63] Reliance also was placed upon the fact that the form of appointment, in its schedule, expressly stated that the commission was payable on "12% of Gross Received + GST". On the point of statutory construction the applicant relied upon the fact that s 139 does not read "the amount collected *by the agent*". It simply refers to "the amount collected".

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33 *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70; *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610.

The proper interpretation of s 139(2)

[64] In its statutory context, and in particular in the context of s 139(1), the term "the amount collected" in s 139(2) refers to the rent collected. The rent is what the tenant pays to let the owner's unit. The amount remitted by Wotif to the agent, after the deduction of its 10 per cent, is not "the rent". It is the residue of the rent.

[65] The subsequent enactment of the *POA* does not illuminate the present issue. A similar form of words is used, with the separate treatment of three kinds of service: selling property, letting property or collecting rents. Section 88(2) of the *POA* provides that the agent must not claim commission worked out on an amount more than "the actual sale price of the property, the actual rental for the property being let or the actual amount of rent collected". In substance it is the same as s 139(2). The express reference to "the **actual** amount of rent collected" in s 88(2) may be compared with the words "the amount collected" in s 139(2) of *PAMDA*. However, nothing appears to turn upon this. The use of the word "actual" in this context serves to distinguish between an actual sale price and an advertised price, and between an actual rent and an advertised rent. An agent must claim commission worked out on an actual sale price or an actual rental, not on an advertised sale price or an advertised rental. Ms Freeman of counsel for the respondent helpfully identified for the Court the mischief at which such a provision is directed in the context of the letting of a unit. For some reason a unit may be let at less than the amount advertised, perhaps as a result of a negotiation or a discount. The agent is only allowed to charge commission on what is actually paid by the person letting the unit, not on the basis of the advertised price.

[66] If s 139(2) was read as if the concluding words were "the (actual) amount collected" then the present issue of construction would be the same. The issue remains what do the words "the amount collected" mean?

[67] The statute does not refer only to the collection of rent in which the agent is personally involved. The section does not refer to "the amount collected **by the agent**". There is no reason in principle why a licensed agent might not engage an agent, whether in the form of a debt collector who collects rents owed by a variety of tenants or a booking agent who collects the rent which a holiday-maker agrees to pay to let the premises.

[68] The interpretation contended for by the applicant reflects the ordinary meaning of the words "the amount collected". Those words refer to rent collected by the agent or on behalf of the agent. There is nothing in the terms of s 139(2) or its context to indicate that the section is concerned with whether rent is collected by the licensed agent personally or by an agent appointed by the licensed agent to collect the relevant amount.

[69] In the circumstances, the primary Tribunal was correct to interpret s 139(2) of *PAMDA* on the basis that the amount received by Wotif from the tenant as rent was "the amount collected". Given the interpretation adopted of the expression "the amount collected" in s 139(2), the primary Tribunal was also correct to find that the fourth disciplinary ground was not established.

A related concern

[70] The oral argument in this Court in relation to the s 139(2) issue revealed that the respondent's concern in connection with the Wotif bookings was that the unit owner was charged, in effect, two commissions: 10 per cent from Wotif and 12 per cent plus GST by the agent. The concern, however, may relate to the appointment form's compliance with s 133, rather than compliance with s 139. There may be an argument that the Wotif fee was an expense that the applicant was authorised to incur in connection with the service of letting a unit. If so, the expense was not stated in the appointment form. As a result, there is a possible argument that the applicant was required to remit the whole of the rent collected by Wotif, less the applicant's agreed commission and any other authorised expenses stated in the appointment form. In not doing so the applicant might be said to have, in effect, charged for the Wotif expense when it was not authorised by the form of appointment to charge the owner for that expense. It is unnecessary to dwell on this issue because the applicant was not alleged to have contravened s 140 or s 141 by failing to state the 10 per cent Wotif fee as an authorised expense in the appointment form.

[71] I should add that the respondent's submissions indicate that it is not the intent of the respondent to begin retrospective proceedings in respect of breaches prior to the Tribunal's determination. Reference was also made to the limitation period for bringing a complaint under s 589 of *PAMDA*.

[72] The primary Tribunal's dismissal of the disciplinary ground alleged in relation to the Wotif bookings in connection with an alleged contravention of s 139(2) should not be interpreted as resolving any issue concerning the use of booking agents which, like Wotif, deduct a fee from the amount of rent which is collected. Whether such a deduction constitutes an expense which must be disclosed in accordance with s 133 of *PAMDA* or s 104 of *POA* is a matter which was not the subject of disciplinary proceedings and is not a matter which either the Tribunal or this Court was required to decide.

Disposition

[73] The applicant has established that the Appeal Tribunal misconstrued s 133 of *PAMDA*. It also established, and the point was conceded, that the Appeal Tribunal failed to give reasons in relation to the s 139 issue and that this amounted to an error of law. As a result, the application for leave to appeal should be granted under s 150 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), the appeal should be allowed and the orders made by the Appeal Tribunal on 24 October 2016 should be set aside.

[74] Whilst the respondent appropriately conceded the second ground of appeal, the applicant has been wholly successful. The appropriate order for costs in this Court is that the respondent pay the applicant's costs of and incidental to the appeal, to be assessed on the standard basis.

[75] The respondent sought a certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973 (Qld) in relation to that part of the appeal which concerned the Appeal Tribunal's failure to give reasons. The error of law made by the Appeal Tribunal was not due to any fault of the respondent, and the point of law in relation to the Appeal Tribunal's failure to give reasons was conceded at an early stage.

[76] In my view, it would have been appropriate to grant such a certificate if that had been the only ground of appeal or if the applicant had not been successful on its other ground. If the only point on the appeal had been the Appeal Tribunal's failure to give reasons then the respondent's concession would have led to the appeal being allowed by consent. However, the respondent chose to argue the appeal in relation to the interpretation of s 133. The respondent would have incurred some additional costs in considering the ground of appeal in relation to the failure to give reasons concerning s 139. However, it would not have taken too long to read the reasons of the Appeal Tribunal and to decide that this ground of appeal should be conceded. The costs it incurred in doing so would not have been significant. The respondent relied upon its written submissions to the Appeal Tribunal concerning the proper interpretation of s 139 and so additional costs were not incurred by it in arguing that issue before this Court. As it transpired, its contentions concerning the proper interpretation of s 139(2) were not accepted. Any costs certificate would require the isolation and assessment of costs incurred by the respondent associated with considering the second aspect of the appeal and conceding it. The costs would not appear to be significant and, in the circumstances, I am disinclined to grant a certificate under s 15 of the *Appeal Costs Fund Act*.

[77] As to costs before the Appeal Tribunal, the applicant indicated that it would wish to be heard on costs in respect of the Appeal Tribunal at an appropriate time. This Court is not presently asked to deal with those costs, or with the costs before the primary Tribunal. I note that costs in the Tribunal are governed by the provisions of s 100 and s 102 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld). Accordingly I propose the following orders:

1. Application for leave to appeal granted.

2. Appeal allowed.

3. The orders made by the Appeal Tribunal on 24 October 2016 are set aside.

4. The respondent pay the applicant's costs of the appeal to be assessed on the standard basis.