DISTRICT COURT OF QUEENSLAND

CITATION:	*Berceanu v Buttriss & Anor* [2004] QDC 020
PARTIES:	**NIKOLAUS PETER BERCEANU** Complainant/Respondent v **PHILLIP KINGSLEY BUTTRISS** Defendant/Appellant **NIKOLAUS PETER BERCEANU** Complainant/Respondent v **QUANTUM DIRECT PTY LTD** Defendant/Appellant
FILE NO/S:	Appeal 9/2002; 9A/2002; 9B/2002 Magistrates Court 00084826/02 (3); 00084870/02 (1); 00084891/02 (3)
DIVISION:	
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Hervey Bay
DELIVERED ON:	13 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	18 July 2003
JUDGE:	McGill DCJ
ORDER:	**Appeals allowed.** **In appeal 9, conviction quashed, complaint dismissed.** **In appeal 9A, order for compensation set aside; recording of conviction set aside; fine confirmed.** **In appeal 9B, fine set aside; recording of conviction confirmed.**
CATCHWORDS:	PRINCIPAL AND AGENT – Statutory Provisions relating to agents – real estate agent – acting without licence – whether penalty excessive – whether appropriate to order compensation. CRIMINAL LAW – Compensation – unlicensed real estate agent – whether appropriate to order a refund of commission.

CRIMINAL LAW – Sentence – recording a conviction – whether discretion miscarried.

COUNSEL: S W Zillman for the appellants
A Ross (solicitor) for the respondent

SOLICITORS: McDuff and Daniel for the appellants
Crown Solicitor for the respondent

[1] On 12 June 2002 three complaints alleging summary offences under the *Property Agents and Motor Dealers Act* 2000 ("the Act")[1] came before the Magistrates Court at Hervey Bay. Mr Buttriss was charged with acting as a real estate agent when he was not the holder of a real estate licence,[2] and that he "being a director of a corporation Quantum Direct Pty Ltd that carried on business as a real estate agent and not being the holder of a real estate agent's licence did act as a real estate agent." In addition that company was charged on a separate complaint that it did act as a real estate agent when it was not the holder of a real estate licence. Particulars were given, which included in each case that between 1 July 2001 and 4 January 2002 seven particular properties "were sold by Phillip Kingsley Buttriss of Quantum Direct Pty Ltd."

[2] The defendants appeared and pleaded guilty to each complaint. On each of the complaints against Mr Buttriss, he was convicted, the conviction was recorded, and he was fined $2,500 and ordered to pay $59 costs of court, in default five months imprisonment and allowed 12 months to pay. The company was convicted, the conviction was recorded, and the company was fined $7,500 and allowed 12 months to pay. In addition, in respect of the first of the charges against Mr Buttriss, he was ordered to pay $36,433.75 as compensation on behalf of the persons outlined in the particulars of the complaint, in default of payment six months imprisonment. He was allowed nine months to pay compensation.

[3] Appeals under s 222 of the *Justices Act* were lodged in respect of each matter. When the appeals came on before me, it was conceded by the respondent that the second charge brought against Mr Buttriss, purportedly pursuant to s 132(2)(a) of the Act, did not disclose an offence known to law. The respondent consented to that appeal being allowed, and the conviction being quashed, and the complaint being dismissed. It does not appear that I actually made the formal order at the time of the hearing, but I will make it now.

[4] In the other two appeals, the appeal by the company was on the ground that the sentence imposed was manifestly excessive. The appeal by Mr Buttriss raised that ground also, but also claimed that the compensation order was made without jurisdiction, and that a punishment was imposed for the same or essentially the same acts which were the subject of a separate complaint. It is convenient to deal first with the order for compensation made against Mr Buttriss.

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1 For this judgment I am applying the Act in Reprint 1, as at 13 July 2001.

2 Said in the file to be an offence under s 160(1) of the Act, but the wording of the complaint follows the terms of s 160(2).

Order for compensation

[5] It does not appear to have been disputed in the course of the sentence hearing that it was the company that was identified as the real estate agent in the transaction in each case, and it was the company that received the commission. It does seem to be clear however that an order for compensation can be made against an offender whether or not that offender actually received the property concerned. The relevant provision is s 35 of the *Penalties and Sentences Act* 1992 ("the PSA"). By that section a court may order that the offender "… pay compensation to a person for any loss or destruction of, damage caused to, or unlawful interference with, property –

(i) in relation to which the offence was committed; or

(ii) in the course of, or in connection with, the commission of the offence …"

The appellant submitted that that did not cover a case such as the present, because there was no loss of property for the purposes of that section.[3] The vendors had simply paid the company for a service which they had received from the company. The respondent on the other hand submitted that there had been a loss of property, because, the appellants not being licensed, they were not entitled to be paid for acting as a real estate agent: s 140 of the Act.

[6] In general, orders for criminal compensation are made on the basis of ordinary principles of civil liability and assessment for loss or damage: *R v Ferrari* [1997] 2 Qd R 472 at 477. In that case a compensation order against a person who was guilty of unlawful use of a motor vehicle as a passenger, in respect of damage caused to the vehicle but for which the appellant was not shown to have been responsible, was set aside. The starting point for any enquiry therefore would seem to be whether the various vendors were entitled to recover the amount of the commission paid by them, either from the company or from the individual.

[7] Section 140 of the Act provides:

> "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 –
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> (a) held a real estate agent's licence; and
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> (b) was authorised under the person's licence to perform the activity; and
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> (c) had been properly appointed under Division 2 by the person to be charged with the reward or expense."

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[3] It was accepted that "property" includes money, so that a person who has lost money is within the section.

[8] Although the wording is by no means identical, similar restrictions appeared in the predecessor to this Act, the *Auctioneers and Agents Act* 1971, s 76(1), and the earlier 1922 Act, s 23(1): see *Greg Roughsedge Realty Pty Ltd v Whitecross* [2002] 2 Qd R 353, where the relevant provisions are quoted. That decision also confirms that the section means what it says, and that in the present circumstances whichever appellant contracted with the vendors (presumably the company) would not have been entitled to sue them to recover commission in respect of any of the transactions. The section also uses the word "retain", not doubt in recognition of the fact that commonly real estate agents receive payment of the deposit, and some or all of the commission is in practice paid by their retaining some or all of this deposit. The word however strengthens the argument that any of these vendors would be entitled the sue the agent to recover any part of the commission which was dealt with in this way, by an action for money had and received. Once a contract settled the appellant became liable to account to the vendor for the deposit paid under it, and if some or all of that deposit has been applied to the payment of commission and hence not paid to the vendor, that would be a matter the appellant would have to plead by way of defence, and in the light of s 140 it would not be a good defence to the action: *Meier v Wardell* [1924] QWN 19.

[9] The question of whether, if any part of the commission had been actually paid by the vendor to the appellant, the vendor could now sue the appellant to recover it, is in my opinion not so straightforward. Section 128 of the Act identifies the activities which a real estate agent's licence authorises the holder to perform for reward. These include to sell land, or to negotiate for the selling of land. By s 160(1) a person must not, as agent for someone else for reward, perform any of those activities unless the person holds a real estate agent's licence and the performance of the activity is authorised under the licence, or is otherwise permitted under this or another Act to perform the activity. It does not seem to me that an offence under that subsection would be committed merely by entering into a contract to do one of the things identified in s 128.

[10] However s 160(2) makes it an offence to "act as a real estate agent" unless there is a licence under the Act authorising "the act", or "the act" is otherwise permitted by the Act or another act. Subsection (3) indicates (redundantly) that a person may act as a real estate agent by performing an activity mentioned in s 128(1), and also by holding himself out as being ready to perform such an activity, or if he "advertises or notifies or states" that he performs or is willing to perform that activity. That is very wide, and it seems to me that a person who contracts to perform such an activity, or at least to attempt to perform such an activity, is at least stating a willingness to perform such an activity and therefore acting as a real estate agent. It seems to follow that it is an offence for a person who does not hold a real estate agent's licence to enter into a contract to act for reward as a real estate agent for a particular client. It would seem to follow that the contracts of retainer of the appellant were themselves illegal, and not simply legal contracts which were performed by the appellant in an illegal way.

[11] As a general proposition money paid under an illegal contract cannot be recovered either in contract or in quasi contract: Goff and Jones "*The Law of Restitution*" (4th edition 1993) at p.498. If payment had not been made the vendor could not have been sued by the appellant, but a payment voluntarily made is not recoverable. Where however the penalty for such illegality is imposed only on one of the parties

that enters into the contract, whether the contract is unenforceable as illegal "depends upon considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party, and any other relevant considerations": *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1988] QB 216 at 273. The practical effect of this approach seems to be that when money is paid under an illegal contract by an "innocent" party to a "culpable" party, it may be recoverable in restitution: Cheshire & Fifoot "*Law of Contract*" (7th Australian edition, 1997) at p.699.

[12] In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 it was held that the fact that a bank was carrying on banking business without the appropriate statutory authority and therefore illegally[4] did not mean that contracts entered into by the bank were unenforceable, so that the bank could enforce by action a contract of loan, mortgage or guarantee. This was held to be a matter of the construction of the statute, although it was said by Gibbs ACJ that as a general rule a contract expressly or impliedly prohibited by statute is void and unenforceable. His Honour went on to note that the fact that the statute was for the protection of the public in general was a factor favouring the conclusion that the prohibited contract was void and unenforceable. His Honour noted various situations where a plaintiff had failed to recover payment on a contract where the plaintiff had done the very thing which the statute forbade him to do. On the other hand, the result of treating the relevant provisions of the statute in that case as rendering contracts void and unenforceable would be that "persons who had deposited money with such a body corporate would be unable to seek the assistance of the courts to recover it."[5]

[13] In these circumstances, it is necessary to see whether the act expressly or by implication gives a cause of action to the client of an unlicensed real estate agent to recover money paid to the agent by the client by way of commission. The client would not have an action to recover money received by the agent on behalf of the client, nor an action to recover a payment on a total failure of consideration; the consideration for the payment did not fail in this case, because the properties the vendors sought to sell were sold. It is not clear that the act provides a cause of action in such circumstances, unless it follows from the use of the word "retain". By way of contrast, s 142 deals expressly with the repayment of an amount which a real estate agent recovered or retained to which that agent was not entitled because of s 139(2). If an agent is convicted of an offence against that section, the court must order the agent to pay to the client the amount the agent was not entitled to obtain. That section of course does not apply in the present case, and the fact that a specific provision was made in such circumstances suggests that the legislature did not intend, or perhaps did not necessarily intend, that a similar result would follow in the case of persons convicted of offences under other sections of the Act.

[14] I have not been able to find a decision specifically dealing with the question of whether a person who has paid commission to an unlicensed real estate agent is entitled to recover that money from that agent, in circumstances where it is not a case of the agent receiving the money for a third party and then claiming a right to

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4 Contrary to s 8 of the *Banking Act* 1959 (Cth).

5 See also *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd R 196 where at p.203 McPherson JA left open the question of whether the other party could sue an unlicensed builder on an illegal contract.

retain it as against the client. Cheshire & Fifoot suggest that there can be no hard and fast rule as to whether and to what extent an illegal contract may be enforced by the innocent party, because the issue involves an element of public interest: p.699.[6] Goff & Jones note that there has been a good deal of criticism from various sources about the rules involving illegal contracts (pp.519-522) and refer to some dicta in England suggesting that an amount paid under a contract prohibited by statute will not be recoverable by the innocent party in the absence of some express provision in the Act to that effect.[7] In these circumstances there must be some element of uncertainty involved in the situation.

[15] The significance of this is that there is authority that it is not appropriate to make an order for compensation under s 35 in circumstances where there is some doubt or difficulty about the entitlement to compensation, or as to the amount of compensation payable: see *R v Ferrari* (supra) at p.477; *Hyde v Emery* (1984) 6 Cr App R(S) 206 at 210. That however really goes to the question of whether as a matter of discretion compensation should be ordered, rather than whether there was jurisdiction to make an order.

[16] On the crucial question of whether there has been any "loss of property," it seems to me that that invites attention to the difference between the position of the person in whose favour a compensation order is to be made as a result of the commission of the offence, and the position that person would have been in if the offence had not been committed. That is consistent with the general approach to the assessment of damages in civil matters, and the approach of the Court of Appeal in *Ferrari* where the issue was whether the offence the appellant committed either directly or indirectly led to the loss in respect of which the order had been made. The same sort of consideration appears to have been applied in *R v Davies* [2002] QCA 29, where the Court of Appeal reduced the compensation order in circumstances where the appellant had committed some offences in connection with the seizing of a motor cycle as security for a debt. The cycle was removed by a co-offender who subsequently damaged it, and the Court held that a compensation order in respect of the damage was open because the damaging of the cycle was a foreseeable consequence of the taking of it and its removal by the co-offender; however fair compensation should reflect the circumstance that the appellant was not personally involved in damaging the vehicle: p.5. Interestingly, both the sentencing judge and the Court of Appeal also deducted from the amount of the compensation payable the debt which the bike had been seized to secure.

[17] In the present case, there are three ways in which, in theory at least, the appellant might have avoided committing the offence. If it was possible for Mr Buttriss to obtain a real estate agent's licence, and the company the appropriate licence, they could have been obtained before any of these transactions occurred, in which case no offence would have been committed. Alternatively they could have refrained from their involvement as real estate agents in these transactions; in those circumstances the vendors would presumably still have wanted to sell their properties, and would have engaged other agents. Presumably the other agents would have secured sales, and there is no reason to think that the sales would have

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6 See also *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394 at 412.

7 *Green v Portsmouth Stadium Ltd* [1953] 2 QB 190 at 195, and *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410, cited at p.509.

been at any different prices than those in fact obtained. Since there is no price competition among real estate agents, all charging in accordance with the maximum rates allowed under the Act, if the various vendors had used other real estate agents to effect the sales they would have ended up in exactly the same position, that is paying the same amount of commission to the other agents.[8] The third possible way in which the offences could have been avoided would have been if the appellants had done what they did anyway, except that they refrained from charging commission, that is they performed the services for the vendors gratuitously. The reference in s 128 to the various activities being performed "for reward", and the prohibition in s 140, suggest that it would not have been an offence for these things to have been done if the appellants had not charged for doing them.

[18] At the relevant time however the appellants did not have the appropriate licences under the Act, and there is no reason to think that they would have been willing to undertake any of these transaction for the vendors gratuitously. For practical purposes therefore had the offences not been committed what would have happened is that the vendors would have engaged other agents and would have paid the same amount of commission to the other agents. The vendors therefore are no worse off than if that occurred.[9] Indeed, the same would be the case if the appellants had first obtained the licences. It is only if one compares what has actually occurred with a situation where the appellants still did what they did for the vendors but did not charge for it that there is a comparison which can be seen to produce some identifiable loss to the vendors.

[19] That strikes me as a highly artificial concept of a loss. For all practical purposes, the vendors in this case have suffered no loss, and if the appellants had to refund the commission paid by the vendors those vendors will suffer a windfall gain. In *Meier v Wardell* (supra) Shand J said of an unlicensed agent's inability to be paid commission, "It may be a hard case. I think it is."

[20] The only matter that concerns me is that it is obviously appropriate to give a wide meaning to the various terms used in s 35. That was certainly the approach adopted by the Court of Appeal in *Ferrari*, and I think it would be inappropriate to adopt any narrow or technical meaning. It may be that the identification of the entitlement to compensation with an entitlement according to the ordinary legal principles of civil liability suggests that there has been a "loss" whenever there is an amount which could be recovered in accordance with the ordinary principles of civil liability. Subject to the question of whether in the present circumstances amounts paid by the vendors to the appellants are recoverable according to those principles, it does seem to follow in the light of the authorities referred to earlier that there may well be a legally enforceable right to recover the "windfall gain". In those circumstances, it is at least arguable that there is a "loss" for the purposes of s 35, even though there is no loss in any practical sense.

[21] If I had to decide that question, I would not be willing to extend the interpretation of the word "loss" in s 35 that far. If there is a civil entitlement to a windfall gain in

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8 There was no suggestion that other, licensed agents would have achieved a better price.

9 Insofar as there is a "victim" of these offences, it was the other agents who missed out on this commission, although they were also relieved of the burden of doing whatever work was involved in earning it.

these circumstances, in my opinion the vendors should be left to pursue their civil remedies. I do not think that parliament was intending by the use of the language in the PSA to go that far, and the section was intended to deal with the situation where there were victims of the offence who had suffered a loss, that is who were worse off in a practical sense, as a result of the commission of the offence. If necessary therefore I would hold that there was no jurisdiction to make the order. I prefer however to decide the matter on the basis that, assuming there was jurisdiction to make the order, in the circumstances of this case, where in a practical sense the various vendors are no worse off than if the offences had not been committed, an order for compensation under s 35 was clearly inappropriate, and therefore as a matter of discretion ought not to have been made.

[22] Apart from this feature, there are a number of other matters which are clearly relevant to the exercise of the discretion. I have already referred to some possible uncertainty as to the extent of any recovery, which is a discretionary factor favouring refusal to make a compensation order. It is also plainly relevant to have regard to the means of the offender. This is particularly significant in the present case, where a period of nine months was allowed to pay an amount in excess of $36,000, in default of which Mr Buttriss was sentenced to six months imprisonment. In *R v Anderson* [1995] 1 Qd R 49 McPherson JA (with whom the other members of the Court agreed) at p.52 commented on an aspect of a sentence of seven months imprisonment and a default term of imprisonment of three months for non-payment of $5,000 in restitution made cumulative, where no time was allowed to pay. His Honour said: "It seems most improbable that the applicant was in a position to pay all those amounts; there was even less possibility of his being able to do so while serving the sentences imposed. In a practical sense, therefore, the result was to extend the effective sentence of imprisonment by a period of three months to ten months. That is not a proper function or purpose of ordering restitution."

[23] In the present case Mr Buttriss was at the time of the sentence unemployed, and had a wife and four children to support: transcript p.7. It appears that he had no practical possibility of being able to pay $36,000 or anything like it within the nine month period ordered by the magistrate, so for practical purposes making an order for restitution with six months imprisonment in default meant that he was being sentenced to six months imprisonment for the offence. In my opinion, it is not appropriate to make an order for restitution against an offender where the offender does not have the capacity to pay the restitution within the time allowed. *R v Anderson* is authority that that is not a proper order to make. In circumstances where there is no reason to think that Mr Buttriss had the capacity to pay the compensation, that was another reason why, as a matter of discretion, compensation ought not to have been ordered against him.

[24] In the course of his decision the magistrate, after referring to the possibility of a fine option order, said: "The compensation must be paid." On the following page he said in relation to the compensation: "The court will expect that to be paid in a much lesser time. … he has had the benefit of those moneys and he was not entitled to them." Those comments seem to be based on an assumption that the money was still available, sitting in a bank account or perhaps under his mattress, and could be repaid if the order was made. It does not appear that the magistrate had any regard

to the question of the appellant's capacity to pay, and that in my opinion was an error of law on his part.

[25] There is also the consideration that none of these vendors have complained about his actions, and there was no allegation that there was anything wrong with the service provided to any of them. There was no indication that any of them had sought a refund of the commission, and it may be that if they had been consulted they would not have sought it.

[26] There is one other matter I should mention, which demonstrates that the decision to order compensation involved an error of law on the part of the magistrate. The transcript reveals that, shortly after the solicitor for the appellants began his address on p.5 by making the point that his instructions were that it was the company who had received the commission rather than Mr Buttriss directly, the magistrate interrupted by saying: "I would make – the [indistinct] order for reparation is going to be made against the individual." That suggests that the magistrate at that point, without having heard the relevant submissions on behalf of the appellants as to whether or not an order should be made, had already made up his mind to make an order for compensation in respect of the commission paid. That decision having been made without having given the appellants the proper opportunity to be heard, it was in breach of the rules of natural justice.

[27] It is therefore necessary for me to exercise the discretion afresh. In my opinion it is entirely inappropriate to make any order for compensation in the present case. If any of the vendors want to pursue civil remedies that is a matter for them, but in my opinion no order for compensation should be made.

Was the sentence excessive?

[28] In respect of each of the offences to which he pleaded guilty Mr Buttriss was fined $2,500. In addition the company was fined $7,500 in respect of the offence to which it pleaded guilty. That is a total of $12,500 in fines, in relation to what is essentially the same illegal conduct. Leaving aside the fact that one of the charges is now accepted to have been one alleging an offence not known to law, and assuming that all of the offences charged had been committed, nevertheless they were still committed by what was essentially the same conduct, and that was in my opinion a factor which was of some importance in relation to sentence, the significance of which appears not to have been recognised by the magistrate. The evidence did suggest that the company was essentially the family company of Mr Buttriss, and it may well have been appropriate for the magistrate to look behind the corporate veil and to identify the company with Mr Buttriss. But the more closely the company is identified with Mr Buttriss, the less appropriate it becomes for both Mr Buttriss and the company to be punished for what is essentially the same wrongdoing. By imposing substantial fines on both the company and Mr Buttriss, that appears to have been precisely what the magistrate did.

[29] It is apparent from both the reasons for the decision given by the magistrate and from various comments he made in the course of the hearing that he regarded this as a very serious offence. The maximum penalty for an offence under s 160 of the Act is 200 penalty units or two years imprisonment. He had previously held a

salesman's licence, so he knew that he had to have a real estate agent's licence in the circumstances. Although there had been some persistence with the offending in the present case, since it involved a total of seven transactions over a period of some months, so it was not at the lowest end of the scale of seriousness, on the other hand there had been no previous convictions for this (or apparently any other) offence by the appellant. He was not a person shown to be unfit to hold a licence, or to have had a prior licence taken away. There was no suggestion of any inappropriate conduct in relation to the various transactions undertaken for the different clients. Insofar as the function of the licensing system is to prevent clients from being badly treated by real estate agents, this was not a case where that had occurred. Plainly if it had occurred that would have made it a more serious example of the offence. There was therefore plenty of scope for the offence to have been much more serious than it was. Overall I would not regard it as a particularly serious example of the offence.

[30] There is also the consideration that, not only did the appellants plead guilty at apparently the earliest opportunity, but they had also actively co-operated with the investigating authority once Mr Buttriss was aware that there was an investigation under way. Indeed he had provided the investigators with a list of the relevant transactions, the seven transactions which were then alleged against him. Even if the investigators could have discovered them without this assistance, it certainly would have saved them time and trouble. Although he did not undertake a formal recorded interview, he did speak to representatives of the Office of Fair Trading and made admissions, and produced a prepared statement. It was not alleged that the statement was inaccurate. There was therefore a high degree of co-operation with investigating authorities. These are important mitigating factors.[10] There was also the consideration that he was otherwise of good character. He was 39, had no previous convictions, and tendered references from three individuals who spoke highly of him, including the principal of a state school who paid tribute to his valued contribution to the school community. These are factors of some significance.

[31] At one point the magistrate seemed to be treating the offence as being as serious as social security fraud in respect of the same amount. In my opinion there is a clear distinction between the two situations. This was a case where the appellant was receiving remuneration at the market rate for the provision of a service, that is to say the payment was one which was earned. It was simply that, in order to enforce the requirement that real estate agents obtain licences, the legislature has made it an offence to do these things for reward if one does not have a licence. But earning money which one is not entitled to earn because one does not have a licence in my opinion involves a significantly lower level of criminality than obtaining by deliberately false statements payments of money by way of government benefits to which one is not entitled. Authorities dealing with social security fraud have emphasised the difficulty in detecting the offences, and the importance of general deterrence; there is no reason to think that those considerations are equally applicable in the case of an offence under s 160 of the Act. In my opinion the analogy drawn by the magistrate was not appropriate, and suggests that he erred in his assessment of the seriousness of the offence.

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10 PSA s 9(2)(i).

[32] In my opinion it is clearly inappropriate for both fines to stand. The magistrate on the whole appears to have taken the view that it was essentially Mr Buttriss who was responsible for the offending. That on the evidence was a reasonable conclusion to draw, and in those circumstances it would have been reasonable and appropriate to impose a fine on Mr Buttriss, and in relation to the company, simply record a conviction but impose no further penalty. In any case, the combined penalty of $10,000 is in my opinion manifestly excessive for the offending, bearing in mind the various factors to which I have referred. The fine imposed on the company must be set aside.

[33] Indeed, I have given somewhat anxious consideration to the question of whether the fine imposed on Mr Buttriss of $2,500 was not in itself excessive. I regard it as a heavy fine in all the circumstances of this case, particularly bearing in mind the degree of co-operation with the investigators. There was also the consideration that apparently the appellant's financial position was quite modest. It is necessary to take into account the financial circumstances of the offender and the nature of the burden that payment of the fine will impose: the *Penalties and Sentences Act* 1992 s 48(1); *R v Prentice* [2003] QCA 34. Mr Buttriss was at the relevant time unemployed, although there was the prospect of a job subject to his being able to obtain a salesman's licence.

[34] In relation to this, the magistrate was asked not to record a conviction, because of the prospect that would cause him economic harm in relation to his obtaining a salesman's licence. However the magistrate refused and recorded a conviction. The magistrate seems to have taken the view that he ought not to be allowed to work in the real estate area, and that a conviction should be recorded in order to prevent that from occurring. I shall deal with that point separately below, but for present purposes it is sufficient to say that, on the basis that the appellant was an unemployed 39 year old man with a wife and four children to support, his financial position was so far as was known to the magistrate quite modest. In those circumstances and bearing in mind all the other matters to which I have referred, in my opinion a fine of $2,500 was manifestly excessive. It is however appropriate for me to deal next with the question of whether a conviction ought to have been recorded.

Recording a conviction

[35] By s 12 of the PSA the magistrate had a discretion whether or not to record a conviction in this matter. By subsection (2) of that section he was required to have regard to all the circumstances of the case including –

"(a) the nature of the offence; and

(b) the offender's character and age; and

(c) the impact the recording of a conviction will have on the offender's –

(i) economic or social wellbeing; or

(ii) chances of finding employment."

In his reasons (p.2) the magistrate said he took these provisions into account and also what he described as principles enunciated in the higher courts in this State, "particularly in relation to not recording a conviction and allowing the offender who has offended against legislation to gain a benefit by licensing under the same legislation. It is wrong in principle that this court should take the step of not recording a conviction to allow you to achieve that purpose."

[36] The magistrate was told by the appellant's solicitor that the appellant had an offer of employment as a real estate salesman, subject to his obtaining a salesman's licence. He had previously applied for such a licence, but that application had not been determined pending the conclusion of the proceedings. To work as a real estate salesperson it is necessary to obtain registration as a registered employee under Chapter 3 of the Act. By s 86, the chief executive must, when deciding whether a person is a suitable person to obtain registration, consider among other things whether the person has been convicted of an offence against the Act: s 86(1)(g). The word "conviction" is defined in Schedule 3 to the Act so that there is not a conviction if a conviction is not recorded by the court. Hence if a conviction is recorded the fact of the conviction of the offence is a matter which the chief executive must consider, but it by no means follows that the application for registration must be rejected.

[37] The position is different if the person has been convicted and the conviction recorded in Queensland or elsewhere within the preceding five years of a serious offence: s 85(1)(c): the term "serious offence" is defined in Schedule 3, as various categories of offences which strike me as obviously serious, where punishable by three years or more imprisonment. Bearing in mind the definition of "convicted" it was correct for the magistrate to proceed on the basis that if no conviction was recorded the fact of conviction could not be taken into account by the chief executive in considering whether the appellant was a suitable person to obtain registration. In the course of the hearing the magistrate said (p.9): "Higher courts have made it clear in principle that in relation to attempting to defeat the provisions of the legislation against which they offend. I use for an example security providers' licences where a person is charged with bodily harm and wants to go back to work as a security guard. Higher courts have said it's wrong in principle to not record a conviction for the purpose of him going back into the industry where they've offended." I am not aware of a case involving a security guard, but there is certainly authority that it is not appropriate to use the discretion in s 12 to prevent a body having some licensing function from ascertaining a relevant matter.

[38] In *R v Beissel* (1996) 89 A Crim R 210 McPherson JA said at p.212: "In my opinion it really misapprehends the purpose and function of provisions like s 12 to suppose that the provisions they confer are designed to enable the fact that criminal convictions have been sustained to be concealed from bodies or authorities whose duty it is to determine whether or not an applicant is a fit and proper person to be licensed under a particular statute." On the same page White J observed that not recording convictions, "seem to me to give an unwarranted benefit to the applicants which will have the effect of seeking to hide from the liquor licensing authority and the Department of Consumer Affairs which administers the *Auctioneers and Agents*

Act conduct which really ought to be taken into account by them when considering the issue of any such licences." These passages were quoted in the joint judgment of Thomas and White JJ in *R v Briese, ex parte Attorney-General* [1998] 1 Qd R 487 at 492 where their Honours immediately thereafter said: "Those observations should not be taken as laying down a rule that the court must not grant an offender the benefit of non-recording of a conviction whenever it is likely that the offender might come before such a board; it is a stricture to look at the matter carefully and to bear in mind the potential public harm that may result from the court's authorising concealment of the truth." It seems to me that the magistrate in this case has fallen into the very error against which their Honours warned in that case.

[39] Their Honours also referred to passages in *R v Hagan* (CA 442, 443/1996; Court of Appeal; 15 November 1996, unreported) that, "It is not the position that a conviction should never be recorded if it will have an adverse impact upon an application because of the consequences attached to a conviction by other legislation." Reference was made to a particular prohibition in the *Corporations Law* and their Honours said: "That section exists to protect the public, and it is not appropriate that this court should routinely fashion a special order with the object of defeating the operation of such a section." That passage also emphasises that the error lies in making an order which would otherwise not be appropriate just to avoid the impact of the legislation. But it did not mean that the discretion should not be exercised simply because it would have prevented that section from operating.

[40] It is important to bear in mind that in *R v Beissel* the court was plainly of the view that the particular circumstances of the offences of which the applicants were convicted justified recording convictions, and were matters which ought to have been taken into account by the relevant authorities when deciding on licensing issues. That and other similar decisions establish that, if it would otherwise be appropriate to record a conviction for an offence or offences, it is not appropriate to exercise the discretion not to do so in order to prevent some licensing authority from having regard to the fact of the conviction in relation to some existing or proposed licence for the offender, notwithstanding that that may well have some adverse economic impact on the offender. But it seems to me that it is just as much an error to record a conviction in circumstances where it would otherwise be appropriate not to do so, just in order to ensure that the matter was taken into account in such circumstances.

[41] The point is that, as their Honours noted in *Briese* at p.491: "The making of an order under s 12 has considerable ramifications of a public nature, and courts need to be aware of this potential effect. In essence a provision of this kind gives an offender a right to conceal the truth, and it might be said, to lie about what has happened at a criminal court. On the other hand the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression."

[42] Their Honours in *Briese* agreed with some comments of Dowsett J in that matter at p.498, that relevant considerations in relation to the nature of the offence included whether violence was used and if so to what extent, whether there was exploitation or abuse of trust, the extent of economic loss to victims, and the extent to which the circumstances of the offence suggest a propensity to offend or risk that if given an opportunity the offender may re-offend.[11] In the present case it seems to me that none of those considerations favour recording a conviction. As to the last of them, it seems to me that there is much less likelihood of re-offending if the appellant is able to obtain registration as a registered employee, or even perhaps a licence as a real estate agent, than if they are refused. Refusing to give registration or a licence to someone who has been convicted of acting as a real estate agent without a licence strikes me as a bit self-defeating. It is like a railway refusing to sell a ticket to somebody who has previously been convicted of travelling on a train without a ticket.

[43] I think it is of some significance here that it was not suggested there was any wrongdoing by the appellant other than that he did not possess the required licence. That does not strike me as a factor which should particularly tell against granting a person a licence, or registration as an employee, under this Act. I do not think that there is any real analogy with the position of a person who has engaged in criminal violence and who holds or is seeking to obtain a licence as a security guard, although even then the exercise of the discretion should be approached in the way indicated in *Briese*, and not on the basis of some distortion of the discretion one way or the other.

[44] In the present case the appellant had no previous convictions, and that I think is of some particular significance in relation to the exercise of the discretion under s 12. In addition, he was able to tender references which spoke well of his character, and he had made contributions to the community. The offence of which he was convicted was nowhere near as serious as those offences which call for the recording of a conviction just because of the nature of the offence. As I have said it was not even a particularly serious example of an offence under s 160. Leaving aside the specific question of what effect this offence might have on an application for registration as a registered employee under the Act, one would expect that it would be likely that recording a conviction would be prejudicial to his prospects of finding employment and his economic and social wellbeing in the future.

[45] As to the fact that not recording a conviction would prevent the chief executive from considering the fact of the conviction, I do not consider that the nature of the offence is so serious, and the significance of the registration so important, that it would be clearly inappropriate for the decision to be made without regard to the conviction, so that a proper consideration of the public ramifications of the exercise of the discretion did not require that it not be exercised. In my opinion the balance in this case is clearly in favour of exercising the discretion. I consider that there was an error of law in the magistrate's approach to the discretion, and I will therefore exercise the discretion afresh, by not recording a conviction.

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[11] There is also authority that ordinarily a conviction should be recorded in the case of a person convicted of a sexual offence against a child: *R v Gallagher; ex parte Attorney-General* [1999] 1 Qd R 200. Again that does not apply here.

[46] That decision is likely to have some beneficial effect on the economic wellbeing of the appellant, although it is by no means clear what the final outcome will be. The majority decision in *Briese* also establishes that the discretion under s 12 should not be exercised in isolation from the sentencing discretion as a whole. Bearing that in mind, it is necessary to consider whether, in all the circumstances referred to earlier but with that change, the fine of $2,500 is manifestly excessive. It still strikes me as a severe penalty in those circumstances, but I am not persuaded that it is so severe that it is manifestly excessive. Accordingly I will not adjust the amount of that fine.

[47] Nevertheless the appeal in relation to the offence under s 160 by Mr Buttriss will be allowed, the order for compensation is set aside, a conviction is not recorded, and he is fined $2,500, with 12 months to pay. In default of payment within that time, imprisonment of 28 days. That default imprisonment is imposed pursuant to s 182A of the PSA, which is available whether or not a conviction is recorded. In relation to the appeal by the company, the appeal is allowed and the sentence imposed is varied so that a conviction is still recorded but there is no further penalty imposed. The respondent should pay the appellants' costs of the appeals; I will hear submissions as to the amount of those costs.