THE REAL ESTATE AGENTS ACT 1976

No: 84/220

IN THE MATTER of an application by the AUCKLAND DISTRICT of THE REAL ESTATE INSTITUTE OF N.Z. (INCORPORATED) for the cancellation/suspension of Certificate of Approval of a Real Estate Salesman for IAN BADENOCK SIME.

Hearing: 1st August 1984, at Auckland

Counsel: Mr A.F. Grant for Auckland District REINZ
Mr D.A. Burns for Mr I.B. Sime

Solicitors: Sheffield, Young & Ellis
Sanders & Burns

Decision: 28th September 1984

DECISION OF THE REAL ESTATE AGENTS' LICENSING BOARD, Mr J.G. Sclater (Chairman), Mrs E.A. Wylie, Messrs H.Y. Cassidy, T.G. Healy and D.R. Morris

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Application was made to the Board by the Auckland District under Section 99 (1) (b) of the Real Estate Agents' Act 1976. This application was for cancellation or suspension of the Certificate of Approval of a real estate salesman. It was alleged that the salesman concerned was of such character that it was in the public interest that his certificate of approval should be cancelled or suspended. The complaint arose out of matters referred to in the judgment of His Honour Mr Justice Sinclair in the High Court case of Clarke v Scholes Oakley (Papatoetoe) Limited. Counsel for the salesman objected to the admission of the evidence by way of production of a copy of the judgment but this was overruled and the Board's discretion under Section 14 of the Real Estate Agents' Act was exercised and evidence of the judgment was admitted. It was noted that in addition to the powers of Section 14 the Board was in the position of other administrative tribunals which are recognised by legal authorities to be entitled to adopt a less strict standard of procedure than is adopted by the Courts and entitled to be more informal in its procedures and admission of evidence so long as natural justice is observed. The judgment was therefore accepted and received in

evidence and referred to at the hearing. The particular passage in the judgment frequently referred to reads as follows:
".....there is no evidence which justifies a finding that either has been guilty of fraud, nor is there sufficient evidence available which would in any way entitle a court to find that Mr Sime had in any way acted in a fraudulent manner. If Mr Sime's evidence is taken at face value then he is an extremely ignorant land salesman and the sooner he finds out to whom he owes a duty as a salesman at any particular time, the better off he will be."

Mr Sime gave evidence before the Board as to his part in the events leading up to the action taken by Mr Clarke against Scholes Oakley (Papatoetoe) Limited. He had been employed by the licensee company and had been instrumental in arranging the initial sale of the property and the on-sales of individual units to individual purchasers. He gave a full account of matters and answered the questions put to him in cross-examination and questions asked by Board members. Evidence was also given by Mr Tweedie, a director of Cubro-Holdings (N.Z) Limited, the property dealing company which purchased the property and on-sold it as units realising a very large profit in a very short time.

After hearing these accounts of the matters and considering the submissions of counsel for the respective parties the Board decided that Mr Sime had placed his objective of achieving sales of properties ahead of his duty to his employer and his employer's duty to its principal, the initial owner of the property. This attitude was unbecoming any person engaged in real estate activity. The Board found that the salesman had been in breach of the standards required although the major portion of blame rested with his employer. The Board decided that the application should succeed but instead of a cancellation or suspension the Board decided that pursuant to Section 99 (4) it should impose a monetary penalty upon Mr Sime and as the matter was serious a penalty of $500:00 should be imposed. The Board orders that a penalty of $500:00 is to be paid by Mr Sime to the Institute forthwith. The question of costs was considered but no award was made.

J.G. Sclater
CHAIRMAN

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 73/86

IN THE MATTER of an Application brought by the Auckland District of the Real Estate Institute of New Zealand (Incorporated) for the cancellation/suspension of Certificate of Approval of a Real Estate Salesman for IAN BADENOCK SIME

BETWEEN IAN BADENOCK SIME of Auckland, Real Estate Salesman

Appellant

A N D THE REAL ESTATE INSTITUTE OF NEW ZEALAND (INCORPORATED)

First Respondent

A N D THE REAL ESTATE AGENTS LICENSING BOARD constituted pursuant to s 4 of the Real Estate Agents Act 1976

Second Respondent

Hearing 30th July 1986

Counsel D. A. Burns for appellant
R. E. Bartlett for first and second respondents

Judgment 19th August 1986

JUDGMENT OF TOMPKINS J

The appellant has appealed, pursuant to s 112 of the Real Estate Agents Act 1976 ("the Act"), to the Administrative Division of the High Court against the decision of the second

respondent ("the Board") delivered on 1st August 1984 whereby the Board imposed upon the appellant a monetary penalty of $500.

Mr Bartlett appeared for the first respondent ("the Institute") and for the Board. He advised that the Board did not wish to play any active role on the appeal. It would abide the decision of the Court.

The application for cancellation or suspension

On 4th May 1984 the Institute applied to the Board, pursuant to s 99(1)(b) of the Act for an order cancelling the appellant's certificate of approval as a salesman, or alternatively, suspending the appellant for such period not exceeding three years as the Board thinks fit upon the grounds that the appellant has been of such a character that it is in the public interest that his certificate of approval should be cancelled or that he should be suspended.

The application set out particulars of the complaint as follows.

> "In making this application the Real Estate Institute of New Zealand relies on the criticisms made of (the appellant) by Mr Justice Sinclair in the High Court at Auckland in a judgment delivered in the case of Clarke v Scholes Oakley (Papatoetoe) Ltd & Anor A 41/83 and on the evidence given by (the appellant) to the said Court during the hearing of that case."

Although it appears that no objection was taken to these particulars at the hearing before the Board, I consider that they were unsatisfactory. The application should have contained particulars that related directly to the conduct of the appellant upon which the Institute relied. Simply referring to criticisms made of the appellant in another court is not a satisfactory way of supplying such particulars. I therefore sought from Mr Bartlett details of what was the precise nature of the allegation made against the appellant. Mr Bartlett's articulation of the allegation was

> "Having ascertained that the property had changed hands at an undervalue the appellant took no steps to protect the vendors when the appellant knew or ought to have known that the position could be remedied and that the appellant's failure to act followed from his view that he had no duty to the vendors."

Background

Since about 1969 the appellant has been the holder of a certificate of approval issued to him pursuant to s 46 of the Act. This certificate has authorised him to act as a salesman on behalf of a licensed real estate agent. For the greater part of that time and at the time relevant to the application for cancellation or suspension, he was employed as a real estate salesman by Scholes Oakley (Papatoetoe) Ltd ("Scholes Oakley"). He dealt principally in residential property in the Papatoetoe area.

On 2nd February 1981 the appellant was in the Scholes Oakley office in the normal course of his employment. On examining the listing file he found a property that had just recently been listed at $58,000. He inspected the property. It was a block of three flats at 16 Wentworth Avenue, Papatoetoe. He then showed the property to Mr Tweedie of Cubro Holdings Ltd, a property company with which the appellant had had earlier dealings. Mr Tweedie decided that his company should buy the property. The appellant completed an unconditional agreement for sale and purchase that was signed by Cubro Holdings and which he then took to the vendors, Mr and Mrs Clarke. Although they expressed some surprise at the speed with which the offer had been received, they signed the agreement. The agreement provided for the payment of a deposit of $2,000. That deposit was not, at that stage, paid.

A week later, on 9th February 1981, Cubro listed the property for sale. On the same day the appellant obtained an agreement for the sale of No.3 unit for $30,000. On 19th February he obtained an agreement for the sale of No.2 unit at $28,500, and on 3rd March he obtained an agreement for the sale of No.1 unit at $33,500. So the result was that within a month of Cubro purchasing the property for $58,000 it had sold separately the three units for a total of $92,000. The deposit that ought to have been paid when the agreement with Mr and Mrs Clarke was signed was not in fact paid until 17th March 1981, when it was paid out of deposits received by Scholes Oakley on behalf of Cubro from the three sales. On that day Scholes Oakley

wrote to Mr and Mrs Clarke enclosing a cheque for $160, being the deposit of $2,000 less commission of $1,840.

The appellant had not been involved in the listing of the property with Scholes Oakley. That had been done by Mr Kenneth Millar, a director and manager of Scholes Oakley. It was on his advice that it was listed at $58,000.

Mr and Mrs Clarke commenced proceedings against Scholes Oakley as first defendant and Mr Millar as second defendant, claiming damages on the grounds of negligence or alternatively, deceit, arising out of the transaction. These proceedings came before Sinclair J in this Court on 1st and 2nd March 1984. By a judgment delivered on 23rd March 1984 he found that Scholes Oakley had failed in its duty to Mr and Mrs Clarke in two respects. First, it failed in the duty of care which it owed to them in giving them the advice in relation to the manner in which the property should be marketed, and secondly, it failed in its duty to advise of the non payment of the deposit after 10th February 1981 and to inform them of the three sales when they had in fact occurred, and at which point the deposit still had not been paid. The significance of the latter finding was the Judge's conclusion that had Mr and Mrs Clarke been told of the sales and of the non payment of the deposit, they could immediately have cancelled their agreement with Cubro, then either themselves completed the three sales already negotiated or

put the property back on the market at a price nearer that which had been established as the true market price.

In expressing his conclusions the learned Judge said

> "However I entirely acquit (Scholes Oakley) and Mr Millar from having acted fraudulently in the circumstances. That they have been negligent goes without saying but there is no evidence which justifies a finding that either of them has been guilty of fraud, nor is there sufficient evidence available which would in any way entitle the Court to find that Mr Sime had in any way acted in a fraudulent manner. If Mr Sime's evidence is taken at face value then he is an extremely ignorant land salesman and the sooner he finds out to whom he owes his duty as a salesman at any particular time the better off he will be."

The hearing before the Board

When the application by the Institute for the cancellation or suspension of the appellant's certificate of approval came before the Board on 1st August 1984 the Institute called no witnesses. To establish the grounds for the application it submitted to the Board a bundle of documents relating to the transactions concerning 16 Wentworth Avenue, Papatoetoe, a copy of the learned Judge's note of the evidence given by the appellant in the High Court in the Clarke v Scholes Oakley action and a copy of Sinclair J's judgment. Counsel for the appellant objected to evidence being put before the Board in this way but the Board ruled that this evidence should properly be admitted pursuant to s 14 of the Act, the section which I set out in full later in this judgment.

Counsel for the appellant then submitted that on that material there was no case for the appellant to answer. Having heard submissions by counsel for the appellant and the Institute, the Board ruled that there was a case to answer. The appellant gave evidence. He described his part in the transactions. He was cross-examined extensively by counsel for the Institute. In the course of this cross-examination he was questioned as to whom he owed his primary duty as a real estate salesman. He contended that his primary duty was to his manager or licensee, that is, to his employer. In support of this view he referred to a document apparently issued by the Institute described as the salesman's guide. This document seems not to have been produced in evidence before the Board, nor was it produced at the hearing in this Court. According to the transcript the passage upon which the appellant relied read

> "The salesman must always bear in mind that he has no legal authority to be engaged in selling property except as an employee of an agent. Thus although he will negotiate with the purchaser and vendor to bring the sale to a successful conclusion, he is doing this on behalf of his employer, the licensed real estate agent. The salesman owes his loyalty and responsibility to his employer, the agent."

He was then cross-examined on a passage in the evidence he had given in the High Court and in particular, containing answers that he had given to Sinclair J. That passage read

> "I am concerned that if you on the 5th March, having got the authority to transfer the deposit in respect of the Clarke sale and were obviously in possession of the information that what you had originally sold for

> $58,000 had now sold for over $92,000, that you did not consider it your duty to report that fact to your original vendor. What is your explanation?---I haven't got one, sir. Is it because you had engineered four sales with four commissions?---No sir.
> Who was your primary duty to?---Sir the way I understand real estate I am employed by the vendor to get the vendor an unconditional agreement at a price that the vendor is happy to accept at any specified time. I cannot see into the future.
> I am not asking you to. I am asking you to do it as at 5th March 1981. Who was your duty to? Your primary duty?---I don't know."

The above is only a brief reference to what was a lengthy cross-examination by counsel for the Institute followed by lengthy questioning by members of the Board. In the course of that in reply to the Chairman, he made clear his view that if something new came up that affected the transaction of which he had previously been unaware, he considered his proper course would be to discuss such a development with his manager, Mr Millar, and if Mr Millar thought that that information should be passed on to the vendors, then certainly he would do so.

It also emerges from the appellant's evidence that Scholes Oakley and in particular Mr Millar, was well aware that Cubro had not paid the deposit due in respect of its agreement with Mr and Mrs Clarke. It was Mr Millar who prepared an authority which Cubro completed, to transfer out of the deposits that Cubro had received from its sales, sufficient to pay the deposit due to Mr and Mrs Clarke.

The decision

The Board issued its decision on 29th September 1984. It referred to the objection of the evidence submitted by the Institute and the Board's decision to admit that evidence under s 14 of the Act. The decision then quoted the passage in the judgment of Sinclair J that I have set out above. It referred to the appellant giving evidence before the Board but did not set out the nature of that evidence in any detail. It then expressed its decision thus

> "After hearing these accounts of the matters and considering the submissions of counsel for the respective parties the Board decided that Mr Sime had placed his objective of achieving sales of properties ahead of his duty to his employer and his employer's duty to its principal, the initial owner of the property. This attitude was unbecoming any person engaged in real estate activity. The Board found that the salesman had been in breach of the standards required although the major portion of blame rested with his employer. The Board decided that the application should succeed but instead of a cancellation or suspension the Board decided that pursuant to Section 99(4) it should impose a monetary penalty upon Mr Sime and as the matter was serious a penalty of $500 should be imposed. The Board orders that a penalty of $500 is to be paid by Mr Sime to the Institute forthwith. The question of costs was considered but no award was made."

The grounds of appeal

Mr Burns for the appellant based his submission that the decision by the Board could not stand on three broad grounds. I deal with each in turn.

First, he submitted that the Board was in error in admitting the documents upon which the Institute's case was founded.

As I have indicated, the Board, in admitting the bundle of documents, the transcript of the evidence the appellant gave in the High Court, and the judgment of Sinclair J, relied on s 14(1) of the Act. That subsection provides

> "14. **Evidence before the Board** - (1) The Board may receive in evidence any statement, document, information or matter that may in its opinion assist it to deal effectively with the matter before it, whether or not the same would otherwise be admissible in a Court of law."

In admitting the transcript of the evidence the appellant gave in the High Court, the Board need not have relied on that subsection. That evidence was legally admissible. There was no challenge to the accuracy of the transcript. The appellant's evidence had, of course, been given on oath and it was directly relevant to the matters into which the Board was required to enquire.

The bundle of documents, whilst in a court of law they would each require to be separately proved, in my view come clearly within the provisions of the subsection. The documents all are relevant to the matter with which the Board was dealing. They were, as Mr Burns acknowledged, non controversial, in the sense that the appellant was not challenging the validity or accuracy of the documentary material. To require each document to be separately proved by an appropriate witness would have been both

pointless and time consuming. I consider therefore that the Board properly exercised its discretion in accepting these documents as evidence.

The judgment of Sinclair J is in a somewhat different category. It of course was dealing with issues different from those the Board was required to decide. It set out in some detail the evidence of witnesses who were not called before the Board. It contained conclusions reached by the learned Judge in proceedings to which the appellant was not a party, was not represented and therefore did not have any opportunity to challenge the evidence given, nor to cross-examine the witnesses. But despite this, the judgment would have been of assistance to the Board provided it was accepted only as background to the matters with which the Board was required to deal. I conclude that it was appropriate for the Board to receive the judgment in evidence, provided it was received only on that basis.

I do not consider that the Board should have used any conclusion reached by the learned Judge in support of its decision. That is largely for the reason to which I have already referred, namely, that that was a conclusion reached in proceedings to which the appellant was not a party nor represented. As I have indicated, the Board, in its decision, set out verbatim a conclusion reached by the learned Judge adverse to the appellant. In doing so it apparently relied on this conclusion in reaching its decision. In

Employees & Builders Labourers Federation (1979) 19 ALR 569 a similar issue arose. Counsel for one of the parties sought to rely on a judgment of the Australian Industrial Court in earlier proceedings as findings of fact by the Court that bore directly on the question of whether any of the applicants were persons of general bad character. The full court of the Industrial Division of the Federal Court of Australia held that the matters found against the applicants in the reasons for judgment in the earlier proceedings were not proved, that the applicants had had in those proceedings no opportunity to refute these matters as the applicants were not present or represented in the deregistration proceedings, so the matters so found were not ones upon which the respondents could properly rely. In my view the same consideration applies here. The Board, in reaching its conclusion, should not have relied on the matters found against the appellant in the High Court judgment.

Mr Burns' second submission is that the appellant had not been proved to have breached any duty that he had to his employer, Scholes Oakley, and that therefore there was no evidence upon which to base the finding of the Board that the appellant had placed his objective of achieving sales of properties ahead of his duty to his employer, and his employer's duty to its principals.

It is difficult to see just what is the duty to Scholes Oakley that the Board apparently thought was subjugated to the

appellant's objective of achieving sales. The decision does not set this out. The appellant undoubtedly had a duty to his employer to keep his employer fully informed of all aspects of the transaction, but there is nothing of which I am aware in the evidence, nor is there any finding by the Board, to indicate that there was any failure to carry out that duty. It will be noted that the Board does not refer to the appellant having a duty to the vendors in the respects now asserted by Mr Bartlett in the particulars he gave to the grounds of the Institute's application. Mr Bartlett criticised that part of the appellant's evidence where the appellant asserted, in reliance upon the guide to salesmen, that the only duty he owed was to his employer. Mr Bartlett urged that the salesman also owed a duty to the employer's principal, but whether or not that is so, that is not the basis of the finding of the Board. The Board has not found that the appellant owed a duty to his employer's principals, it has referred only to the appellant's duty to his employer. So I consider Mr Burns is correct when he submits that there is no evidence on which to base the conclusion of the Board that the appellant was in breach of his duty to his employer.

Mr Burns' third ground was that in any event, the findings of the Board are not sufficient to establish the grounds set out in s 99(1)(b) of the Act. The relevant parts of s 99 are

> "99. Board may cancel certificate of approval or suspend salesman - (1) On application made to the Board in that behalf by the institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not

> exceeding 3 years as the Board thinks fit on the ground -
>
> (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
>
> (b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.
>
> (2) ...
>
> (3) ...
>
> (4) The Board may, in addition to or instead of cancelling a certificate of approval or suspending the holder under this section, impose a monetary penalty upon the holder not exceeding $750."

This submission involves consideration of what is required to establish the grounds set out in paragraph (b) of subs (1). There are two aspects of this paragraph that call for consideration.

The first is that the enquiry is into the person's <u>character</u>. This word has no doubt been chosen deliberately. It appears to be intended to mean something other than whether he is a fit and proper person to be employed as a salesman. That is the expression used in s 46 which requires the Board to be satisfied before granting an application for a certificate of approval to a salesman

> "(a) That having regard to the character and general knowledge of the person in respect of whom the application is made and to the interests of the public he is a fit and proper person to be employed as a salesman by a real estate agent."

But in setting out in paragraph (b) the ground for cancelling or suspending that certificate, the legislature has referred only to the salesman's character.

Nor is it intended to cover only a case where a salesman has been guilty of professional misconduct or of any breach of the duties imposed under the Act. Conduct of that kind is dealt with expressly in s 102 of the Act and is to be the subject matter of charges before a regional disciplinary committee of the Institute. S 102 provides that the Institute may lay with the disciplinary committee a complaint that any salesman

> "has been guilty of professional misconduct or has been guilty of any breach of the duties and obligations imposed on him or under this Act."

So it is clearly intended that the type of character required to be established under s 99(1)(b) is something of a more serious kind than professional misconduct, or breach of the duties imposed under the Act, although conduct that reflected adversely on a person's character might also amount to professional misconduct or a breach of those duties.

In the Australian Building Federation case the Court was required to consider the phrase "general bad character". At p 588 the full court, without deciding the question, inclined to the view that in the context in which the phrase was used in the Act with which the Court was concerned, the word "character" referred to both disposition and reputation. In R v Vallett [1951] 1 All ER 231 the Court of Appeal in England emphasised the wide nature of the words "character and antecedents" in a section

that authorised justices to commit for sentence

> "If on obtaining information as to (the offenders) character and antecedents the Court is of opinion..."

It is pertinent to note that there are only two paragraphs to s 99(1). The first refers to the person being convicted of any crime involving dishonesty. The second refers to the person's character.

So what the Board is required to enquire into is that person's character in the sense of his personal qualities, his individual traits, his reputation and aspects of his behaviour that reflect on his honesty and integrity.

The second aspect is that the type of character the person must be shown to have must be such that it is in the public interest that the certificate be cancelled or the person suspended. The adverse qualities in his character relied on must be measured against the public interest in his continuing or not continuing as a salesman. Traits such as dishonesty or gross incompetence may be within this category. Less culpable characteristics may well not.

S 94 of the Act sets out the grounds upon which the Board may cancel a real estate agent's licence. Six grounds are listed. One is if the licensee has been shown to be of such a character that it is in the interests of the public that the

licence be cancelled. Another is that the licensee has been guilty of misconduct in the course of the business, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled. So the legislature in that section has recognised a distinction between misconduct in the course of the business, and character.

This examination of the Act shows that what must be established to satisfy the ground in paragraph (b) is not necessarily that the salesman is not a fit and proper person, nor that he has been guilty of professional misconduct or a breach of his duties, nor misconduct in the carrying out of his employer's business. It could of course be, in any particular case, that a person's fitness, his professional misconduct or the like could be evidence that goes to character. But in the end what the Board is required to find before it can act under s 99(1)(b) is that the person's character, in the sense to which I have referred, is such that in the public interest the certificate should be cancelled or suspended. That must be established, even if the Board in the end decides, pursuant to subs (4), to impose a monetary penalty instead of cancellation or suspension.

Both the findings of the Board and the evidence adduced, in my view, falls far short of establishing the requisite character. The Board held that the appellant's attitude was "unbecoming any person engaged in real estate activity". Finding a person's attitude to be "unbecoming" is different from and significantly less than holding that he was of such a character that in the

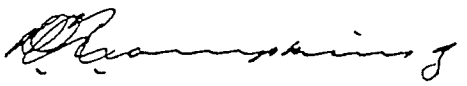
public interest his certificate should be cancelled or he suspended. Then the Board goes on to find that the appellant "had been in breach of the standards required" although the major portion of the blame rested with his employer. Put at its highest this seems to be a finding that he was guilty of professional misconduct. That may justify a disciplinary committee making an adverse finding under s 102, but it does not justify the Board holding that the ground in s 99(1)(b) has been established.

Apart from the Board's findings, the evidence shows that the appellant had an attitude towards his duty that has been criticised by the Institute. But even if it were thought that the appellant's duty went further than he believed it to go, any such misunderstanding by him of the extent of his duty also, in my view, falls far short of establishing the requisite character. And of course there is nothing in the evidence submitted to the Board to show, nor did the Institute contend, that the appellant had acted in any way dishonestly.

For these reasons therefore I consider that neither the evidence submitted to the Board nor the reasons given by the Board, justify a conclusion that the necessary ground was established.

The appeal is allowed. The decision of the Board imposing a monetary penalty of $500 on the the appellant, is reversed. The

appellant is entitled to costs against the Institute of $750 plus disbursements as fixed by the Registrar.



Solicitors

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Messrs Chapman Tripp Sheffield Young, Auckland for first and second defendants