

REAL ESTATE AGENTS LICENSING BOARD

No. 2006/587

IN THE MATTER	of an application under s99 of the Real Estate Agents Act 1976
BETWEEN	REAL ESTATE INSTITUTE OF NEW ZEALAND INC. Applicant
A N D	XUE YAN ZHU (also known as Tina Zhu) Respondent

HEARING: 26 April 2006
DECISION: 14 July 2006
APPEARANCE: T D Rea for the applicant

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

A A Sinclair (Chairperson), K Coakley, P Dudding, R H Kirk and R I Stark

1. INTRODUCTION

- 1.1 The Real Estate Institute of New Zealand Inc. ("the Institute") filed an application under s99(1)(b) of the Real Estate Agents Act 1976 ("the Act") for the cancellation of the certificate of approval as a real estate salesperson held in the name of Xue Yan Zhu (also known as Tina Zhu) ("Ms Zhu"), upon the grounds that having regard to her character and to the interests of the public, Ms Zhu is not a fit and proper person to be employed as a real estate salesperson.
- 1.2 The application came before the Board on 26 April 2006. Mr Rea appeared on behalf of the Institute. There was no appearance by Ms Zhu. In advance of the hearing, Ms Zhu's certificate of approval was returned to the Board by her employer. As well, Ms Zhu wrote to the Board advising that she did not intend to contest the application.
- 1.3 The Board heard evidence from Ms Peter Thompson, a Director of Barfoot & Thompson Limited and Mr Paul Newman, Manager, Credit Investigations for ASB Bank Limited ("ASB"). Mr Rea also produced an affidavit sworn by Ms Shanta Raj, a Personal Relationship Manager employed by the ASB at the Manukau City Branch.

2. LEGAL ISSUES

2.1 Section 99(1)(b) of the Act provides:-

"(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) ...

(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"

2.2 In *Sime v The Real Estate Institute of New Zealand Incorporated* (High Court, Auckland M73/86, 19 August 1986). Tompkins J considered the matters necessary to establish the grounds set out in s99(1)(b). He identified two aspects:

"The first is that the enquiry is into the person's character. 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...

So it is clearly intended that the type of character required to be established under s99(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...

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."

2.3 The Board has adopted the approach set out in *Sime* in considering applications under s99 of the Act and applies a two tier test in determining whether the certificate of approval of a real estate salesperson should be cancelled or whether the holder of that certificate should be suspended. First, the Board must be satisfied that the allegations made

against the salesperson's character meet the criteria set out in **Sime**. Secondly, it must be satisfied that by reason of its findings as to character, it is in the public interest that the penal sanctions of s99(1)(b) should be invoked.

3. EVIDENCE

- 3.1 Between 1 June 2005 and 29 November 2005, Ms Zhu was employed as a real estate salesperson by Barfoot & Thompson Limited ("Barfoot & Thompson") at its Remuera branch office. The Board heard that on 1 August 2005, Ms Zhu obtained a listing for the property at 14 Houghton Street, Meadowbank ("the Property") on behalf of Barfoot & Thompson from the vendors of the property, Paul Hau Ming Chang and Jane Chang ("Mr & Mrs Chang"). Barfoot & Thompson undertook a marketing campaign for the property with the intention to offer the Property for sale by auction. The auction was held at the premises of Barfoot & Thompson at Level 4, 50 Kitchener Street, Auckland on 7 September 2005. Mr & Mrs Chang and Ms Zhu were present at the auction.
- 3.2 The property was sold "under the hammer" for a purchase price of \$460,000. The purchaser was a Mr Tim Mycock. Mr Mycock was known to Ms Zhu and was either at the time (or had previously been) involved in a romantic relationship with Ms Zhu.
- 3.3 Following the auction, while still at the Barfoot & Thompson Kitchener Street premises, Ms Zhu assisted Mr & Mrs Chang and Mr Mycock to record the transaction in an agreement headed "Particulars and Conditions of Sale by Auction" ("the Agreement"). The Agreement was signed by Mr & Mrs Chang and Mr Mycock. Clause 2.1 of the Agreement recording the conduct of the auction, states (inter alia):

"2.1 Subject to the reserve price being reached, the highest bidder whose bid is accepted by the auctioneer, shall be the purchaser. **The amount of the highest accepted bid shall be the purchase price.**"

(Emphasis added)

Although Mr Mycock's bid at the auction had been for \$460,000, the purchase price was recorded in the Agreement as being \$560,000. The Agreement further provided for a deposit of 10% of the purchase price to be paid. The deposit actually paid was \$46,000. This deposit was paid to Barfoot & Thompson by way of a bank cheque dated 7 September 2005 issued by the ASB.

- 3.4 At the same time as signing the Agreement, Mr & Mrs Chang and Mr Mycock signed a separate document also dated 7 September 2005 written on the letterhead of Barfoot & Thompson ("the Refund Document") which stated:

"Further to the agreement between P H Chang and J Chang for the sale and purchase of 14 Houghton Street, Meadowbank to Tim Mycock or nominee.

It is hereby agreed between the parties that the purchaser will be refunded \$100,000 on settlement date being 16 January 2006."

- 3.5 On 22 November 2005, Ms Zhu applied to the Manukau City Branch of the ASB for a housing loan. Ms Zhu was an existing customer of that Bank. The purpose of the loan application was stated as being for funds to complete the purchase of the Property. In support of her application, Ms Zhu gave Ms Raj a copy of the Agreement.
- 3.6 The Refund Document was not disclosed to ASB. Subsequently, during a routine audit by the Bank, the discrepancy of \$100,000 in the sale price of the Property was discovered. The discrepancy came to light because the vendors, Mr & Mrs Chang, were also ASB customers. The investigation also disclosed that Ms Zhu had purchased an ASB bank cheque for \$46,000 with funds drawn from her personal bank account at the Remuera Branch of the ASB on 7 September 2005.
- 3.7 Following further inquiries, Mr Newman obtained a copy of the Refund Document and as a consequence, he contacted Barfoot & Thompson.
- 3.8 On 24 November 2005, a meeting was held at Barfoot & Thompson's head office. This meeting was attended by Mr Thompson, Ms Wendy Alexander (General Manager for Barfoot & Thompson) and Mr Jeffrey Cate, Branch Manager of the Remuera Branch Office. The meeting was also attended by Mr Newman and Ms Zhu. The purpose of the meeting was to put allegations to Ms Zhu and to seek her response to matters relating to the sale of the Property and loan application.
- 3.9 At the meeting Ms Zhu admitted that prior to the auction, she had persuaded Mr & Mrs Chang to agree to refund a portion of the purchase price to Mr Mycock if Mr Mycock turned out to be the successful bidder at the auction in order to assist Mr Mycock to purchase the property. She further admitted that she had been in a personal relationship with Mr Mycock which she had not disclosed to the vendors. In respect of the funding for the purchase, Ms Zhu acknowledged that she had personally provided funds for the deposit and that she had made the loan application to the ASB as Mr Mycock had been unsuccessful in his own attempts to obtain finance for the purchase from KiwiBank and Wizard Home Loans.

4. CONSIDERATION

- 4.1 On the evidence, the Board finds that Ms Zhu devised a scheme which she put to her vendor clients whereby if Mr Mycock was the successful purchaser, an inflated purchase

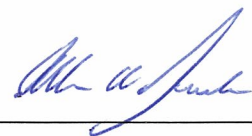
price would be recorded in the sale and purchase and by separate agreement, a portion of that purchase price would be repaid to Mr Mycock. Ms Zhu prepared the Agreement knowing that the purchase price written in the Agreement was \$100,000 higher than the amount of Mr Mycock's successful bid and also prepared the Refund Document which she had executed by the vendors and Mr Mycock.

- 4.2 Ms Zhu knew that Mr Mycock had presented the agreement to KiwiBank and Wizard Home Loans for the purpose of obtaining finance. When his efforts were unsuccessful, she made an application to her own bank for a loan and presented the fraudulent Agreement to the ASB.
- 4.3 Ms Zhu did not disclose to the vendors that she had paid the deposit or that she had a personal relationship with the purchaser. Instead, she encouraged the vendors whose interests she was employed to protect, to become unwitting participants in a scheme of deception and fraud. On the evidence, we are satisfied that Ms Zhu was the principal antagonist in this scheme which if not discovered, could have resulted in a potential loss to the ASB.
- 4.4 The Board is satisfied that Ms Zhu's conduct is of the most serious kind. Ms Zhu has breached her duties to her clients and has acted in a dishonest and fraudulent manner. We have no hesitation in finding that Ms Zhu's conduct reflects adversely on her character and that it is in the interests of the public that the penal sanctions under s99(1)(b) should be invoked. We turn now to consider penalty.

5. PENALTY

- 5.1 Mr Rea referred the Board to its previous decisions in **Lolohea** (Decision No. 1996/420), **Singh** (Decision No. 1996/426) and **Ganesh** (Decision No. 1997/450) where each of the salespersons had been involved in falsifying sale and purchase agreements. In the case of Mr Lolehea, the Board considered that he had been motivated by his desire to assist members of the Tongan community into their own homes rather than by any personal financial gain. In that case, Mr Lolehea was fined \$750 and suspended for 12 months. Mr Singh was found to have also been deceitful in his explanation of his activities to his employer. In that case, the Board fined Mr Singh \$750 and suspended him for a period of 18 months. Mr Ganesh's conduct occurred in a personal capacity. Mr Ganesh pleaded guilty and was convicted of seven offences of dishonesty which included using altered agreements for sale and purchase and attempting to use a finance application for pecuniary advantage. The Board found that he had been motivated by personal greed. By a majority, the Board suspended Mr Ganesh for 20 months and imposed a \$750 fine.

- 5.2 In the Board's view, the conduct of Ms Zhu is of a more serious nature than that of any of these salespersons. The public must be able to rely upon a real estate salesperson to properly represent and protect their interests. Likewise, lending institutions have to be able to rely upon the accuracy of any sale and purchase agreement presented in support of a loan application. In this case, Ms Zhu involved innocent vendors in a scheme of deception and fraud devised by her to assist a personal friend to purchase a property which she knew he could not afford. Ms Zhu did not give any consideration to the interests of the vendors and to the potential ramifications to them and prospective lenders as a consequence of her actions.
- 5.3 In considering penalty, we have taken into account that Ms Zhu was open about her involvement in the transaction when questioned by her employer and that in her letter to the Board, she offered an apology for her actions. However, such deceitful and dishonest conduct by any real estate salesperson is totally unacceptable and cannot be condoned in any way. After careful consideration, we have therefore come to the view that the only possible penalty is one of cancellation and the imposition of the maximum fine permitted under s99(4) of the Act being \$750.
- 5.4 Accordingly, we make an order pursuant to s99(1) of the Act cancelling the certificate of approval as a real estate salesperson held in the name of Xue Yan Zhu (also known as Tina Zhu). This cancellation is to commence immediately upon service of this decision on Ms Zhu. We also impose a fine of \$750, the payment of which is to be made to the Board within 30 days of the date of service of this decision.
- 6. COSTS**
- 6.1 The Institute has been successful in its application and is entitled to an order for costs under s105 of the Act. The Institute is to file a memorandum with the Registrar of the Board within 30 days of service of this decision.



A A Sinclair
Chairperson