

REAL ESTATE AGENTS LICENSING BOARD

No. 2006/592

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 **PAUL JOHN DEMPSEY**

Respondent

HEARING: 18 July 2006

DECISION: 31 August 2006

APPEARANCES: T D Rea for the applicant
R Hern for the respondent

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 This is an application under s99(1)(b) of the Real Estate Agents Act 1976 ("the Act") for the cancellation or suspension of the certificates of approval as a real estate salesperson and as a branch manager held in the name of Paul John Dempsey ("Mr Dempsey"), upon the grounds that having regard to his character, it is in the public interest that the certificates be cancelled or that Mr Dempsey be suspended.
- 1.2 This application arises out of the same matter which was the subject of the Board's decision in **Zhu** (No. 2006/587). Mr T D Rea appeared for the Institute and Mr R Hern for Mr Dempsey. In advance of the hearing, counsel had agreed that it was not necessary for the Institute to call witnesses. An agreed bundle of documents together with the briefs and affidavits previously filed by the Institute in the Zhu hearing were admitted by consent. Evidence was given by Mr Dempsey, Mrs Dempsey and Mr Garth Barfoot.

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

(a) Sale by Auction

3.1 In *Zhu* (supra) the Board heard that while employed as a real estate salesperson at Barfoot & Thompson Limited ("Barfoot & Thompson"), Ms Zhu had obtained a listing for a property at 14 Houghton Street, Meadowbank ("the Meadowbank property"). The vendors of the property were a Mr & Mrs Chang. The property was listed for sale by auction and that auction was held at the premises of Barfoot & Thompson at Level 4, 50 Kitchener Street, Auckland on 7 September 2005.

3.2 The property was sold "under the hammer" for a purchase price of \$460,000. The purchaser was a Mr Tim Mycock or nominee. 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, Mr & Mrs Chang and Mr Mycock signed an agreement headed "Particulars and Conditions of Sale by Auction" ("the Agreement"). The purchase price recorded in that Agreement was \$560,000.

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 Collateral Agreement") 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 When Mr Mycock was unsuccessful in obtaining the necessary funding, Ms Zhu applied to the ASB Bank Limited for a loan for funds to be used to complete the purchase of the property. In support of her application, Ms Zhu gave the Bank a copy of the Agreement. In an interview held on 24 November 2005 with Mr Peter Thompson, a director of Barfoot & Thompson, Ms Wendy Alexander, general manager of Barfoot & Thompson, Mr Jeffrey Cate, branch manager of the Remuera branch office and Mr Paul Newman, manager credit investigations for ASB Bank Limited, Ms Zhu implicated Mr Dempsey in the

transaction. Following the Institute's further investigation, the present application was brought.

(b) Mr Dempsey's Role

- 3.6 Mr Dempsey was employed as a real estate salesperson by Barfoot & Thompson in 1973. In 1979, he became manager of that company's Onehunga branch and worked there until 1986 when he was appointed manager of Barfoot & Thompson's Mission Bay office. He continued in that role until December 2000. Since that time, he has worked as a relieving branch manager for the company and has otherwise been involved in property development.
- 3.7 In the week commencing 5 September 2005, Mr Dempsey was relieving manager at the Remuera branch. On Monday, 5 September 2005, Tina Zhu, who was a salesperson at the Remuera branch, spoke to Mr Dempsey and told him that she had a property going to auction on 7 September 2005. She explained that she had only one buyer and that special terms and conditions would be required. Mr Dempsey was uncertain whether Ms Zhu told him that it was her first auction ever or first as a salesperson at Barfoot & Thompson. In any case, she advised Mr Dempsey that she was not familiar with the auction documentation and Mr Dempsey agreed to attend.
- 3.8 Mr Dempsey was involved in assisting with another auction also held on that day and he told the Board that he remembers very little about the auction of the Meadowbank property or Ms Zhu's participation in it. Following the auction, Mr Dempsey was asked by Ms Zhu to come into an office where he was introduced to the purchaser, Mr Mycock. Ms Zhu explained to Mr Dempsey that the parties had agreed to document the sale at a purchase price of \$560,000 although the actual sale price under the hammer was \$460,000. She told him that the purchaser had special terms and she gave Mr Dempsey a handwritten document providing for a refund of \$100,000 to the purchaser to be paid on the settlement date. Mr Dempsey was unsure who had prepared this document but told the Board that he did not believe that it had been signed by either party.
- 3.9 Mr Dempsey gave evidence that his initial reaction when presented with this document by Ms Zhu was "you can't do this". Ms Zhu told Mr Dempsey that the vendors (who did not speak English) had agreed. Mr Dempsey then redrafted the handwritten document for signature by the vendors and the purchaser. This was the Collateral Agreement set out in paragraph 3.4 above.
- 3.10 Mr Dempsey told us that he asked the purchaser the question: "*Is the arrangement a 'jack up' to arrange finance or to achieve a higher price on resale?*" The purchaser did not

answer. Mr Dempsey told the Board that it was his suspicion that the arrangement was a 'jack up' to arrange finance.

- 3.11 Mr Dempsey did not know at the time of any relationship between Ms Zhu and the purchaser.
- 3.12 Despite his concerns, Mr Dempsey did not discuss the matter on the day with anyone in authority at the Barfoot & Thompson head office nor did he discuss the transaction with the Remuera branch manager, Mr Cate, on his return. Mr Dempsey told us that he did observe to Mr Cate that Ms Zhu was a "time bomb" and that he should "get rid of her". He stated that he made this comment having observed Ms Zhu's conduct in relation to another transaction and was more an observation on Ms Zhu's competence than on her character.
- 3.13 In retrospect, Mr Dempsey could only explain his failure not to stand by his original advice to Ms Zhu as an error of judgment by him. The only justification which he could offer for his actions was that Ms Zhu had presented the Agreement recording the sale price at \$560,000 and the Collateral Agreement recording the \$100,000 refund, as a "fait accompli".
- 3.14 It was Mr Dempsey's evidence that he had been overseas at the time that Barfoot & Thompson's directors called a meeting of branch managers on 19 May 2005 expressly to address their concern about participation in "mortgage scams". Mr Dempsey told us that he had also not been aware of the series of mortgage cases involving various salespersons in the mid 1990s.
- 3.15 Mr Dempsey attended a meeting with Mr Garth Barfoot and Ms Alexander on 2 March 2006. The notes of that meeting were presented in evidence. Mr Dempsey was co-operative and candid in his answers to Mr Barfoot and Ms Alexander detailing his involvement in the transaction. At that meeting, he also advised that he would not accept any appointment as a temporary branch manager while the matter was under investigation.
- 3.16 Mr Dempsey apologised to the Board, the Institute and Barfoot & Thompson. He told us of the personal anguish and stress which this situation had caused him, having otherwise enjoyed an unblemished career in the real estate industry spanning 33 years.
- 3.17 The Board also heard from Mrs Dempsey who told the Board of the personal toll that the present application had taken on Mr Dempsey. Mr Barfoot also gave evidence as to Mr Dempsey's employment with Barfoot & Thompson. He told us that apart from the

present matter, there had never been any other issues of concern as to Mr Dempsey's competency as a manager. As well, Mr Dempsey produced a number of references from members of the real estate industry and from others who spoke glowingly of his honesty and integrity and high professional standards.

4. CONSIDERATION

4.1 Mr Dempsey was acting branch manager and responsible for overseeing the activities of Ms Zhu. Having been asked by Ms Zhu to document the Collateral Agreement, Mr Dempsey immediately recognised that the proposed arrangement was wrong. Instead of exercising his responsibilities as branch manager to stop the transaction from going ahead, Mr Dempsey allowed himself to become a party to it by drafting the Collateral Agreement and arranging for it to be typed on the letterhead of Barfoot & Thompson.

4.2 In the Board's view, this is not a matter of a simple error of judgment on the day. Mr Dempsey acted recklessly and with complete disregard for the interests of his employer, the vendors and potential financiers. Members of the public are entitled to expect that a branch manager, charged with the obligation to be in effective control, will properly supervise salespersons and take appropriate steps to prevent any wrongful conduct. In this case, Mr Dempsey failed to take any steps to stop a transaction which he knew to be wrong or to bring it to the attention of senior management or the Remuera branch manager on his return. Such conduct reflects adversely on Mr Dempsey's honesty and integrity. After careful consideration, the Board is satisfied that Mr Dempsey is of such a character that it is in the public interest that the penal sanctions of section 99(1)(b) should be invoked.

5. PENALTY

5.1 Mr Hern told the Board that Mr Dempsey accepted that the first tier of the *Sime* test had been made out and that he further accepted that because of his managerial position, the Board may well be inclined to invoke the penalty sanctions under the second tier of that test. His submissions and those of the Institute were directed to penalty. We have taken the submissions of both counsel into account in reaching our decision.

5.2 There are matters in relation to Mr Dempsey's conduct which may be seen as aggravating features. We summarise these as follows:

- (1) Mr Dempsey was acting as the temporary branch manager for the Remuera branch office and was in a position of authority. He was engaged to exercise

effective control including overseeing the activities of salespersons attached to the Remuera branch. In this case, instead of ensuring that proper professional standards were maintained, Mr Dempsey became an active participant in preparing documentation designed for a fraudulent purpose;

- (2) The situation which eventuated could not be seen as a youthful mistake. Mr Dempsey has had over 30 years experience in real estate. For the past 25 years, he has worked as a branch manager. In the Board's view, he ought to have understood the seriousness of the proposed transaction. Indeed, on the evidence, Mr Dempsey recognised that the transaction was wrong but he allowed it to proceed in any case;
- (3) Mr Dempsey's wrongful conduct occurred during the course of his real estate activities and not in any personal capacity. Furthermore, it involved the preparation of an agreement for sale and purchase which is a fundamental real estate document;
- (4) Mr Dempsey took no steps to investigate the transaction and to otherwise protect the vendors whom he knew could not speak English. Instead, he treated the transaction presented to him as being a "fait accompli";
- (5) Despite his concerns about the transaction, Mr Dempsey did not bring the matter to the attention of Barfoot & Thompson's senior management nor did he discuss it with Mr Geoff Cate on his return to the Remuera branch office.

5.3 As the Board learnt in the **Zhu** proceeding, the Agreement was subsequently presented to ASB who fortunately became aware of the fraud and no loss eventuated. The outcome could have been very different however, and substantial losses could potentially have been incurred if the transaction had proceeded.

5.4 There are a number of mitigating factors which we also take into consideration. We set these out below:

- (1) Mr Dempsey did not stand to benefit financially in any way from the transaction;
- (2) Mr Dempsey has not previously been the subject of any disciplinary proceedings before this Board;
- (3) Mr Dempsey co-operated fully with the Institute both in its investigation and in relation to the hearing;

- (4) Mr Dempsey recognised his wrongdoing and agreed with Barfoot & Thompson that he would not act as a temporary branch manager until this present application had been determined;
- (5) Mr Dempsey apologised to the Board, the Institute and Barfoot & Thompson for his actions and the Board was left in no doubt that he is remorseful for his conduct and deeply ashamed of what has occurred;
- (6) Mr Dempsey is otherwise well respected as being a person of good character who maintains high professional standards.

5.5 In the **Zhu** decision (supra), the Board cancelled Ms Zhu's certificate of approval as a real estate salesperson and imposed a maximum fine of \$750. Mr Rea referred the Board to a number of the Board's prior decisions under s99(1)(b) of the Act. While each application turns on its own facts, we have also taken these decisions into consideration. In the case of **Watson** (No. 2000/514), Mr Watson had been involved in a shoplifting incident resulting in police diversion and had also altered a document to extend an agency agreement. Mr Watson was fined \$500 and suspended for a period of four months. In **Gallagher** (No. 1999/484), Mr Gallagher had forged the signature of his de facto partner and disposed of the security for a loan without advising the finance company involved. Mr Gallagher was discharged without conviction by the Court; no loss was suffered and his dishonest activity occurred outside the scope of his employment as a real estate salesperson. Mr Gallagher was fined \$750 and suspended for five months. In **Howes** (No. 2001/528), Ms Howes had falsified a tenancy agreement to enable a child to enrol in a school from outside the zone and had subsequently deceived the school principal. The Board accepted that Ms Howes was motivated by a genuine desire to help the child and that she had gained no financial benefit. In that case, no monetary penalty was imposed and Ms Howes was suspended for a period of six months. In **Hastings** (No. 2003/559), Ms Hastings falsified a bond release form provided to Tenancy Services to secure the release of a bond for a landlord. At the time, Ms Hastings was recovering from surgery and pressure was being exerted on her by the landlord. Ms Hastings did not receive any financial benefit. In that case, Ms Hastings was suspended for 5 months and fined \$750.

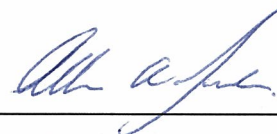
5.6 These cases can all be distinguished from the present case. They all involved salespersons and in some instances, the wrongdoing occurred outside the scope of the salespersons' real estate activities. In the present situation, Mr Dempsey is a branch manager and the wrongdoing occurred in the performance of his duties as a branch manager. Mr Rea, on behalf of the Institute, submitted that an appropriate penalty would

be a fine of \$750 and a period of suspension between 9 and 12 months. In reply, Mr Hern submitted that a fine only would be a sufficient penalty. Having weighed all relevant factors and taken into consideration the Board's previous decisions, we have come to the view that an appropriate penalty is one of a period of suspension and maximum fine.

- 5.7 We make an order pursuant to s99(1) of the Act suspending Mr Dempsey as a branch manager and real estate salesperson for a period of 9 months, commencing 7 days after the date of service of this decision. 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 Mr Hern invited the Board to set costs in its decision however, Mr Rea sought an opportunity to make submissions. The Board declines to fix costs at this stage. If counsel are unable to reach agreement as to costs, the Institute is to file a memorandum as to costs with the Registrar of the Board within 30 days of service of this decision. Any memorandum in reply on behalf of Mr Dempsey is to be filed 14 days after service of the Institute's memorandum.



A A Sinclair
Chairperson