

REAL ESTATE AGENTS LICENSING BOARD

No. 2007/598

IN THE MATTER of an application under s94
of the Real Estate Agents Act
1976

APPLICANT **REAL ESTATE INSTITUTE
OF NEW ZEALAND INC.**

RESPONDENT **BOUTIQUE REALTY
LIMITED**

IN THE MATTER of an application under s99
of the Real Estate Agents Act
1976

APPLICANT **REAL ESTATE INSTITUTE
OF NEW ZEALAND INC.**

RESPONDENT **SUZANNE CAROL
MANGOS**

HEARING: 14 March 2007
DECISION: 30 March 2007
APPEARANCE: Mr T D Rea for the applicant

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

A A Sinclair (Chairperson), K Coakley, P Dudding, J F Harnett-Kindley and R H Kirk

INTRODUCTION

1. On 24 January 2007, the Real Estate Institute of New Zealand Incorporated ("the Institute") filed an application under s94(1) of the Real Estate Agents Act 1976 ("the Act") seeking cancellation of the real estate agent's licence held in the name of Boutique Realty Limited ("Boutique Realty"). At the same time, an application was also filed under s98 of the Act for the interim suspension of the real estate agent's licence held in the name of Boutique Realty pending determination of the Institute's application under s94. This application was heard by the Chairperson sitting alone on 25 January 2007 and an order

was made suspending the licence of Boutique Realty pending determination of the Institute's present application.

2. The Institute seeks cancellation of Boutique Realty's real estate agent's licence upon the grounds that:
 - (a) the principal officer, Suzanne Carol Mangos ("Ms Mangos"), has been guilty of misconduct in the course of the respondent's business as a real estate agent, and by reason of that misconduct, it is in the interests of the public that the licence be cancelled;
 - (b) Ms Mangos is of such a character that it is in the interests of the public that the licence be cancelled;
 - (c) Ms Mangos has failed to be in effective control of the principal place of business of the respondent, and it is in the interests of the public that the licence be cancelled.
3. The Institute subsequently filed a further application under s99(1)(b) of the Act to cancel the salesperson's certificate of approval issued in the name of Suzanne Carol Mangos or to suspend Ms Mangos upon the grounds that Ms Mangos is of such a character that it is in the public interest that the certificate of approval be cancelled or that Ms Mangos be suspended.
4. These applications were set down to be heard together on 14 March 2007. Mr T D Rea appeared for the Institute. There was no appearance on behalf of either respondent. A facsimile letter was received from Ms Mangos after the hearing had commenced in which she advised that she would not be appearing. Ms Mangos stated in the letter that she would be resigning from the Institute. However, she did not address the matters at issue in respect of either application nor did she surrender the licence of Boutique Realty or resign as a real estate salesperson.

LEGAL ISSUES

5. Section 94(1) provides:

"The Institute ... may at any time apply ... to the Board for an order cancelling a real estate agent's licence, and the Board may cancel the licence on any of the following grounds:

- (a) ...:

- (b) That a licensee or, in the case of a licensee company, any officer of the company, has been guilty of misconduct in the course of his [or her] or the company's business as a real estate agent, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled:
- (c) That a licensee or, in the case of a licensee company, any officer of the company, has been shown to the satisfaction of the Board to be of such a character that it is in the interests of the public that the licence be cancelled:
- [(ca) That a licensee or, in the case of a licensee company, the chief executive officer of the company, has failed to be in effective control of any place of business in respect of which it is that person's duty to be in effective control or has failed to ensure that any [[branch manager]] of a branch office has been in effective control of that branch, and it is in the interests of the public that the licence be cancelled.]"

6. Section 99(1)(b) provides:

- "(1) On application made to the Board in that behalf by the Institute, ... 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."

7. In considering the meaning of the word "misconduct", the Board has previously adopted the interpretation applied by Davison CJ when considering a similar provision in the Motor Vehicle Dealers Act 1975 (since repealed). In ***New Zealand Classic Car Co Ltd v Motor Vehicle Dealers Licensing Board*** (1985) 5 NZAR 170, His Honour said:

"In the context of this present Act, particularly s112 with which I am concerned, the misconduct which is required to justify a suspension or cancellation must be something which is in my view wilful. It must be more than negligence, mistake - it must be something where there is a wrong motive, something which would cause the public whose interests are concerned to feel that the dealer has in fact been guilty of misconduct."

8. The interpretation of the word "character" in s99(1)(b) of the Act was discussed by Tompkins J in ***Sime v Real Estate Institute of New Zealand Incorporated*** (High Court, Auckland, M73/86, 18 August 1986). He observed:

"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."

9. In **Action Realty** (No. 92/331) the Board held that there was no reason why the word "character" in s94(1)(c) should be construed differently, and we accordingly adopt the approach taken in **Sime** in considering the allegations against Ms Mangos' character under both s94(1)(c) and s99(1)(b) of the Act.
10. We also adopt, as we have in past applications under s94, a two tier approach. First, we must find that one or more of the grounds relied upon by the Institute has or have been established. Secondly, the Board must be satisfied that by reason of findings, it is in the interests of the public that the penal sanctions under ss94, 95 and/or 96 be invoked. This approach is also followed in our consideration of the Institute's application under s99(1)(b) of the Act.
11. The onus of proof is on the Institute. The Board has held in previous decisions under the disciplinary provisions of the Act, that the appropriate standard of proof is the criminal standard of proof beyond reasonable doubt. We adopt that standard in this case.

EVIDENCE

12. Evidence in support of each application was given by Vernon Joseph Tamatea who is employed as legal counsel and compliance manager of the Institute; Graeme Carson McGlinn, Chartered Accountant and director of Grant Thornton (Christchurch) Limited, the auditor employed by the Institute to conduct an audit of the trust account of Boutique Realty and Lyn Carol Brumby, a real estate salesperson previously employed by Boutique Realty. We summarise the evidence given under the following broad headings:
 - (a) **Institute's Regulation 10 Audit**
13. Ms Mangos is the principal officer and sole director of Boutique Realty. The shares in that company are held as to 50% by Ms Mango and 50% by Mr Paul Charlesworth. The

Board's records disclose that during 2006, there were four real estate salespersons including Mr Charlesworth employed by the company. Despite follow up reminders, Boutique Realty had not filed trust account returns with the Institute since May 2006. In mid November 2006, Mr Paul Charlesworth wrote to the Institute expressing concern about the activities of Ms Mangos including possible irregularities in the operation of Boutique Realty's trust account.

14. In January 2007, the Institute engaged Grant Thornton to undertake an audit pursuant to Regulation 10 of the Real Estate Agents Audit Regulations 1977 ("the Audit Regulations"). On 18 January 2007, the Institute served notice on Ms Mangos that Mr Tamatea would attend at the premises of Boutique Realty at 451 Mt Eden Road, Mt Eden on Friday, 19 January 2007 at 9.00am to conduct the audit.
15. On his way to Boutique Realty's offices, Mr Tamatea received a telephone message to contact Ms Mangos on her cellphone. Mr Tamatea telephoned Ms Mangos who told him that she was out of Auckland and that she would not be back until 10am on Wednesday, 24 January 2007. She acknowledged that she was aware of the Institute's audit notice.
16. At 9am Mr Tamatea attended at Ms Mangos' home at 37 Peary Road, Balmoral, Auckland. He telephoned Ms Mangos' cellphone number again. It was his evidence that he could hear a phone ringing inside the residence. He spoke again with Ms Mangos who repeated her earlier advice that she couldn't do anything because she was out of town. Mr Tamatea then knocked on the door of the Peary Road property and found Ms Mangos at home. When confronted by Mr Tamatea, Ms Mangos told him she didn't have the company's records ready for audit. She said she would try to have them available by Monday, 22 January 2007 or Wednesday, 24 January 2007.
17. Mr Tamatea then visited the principal place of business of the company at 451 Mt Eden Road and discovered that the company had moved out of its premises some three months previously although no change of address had been notified to the Board. Mr Tamatea established that the company had set up in new offices at Suite 17, 6A Wagener Place, although it was unclear whether the company had ever operated from that address. Ms Brumby gave evidence that after the closure of the Mt Eden office, the company had traded from Ms Mangos' home.
18. Mr Tamatea subsequently made an appointment with Ms Mangos to conduct the audit at 1pm on Monday, 22 January 2007. When he arrived at Ms Mangos' home, he found an envelope stuck in the door addressed to him. The envelope contained a handwritten letter from Ms Mangos which read as follows:

"Vernon, I do not have all the relevant documents today - as some have been removed by a former staff member.

I am resigning today from the Institute as a licensee and branch manager and salesperson. I will send a full and correct statement to you and the Institute and Licensing Board by the end of the week.

As soon as I retrieve the relevant documents, I will let you know"

Mr Tamatea gave evidence that despite the passage of time, Ms Mangos had still not provided the books and records of Boutique Realty for audit. Furthermore, no letter of resignation had been received by the Institute or the Board nor had the statement referred to in Ms Mangos' letter, been received.

(b) Auditor's Investigations

19. Mr Charlesworth provided the Institute with copies of the bank records for the trust account of Boutique Realty held at the ASB Bank for the period from 20 April 2006 to 14 November 2006. Based on the information provided by Mr Charlesworth and as a consequence of their own investigations, the auditors uncovered a number of breaches of the Act and of the Audit Regulations.
20. The most serious matter identified related to an agreement for sale and purchase of a grocery business referred to as "Bell Block Four Square". The agreement provided for the payment of a deposit of \$50,000 to be made to the trust account of Boutique Realty on the signing of the agreement for sale and purchase. Mr McGlinn gave evidence that it appears that an initial deposit of \$10,000 was received and properly receipted into the trust account as required under s56 of the Act. A second deposit of \$40,000 was paid by the purchaser by cheque dated 21 April 2006. These funds were receipted by Boutique Realty on 4 May 2006. However, there was no record of these funds having been paid into the company's trust account.
21. At the time of the s98 hearing, the auditors had yet to establish what had happened to the second deposit. Since the s98 hearing, Mr McGlinn advised the Board that with the purchaser's authority, he had obtained a trace on the ASB Bank cheque for \$40,000 and had been able to establish that the cheque was deposited on 24 April 2006 into a joint account in the name of Ms Mangos and her husband, David George Goodwin.
22. The commission due to Boutique Realty on the Bell Block transaction was \$28,125 (being \$25,000 plus GST). The balance of the deposit of \$21,875 due to the vendors, was withdrawn from Boutique Realty's trust account on 29 May 2006. As the sum of only

\$10,000 (being the first deposit) was held in the trust account at the time, the balance paid to the vendors was funded by utilising other clients' funds.

23. This meant that the funds then remaining in the trust account were insufficient to meet the amounts due to other clients. This situation continued until 16 June 2006 when a cheque for \$11,875 was paid into the trust account. The auditors were not able to determine where these funds came from but were able to establish that they did not come from Boutique Realty's trading account. In his letter to the Institute, Mr Charlesworth stated that the payment was made from Ms Mangos' personal account.

(c) Failure to Account for Commission

24. Ms Brumby was engaged as a real estate salesperson with Boutique Realty from January 2003. In November 2006, she was involved in a conjunction sale of a property at 413 Sandringham Road with Barfoot & Thompson Limited. It was agreed that Boutique Realty was to receive 50% of the commission on the sale being \$8,423.44. Under the terms of her employment contract with Boutique Realty, Ms Brumby was entitled to receive 85% of that commission payment.
25. The contract was made unconditional on 22 November 2006 and settled on 30 November 2006. In mid December 2006, Ms Brumby contacted Ms Mangos to ask whether or not the commission had been paid. Ms Brumby gave evidence that she was told by Ms Mangos that no payment had yet been received as it had been misdirected by Barfoot & Thompson but that she (Ms Mangos) would take up the matter and make sure it was corrected. Ms Brumby subsequently tried to contact Ms Mangos on a number of occasions and left messages on her home, business and mobile phone. None of her calls were returned and Ms Brumby has never received payment of her share of the commission for the conjunctional sale. She assured the Board that there was no reason why it should not have been paid.
26. Mr McGlinn told the Board that a sum of \$8,423.44 (being the exact amount of the commission due to Boutique Realty) had been banked into the ASB trading account of Boutique Realty on or about 4 December 2006. The ASB account had subsequently been emptied and was now inactive.

CONSIDERATION

27. The Board is conscious that Ms Mangos chose not to appear and that we should view with particular caution the allegations of dishonesty made against her. The evidence however, is compelling. In relation to the Bell Block transaction, the Board finds:

- (1) Ms Mangos received the sum of \$40,000 as part of the deposit on the Bell Block Four Square sale and purchase and paid that money into her personal account.
 - (2) When the vendors were entitled to receive the balance of the deposit (after deduction of the commission due to Boutique Realty), Ms Mangos used other client funds to make up the amount payable to the vendors of \$21,875.
 - (3) The trust account was then left in an overdrawn state for 18 days until the sum of \$11,875 was paid in to cover the shortfall.
28. Ms Mangos is an experienced principal officer and the Board has not doubt that Ms Mangos was fully aware she had no right to use trust funds for her own purposes and that such conduct involved serious breaches of the Act and the Audit Regulations. Ms Mangos demonstrated a total disregard for her professional duties to the clients of Boutique Realty and by her actions, she put client funds at risk.
 29. With regard to the Regulation 10 audit, the Board is satisfied on the evidence that Ms Mangos lied to Mr Tamatea as to her whereabouts and deliberately failed to produce the books and records of Boutique Realty in a calculated and deliberate attempt to frustrate the Institute in its attempts to conduct an audit which she knew would uncover serious irregularities in the operation of the trust account.
 30. In respect of the non-payment of commission to Ms Brumby, the Board considered Ms Brumby to be a credible witness and had no difficulty in finding on the evidence, that Ms Mangos deliberately lied to Ms Brumby that the commission on the conjunctural sale had not been received from Barfoot & Thompson and subsequently misappropriated the funds due to Ms Brumby for her own use.
 31. Ms Mangos has been guilty of serious misconduct in the operation of the trust account of Boutique Realty. She has lied to the Institute and to a salesperson in the company's employ and has misappropriated funds due to that salesperson. We have no hesitation in finding that such conduct reflects adversely on the character of Ms Mangos. In these circumstances, the Board is satisfied that the grounds set out in s94(1)(b) and (c) and in s99(1)(b) have been met and that it is in the interests of the public that the licence of Boutique Realty be cancelled (s94(1)(b) and (c)) and that the certificate of approval held in the name of Ms Mangos be cancelled or that Ms Mangos be suspended (s99(1)(b)).
 32. Before turning to consider the issue of penalty, we note that the Institute also raised questions of effective control. The Board had serious concerns as to whether Ms Mangos was in effective control, particularly after the company left its premises at 451 Mt Eden

Road, Mt Eden, however in view of our findings above, we do not propose to consider whether there has been any breach of s94(1)(ca) of the Act.

PENALTY

33. We have given careful consideration to the penalty which should be imposed on Boutique Realty and Ms Mangos. Members of the public have to be able to trust that a real estate agent will properly account at all times for moneys paid to that agent in respect of any real estate transaction in accordance with ss56 and 57 of the Act and the Audit Regulations. Furthermore, members of the public must be able to rely at all times on the honesty and integrity of all members of the industry. In this case, Ms Mangos has been found to have misused trust funds and to have acted dishonestly in her dealings with the Institute and Ms Brumby. We wish to make it clear that we will not condone such conduct in any circumstances.
34. Ms Mangos has offered no explanation for her conduct. Taking into account the Board's previous decisions and our findings set out above, we are firmly of the view that the appropriate penalty in respect of each application is cancellation and a fine. We accordingly order that:
 - (b) the real estate agent's licence held in the name of Boutique Realty Limited be and is hereby cancelled and that the company pay the maximum monetary penalty of \$5,000;
 - (c) the certificate of approval as a real estate salesperson issued in the name of Suzanne Carol Mangos be and is hereby cancelled and that Ms Mangos pay the maximum monetary penalty of \$750.

Payment of the penalty in each case is to be made to the Board within 30 days of service of this decision on each respondent.

COSTS

35. The Institute has sought an order for costs. Pursuant to s105 of the Act, the Board after hearing any complaint under the disciplinary provisions of the Act, may make such order as to costs as it thinks fit. In the present case, the Institute has been successful and the Board is satisfied that it is entitled to costs on each application under s94 and s99 of the Act and earlier application for interim suspension under s98 of the Act.
36. The Institute is to file a memorandum as to costs with the Board within 21 days of receipt by the Institute of this decision. We direct that the memorandum be served on each of

the respondents. Any memorandum in reply by the respondents is to be filed and served within a further 14 days from the date of service of the memorandum. The Board will then consider the application for costs on the papers.



A A Sinclair
Chairperson