

REAL ESTATE AGENTS LICENSING BOARD

No. 2007/599

IN THE MATTER	of an application under s99 of the Real Estate Agents Act 1976
APPLICANT	REAL ESTATE INSTITUTE OF NEW ZEALAND INC.
RESPONDENT	LINCOLN WU also known as LI NONG WU

HEARING: 9 November 2006

DECISION: 26th April 2007

APPEARANCES: Mr T D Rea for the applicant
Mr A H Waalkens QC and Ms A L Credin for the respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

INTRODUCTION

1. This is an application by the Real Estate Institute of New Zealand Incorporated ("the Institute") for an order cancelling the certificate of approval as a real estate salesperson held in the name of Lincoln Wu also known as Li Nong Wu. The Institute relies upon the grounds set out in s99(1)(a) and (b) of the Real Estate Agents Act 1976 ("the Act"), namely that:
 - (a) since the issue of the certificate of approval, Mr Wu has been convicted of a crime involving dishonesty; and/or
 - (b) having regard to his character, it is in the public interest that Mr Wu's certificate of approval be cancelled or that Mr Wu be suspended.
2. This application came before the Real Estate Agents Licensing Board ("the Board") on 9 November 2006. No evidence was called by either party. Mr T D Rea appeared for the

Institute and Mr A H Waalkens QC and Ms A L Credin for Mr Wu. Counsel for both parties made submissions.

LEGAL ISSUES

3. Section 99 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) 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 \$750.00. "

4. Section 2 of the Act defines a "crime involving dishonesty" under s99(1)(a) as being:

"Any crime described in Sections 101 to 105, Section 108 to 117 and Sections 217 to 292 of the Crimes Act 1961."

5. In *Sime v The Real Estate Institute of New Zealand Incorporated* (High Court, Auckland M73/86, 19 August 1986) Tompkins J considered what is required to establish the grounds set out in s99(1)(b)). He said:

"There are two aspects that call for consideration.

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."

6. In respect of the application under s99(1)(a), it was acknowledged by counsel for Mr Wu that Mr Wu had been convicted in 1994 and 2005 of crimes falling within the definition of "crime involving dishonesty" contained in s2 of the Act.
7. In relation to the application under s99(1)(b), applying the approach adopted in *Sime* (supra), it was further accepted that the grounds set out in s99(1)(b) had been established, namely that Mr Wu's conduct reflected adversely on his character and that it was in the interests of the public that Mr Wu's certificate of approval as a real estate salesperson be cancelled or that Mr Wu be suspended. The submissions of counsel were therefore directed solely to penalty.

FACTUAL BACKGROUND

8. On 22 November 1994, Mr Wu was convicted of assault and fined \$100 together with court costs of \$95. He was further convicted and fined \$200 together with court costs of \$95 and reparations of \$30 for stealing jewellery valued at \$350. The Board heard that these charges related to an incident on 25 June 1994 when Mr Wu was employed as a taxi driver. A dispute arose over the non-payment of a fare and Mr Wu took a necklace from one of the passengers.
9. On 30 November 1994, a certificate of approval as a real estate salesperson was issued to Mr Wu by this Board. It appears that neither the Board nor the Institute was made aware of Mr Wu's criminal convictions at the time the application was granted. Since 1994, Mr Wu has been employed as a real estate salesperson by Profile Realty Limited, In the Zone Limited (a member of the Harcourts Group) and most recently, by Metro City Limited trading as Remax Metro City.
10. On 4 November 2005, Mr Wu was convicted in the Auckland District Court of three counts of uttering a forged document under s257(1) of the Crimes Act 1961 and four counts of producing a misleading document to an immigration officer under s142(1)(c) of the Immigration Act 1987. Mr Wu was sentenced by the Court on 22 February 2006. The fines imposed were amended at a subsequent hearing on 1 March 2006. On each of the

offences under the Crimes Act, Mr Wu was fined \$8,000 and in respect of each of the offences under the Immigration Act, he was fined \$20,000. The total amount of the fines imposed was \$104,000. Mr Wu was also ordered to pay costs to the Immigration Department of \$5,000.

11. These convictions related to events occurring between January and April 2003. In his sentencing notes, Judge S G Lockhart QC described the offending in the following terms:

- [4] The offending under the Immigration Act occurred when you provided to the Immigration Service documents filed in support of applications for four non-residents for various forms of immigration status, three of those cases was for residence in New Zealand and the fourth was a work permit. You provided, in support of the three applications in respect of residency, employment information details of two businesses in which you were involved, Pacific Asian Corporation Limited and Harcourts in the Zone Limited. You knew that the information contained in those forms was false and misleading. The fourth application you provided the form in your own handwriting, you must have known that that information was false and misleading.
- [5] Other documents filed in support of the three applications included forged letters, purported to be letters of reference from the accountant and were offered in support of Pacific Asian Corporation Limited as employers. Each of those three letters were forgeries and by the jury's verdicts you were found guilty of personally being involved in the uttering of those forgeries to the Immigration Service.

His Honour went on to considering the aggravating features of Mr Wu's offending and said:

- [7] There are aggravating features in that particularly the uttering offences were designed to mislead the Immigration Service and resulted in the applicants acquiring resident permits in such circumstances that those permits might not otherwise have been granted. You must know, from your own personal experience, that the immigration system relies on the truthfulness of information supplied to it. The Immigration Department has a tremendous workload, does not necessarily have the ability to check all applications so there is an element of trust which the Immigration Department relies upon that the information it is supplied is correct.
- [8] You deliberately circumvented the operation of the system set up by a country which has actually been very good and very kind to you. That system relies on accurate information and by this offending, in the way that you did, it can be said that you abused a position of trust.

12. As to mitigating features, His Honour noted:

- [9] It is hard to ascertain any mitigating features. Possibly the fact that you did not seek or obtain any financial gain distinguishes your case from a number of other reported cases of similar offending. It cannot be

denied that you were fully involved in the provision of quite a substantial number of documents to the Immigration Service, which were either false or misleading.

13. Following Mr Wu's sentencing, the Institute lodged the present application.

SUBMISSIONS

14. Both counsel made lengthy submissions which are summarised below.

(a) Submissions on behalf of the Institute

15. Mr Rea submitted that there were a number of aggravating features relating to Mr Wu's conduct, in particular:

- 15.1 Mr Wu's offending was of a serious nature. Four of Mr Wu's convictions were for crimes involving dishonesty as defined in s2 of the Act namely, theft in 1994 and three convictions in 2005 for using forged documents. All of Mr Wu's other 2005 convictions were for offences which, while not coming within the definition of "*crime involving dishonesty*", were as a matter of fact, offences that involved dishonesty by Mr Wu.
- 15.2 The dishonest conduct did not occur in the course of Mr Wu's real estate activities but the provision by Mr Wu of false information in relation to alleged offers of employment by In the Zone Limited involved his employer and was an abuse of the position of trust as an employee. There was also an element of abuse of trust towards the Immigration Department which necessarily relies upon the accuracy of the information supplied to it.
- 15.3 All of Mr Wu's convictions followed pleas of not guilty. The sentencing notes record Mr Wu's attempt to minimise his involvement in the fraudulent activity.
- 15.4 Mr Wu's activities had resulted in applicants acquiring permits in circumstances where the applications might otherwise have been declined.
- 15.5 Although there was no evidence of payments having been made to Mr Wu, the Judge observed that Mr Wu nevertheless benefited by having people who were permitted to be employed by him, who might not otherwise have been granted that permission.
- 15.6 The conduct leading to the 2005 convictions occurred in 2003. At that time, Mr Wu was 43 years old so it cannot be said that his offending was youthful.

- 15.7 Judge Lockhart QC observed in his sentencing notes that Mr Wu's offending was protracted. The "deceptions and falsities" relating to the convictions were repeated over a three and a half month period between January and April 2003.
- 15.8 A substantial period of time had passed between Mr Wu's convictions in 1994 and his subsequent convictions in 2005 however, it was significant that Mr Wu's subsequent offending also included crimes involving dishonesty, indicating a continuation of the serious character flaw evidenced by Mr Wu's earlier offending.
16. By way of mitigating factors, Mr Rea submitted:
- 16.1 Mr Wu had not previously been the subject of disciplinary proceedings however, this may be simply the result of the Institute being unaware of his earlier offending.
- 16.2 There was no evidence of financial gain to Mr Wu from his offending.
17. Mr Rea referred the Board to previous decisions where there had been convictions for crimes of dishonesty but acknowledged that all differed from the present case. The most analogous decision was **Suresh Ganesh**, No. 97/450 in which (by a majority) the Board suspended Mr Ganesh for 20 months and imposed a fine of \$750.00 together with costs. Mr Ganesh's convictions for dishonesty offences had followed guilty pleas. Further, in this case, there was an additional factor being Mr Wu's previous dishonesty conviction.
18. Mr Rea submitted that in all the circumstances, the appropriate penalty was an order for cancellation of Mr Wu's certificate of approval.
- (b) Submissions on behalf of Mr Wu**
19. Mr Waalkens submitted that Mr Wu, to his credit, has accepted both the convictions and sentence imposed by not pursuing an appeal. He was penalised by a substantial fine which he had since paid. Further, although his offending was of a serious nature, it did not involve an "immigration scam" and Mr Wu did not receive any personal financial gain or benefit. This distinguished the case from other cases involving similar offending where a term of imprisonment has been imposed.
20. Mr Waalkens submitted that Mr Wu's involvement in the offences was minimal. He did not provide the forged document to the Department. Three of the four "employment information details" forms were not completed by him but were merely signed by him. The information which was found to be misleading, namely the date of registration of the company and the GST number were details consistent with a low degree of culpability or

deception on Mr Wu's part. Mr Waalkens noted that the registration date that was put on each of the four forms was the original date of registration of Mr Wu's company, Asia Pacific Limited. This company was removed from the Companies Register in 1995 and reregistered in 2002. In regard to the GST number, the number used was Mr Wu's IRD number not the company's GST number. In these circumstances, he submitted that the misleading aspects were minor and the convictions in this regard were highly technical.

21. All four applications to the Immigration Department were related to the business of Asia Pacific Limited and not to Mr Wu's real estate interests. Harcourts' name was mentioned on two of the applications but all the details were for Asia Pacific Limited. The two references to Harcourts were in error.
22. Mr Waalkens told the Board that Mr Wu was remorseful and assured the Board that there is no prospect of any repeat of these matters. He submitted that other than the 1994 convictions, Mr Wu was previously of good character. He has not been the subject of any complaint to the Institute during the period in which he has been employed as a real estate salesperson.
23. Mr Waalkens set out Mr Wu's personal circumstances and also produced a number of references including references from solicitors and work colleagues. All spoke positively of Mr Wu's honesty and integrity.
24. Mr Waalkens submitted that this was not a case where the protection of the public required cancellation of Mr Wu's certificate of approval. Instead he submitted that an appropriate penalty was a period of suspension and a fine.

PENALTY

25. We have given careful consideration to the matter of penalty taking into account the helpful submissions of counsel, the observations made by Judge Lockhart QC in his sentencing notes and previous decisions of this Board.
26. Mr Wu has been found guilty of a number of serious offences under the Crimes Act 1961 and Immigration Act 1987 which we have detailed above. By his criminal conduct, Mr Wu has demonstrated a lack of honesty and integrity which reflects adversely on his character and on his fitness to be employed as a real estate salesperson. Mr Wu's offending in 2005 occurred over a period of three and a half months and at a time when Mr Wu was 43 years old.
27. The Board has consistently said that the public must be able to rely upon the honesty and integrity of those involved in the real estate industry and the Board will not condone

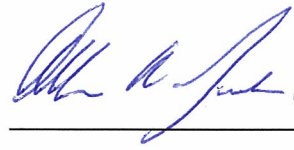
dishonest conduct by any real estate salesperson. In these circumstances, we have given careful consideration as to whether the appropriate penalty in this case is one of cancellation.

28. In reaching our decision, we take into account that Mr Wu's offending did not occur during the course of his real estate agency activities and further, that Mr Wu did not receive any personal financial benefit from his wrongdoing. We also take into account that Mr Wu has been employed in the real estate industry since 1994 and has not previously been the subject of disciplinary proceedings.
29. We are of the view that Mr Wu's conviction in 1994 for theft was of a minor nature and totally unrelated to his subsequent offending in 2005. Furthermore, we do not consider that the later offending demonstrates any serious character flaw or propensity to re-offend.
30. We are satisfied that this is not a situation where the cancellation of Mr Wu's certificate of approval is necessary in the public interest. Instead, we are of the view that the appropriate penalty is a lengthy period of suspension and a fine.
31. In **Ganesh** (supra), which we accept is the most similar decision of this Board, Mr Ganesh had pleaded guilty to a total of seven offences under the Crimes Act 1961. Four of these offences involved using or attempting to use a finance application for the purpose of obtaining a pecuniary advantage while the remaining three involved using an agreement for sale and purchase knowing that the purchase price had been altered with intent to defraud. The offending was real estate related (occurring in relation to Mr Ganesh's personal real estate activities) and Mr Ganesh stood to gain financially from his fraudulent conduct.
32. Taking into account all matters, we are of the view that an appropriate period of suspension in this case is 18 months. The Board accordingly makes an order pursuant to s99(1) of the Act suspending Mr Wu as a real estate salesperson for a period of 18 months. The period of suspension is to commence seven days after the date of service of this decision on Mr Wu. Further, the Board orders that Mr Wu pay the maximum fine which the Board is able to impose under s99(4) of \$750.00. This fine is to be paid to the Board within 30 days following the date of service of this decision.

COSTS

33. Pursuant to s105 of the Act, the Institute is entitled to costs on the application. If the parties cannot agree, then the Institute is to file and serve a memorandum as to costs

within 21 days of the date of service of this decision. Any memorandum in reply is to be filed 14 days after service of the Institute's memorandum.



A A Sinclair
Chairperson