

REAL ESTATE AGENTS LICENSING BOARD

Decision No. 2007/614

IN THE MATTER of an application to the Real
Estate Agents Licensing Board
under Section 99 of the Real
Estate Agents Act 1976

APPLICANT **REAL ESTATE INSTITUTE OF
NEW ZEALAND
INCORPORATED**

RESPONDENT **GRAEME ESMOND SAWYER**

HEARING: 15, 16 and 17 October 2007 at Napier

DECISION: 23 November 2007

COUNSEL: S J E Moore and M Mann for the Applicant
R Fowler for the Respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

A A Sinclair (Deputy Chairperson), K Coakley, P Dudding, M Giera and J Harnett-Kindley

1. The respondent ("Mr Sawyer") is the holder of a certificate of approval as a real estate salesperson. The applicant ("the Institute") has lodged an application under section 99(1)(b) of the Real Estate Agents Act 1976 ("the Act") to cancel the certificate or to suspend Mr Sawyer on the grounds that having regard to his character, it is in the public interest that the certificate be cancelled or that he be suspended.
2. The Institute allege in relation to an agreement for sale and purchase of a property at 74 The Esplanade, Westshore, Napier, that Mr Sawyer:
 - (a) knowingly breached the provisions of s63 of the Act by failing to obtain the consent of the vendor on the prescribed form to the proposed purchase of the property by Mr Sawyer and his wife; and

- (b) deliberately misrepresented to the vendor the background and circumstances of the offer in an email sent by Mr Sawyer to the vendor on 7 November 2003.

FACTUAL BACKGROUND

(a) 74 The Esplanade

3. Ms Debra Leask owned a property at 74 The Esplanade, Westshore, Napier consisting of two separate units ("the Property"). Ms Leask has lived in Australia since 1992 and both units were tenanted. In September 2003, she decided to sell the Property and on advice from a relative, Ms Leask contacted John Payne of CD Realty (HB) Limited, a member of the Bayleys Group ("CD Realty (HB)"). There was no listing price recorded on the listing agreement however, Ms Leask giving evidence by way of videolink from Queensland, told the Board that she had intended the listing price to be \$400,000. Ms Leask's father had power of attorney in respect of the Property and Ms Leask instructed Mr Payne to deal directly with him.
4. On 25 October 2003, Ms Leask emailed Mr Payne inquiring as to whether there had been any interest shown in the Property. Subsequently, on 29 October 2003, Mr Payne rang Ms Leask and advised that he had an offer on the Property for \$220,000. He also commented that the purchaser thought the Property needed a lot of work done on it. Ms Leask made it clear that she was not interested in an offer at that level. Mr Payne replied that maybe he could push the buyer to \$230,000. Ms Leask confirmed that the price was \$400,000 and instructed Mr Payne not to take \$200,000 buyers to view the Property. She subsequently confirmed these instructions to Mr Payne in an email dated 30 October 2003.
5. On 5 November 2003, Ms Leask contacted Mr Payne and requested a copy of "the contract" to be faxed to her in Australia. By the contract, Ms Leask had meant the listing agreement. Instead of this agreement, she received by fax, two pages of an agreement for sale and purchase of the Property at an offering price of \$230,000. The purchasers named in the agreement were Graeme Esmond Sawyer and his wife, Judith Ann Sawyer. Ms Leask subsequently became aware that Mr Sawyer was in real estate and was residential sales manager at CD Realty (HB). As a consequence of making this discovery, Ms Leask instructed Mr Payne to cancel the listing. Her email to Mr Payne dated 6 November 2003 read as follows:

"John

Please take my property off your listing. I believe Graeme Sawyer is a Sales Manager with Bayleys and is seeking to buy cheap rental properties.

After telling you of other unethical agents I have had to deal with in the past with my properties, I now find you no better. I will be seeking advice from REINZ on this matter."

6. On 7 November 2003, Ms Leask received a reply email written by Mr Sawyer which we set out in full below:

"I am extremely concerned by the tone of your EMAIL and the accusation that we are unethical. You need to check out your facts before making such allegations.

For your information John Payne got a Valuer from Telfer Young to your property to get a better idea on the value. In comparing it with the three next door that recently sold and what the front one was worth on that property he was convinced that the value sat at \$230,000 to \$240,000 max.

This is mainly because of the condition of your flats in that the outside cladding is lifting and represents a likely major problem because of the "leaky building" syndrome which is prevalent throughout the country and is very topical at present.

Advice from a texture company in Napier suggests the cost of rectifying the problem at around \$8,000 to \$10,000 per Unit. Besides there has been nothing done to the interior carpets and décor for many years and badly needs a major re-dec. All of these things taken into account reveals that the value is indeed around the \$230,000 to \$240,000.

Besides, you may not be aware that as a licensed real estate salesperson I am legally required to furnish you with an independent registered valuation within 14 days of the purchase to show that we are not ripping anyone off. The other main point you should be aware of is that Telfer Young are a very reputable firm and would not dare risk their reputation on under valuing properties. Likewise our reputation at Bayleys is paramount and mine and John's as well so would never, and I repeat never for one minute attempt to rip anyone off. I believe you owe us an apology forthwith. If you don't wish to leave your property with us to sell that's fine, but don't dare suggest we are trying to rip you off.

Yours faithfully

Graeme Sawyer
Residential Manager"

7. This was the only communication which Ms Leask had with Mr Sawyer.
8. Mr Sawyer became a real estate salesperson in 1992 having previously spent 28 years as a member of the NZ Police. He holds a certificate of approval as a branch manager and is an Associate of the Institute. In February 2003, he was employed by

CD Realty (HB) as residential sales manager. Mr Sawyer's responsibilities included supervision of the residential sales staff and development of that division. The role was a non-selling one for which Mr Sawyer was paid a salary and bonus.

9. In October 2003, Mr Sawyer owned two rental properties and was considering the purchase of a third. He became aware of the Property which Mr Payne had listed for sale. Mr Sawyer discussed the Property and its value with Mr Payne. It was Mr Sawyer's evidence that during the course of this conversation Mr Payne had commented that he had spoken to Trevor Kitchen (a registered valuer who was known to both men) who had referred to the sale of three units on the other side of the driveway to the Property for \$430,000. Mr Sawyer could not recall whether Mr Payne told him that Mr Kitchen considered the Property was worth \$240,000 or thereabouts but said that was the inference that he had taken from the discussion.
10. Following this discussion, Mr Sawyer had visited the Property with his wife and Mr Payne. It was his evidence that the exterior of the units needed some work and the Spraycote cladding was peeling and lifting off at the joins and in other places. The back stairs were rotting and both units were overdue for painting. They were able to inspect one of the units and Mr Sawyer observed that the carpet was worn and the interior decoration including the bathroom and kitchen, needed to be modernised.
11. Mr Payne also gave evidence. There was some difference between Mr Sawyer and Mr Payne as to whether Mr Payne had informed Mr Sawyer during this inspection that the vendor's price expectation was around \$400,000. Mr Sawyer told the Board that he suffered a measure of hearing loss and that if Mr Payne had made this statement, he did not hear him.
12. Mr Sawyer considered the possibility of making an offer for the Property. He made enquiries of two exterior cladding companies as to the likely cost of repairing the exterior cladding. Mr John Hanlon, who was then managing director of Hawkes Bay Fibrous Plasters, gave evidence that he had advised Mr Sawyer that it would cost approximately \$8,000 - \$10,000 per unit to repair and fix the cladding. Together with the decorating of the interior, Mr Sawyer told us that he estimated that the costs of remedial work could be up to \$80,000. He was also concerned that there may be water ingress issues. After discussing the matter, Mr & Mrs Sawyer decided to make an offer for the Property at \$220,000 and Mr Sawyer told Mr Payne of their intention. Mr Payne informed Ms Leask of this offer in their telephone conversation on 29 October 2003 but did not identify the purchaser. He disagreed with Ms Leask's recollection of the phone call and told us that he said he may be able to get the buyer

to pay more. He commented that in view of Ms Leask's price expectation, another \$10,000 would not have been enough.

13. The following day Mr Sawyer completed an agreement for sale and purchase for the Property. The purchase price was \$220,000 and the offer was conditional on a builder's inspection and suitable finance. Mr Sawyer told us that he saw this as an opening offer and expected to have to pay in the mid 200s for the Property. As well, Mr Sawyer gave evidence that he prepared the form prescribed under s63(2) of the Act ("the Prescribed Form") for execution by Ms Leask as vendor and placed the documents in an envelope marked for John Payne's attention. It was Mr Payne's evidence that when he received the written agreement, the Prescribed Form was included.
14. Mr Payne subsequently told Mr Sawyer that the vendor would not accept an offer of \$220,000. Mr Sawyer said that he would increase the offer to \$230,000. He took the envelope back from Mr Payne and he and his wife initialled the amendments. Mr Sawyer believed it was the next day that he returned the envelope to Mr Payne.
15. When Mr Sawyer next saw Mr Payne, which he thought was the following day, Mr Payne told him that the \$230,000 offer would not be acceptable either. He explained that the vendor's expectations were something close to \$400,000. Mr Sawyer told us that this was the first time that he understood that Ms Leask's expectations were at that level. He knew he could not possibly meet that figure and withdrew the offer.
16. No written offer for the purchase of the Property by Mr & Mrs Sawyer was ever formally presented by Mr Payne to Ms Leask or her father.
17. On 5 November 2003, Mr Payne faxed to Ms Leask the front and back pages of the Sawyer agreement. What followed was the exchange of emails set out in paragraphs 5 and 6 above. Mr Sawyer told us that when he saw the email from Ms Leask, he was (to use his words) "incensed". He was concerned about the slur on CD Realty (HB) and on him personally. In particular, he resented any suggestion that he had tried to "rip off" the vendor. He told the Board that his offer was based on a genuine estimate on his part of the worth of the Property. Furthermore, the offer was accompanied by the Prescribed Form which protected the vendor's interests.
18. With regard to the statements made in paragraph 2 of the email as to the position of Mr Kitchen, Mr Sawyer told the Board that he genuinely believed that Mr Kitchen had provided some views as to the value of the Property. He acknowledged that to say

that a valuer "was convinced that the value sat at \$230,000 - \$240,000" may have gone beyond what Mr Kitchen had said to Mr Payne.

19. Mr Payne told us that he had not discussed the Property with Mr Kitchen but he did have a discussion with him sometime before October 2003 regarding the neighbouring property and believed that he would have told Mr Sawyer of Mr Kitchen's view of the value of that property.
20. The email makes references to the value for the Property as being in the \$230,000 - \$240,000 range. The Board heard evidence from three local valuers, Mr Trevor Kitchen of Telfer Young (Hawkes Bay) Limited, Mr Frank E Spencer of Logan Stone Limited and Mr Terrence Rawcliffe of Rawcliffe & Co. Mr Kitchen told us that while he had not inspected the Property, he believed its market value in October 2003 was approximately \$240,000. Mr Rawcliffe on behalf of Mr Sawyer, assessed the market value on 30 October 2003 at \$255,000 and in March 2004 at \$355,000. In his valuation, he had taken into account the poor state of maintenance of the Property. Mr Spencer for the Institute, assessed the market value in November 2003 at \$345,000 but acknowledged that he had not taken the condition of the Property into account in his valuation which he commented, may account for the difference between his valuation and that of Mr Rawcliffe. Mr Kitchen and Mr Rawcliffe also gave evidence of the rising property market through this period. Investment properties were in keen demand.
21. Having cancelled the listing agency with CD Realty (HB), Ms Leask subsequently listed the Property with Napier Real Estate Limited, a member of the Professionals Group. Ms Julie-Anne Barnes was the listing salesperson. The Property was listed in November 2003 for \$400,000 and subsequently sold in early March 2004 for \$369,000.
22. In December 2004 Ms Leask made a complaint to the Institute about the activities of Mr Sawyer and Mr Payne. Mr Carty, principal officer of CB Realty (HB) told the Board that when he had got out the file to answer the complaint, the Prescribed Form was on it.

(b) 4 Ngarimu Crescent

23. Evidence was given of an unrelated transaction which involved the purchase by Mr & Mrs Sawyer in December 2003 of a property at 4 Ngarimu Crescent, Taradale which had been listed by Ms Virginia Wilson, a real estate salesperson with CD Realty (HB).

It was asserted by the Institute that this transaction demonstrated the procedure which Mr Sawyer in fact adopted when complying with the requirements of s63.

24. In this case, the agreement for sale and purchase which was prepared included an additional clause (clause 14), headed "Consent for Real Estate Agent to take interest in property". Under cross examination, Ms Wilson acknowledged that the clause had been inserted by her and not by Mr Sawyer.
25. Mr Sawyer told the Board that while he had used the Prescribed Form when he had prepared the agreement for sale and purchase for the Property, he considered that the procedure adopted for compliance with s63 was up to the salesperson handling the sale and his only concern had been to ensure that the requirements of s63 had in fact been addressed. (The wording of clause 14 was taken from a CD Realty (HB) booklet of helpful clauses in use at the time. The use of such a clause is not in accordance with s63(2) of the Act which provides that consent is to be given on the Prescribed Form separate from the agreement. Mr Carty told us that the clause has since been removed from the booklet).
26. The Institute further asserted in relation to this transaction that Mr Sawyer had delayed putting up advertising signage at the property allegedly to enable him to have time to advance his own purchase offer in the interim. The property was listed on 9 December 2003. Ms Wilson gave evidence that Mr Sawyer had offered to put up a sign on the property on Friday, 12 December 2003 but that one of the vendors had said it had still not been erected by the following Sunday. Mr Sawyer did not recall offering to put up the sign but said he regularly did this to assist salespersons at their request. He did not believe that there had been any delay in erecting the sign. From a photograph annexed to the registered valuation (obtained by Mr Sawyer in order to satisfy the requirements of s64), it was clear that the sign was in place when the registered valuer visited the house on 16 December 2003. As well as signage on the property, advertisements were also placed in the Property Guide and internet on 12 December 2003.
27. This particular allegation was not pleaded in the s99 application and presumably has been raised simply as an attack on Mr Sawyer's credibility. The Board was not satisfied that there had been any delay or that if there had been delay, it was deliberate on Mr Sawyer's part in order to obtain an advantage for himself in the sale process. Indeed, it is an absurd proposition. Mr Sawyer knew that other advertising had been placed and in these circumstances, no possible advantage could have been

obtained by not putting a sign on the Property. In view of our findings, we do not propose to refer to this transaction again.

FINDINGS: 74 THE ESPLANADE

28. It was the Institute's submission that from a combination of factors for example, the circumstances of the offer, the price offered, the alleged misrepresentations made in the email of 7 November 2003 to Ms Leask and the procedure for compliance with s63 adopted in relation to the Ngarimu Crescent purchase, it could be inferred that Mr Sawyer had deliberately omitted to disclose his interest in the offer to purchase the Property in breach of s63 of the Act. It follows from this submission that the Prescribed Form produced in evidence must be a fabrication and have been added to the file at a later stage, either by Mr Sawyer alone or in concert with Mr Payne.
29. Over a three day period, the Board heard evidence from eleven witnesses and received written evidence from one other witness. Mr Sawyer and Mr Payne in particular, were subject to careful cross examination by Mr Moore and the Board had ample time to assess their credibility. Both Mr Sawyer and Mr Payne remained firm in their evidence that the Prescribed Form was completed by Mr Sawyer at the time he completed the agreement for sale and purchase and the documents were then given to Mr Payne and the Prescribed Form then remained with the agreement. While we accept that there were some inconsistencies in the evidence of both men, such inconsistencies are not surprising after 4 years and were not in relation to matters which the Board considered to be significant. Mr Payne appeared under subpoena. The Institute went to considerable lengths to discredit his evidence however, the Board found him to be a reliable and careful witness. Both Mr Sawyer and Mr Payne answered questions in an open and frank manner and we consider each of them to be credible witnesses.
30. We are satisfied on the evidence that the Prescribed Form was not a fabrication but that it had been completed at the same time as the agreement for sale and purchase and given to Mr Payne. We are further satisfied that Mr Sawyer had every intention of complying with the provisions of ss63 and 64 of the Act. In his email to Ms Leask of 7 November 2003, Mr Sawyer refers specifically to s64. It makes little sense that he would be drawing Ms Leask's attention to his obligation to provide a registered valuation if he had not complied already with s63.
31. The Institute further contend that in his email of 7 November 2007, Mr Sawyer deliberately misrepresented the background and circumstances of the offer in order to conceal his earlier breach of s63 and low offer price. In support of this allegation, the

Institute relies in particular on the representations contained in paragraph 2 of the email that Mr Payne had a valuer go to The Esplanade property and that the valuer was "convinced" the value of the property sat at \$230,000 - \$240,000.

32. This email was written in reply to Ms Leask's earlier email to Mr Payne of 6 November 2003. Mr Sawyer acknowledged to the Board that he was wrong in his recollection of his discussion with Mr Payne and accepted that Mr Kitchen had not visited the Property or made any statement as to the value of the Property. It is regrettable that Mr Sawyer did not take the time to check with Mr Payne however, we accept that he was angry and the email was written in haste. We are satisfied that in making these statements, Mr Sawyer did not deliberately lie or intend to mislead Ms Leask as to the value of the Property. Mr Sawyer had already withdrawn his offer and Ms Leask had cancelled the listing agreement. We have previously found that Mr Sawyer had complied with s63 of the Act. There was simply no need for him to cover up a low price as suggested by the Institute. As Mr Sawyer states later in the email, if the offer had proceeded, he would have been required to furnish a registered valuation pursuant to s64 of the Act and if that valuation had been higher, the sale and purchase agreement would have been voidable at Ms Leask's option. It is also worthy of note, that Mr Kitchen told the Board that he considered a fair valuation for the Property at that time was in fact \$240,000 being the figure stated in the email so that there was in fact no misrepresentation as to the value itself.
33. Much has been made of the price of \$369,000 achieved on the eventual sale of the Property in March 2004. It was clear from the valuation evidence that over this period, there was a rapid increase in the value of property in the Hawkes Bay.

CONSIDERATION

34. In *Sime v The Real Estate Institute of New Zealand Incorporated* (High Court Auckland, M73/86, 19 August 1986) Tompkins J considered that the requirements necessary to establish the grounds set out in s99(1)(b) of the Act.

"There are two aspects that call for consideration.

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

... 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.

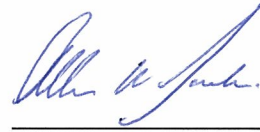
The second aspect is that the type of character the person must be shown to have must be such that it is in the public interest that the certificate be cancelled or the person suspended. The adverse qualities in his character relied on must be measured against the public interest in his continuing or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

35. In the present case, the Board has found that Mr Sawyer complied with s63 of the Act and provided the Prescribed Form when he prepared the sale and purchase agreement and gave it to Mr Payne. When Mr Sawyer subsequently found out that Ms Leask was expecting a sale price for the Property of \$400,000, he withdrew the offer. In the normal course, that should have been the end of the matter.
36. Unfortunately through a misunderstanding, the front and back pages of that agreement were faxed by Mr Payne to Ms Leask. The Prescribed Form which had accompanied the agreement was not sent. Mr Sawyer had no knowledge of these events. In turn, Ms Leask had no knowledge that Mr Sawyer had provided this form when she sent her email of 6 November 2003.
37. Ms Leask eventually sold her property in March 2004 for \$369,000. The property market through this period was rising at a rapid rate so that an offer price of \$220,000 (which Mr Sawyer acknowledged was an opening figure) in October 2003, viewed retrospectively, may appear unreasonably low.
38. The Board has given careful consideration to this application and we are unanimously of the view that there are no aspects of Mr Sawyer's conduct in this transaction which reflect adversely on Mr Sawyer's honesty or integrity. There was no direct evidence of any wrongdoing by Mr Sawyer at all. Instead, we were invited to draw inferences from various events and circumstances which simply could not be drawn. The Institute is well aware of the threshold that it is required to meet in respect of applications under s99(1)(b) of the Act as set out in *Sime* (supra). In this case, it has fallen woefully short of meeting that threshold. The application is dismissed accordingly.

COSTS

39. Pursuant to s105(a) of the Act, the Board awards costs to Mr Sawyer on the application. If the parties cannot agree on those costs, then counsel for Mr Sawyer is to file and serve a memorandum as to costs within 14 days of the date of service of

this decision. Any memorandum in reply is to be filed and served 7 days after service of that memorandum. The Board will then consider the application on the papers.



A A Sinclair
Deputy Chairperson