REAL ESTATE AGENTS LICENSING BOARD

No. 2007/616

IN THE MATTER	of an application under s99 of the Real Estate Agents Act 1976
APPLICANT	**REAL ESTATE INSTITUTE OF NEW ZEALAND INC.**
RESPONDENT	**DAVID CAMERON MCNEILL**
	Respondent

HEARING:	30 October 2007 at Dunedin
DECISION:	12th December 2007
APPEARANCES:	Mr S N Haszard for the applicant Mr L A Anderson for the respondent

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DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

Hon W P Jeffries (Chairperson), P Dudding, M Giera, D Russell and J Harnett-Kindley

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INTRODUCTION

The Real Estate Institute of New Zealand Incorporated ["the Institute"] is required by the Real Estate Agent's Act 1976 ["the Act"] to consider complaints made by members of the public against people authorised to participate in the sale of real estate. In the event of the Institute concluding that sufficient justification exists in respect of a complaint, the Institute may apply to the Real Estate Agents Licensing Board ["the Board"] under Part VII of the Act, seeking either cancellation of the license or cancellation of the certificate of approval of the salesperson.

The events giving rise to the disciplinary application in this matter occurred in the first half of 2003. The original complaint of 18 December, 2003 of the former client of the approved salesperson's Mr David McNeill was dismissed by the Institute. Subsequent complaints on

26 May, 2005 and 18 August, 2005 were also dismissed by the Institute and it was not until the final complaint of 23 February, 2007 made by the former client, Mr Stuart Dean and his father Alan Dean that the Institute acted to bring the present application before the Board.

The Department of Inland Revenue's 2006 investigation and prosecution of the respondent, Mr David Cameron McNeill leading to his guilty plea and conviction on 21 February, 2007 for providing misleading information in his G.S.T. return in relation to the real estate transaction under examination in these proceedings (which occurred on 31 July, 2003) provides some explanation for the long delay in bringing the facts before this Board in a disciplinary proceeding. Evidence used by the Department was relied upon by the Institute to decide to commence disciplinary proceedings against Mr McNeill. Normally in similar summary jurisdictions, limitation periods exist. The purpose of a limitation period is to stimulate prosecutorial authorities into taking necessary action in the interests of the timely resolving of issues involving the imposition of penal sanctions. Long delay can leave complainants without resolution; long delay can create injustice for those charged because the penalties if warranted have to be considered, as in this case, almost five years after the critical events.

DECISION

For reasons set out, the Board does find that Mr McNeill's conduct in the particular transaction warrants either suspension or cancellation of his certificate of approval and in accordance with relevant High Court authority, will resume the hearing in this matter to consider penalty. An inevitable consequence of the Board's findings which will be set out is that the complainant unjustifiably lost the benefit of the true market value of his former property. This Board does not have statutory power to award compensation. However, should Mr McNeill choose to accept the Board's findings and to voluntarily reach some form of settlement with the complainant, such a factual consideration will be taken into account when the Board assesses penalty following submissions from the parties at the resumed hearing.

EVIDENCE

Mr Stuart Dean is the complainant. In 2002, his company, Whitestone Fine Furniture Limited was the registered proprietor of land and buildings located at 364 Thames Highway, Oamaru. Mr Dean is a joiner and maker of furniture. He used the premises as his factory and as a shop.

Mr Dean outlined his decision on 5 November, 2002 to appoint Oamaru Real Estate Limited as sole agent (to 31 March, 2003) to sell his business and property, relying upon the skills of the experienced respondent in these proceedings, Mr David McNeill. At all material times, Mr McNeill holds the legal status of a holder of the certificate of approval to act as a salesperson. Mr McNeill is also the joint owner of Oamaru Real Estate Limited.

The original listing price to sell the business and property was $100,000 plus G.S.T. Because of a lack of interest, Mr Dean decided to sell just the building and land with the hope that he might be able to continue his business as a lessee of any purchaser. On this changed basis, he indicated to Mr McNeill, that he would accept $70,000 plus G.S.T. and extended the sole agency to 31 May, 2003.

Mr McNeill secured on 23 April, 2003, a conditional purchaser for $65,000 but the contract failed on 30 April, 2003 because of Mr Dean's disagreement with the offered terms of a future lease of the building.

Mr Dean then verbally withdrew the property from the market.

In the first week of May, 2003, Mr McNeill contacted Mr Dean, visiting his shop and told him that there was an inquiry from a potential purchaser from Timaru who might be interested.

Mr Dean claimed in his evidence that Mr McNeill suggested that this particular buyer "might be interested" in purchasing the property for $120,000. Mr Dean testified as to his elation at the prospect of such a sale after six disappointing months.

Counsel for Mr McNeill, Mr Anderson, cross examined Mr Dean on this point of his evidence, for the reason that Mr McNeill, in his brief of evidence, claimed that Mr Dean in a telephone conversation in discussing whether to return his property to the market stated that, unless a purchaser paid $120,000, he (Mr Dean) was not interested. The first evidential issue is whether Mr Dean was given the figure of $120,000 or whether the figure of $120,000 was determined by Mr Dean himself?

The Board finds that Mr Dean's recollection is the more credible. Mr Dean's financial position was difficult and he was prepared to enter into a conditional agreement for sale and purchase of the property earlier in the year for $65,000. The bank of Mr Dean imposed financial pressures on him and six months of marketing had been fruitless. Mr McNeill had correctly ascertained that the prospective purchaser was motivated to buy and at that stage was

encouraging Mr Dean to return the property to the market. The Board finds that Mr McNeill set the figure of $120,000 knowing the willingness of the purchaser.

Later, on 6 May, 2003, the prospective purchaser Mr Simpson inspected the property with Mr McNeill. Mr Dean inquired of Mr McNeill about Mr Simpson's intentions. Both Mr Simpson's and Mr McNeill's evidence coincide to the extent that Mr Simpson was not prepared to pay $120,000 at this time.

But a major difference in evidence emerges at this point of the time-line. Mr McNeill claims that Mr Simpson discarded the property at this time on the ground of its location outside the central business district. Mr Simpson evidenced that his sole concern at this time was the stated refusal of the vendor to negotiate a sale and purchase at any figure less than $120,000, particularly, when Mr Simpson needed to expend funds upgrading the property.

The Board finds that Mr Simpson's evidence on this issue is the more credible. Mr Simpson returned to the property with his father for a second inspection. Mr Simpson needed a commercial property in Oamaru. In providing his evidence and in cross examination, the Board found that Mr Simpson was a direct man. Whilst not wanting to pay $120,000, Mr Simpson needed premises in Oamaru and he was a willing purchaser and in fact was the ultimate purchaser.

Therefore, the Board finds that Mr McNeill communicated two different explanations of the vendor's position and the prospective purchaser's position to each other. These two different explanations are:

Mr Dean was an obstinate vendor unwilling to sell below $120,000, as told to Mr Simpson by Mr McNeill.

Mr Simpson was unwilling to consider buying a commercial property outside the central business district, as told to Mr Dean, by Mr McNeill.

On the basis of Mr McNeill's misinformation concerning Mr Simpson's intentions to buy, Mr. Dean finally withdrew the property from the market and ended his sole agency listing with Mr McNeill's real estate business on 17 May, 2003.

On the basis of Mr McNeill's misinformation concerning Mr Dean's obstinacy as to sale price, Mr Simpson also withdrew from the sale process.

Mr McNeill relied upon the documentary record of a telephone message from Mr Simpson to his business timed at 4:03pm on 16 May, 2003 which stated:

> "The shop in north end wasn't suitable but if you have any new ones, please let [him] know".

What does "not suitable" mean in this factual context?

Mr Simpson's explanation is that at $120,000, the property was not viable as some $70,000 to $80,000 needed to be expended in order to make the building suitable for the purposes of Mr Simpson's flooring business. As later events prove, the property in its location was suitable for Mr Simpson. The not suitable means the "fixed" price of $120,000 was not "suitable".

Mr Dean evidenced that after he took the property off the market on 17 May, 2003. Mr McNeill some weeks later, visited him at the shop and after discussing the possibility of a sale to someone from the North Island, told him that as he had come into some money, he was interested in buying the property "privately". Mr McNeill invited Mr Dean to set a price which he did a few days later at $85,000. Mr McNeill responded by organising an electrician to investigate the wiring of the building and on the basis that monies needed to be expended, offered to buy at the sum of $80,000. Mr Dean counter offered verbally in the sum of $82,500 which was accepted by Mr McNeill who then arranged for a contract to be prepared and referred to Mr Dean's solicitor.

The 12 June, 2003 agreement for sale and purchase is before the Board as an exhibit. The further terms of sale provide for the vendor to lease for the sum of $60 per week a defined portion of the premises. An express term of the contract is:

> "The vendor accepts and acknowledges that the purchaser is a real estate agent".

S.63 and S.64 of the Real Estate Agent's Act control the purchase of real estate by an authorised person in circumstances where the vendor has commissioned a licensee to sell.

A licensed real estate agent (and its employees) owes fiduciary duties to the members of the public who commission the licensee to sell. A cardinal characteristic of the fiduciary relationship is the requirement to act in the best interests of the client. If a conflict emerges, the law requires the fiduciary to subordinate their own interests, to the interests of the client. This is the distinguishing mark of a professional relationship, in contrast to general

commercial contractual relationships where the terms of the bargain, in themselves, do not usually warrant judicial intervention.

To preserve the benefits of the fiduciary relationship, sections 63 and 64 allow a person authorised to sell real estate to buy from the commissioning vendor, provided two conditions are met: the vendor must know the identity of the purchaser and the vendor must be provided with an independent market valuation of the property in order to be separately and properly informed prior to signing the sale and purchase agreement. A form of acknowledgement defined in the statutory regulations must be signed by the vendor, see Form 15, First Schedule, Real Estate Regulations, 1977.

As regards, the first of these conditions, Mr McNeill ensured that Mr Dean acknowledged in the contract that he (Mr Dean) was aware of the legal status of Mr McNeill. Such a provision is not a substitute for completion by the vendor of a Form 15 document.

The second condition involving an independent valuation of the property was not met. After acquiring the property for $82,500 from Mr Dean, who was granted a one year lease to continue to operate his business from the property at a moderate rent of $3,120.00 per year, a figure less than 5 per cent of capital paid ($82,500), Mr McNeill began renovations on the property. Mr McNeill did not attempt compliance by providing Mr Dean with an independent valuation.

According to Mr McNeill's evidence, on 6 July, 2003, Mr Simpson contacted him renewing his interest in the property. This fact underlines the willingness of Mr Simpson and undermines the contention of Mr McNeill that Mr Simpson was only interested in the central business district of Oamaru.

Mr McNeill responded to Mr Simpson by preparing a sale and purchase agreement and travelling to Timaru to make personal contact with Mr Simpson.

Mr Simpson evidenced two visits to him by Mr McNeill. Mr McNeill claims a single visit.

There is no difference between the witnesses Mr McNeill and Mr Simpson that the contract for the sale of the property was signed showing the price at $85,000 Mr Simpson adduced documentary evidence demonstrating that he withdrew the sum of $24,000 cash from a bank account on 8 July, 2003. Mr Simpson and Mr McNeill agree that they both reached an agreement that the nominal purchase price would be supplemented by a cash amount of $24,000. Mr McNeill claims that he only received $17,000 cash despite the arrangement

being for the payment of $24,000. Mr Simpson evidenced that after discussion with an adviser, he paid in full the sum of $24,000 cash to Mr McNeill.

Those authorised to participate in the sale and purchase of real estate, perform an important role in the land transfer statutory scheme. It is important that certificates of title in New Zealand's land registration system are accurate in all respects. Transfers of ownership are accomplished by the registration of a memorandum of transfer certified as being "correct" by the purchaser's solicitor. The actual consideration paid is shown on the memorandum. This public information is vital. This Board will not tolerate licensees or authorised persons to participate in real estate transactions which could adulterate the integrity of the land transfer system. Artificial legal documents which do not correspond with the facts of the transaction are wrong.

Mr McNeill's counsel adduced an independent valuation of the property assessed as at 1 June, 2003 at $81,000, a date prior to the sale in June 2003. This expert opinion evidence is provided four years after the event. Whilst referring to similar locations, according to the standard methodology of real estate valuations, the report does not record the 8 July, 2003 sale by Mr McNeill to Mr Simpson's entity, Simo Enterprise for the nominal sum (as expressed in the contract) of $85,000, due to the artificiality of fixing a 1 June, 2003 date. The Board does not place any weight on this particular evidence.

The fact that Mr McNeill's purchase of 12 June, 2003 occurred more than a month after Mr Dean took the property off the market is without legal significance in relation to Mr McNeill's obligations under S.63 and S.64 of the Act.

Exhibit "B" is the standard form listing form of Oamaru Real Estate Limited and incorporates a common provision of such authorisations. Under vendor "commission fees" the real estate agent preserves its ability to recover commission from a vendor who, after de-listing, sells to a person introduced to the property by the agent.

Applying the reasoning of this provision allowing the real estate agent to recover commission attributable to an introduction of a purchaser to the vendor during the time of listing, it follows that the agent continues to be obliged to observe the requirements of the statute in relation to the agent's own purchase of a property introduced to the agent in circumstances of a fiduciary relationship. Any alternative position would allow agents to escape their fiduciary duties by waiting for the expiration of the listing and then buying and selling later with persons introduced during the currency of the listing.

DISCLOSURE TO MR DEAN

Before Mr McNeill's settlement on the sale of the property to Simo Enterprise, being the entity under the control of Mr John Simpson for a total consideration of $109,000 (accepting that $24,000 cash was paid by Mr Simpson to Mr McNeill), Mr Dean continued to occupy the premises under the terms of his lease agreement with Mr McNeill.

According to Mr Dean, Mr Simpson rang him to ask him how much he had sold the property to Mr McNeill for. Mr Dean said $82,500. When Mr Simpson advised Mr Dean that he had purchased the property from Mr McNeill, Mr Dean asked whether the purchase price "was around $120,000". Mr Dean testified that Mr Simpson replied that the figure was "close to that".

A few days later, Mr McNeill visited Mr Dean at the premises. According to Mr Dean, Mr McNeill stated that he had sold the property and on the inevitable question for how much, he answered $85,000. Mr McNeill arranged for the same moderate terms of lease to continue under new ownership.

SUMMARY

Two principal facts stand out. Firstly, Mr McNeill's conduct as the original real estate agent for Mr Dean and his subsequent purchase for $82,500 of the property shortly after the listing terminated, breached S.63 and S.64 obligations owed by Mr McNeill to Mr Dean.

Secondly, Mr McNeill's surreptitious sale to Mr Simpson less than four weeks later for the increased price of $109,000 compounded the breach of his obligations of a fiduciary character owed to Mr Dean. The misrepresentation as to the consideration paid contained in the memorandum of transfer required for the purposes of the Land Transfer Act further compounds the wrong committed by Mr McNeill. Therefore, the test set out by S.99 (1) (b) is met.

The Department of Inland Revenue prosecution and conviction in respect of the tax implications has directly penalised Mr Dean.

Extensive character references for Mr McNeill reveal an otherwise reputable, competent middle-aged person authorised to engage in the business of real estate.

As for the complainant, Mr Steven Dean, the Board observed an honest man who trusted Mr McNeill to act for him in circumstances of financial pressure. Later, Mr Dean suffered an illness related to his economic difficulties.

According to the Sime v. Real Estate Institute Incorporated decision, the Board directs the Registrar to arrange a date of hearing with the Institute and Counsel for Mr McNeill to consider penalty.

Hon W P Jeffries
Chairperson

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/624

IN THE MATTER	of an application under s99 of the Real Estate Agents Act 1976
APPLICANT	**REAL ESTATE INSTITUTE OF NEW ZEALAND INC.**
RESPONDENT	**DAVID CAMERON MCNEILL**
	Respondent

HEARING:	18 February 2008 at Dunedin
DECISION:	10 March 2008
APPEARANCES:	Mr S N Haszard for the applicant Mr L A Anderson for the respondent

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DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

Hon W P Jeffries (Chairperson), P Dudding, M Giera, D Russell and J Harnett-Kindley

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INTRODUCTION

The Real Estate Agents Licensing Board ["the Board"] refers to its decision of 12 December 2007.

At the separate hearing as to the penalty, the Real Estate Institute of New Zealand ["the Institute"] submitted that the cumulative affect of what its Counsel, Mr S N Haszard described as "significant aggravating features", warrants the cancellation of Mr McNeill's salesperson certificate.

According to the Institute, the five features were breach of trust, motivated self-interest, financial loss, the duration and breadth of the misrepresentation and misconduct central to agency practice.

Mr Anderson, Counsel for Mr McNeill, called an expert witness Mr Perkins to confirm his opinion that the market valuation of the property at the time of Mr McNeill's purchase from Mr Dean in 2003 was $ 81,000. The Institute did not seek to challenge this valuation by the cross examination of the expert witness.

Mr Anderson, in written submissions, argues that as "full value was paid for the property at the time"..... [of the purchase by Mr McNeill] because the contracted price was similar to the expert's opinion as to market valuation, Mr Dean did not suffer financial loss warranting suspension or cancellation of Mr McNeill's ability to work as an approved salesperson in real estate.

Mr Anderson also, correctly pointed out that the current practice with memoranda of transfers used to register sales for the purpose of the Land Transfer Act, is not to include the consideration paid in the key document and the Board received a copy of the transfer corroborating this fact.

Regarding the expert evidence, the ultimate issue for the Board is whether a below market sale was conducted by Mr McNeill. For reasons set out in the original decision, the Board finds that in fact, Mr McNeill did so participate in a below market sale in circumstances where he was legally bound to provide an independent market valuation.

Mr McNeill's references demonstrate that he has earned the high regard of people who have known him over a long period of time, including satisfied clients. The long time of uncertainty before and since the hearing is also taken into account by the Board.

The Board is bound by the High Court decision of Simes. Mr McNeill attempted to hide the truth of his sale of Mr Dean's former property. This conduct on the part of Mr McNeill satisfies the Simes test of "character".

Weighing the necessity for the Board to uphold in the public interest, the standard of fiduciary obligation owed by a salesperson, including in this case a salesperson who used to act in a listed capacity but had recently ceased to do so, the Board finds that suspension is justified.

Therefore, Mr McNeill may not gain approval to act as a salesperson for eighteen months from the date of this decision.

The Institute claims sixty percent re-imbursement of its costs and a disbursement of $28,738.13 and $6,041.87. Such calculation results in the figure of $20,868.00.

Mr Anderson provided written submissions arguing that the proper costs owed ought to be $10,000 inclusive of disbursements. Mr Anderson refers to High Court practice regarding costs and disbursements. Mr Anderson refers to the use of Auckland solicitors.

The scheme of the Real Estate Agents Licensing Act establishes an industry-supervised regime with enforcement responsibilities vested in the Real Estate Institute of New Zealand Incorporated. Party to party costs in private civil litigation differs from the statutory context of these disciplinary proceedings. The Institute uses two legal firms of solicitors to perform its legal enforcement services and costs may well be saved out of specialist advice.

As all members of the Real Estate Institute of New Zealand contribute to the enforcement costs of the Institute, those who are in default, cannot escape having to contribute to properly incurred costs of prosecution. The Board therefore, upholds the Institute's claim of $20,868.00 inclusive of disbursements inclusive of GST and orders payment to the Institute by Mr McNeill.

Hon W P Jeffries
Chairperson

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV 2008-412-000294

BETWEEN	DAVID CAMERON MCNEILL Appellant
AND	REAL ESTATE INSTITUTE OF NEW ZEALAND INCORPORATED Respondent

Hearing: 6 June 2008

Counsel: L A Andersen for Appellant
S N Haszard for Respondent
No appearance by or on behalf of Real Estate Agents Licensing Board (abides decision)

Judgment: 25 June 2008

JUDGMENT OF HEATH J

This judgment was delivered by me on 25 June 2008 at 9.30am pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
David Polson Lawyer, PO Box 5547, Dunedin
Meredith Connell, PO Box 2213, Auckland
Simpson Grierson, Private Bag 92518, Auckland
Counsel:
L A Andersen, PO Box 5117, Dunedin

Introduction

[1] Mr McNeill worked as an "approved salesperson" for Oamaru Real Estate Ltd, a licensed real estate agent. A series of complaints were made to the Real Estate Institute of New Zealand Inc (the Institute) about Mr McNeill's conduct in acquiring a property from a client who had, in November 2002, given a sole agency to Oamaru Real Estate Ltd to effect a sale of a commercial property. Complaints were made on 18 December 2003, 26 May 2005 and 18 August 2005, but the Institute did not act on them.

[2] On 21 February 2007 Mr McNeill pleaded guilty, in the District Court at Oamaru, to providing misleading information to the Department of Inland Revenue in a GST return which, in part, included claims arising out of the relevant property transaction. Following Mr McNeill's conviction, the Institute applied to the Board for an order cancelling his certificate of approval. The application was made under s 99(1) of the Real Estate Agents Act 1976 (the Act). On such an application, the Board had power not only to cancel the certificate but also to suspend the salesperson or impose a monetary penalty not exceeding $750: s 99(1)(b) and (4).

[3] On 12 December 2007, the Board concluded that "Mr McNeill's conduct in the particular transaction warrants either suspension or cancellation of his certificate of approval". Applying *Sime v Real Estate Institute of New Zealand Inc* (High Court, Auckland M73/86, 19 August 1986, Tompkins J), the Board adjourned questions of penalty for determination following another hearing. In a subsequent decision, given on 10 March 2008, the Board suspended Mr McNeill from holding a certificate of approval for a period of 18 months from the date of that decision.

[4] Mr McNeill appeals against the suspension order. He appeals also against an order for costs made against him. An appeal to the High Court lies from a decision of the Board that suspends a salesperson: s 112(2)(c).

Background to the inquiry

[5] On 5 November 2002, a property at 364 Thames Highway, Oamaru was listed for sale by Mr Stuart Dean, as director of the registered proprietor, Whitestone Fine Furniture Ltd. Oamaru Real Estate Ltd was granted a sole agency. Mr Dean dealt with Mr McNeill.

[6] Initial attempts to sell the property were unsuccessful. In May 2003, while the property was on the market, Mr John Simpson, a businessman from Timaru, made an inquiry with Mr McNeill. Despite some discussions between them, no transaction was concluded. The sole agency was terminated soon after those discussions.

[7] After the sole agency was terminated, Mr McNeill expressed an interest in acquiring the property personally. He spoke to Mr Dean. As a result of what transpired, Whitestone sold the property to Mr McNeill. The property was sold for $82,500, plus GST (if any). Mr McNeill's acquisition was evidenced by an agreement for sale and purchase dated 12 June 2003.

[8] Mr McNeill ascertained (whether before or after he bought the property from Whitestone is in dispute) that Mr Simpson's interest in the property had been rekindled. An agreement for sale and purchase, dated 8 July 2003, discloses that Mr McNeill sold the property to a company operated by Mr Simpson for a purchase price of $85,000. The stated purchase price was false. Mr Simpson had agreed to pay an additional sum of $24,000 to Mr McNeill.

[9] As a result of the misleading GST return that Mr McNeill completed for the period after settlement of the sale to Mr Simpson, he was prosecuted for knowingly providing false or misleading information in a GST return for the six months ending 30 September 2003. Mr McNeill was sentenced, on 21 February 2007, to pay a fine of $600, together with Court costs and a solicitor's fee.

[10] Although both Mr Dean and Mr Simpson entered into contractual arrangements through companies they operated, for convenience I refer to them individually.

The Board's decisions

[11] With respect, it is not easy to identify the precise reasons that led the Board to conclude that Mr McNeill's conduct justified suspension of the certificate of approval he held. The problem lies in the lack of explicit reasoning. However, in agreement with Mr Haszard, for the Institute, I consider that the rationale for the decision can be reconstructed readily from the Board's two decisions.

[12] The relevant facts were traversed extensively in the first decision of 12 December 2007. Having heard Mr Dean and Mr McNeill give evidence about what occurred, the Board preferred the evidence of Mr Dean to that of Mr McNeill. Similarly, on critical issues, the Board preferred the evidence of Mr Simpson to that of Mr McNeill.

[13] Mr Simpson's first involvement was in May 2003 when he made an inquiry about the property to Mr McNeill. Mr McNeill relayed his interest to Mr Dean. Mr Dean and Mr McNeill agreed that the possibility of the potential buyer acquiring the property for $120,000 was discussed, though they disagreed as to which of them first mooted that price. The Board found Mr Dean's evidence more credible and held that Mr McNeill informed Mr Dean of the figure of $120,000, "knowing the willingness of the [proposed] purchaser".

[14] Mr Simpson inspected the property with Mr McNeill. Both Mr Simpson and Mr McNeill gave evidence that Mr Simpson was not prepared to pay $120,000 at that time.

[15] However, an important evidential conflict did arise between Mr McNeill and Mr Simpson. Mr McNeill's evidence was that Mr Simpson was not prepared to pursue purchase of the property because it was located outside the central business district. On the other hand, Mr Simpson deposed that his sole concern was

information conveyed by Mr McNeill to him that the vendor was not prepared to negotiate a sale at a figure less than $120,000. The Board accepted Mr Simpson's evidence on this issue.

[16] In accepting the evidence of both Mr Dean and Mr Simpson on critical points, the Board found that Mr McNeill had communicated different explanations of the vendor's and prospective purchaser's positions when talking to the other. It found that Mr McNeill told Mr Simpson that Mr Dean "was an obstinate vendor unwilling to sell below $120,000", while Mr Dean was told that "Mr Simpson was unwilling to consider buying a commercial property outside the central business district".

[17] On the basis of what was conveyed to him by Mr McNeill, Mr Dean withdrew the property from the market and terminated the sole agency listing on 17 May 2003. As a result of what he was told by Mr McNeill, Mr Simpson's interest in the property waned.

[18] Mr Dean gave evidence, accepted by the Board, that some weeks after the property was de-listed, Mr McNeill visited him to discuss the possibility that he might buy the property "privately". A sale price of $82,500 was agreed shortly afterwards. An agreement for sale and purchase was entered into on 12 June 2008.

[19] Mr McNeill's evidence was that the first he knew of Mr Simpson's "renewed" interest in acquiring the property was on 6 July 2003. Mr McNeill and Mr Simpson met on 8 July. Mr Simpson gave evidence that they agreed that their written agreement for sale and purchase would not reflect accurately the price paid for the property. Mr Simpson produced documentary evidence to demonstrate that he withdrew the sum of $24,000, from a bank account on 8 July 2003. The agreement was signed on the same day.

[20] In taking the view that Mr McNeill's role in the transaction amounted to conduct that might justify cancellation or suspension of his certificate of approval, the Board relied on Mr McNeill's position as a fiduciary to Mr Dean during the course of the agency and what it termed "a surreptitious sale" to Mr Simpson's

company, less than four weeks after Mr McNeill had purchased the property for $82,500.

[21] The Board took the view that Mr McNeill had breached obligations owed to Mr Dean under ss 63 and 64 of the Act. In the course of the penalty decision given on 10 March 2008, the Board said:

> Weighing the necessity for the Board to uphold in the public interest, the standard of fiduciary obligation owed by a salesperson, including in this case a salesperson who used to act in a listed capacity but had recently ceased to do so, the Board finds that suspension is justified.
>
> Therefore, Mr McNeill may not gain approval to act as a salesperson for eighteen months from the date of this decision.

[22] The Board also ordered Mr McNeill to pay costs to the Institute. He was directed to reimburse 60% of the actual costs and disbursements that the Institute had incurred. The amount ordered was $20,868.

The competing contentions

[23] Mr Andersen, for Mr McNeill, advanced three grounds of appeal. He submitted:

a) The Board erred in determining that Mr McNeill's conduct on the two transactions justified suspension of his certificate of approval.

b) The Board erred in failing to apply s 99 of the Act in a manner that accorded with the two-stage process identified in *Sime v Real Estate Institute of New Zealand Inc.*

c) The Board erred in awarding costs and disbursements in favour of the Institute.

[24] Mr Andersen's primary submission, on the suspension appeal, was that, at the time Mr McNeill sold the property to Mr Simpson, he owed no fiduciary obligation

to Mr Dean and, therefore, was entitled to enter into the profitable contract with Mr Simpson's company.

[25] Mr Haszard submitted that that:

a) Mr McNeill had deliberately misled both Mr Dean and Mr Simpson, when Mr Simpson first expressed an interest in acquiring the Thames Highway property. He submits that the Board found that Mr McNeill intended to thwart a transaction because he intended to purchase the property himself in the future.

b) Mr McNeill concealed the true purchase price paid by Mr Simpson by a series of deliberate misrepresentations: namely,:

i) Mr McNeill misrepresented the actual purchase price on the agreement for sale and purchase evidencing his sale of the property to Mr Simpson's company;

ii) Mr McNeill misrepresented, to Mr Dean, the purchase price he received from Mr Simpson for the property

iii) Mr McNeill misrepresented, to Oamaru Real Estate Ltd, the purchase price he received from Mr Simpson for the property and

iv) Mr McNeill misrepresented, to the Inland Revenue Department, the true purchase price paid to him, for GST purposes.

[26] Mr Haszard submits that the deliberate actions of Mr McNeill, both in attempting to prevent Mr Dean from acting on the original approach from Mr Simpson and in lying about the true purchase price go to "character" and justify the Board's decision to suspend Mr McNeill.

The appellate approach

[27] The correctness of the premise from which Mr McNeill's and the Institute's respective arguments proceed is critical to the disposition of the appeal. Therefore, my first task is to determine what factual findings were made by the Board and whether they were reasonable findings open to it.

[28] While this is an appeal from a specialist tribunal (see the composition of the Board set out in s 4(2) of the Act), this Court's role, on appeal, is to determine whether the Board reached correct findings of fact and correctly articulated and applied controlling legal principles: see *Austin-Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC). Elias CJ, delivering the judgment of the Supreme Court, said:

> [5] The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case. (footnote omitted)

Mr McNeill's conduct

[29] Was it open to the Board to prefer the evidence of Messrs Dean and Simpson to that of Mr McNeill? Mr Andersen submitted that the findings were against the weight of evidence. In particular, he submitted that "on critical acceptance of Mr Dean's evidence [was] remarkable in light of the fact that he was established to be incorrect in his claim that he signed a new lease with Mr Simpson", Mr Andersen submitted that that error demonstrated that Mr Dean did not have a "clear recollection" of relevant events.

[30] In my view, there was evidence on which the Board was entitled to act to make its factual findings.

[31] Mr Dean gave evidence that he spoke to Mr McNeill when he first approached Oamaru Real Estate Ltd to list the property at 364 Thames Highway. The original listing was at $100,000, though later financial hardship led to the asking price being reduced to $70,000. Subsequently, an agreement to sell for $65,000 was reached but it was conditional on an acceptable lease-back arrangement. No such agreement was reached and that sale could not proceed. Mr McNeill's evidence was consistent with Mr Dean's general description of those early events.

[32] Mr Dean deposed that he intended to take the property off the market when the proposed sale for $65,000 did not proceed. He said that Mr McNeill persuaded him to keep it on the market, due to the interest expressed by someone from Timaru. Mr Dean said that Mr McNeill suggested that he should ask for $120,000 on a sale to the Timaru party. Mr Dean says that his response was to tell Mr McNeill "if you can get $120,000 for it, go for it".

[33] Mr McNeill's evidence, in contrast, was that Mr Dean wanted to take the property off the market and terminate the agency. He says that he expressed an interest in buying the property which Mr Dean declined. After receiving a telephone call from Mr Simpson on 6 May 2003, Mr McNeill says he asked Mr Dean if he could show him around the property. Mr McNeill's evidence was that Mr Dean told him he was not interested unless the purchaser would pay $120,000 for it. Mr McNeill said that he told Mr Simpson the price was $120,000 but added that he did not tell Mr Simpson the price was non-negotiable.

[34] Mr Simpson's evidence was that, after looking at the building, he was told by Mr McNeill that Mr Dean wanted $120,000 for it. Mr Simpson said:

> I thought it was a bit rich and said to [Mr McNeill] "can we negotiate on that" and [Mr McNeill] was quite sure at that time that the person selling wouldn't negotiate and I thought "well, it's the first building I've had a look at, I'll see what else is around".

[35] Mr Dean described being told by Mr McNeill that Mr Simpson was not interested in buying the property because "the place isn't big enough". He says that Mr McNeill did not mention anything about the purchase price being in issue. Mr Simpson said that he was not troubled by the location of the building but was concerned about the cost involved in making it suitable for his purposes. Mr McNeill denied telling Mr Dean that Mr Simpson was concerned about the size of the building.

[36] That ended the phase of dealings involving a potential sale of the building to Mr Simpson. It is striking that Mr McNeill's evidence was, on material issues, in conflict with both that of Mr Dean and Mr Simpson. In the absence of any foundation to assert collusion between Mr Dean and Mr Simpson, those material discrepancies would be enough to justify the Board preferring Mr Dean's evidence to Mr McNeill's on disputed questions of fact arising during this phase of the transaction.

[37] After Mr Simpson decided not to make an offer, Mr Dean took the property off the market. Initially, he suggested that part of the building be sub-leased, but he said he got a "cold" response from Mr McNeill to that proposition. About a week later, Mr McNeill approached him and said that he had come into some money and would be interested in acquiring the property. After a little bargaining, they agreed on a figure of $82,500. Mr McNeill's evidence is not directly in conflict with that explanation, though he reports having shown the building to a prospective tenant and indicating to Mr Dean that he could use part of the premises for a low rental.

[38] Mr McNeill was adamant that, at the time he acquired the property, he did not know that Mr Simpson remained interested in it. On Mr McNeill's evidence, Mr Simpson's interest, fortuitously, was renewed after he became registered proprietor. That evidence, particularly given the earlier conflicts with both Mr Dean and Mr Simpson, required careful scrutiny because of the close proximity of the two agreements: Mr Dean's agreement to sell to Mr McNeill was entered into on 12 June 2003 while Mr McNeill's agreement to sell to Mr Simpson was signed less than one month later, on 8 July 2003.

[39] Mr Simpson's evidence was that, after looking for another property for some five or six weeks, he contacted Mr McNeill again to ask if other buildings had come on the market or, if not, whether it would be possible to reconsider acquisition of the Dean property. He says that Mr McNeill told him there were no other buildings available and that Mr Dean's property was no longer on the market.

[40] About a week later, Mr Simpson says that he received a telephone call from Mr McNeill to say "it possibly could be on the market". When Mr McNeill visited Mr Simpson in Timaru, Mr Simpson says he was told that Mr McNeill then owned the building. Mr Simpson described Mr McNeill as looking and sounding "very nervous".

[41] Mr McNeill suggested that the agreement be structured in a manner that would not disclose the total purchase price on the face of the signed agreement for sale and purchase. Mr Simpson says he was "taken aback" but, after speaking to his lawyer, he agreed to proceed in the manner discussed. The cash payment of $24,000, in addition to the $85,000 figure to be shown on the agreement for sale and purchase, was agreed.

[42] Significantly, a few days after the agreement was signed, Mr Simpson telephoned Mr Dean to express disappointment that he was not able to negotiate a price when he had looked at the building earlier and told Mr Dean that he did not think he "had been particularly well looked after" by Mr McNeill. That conversation alerted Mr Dean to what had occurred.

[43] Mr McNeill's evidence conflicted with that of Mr Simpson. He suggested that Mr Simpson had telephoned him on a number of occasions seeking to persuade him to sell.

[44] I have no hesitation in concluding that the Board had more than ample reason to reject Mr McNeill's evidence and to act on the evidence of those witnesses considered credible and reliable.

[45] Given the consistent nature of the evidence of Mr Dean and Mr Simpson, neither of whom had any reason to testify falsely to support each other, it was open to the Board to act on their evidence.

Did the Board err in holding that Mr McNeill's conduct justified suspension?

[46] Mr Andersen began his submissions by referring to the 12 particulars on which the Institute relied in its application to the Board to cancel Mr McNeill's certificate of approval. I gained the impression that Mr Andersen was concerned that Mr McNeill had not had an opportunity to properly answer the central issue on which the Board based its decision: whether the potential sale to Mr Simpson was known to Mr McNeill at the time he acquired the property from Mr Dean.

[47] It is clear, however, from the opening submissions of counsel for the Institute before the Board, that the complaint was always that Mr McNeill compromised his integrity when dealing with both Mr Dean and Mr Simpson. Mr Haszard, who also acted for the Institute before the Board, submitted to it:

> 20. ... His integrity has been compromised by the fact that he used knowledge, gained through his fiduciary relationship with Mr Dean, for his own personal benefit. He put his desire to make a capital gain ahead of acting in Mr Dean's best interest as his sales representative, and as a result, has shown his character to be lacking the desired qualities of a trustworthy salesperson.

Mr Haszard buttressed that submission by reference to aggravating features relating to what he termed Mr McNeill's attempts to conceal his actions from Mr Dean, his employer and the Department of Inland Revenue. The fundamental allegations of impropriety were squarely before the Board.

[48] Having regard to the findings it made, was the Board entitled to conclude that Mr McNeill's conduct was such as to justify cancellation or suspension of his certificate of approval?

[49] Mr Andersen submitted that the Board erred in finding that Mr McNeill breached ss 63 and 64 of the Act. Those sections are designed to constrain agents or

their employees from obtaining benefits from transactions involving land in respect of which, previously, an agency relationship has existed.

[50] Sections 62 and 63 provide:

> **62 Real estate agent to have written contract of agency**
>
> No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him [or her] as a real estate agent, unless—
>
> (a) He or she was the holder of a licence as a real estate agent under this Act or the holder, or the partner of a holder, of a licence as a real estate agent under the Real Estate Agents Act 1963 at the time of the performing of the service or work; and
>
> (b) His or her appointment to act as agent or perform that service or work is in writing signed either before or after the performance of that service or work by the person to be charged with the commission, reward, or consideration or by some person on his or her behalf lawfully authorised to sign the appointment.
>
> **63 Purchase or lease by agent voidable**
>
> (1) No real estate agent shall, without the consent on the prescribed form of his or her principal, directly or indirectly and whether by himself or herself or by any partner or sub-agent,—
>
> > (a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which he or she is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or
> >
> > (b) Sell or lease to his or her spouse, civil union partner, de facto partner, or child any such land or business.
>
> (2) No partner or employee of a real estate agent and no officer of a company that is a real estate agent shall, without the consent on the prescribed form of the principal of the real estate agent, directly or indirectly,—
>
> > (a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which the real estate agent of whom he or she is a partner or by whom he or she is employed, or of which he or she is an officer, is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or
> >
> > (b) Sell or lease to his or her spouse, civil union partner, de facto partner, or child any such land or business.

> (3) Any contract made in contravention of this section shall be voidable at the option of the principal. No commission shall be payable in respect of any such contract, whether the principal has avoided it or not; and any commission paid in respect of the contract shall be repayable by the real estate agent to his or her principal and shall be recoverable by the principal as a debt.

[51] At the time Mr McNeill acquired the property the sole agency granted in favour of Oamaru Real Estate Ltd had been terminated. On the Board's findings, termination occurred on 17 May 2003, just under a month before the agreement for sale and purchase between Whitestone and Mr McNeill was signed.

[52] I agree with Mr Andersen that ss 62 and 63 have no application to transactions which occur after an agency agreement has been terminated. In any event, ss 62 and 63 set out statutory consequences which arise from what the law would regard, in any event, as the breach of a fiduciary duty owed by an agent to his or her principal. Accordingly, in my view, the question of Mr McNeill's conduct is better examined by reference to any fiduciary obligations he owed. Mr Haszard did not suggest otherwise.

[53] It is clear that the Board was conscious of the fiduciary relationship and the need for "the fiduciary to subordinate [his] own interests, to the interests of the client": at p.5 of the decision of 12 December 2007. Also, in the penalty decision, the major factor influencing the decision to suspend related to the standards required of fiduciaries, including those who had ceased to act recently "in a listed capacity" at p.2.

[54] Mr Andersen's argument stands or falls on the dual propositions that

a) Mr McNeill did not know of Mr Simpson's continuing interest in the property at the time he acquired it from Mr Dean and,

b) once he had acquired the property on settlement, he owed no further fiduciary obligation to Mr Dean.

[55] On the other hand, Mr Haszard submits that Mr McNeill deliberately used information obtained in his capacity as an agent for his own benefit, in breach of his fiduciary obligations to the principal.

[56] The basic propositions of law are clear and settled. In Laws NZ, *Agency* at para 67, the learned author says:

> **67. Use of information acquired in agency.**
>
> *It is the duty of an agent to employ the materials and information obtained by reason of the agency solely for the purposes of the agency and not to use them so as to make a personal profit. This arises as part of the agent's fiduciary duty,* but an agent may also come under an independent duty not to disclose confidential information where circumstances make it clear that information is to be kept confidential. *If an agent misuses information to compete with the principal or to make a secret profit, the agent will be liable to account for any profits made. It is irrelevant that no loss or damage has occurred to the principal, or that the agent acted in good faith, unless the profit made was with the full knowledge and assent of the principal.*
>
> An agent will not be made to account to a principal or former principal for profits made by the use of information or knowledge acquired in the course of the agency that is not secret or confidential. When an agent in breach of his or her duty to the principal acts for a second principal, and in the course of doing so acquires information which is confidential to the second principal, he or she must not disclose that information to the first principal. The agent may, however, be liable to compensate the first principal for any loss caused by the resulting conflict of duties. An agent has a fiduciary duty to reveal to a principal material information that comes into his or her hands. (footnotes omitted; my emphasis)

See *Pacifica Shipping Co Ltd v Andersen* [1986] 2 NZLR 328 (HC), *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615 (HC), *Boardman v Phipps* [1967] 2 AC 46 (HL) and *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n (HL).

[57] On the findings of fact made by the Board, Mr McNeill acquired information from Mr Simpson, while acting as Mr Dean's agent. That information disclosed an interest in acquiring the property for a sum that could be negotiated from a starting point of $120,000. Mr McNeill, having received that information, failed to pass it on to his principal, instead choosing to explain termination of discussions on a different basis. Subsequently, after the sole agency agreement had been terminated, Mr McNeill based his decision to purchase the property on the information acquired and approached Mr Simpson to negotiate an agreement to his advantage.

[58] Deliberately, Mr McNeill persuaded Mr Simpson to lend his name to an agreement for sale and purchase which did not disclose the sale price truthfully. If Mr Dean had seen the agreement for sale and purchase he would have thought that Mr McNeill had sold the property for only $2,500 more than the cost of acquisition. He is unlikely to have taken umbrage at that. But, if Mr Dean had seen an agreement for sale and purchase with the true sale price ($109,000), he would have known immediately that Mr McNeill had sold the property for $26,500 more than the cost of acquisition, less than one month after purchase.

[59] Mr Andersen was critical of the Board for not taking into account uncontested valuation evidence demonstrating that, as at 1 June 2003, the property in issue was worth about $81,000. With respect, the submission is misconceived. First, the valuation fails to take account of knowledge that a purchaser was in the market who, because of particular business objectives, would have been prepared to pay a premium for the property. Second, as a matter of law, the notional market value of the property as at that date is irrelevant. The question is whether the agent used information coming into his or her possession as agent for his or her personal benefit.

[60] The only inference that can be drawn from Mr McNeill's conduct, as found by the Board, is that he acted deliberately to make a personal profit at the expense of his principal and took steps to conceal his profit making venture from him. That is the conclusion to which the Board came. In my view, the Board was correct to hold that such conduct warranted either suspension or cancellation of Mr McNeill's certificate of approval.

Did the Board err in its approach to the penalty decision?

[61] Mr Andersen criticises the Board's decision to suspend Mr McNeill because the proved conduct did not adversely impact on his suitability to hold status as an "approved salesperson". He submitted that the Board did not follow faithfully the approach taken by this Court in *Sime*. Out of fairness to Mr Andersen, his submissions were based on the premise that Mr McNeill's version of events was accepted.

[62] The Board adopted the test set out in *Sime v Real Estate Institute of New Zealand Inc* at p.15 and 16. In that case, Tompkins J had described a two step process. The first was an inquiry into the salesperson's character, in the sense of his personal traits, reputation and any aspects of his behaviour that reflect on his honesty and integrity. The second was to determine whether his character was such that it was in the public interest to suspend him.

[63] The Board was mindful of Mr McNeill's prior good character and reputation. Nevertheless, it was justified in taking the view that a salesperson who had acted in a dishonest manner and had contravened fiduciary duties, in the way Mr McNeill had, was not someone who should hold, at least for a specified time, a certificate of approval as a salesperson.

[64] An inference of dishonest conduct is irresistible on the facts found by the Board. Mr McNeill's conduct included:

a) Deliberate falsehoods conveyed by Mr McNeill to Mr Dean and Mr Simpson during the time he was dealing with them.

b) Deliberate concealment of the true purchase price, both to undermine any suggestion that the sale to Mr Simpson was at other than market value and to provide misleading information to the Department of Inland Revenue.

c) A deliberate course of action designed to obtain a secret profit for himself to the detriment of the principal.

[65] Plainly, that type of conduct justified suspension. One could not regard a person who behaved in that way as fit to hold "approved salesperson" status. Indeed, Mr McNeill might consider himself fortunate that his status as an "approved salesman" was not cancelled. It might have been difficult, on appeal, for an order cancelling such a certificate to have been successfully challenged.

[66] In approaching the question of penalty, I have also borne in mind that the Board is a specialist tribunal, of which three of its members were real estate agents. To some extent, therefore, the penalty is a judgment passed upon Mr McNeill by his peers with which this Court would, in any event, be reluctant to interfere.

Did the Board err in awarding costs?

[67] Mr Andersen submitted that the Board erred in allowing costs equating to 60% of the actual costs and disbursements incurred by the Institute.

[68] The Board's discretion as to costs is conferred by s 105 of the Act:

> **105 Board or Disciplinary Committee may award costs**
>
> After hearing any complaint under this Part of this Act the Board ... may make such order as to costs as it thinks fit, including—
>
> (a) An order that costs be awarded to the licensee or officer of the company or salesperson or branch manager against whom the complaint was made, and that the costs be paid by the Institute:
>
> (b) An order that the licensee or officer of the company or salesperson or branch manager concerned pay to the Institute such sum as the Board ... thinks fit in respect of the costs and expenses of and incidental to the inquiry or any preliminary investigation conducted by the Institute.

[69] The Board was entitled to exercise its discretion to require Mr McNeill to reimburse the Institute for costs and expenses incurred by it "of and incidental to the inquiry or any preliminary investigation".

[70] Mr Andersen's primary complaint is that the Institute instructed Auckland solicitors in respect of a hearing to be held in Dunedin, with the consequence that higher costs were charged and additional disbursements incurred.

[71] The Board was aware of those considerations when it made its decision on costs. The Board's reasons for granting costs were set out in the final two paragraphs of its penalty decision as follows:

> The scheme of the ... Act establishes an industry-supervised regime with enforcement responsibilities vested in the Real Estate Institute of New Zealand Incorporated. Party to party costs in private civil litigation differs

> from the statutory context of these disciplinary proceedings. The Institute uses two legal firms of solicitors to perform its legal enforcement services and costs may well be saved out of specialist advice.
>
> As all members of the Real Estate Institute of New Zealand contribute to the enforcement costs of the Institute, those who are in default, cannot escape having to contribute to properly incurred costs of prosecution. The Board therefore, upholds the Institute's claim of $20,868.00 inclusive of disbursements inclusive of GST and orders payment to the Institute by Mr McNeill.

[72] I am satisfied that the principle on which the Board relied was correct. It takes account of the particular functions of an industry-supervised disciplinary regime and the desirability of recompensing competitors who are required to fund an inquiry.

[73] The Board made no error of law in its costs decision. Nor, in my judgment, did the Board fail to take account of any relevant consideration or take into account any irrelevant consideration. It was not plainly wrong. For those reasons, there is no basis on which this Court can interfere with its discretionary decision to award costs.

Result

[74] The appeal is dismissed.

[75] Costs are awarded in favour of the Institute on a 2B basis, together with reasonable disbursements. Those disbursements shall include the reasonable travelling and accommodation expenses of counsel who appeared for the Institute on appeal. It was appropriate, in my view, for the Institute to instruct the same counsel who appeared before the Board.

P R Heath J

Delivered at 9.30am on 25 June 2008