

**REAL ESTATE AGENTS LICENSING BOARD**

No. 2008/629

**IN THE MATTER**

of an application under  
s99 of the Real Estate  
Agents Act 1976

**APPLICANT**

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

**RESPONDENT**

**ANNE LESLEY DAVIS**

**HEARING:** 12<sup>th</sup> & 13<sup>th</sup> May 2008 at Christchurch

**DECISION:** 30th June 2008

**APPEARANCES:** S Haszard for the applicant  
P McDonald for the respondent

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**INTERIM DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD**

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

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**INTRODUCTION**

The Real Estate Institute of New Zealand Incorporated ["the Institute"] applies to the Real Estate Agents Licensing Board ["the Board"] to cancel the certificate of approval of Anne Lesley Davis to act as a real estate salesperson.

The application is made on the basis of S.99 of the Real Estate Agents Act 1976 ["the Act"]. This section stipulates that the Board must be satisfied that the subject of a S.99 application is "of such character that it is in the public interest that the certificate of approval be cancelled or that the certificate be suspended."

By S.S(4) of S.99, the Board is also empowered to impose, what are now nominal monetary penalties, in addition to or instead of a cancellation or suspension.

Since 1986, this Board has been bound by a High Court decision, *Sime v. Real Estate Institute of New Zealand Incorporated* [19 August 1986; High Court Auckland; Tompkins J]. This decision sets a standard higher than "professional misconduct" or breach of duty under the Act, before cancellation or suspension of a salesperson can occur or indeed even imposition of the nominal monetary penalty. The crucial element of the *Sime* case is the

requirement for the Board to inquire into a [salesperson's] character, considering individual traits such as reputation and aspects of behaviour that might reflect on the salesperson's honesty and integrity. After such inquiry, the Board then has to determine whether any "qualities of character" warrant cessation of participation in real estate in the public interest.

In contrast to S.99 of the Act, the Disciplinary Committee regime prescribed in S.101 and S.102 of the Act, stipulate different standards in a disciplinary context for assessing the performance of real estate salespersons (and real estate agents) than those set by way of S.99 of the Act, as interpreted by the High Court Sime decision. For example, "professional misconduct" or breach of duties and obligations imposed under the Act, may trigger the imposition of penalties. The important point is the difference in statutory criteria governing discipline, between the S.99 narrow examination of "character" and the S.101 broader examination of the salesperson's conduct, which allows for comparatively significant financial penalties.

This particular case illustrates the difficulties of S.99 of the Act. The stringencies of the High Court Sime decision requires the Board to satisfy itself in such a way that as a statutory body, the Board, makes an adverse finding of character against the salesperson in order to express a meaningful measure of disapproval against the impugned performance of the salesperson, even to the extent of imposing a penalty of a nominal amount of \$750.00. As a result, the Board is confronted with the question as to whether or not to make an adverse finding of character against a salesperson for conduct involving a finding of bad character even to support a nominal financial penalty of \$750.00.

An added dimension in the process of inquiring into character, involves the over-all practice in the real estate market of New Zealand. The existing statute licences real estate agents as limited liability companies. All vendors using real estate agents to market and sell their land and properties, are at law principals relying on the real estate agent to perform the required duties. Therefore, the contractual relationship of principal and agent exists between the vendor and the licensed real estate agency usually evidenced by a Property Listing Agreement.

Within the business of a licensed real estate agency, there are two statutory positions subordinate to the holder of the real estate licence, that is, a branch manager needed to exercise "effective control of a branch office" in place of the real estate licensee holder or principal officer where a branch exists and a "salesperson" employed or engaged by a real estate agent in the selling or disposing of land and other functions associated with the business of real estate.

In assessing the over-all statutory scheme, it is clear that the statute allows a defined structured business involving the real estate agent or principal officer assisted by, if needed,

"branch managers" and real estate "salespersons". Crucially, the contract of appointment between the vendor/principal is not with the salesperson or branch manager, who may have introduced the vendor to the licensed business, but with the licensed real estate agent.

When facts occur which justify the Institute instigating disciplinary applications to this Board, the salesperson employed by the real estate firm who was directly involved in the controversial transaction is named as the respondent. The statutory position of "salesperson" is at the lowest level of hierarchy set by the statute. Such a person at law, is an employee and should be under the supervision of a "branch manager" exercising "effective control of the branch", if there is a branch, or if not, under the direct supervision of the licensed real estate agent's principal officer who holds the contract of appointment with the vendor/principal.

A further dimension is the comprehensive franchise arrangements which form part of the current practice of real estate for a significant proportion of the real estate market in New Zealand. The franchises are characterised by a highly systemised approach to marketing and selling relying upon access to current market data recording vital price information. Within the franchise firms, there are usually standard but comprehensive operating procedures designed to protect the interests of vendors as well as enhancing the reputation of the franchise for reliable service.

The relevance of this background is to illustrate the problem facing the Board in this particular case. The salesperson whose character as well as conduct is under examination operated within a franchise real estate firm with superiors responsible at law and franchise practice for supervising her conduct and providing a form of check or balance to the judgment of the salesperson.

## **THE TRANSACTION**

The sales transaction under examination in these disciplinary proceedings occurred in January 2005. The more than three year period before these events were brought to this Board, is a matter of concern. All parties, complainants, witnesses and the subject of disciplinary action deserve a faster resolution of the issues.

The vendor, Shona Fenetta Thom, lives in Pine Avenue, South New Brighton, Christchurch within walking distance of her late mother's cross-lease title, rear Summerhill Stone, 2 bedroom unit on a flat site. In 2000 the mother died and the vendor inherited full title to the property.

In 2001 Ms Thom met Mrs Davis who is a salesperson employed at Twiss & Keir Realty Limited, a member of the Harcourts Group, in Shirley to discuss a potential sale of her late

mother's property. Mrs Davis has been in real estate since 1999. Mrs Davis prepared a marketing proposal but Ms Thom did not wish to sell at that time.

In early 2005, Ms Thom informed Mrs Davis that she was now prepared to sell. On Monday, 10 January, 2005, Ms Thom signed a listing agreement with Twiss & Keir Realty Limited for sole agency of 2/255 Pine Avenue, New Brighton. Because some further cleaning of the property was necessary, public marketing of the property was set to occur on Friday, 14 January, 2005.

Myra Jean Gibson, a fellow real estate salesperson with Twiss & Keir Realty Limited with some 17 years experience in real estate, evidenced the circumstances in the office of the real estate agent where Mrs Davis discussed a suitable sales price for the subject property. Another consultant, Zena Smith also participated in a general discussion with Mrs Davis as to an appropriate asking price for the subject property. The women discussed computer data concerning other properties in the area, and properties in Jellicoe Street and Bridge Street resulting in the three salespersons agreeing on a price of \$165,000. Ms Thom accepted Mrs Davis's advice and listed her property at this figure as an asking price.

Mrs Davis testified that she had prepared a Comparative Market Analysis which is a comprehensive assessment of similar property sales in the locality which provides strong guidance in calculating listing prices. Ms Thom denied receiving such a document.

Because Ms Thom encountered problems securing the services of people to help her remove all the remaining property of her mother from the unit, Mrs Davis offered the services of her own cleaner and Mrs Davis herself, to clean out the unit on Thursday, 13 January, 2005.

## **TWO OFFERS**

Another salesperson at the real estate agency of Twiss & Keir Realty Limited, a Jeanne Elizabeth Bernadette Henderson gave evidence about her intention, as at January 2004, to acquire a 2 bedroom unit in the South Brighton area, a locality adjacent to South Shore where this witness was living at the time with her then partner. Ms Henderson's eighty four year old mother was living in the family home at Dallington and required a smaller living accommodation close to her daughter in the coastal suburbs of Christchurch.

Ms Henderson informed the sales team at Twiss & Keir Realty Limited of her willingness to acquire such a property sometime in December 2004 or January 2005. Mrs Davis immediately responded to her colleague stating that she had the prospect of selling a suitable property in Pine Avenue, indicating that Ms Henderson's announcement to her colleagues occurred before 10 January, 2005 when Ms Thom formally commissioned the real estate agency to sell the property.

Thursday, 13 January, 2005 is a critical date in the narrative of events involving this salesperson's management of the sale of Ms Thom's property. The only two offerers visited the property this day, before any member of the public knew of the availability of the property.

On this Thursday, Ms Henderson visited the property located some 3 minutes drive from where she was then living. Ms Henderson regarded the property as being suitable for her mother and when Mrs Davis contacted her by phone on Friday, 14 January, 2005, Mrs Davis told her that one offer had already been made for the property and invited Ms Henderson to make an offer.

On the same Thursday, the partner (a Mr Walker) of the cleaner, who assisted Mrs Davis prepare the subject flat unit for public inspection commencing on Friday, 14 January, 2005 also expressed an interest in making an offer, as he had just sold an existing property and needed to replace it.

On Friday, 14 January, 2005, Mrs Davis prepared an offer for Mr Walker to purchase the property. Simultaneously, on Friday, 14<sup>th</sup> January, 2005, Ms Henderson at the same real estate firm of Mrs Davis prepared her own offer to purchase the subject property owned by a client.

### **MS HENDERSON'S OFFER**

The statute sets requirements for real estate agents and "employees" (in the notional sense in relation to salesperson whose actual commercial relationships with the holder of a real estate licence usually reflect an independent contractor arrangement) who engage in acquisition of properties from vendors relying on the real estate licensee as a result of the contractual agreement between the vendor and the real estate licensee.

In order to avoid exploitation of the fiduciary relationship existing between a vendor/principal or licensed real estate agent, sections 63 and 64 of the Act demand express authorisation by the vendor of the licensed real estate agency, coupled with the provision of an independent valuation of the property to the vendor, where the purchaser is from the commissioned agency.

Mrs Davis, with Ms Henderson arranged a Form 15 (in accordance with the Real Estate Agents Regulations 1977) to be prepared and signed by Ms Thom. This form states that the property is provisionally valued at \$160,500, the same sum as the offer made by Ms Henderson, subject to the valuation. Within the 14 day period set by the statute, Ms Henderson provided at her expense a valuation made by an independent registered valuer assessing the market value of the property at \$158,000. The Report Investigation – "A" Committee of the Canterbury Westland branch of the Institute adduced in evidence by the

Convenor, Deanne McKenzie criticised the independent registered valuer's opinion as not complying with "NZIV / NZP1 valuation standards for residential properties. In any event, Ms Henderson's offer at \$160,500 was above the \$158,000 set by the valuer.

### **MR WALKER'S OFFER**

At 10:30 on Friday, 14 January, 2005, Mrs Davis prepared an offer for Mr Walker to purchase Ms Thom's property. Whilst a copy of this offer was not adduced at the hearing Ms Thom evidenced that the sum proposed was \$158,000.

### **PRESENTATION OF OFFERS**

At this point on the morning of 14 January, 2005, the licensed real estate agency and the salesperson Mrs Davis, had two offers to purchase. Apart from the inside circle of the salesperson's immediate contacts, namely, Ms Henderson, a colleague consultant at the firm who gained early knowledge, before the public, of the market availability of the property and Mr Walker who gained early knowledge before the public of the market availability of the property through the fortuitousness of his friend assisting the salesperson preparing the property for sale on the Thursday, 13 January, 2005, no member of the public knew of the vendor's wish to sell. No marketing by the agency had occurred.

The central fact is that the licensed real estate agency itself, through its salesperson Mrs Davis, held itself out as willing to materialise its "Marketing Proposal" provided to the vendor in December, 2001. This proposal was described by Mrs Davis in a covering letter addressed to Ms Thom 10 December, 2001 as ".....a wealth of information to make your real estate transaction progress smoothly, until a successful result is achieved."

In the proposal the licensed real estate agency states:

"Our responsibility is to supply to you with facts about properties that have recently been sold in your area for you to make an informed decision on the current market value of your property."

Under the heading "Listing your home exclusively" as occurred, the licensed real estate agency offer:

"A high profile marketing programme is put in place for your property, increasing exposure to potential buyers through open homes, advertising, signs, and the numerous other marketing opportunities offered by Harcourts, such as Internet and the Bluebook."

## THE "SALES MANAGER"

Indisputably, the agency and Mrs Davis did not take a single marketing step for Ms Thom allowing any public exposure to potential buyers through any utilisation of conventional marketing opportunities. At some undefined time on Friday, 14 January, 2005, at the branch office in Shirley of the licensed real estate agent, Mrs Davis contacted Mr Mark Lambie, the "sales manager". Mr Lambie was not the authorised "Branch Manager". This was a Mr Bill Twiss who together with the principal officer, Mr Nigel Keir, were both "on summer holidays." Therefore, on this date, no "effective control" of the salesperson under examination was immediately available.

Mr Lambie gave evidence and was cross examined by Counsel for the Institute, Mr Haszard and was also subjected to comprehensive questioning on the part of Board members.

Mr Lambie's evidence was that under the "Harcourts system", he as "manager", faced "a multi-offer situation", that is two offers from two salespersons, being Ms Henderson's own offer to buy and Mrs Davis's offer made by Mr Walker.

Mr Lambie's response was to implement the "Harcourt's system" of managing the inter-agency potential conflict between competing salespersons or other authorised to sell persons, by taking responsibility himself for the submission of the two offers to the vendor.

Mr Lambie accompanied by Mrs Davis attended Ms Thom at her home sometime in the afternoon of 14 January, 2005, seeing Ms Thom on her own whilst Mrs Davis waited in the car.

Mr Lambie did not study the offers beforehand merely taking sealed envelopes with the two offers inside, as provided to him by his colleagues.

Mr Lambie submitted Ms Henderson's offer of \$160,500 explaining to Ms Thom that an independent valuation will be forthcoming allowing Ms Thom to avoid the sale if the opinion revealed a higher figure than offered, as Ms Henderson was an employee of the licensed real estate firm.

Mr Lambie also submitted Mr Walker's offer of \$158,000. Mr Lambie secured Ms Thom's signature to Harcourts "Purchase Acknowledgement Multiple Offer Presentation".

Mr Lambie in answer to questions from Board members on what advice he provided to Ms Thom as to price, emphasised that the judgement as to what offer should be accepted was a matter for the vendor. Mr Lambie described himself as a "neutral party". Mr Lambie left and Mrs Davis then took over the assessment of the two offers.

What became evident to the Board in assessing Mr Lambie's role as the manager of Mrs Davis is that Mr Lambie only concentrated on the firm's internal operating procedures in relation to managing two offers from two salespersons without regard to the larger question of whether offers from insiders who learned of the prospective marketing of the property, should have been submitted to the vendor before any public marketing of the property had begun. No "For Sale" sign had been erected nor any other marketing steps taken before the two offers were submitted to Ms Thom.

The question for a manager in a licensed real estate agent firm in these circumstances is, has the commissioned agent, through its "employee", the salesperson, marketed the property sufficiently before offers are submitted to a vendor? Rather than consider this basic issue, Mrs Davis's manager just managed the firm's own internal protocols governing multiple offers.

A material fact is the health of Ms Thom. In her sworn testimony, Ms Thom evidenced three separate medical conditions. Whilst those assisting Ms Thom in the sale process may not have known of the existence of these precise medical syndromes, it is evident from the demeanour of Ms Thom that she does not enjoy robust physical health and that generally Ms Thom is not an experienced person in relation to commercial matters. The fullest consideration of the interests of the vendor is the hallmark of the fiduciary relationship existing between a principal and the licensed real estate agent. Mrs Davis, who knew Ms Thom for at least four years was aware of Ms Thom's need for professional guidance.

Ms Thom evidenced that Mrs Davis told her "that these offers were the "best that she could get". Unsurprisingly, Ms Thom accepted the higher offer of \$160,500.00 which was supported by the later valuation of \$158,000 thereby making the contract unconditional. Mrs Davis also, concentrated on the actual offers without regard to the larger question of the sequence of ensuring marketing first in order to secure market based offers.

On Monday, 17 January, 2005, the licensed real estate agency for "promotional" reasons erected a "For Sale" sign on the property after the vendor had accepted the conditional offer of Ms Henderson. The promotion was for the real estate agency itself and Mrs Davis.

## **POST-SALE REACTION**

Mr Russell Rogers owns the adjoining property at 253 Pine Avenue, South Brighton. Mr Rogers evidenced informing Ms Thom over the years between the death of her mother in 2000 and early 2005, that Mr Rogers and his wife wanted to purchase the subject property for the elderly mother of Mrs Rogers. When Mr Rogers saw the "For Sale" sign on 17 January, 2005 he "immediately" phoned Anne Davis who was the salesperson. On being told the fact that the property was under offer to a sale contract Mr Rogers asked the obvious question as



to how a sign advertising the property for sale as from 17 January, 2005 when an offer had already been accepted. Mrs Davis referred to the fact that she had known the vendor for many years and had organised a purchaser already. On being told that the property had been sold "close to the offer price [\$165,000]", Mr Rogers expressed his view that \$165,000 was too low. Mr Rogers has since maintained that he would have made an offer in excess of \$165,000, if given the opportunity in January, 2005.

There is an evidential dispute between the evidence of Mr Rogers and Mrs Davis in relation to the statement of Mr Rogers that during this conversation Mrs Davis asked Mr Rogers whether he would be interested in acquiring the property after it had been done up.

The Board found Ms Henderson's evidence on the issue as to whether the property was genuinely purchased for her mother in January 2005 to be credible. On that basis, it is unlikely that Ms Henderson would be offering the property for on-sale in circumstances when her conditional purchase had not yet been made unconditional.

In fact, Ms Henderson did later change her mind and after some up-grading of the property costing some \$20,000.00, the property was placed on the open market in late April and subsequently sold for the sum of \$205,000.

Another neighbour, Mr Barry Perkins who lives at 249 Pine Avenue, South Brighton, adjoining the subject property also noted the sign erected after Ms Henderson's offer had been accepted.

This witness was another potential purchaser of the property with an elderly relative he wished to have live near his family home. Mr Perkins evidenced a willingness to pay \$180,000 for the property. Mr Perkins and Mr Rogers discussed the fact that they both were denied the opportunity to make an offer for Ms Thom's property as a consequence of the responsible licensed real estate agency Twiss & Keir Realty Limited, a member of the Harcourts Group's closed management of the sale process. Consequently, Mr Rogers laid a complaint dated 14 April, 2005 with the real estate firm. The reply signed by Mr Lambie dated 20 April, 2005, deflected the complaint emphasising that the vendor was "well-informed" and did not herself ".....relay that there were any interested parties". Mr Lambie confirmed compliance with sections 63 and 64 of the Act, correctly implying that the accepted offer was in excess of the registered valuation.

On 25 April, 2005, Mr Rogers complained to the Institute. Mr Rogers had observed the marketing of the property at between \$210,000 - \$230,000 caused by the new owner Ms Henderson. Mr Rogers made the obvious point that such open marketing had not occurred in relation to the January 2005 sale and purchase.

Mr Perkins, on 31 July, 2005, provided a written letter evidencing his disappointment at being denied the opportunity to acquire the property in January 2005 for a price of between \$170,000 and \$180,000.

The Canterbury Westland Investigation "A" Committee of the Institute conducted an investigation into Mr Roger's complaint on 2 August, 2005 delivering a written decision dated 23 August, 2005. Ms Henderson told the Committee that "one of the advantages of working for a real estate company was that you get to hear first, about the listings that might suit you as they come up". Responsible management of a licensed real estate agency ought to prevent such insider advantage.

The principal officer of the licensed real estate firm, Mr Nigel Keir, gave evidence to the Committee and to this Board. Mr Keir's opinion is that the written valuation demonstrated that "the property was not undersold".

The Committee found that "had the property been marketed correctly, the vendor would have achieved a higher selling price. Anne Davis disadvantaged the vendor by her unprofessional conduct and advice". This Board agrees with the Committee.

The Committee also found fault with the attempt at compliance with sections 63 and 64 of the Act by Ms Henderson in that the valuation did not meet valuation standards.

### **THE INSTITUTE'S CASE**

Mr Haszard summarised the Institute's case into three broad points. Firstly, in relation to the application of the Sime case to the S.99 application, Mr Haszard submitted that the conduct of Mrs Davis in managing Ms Thom's sale, particularly having regard to Mrs Davis's knowledge of Ms Thom's general health and understanding, satisfied the Sime test warranting the Board cancelling or suspending Mrs Davis's certificate of approval to act as a salesperson. The fundamental flaw, according to the Institute, was Mrs Davis's failure to market the property before submitting offers to Ms Thom, known to need particular care. It is at this point that the character test comes into play. It is less than the standard of utmost good faith to allow the limited Ms Thom to accept any offer before the open market had been tested. Secondly, the cumulative analysis of the conduct of Mrs Davis supported the satisfaction of the Sime test of "character", justifying S.99 penalty. Thirdly, Mr Haszard refuted the assertion that the written valuation supporting Ms Henderson's offer of \$160,500 provided a "complete answer" to the idea that the property was under-sold because only an open and informed market could provide such a complete answer and obviously, no such comprehensive market testing occurred in January 2005.

## **MRS DAVIS'S CASE**

Mr McDonald for Mrs Davis emphasised the "character" test of the Sime case. Mr McDonald correctly drew attention to the fact that Ms Thom's mental capacities were not an issue as she had demonstrated memory and understanding. Mr McDonald refuted the argument that there had been any form of collaboration between Ms Henderson and Mrs Davis in respect of the January 2005 purchase of the property in order to conduct an on-sale shortly afterwards for capital gain.

Mr McDonald emphasised the long-term good high standing of Mrs Davis and that she had an honest belief that her duty was to submit the two genuine offers immediately to Ms Thom and that the vendor had made an informed decision to accept an offer later vindicated by an independent valuer's opinion.

## **CONCLUSION**

The essential facts in this matter are not much in dispute. Mrs Davis did not instigate an open market campaign for this property before submitting offers to the vendor. The two offers submitted on Friday, 14 January, 2005, were created out of inside knowledge of Mrs Davis. One of the two offers was from a person which the law requires express steps in order to ensure that a vendor is not exploited by a person in a fiduciary relationship. This fact alone should have put all the professional people involved on notice to the need to ensure a level of protection for the vendor.

The sale was conducted in circumstances of rising real estate values, particularly for suburban coastal areas of Christchurch. Ms Thom had waited some four years before deciding to finally empty the property of her late mother and sell and was therefore not in a hurry to sell. Ms Thom, demonstrably, was not a sophisticated seller and this fact does not allow a real estate agent to retreat to the position that the vendor was "fully informed". Finally, the role of Mr Lambie probably exaggerated a sense of necessity on the part of Ms Thom to accept one of the two offers on 14 January, 2005 rather than allowing Ms Thom the opportunity to wait out the testing of the market. Mr Lambie did not appreciate the double obligation of superintending not only a "multiple offer" sale involving two salespersons from one licensed real estate firm, but also an offer from an employee of that firm to ensure that the client was not exploited when the client relied upon the agency for detached professional advice on price and method of sale.

## **FIRST STAGE OF THE SIME TEST**

The Board assesses the conduct of Mrs Davis against the "character" test set by the High Court's interpretation of S.99, recently confirmed by Heath J in *McNeill v. Real Estate Institute*

of New Zealand Incorporated (High Court, Dunedin CIV-2008-412-000294). Did Mrs Davis reveal personal traits, reputation and aspects of behaviour that reflect on her honesty and integrity?

Prior to the events of January 2005, Mrs Davis enjoyed a good reputation and her character was without challenge. The Board's findings following the examination of the tested evidence are as follows:

1. Whilst Mrs Davis did seek some advice from her manager, at all material times, as the responsible salesperson, she owed a fiduciary duty of utmost good faith to Ms Thom and cannot therefore, rely on the fact that Ms Thom's accepted offer exceeded the valuation obtained by Ms Henderson and that the manager did not exercise better judgement and assess the wider problem of submitting an offer governed by S.63 and S.64 and another offer before marketing. The primacy of the interests of the vendor must be maintained at all times and was not by Mrs Davis on 14 January, 2005 and this default reflects on her own integrity as the responsible person selling Ms Thom's property. The fact that the market was untested, coupled with the later credible potential offers from motivated neighbours, outweighs Ms Henderson's independent valuation.
2. The interests of Mrs Davis and her employer prevailed, on 14 January, 2005 over the interests of Ms Thom because Ms Thom was denied the advantage of having her property tested on an open market, at that time, favouring vendors. Mrs Davis should not have allowed the two offers to be placed before the vendor on 14 January, 2005 before the open market had been tested, particularly having regard to Ms Thom's limited knowledge or understanding of commercial matters.
3. Mrs Davis's action in erecting a "promotional sign" on Monday, 17 January, 2005, illustrates the extent of the preference of her own interests over the interests of the vendor. Even on the basis of the Board accepting Ms Henderson's evidence that she genuinely intended to purchase the property for her own elderly mother, Mrs Davis's actions in publicising her own name and employing firm on 17 January, 2005, demonstrates a preference over the interests of the vendor not consistent with fiduciary standard applying to the vendor/agent professional relationship. There was no "sold" sticker on the sign. The sign was designed to attract future potential vendors and sellers.
4. The complaint made by Mr Russell Rogers was justified. Mr Rogers was a credible witness and the Board accepted his evidence that he had a genuine interest in a purchase of the property, if given an opportunity and the fact that Mr Rogers reacted to the new sign on the day it was erected, demonstrates his real interest in the matter.

5. The evidence of Mr Perkins demonstrated that the adjoining properties' registered proprietors, all had similar good reason to seek ownership of Ms Thom's property. Three separate witnesses, Ms Henderson, Mr Rogers and Mr Perkins, each provided mutually reinforcing evidence of market demand at that time for a residential unit on a flat section suitable for the aged. The valuation opinion obtained by Ms Henderson does not redeem Mrs Davis from the fact that two potential purchasers have given credible evidence that they were willing and able potential offerors prepared to pay in excess of the asking price of \$165,000. Therefore, Ms Thom suffered loss out of this examined transaction.

## **SECOND STAGE OF SIME TEST**

As a result of these findings, the Board considers that Mrs Davis's character as revealed in her conduct of this sale, does satisfy the Sime test. Accordingly, the Board considers the second stage: Is it in the public interest that S.99 is invoked, having regard to these findings of fact? The Board answers this question in the affirmative. The original complainant in this matter is not the vendor who lost the opportunity to have her former property tested on a vendor's market in January 2005. The original complainant, assisted by his neighbour, Mr Perkins, is a member of the public. The Board agrees with Mr Russell Rogers' challenge articulated in his first letter to the Institute in April 2005, when Mr Rogers witnessed the on-sale of Ms Thom's former property at a significantly higher asking price four months after the January 2005 closed sale. Therefore, the Board finds that the public interest warrants imposition of S.99 penalties but remains open until the necessary submissions are made as to what such penalty should be imposed.

Accordingly, the Board awaits submissions from the parties as to penalties and if necessary, a further hearing.



**Hon W P Jeffries**  
Chairperson

**REAL ESTATE AGENTS LICENSING BOARD**

No. 2008/637

**IN THE MATTER**

of an application under  
s99 of the Real Estate  
Agents Act 1976

**APPLICANT**

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

**RESPONDENT**

**ANNE LESLEY DAVIS**

**HEARING:** 7<sup>th</sup> October 2008 at Christchurch

**DECISION:** 13<sup>th</sup> October 2008

**APPEARANCES:** S Haszard for the applicant  
P McDonald for the respondent

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**DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD**

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

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The Real Estate Agents Licensing Board ["the Board"] refers to its interim decision of 30 June 2008 and the resumed hearing of 7 October 2008 dedicated to the assessment of penalty.

The Real Estate Institute of New Zealand Incorporated ["the Institute"], through its Counsel Mr. Haszard, submitted that having regard to the Board's central finding that the Respondent had breached her fiduciary duty to Ms. Shona Thom resulting in a sale before marketing causing financial disadvantage, suspension "...in the vicinity of three months" ought to be imposed by the Board. The Institute has also given notice that the Institute will seek an order for the costs of the prosecution.

Mr. Haszard drew the Board's attention to aggravating factors relating to the breach of trust, and a mitigating factor being the Respondent's "otherwise unblemished record during her time in the real estate industry".

For the Respondent Mrs. Davis, Mr. McDonald concentrated his comprehensive submissions on two of the five findings of fact contained in the interim decision, submitting that no penalty whatsoever ought to be imposed by the Board.

These two findings of fact are number two and three on Page 12 of the interim decision which were:

1. *The interests of Mrs Davis and her employer prevailed, on 14 January, 2005 over the interests of Ms Thom because Ms Thom was denied the advantage of having her property tested on an open market, at that time, favouring vendors. Mrs Davis should not have allowed the two offers to be placed before the vendor on 14 January, 2005 before the open market had been tested, particularly having regard to Ms Thom's limited knowledge or understanding of commercial matters.*
2. *Mrs Davis's action in erecting a "promotional sign" on Monday, 17 January, 2005, illustrates the extent of the preference of her own interests over the interests of the vendor. Even on the basis of the Board accepting Ms Henderson's evidence that she genuinely intended to purchase the property for her own elderly mother, Mrs Davis's actions in publicising her own name and employing firm on 17 January, 2005, demonstrates a preference over the interests of the vendor not consistent with fiduciary standard applying to the vendor/agent professional relationship. There was no "sold" sticker on the sign. The sign was designed to attract future potential vendors and sellers.*

Regarding the first finding of fact challenged by Mr McDonald at the resumed hearing, Mr McDonald submitted on the basis of governing legal authorities that an agent is under a strict legal obligation to immediately refer offers to a principal and that she did. Further, Mr McDonald reasoned that Mrs Davis having met her obligation to expeditiously refer offers to her principal, ought not be held liable for the fact that her principal accepted one of the offers.

Regarding the second finding of fact concerning Mrs Davis exhibiting her name on an exhibited sign erected after the principal's acceptance of a conditional offer, Mr. McDonald founds a legal argument on this finding of fact. Mr. McDonald criticises the Institute's particularisation of its case regarding this issue, submitting that Mrs. Davis was prejudiced by the absence of notice and that the Board may have consequently made a determination in respect of Ms. Davis in breach of S. 27(1) of the New Zealand Bill of Rights Act.

The Board holds that the second stage consideration of a disciplinary matter, in accordance with the High Court decision of *Sime*, is not the appropriate forum for the Board to a re-

assess its own decision-making in its interim decision. It would be unsound in principle to either rule in its own favour in relation to either issue or rule against itself and neither option will be chosen. If the Board is in error on either issue, the Respondent has appellate rights.

The Board takes into account the isolated nature of the default of Mrs. Davis, the previous evidence of good character, the absence of checks and balances within her own employing firm which may have saved her from the precipitate conclusion of a sale prior to marketing and the long period of uncertainty occasioned by the delay in prosecuting the complaint.

The public interest and the individual facts of Ms. Shona Thom must be recognised. Therefore, the Board imposes a short period of suspension of three months together with the monetary penalty of \$750.00.

The Board will stay the imposition of the suspension period for 30 days to allow Mrs. Davis time to assess her appellate rights. If Mrs. Davis elects to appeal, the stay will be extended until the High Court has considered the appeal. If Mrs Davis, through her Counsel, decides to accept the decision and so advises the Registrar, suspension may be calculated from the date of such notice.



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**Hon W P Jeffries**

Chairperson