

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/634

IN THE MATTER of an application under
s 99 of the Real Estate
Agents Act 1976

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

RESPONDENT **RAJNEEL
(RAGENAL) RAJ**

HEARING: 16 April and 26 May 2008

DECISION: 8 August 2008

APPEARANCES: S N Haszard and S Herdson for the Real Estate Institute
S Sharma for respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

R C Laurenson (Deputy Chairperson), P Dudding, M Giera, K Coakley and J Harnett-
Kindley

Introduction

1. The applicant, The Real Estate Institute of New Zealand Incorporated (the Institute) has brought this application under section 99 of the Real Estate Agents Act 1976 seeking the cancellation of the certificate of approval as a real estate salesperson held by the respondent, Rajneel (Ragenal) Raj upon the grounds that, having regard to his character, it is in the public interest that the certificate be cancelled. The application is made pursuant to section 99 of the Real Estate Agents Act 1976 (the Act).

2. Section 99 of the Real Estate Agents Act provides relevantly as follows:

(1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground –

...

(b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.

3. The challenge to the respondent's character, which the Institute claims founds the ground that it is in the public interest that the certificate be cancelled, is that on three occasions Mr Raj, acting as an approved salesperson at the Otahuhu Branch of Barfoot & Thompson Limited, sold property to family members and in doing so deliberately failed to comply with his obligations under sections 63 and 64 of the Act and/or his obligations to his employer, Barfoot & Thompson Limited. In opening submissions, counsel for the Institute stated that the Institute also relied on as a challenge to his character, the fact that Mr Raj made efforts to disguise the second two transactions so that it would not come to the notice of his employer, Barfoot & Thompson Ltd, that the transactions were sales involving a family member.

4. The provisions of sections 63 and 64 of the Act are as follows:

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 or 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.

64. Real estate agent to provide valuation – (1) This section shall apply to every real estate agent, partner or employee of a real estate agent, or officer of a company that is a real estate agent; but, in relation to any real estate agent (whether a company or not) that carries on other business in addition to its business as a real estate agent, shall not apply to any employee of that real estate agent whose work primarily and predominantly relates to that other business.

- (2) Every person to whom this section applies shall either –
 - (a) Before seeking the consent of a principal for the purposes of section 63 of this Act; or
 - (b) With the agreement of the principal, within 14 days after obtaining that consent –

supply, at his or her own expense to that principal, a valuation made by an independent registered valuer of the land or business in question.

- (3) Every consent given under section 63 of this Act without the valuation being supplied to the principal in accordance with subsection (2) of this section shall be deemed not to have been given.
- (4) Where –
 - (a) A principal gives his or her consent under section 63 of this Act before a valuation is supplied to the principal in accordance with subsection (2) of this section; and
 - (b) The valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation, -

any contract to which the principal is a party and to which the consent relates shall be voidable at the option of the principal.

5. The second and third transactions relied upon by the Institute involved a sale (wholly or jointly) to a Zia Nisha, understood by the Institute to be the partner of the respondent. The hearing of this application commenced on 16 April 2008 and during the course of the hearing it was made known on behalf of Mr Raj that he denied at the relevant time of the second and third transactions that Zia Nisha was his partner although he admitted that he had been in a relationship with her previously but that had

ended in or about June 2006. This assertion by Mr Raj had either not been known to or apprehended by the Institute prior to the hearing on 16 April 2008 and it was disputed by the Institute. At the close of evidence on that day application was made on behalf of the Institute to seek to bring rebuttal evidence relevant to the currency of the relationship at the time of the second and third transactions. The Board granted that application and the hearing resumed on 26 May 2008 on which day the rebuttal evidence was adduced by the Institute and closing submissions were received by the Board.

Legal principles

6. The leading authority in respect of the application of section 99(1)(b) of the Act is the decision of *Sime v The Real Estate Institute of New Zealand (Incorporated)* (High Court, Auckland M73/86, 19 August 1986) a decision of Tompkins J. The relevant passages are contained at page 16 of that decision and are as follows:

It is pertinent to note that there are only two paragraphs to s 99(1). The first refers to the person being convicted of any crime involving dishonesty. The second refers to the person's character.

So what the Board is required to enquire into is that person's character in the sense of his personal qualities, his individual traits, his reputation and aspects of his behaviour that reflect on his honesty and integrity.

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

Facts

7. At the times relevant to this application, Mr Raj was an approved salesperson at the Otahuhu Branch of Barfoot & Thompson Limited. He had commenced with Barfoot & Thompson Ltd in October 2005. He had been with another real estate firm prior to that for nearly two years. Mr Raj told the Board that he had completed a BA in Education at the University of Waikato in 1997 and had held some teaching positions until his decision to change his career and become a real estate salesperson which he did at the end of 2003 after obtaining his certification as an approved salesperson. At

all relevant times, the manager of the Otahuhu Branch of Barfoot & Thompson Limited was a Mr Peter Ladd. He was called as the principal witness for the Institute.

8. The three transactions which the Institute relies upon in chronological order are as follows:

3/98 Station Road

9. The respondent Mr Raj acted as salesperson in the sale of a property at Unit 3, 98 Station Road, Otahuhu by an agreement dated 29 August 2006 from the vendor, Vision Investment Property Limited to a Sant Raj or nominee for a purchase price of \$140,000. The settlement date provided under the agreement was 18 September 2006. Sant Raj was the father of the respondent, Mr Rajneel Raj.

10. Barfoot & Thompson Limited received a complaint from the vendor of this property after the vendor perceived that it was being marketed for onsale before settlement of the first sale had occurred. In this regard the Institute provided as an exhibit to the Board a residential listing report of Barfoot & Thompson Limited for the property dated 31 August 2006 (two days after the date of the agreement for sale and purchase between Investment Property Limited and Sant Raj) where Mr Rajneel Raj was stated as the salesperson and stating a sales price of \$159,000; although the vendor named in this listing was Vision Investment Property Limited, not Sant Raj.

11. On receiving the complaint and after making enquiries, Mr Peter Ladd, the Manager of the Otahuhu Branch of Barfoot & Thompson Limited, confronted Mr Rajneel Raj about the transaction. Mr Ladd told the Board that when he confronted Mr Raj, he had mistakenly believed that Mr Raj, by selling to his father, had not followed the proper procedures as required by section 63 of the Act and therefore mistakenly treated the circumstances as a breach of section 63 of the Act. He said that when confronted, Mr Raj admitted that he had sold the property to his father; that he, Mr Raj, knew of the requirements under section 63 and that he had not adhered to the procedure. Following this interview, Mr Ladd then wrote a letter to Mr Raj dated 15 September 2006 which read as follows:

Dear Ragenal

Re: Your personal involvement – Sale of 3/98 Station Rd, Otahuhu

I write to confirm our discussion regarding your unprofessional involvement with the sale of 3/98 Station Rd, Otahuhu and also the actions of your family.

As I have pointed out to you, your actions breached Sections 63 and 64 of the Real Estate Agents Act 1976, and also the Policies and Rules of Barfoot & Thompson Ltd, as stated in the Barfoot & Thompson Ltd manual, pages 39, 41, 42, 43 and 44.

When you joined Barfoot & Thompson Ltd, Otahuhu, you signed a declaration statutory, that you had read and understood the manual. I also, have stressed at both formal and informal office meetings, the requirement and necessity to act professionally and ethically at all time.

Your actions are in contravention of all of the above. Accordingly, I advise you, that any repeat of your misconduct, or any other matters in contravention of Barfoot & Thompson Ltd's rules, policies and instructions, will result in your being referred to the Directors and General Manager for appropriate action.

Yours faithfully,

Peter Ladd,
Manager – Otahuhu Branch.

12. Although the letter alleged a breach of sections 63 and 64 of the Act it also referred to pages 39, 41, 42, 43 and 44 of the Barfoot & Thompson Limited manual. A copy of the relevant portions of that manual were provided to the Board and page 44 contains the following:

b) Sales not covered by Section 63

We require you to make written disclosure if you are the selling salesperson and the purchaser is your parent or grandparent, brother or sister, stepchild or grandchild, former spouse or intended spouse, partner or intended partner or any other person living under the same roof as you e.g. flatmate/roommate. The written disclosure should be in the form of "The vendor is aware that the purchaser is ..." If the relationship is sensitive and written disclosure would create difficulties, you must consult a branch manager as to how the disclosure should be made.

In the case of properties you have listed for auction or tender, advise the vendor that a person closely associated with you may be bidding or tendering. Also advise the vendor that the branch manager, or someone nominated by the branch manager, will be involved should negotiations eventuate with that person.

13. It is clear from this passage of the manual that Barfoot & Thompson Limited required a similar disclosure to that required under sections 63 and 64 of the Act when

a salesperson was involved in a transaction which in turn involved a parent of that salesperson. In respect of the sale of 3/398 Station Road, the vendor, Mr Raj did not disclose to the vendor that the purchaser was Mr Raj's father. The Board also notes that the passage from page 44 of the Barfoot & Thompson manual also applies to a "grandparent, brother or sister, step child or grandchild, **former spouse** or intended spouse, partner or intended partner or any other person living under the same roof as you e.g. flatmate/room mate" (emphasis added).

14. The sale to Mr Sant Raj of 3/398 Station Road may not have breached the black letter of section 63 (or section 64) of the Act. However, the Board was provided with a copy of the original contract for services entered into by the respondent with Barfoot & Thompson Limited. That contract provided in its clause 5 the following:

Your duties will be outlined to you by your branch manager and include the observance of the code of ethics of the Real Estate Institute and the procedures in the company manual. Your attention is drawn to that section in the manual entitled "Property Transactions Involving Staff".

In cross examination, this contract was put to Mr Raj and he admitted that he might have read the Barfoot & Thompson Limited manual but it had "slipped from [his] memory". In the same passage of cross examination he confirmed that he was aware that a declaration or disclosure had to be made so that a vendor was aware if a purchaser had a family relationship to him as salesperson. He confirmed that he did not convey to the vendor that the purchaser was his father and that it had been "just overlooked".

15. As a result of the complaint from the vendor, a settlement was reached whereby Mr Raj forewent his share of the commission on the sale which in turn was refunded to the vendor and Mr Raj Senior agreed to pay \$10,000 to the vendor. The agreement to pay the further \$10,000 was recorded in a written variation of the original agreement dated and concluded by 5 September 2006.

50 Hallberry Avenue, Mangere East

16. This transaction took place in February 2007. When the present application before the Board was first initiated by the Institute, this transaction was not known to the Institute nor was it, in an offending sense, known to Barfoot & Thompson Limited.

It became known by reason of a complaint received by Barfoot & Thompson Limited in March of 2008. Because of this late knowledge about the Hallberry Avenue transaction, late also was the notice to the respondent that it was to be relied upon by the Institute for the purposes of the hearing of this application. Notwithstanding the late notice, Mr Sharma, counsel for Mr Raj, made it clear that Mr Raj was prepared to deal with it at the hearing and not to plead prejudice because of the late notice.

17. The transaction relied upon by the Institute is that contained in an agreement for sale and purchase dated 16 February 2007 between vendors named Madan Singh Bisht and Manju Bisht and a purchaser named as Badrul Nisha and/or nominee for the sale of the property at 50 Hallberry Avenue, Mangere East but which, according to the agreement, contained two parcels of land and two separate certificates of title or identifiers, for a total purchase price of \$385,000 with settlement on 2 March 2007. The respondent, Mr Raj, was the salesperson who completed this transaction. The agreement for sale and purchase was on a Barfoot & Thompson Limited form. The Board notes that the agreement was dated five months (almost to the day) after the letter of warning written by Mr Ladd to Mr Raj of 15 September 2006. Badrul Nisha did not take title to the property. Instead a Zia Nisha took title to the property. The transfer into the name of Zia Nisha from the vendors named on the title as Madham Singh Bist and Manju Bisht was registered on 8 June 2007. By agreement dated 14 August 2007 Zia Nisha sold the property under what appears to be a private sale with settlement to take place on 14 September 2007 for a sale price of \$435,000. Mr Raj wrote out that agreement for sale and purchase. The purchaser under this agreement for sale and purchase made the complaint to Barfoot & Thompson Limited in March 2008. The Institute does not rely upon the onsale in this application. It relies upon only the transfer from Bisht to Zia Nisha. The Institute alleges that Zia Nisha at all relevant times was the partner of Mr Raj.

18. This raises the issue of exactly what relationship was Zia Nisha to Mr Raj on 16 February 2007, which issue will be addressed below. However, on the belief that Zia Nisha was the partner of Mr Raj, Mr Ladd had made enquiry of the records of Barfoot & Thompson Limited in respect of the transaction to determine whether there had been any disclosure and other compliance with sections 63 and 64 of the Act and his uncontradicted evidence was that there was no compliance.

4/122 Church Street, Otahuhu

19. On 19 July 2007 by agreement for sale and purchase on a Barfoot & Thompson Limited form this property was sold by the vendor stated in the agreement as Dhan Lakashmi to a purchaser stated as Vinod Dhani and/or nominee for a sale price of \$180,000 with settlement on 31 August 2007. At paragraph 17 of his written evidence in chief, Mr Raj stated that Vinod Dhani was a very good friend of his brother. Mr Raj wrote out the agreement and he was the salesperson although the listing agent (not Mr Raj) had some instrumentality in effecting the sale. On 26 July 2007 the same property was the subject of an onsale by an agreement for sale and purchase of that date at a sale price of \$203,000 where the vendor was stated as the Razia Trust and the purchasers were a Babu Sailendra Singh and a Ritesh Dharmeshwar Nand. This onsale agreement for sale and purchase was also on a Barfoot & Thompson Limited form and handwritten by Mr Raj.

20. The certificate of title/identifier for the property at 4/122 Church Street (NA 22B/67) shows that the property was transferred from Dhan Lakashmi to Zia Nisha and Roneel Rajnit Raj by a transfer which was registered on 31 August 2007 at 3.43pm and immediately on transferred to Babu Sailendra Singh and Ritesh Dharmeshwar Nand by a transfer registered on the same day at 3.50pm. The Board was told that Roneel Rajnit Raj was the brother of the respondent.

21. On 24 October 2007 a meeting took place at the head office of Barfoot & Thompson Limited where present were Mr Peter Thompson, a director of Barfoot & Thompson Limited, a Wendy Alexander, the general manager of Barfoot & Thompson Limited, Mr Peter Ladd and the respondent. The business of the meeting was the transactions in respect of Church Street. The Board were provided with a written record of the meeting which had been prepared for all intents and purposes contemporaneously by Wendy Alexander, the general manager of Barfoot & Thompson Limited. The record of the meeting shows that it was conducted by Mr Peter Thompson and records, relevantly, the following:

- (a) The respondent, Mr Raj, was first shown the agreement for sale and purchase between the vendor Dhan Lakashmi and the purchaser Vinod Dhani or nominee

at a sale price of \$180,000. Mr Raj confirmed that this was the agreement he had prepared and negotiated for the sale of the property.

- (b) Mr Raj was asked if he was aware of the actual identity of the purchasers to which Mr Raj replied that the purchasers were "Singh and Nand" (the purchasers under the second agreement were Babu Sailendra Singh and Ritesh Dharmeshwar Nand).
- (c) The respondent was asked if there had been another transaction to vary the purchaser from Vinod Dhani and/or nominee to Singh and Nand to which Mr Raj responded "No".
- (d) The respondent was then shown a copy of the relevant certificate of title/identifier which indicated the intermediate transfer from Dhan Lakashmi to Nisha Zia and Roneel Rajnit Raj with the immediate on transfer to Singh and Nand. Mr Raj was then asked if Zia Nisha and Roneel Rajnit Raj were known to him. His answer as recorded is that he confirmed that one was his partner and that the other was his brother.
- (e) The meeting then confirmed that there was no section 63 disclosure in respect of the sale from Dhan Lakashmi to Vinod Dhani and/or nominee and that this was confirmed by Mr Raj to the meeting.
- (f) By way of explanation to the meeting, Mr Raj stated that the original purchaser, Vinod Dhani could not settle and that he, Mr Raj, had arranged the onsale to Zia Nisha and his brother who subsequently onsold immediately to Singh and Nand at the increased price of \$203,000. Mr Raj was unable to give any explanation regarding the increase in value but said that Mr Vinod Dhani had got the additional \$23,000 and that he, the respondent, got the selling commission from the original sale.
- (g) The respondent further indicated that he could have at any time consulted his manager, Mr Peter Ladd, for guidance or clarification but chose not to do so, a decision which Mr Raj said he subsequently very much regretted.

- (h) Mr Thompson asked the respondent if the onsale agreement from Zia Nisha and the brother to Singh and Nand was on a Barfoot & Thompson Limited sale and purchase agreement form to which the respondent replied that it was not and that it was a private agreement written up on a "private sale and purchase agreement". (The evidence before the Board is that the agreement was in fact written on a Barfoot & Thompson Limited form).

22. Mr Raj's association with Barfoot & Thompson Limited came to an end at this meeting.

Explanations of respondent in respect of Hallberry Avenue and Church Street transactions

23. In the course of his evidence before the Board, Mr Raj gave the following explanation in respect of the Hallberry Avenue transaction. In examination in chief he stated that Badrul Nisha, the purchaser under the agreement for sale and purchase dated 16 February 2006 was a distant cousin of Zia Nisha. He stated he did not know how the property had got to Zia Nisha but he had drafted the second onsale agreement dated 14 August 2007 from Zia Nisha to the on purchasers on a private basis. In cross examination, Mr Raj stated that he had found it a bit odd when he discovered Zia Nisha was the owner. He said that Badrul Nisha had wanted to sell the property or part of the property after it had settled or become unconditional and that he, Mr Raj, later found out that there was a buyer so he assisted in drawing an agreement. He expanded this by saying that Badrul said that she could not settle the first agreement so she asked the family to help and that Zia Nisha was the only one who could help. When it was put to him in cross examination that he always knew Zia Nisha was to be the purchaser of the property (under the agreement where Badrul Nisha was the purchaser) and that he had been more clever on this transaction than the Station Road transaction so that instead of inserting the name of the real purchaser he had used the reference to a nominee, Mr Raj stated that that was not what had happened and that his involvement was simply to assist to draw up the document. In reference to a onsale agreement where Zia Nisha was named as vendor, when it was put to him that the name Zia Nisha as the vendor would have been one of the first things he would have inserted in the agreement, Mr Raj stated that he had basically filled everything out in the form of agreement when

he then inserted the name of the vendor and purchaser and on being told of the identity of the vendor he said that he had "kept quiet".

24. In respect of the Church Street property Mr Raj gave the following explanations. This is additional to the comments made by him to the meeting at the head office of Barfoot & Thompson Limited on 24 October 2007. First, in a letter to the Board dated 29 November 2007, he said:

The second transaction concerned the unconditional sale of the Church St property to a Vinod Dhani or Nominee for \$180000. Some time later Vinod Dhani advised that he was financially stretched and would like to sell the property. He had gone unconditional on the purchase. I suggested to my brother Roneel and his partner Ms Zia Nisha that they should buy the property as I thought it was a good deal for both parties. My brother was prepared to pay \$203000 for the property as a private sale as he knew someone who was after a house.

I naively complied with Vinod Dhani's request to write up a sale and purchase agreement to "sell" to his Trust as I did not understand what it was for but later I found out the possible reason for writing up such a contract and this contract was set aside and was never used. The sale NEVER HAPPENED.

25. Secondly, in his evidence in chief, he said:

On or about a week later, Vinod rang me to say that he was having financial difficulties as his business in Fiji was not doing well and that he wanted to pull out of the agreement. I told him that I cannot advise him on anything and that he should contact his solicitors. He told me that he was going to Fiji and that he may have a buyer, who was interested in buying the property, however that he did not have any sale and purchase agreement for the Purchaser to sign. He told me that he was very desperate and if he was not able to sell, then he would not be able to buy as well. I felt sorry for Vinod and naively prepared an agreement for sale and purchase for him. However I then later thought about it and realized that it was not a good idea for me to have given an agreement unknowingly to Vinod. I contacted him and demanded that he return the original agreement to me. I got the original back which I have with me and will provide at the hearing.

At the time, I had thought that this was the end of the matter and after this I had no idea as to how the transaction was completed. I was paid as the selling agent.

26. Thirdly, in cross examination Mr Raj is understood to have said that he did not know Zia Nisha and his brother were involved until after Vinod Dhani had returned the onsale agreement to him. He then had learnt Zia Nisha and his brother were the trustees nominated by Vinod Dhani for his trust (the vendor stated in the onsale agreement was the Razia Trust). He further stated that when he wrote out that agreement he did not know Zia Nisha and his brother were trustees. When it was put to him that he had prepared the two agreements in the form that he did in order to hide

from Mr Ladd that in effect there was a direct sale from the original vendor to Zia Nisha and his brother, Mr Raj said that he had not told Mr Ladd about the agreement (presumably referring to the onsale agreement) because it had been returned to him.

27. This last aspect was sought to be explained by Mr Sharma, counsel for Mr Raj, in closing submissions in the context of the answer Mr Raj had given at the meeting of 24 October 2007 that he was unaware of any other transaction which changed the original purchaser from Vinod Dhani and/or nominee to the eventual purchasers Singh and Nand. As the Board understands from the closing submissions, after Mr Raj had prepared the agreement from Razia Trust to Singh and Nand he had, in his counsel's submission, come to his senses and retrieved the agreement and that is why at the meeting on 24 October 2007 he said there was no other transaction because this was based on his misunderstanding that he had in his own hands the only agreement he knew about which varied the transaction. It is implicit from the explanation of Mr Raj and that submission, that the Board is to understand that whatever occurred to transfer the Church Street property from the original vendor (Dhan Lakashmi) to Singh and Nand through the intermediate ownership of Zia Nisha and Roneel Rajnit Raj, occurred not because of the onsale agreement drawn by Mr Raj and happened outside of his knowledge.

Relationship of respondent to Zia Nisha

28. As already indicated above, during the first part of this hearing, the Institute had proceeded on the belief that Zia Nisha was at all material times the partner of Mr Raj. This belief was founded amongst other things, on the acknowledgement recorded to this effect made by Mr Raj at the meeting on 24 October 2007 and also on evidence given by Mr Ladd that Zia Nisha had been introduced to him as Mr Raj's partner at social functions held at the Otahuhu office of Barfoot & Thompson Limited. That Zia Nisha was the partner at all material times of Mr Raj, however, was put directly in issue during the first part of the hearing. The contention of Mr Raj was that his relationship with Zia Nisha had ended in June 2006 and that at all times after that, he had had no relationship with Zia Nisha and from that time onwards she was in a relationship with his brother Roneel Rajnit Raj. It was further contended by Mr Raj that the acknowledgement made by him at the meeting of 24 October 2007 had been

misunderstood by those present because he had said at the meeting that Zia Nisha was the partner of his brother, not his partner. To be fair, in his letter to the Board dated 29 November 2007 Mr Raj did make this claim that Zia Nisha was the partner of his brother.

29. As stated above, leave was given to the Institute to seek to adduce rebuttal evidence and this came before the Board in essentially two categories, first, evidence from Mr Peter Thompson, Mr Peter Ladd and Wendy Alexander, being the persons other than Mr Raj at the meeting at Barfoot & Thompson Limited on 24 October 2007 of their recall and record of that meeting which was to the effect that Mr Raj had stated Zia Nisha to be his partner and that they were not mistaken in this respect. Secondly, evidence was given by reference to business records, telephone records, records of residential addresses, and observations made of Mr Raj and Zia Nisha, both during the relevant time between June 2006 and the meeting on 24 October 2007 and more recently (after the first day of the hearing on 10 April 2008 and before the second day of the hearing on 26 May 2008). In addition photographs were produced by Mr Peter Ladd of the two social functions that occurred where Zia Nisha had been introduced to him as Mr Raj's partner. The functions to which the photographs related had taken place first on 28 July 2006 and on 7 September 2007. The photographs of the second function also included a photograph of a young girl who was identified as the daughter of Mr Raj and the same young girl had been observed to be living with or at the same home as Zia Nisha since April 2008.

30. Finally, the evidence adduced by the Institute was also directed to show no evidence of Zia Nisha having a relationship with Mr Roneel Rajnit Raj.

Discussion

31. The Institute seeks the cancellation of Mr Raj's certificate of approval as a salesperson on the grounds that he is of such a character that it is in the public interest that the certificate be cancelled. The Board proceeds on the basis that the burden of proof is on the Institute to satisfy the Board in terms of section 99(1)(b) of the Act and that the standard of proof is the civil standard of proof: refer *Z v Dental Complaints Assessment Committee* SC22/2007; [2008] NZSC 55.

32. As already stated, the challenge to the character of Mr Raj made by the Institute is on the grounds of what the Institute alleges to be the deliberate breach of sections 63 and 64 of the Barfoot & Thompson Limited manual in respect of family transactions, in respect of the three properties set out above. The Board considers that the first transaction involving 3/98 Station Road, Otahuhu which involved the sale to Mr Raj's father, by itself would not assist the Institute to establish the required wanting in character. However, this transaction and the consequences of it are significant in that they provide the platform and relief against which the actions of Mr Raj in respect of the two subsequent properties might be judged. After the Station Road transaction, Mr Raj was put on clear notice and warning of the consequences the failure to observe the requirements of sections 63 and 64 of the Act and of the Barfoot & Thompson Limited manual in respect of family transactions could attract. He was also aware from the same incident that the vendor could seek compensation and that his employer, Barfoot & Thompson Limited was exposed to monetary loss and that, directly for him, he could lose his commission.

33. Mr Raj's explanation and defence for the subsequent two transactions involving Hallberry Ave and Church Street are essentially twofold. The first is that the transactions did not contravene sections 63 or 64 of the Act nor the Barfoot & Thompson Limited manual because Zia Nisha at the relevant times was not his partner. This, however, only helps Mr Raj to a limited extent because the Church Street property was transferred initially to Zia Nisha and Roneel Raj, the brother of Mr Raj. To the extent it was a transfer to his brother it was still a family transaction and, in terms of the passage from page 44 of the Barfoot & Thompson Limited manual, it could also be said Zia Nisha, in respect of both transactions and if it were accepted by the Board that the relationship had ended, was the "former spouse" of Mr Raj and therefore caught by the provisions of the manual. Secondly, in respect of both of the subsequent transactions, Mr Raj says he did not know of the involvement of Zia Nisha (or his brother in respect of the Church Street transaction); that in each case the initial purchaser had found herself or himself in circumstances where she or he could not complete the transaction and looked for another purchaser; Mr Raj had assisted on each occasion by writing out another agreement but, he claims, on both of the occasions he

wrote out a further agreement he was ignorant of the involvement of Zia Nisha (and in respect of the Church Street property) his brother.

34. Aside from his denial that he was in a relationship with Zia Nisha at the relevant times, the Board does not accept Mr Raj's explanations in respect of the two subsequent transactions. Each of the explanations has an inherent implausibility about them and Mr Raj is very much seeking an extended credulity of the Board to expect it to accept them. Further on all important matters of credibility, the Board finds against Mr Raj. The Board had the opportunity to observe Mr Raj both giving his evidence in chief, including supplementary evidence to his written statement, and under cross examination. The Board was able to observe his demeanour and responses when important or significant issues were put to him and by reason of this the Board does not accept his evidence on these important issues. Examples of such responses (and these are not intended in any way to be exhaustive), are his response in cross examination as to why he had not disclosed the relationship of his father on the Station Road transaction when he said he had "just overlooked" that requirement. Another is his assertion, also in cross examination that when he wrote out the onsale agreement in respect of Hallberry Avenue the names of the parties were inserted after he had completed the remainder of the document. Yet further, Mr Raj did not call as a witness, Zia Nisha, his brother Roneel Raj, Badrul Nisha nor Vinod Dhani, all of whom presumably would have been of assistance to Mr Raj if his explanations were correct. Finally, the Board is satisfied from all the evidence adduced that he was in a relationship with Zia Nisha at the relevant times between June 2006 and the meeting at Barfoot & Thompson Limited on 24 October 2007 or, at least, his relationship was one which required him to make disclosure of Zia Nisha as a spouse or former spouse or partner.

35. Having rejected the explanations and defences of Mr Raj, the Board still must be satisfied that on the evidence before it, Mr Raj deliberately sought to avoid the requirements of sections 63 and 64 of the Act and/or the Barfoot & Thompson Limited manual in respect of the second and third transactions and those actions and the manner in which he did it provide such a deficit of character that in the public interest his certificate of approval as a salesman should be cancelled. In considering this ultimate issue, the Board considers that it is entitled to include in the mix the fact that Mr Raj

was prepared to place before the Board evidence of an implausible and incredulous kind.

36. The Board is satisfied that on the evidence before it, in respect of the second and third transactions Mr Raj in each case obtained an agreement for sale and purchase where in effect he obtained a tame purchaser (both were known to him or his family, in the case of Hallberry Avenue, the initial stated purchaser was Badrul Nisha described as a distant cousin of Zia Nisha and in respect of the Church Street property, the initial purchaser was Vinod Dhani described as a "very good friend" of Mr Raj's brother) but also, in each case, included in the description of purchaser "and/or nominee". Although not required as a matter of law, that mechanism of providing for a nominee allowed Zia Nisha and Zia Nisha and Roneel Raj to step in as purchasers in each case, after the transaction had been completed. This mechanism, on the face of it precluded the need of any declarations or disclosure to anybody, including Mr Ladd, the manager of the Barfoot & Thompson Limited office at Otahuhu, of the interest of Zia Nisha and/or Roneel Raj; and in fact they did step in. The Board also considers that what Mr Raj acknowledged to Barfoot & Thompson Limited at the meeting of 24 October 2007 bears to the truth much more closely than what he was later prepared to advance before the Board.

37. The Board therefore finds that Mr Raj did deliberately breach the provisions of sections 63 and 64 of the Act and the family transaction provisions of the Barfoot & Thompson Limited manual in respect of the Hallberry Avenue and Church Street transactions and that he did so by using the mechanism of the tame purchaser and reference to nominee in order to disguise the breach.

38. The issue remains whether these actions constitute such a wanting in character that it is in the public interest that Mr Raj's certificate of approval (as a salesman) be cancelled. In *Sime v The Real Estate Institute of New Zealand Incorporated*, Justice Tompkins J said that what the Board is required to enquire into is the salesperson's character in the sense of his personal qualities, his individual traits, his reputation and aspects of his behaviour that reflect on his honesty and integrity, and that any adverse qualities in his character relied on must be measured against the public interest in his continuing or not continuing as a salesperson.

39. The Board is of the view that against the clear warning given and knowledge of the consequences that Mr Raj obtained in September 2006 following the Station Road transaction involving his father, for him to undertake the two subsequent transactions in the manner of the deliberate breach set out above and using the mechanism to disguise that breach, does reflect adversely on his honesty and integrity. Further this can be measured against the public interest in his continuing or not continuing as a salesperson because it was committed in his very role as a salesperson and in the context of sections 63 and 64 of the Act and indeed of the family transaction provisions of the Barfoot & Thompson Limited manual. The breach of these provisions potentially can cause loss to the public, however, quite apart from that, it is not in the public interest to have a person who is prepared to deliberately flout these provisions acting within the real estate industry.

Disposition

40. For the reasons referred to above, the Board is satisfied that Mr Raj has been shown to be of such a character that it is in the public interest that his certificate of approval as a salesman be cancelled.

41. The Registrar of the Board is now to fix a date and time for hearing of submissions on sanction.



R C Laurenson
Deputy Chairperson

Date:

8 August 2008

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/643

IN THE MATTER of an application under
s 99 of the Real Estate
Agents Act 1976

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

RESPONDENT **RAJNEEL
(RAGENAL) RAJ**

HEARING: 10 November 2008

DECISION: 17 November 2008

APPEARANCES: S N Haszard and S Herdson for the Real Estate Institute
S Sharma for respondent

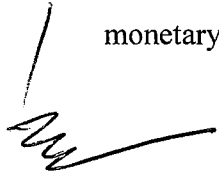
**DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD ON
SANCTION**

R C Laurenson (Deputy Chairperson), P Dudding, M Giera, K Coakley and
J Harnett-Kindley

Introduction

1. By its decision dated 8 August 2008, this Board determined that the respondent, Mr Rajneel (Ragenal) Raj had been shown to be of such a character that it was in the public interest that his certificate of approval as a salesman be cancelled. That finding was pursuant to section 99 of the Real Estate Agents Act 1976 (the Act). The Board refers to that decision. Because of that finding a further hearing was fixed for 10 November 2008 for submissions on sanction and this decision follows that hearing.

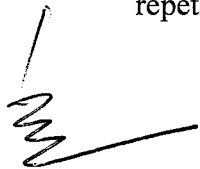
2. On a finding under section 99 of the Act, the Board has power to cancel a certificate of approval or to impose a suspension of up to three years and/or to impose a monetary penalty of up to \$750.



3. By an earlier decision of the Board dated 20 November 2007, the Board had ordered the interim suspension of Mr Raj as an approved salesman until the determination of the substantive application.

Submissions for Institute

4. On behalf of the applicant, the Real Estate Institute of New Zealand Inc., Mr Haszard sought that the respondent's certificate of approval as a salesman be cancelled. In support of this, Mr Haszard counsel for the Institute, advanced the following matters:


- 4.1 In its decision of 8 August 2008 the Board had found Mr Raj to have deliberately breached the provisions of section 63 and 64 of the Act and of the family transaction provisions of the Barfoot & Thompson Limited manual, in respect of two transactions, one involving a sale of 50 Hallberry Avenue, Mangere East and the other a sale of 4/122 Church Street, Otahuhu. The Board had found that Mr Raj had committed these breaches deliberately by the use of the mechanism of a tame purchaser and a nominee and that he had committed the breaches after a clear warning by his employer as to his duties and the consequences that might befall him after an earlier incident where he had acted in the sale of a property at 3/98 Station Road, Otahuhu to his father without disclosing to the vendor that family relationship.
- 4.2 That the Board in arriving at its decision of 8 August 2008 had found against Mr Raj on all important matters of credibility and that, indeed, this further hearing on sanction arose because the Board had made the determination that Mr Raj's conduct in respect of the Hallberry Avenue and Church Road transactions were so wanting in character that it was in the public interest that his certificate of approval as a salesperson should be cancelled; that being the test contained in section 99 of the Act.
- 4.3 There were three aggravating factors to Mr Raj's conduct. The first was that his conduct was a breach of trust both to his employer Barfoot & Thompson Limited but more importantly to the vendor on each of the two transactions. The second aggravating matter was that the conduct was deliberate and repetitive and that it involved two transactions after the earlier warning given
- 

by his employer when the earlier Station Road transaction had been discovered. The third aggravating factor was the attempted disguise of the true nature of the transactions by the mechanism referred to above in each of the relevant agreements for sale and purchase.

5. The Board asked Mr Haszard how it should determine sanction in the present case in light of the earlier sanction imposed in *McNeill v Real Estate Institute of New Zealand Incorporated*: CIV 2008-412-000294, Dunedin Registry, 25 June 2008; Heath J (a copy of this decision had helpfully been provided by Mr Sharma for the respondent in his submissions). Mr Haszard responded that in *McNeill* at paragraph [65] of the decision, Justice Heath had made the obiter comment that it "might have been difficult, on appeal," for Mr McNeill to have successfully challenged an order cancelling his certificate. In that case, the Board had imposed a sanction of 18 months suspension which sanction was not disturbed on appeal. In *McNeill*, the offending salesperson had purchased a property from a principal and on-sold it at a profit and had deliberately understated the sale price on the on-sale. The purchaser on the on-sale was a person who had expressed interest in the property when the salesperson had been attempting to sell it on behalf of the principal. McNeill had purchased it from the principal for the sum of \$82,500 plus GST. The on-sale stated the purchase price to be \$85,000. This was false; in fact the sale price on the on-sale was an additional \$24,000 to the \$85,000. Mr Haszard further submitted that the present case could be distinguished from the circumstances in *McNeill* because Mr Raj offended twice whereas there is only the one transaction in *McNeill*, and that this offending had occurred after a warning given both orally and in writing by his employer following the earlier Station Road transaction.

Submissions on behalf of respondent

6. Mr Sharma for the respondent submitted that any sanction imposed on Mr Raj should be suspension and not cancellation of his certificate of approval as a salesperson. Mr Sharma pointed to other decisions of the Board where, following the finding under section 99 of the Act, the Board had imposed a suspension and not cancellation and relied particularly on the decision in *McNeill*. As already noted, that decision imposed a sanction of 18 months suspension and for Mr Raj it was advanced that in the circumstances found by the Board in its earlier decision, the actions of



Mr Raj did not warrant a period of suspension beyond that of 12 months to include the period of his interim suspension.

7. Mr Sharma further stated that Mr Raj was very regretful and remorseful of his actions, however, when pressed on this, Mr Sharma stated that Mr Raj maintained his account of events which he advanced at the earlier hearing and that his remorse was directed more at the circumstances in which he now found himself.

8. Mr Sharma pointed out that Mr Raj had already been the subject of an order for interim suspension of his certificate of approval which order had been made by this Board on 20 November 2007 (and sealed on 26 November 2007) and submitted that any sanction now should take this into account. In support of this, Mr Sharma said that Mr Raj had not been working over the time of his interim suspension; he had been living with the assistance of his parents and on resources which he had accumulated prior to his interim suspension but that he was now in financially difficult circumstances. Mr Sharma further stated that although Mr Raj had a tertiary qualification in education he had no desire to return to that kind of work; that he, Mr Raj, had a passion for selling real estate and wanted to continue with that work.

9. Mr Sharma further advanced that Mr Raj had not previously appeared before the Board and had not any previous involvement in any untoward behaviour. He said Mr Raj was well known in the community and respected by many in the community and to this end he produced a number of references which attested to the quality of Mr Raj, his work in the community and particularly his work in youth sport.

10. Mr Sharma also submitted that Mr Raj had not gained any financial benefit from any of the transactions which were the subject of scrutiny at the earlier hearing. When pressed on this aspect, Mr Sharma had to confirm that Mr Raj did receive or stood to have received a commission from the vendor in each of the transactions. No information was given as to whether or not there was any financial benefit to Mr Raj in the on-sale of the Hallberry Avenue property and the Church Street property where Zia Nisha ended up as the owner or joint owner.



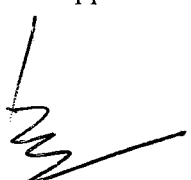
Discussion

11. It is the view of the Board that the decision of *McNeill* provides a useful guideline for the determination of this case. It is correct that in *McNeill*, Justice Heath made the obiter comment that had McNeill's certificate been cancelled by the Board McNeill might have had difficulty in upsetting that on appeal. However Justice Heath also stated at paragraph [66] of the decision:

"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 the Court would, in any event, be reluctant to interfere."

12. *McNeill* involved a deliberate falsehood and the salesman in that case was suspended by the Board for 18 months. It is also quite clear in *McNeill* that the salesman benefitted financially from that falsehood. In the present case, the two transactions of Hallberry Avenue and Church Street also involved dishonesty on the part of Mr Raj whereby he concealed the true nature of the transactions by the mechanism of a tame purchaser and reference to "nominee". Further, there were two such transactions (as opposed to one in *McNeill*) and they followed a clear warning by the employer as to consequences after Mr Raj had been picked up on the earlier Station Road transaction. There is no evidence of financial benefit to Mr Raj personally coming out of the two transactions and in reaching this decision on sanction, the Board gives therefore no regard to that possibility. In mitigation the qualities of Mr Raj as a community member and who assists youth in sport were advanced but the Board has to be careful about the significance that those factors should be given in the context of this proceeding; the fact of the matter is that the Board has made a finding that Mr Raj is wanting in character of a kind which affects his suitability to be a real estate salesperson working in the community. Also, although remorse has been expressed that remorse is not because of an acceptance by Mr Raj of the matters found against him.

13. That Mr Raj has not previously appeared before the Board is of little assistance to the determination by the Board of an appropriate sanction. The fact that an approved salesperson is appearing before the Board on an application under section 99



is the exception, and as noted elsewhere, Mr Raj entered the real estate industry only as late as 2003.

14. In approaching the imposition of a sanction after a finding under section 99 of the Act, the Board has to balance on the one hand what is an appropriate expression of a public opprobrium for the actions and breaches of Mr Raj and what is an appropriate deterrence in the public interest and for the protection of the public with, on the other hand, the individual circumstances Mr Raj including that real estate sales is his chosen occupation and he has worked in the real estate industry since 2003, and that he comes before the Board at this hearing with some commendation from his community and the wider community.

15. As already noted above, on a finding under section 99 of the Act, the Board has power to impose a period of suspension of up to three years if the Board determines suspension and not cancellation is the appropriate sanction. The Board also may impose a monetary penalty of up to \$750; that limit having been set by an amendment to the Act in 1982. That limit of \$750 is now well out of date. The view of the Board is that suspension is the appropriate sanction in the present case together with the maximum monetary penalty but the circumstances of this case do warrant a longer period of suspension than that imposed in the circumstances in *McNeill*.

Decision

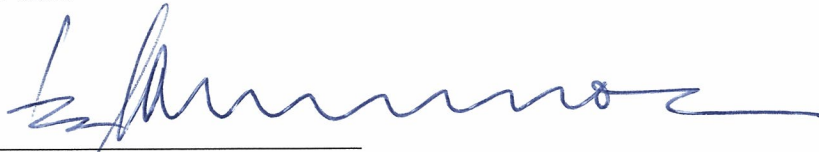
16. Mr Raj is suspended for a period of two years from holding a certificate of approval as a salesman and that this period of suspension is to commence from the date of the decision of the Board to impose interim suspension. The date of that decision was 20 November 2007, the period of suspension is therefore to run for the two years from 20 November 2007. Mr Raj is also ordered to pay a monetary penalty to the Board of \$750.

Costs

17. At the hearing on 10 November 2008 it was agreed that costs be dealt with by memoranda. The Institute is requested to file a memorandum 10 working days from



the date of this decision with Mr Raj to file a memorandum in reply 10 working days after that.

A handwritten signature in blue ink, appearing to read 'R C Laurensen', written over a horizontal line.

R C Laurensen
Deputy Chairperson

Date: 17 November 2008.