

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/635

IN THE MATTER

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

APPLICANT

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

RESPONDENTS

**RAGHU SRINIVAS
ARYASOMAYAJULA**

**PHILLIP JULIAN
CAVANAGH**

PHILLIP JOHN NIALL

HEARING: 11 & 12th August 2008

DECISION: 23rd October 2008

APPEARANCES: S Haszard and Ms Herdson for the Real Estate Institute of NZ
Inc.
Phillip Niall (in person)
Raghu Aryasomayajula (no appearance)
Phillip Cavanagh (no appearance)

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

INTRODUCTION

On 3 October 2007, the Real Estate Agents Licensing Board ["the Board"] granted applications made by the Real Estate Institute of New Zealand Incorporated ["the Institute"] under S.98 of the Real Estate Agents Act 1976 ["the Act"] for the interim suspension of the five certificates of approval of five former employees of an Auckland real estate firm, Barfoot and Thompson Limited. These five salespersons were: Phillip Julian Cavanagh, Raghu Srinivas Aryasomayajula, Phillip John Niall, Faizel Jassat and Margot Jassat. The Board set out its reasons for these interim suspensions in its decision of 3 October 2007.

On 6 December 2007, Phillip John Niall sought a revocation of the interim suspension affecting himself and the contested application was heard by the Board on December 2007. The Board, in its decision dated 14 January 2008, refused the application for reasons set out in its decision of that date.

This present decision involves three of the five previously named Respondents. Two other respondents interrimly suspended on the 3 October 2007, Faizel Jassat and Margot Jassat, later on 26 October 2007 agreed to withdraw their applications to revoke the interim suspension orders of their certificates of approval and to not seek any return to the real estate licensing system. This event occurred on 26 October 2007 and is recorded in the decision of the Board of 30 October 2007.

Only Phillip John Niall appeared at this hearing to contest the Institute's application to the Board to cancel his certificate of approval.

Mr. M.I.S. Phillips, a Barrister representing Phillip Julian Cavanagh, informed the Board by way of a letter dated 8 August 2008 addressed to the Registrar, that whilst Mr. Cavanagh did not wish to be heard in respect of the Institute's application to cancel Mr Cavanagh's certificate of approval, he reserved the right of Mr. Cavanagh to be heard before the Board in respect of penalty.

Mr. Raghu Srinivas Aryasomayajula (referred to by the witnesses as "Mr. Raghu" and also by the Board for the balance of this decision) has not communicated with the Board in any way after being served with notice of the hearing and he did not appear at this scheduled hearing.

THREE APPLICATIONS

Accordingly, this decision relates to the Institute's three applications each dated 28 September, 2007 made in reliance upon S.99 (1) (b) of the Act seeking three cancellations of

the certificates of approval of Raghu Srinivas Aryasomayajula, ["Mr Raghu"], Phillip Julian Cavanagh and Phillip John Niall on the basis that having regard to their respective characters, demonstrated by their conduct (as particularised in each of the three applications) that such certificates ought to be cancelled.

Therefore, the central issue raised by these three applications is whether the Board is satisfied that the adduced evidence demonstrates that having regard to their conduct, the character of each of the three respondents is such that it is in the public interest that their certificates of approval to act as salespersons be cancelled, or suspended for up to three years, and/or a fine of \$750 be imposed. In accordance with the **Sime** [Decision 1984/220], recently affirmed in the High Court [CIV-2008-412-000294 Heath J], the Board approaches the central issue, on a two stage basis: does the Institute make out its primary case? If so, should the Board impose the penalty of cancellation?

ORGANISATION OF THIS DECISION

The Institute has set out in comprehensive form its case against each respondent. These are the "Particulars", in each application. The conduct of Messrs. Cavanagh and Raghu ranges over eleven real estate transactions drawing in their former employer, Barfoot & Thompson, over the period 1 November 2006 to July 2007. In total, the consideration paid for these eleven real estate transactions amounts to almost \$13.5m. The Board will assess their conduct separately from that of Mr. Niall.

Mr. Niall's conduct under examination, as a matter of perspective, involves one property transaction, 163 Wellington Street, Howick, Auckland sold for \$870,000. The Institute's Counsel, Mr. Haszard, properly conceded at the hearing that Mr. Niall was not at the "hub" of the scheme which the Institute pleads against Messrs Raghu and Cavanagh.

This decision is divided into three parts. Firstly, the Board's assessment of each of the witness's evidence, secondly, the Board's assessment of Mr Niall's defence of his conduct

and thirdly, the Board's consideration and resolution of the question as to whether the Institute have proven a scheme. From this analysis, the Board will in accordance with **Sime** then determine for each Respondent the issue of "character" and related statutory public interest considerations and make findings of fact.

THE EVIDENCE

The Institute called five witnesses and adduced affidavit evidence of Marlene Rule. The first testimony was that of Dean Clayton Geddes, a self-employed nutritionist operating from inside Les Mills gym on Victoria Street West, Auckland City.

Respondant, Mr. Cavanagh, was a client at the gym. Mr Cavanagh invited Mr. Geddes, his nutritionist, in May, 2007 to participate in a real estate transaction involving the sale of 8 Trafalgar Street, Onehunga, Auckland, to Mr. Geddes for the original sum of \$760,000.

Mr. Cavanagh explained to Mr. Geddes that the basis of the transaction was that Allwin Holdings Limited, the company formed by Messrs. Cavanagh and Raghu and the registered proprietor of 8 Trafalgar Street, Onehunga would transfer legal ownership of the real estate to Mr. Geddes for a three month period, during which time Allwin Holdings Limited would subdivide the property and then arrange to on-sell the subdivided lots for the same price "paid" by Mr. Geddes to the company for his acquisition of the property. Such a real estate transaction was promoted by Mr Cavanagh to Mr Geddes on the basis that Mr Geddes would not actually have to pay the purchase price.

Initially, the purchase price was set at \$760,000. Mr. Cavanagh offered to arrange the purchase payment [to his own vendor company] through bank mortgage finance obtained by Mr Cavanagh in the name of Mr. Geddes. For Mr Geddes to lend his name to such a transaction, he would receive payment from Mr Cavanagh and his partner Mr Raghu in the sum of \$20,000.

Mr. Geddes is a nutritionist and not a property developer. The intricacies of a real estate sale and purchase, the application for bank mortgage finance, the legal responsibilities of a mortgagor, the unconventional fact of 100% financing, the absence of a legally binding commitment on the part of Allwin Holdings Limited to repurchase and on-sell the property in three months, the problem of securing local government resource consent to a subdivision to be implemented by Allwin Holdings Limited, all when the property is "owned" by Mr. Geddes, escaped Mr. Geddes.

All Mr. Geddes had to do was sign the necessary legal documentation to achieve the acquisition of the property in accordance with plan explained by Mr. Cavanagh to Mr. Geddes.

The Institute adduced the sale and purchase agreement dated 28 May, 2007 for 8 Trafalgar Street signed by Mr. Geddes as purchaser with Allwin Holdings Limited, the vendor. Contrary to Mr. Cavanagh's initial information, the purchase price is defined at \$960,000. A deposit of \$20,000 is shown as being due on the settlement date of 1 June 2007.

Mr Geddes met Mr Raghu for the first time on 28 May 2007. Both, Mr. Cavanagh and Mr. Raghu questioned Mr. Geddes about his own financial statement of position and completed a Westpac Customers Needs Review Document. Mr Geddes evidenced that his present home is owned by himself with his partner Angela Pope and was mortgaged. He expressed doubt to both Messrs Raghu and Cavanagh as to whether he could "*borrow more.*" To this comment, Mr Cavanagh replied that "*he had a friend who would take care of it.*"

On 6 June 2007, Mr. Cavanagh attended Mr. Geddes at his place of employment at the gym. Without understanding, Mr. Geddes signed a document provided to him by Mr. Cavanagh which Mr Geddes later discovered was a Bank of New Zealand application form.

On the previous day, 5 June 2007, a Bank of New Zealand employee had rung Mr. Geddes to advise him that his "loan" had been approved. According to Mr Geddes, this was an unsolicited call to him.

On 11 June 2007, Mr. Geddes then attended his own lawyer's office where he and his partner signed mortgage documents in favour of the Bank of New Zealand for an amount undisclosed in the evidence, and an acknowledgement of debt purporting to evidence the indebtedness of himself and his partner and mother of his child, Angela Jane Pope, to Allwin Holdings Limited in the sum of \$191,000 repayable on the sale of Mr. Geddes and Ms. Pope's family home at 90 Summer Street, Ponsonby, Auckland, or repayable 10 years from the date of advance, or repayable on the death of "the Creditor" [Allwin Holdings Limited is defined as "the Creditor"], whichever is earlier, with interest payable on demand and calculated at bank interest rates for residential loans plus 2% per annum.

Mr. Geddes and Ms Pope signed these liability-creating documents in the presence of a solicitor who witnessed the deed of acknowledgement of debt.

Mr. Geddes testified that *"...my lawyer did not know the actual agreement [between Mr. Geddes and Messrs. Cavanagh and Raghu] and as far as he [the solicitor] was aware, it was a legitimate sale from Allwin Holdings Limited to myself as purchaser, and that the sum of \$191,000 as vendor finance was legitimate".*

Mr. Raghu later paid the solicitor's fees, as part of the arrangement between Messrs. Raghu and Mr. Cavanagh with Mr. Geddes.

Allwin Holdings Limited paid the first month mortgagor's-servicing costs to the Bank of New Zealand, that is the June/July 2007 monthly mortgage instalment.

On 9 August 2007, Mr. Geddes was invited to a meeting with the manager of Strategic Business Services of the Risk Management Department of the Bank of New Zealand. During the meeting the bank official disclosed the loan application signed by Mr. Geddes but prepared for him by Mr. Cavanagh. This document relating to the mortgage finance advanced by the Bank of New Zealand to Mr. Geddes and his partner to acquire 8 Trafalgar Street and expressly stated in Mr. Cavanagh's recognisable handwriting [to Mr Geddes] that "the deposit" for the property of \$190,000 had been funded by the sale of a Hawke's Bay property "owned" and recently "sold" by Mr. Geddes. Mr. Geddes states that he did not, nor did he at any time own any Hawkes Bay property.

The Board particularly observes that the signed deed of acknowledgment of debt between Allwin Holdings Limited and Mr. Geddes and Ms. Pope for \$191,000 signed at the time of the settlement of the sale of the property contradicts the proposition that "the deposit" was funded from the proceeds of the sale of a Hawke's Bay property. According to the terms of this deed of acknowledgment of debt signed by Mr. Geddes and his partner, Allwin Holdings Limited could demand the execution of a mortgage in its favour over 8 Trafalgar Street. Such an express term would be consistent with a vendor [Allwin Holdings Limited], financing the deposit; such an express term, in these circumstances, is inconsistent with Mr. Geddes and Ms. Pope supposedly providing their own funding of the deposit out of sale proceeds of their Hawke's Bay real estate, as stated in the formal application made in their name to the Bank of New Zealand.

Subsequently, with the mortgage in the name of Mr. Geddes and Ms. Pope in default, the mortgagee The Bank of New Zealand conducted a forced sale of 8 Trafalgar Street which yielded \$595,000. Mr. Geddes and his partner Ms. Pope are now being held liable for \$285,000 by The Bank of New Zealand.

The second witness is Mrs. Jean Smith who is the branch manager of the Mt. Albert branch of Barfoot & Thompson Limited ["Barfoot and Thompson"]. In this position, Mrs. Smith was

responsible for the supervision of the respondent employees Messrs. Cavanagh and Niall during the relevant period, 1 November 2006 to July, 2007. Mr. Raghu resigned in September 2006, although Mrs Smith did know Mr Raghu from his previous time of employment at Barfoot & Thompson.

After Mrs Smith approved a discounted commission arrangement in April 2007 on behalf of Barfoot & Thompson with Mr. Cavanagh following the comprehensive discussion initiated with her by Mr. Cavanagh, Mrs. Smith knew that Allwin Holdings Limited would be using the services of Barfoot & Thompson for particular real estate transactions.

During the course of this discussion which resulted in the approval, Mrs Smith challenged Mr. Cavanagh as to why Mr. Cavanagh would want to place properties for sale through Barfoot and Thompson in circumstances where Mr. Cavanagh had already located the buyers. Mr. Cavanagh's response was that banks preferred to see evidence of commission income to assist with his (and Mr. Raghu's) loan applications seeking bank finance.

Mrs. Smith in concluding the discounted fee arrangement reminded Mr. Cavanagh of his need for full disclosure both in terms of the statute and in terms of the firm's policies and procedures. Barfoot & Thompson maintain a comprehensive set of policies governing sales by agents of properties sold through the agency. Barfoot & Thompson itself has the practice of funding the commissioning of the statute-required independent registered valuer's opinion on market value, of the property being sold by Barfoot & Thompson employee, to ensure complete objectivity in such a process.

Mrs. Smith exhibited Barfoot and Thompson's record of transactions processed through the firm and in accordance with the approved discount scheme. These are as follows

| Date | Vendor | Purchaser | Address | Price | Deposit |
|------------|----------------------|--|----------------------------------|------------------------|----------|
| 10/04/2007 | Allwin Holdings Ltd | Rohit & Sangita Ranchhood as trustees of Rosang Trust (or Nom) | 38 Rawhikroa Road, Kohimarama | \$1,750,000 Nil | |
| 28/05/2007 | Allwin Holdings Ltd | Mrs Margot Jassat (&or Nom) | 77 Donovan Street Blockhouse Bay | \$1,350,000 Nil | |
| 28/05/2007 | Allwin Holdings Ltd | Dean Geddes (&or Nom) | 8 Trafalgar Street, Royal Oak | \$960,000 Nil | |
| 21/05/2007 | P.J. Cavanagh | Cheryl Anne Graham | 9 Bolton Street, Blockhouse Bay | \$580,000 | 10,000 |
| 30/05/2007 | Allwin Holdings Ltd | Kenny Abbott Developments Ltd | 165 Paratai Drive Orakei | \$1,250,000 Nil | |
| 06/07/2007 | Philip John Niall | Grace Elizabeth Anderson (&or Nom) | 163 Wellington Street, Howick | \$870,000 Nil | |
| 06/07/2007 | Fairways 2006 Ltd | Djas Investments Ltd (&or Nom) | 53A Woodward Road, Mt Albert | \$650,000 Nil | |
| 06/07/2007 | Fairways 2006 Ltd | Djas Investments Ltd (&or Nom) | 53B Woodward Road, Mt Albert | \$1,450,000 Nil | |
| 04/07/2007 | Djas Investments Ltd | Allwin Holdings Trust (&or Nom) | 41 Alford Street, Waterview | \$1,100,000 Nil | |
| 04/07/2007 | Djas Investments Ltd | Allwin Holdings Trust (&or Nom) | 43 Alford Street, Waterview | \$1,500,000 Nil | |
| | | | | \$4,700,000 | |
| | | | | \$1,450,000 | \$30,000 |
| 20/07/2007 | Spencer Homes Ltd | Pauline Lancaster (&or Nom) | 15 Spencer Street, Remuera | | |

| Vend Sol Comp | Purch Sol | Conditions | Notes |
|-------------------------------|----------------------------------|---------------|--|
| Andrew Lemalu Law (K Walters) | Ganda & Assos. | No conditions | Purchaser's previous clients (Verbal disclosure) |
| Andrew Lemalu Law (K Walters) | Eastland Legal(J Park) | No conditions | note on agreement (Verbal disclosure) |
| Andrew Lemalu Law (K Walters) | Steindle Williams(T Lewis) | No conditions | note on agreement (Verbal disclosure) |
| Andrew Lemalu Law (A Lemalu) | Andrew Lemalu Law (K Walters) | 85% BNZ | disclosure signed by purchaser |
| Andrew Lemalu Law (K Walters) | Lower Hutt Law(M Donovan) | Title issue | note on agreement (Verbal disclosure) |
| Conveyancing Shop(T Inglin) | Andrew Lemalu Law (K Walters) | No conditions | disclosure signed by purchaser |
| Andrew Lemalu Law (K Walters) | Davies Law (S Davies) | No conditions | disclosure signed by purchaser |
| Andrew Lemalu Law (K Walters) | Davies Law (S Davies) | No conditions | disclosure signed by purchaser |
| Davies Law (S Davies) | Andrew Lemalu Law (K Walters) | No conditions | Form 15 signed by Vendor after agreement signed |
| Davies Law (S Davies) | Andrew Lemalu Law (K Walters) | No conditions | Form 15 signed by Vendor after agreement signed |
| Andrew Lemalu Law (K Walters) | Rogers Rutherford (S Rutherford) | No conditions | |

Sworn at Auckland
This 23 day of ... 2007 before me
A Solicitor of the High Court of New Zealand

This is the document marked
with the letter "B" referred to in annexed affidavit
of Jean Smith

Mrs. Smith, as branch manager, always supervised the documentation of all transactions completed through her office. In due course, the transactions promoted by Mr Cavanagh, began to fall under the critical eye of Mrs Smith.

In the course of such supervision, assessing the 77 Donovan Street Blockhouse Bay transaction, Mrs. Smith at first did not recognise Mrs. Margot Jassat as the "sales assistant" at another Barfoot and Thompson branch located in Howick. Mrs Margot Jassat, and or her nominee was shown as the purchaser but Mr Cavanagh, in breach of his own obligations, did not disclose his status as an employee of the real estate agency to Barfoot & Thompson management or meet the other statutory requirements including the commissioning of an independent valuation.

On assessing the 8 Trafalgar Street, Onehunga transaction involving the previous witness, Mr Geddes, Mrs. Smith assumed that Mr. Geddes was a genuine purchaser for value and that there were no conflicts of interest involving the firm in the matter. Such an assumption on the part of Mrs. Smith at that time was justified.

As for the 163 Wellington Street, Howick transaction, Mrs. Smith did observe that the vendor was Phillip Niall, who was an employee salesperson at her branch.

The first anomaly on the 163 Wellington Street transaction, noted by Mrs. Smith was that Mr. Niall had invoked the discounted fee arrangement previously negotiated by Mrs. Smith with Mr. Cavanagh despite the fact that its terms did not extend to Mr. Niall. These anomalies first became apparent to Mrs. Smith on 11 July 2007.

The next day, Mrs. Smith then summoned Mr. Niall. In the course of the ensuing conversation, Mr. Niall, to his credit, frankly revealed to his manager Mrs. Smith the fact that he, Mr. Niall, was not the genuine vendor of 163 Wellington Street, Howick and that Mr. Cavanagh was master-minding the transaction and that he, Mr. Niall, would be paid \$5000 to facilitate the sale transaction. Mr Niall did not attempt to justify his position with reference to any trust arrangement.

On the very next day after this interview, 12 July 2007, Mr. Cavanagh provided to Mrs. Smith four executed contracts relating to properties at 53A and 53B Woodward Road, Mt. Albert and 41 and 43 Alford Street, Waterview, totalling \$ 4.7m. in consideration.

Mrs. Smith observed that the purchaser for the 41 and 43 Alford Street, Waterview properties was "Allwin Holdings Trust and/or nominee". As these entities were associated with Mr. Cavanagh, the statutory disclosure regime applied, but the required documentary evidence, being Form 15, at first instance, was not provided by Mr. Cavanagh.

Mrs. Smith then summoned Mr. Cavanagh to a meeting on 16 July 2007. Mrs Smith challenged Mr Cavanagh regarding the obvious breach of S.63 of the Act, namely, the necessity for a real estate authorised person selling a property through the services of his/her employing licensed real estate agency to fully disclose that fact to the purchaser together with the securing of an independent valuation not paid for by the vendor. These statutory provisions are of a mandatory nature and there is no provision of exemptions or dispensations. The fact that the vendor was also in real estate is immaterial.

Mr. Cavanagh's response was that he did not understand what all the fuss was about over a form. He then revealed that another employee of Barfoot and Thompson, Mr. Jassat, had recently sold the 163 Wellington Street, Howick property to Mr. Niall.

Mrs. Smith then decided to investigate the documentary history of the purchase of the 163 Wellington Street, Howick property. In this respect, Mrs. Smith discovered that "Raghu Aya and/or nominee" had acquired the property on 23 November 2006 for \$540,000. The "nominee" purchaser was in fact the Barfoot and Thompson employee Faizel Jassat but the S.63 obligations imposed upon the salesperson had not been met, by Mr. Jassat.

In April 2007, the Jassats obtained an independent valuation from a registered valuer for 163 Wellington Street assessing the current market value at that time at \$555,000.

The documentary record for the 163 Wellington Street Howick property then revealed a sale by the Jassats through Djas Investments Limited to Mr. Niall, all parties being employees of Barfoot and Thompson. The agreement is dated 25 May 2008 and reveals a sale price of \$770,000. Mrs. Smith learned for the first time that her own name and branch, "Mt Albert Jean Smith", had been endorsed on the contract but struck out and instead the hand-written words "Howick – Steve [indecipherable]" had been substituted.

As Mrs. Smith herself had no direct knowledge or involvement whatsoever in this transaction she realised at this point that she was uncovering events with severe implications for her employing firm, Barfoot & Thompson.

Further investigations of the documentary record for 163 Wellington Street revealed to Mrs. Smith that on 6 July 2007 the property was sold again, ostensibly by Mr. Niall to a Grace Anderson for \$870,000.

Mrs. Smith alerted her Directors and the Chief Executive of Barfoot and Thompson, Wendy Alexander. Phil Cavanagh was required to attend a meeting with Mr. Peter Thompson, Wendy Alexander together with Mrs. Smith. Mr. Peter Thompson asked Mr. Cavanagh to account for the non-disclosure of "side agreements", being a Deed of Debt between Mr. Niall and Faizal Jassat for \$155,000, in relation to the sale of 163 Wellington Street, Howick property, together with another "side agreement" in relation to the Allwin Holdings Limited sale of the same property to Grace Anderson.

On 25 July 2007, Mr. Peter Thompson terminated Barfoot and Thompson's contract of employment with Mr. Cavanagh because of his irregular involvement in the 141 and 143 Alford Street, Waterview and 163 Wellington Street, Howick transactions without the proper authority of Barfoot and Thompson.

Later that same day, Mrs. Smith terminated the contract of employment of Barfoot and Thompson with Mr. Niall because of his involvement in the 163 Wellington Street, Howick transaction without the proper authority of Barfoot and Thompson.

Mrs. Smith completed her evidence before the Board with testimony concerning a telephone call from a former employee, Marlene Rule, who was once a rental manager for Barfoot & Thompson. As a result of this call, Mrs. Smith was sent by Marlene Rule a standard Barfoot and Thompson's letterhead document dated 23 December 2007 entitled 6/265 Kohimarama

Road purportedly assessing weekly rental for 6/265 Kohimarama Road at \$380 to \$390 per week with the express endorsement "Mt. Albert" with branch address. The document revealed the signature of "Marlene Rule", Rental Manager.

Marlene Rule told Mrs Smith and later testified that she did not sign such a letter.

Mrs. Smith's practice for all rent appraisals at the Mt. Albert branch conducted under the name, Barfoot & Thompson is to maintain a register of copies of all such rental appraisals. These appraisals normally involve a form letterhead with the words "Mt. Albert Property Management", unlike the letterhead entitled 6/265 Kohimarama Road document.

Therefore, the document purportedly signed by Marlene Rule on 23 December 2006 [some four months after Marlene Rule had left the Barfoot & Thompson branch in August 2006] on unconventional letterhead of Barfoot and Thompson, purportedly signed by a former employee who denies signing the document, is fraudulent.

On 20 September 2007 a new development occurred involving Mrs Smith. The manager of Fraud Mitigation at the ANZ National Bank Limited contacted Mrs. Smith to inform her that she (Mrs. Smith) had been named as "the real estate manager" on a Barfoot and Thompson standard form contract for the sale of a property located at 9A Melanesia Road, Kohimarama dated 29 April 2007 with the vendor "P.J. Cavanagh" and the purchaser "Greg Nelson and/or nominee". Mr. Nelson was a Barfoot and Thompson employee salesperson based at the Kumeu branch. The purchase price for 9A Melanesia Road, Kohimarama was \$1.27million.

Mrs. Smith had never seen the particular contract document which she exhibited with her evidence. There was no record at Barfoot and Thompson of such a sale at the Mt. Albert office of Barfoot and Thompson, or any other branch of the firm. The salesperson shown on the contract is "Mr. P.J.C.". These are the initials of Mr. Cavanagh.

Therefore, this contract relating to 9A Melanesia Road Kohimarama is fraudulent. That is because the document is not what its terms represent namely an authorised Barfoot and Thompson sale and purchase agreement under the branch management supervision at Mt. Albert of Mrs. Smith. The author of the endorsements on this contract knowingly and deliberately represented that Mrs Smith had sanctioned Barfoot & Thompson's involvement in the sale of 9A Melanesia Road, Kohimarama when she did not.

Another witness for the Institute was Rohit Ranchod, an Auckland mortgage broker.

Mr. Ranchod evidenced meeting Mr. Cavanagh in 2005 when Mr. Ranchod and his wife acquired a family property in Mount Albert and Mr. Cavanagh, then of Barfoot and Thompson, acted for the vendor.

In September 2006 Mr. Cavanagh persuaded Mr. Ranchod and his wife to acquire 16 Powell Street, Avondale on the basis that Mr. Raghu would in a six month period subdivide the large section surrounding the house property. This acquisition was a private sale not involving Barfoot and Thompson. Whilst Mr. Raghu has not materialised his promises in respect of his proposal to achieve a subdivision, the issues raised by this transaction do not require determination by this Board and may be more amenable to resolution in private civil proceedings between the parties.

Mr. Ranchod's evidence in relation to Mr. Raghu's aborted purchase of Mr. Ranchod's franchise business also has marginal value in this matter.

However, evidence relating to Messrs. Raghu's and Cavanagh's encouragement of Mr. Ranchod to acquire two adjoining apartment blocks at Kohimarama Road is of central importance to the Institute's application. Whilst this \$2.7million acquisition by Mr. Ranchod's trading trust "Rosang Trust" of six flats in total was again effected outside the use of a licensed real estate agency, the conduct of Messrs. Raghu and Cavanagh must be examined

in relation to their representations with supporting documentation on Barfoot & Thompson letter head made to Westpac Bank and Bank of New Zealand supporting Mr. Ranchod's applications for bank finance.

As revealed in the evidence of Mrs. Smith and Marlene Rule, the letterhead of Barfoot and Thompson was used without authority of the firm by both men to represent to the banks that apartment 6 was capable of earning between \$380 - \$390 per week, according to the certification of Marlene Rule, "rental manager" of Barfoot and Thompson, 23 December 2006.

Marlene Rule evidenced that she terminated her employment with Barfoot and Thompson in August 2006 and denied signing the letter used by Messrs Raghu and Cavanagh to secure bank mortgage funding.

McGregor Martin Nelson, a certificated salesperson, evidenced his commercial relationship with Messrs. Raghu and Cavanagh based upon Mr. Nelson's acquisition from Mr. Cavanagh of Unit 9A Melanesia Road consisting of two sections, for the sum of \$1.55m.

The critical and unusual feature of the terms agreed between Mr. Cavanagh and Mr. Nelson for this real estate transaction of a \$1.55m. property was that Mr. Nelson could secure ownership with only \$100,000 payment to Mr. Cavanagh. Mr Cavanagh and Mr Raghu would then service the extensive bank finance in the name of Mr. Nelson, as nominal mortgagor. Mr Nelson expected an early on-sale, out of the proceeds of which, Mr Nelson would be paid \$400,000.

Mr. Nelson gave detailed evidence concerning the exhibited agreement for the sale and purchase of Unit A being Tab 16 in the Bundle of Exhibits placed before the Board.

Mr. Nelson testifies that the express date of "29 April 2007" is wrong and that he recalls signing the agreement "somewhere around 24 April 2007".

Further, Mr. Nelson states that he uses his full legal name on legal documents as McGregor Martin Nelson.

Mr. Nelson observes an anomaly on examining the agreement used to effect the Land Transfer Act transaction because the purchaser on this document is "Greg Nelson and/or nominee". Mr. Nelson testifies that he used his full name, not an alternative shortened summary of his name, on the document.

Mr. Nelson agreed to acquire a property for \$1.55m. The exhibited document reveals the purchase price at \$1.27m. To encapsulate the matter, it is unusual for an experienced property person such as Mr. Nelson to mistakenly overpay \$280,000 for a property. For some unexplained reason, the vendor, Mr. Cavanagh, another experienced property person, provided an agreement with the purchase price almost 20% discounted against his purchaser's agreed price.

The final anomaly is the description of which unit, of the two, Mr. Nelson actually acquired. Through his signed agreement for sale and purchase in April 2007 in relation to the Melanesia property, Mr Nelson testifies to buying Unit "A" not Unit "B". He refers to Tab 16 of the Exhibit Bundle which describes the subject property as

"Unit B"

According to Mr. Nelson's arrangement with Messrs Raghu and Cavanagh, Mr Raghu was identified as the person who would facilitate the obtaining of bank mortgage finance for Mr. Nelson to acquire the unit at 9 Melanesa Street, Kohimarama. Prior to settlement on 16 May 2007, Mr Raghu then informed Mr. Nelson that another "investor" named "Cassidy" was involved.

According to his evidence, somewhat in "a hurry", Mr. Nelson attended a branch office of the ANZ Bank and completed the necessary documentation to obtain bank mortgage finance in his name. Then, Mr Nelson attended a solicitor's office on 16 May 2007 at which time he met Cassidy Jones, completed the necessary documentation to advance registration of transfer of title and a first mortgage in favour of the ANZ Bank in accordance with the Land Transfer Act.

On the day of the settlement, Mr Cavanagh rang Mr. Nelson to declare that "[they] were about \$80,000 short" and would Mr Nelson provide a cheque in the sum of \$181,402.05 to make the transaction work, which he did.

Later, Mr Nelson learned from the bank that, contrary to his previous understandings, Messrs Raghu and Cavanagh were not servicing monthly mortgage payments. Consequently, Mr Nelson visited Mr Cavanagh at his Woodward Road property. In the course of the conversation, Mr Cavanagh acknowledged that the original agreement for sale and purchase had been changed by "Raghu" in order to assist with the loan application to the bank. As for the late involvement of Cassidy James, Mr Cavanagh revealed that he and Mr Raghu paid Ms Jones \$5,000 to assist the loan application and in order to appear on the certificate of title as one of the registered proprietors.

At the time of giving evidence, Mr Nelson had accepted a conditional offer to sell the property for \$610,000.

The last witness was Cassidy Jones, a receptionist at another real estate brand-name office in Auckland. For a little over two months in 2006, Ms Jones had worked as a salesperson at the Te Atatu branch of Barfoot & Thompson leading to her meeting Mr Cavanagh at a conference of employees, although she had some 12 years before previously met Mr Cavanagh. After Mr Cavanagh learned of Ms Jones' personal debt problems, in February 2007, Mr Cavanagh approached her to invite her to allow her name to be used to acquire a property with bank mortgage finance. Ms Jones would be paid the sum of \$10,000. Mr

Cavanagh explained that the property at 9A and 9B Melanesa Road, Kohimarama would be acquired for 2-3 months and "fixed up" prior to being on-sold and that "the mortgage on the property would get paid."

Attracted by the idea of solving her immediate personal debt problems, Ms Jones accepted Mr Cavanagh's proposal. Both Messrs Raghu and Cavanagh visited Ms Jones at her home on Sunday, 29 April 2007 where documentation was completed in her name and taken away with supporting bank statements and payslip. No copies of these documents were retained by Ms Jones.

Ms Jones met the previous witness Mr Nelson at the solicitor's office on 8 May 2007 where she completed the necessary documentation to enable the Land Transfer Act processes to be successfully completed with herself and Mr Nelson as the registered proprietors with a registered first mortgage in favour of the ANZ Bank.

One week later, on 15 May 2007 Ms Jones was informed by Mr Cavanagh that she was to be paid \$5,000 not \$10,000. Subsequently, the mortgage fell into default and Ms Jones, together with Mr Nelson, now face heavy liabilities.

MR NIALL'S DEFENCE

Mr Niall gave evidence on his own behalf. He adduced a trust deed dated 28 March 2007 recording his appointment by an unnamed appointer as a trustee with Allwin Holding Limited as sole beneficiary.

He also adduced a deed of acknowledgment of debt between the Jassats and himself dated 15 June 2007.

Mr Niall summarised his position as admitting that he erred in signing the documents facilitating the sale of 163 Wellington Street and that he was liable to a penalty. He reminded the Board that he was dismissed from his income-earning position at Barfoot & Thompson in July 2007 and because of the interim suspension decision of the Board on 3 October 2007 and the Board's subsequent refusal to revoke in December 2007, he has been forced to accept a minimum paying position on a farm. Furthermore, Mr Niall, is liable for some \$230,000 owed to the BNZ as mortgagor, created out of the Messrs Raghu and Cavanagh inducements in relation to the 163 Wellington Street property. Because Mr Niall could not meet this debt he declared himself a bankrupt and is now under the supervision of the Official Assignee.

Mr Niall relied upon the deed of trust to justify himself as a trustee for the acquisition of the 163 Wellington Street property, acquiring on behalf of the beneficiary, Allwin Holdings Limited. Mr Niall argued that his signing of the agreement to purchase 163 Wellington Street from the Jassats' company was not on an artificial basis, but rather as the legitimate authorised trustee for Allwin Holdings Limited. Mr Niall further argued that the Jassats provided vendor finance duly evidenced by the adduced deed of acknowledgment of debt.

Mr Haszard cross examined Mr Niall concerning this aspect of his defence and supporting documentary evidence. Mr Haszard concentrated on the express provision of the acknowledgement of the debt to the Jassats that Mr Niall was obliged to discharge the debt of \$135,000 within seven days of incurring the debt, that is by 22 June 2007. Mr Niall did not appreciate his almost immediate liability for such a large sum.

Mr Haszard also challenged Mr Niall on the basis that he received a fee for being a trustee. Mr Niall did not understand the problem of payment to a trustee without there being express provision.

The supporting relevant documentation, being, the sale and purchase agreement dated 6 July 2007 [Tab 7] and the listing agreement [Tab 8] for 163 Wellington Street, do not record Mr Niall's ownership by way of a trusteeship. Mr Niall's application to the BNZ for bank mortgage finance completed and presented by Messrs Raghu and Cavanagh, although signed by Mr Niall was not adduced in evidence. The Board regards the application as being exclusively personal to Mr Niall.

If a true trust existed, then the trust itself would make its own application for bank finance based upon the trust's assets and the trust's revenues to support bank mortgage repayments. Assessing the document, the legal requirement is that a trustee's entitlement for payment can only occur on an express basis, was over-looked. Notably, the deed of trust, unlike the deed of acknowledgement of debt, was not prepared by solicitors.

Mr Niall's responses to Mr Haszard cross examining questions concerning the deed of acknowledgment of debt obligation of Mr Niall to discharge within seven days the debt to the Jassats, revealed Mr Niall's absence of appreciation of the legal significance of the deed.

Finally, relevant testimony of Mrs Smith is inconsistent with Mr Niall's contention that he acted as a trustee for Allwin Holdings Limited in his acquisition from the Jassats of 163 Wellington Street. Mr Niall did not refer to the trust at the first meeting with Mrs Smith in July 2007.

In summary, the Board rejects the proposition that Mr Niall was acting as a trustee for Allwin Holdings Limited in the acquisition of 163 Wellington Street. If such a proposition was true, the Board would expect all other related documentation to align with the important legal concept of trusteeship and the adduced documentation does not. Further, the Board would expect Mr Niall to invoke the concept of trusteeship from the moment his conduct fell under the critical examination of his employer in July 2007 and he did not. As the evidenced conduct of the Jassats is within the knowledge of this specialist statutory Licensing Board, the Board is entitled to conclude that the true nature of the legal relationship between the Jassats

and Mr Niall, was not one of bona fide vendor/purchaser nor was the legal relationship one of genuine lender/borrower under the express terms of the acknowledgement of debt. Both the Jassats and Mr Niall were participants with Messrs Raghu and Cavanagh in arrangements designed to secure mortgage bank finance on an artificial and therefore improper basis.

The Board now considers whether a scheme has been proven by the Institute.

SCHEME

The Shorter Oxford English Dictionary, Third Edition, defines a scheme as - *"A plan of action devised in order to attain some end...often with an unfavourable notion, a self-seeking or an under-hand project, a plot...or foolish project."*

The Institute in each application particularises the existence of a scheme in paragraphs 5 – 14 of each Notice of Application.

As well as assessing each real estate transaction under examination separately, the Institute also pleads that there is a common thread through all the impugned transactions to the extent that the Board can conclude the existence of a scheme. In order to establish the existence of a scheme, it is necessary to establish that there is coherent common evidence to all the examined transactions directed at the achievement of an identifiable single end or objective.

The Institute identifies the objective of the scheme as the fraudulent securing of bank mortgage finance provided to mortgagors [as agents for undisclosed principals, being the Respondents Messrs. Cavanagh and Raghu] on the mistaken basis of market valuation evidenced by the transactions being conducted by a real estate firm of high reputation of the real estate security supporting the mortgage advance. The Board refers to its assessment of the evidence of the conduct of Messrs Raghu and Cavanagh in relation to real estate transactions involving 8 Trafalgar Street, Onehunga, 77 Donovan Street, Blockhouse Bay, 163 Wellington Street, Howick and 265 Kohimarama Road and 9A Melanesia Road,

Kohimarama. By disguising the identity of themselves as the mortgagors to the three major banks, ANZ, Westpac and BNZ, (through using paid intermediaries who appeared on the public record to be engaged in the real estate transactions, borrowing bank funds on the security of registered mortgages over the real estate security) Messrs. Raghu and Cavanagh wrongly retained two improper benefits. One, they were able to access bank finance for numerous transactions in defiance of normal bank lending criteria which limits the amount of finance available to a single borrower; secondly, they were able to access bank loan advances in excess of the true market value of the provided real estate security, also in defiance of normal bank lending criteria.

The victims of such a scheme were the paid intermediaries who have been left as the legal mortgagors owing funds to the banks, with properties valued less than the mortgage advances; the banks whose normal lending criteria have been breached, exposing the banks to impaired loans; and the employer whose commercial reputation was, unknown to the employers themselves, used to give credence to each individual application made to the bank for finance. The ultimate victim is the New Zealand public who rely upon the integrity of the New Zealand Land Transfer Act system.

FINDINGS

1. The Board finds that Messrs Raghu and Cavanagh engaged in a scheme to secure on a fraudulent basis bank mortgage finance provided to their agents, Margot Jassat, Mr Geddes, Mr Niall, Ms Jones and Mr Gibson in relation to properties at 77 Donovan Street, Blockhouse Bay, 8 Trafalgar Street, Onehunga, 163 Wellington Street, Howick and 265 Kohimarama Road. In each instance, Messrs Raghu and Cavanagh acted as joint parties to disguise themselves and their company Allwin Holdings Limited from being regarded by the three major banks, A.N.Z, Westpac and B.N.Z as the true borrowers.

2. The Board finds that Barfoot and Thompson's brand name reputation was used by Messrs Raghu and Cavanagh to facilitate bank mortgage lending on an assumed valuation basis rather than on a proven market valuation opinion provided by independent registered valuers.
3. The Board finds that Mrs Smith, and subsequently, the Chief Executive of Directors of Barfoot and Thompson, on discovering their employee's and former employee's unauthorised use of the brand name reputation of Barfoot and Thompson, acted promptly and properly to protect the public interest
4. The Board finds that Messrs Raghu and Cavanagh altered the terms of the agreement for sale and purchase of the "P J Cavanagh – Greg Nelson" agreement in April 2007 in relation to 9A Melanesia Road, Kohimarama.
5. The Board finds that Messrs Raghu and Cavanagh altered the terms of the agreement for sales and purchase of the "Jassat – Niall" agreement in June 2007 in relation to 163 Wellington Street by changing the name of the real estate agent from Jean Smith Mt Albert to Howick – Steven M [indecipherable].
6. The Board finds that Messrs Raghu and Cavanagh fraudulently used a Barfoot and Thompson letterhead to create a document dated 23 December 2006 falsely representing that Marlene Rule, on behalf of Barfoot and Thompson assessed the residential unit at 6/265 Kohimarama Road as capable of generating a weekly rental of \$380-390 per week.
7. The Board finds that Phillip Niall allowed his signatures to be used on various documents by Messrs Raghu and Cavanagh to facilitate the scheme of deception perpetrated by Messrs Raghu and Cavanagh in consideration of a monetary payment, but that Mr Niall was not a principal party to the scheme of deception.

8. That the proven conduct of Messrs Raghu and Cavanagh satisfies the Board that it is in the interest of the public that their certificate of approval ought to be cancelled or suspended.
9. That the proven conduct of Mr Phillip Niall satisfies the Board that it is in the interest of the public that his certificate of approval ought to be cancelled or suspended.

SUMMARY


All persons who gain statutory approval to participate as agents acting on behalf of vendors, participate in New Zealand's land registration system governed by the Land Transfer Act. In New South Wales, the State Parliament has legislated against licensed real estate agents drafting agreements for sale and purchase used to advance the process of registration of transfers of title and mortgages. The province of drafting such agreements is reserved for duly certificated members of the legal profession.

In contrast, New Zealand licensed real estate agents perform a responsible role in the New Zealand land transfer system which in other jurisdictions is the preserve of lawyers. Land Transfer Act transactions commence with enforceable agreements for sales and purchase usually prepared by licensed real estate agents. It has been established by the evidence adduced by the Institute in this case, which is also another example of the Institute maintaining the rule of law in New Zealand real estate, that certificated sales persons have engaged in the conduct of facilitating inflated real estate transactions which become part of the public record. Such conduct was designed to secure bank mortgage debt on a false understanding of the market value of the real estate security.

The public interest is damaged by such conduct. Public statistics are polluted by the in-pur of false real estate values. The Land Transfer Act system is undermined by fraudulent transactions which might defeat the indefeasibility of title principle.

The Institute has proven its case in relation to the first stage of **Sime**. Three applications relating to the salesperson's certificate of Raghu Srinivas Aryasomayajula, Phillip Julian Cavanagh and Phillip John Niall demonstrate misconduct revealing character of a kind inconsistent with the responsibilities of a certified salesperson.

The Board will hold a second hearing as to penalty.

A handwritten signature in blue ink, appearing to read 'W P Jeffries', is written over a horizontal line.

Hon W P Jeffries

Chairperson

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/650

THE MATTER

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

APPLICANT

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

RESPONDENTS

**RAGHU SRINIVAS
ARYASOMAYAJULA**

**PHILLIP JULIAN
CAVANAGH**

PHILLIP JOHN NIALL

HEARING: 9th December 2008

DECISION: 18th December 2008

APPEARANCES: S Haszard and Ms Herdson for the Real Estate Institute of NZ
Inc.
Phillip Niall (in person)
Raghu Aryasomayajula (no appearance)
Phillip Cavanagh (no appearance)

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

INTRODUCTION

On 23 October 2008 the Real Estate Agents Licensing Board ["the Board"] delivered a reserved decision containing nine findings of fact in relation to the substantive applications made by the Real Estate Institute of New Zealand, Inc. ["the Institute"] directed against the conduct of Phillip Julian Cavanagh, Raghu Srinivas Aryasomayajula, and Phillip John Niall whilst holding certificates of approval to act as real estate salespersons.

In accordance with the High Court **Sime** case, recently affirmed in the High Court [CIV -2008-412-000294 Heath J], the required first stage is for the Board to satisfy itself that the Institute has proven facts warranting the possible imposition of statutory penalty and then to hear from the affected persons as to whether the "character" test of S.99, as interpreted by the High Court in **Sime** is met, justifying the imposition of statutory penalties.

With notice, the Institute arranged for this matter to be heard by the Board on 9 December 2008. Mr. Mark Ryan of Auckland, Barrister, wrote to the Registrar on 8 December 2008 advising that he had been instructed to represent Mr. Raghu but he sought an adjournment on the basis that he (Mr. Ryan) was engaged in a trial on the scheduled day. The Institute through its Counsel Mr. Haszard objected to the application for an adjournment through its Counsel firm's letter of 8 December 2008.

At the hearing, the Board declined Mr. Ryan's application on the basis that the Board was not convinced that Mr. Raghu could not in the time provided obtain a legal representative available to attend the scheduled hearing. However, the Board directed that Mr. Ryan could within seven days file written submissions. No submissions have been filed. Mr. Cavanagh did not appear either. (Counsel for Mr Cavanagh elected not to appear)

The summary facts set out in the Board's decision of 23 October 2008 involve the invention and implementation of a comprehensive scheme of deception designed to secure accumulating capital funds provided by banks arising out of the purchase and on-sale at inflated prices of some four properties. The inventors and implementers of the scheme were Messrs. Raghu and Cavanagh. The same men implemented the scheme. The same men gained funds out of the scheme.

There are no mitigating factors.

FINDINGS

On the basis of the findings of fact the Board concludes that it is in the public interest that the certificates of approval of Messrs. Raghu and Cavanagh are hereby cancelled.

Regarding Mr. Niall, the Board made findings of fact involving Mr. Niall's conduct in relation to 163 Wellington Street, Howick. Mr. Haszard, Counsel for the Institute, in his written submissions dated 8 December 2008 also drew the Board's attention to Mr. Niall's admission of similar involvement in another property transaction at Kotiri Street. This latter property was not the subject of evidence at the earlier hearing and the Board regards the admission as material but concentrates on the actual known facts concerning the purchase and rapid on-sale of 163 Wellington Street.

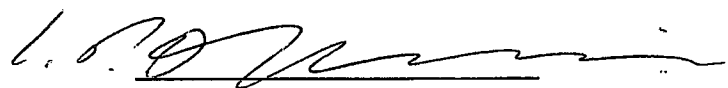
Mr. Niall represented himself and gave evidence and was cross-examined by Mr. Haszard, Counsel for the Institute. Mr. Niall's position was that he was also a victim of the scheme invented and implemented by Messrs. Raghu and Cavanagh. Mr. Niall, unduly influenced by the strong personalities of Messrs. Raghu and Cavanagh, allowed himself to go along with two falsely documented Land Transfer Act real estate transactions.

All who participate in this statutory licensing regime carry the responsibility of a fiduciary owing duties of utmost good faith, not only to the vendor/clients, but also in a general sense to the proper functioning of New Zealand's land registration system interwoven as it is with the provision of credit finance on the security of title to land.

Mr. Niall correctly contrasts the relatively low level of his culpability with the extremity of culpability of Messrs. Raghu and Cavanagh. Mr. Niall, understandably, reasons that he should not suffer the penalty of cancellation as has occurred in respect of the perpetrators of the scheme.

This Board is charged to assess penalty against "the public interest": S.99 (1)(b). Regardless of Messrs. Raghu's and Cavanagh's level of offending, Mr. Niall personally signed documentation on a false basis and this documentation was used to register changes of title and secure bank mortgage finance. Just because others conducted themselves on a considerably worse basis, cannot save Mr. Niall. The Board sets standards for real estate agents in New Zealand. The Board makes plain to all participants in the statutory licensing regime that cancellation of authority to participate is the price for any participant's interference with the integrity of any material documentation used to facilitate the transfer and mortgaging of land.

Consequently, whilst Mr. Niall is to a large extent a victim of other people's schemes, without justification he became a participant himself in the scheme and his certificate of approval is also cancelled.



Hon W P Jeffries
Chairperson