

REAL ESTATE AGENTS LICENSING BOARD

No. 2008/641

IN THE MATTER

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

APPLICANT

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

RESPONDENT

LYNDA AVRILL DAY

HEARING: 8th October 2008 (in Nelson)

DECISION: 24th October 2008

APPEARANCES: S Haszard for the Real Estate Institute of NZ Inc.
S England for the Respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

INTRODUCTION

The Real Estate Institute of New Zealand Incorporated ["the Institute"] applies to the Real Estate Agents Licensing Board ["the Board"] for an order pursuant to S.99 of the Real Estate Agents Act 1976 ["the Act"] for the cancellation of the certificate of approval as a real estate salesperson of Lynda Avrill Day. The principal ground of the application is that the salesperson engaged in a property transaction without meeting S.63 and S.64 obligations to disclose her interest to the vendor as a co-trustee of the purchaser.

The essential facts of the application which are not disputed, apart from the Institute's allegation of deliberate failure to comply and engagement in a scheme of deception, may be summarised.

Summit Real Estate Limited ["Summit"] is the employer of Mrs. Day. Its principal office is located at Nelson with branch offices at Stoke, Richmond and Motueka. Mrs. Day is an employee based in the Motueka branch. The subject property of these proceedings, 682

Main Road, Stoke, was listed with Summit by the registered proprietor and vendor, Brendon Dohmen on 4 November 2005 on a sole agency basis until 19 December 2005. The rateable value was \$195,000. Gay Molineaux of Summit's Stoke office listed and later advertised the property at \$269,000. Ms. Molineaux evidenced that the vendor intended to leave for Australia prior to Christmas 2005, indicating an early sale would be desirable.

According to the internal procedures of Summit, other salespersons employed by Summit were allowed to directly contact a vendor. This normally occurred after visiting the property, following a standard "caravan" involving all sales employees viewing all the firm's property listings. The utilisation of all salespeople is part of the marketing service Summit provides its vendor clients.

Following two "open home" viewings on 13 and 20 November 2005 and three separate visits to the property by prospective purchasers, no offers to purchase the property had been generated by the listing agent, Ms. Molineaux.

At some inexact date around this time, Ms. Molineaux learned of an offer for \$260,000 showing Mrs. Christine Jackson as "manager" of the Motueka branch and Mrs. Day as the "salesperson".

The offer was made by "Colin Lyle Johnston as nominee". After the offeror accepted a counter-offer to sell at \$267,000, the sale proceeded to settlement.

Ms. Molineaux was not alerted in any way as the responsible salesperson on the sole agency listing, as to any possible conflict of interest involving the name "Colin Lyle Johnston" and her fellow employee salesperson at another (Motueka) branch of Summit, Mrs. Day. Ms. Molineaux assumed a normal purchase transaction not requiring any consideration of the statutory mechanisms governing purchases involving an indirect interest in the purchase, on the part of the salesperson.

THE EVIDENCE OF MRS. DAY

Mrs. Day provided an affidavit detailing the formation of the critical agreement for sale and purchase of the subject property.

Earlier in 2005, Mrs. Day and her husband sold a business and invested the proceeds in a family trust, "The Chalet Trust" appointing themselves (Mr. and Mrs. Day) and her brother

Colin Johnston and a family solicitor as trustees with the beneficiaries being their children, including their married son Gregory Bruce Day and his wife Claire Day.

According to Mrs. Day, her son and his wife discovered the subject property themselves and contacted her to enlist her support in their endeavour to acquire a property.

The Chalet Trust family trustees, being Mr. and Mrs. Day, the salesperson, and her brother Colin Johnston together with some of the beneficiaries, being Greg and Claire Day, after viewing the property, had dinner together on Friday 18 November 2005 to discuss making an offer on the property.

According to para. 16 of Mrs. Day's affidavit:

"The property was listed at \$269,000 and we decided to make an offer at \$260,000."

In the presence of her son and daughter-in-law beneficiaries, Mrs. Day completed at the restaurant dinner an offer to acquire the subject property, showing her brother, Colin Johnston (one of the Chalet trustees, with herself, her husband and a family solicitor) as purchaser. This offer was on a Summit letterhead standard agreement.

According to Mrs. Day, the justification for not including her husband Stephen Day (a co-trustee) as nominee was

"...simply because Stephen was going to be away for a lot of time leading up to Christmas (which included the proposed settlement date) and would not therefore readily be available to sign documents".

Mrs. Day took the offer to the Stoke office of Summit and slipped it under the door of Mrs. Molineaux, after the family had completed their restaurant dinner on the Friday evening.

Through Ms. Molineaux the vendor rejected the \$260,000 offer but initialled a counter-offer to sell at \$267,000. Mrs. Day collected the counter-offer and took it to her brother at his office who accepted the counter-offer thereby completing the agreement.

THE EVIDENCE OF MRS. JOHNSTON

Regarding the mechanics of the payment of the purchase price, Mrs. Day's brother at the material time was married to the complainant in this matter, Christine Marie Johnston who is a chartered accountant in public practice in Nelson. Mrs. Johnston employed her husband Colin Johnston, who is not a qualified accountant, in her practice.

Mrs. Johnston's evidence is that her office trust account (National Bank Nelson account 0583-054 14 1401), for which only herself and another specified employee (not her husband) held disposal authority, registered a credit of \$241,799.89 and subsequent debit for the same amount on 20 December 2005.

Mrs. Johnston adduced her bank account statement for 20 December 2005 recording both these events, a credit and a debit.

Further, Mrs. Johnston adduced a bank credit slip for the same day evidencing payment of \$241,799.89 into her trust account from Chalet Trust (National Bank account 060705-03397687-25).

A debit slip for the same day evidences withdrawal of \$241,799.89 from "Chalet Trust". On the exhibited debit form are the words "Stephen and Lynda Day". Tab 7 of the exhibit bundle evidences Mr. Colin Johnston's signed authority under the chartered accountant's letterhead, dated 20 December 2005 addressed to the Bank, directing payment of \$241,799.89 to a firm of Nelson solicitors regarding 682 Main Road Stoke.

Mrs. Johnston identified these December 2005 movements in her trust account early in January 2006. Mrs. Johnston regarded the transactions as anomalous as she had not expressly authorised her husband to withdraw funds from her professional firm's bank trust account.

At this time, her marriage was breaking under various pressures which need not be identified in this decision.

Mrs. Johnston, in circumstances of a matrimonial dispute, reported these anomalies to the Institute whose officers then instituted an inquiry involving the local branch. Mr. Paul Hedwig testified as to the inquiry and was cross examined by Mr. England. The Board notes previous inquiries but decides itself on issues before it.

Subsequently, the Institute's head office in Auckland commenced these disciplinary proceedings.

Resuming with the sworn evidence of Mrs. Day, Mrs. Day adduced a credit slip dated 22 November 2005 evidencing Chalet Trust's payment of \$26,000 into the trust account of

Summit Real Estate Limited Motueka Trust account, being the deposit paid in respect of the purchase made by Mr. Colin Johnston in his capacity as co-trustee of the Chalet Trust.

Mrs. Day evidences authorising in her capacity as a trustee of the Chalet Trust, the release of Chalet Trust funds to "Colin's [her brother's] work trust account". Mrs. Day is unsure as to whether this particular event related to the payment of the deposit or the balance owing to settle the acquisition of 682 Main Road Stoke. Her husband Stephen, she records in her affidavit, believed that the event related to the payment of the balance of funds.

Mrs. Day deposes that the justification for using her husband's work trust account was that her husband Stephen "...had telephoned Colin from a cell phone with limited reception and asked Colin to simply "take care of it".

Mrs. Day admits receipt of \$1877.28 commission, being the standard calculated rate in her firm for the salesperson "who actually sold the property".

Mrs. Day explains the trust related problems of her brother as one of the three trustees holding the property as "bare trustee" and the implications in respect of duty payable for gifting in the event of the property being transferred to her son Greg as a beneficiary. Because of other matrimonial property enforcement steps taken by Mrs. Day's brother Colin's wife Christine Johnston following the breakdown of her marriage, all the trustees decided to direct Colin Johnston to transfer the property into the full name of the trust, which he did on 12 March 2007.

ADMISSION

Mrs. Day in paragraph 38 of her affidavit:

"I therefore also confirm that I have breached ss.63 and 64 of the Real Estate Agents Act 1976."

Mrs. Day explains that as the sale was listed through another branch of her employer, she did not understand that she had obligations in terms of the statute. In particular, Mrs. Day observes that the sale was "within \$2000 of the asking price" dispelling any notion of an obvious exploitation of the vendor, according to herself.

After the Institute had completed the hearing, with the assistance and advice of her Counsel Mr. England, Mrs. Day accepted the central allegation made against her by the Institute.

Three other affidavits, from her brother Colin, her husband Stephen and her Motueka branch manager Mrs. Jackson were adduced in evidence and have each been considered by the Board, as have the nine fulsome character references from a range of persons in the region in favour of the general character and competency of Mrs Day.

ISSUE

The central question for the Board is whether the conduct of Mrs. Day reflects features of character as defined in the **Sime** case [Decision 1984/220], recently affirmed in the High Court [CIV-2008-412-000294 Heath J] warranting imposition of S.99 penalties in the public interest?

The Board observes the references provided by Mrs. Day, the full explanation provided in the affidavit of her husband Stephen Clifford Day, that there was no intention to conceal his wife's involvement with the property transaction "...either as the selling agent or as the trustee of the trust or as a parent of Greg and Claire", and that there was no compromise of the price gained by a vendor.

The Board does not need to concern itself with the evidence of the complainant concerning 31 Kendall View Estate, Stoke. Even where there may be circumstances over-laying a complainant's relationship with a salesperson, the Institute is justified in bringing a disciplinary application to the Board and the Board is capable of separating the overlaying considerations when assessing the conduct and character of a salesperson.

FINDING

1. The Board finds that the conduct of Mrs. Day, in acting as a salesperson in the acquisition of the property by a trust controlled by herself, with three other trustees, without disclosing that fact to both her employer and the vendor to whom she owes a fiduciary duty, constitutes character-reflecting conduct as described in the **Sime** case.
2. The Board finds the explanation as to why Mrs. Day's brother Colin Johnston was shown on the public documentation relating to the Chalet Trust purchase of the subject property without reference to his legal status of trustee to be unconvincing. Truth may be defined as correspondence with the facts. The stubborn fact is that at all times the purchaser was a trust and Mrs. Day, the salesperson, a trustee; therefore, this fact ought to have been disclosed on the agreement for sale and purchase and on the memorandum of transfer deployed for the purposes of the Land

Transfer Act registration of title. A trust is a legal entity and by its nature ought to be revealed. Secret trusts are a discrete subject in the law of equity and trust (vide 13.1.13 "Equity and Trust in New Zealand" Thomson & Brookers 2003) and generally courts are sceptical of recognising such entities because of the vulnerability for abuse. A "bare trustee" is also a discrete legal entity and is not an applicable term in these circumstances (vide 3.2.3 "Equity and Trust in New Zealand" supra). Mrs. Day was paid a commission by the vendor on the basis that she did not have any indirect interest in the purchase transaction. She did.

3. The public interest element of ss.63 and 64 of the statute requires compliance without any form of qualification. The with-holding of information regarding the true purchaser, Chalet Trust, was an omission of a material fact for which Mrs. Day possessed knowledge.
4. As the responsible salesperson, Mrs. Day cannot escape statutory responsibility for conduct which may be interpreted in the light of the **Sime** test as manifesting features of character justifying imposition of S.99 penalties.

PENALTY

The Board imposes a period of suspension of three months, commencing ten days after the receipt of this decision to allow Mrs Day time to both assess appeal rights and to make practical arrangements. A stay may be sought, should there be an appeal.

Also a monetary penalty of \$750.00 is imposed.



Hon W P Jeffries

Chairperson