

REAL ESTATE AGENTS LICENSING BOARD

No. 2009/657

IN THE MATTER

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

APPLICANT

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

RESPONDENT

**ANTHONY RICHARD
WHITEHOUSE**

HEARING: 9 July 2009

DECISION: 17 July 2009

APPEARANCES: S Haszard for the Real Estate Institute of NZ Inc.
S Gloyn 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"] is required to enforce standards of conduct in the real estate sector of New Zealand. Complainants to the Institute instigate factual investigations which can result in formal proceedings against a licence holder or a certificate of approval holder under Part VII of the Real Estate Agents Act 1976 ["the Act"] being the disciplinary provisions of the statute.

In this instance, the Institute makes an application under S.99(1)(b) for the cancellation of the certificate of approval of Anthony John Whitehouse upon the grounds of "character" as stipulated in the Act, following a complaint and some investigation.

This Board continues to apply a statute which will be replaced later this year by Parliament's comprehensive reform of the institutions and standards of conduct for real estate, being the Real Estate Agents Act 2008.

Therefore, during this intervening period when the present statute is due to terminate in favour of a new statutory licensing regime in November of this year, there is an opportunity to

compare and contrast the new statutory grounds for disciplinary action of cancellation for participants in the newly reformed proposed statutory licensing regime with the shortly to be made redundant regime.

The central point of the comparison is that Parliament in the new statute has not adopted "character" per se, as a ground for disciplinary action in the new statute. Rather, the disciplinary grounds in the new law relate to misconduct in various degrees of culpability with a variety of responses in remedies, fines, commission rebates and damages. However, the "character" ground in S.99(1)(b) of the current Act is the only ground available to the Institute in respect of a certificate of approval holder.

The governing High Court decision in the Sime case **Sime v Real Estate Institute of New Zealand Incorporated** (High Court, Auckland, M73/86, 18 August 1986) illustrates the challenge of proper construction of the term "character" within the context of this statutory disciplinary regime. The Court in that case emphasised the need for the Board to be satisfied with a high standard of proof with specificity as to the "adverse" features of character in order to justify the invocation by the Board of the rather severe penalty of cancellation or suspension.

The interpretation of the word "character" in s99(1)(b) of the Act was discussed by Tompkins J in **Sime v Real Estate Institute of New Zealand Incorporated** (High Court, Auckland, M73/86, 18 August 1986). He observed:

"So it is clearly intended that the type of character required to be established under S.99(1)(b) is something of a more serious kind than professional misconduct, or breach of the duties imposed under the Act, although conduct that reflected adversely on a person's character might also amount to professional misconduct or a breach of those duties..."

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 is 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."

THESE PROCEEDINGS

Against this changing background, the Institute brings these proceedings against Mr Whitehouse based upon "Particulars" set out in its notice of application dated 18 May 2009.

Mr Whitehouse, a certificated salesperson is employed by Satellite Realty Limited, a member Ray White Real Estate in Takapuna. In January-February 2009, Mr Whitehouse was responsible for the marketing and sale of a property located at 18 Archers Road, Glenfield, North Shore, for an asking price of \$555,000

The complainant Ms Elizabeth Keene and two other co-investors were at this time investigating properties for the purpose of an investment acquisition and Ms Keene paid two visits to 18 Archers Road on 31 January and 21 February 2009 in order to assess this house.

Mr Whitehouse maintains a register for those who attend his open home campaigns, with contact telephone numbers so that he can make follow-up calls. Following an uncontroversial first telephone call to Ms Keene, on an unknown date after the 21 February 2009, Mr Whitehouse telephoned Ms Keene at her place of employment at the Department of Inland Revenue with both parties using a mobile telephone. Ms Keene had identified only her cell phone number in the register.

Both Ms Keene and Mr Whitehouse gave evidence about this second telephone call and both were cross examined by respective opposing counsel.

Both parties agreed the terms of the conversation to the extent that there was a discussion instituted by Mr Whitehouse informing Ms Keene that an offer for the property was in the making and inquiring of Ms Keene as to whether she and her co-investors would like to put an offer to acquire the property. Both parties agreed that there was some discussion about the possibility of vendor-finance being available to supplement any bank borrowing needed to acquire the property.

The point of fundamental disagreement of the terms of the conversation relates to Ms Keene's recollection that Mr Whitehouse made a specific proposal as to a method by which Ms Keene and her co investors could secure a larger proportion of bank borrowings.

As the acquisition of most real estate is financed by the provision of finance by a mortgagee on the mortgage security of the property being acquired, the market value of properties is of paramount importance. Lenders normally require borrowers to invest their own money as equity in the property to provide a buffer against a potential deterioration in real estate values.

A rare illegitimate practice in real estate is to inflate the market value of the property security in order to induce the lender to increase the level of mortgage finance beyond level

expressed as a percentage of the market value of the property. To accomplish such an improper objective which results in the lender losing an expected "equity" buffer and therefore being placed at a greater risk of default or discount in the repayment of the principal sum owing, both the vendor and the purchaser have to collude in the execution of inaccurate documentation which is designed to mislead the mortgagee.

The point of fundamental disagreement of the terms of the telephone conversation between Mr Whitehouse, acting in his professional capacity as a certificated real estate salesperson and Ms Keene a potential buyer who twice registered her attendance at an open home involves the singular and serious allegation by Ms Keene that Mr Whitehouse invited Ms Keene to participate in such an illegitimate practice as previously described in this decision. Ms Keene's evidence is that Mr Whitehouse proposed such a course of action but that she rejected the proposition and sternly reprimanded Mr Whitehouse for making such a suggestion. The Institute, in turn, argued that if this conversation occurred in these terms, such conduct on the part of Mr Whitehouse reflects adversely on his character justifying severe penalty.

Before assessing Ms Keene in the course of cross examination, the Board makes some observations regarding her prepared written statement of evidence, which the Institute made available to Mr Whitehouse's counsel Mr Gloyn, before the hearing.

A close examination of Ms Keene's evidence reveals the following: firstly, the conversation was on a hypothetical basis concerning "methods by which we (as purchasers) could come to a resolution with the vendors in order to purchase the property", secondly, and consistent with the hypothetical nature of the alleged conversation is the claimed use of an "example" at "say \$585,000," thirdly, Ms Keene does not purport to record actual words used by Mr Whitehouse. Rather the witness prefaces two possible direct quotes with "words to the effect" that "we would just pretend to the bank that it has been paid." And "words to the effect" that "people do this all the time."

The Board further observes that the direct testimony of Ms Keene regarding the crucial part of the conversation which Mr Whitehouse emphatically denies relates to paraphrasing Mr Whitehouse's alleged explanation of the hypothetical proposal with Ms Keene's own personal understanding of the hypothetical proposal.

The Board also notes that this crucial telephone conversation which occurred on an unknown date was not supported by a contemporaneous (or later), file note despite Ms Keene's

training as a professional investigator with previous experience in the litigation department of a national law firm and as an Inland Revenue Department tax investigator.

Finally, the crucial telephone conversation despite taking place at Ms Keene's employer's offices with people within earshot (according to Ms Keene), was not corroborated by any other witness who might have over-heard Ms Keene's "tirade" of reprimand against Mr Whitehouse, as claimed.

On behalf of Mr Whitehouse his counsel Mr S Gloyn conducted a skilful and comprehensive cross examination of Ms Keene.

After securing from the witness a statement that she possessed a "photographic memory" Mr Gloyn was able to establish points of fact with which Ms Keene was "not a hundred percent certain". Ms Keene could not categorically remember whether the phone conversation was by way of a landline or cell phone. There was division as to the length of the telephone conversation.

Ms Keene acknowledged that she did not "drill down" meaning she did not ask a series of questions designed to fully establish the extent of the alleged hypothetical proposal advanced by Mr Whitehouse. Ms Keene did understand the elements of inflated pricing but did not specify an explanation by Mr Whitehouse in his own words.

Mr Whitehouse evidenced some five years in real estate without any previous complaint or challenge to his conduct.

Regarding the actual vendors of the property under examination in these proceedings, Mr Whitehouse evidenced that an elderly couple with whom he had completed a previous successful sale, owned the property through the instrumentation of a legal trust administered by an Auckland practising solicitor Mr John Rust, who is also a trustee.

This fact is significant because the implementation of an artificial proposal would necessarily involve the vendors. On the basis that the Board accepts that Mr John Rust is a solicitor of good standing in Auckland, it is improbable that Mr Whitehouse possessed any authority to advance such a proposition in any serious manner whatsoever.

Mr Whitehouse impressed as a witness and withstood Mr Haszard's usual adroit cross-examination.

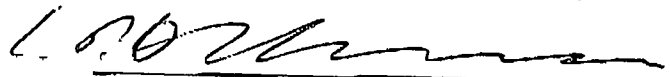
The final material undisputed fact is that Mr Whitehouse made a third telephone call to Ms Keene. Is this fact consistent with a professional person advancing an illegitimate proposal in a previous telephone call in a serious manner that was met by a "tirade" which occupied some time of a "ten to fifteen minutes" telephone call? The Board concludes that Mr Whitehouse, in making this third and uncontroversial call did not believe in any way that he had conducted himself improperly in the second phone call and was in any way in jeopardy if he contacted Ms Keene on a subsequent occasion. Ms Keene, for her part, did not in the third telephone call maintain her vocal opposition to the alleged previous illegitimate proposal but simply replied that she and her co-investors would not make an offer and were now interested in another property.

The Board must be convinced on the balance of probabilities that the mobile phone call occurred in terms which unambiguously implicate the salesperson in the attempted perpetration of an illegal act. In the Board's view, Ms Keene misunderstood Mr Whitehouse.

In the Board's view, Mr Whitehouse impressed the Board as a responsible and competent salesperson aware of his professional duties.

The Board is not convinced on the balance of probabilities, for the reasons set out in this decision, that the sales person engaged in conduct of the kind justifying any penalty what so ever.

The Institute's application is dismissed and the respondent is entitled to a contribution to his legal costs. If the parties cannot agree, Counsel for the respondent is to file and serve a memorandum as to costs within 14 days from the date of service of this decision. Any memorandum in reply is to be filed 14 days after service of the respondent's memorandum.



Hon W P Jeffries
Chairperson