

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

UNDER

The Real Estate Agents Act 1976

BETWEEN

PHILLIP JOHN NIALL
Appellant

AND

THE REAL ESTATE INSTITUTE OF
NEW ZEALAND INC
Respondent

Hearing: 28 May 2009

Appearances: SRG Judd for appellant
S Haszard and S Herdson for respondent

Judgment: 9 July 2009

JUDGMENT OF ALLAN J

*In accordance with r 11.5 I direct that the Registrar endorse this judgment
with the delivery time of 4 pm on Thursday 9 July 2009*

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[1] Mr Niall appeals against a decision of the Real Estate Agents' Licensing Board (the Board), given on 18 December 2008, cancelling his certificate of approval to act as a real estate sales person. While accepting that an order suspending him for a defined period would have been appropriate, he contends that in all the circumstances, cancellation constituted a penalty that was too severe. He asks the Court to reverse the decision, and to substitute a period of suspension instead.

Factual background

[2] For about four years preceding mid-2007, the appellant worked as a sales person at the Mt Albert branch of Barfoot & Thompson. He had a good record there; there were no concerns about his honesty or integrity. In about April 2007 the manager of the Mt Albert branch, Mrs Jean Smith, was approached by a Mr Cavanagh and a Mr Arya (also known as Mr Raghu). The former had been working as a sales person at the Mt Albert branch for about three years. Mr Arya had worked there earlier. They put a proposal to Mrs Smith, related to their plan to form a company, Allwin Holdings Ltd, which was to subdivide and develop property. Under the proposal, sales would be processed through the Mt Albert branch at a discounted commission rate. Mrs Smith agreed to the proposal.

[3] Between 10 April and 20 July 2007, eleven transactions were processed in accordance with the scheme. Subsequently it transpired that the transactions into which Messrs Cavanagh and Arya had entered involved a degree of deception. They had arranged for a number of properties to be bought and sold at inflated prices in order to obtain more substantial loans from banks than would have been available if reliable valuations were submitted. The perpetrators of the scheme disguised their identities by using other persons as named purchasers, and therefore borrowers. In that fashion they were able to obtain bank finance for a number of transactions in excess of ordinary bank lending criteria.

[4] Mr Niall was one of the people used by Messrs Cavanagh and Arya as purchaser. At the request of Mr Cavanagh he entered into an agreement to purchase a property in Wellington Street, Howick. For that purpose, he signed an agreement for sale and purchase and a deed of acknowledgement of debt for vendor finance, together with loan documents for submission to the Bank of New Zealand. Mr Niall regarded himself as a trustee for Allwin Holdings Ltd, and produced at the hearing before the Board a trust deed in which he was named as trustee.

[5] There is evidence that he was to be paid \$5000 for his role in the transaction, although he never actually received that sum, or indeed any sum. Mr Cavanagh acted as the sales person for the purpose of processing the transaction through Barfoot & Thompson.

[6] When the scheme ultimately collapsed, Mr Niall was left owing about \$120,000 to the BNZ. By then he had been suspended from his position and was without income. Eventually he became bankrupt on his own application.

[7] There was no evidence that Mr Niall had any knowledge that the price of the property was inflated. Neither is it suggested that he knew that he was being used for the purpose of perpetrating a scheme involving large scale deception. He was aware that the transactions were being processed through the Mt Albert branch of Barfoot & Thompson, which he believed to be an indication that the transactions were taking place in the ordinary course of business.

[8] Nevertheless, once the true character of the scheme was revealed as the transactions unravelled, Mr Niall accepted that in signing documents at Mr Cavanagh's request without investigating the background adequately, he was careless and irresponsible, and that his actions had assisted in perpetrating what amounted to a fraud on other innocent parties.

Proceedings before the Board

[9] In September 2007, the respondent made an application to the Board pursuant to s 99 of the Real Estate Agents Act 1976 (the Act) for an order suspending or

cancelling Mr Niall's sales person's certificate. The respondent alleged that Mr Niall had participated in a fraudulent mortgage ramping scheme run by others. Although the respondent accepted that he was not a principal in the scheme, he had allowed his name to be used on documents in a manner that suggested that he was the legitimate purchaser of a property, when in fact he was not.

[10] On 3 October 2007, the Board granted the respondent's application for interim suspension of Mr Niall's certificate. The application was made and determined without notice to him. He has been suspended from acting as a real estate sales person since that date.

[11] A significant degree of publicity attended the making of the orders. The respondent issued a press release to which a great deal of attention was paid in both the print media and on television. Mr Niall was portrayed, along with other co-offenders, as having engaged in fraudulent transactions. Mr Judd submits that the media coverage did irreparable harm to the appellant's reputation. I accept that was the inevitable result of what occurred.

[12] Subsequently Mr Niall applied to the Board for an order revoking the interim suspension. On 14 January 2008 the Board refused that application. The immediate financial consequences for Mr Niall were severe. He lived off an unemployment benefit for some time, but more recently has been working on a farm on an income of about \$700 per week. As earlier noted, he became bankrupt because he was unable to repay the debt incurred by reason of his involvement in the Wellington Street transaction.

[13] On 11 and 12 August 2008, the Board heard the respondent's substantive application against the appellant, Mr Cavanagh and Mr Arya. The respondent had also proceeded against a Mr and Mrs Jassat, participants in the scheme, but did not pursue the application against them, because they had left New Zealand and indicated that they would not seek to return to the real estate industry here.

[14] Neither Mr Cavanagh nor Mr Arya appeared at the hearing. The respondent was represented by counsel. Mr Niall represented himself; he could not afford legal assistance.

[15] The Board issued a decision on 23 October 2008. It concluded that the respondent had proved its case under s 99 and that an appropriate sanction was warranted.

[16] Section 99 of the Act provides:

99 Board may cancel certificate of approval or suspend salesman

(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—

- (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
- (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.

(2) The Board shall, as soon as practicable after receiving an application under this section, send a copy of the application to the salesperson or branch manager, and shall not hear or consider the application within 10 clear days after the date of the receipt of the copy by the salesperson or branch manager.

(3) The salesperson or branch manager and the complainant concerned shall be entitled to appear and be heard by the Board in respect of the application.

(4) The Board may, in addition to or instead of cancelling a certificate of approval or suspending the holder under this section, impose a monetary penalty on the holder not exceeding \$750.

[17] On 9 December 2008 the Board held a penalty hearing. Again, the respondent was represented by counsel and Mr Niall appeared in person.

[18] On 18 December 2008, the Board issued its penalty decision. It determined that all three respondents, including Mr Niall, should have their certificates cancelled. It is against that decision that Mr Niall now appeals.

Jurisdiction

[19] An appeal to this Court lies from a decision of the Board that cancels a certificate of approval of a sales person: s 112(2)(c) of the Act. In its determination of any appeal the Court may confirm, modify, or reverse the decision appealed against: s 115(4). Because this is a general appeal, this Court must reach its own view on the merits, and must not simply defer to the views of the Board. That is not to say of course, that the Court should not give significant weight to a body that possesses both the technical expertise and significant industry experience. It is appropriate also to take into account the fact the Board had the opportunity to assess credibility, although in this particular case, because there is agreement as to Mr Niall's role in the impugned transactions, credibility issues do not perhaps play a major role in the outcome.

[20] The approach to be adopted is that discussed in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 at [5]; *McNeill v Real Estate Institute of New Zealand Inc* HC DUN CIV 2008-412-294 25 June 2008 at [28]; and *Davis v Real Estate Institute of New Zealand Inc* HC AK CIV 2008-404-7408 1 May 2009 at [38].

The Board's findings

[21] In its decision of 23 October 2008 the Board summarised the effect of the scheme on its victims in the following way:

The victims of the scheme were the paid intermediaries who have been left as the legal mortgagors owing funds to the banks, with properties valued [at] less than the mortgage advances; the banks' 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 banks for finance.

[22] Of course, viewed in that light, Mr Niall was both a facilitator of the transaction and the victim of it. At the hearing before the Board, counsel for the respondent expressly disavowed any suggestion on the Institute's part that Mr Niall was directly involved in the mortgage ramping scheme.

[23] In its decision of 23 October 2008, the Board set out nine detailed findings, the first six of which relate to the conduct of Messrs Cavanagh and Arya. The seventh concerns the appellant. It reads:

The Board finds that Phillip Niall allowed his signature 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.

[24] The Board's relatively brief penalty decision of 18 December 2008 records a submission made by Mr Haszard on behalf of the Institute in relation to Mr Niall's apparent involvement in a second property transaction in respect of a house in Kotiri Street. The Board indicated however that that transaction was not the subject of evidence at the earlier hearing, and that while it regarded the admission as material, it elected to concentrate on the facts concerning the purchase and on-sale of 163 Wellington Street.

[25] In its penalty decision the Board summarised the overall culpability of the perpetrators of the scheme:

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.

[26] Messrs Raghu and Cavanagh did not appear before the Board, which simply determined that their certificates of approval should be cancelled.

[27] In respect of Mr Niall the Board said this:

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.

The appellant's argument

[28] On behalf of the appellant, Mr Judd submits that the Board fell into error in that it:

- a) failed to consider properly the appellant's diminished culpability when compared with Messrs Cavanagh and Arya, and failed to take into account the need to distinguish between cases calling for cancellation and those for which an appropriate period of suspension will be sufficient; and
- b) failed to have regard to its own previous penalty decisions.

The appellant's culpability

[29] Mr Judd sought to distinguish this case from others in which the sales person was acting in that capacity when the relevant transgressions were committed. He points out that Mr Cavanagh was the agent on the sale of Wellington Street and that

he received the commission. Mr Niall was simply the purchaser, like all other purchasers used by Mr Cavanagh and Mr Arya. He contends that the fact that the appellant happened to be a real estate agent was irrelevant to his role in the transaction.

[30] I reject that contention; as Mr Haszard submits, Mr Niall was legally obliged by virtue of ss 63 and 64 of the Act to disclose his involvement and role in the transaction, and he had associated professional obligations to Barfoot & Thompson. Having regard to the culpability admitted by Mr Niall in respect of his role in the Wellington Street transaction, this point lacks substance.

[31] Mr Judd's next argument, by contrast, is of significantly greater weight. It is common ground that Mr Niall was not dishonest; nor, it is agreed, did he have any intention to mislead. He was simply careless and perhaps naïve. The Board itself acknowledged that he had a "relatively low level of culpability" and was "to a large extent a victim of other people's schemes". It appears that he was relatively junior at the Mt Albert branch of Barfoot & Thompson. Mr Cavanagh was considerably more experienced, and was senior to Mr Niall. Moreover, Mr Cavanagh's activities appeared to carry the approval of the branch manager.

[32] By contrast, the perpetrators of the illegal scheme were involved in a total of 11 property transactions with sales totalling nearly \$13.5 million. They were found to have fraudulently altered agreements for sale and purchase in furtherance of their activities, and to have unlawfully used a Barfoot & Thompson letterhead to create a false document.

[33] Mr Judd submits that the Board ought to have considered Mr Niall's character, but appeared not to have done so. He had worked at the Mt Albert branch of Barfoot & Thompson for four years without any difficulties, and was regarded by Mrs Smith as an honest and competent sales person. Beyond his role in the impugned transactions, there was nothing to suggest that he represented an on-going risk to the public. He had suffered serious and irretrievable damage by reason of the publicity surrounding the original interim suspension decision, the media not troubling to distinguish between the roles of the primary perpetrators and those of

persons such as the appellant. Mr Niall was left with a very significant debt to the bank, which he could not repay, and in consequence of which he was declared bankrupt.

[34] Those are all factors, which, Mr Judd suggested, ought to have been taken into account by the Board.

[35] There is a measure of substance in Mr Judd's criticism. The penalty decision is silent in respect of Mr Niall's character, apart from the little that emerges from the discussion of the offending itself. Yet, s 99(1)(b) expressly required the Board to have regard to the appellant's character. In the leading authority, *Sime v Real Estate Institute of New Zealand* HC AK M73/86 19 August 1986, Tompkins J said at 16:

So what the Board is required to inquire 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.

[36] The Board does not appear to have considered Mr Niall's character as such. Rather, it seems to have decided to make an example of him. In so doing it has fettered its future discretion by determining that cancellation will follow in any case where there has been falsification of documents used in the transfer of land and in the borrowing of money on the security of land. The Board's intention appears to have been to prescribe cancellation in any such instance, regardless of the role played by an individual participant, or the previous character of the person concerned. That approach places an unnecessary fetter on the Board's role in exercising its functions under s 99. Although I accept that cancellation may well be appropriate in many – indeed most – cases where falsification has occurred, the Board is obliged to have regard to all relevant factors, including character, before concluding that cancellation is appropriate in an individual case.

[37] For present purposes it is sufficient to say that the Board appears to have paid insufficient attention to the precise role played by the appellant, and none at all to matters personal to the appellant beyond the transaction itself.

Previous penalty decisions

[38] The Board's powers are extensive. It has jurisdiction to deprive those involved in the industry of their livelihood. It must exercise its jurisdiction in accordance with the principles of natural justice, among which is a requirement that a sanction imposed in a given case must bear some proper relationship to penalties imposed in past similar cases: *Aitken v Real Estate Agents Licensing Board* HC CHCH AP130/96 6 September 1996 at 12.

[39] I was referred to a number of earlier decisions of the Board. In each of them the Board considered earlier cases for the purpose of endeavouring to fix a penalty that was in line with the scale of sanctions hitherto imposed. Curiously, in the present case, the Board did not refer to any of its previous decisions. Neither did it endeavour to compare its approach in the present case with that taken in the past.

[40] Mr Judd submits that this case is simply out of line with earlier authority. It is therefore necessary to consider certain of the Board's prior decisions.

[41] In *Lolohea* (96/420 18 April 1996), Mr Lolohea had falsified agreements for sale and purchase for a number of properties by inserting an inflated purchase price. As in this case, the agreements were submitted to lending banks for the purpose of persuading those institutions to lend a greater proportion of the actual purchase price than would normally be advanced. There was some suggestion that Mr Lolohea was prompted by a desire to assist in facilitating the provision of homes to those who could not otherwise afford them.

[42] The Board imposed a 12 months suspension and directed that Mr Lolohea pay the maximum fine of \$750. It said:

5.3 The dishonest activities in which Mr Lolohea was involved are regarded by the Board as extremely serious. They cannot be condoned even though the Board accepts that Mr Lolohea was motivated by the desire to see members of his community in their own homes. The fact that it appears that no loss will be suffered by Westpac is fortuitous but does not lessen the seriousness of Mr Lolohea's activities. Likewise the breach of sections 63 and 64 by Mr Lolohea reflects badly on his integrity. The Board is therefore of

the view that a monetary penalty alone is not sufficient and that the appropriate sanction is one of suspension and fine.

- 5.4 The Board makes an order pursuant to section 99(1) of the Act, suspending Mr Lolohea as a salesperson for a period of 12 months, such period to run from 20 December 1995, being the date of Mr Lolohea's interim suspension. Further, the Board orders that Mr Lolohea pay the maximum fine under section 99(4) of \$750.

[43] The next case is *Ranjit Singh* (96/426 29 July 1996). That was another case in which the agent falsified agreements for sale and purchase in order to deceive lending institutions by inserting a falsely inflated purchase price. The Board cited the decision of Tompkins J in *Sime* and set out passages from His Honour's judgment. In determining penalty it said:

- 6.1 In the *Lolohea* decision the Board made it clear that while the Board takes note of penalties imposed in prior decisions, the penalty has to be assessed in each case having regard to the facts and circumstances of the particular case. In reaching that decision on penalty the Board has given careful consideration to the facts and circumstances of this case and to the submissions made by counsel for Mr Singh and for the Institute.
- 6.2 By his own admission, Mr Singh has engaged in dishonest and fraudulent activities. Mr Ryan told the Board that in the cases of Jenkins and Mahanga neither purchaser could have afforded to purchase a home in the normal course and in order to assist them, Mr Singh had concealed the true purchase price in the applications for loan finance. While this may have been a consideration for Mr Singh in these transactions, no evidence was placed before the Board that showed that Mr Singh in entering into these transactions, was motivated other than by a desire to complete sales and to obtain payment of a commission.
- 6.3 The Board recognises that Mr Singh did eventually admit his misconduct and is remorseful for his actions. However, Mr Singh did not initially disclose the other fraudulent transactions in which he had been involved when confronted by Mr Thompson about the Frank Grey Place property. Mr Singh's failure to disclose these transactions to Mr Thompson was deliberate and deceitful and the Board regards this behaviour in itself, as a serious breach of character.
- 6.4 After deliberation the Board is of the view that the appropriate penalty in this case is one of suspension and fine. The Board makes an order pursuant to section 99(1) of the Act, suspending Mr Singh as a salesperson for 18 months. The period of suspension is to commence seven days after service of this decision on Mr Singh excluding the date of service. Further, the Board orders that Mr Singh pay the maximum fine under section 99(4) of \$750. The

fine is to be paid by Mr Singh to the Board within 30 days following the date of service of the decision on Mr Singh.

[44] In *Ganesh* (97/450 25 September 1997), there had been convictions in the District Court on seven charges involving dishonesty. Again, the offences concerned related to material alterations to finance applications and sale and purchase agreements. Inflated prices were inserted in order to persuade lending institutions to advance more than was warranted. The Board noted that Mr Ganesh had co-operated fully with the Institute and the Board, but he did not offer an apology or show any remorse. He was suspended for 20 months and ordered to pay a fine of \$750. A minority of the Board delivered a dissenting decision in which it was said that persons convicted of crimes of dishonesty as a result of their real estate activity, ought not to continue in the industry, even on suspension.

[45] In *Zhu* (2006/587 14 July 2006), the Institute's application for cancellation was not contested. Nevertheless, the Board delivered a detailed decision which referred to each of the earlier authorities mentioned above, and distinguished Ms Zhu's case as more serious, in that it involved innocent vendors in the scheme of deception and fraud devised by her to assist a personal friend to purchase a property which she knew he could not afford. The Institute cancelled the certificate and imposed the maximum permitted fine of \$750.

[46] Most recently, in *Liu* (2007/604 30 July 2007), Mr Liu had deliberately falsified a tenancy agreement which he then submitted to Wizard Home Loans in support of his client's loan application. A false tenancy agreement was produced in order to deceive the lender as to the borrower's financial position. The agent gave an elaborate explanation of events which the Board regarded as carefully contrived, in an effort to deceive the Board as to the true status of the tenancy agreement. The Board considered its earlier decisions in *Lolohea*, *Singh*, *Ganesh* and *Zhu*, and decided this was a serious case in that Mr Liu knew that his client would not meet the lending criteria in the absence of falsified information. In addition, he forged his client's signature and without the client's knowledge, he present the agreement to the lender, knowing the company would rely upon it in considering the client's application for finance. The Board found that Mr Liu was motivated entirely by his own desire to obtain a commission.

[47] The Board noted also that, unlike the sales persons involved in the mortgage scam cases, Mr Liu denied any wrongdoing in his explanation to the Institute and continued to do so before the Board. At no stage did he acknowledge any wrongful conduct, or show any remorse. The Board characterised Mr Liu's dishonest conduct as "of a very serious nature". It said it had considered cancellation, but after careful deliberation and taking into account all of the balancing factors, it was of the view that the appropriate penalty was a lengthy suspension and fine. Mr Liu's certificate was accordingly suspended for 24 months; the maximum fine of \$750 was also imposed.

[48] The decision in *Liu* is of considerable significance because, in a contested case, the Board confirmed that it regarded its earlier decisions, stretching back to 1996, as having continuing validity in the sense of providing benchmarks for the assessment of penalties. By contrast, in the present case, the Board referred to no prior authority in its penalty decision.

[49] In my opinion, the decision to cancel Mr Niall's certificate was manifestly out of line with prior authority. This was, in effect, another mortgage scam and so bore some similarity to certain of the cases which had come before the Board in earlier years. But Mr Niall's role in it was limited. Both the Institute and the Board accepted he was not dishonest. Indeed, it might properly be said that he was as much a victim as a perpetrator. Mr Niall's culpability lay in the realm of negligence and naivety, rather than in outright dishonesty present in each of the earlier cases.

[50] It may be that the Board was intending to set a new benchmark. It is difficult to tell. If it was, then the ordinary course to adopt would have been for the Board to extensively review its prior decisions, and then as a matter of principle to set out its reasons for departing from them. Even then, it would need to leave room for the exercise of discretion in an individual case in order to carry out its s 99 functions as explained in *Sime*. That did not occur here. Because the Board considered that the scheme itself was so worthy of condemnation, it concluded that all associated with it should suffer cancellation of their certificates. That approach was not mandated by s 99 or by *Sime*. Moreover, it was adopted without reference to the Board's own previous decisions.

Result

[51] In my view Mr Niall's limited, although of course blameworthy, role in the schemes of his associates did not justify an order cancelling his certificate of approval. I accept however that, in line with the Board's previous decisions, a lengthy period of suspension was appropriate.

[52] The appeal is allowed. The order of the Board cancelling the appellant's certificate of approval is reversed. I substitute an order suspending the appellant's certificate of approval for 18 months from 3 October 2007, a period which has already expired.

C J Allan J