

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

CIV 2008-404-007408

IN THE MATTER OF the Real Estate Agents Act 1976

BETWEEN ANNE LESLEY DAVIS
 Appellant

AND THE REAL ESTATE INSTITUTE OF
 NEW ZEALAND INCORPORATED
 Respondent

Hearing: 4 March 2009

Appearances: Mr McDonald for appellant
 Mr Haszard for respondent

Judgment: 1 May 2009

JUDGMENT OF WINKELMANN J

*This judgment was delivered by me on 1 May 2009 at 2.00 pm pursuant to
Rule 11.5 of the High Court Rules.*

Registrar/ Deputy Registrar

Peter McDonald, Solicitor, Auckland
Meredith Connell, Auckland
Simpson Grierson, Auckland

[1] Mrs Anne Davis worked as an approved salesperson for Twiss-Keir Realty Ltd, a licensed real estate agency and a member of the Harcourts Franchise. Complaints were made to the Real Estate Institute of New Zealand Incorporated about Mrs Davis' conduct when acting as agent in the sale of a property at 2/255 Pine Avenue, South Brighton, Christchurch. Following investigation of these complaints, the Institute applied to the Real Estate Agents Licensing Board to suspend and/or cancel the certificate of approval issued in respect of Mrs Davis. The application was brought on the basis that Mrs Davis' conduct showed her to be of such a character that it was in the public interest that her certificate be cancelled or that she be suspended. Following a defended hearing the Board found that Mrs Davis' conduct warranted imposition of penalties. The Board imposed a period of suspension for 3 months together with a monetary penalty of \$750.00.

[2] Mrs Davis now appeals against both the finding in relation to Mrs Davis' character and the penalty imposed.

[3] The Institute's application was brought under s 99 of the Act which provides in material part as follows:

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

- (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.

(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 upon the holder not exceeding [\$750].

[4] The leading authority as to the approach to be taken to a s 99 application by the Board is *Sime v REINZ* HC AK M73/86 19 August 1986, Tompkins J. Tompkins J said of s 99(1)(b):

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.

[5] And at page 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.

[6] Once that inquiry has been undertaken the Board is then to address itself to whether given the type of character the person has been shown to have, it is in the public interest that the certificate be cancelled or that the person suspended. Tompkins J said:

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.

[7] This appeal is brought on grounds that the Board:

- (a) Erred in some of its factual findings.
- (b) Made some findings without providing Mrs Davis with an opportunity to be heard on the allegation.
- (c) Misapplied the *Sime* test.
- (d) Imposed too severe a penalty.

Background facts

[8] Mrs Davis has been employed by Twiss-Keir Realty Ltd as a salesperson since 1999. She and Ms Thom and Mrs Davis lived in the same neighbourhood in Christchurch, South Brighton, and were known to each other.

[9] Ms Thom's mother, who owned a small two bedroom unit in that same neighbourhood, died in 2000. In 2001 Mrs Davis completed a marketing proposal for the property, but at that point in time Ms Thom decided that she was not ready to sell. The marketing proposal presented included detail of the marketing programme the agency would undertake for a property listed with it, and options available for the method of sale.

[10] In very early 2005 Ms Thom told Mrs Davis that she was now prepared to sell, and on Monday 10 January 2005, Ms Thom signed a listing agreement with Twiss-Keir Realty Ltd for sole agency of 2/255 Pine Avenue, New Brighton. Mrs Davis discussed an appropriate listing price with Ms Thom and it was agreed that the property would be offered for sale at \$165,000.

[11] At some time shortly prior to the signing of the listing agreement, another employee at Twiss-Keir Realty Ltd, Ms Henderson, announced to the office that she was looking for a two bedroom unit in the South Brighton Area. Ms Henderson gave evidence before the Tribunal that she was not sure whether she told everybody in the office that it was for her mother or not. Accordingly, when the listing agreement was signed, Mrs Davis told Ms Thom that she might have someone interested in purchasing the house.

[12] There was a difference in the accounts given by Mrs Davis and Ms Thom as to the information given to Ms Thom by Mrs Davis to help her in pricing the unit for sale. Mrs Davis said that she provided Ms Thom with information about recent sales in the area, but that she no longer retained a copy of that information. Ms Thom denied that she received any such information. She said she proceeded on Mrs Davis' recommendation alone. She said that if she had received additional

information, she would have kept it on the file she had for the property. There was no such information on the file.

[13] Because further cleaning of the property was necessary, it was agreed that public marketing of the property would not commence until Friday 14 January 2005. But Ms Thom had difficulties organising cleaning of the property and it seemed that marketing would be further delayed. Mrs Davis offered to clean the unit on Thursday 13 January 2005, with the assistance of her own cleaner, an offer that was accepted.

[14] On Thursday 13 January 2005, the partner of Mrs Davis' cleaner, Mr Walker, saw the unit when he was dropping his partner off. On that day he told Mrs Davis that he had recently sold his own property and wished to make an offer to buy the unit. Mrs Davis prepared an offer for Mr Walker to purchase the property on Friday 14 January 2005.

[15] On 13 January 2005, after she had cleaned the unit, Mrs Davis returned to the office and told Ms Henderson that the property had been cleaned, was available for inspection and that a lock box (a storage facility for keys utilised by real estate sales people) was in place. Mrs Davis also told Ms Henderson that she was already drawing up an offer for the property, and that if Ms Henderson was interested in the property she would need to move quickly. Ms Henderson visited the unit. She too decided to make an offer.

[16] Accordingly, on Friday 14 January 2005 two offers for the property were generated. Both of the offerors had visited the property before any member of the public knew of its availability. One of the offerors was an employee of Twiss-Keir Realty Ltd. It is an uncontested fact that by this point in time not a single marketing step had been undertaken for Ms Thom. No "for sale" sign had been erected, although it had been agreed one would be erected. The property had not been advertised in the newspaper or in the "Bluebook" marketing magazine used by Twiss-Keir. There had been no leaflet drop to properties in the neighbourhood.

[17] Because two offers had been generated, (what the agency refers to as a “multi-offer situation”) Mrs Davis involved Mr Mark Lambie, the sales manager at Twiss- Keir. In terms of the Act it is the branch manager who is charged with supervision of a real estate agency’s office, but the branch manager was away from work on his summer holidays, and so Mr Lambie stepped into the breach. In accordance with protocol followed at Twiss-Keir in “multi-offer” situations Mrs Davis contacted Mr Walker, and told him there was another offer for the unit. She asked him if he wanted to increase his offer. He declined to do so.

[18] On the afternoon of 14 January 2005 Mr Lambie and Mrs Davis travelled together to Ms Thom’s home. While Mr Lambie went inside with the offers in two sealed envelopes, Mrs Davis remained in the car. Mr Lambie said that he did not study the offers beforehand but simply handed them in sealed envelopes to Ms Thom. When submitting Ms Henderson’s offer of \$160,500, he explained that because the offeror was an employee of the agency an independent valuation would be obtained, allowing Ms Thom to void the sale if the valuation revealed that the property had a higher value than offered. Mr Walker’s offer submitted to Ms Thom was \$158,000. Mr Lambie offered no advice to Ms Thom in relation to which offer to accept.

[19] When Mr Lambie left Ms Thom's home, Mrs Davis entered it at Ms Thom’s invitation. Ms Thom’s evidence before the Board was that Mrs Davis told her that these offers were the “best that I would get”. In her evidence Mrs Davis was not able to recall precisely what she had said, but did not contradict that evidence. Ms Thom initially described Mrs Davis’ manner at that time as “pushy”. On cross-examination she said that the word “pushy” might be too strong, but still maintained that Mrs Davis was very keen for her to sign up. Ms Thom accepted the higher offer of \$160,500 which was later supported by a valuation of \$158,000, thereby making the contract unconditional.

[20] A “for sale” sign was not erected on the property until Monday 17 January 2005. One of the neighbours, Mr Rogers, saw the for sale sign and immediately phoned Mrs Davis. He was told that the property had already sold.

[21] Another potential purchaser of the property in the neighbourhood was Mr Perkins. He and Mr Rogers discussed the fact that they were both denied the opportunity to make an offer on Ms Thom's property as a consequence of the conduct of the real estate agent. Mr Rogers laid a complaint dated 14 April 2005 with Twiss-Keir Realty, and when he was not satisfied with their reply, he complained to the Institute.

[22] Mrs Henderson resold the property, only three months after settling the purchase, for \$40,000 more than she had paid for it. Her mother did not live in it at any stage. Mrs Henderson simply undertook minor renovations before resale.

[23] The Institute formed a sub-committee to investigate the complaint, and in the course of the investigation various witnesses were interviewed. Following on from the investigation the Institute made application to the Board under s 99 of the Act.

[24] The grounds on which the application was brought were particularised as follows:

1. At all material times, Anne Lesley Davis ("Mrs Davis") was the holder of a certificate of approval as a salesperson. The certificate of approval was held by Twiss Kerr Realty Limited ("Twiss").
2. On the 10 December 2004, Mrs Davis met with Shona Thom at the address of 2/255 Pine Avenue, South Brighton, Christchurch ("the property"). Ms Thom indicated to Mrs Davis that she was looking at selling the property at some stage in the relatively near future, but was not ready to list the property at that time. Mrs Davis gave Ms Thom a marketing proposal for sale of the property when it was available for listing.
3. On 10 January 2005, a listing agreement was signed, giving Twiss sole agency to market the property. The commencement date for the agency was 14 January 2005.
4. On 14 January 2005, Mrs Davis and a colleague presented two offers to Ms Thom. One offer was from Ms Henderson, a colleague of Mrs Davis, for \$160,500.00. The second offer of \$158,000.00 was from a Mr Walker, a cleaner who had been assisting in preparing the property for listing for sale.
5. At the time that the offers were presented, Mrs Davis:
 - (a) Knew Ms Thom was unwell;
 - (b) Had not provided a current market appraisal;

- (c) Had not marketed the property for sale in any meaningful way at all.
6. Ms Thom expressed concern to Mrs Davis at the time the offers were presented that she (Ms Thom) knew some neighbours who were interested in purchasing the property, and therefore would like the property advertised. Ms Thom further advised Mrs Davis that she wanted a sign put up advertising the property for sale.
 7. Mrs Davis ignored Ms Thom's requests and concerns, and in what Ms Thom describes as a "pushy manner", told Ms Thom that the Ms Henderson offer was the best offer that she would get for the property. Ms Thom accordingly accepted the Ms Henderson offer.
 8. On 17 January 2005, a for sale sign was erected outside the property for promotional reasons. A neighbour saw the sign and called Mrs Davis expressing interest in the property. Mrs Davis advised the neighbour that the property was under an accepted offer, but indicated to the neighbour that the property would be done up and offered for re-sale.
 9. The sale of the property was settled on 11 February 2005. Some relatively minor renovations were carried out by Ms Henderson, before the property was put back on the market for sale on 14 April 2005. The property was subsequently sold in May 2005 for \$205,000.
 10. Following a complaint to the Institute, an Investigation Sub-Committee was convened. At the Investigation Sub-Committee ("ISC") hearing, Mrs Davis incorrectly advised the ISC on three matters, namely:
 - (a) The timing as to when Ms Henderson expressed interest in purchasing the property. Mrs Davis incorrectly advised the ISC that Ms Henderson had only expressed interest in purchasing the property after it was listed;
 - (b) The purpose as to why Ms Henderson was purchasing the property. Mrs Davis incorrectly advised the ISC that Ms Henderson was purchasing the property for her elderly mother, not to do up and then re-sell.
 - (c) That a current market appraisal had been completed. Mrs Davis incorrectly advised the ISC that a current market appraisal had been completed for the property and given to Ms Thom.

The Board's decision

[25] The Board stated the Institute's case against Mrs Davis as follows:

Mr Haszard summarised the Institute's case into three broad points. Firstly, in relation to the application of the *Sime* case to the s 99 application, Mr Haszard submitted that the conduct of Mrs Davis in managing Ms Thom's sale, particularly having regard to Mrs Davis' knowledge of Ms Thom's general health and understanding, satisfied the *Sime* test warranting the Board cancelling or suspending Mrs Davis' certificate of approval to act as a salesperson. The fundamental flaw, according to the Institute, was Mrs Davis' failure to market the property before submitting offers to Ms Thom, known to need particular care. It is at this point that the character test comes into play. It is less than the standard of utmost good faith to allow the limited Ms Thom to accept any offer before the open market had been tested. Secondly, the cumulative analysis of the conduct of Mrs Davis supported the satisfaction of the *Sime* test of "character", justifying s 99 penalty. Thirdly, Mr Haszard refuted the assertion that the written valuation supporting Ms Henderson's offer of \$160,500 provided a "complete answer" to the idea that the property was under-sold because only an open and informed market could provide such a complete answer and obviously, no such comprehensive market testing occurred in January 2005.

[26] In considering the application, the Board saw it as significant that in the marketing material given to Ms Thom in 2001 Mrs Davis represented that if engaged to sell the property the agency would institute a high profile marketing programme. The marketing proposal included a statement that it would increase "exposure to potential buyers through open homes, advertising, signs and numerous other marketing opportunities offered by Harcourts, such as the internet and the Bluebook." However, by the time the two offers were presented, the agency and Mrs Davis had not taken a single marketing step for Ms Thom. The Board also identified as a material fact that Mrs Davis knew that Ms Thom was not physically well, and that she was not an experienced person in relation to commercial matters, describing her as "limited". It said that Mrs Davis, who knew Ms Thom for at least four years, was aware of Ms Thom's need for professional guidance and that "the fullest consideration of the interests of the vendor is the hallmark of a fiduciary relationship existing between a principal and the licensed real estate agent."

[27] The Board said that the two offers submitted on Friday 14 January 2005 were created out of Mrs Davis' inside knowledge, and one of the offers was from a person whose position was such that the Act imposes protective measures to ensure that a vendor is not exploited by a person in a fiduciary relationship. This fact alone should have put all the professionals involved on notice of the need to ensure a level of protection for the vendor.

[28] Although it was the Institute's case that Mrs Davis knew that Ms Henderson was buying the property to re-sell, the Board declined to make that finding. It accepted Ms Henderson's evidence that she had initially intended the house for her mother, but that at some time after the agreement was signed, her mother refused to live there. The Board did not find that Mrs Davis had misled the Investigation Sub-Committee. In fact, there is no discussion by the Board of the allegations that Mrs Davis misled the Sub-Committee.

[29] The Board directed itself that it had to assess Mrs Davis against the character test set in s 99. It asked itself the question:

Did Mrs Davis reveal personal traits, reputation and aspects of behaviour that reflect on her honesty and integrity?

[30] The Board said that following the examination of the test and evidence its findings were:

- (1) Mrs Davis could not rely upon the fact that the valuation obtained by Ms Henderson was lower than Ms Henderson's offer, nor upon the fact that she sought advice from her manager. Three separate witnesses, Ms Henderson, Mr Rogers and Mr Perkins each provided mutually reinforcing evidence of market demand at that time for a residential unit on a flat section suitable for the aged. The valuation opinion obtained by Ms Henderson did not redeem Mrs Davis from the fact that two potential purchasers had given credible evidence that they were willing and able to be potential offerors, prepared to pay in excess of the asking price of \$165,000. Therefore Ms Thom suffered loss out of the examined transaction. The Board said:

The primacy of the interests of the vendor must be maintained at all times and was not by Mrs Davis on 14 January 2005 and this default reflects on her own integrity as a responsible person selling Ms Thom's property. The fact that the market was untested, coupled with the later credible potential offers from motivated neighbours, outweighs Ms Henderson's independent valuation.

- (2) The interests of Mrs Davis and her employer prevailed on 14 January 2005 because Ms Thom was denied the advantage of having her property tested on an open market which at that time, the Board said, favoured vendors. It said:

Mrs Davis should not have allowed the two offers to be placed before the vendor on 14 January 2005 before the open market had been tested, particularly having regard to Ms Thom's limited knowledge or understanding of commercial matters.

- (3) Mrs Davis' action in erecting a "promotional sign" on Monday 17 January 2005 illustrated the extent of the preference of her own interests over the interests of the vendor. There was no "sold" sticker on the sign. The sign was designed to attract future potential vendors and sellers for the benefit of Mrs Davis and not Ms Thom.

[31] The Board found that the complaint made by Mr Rogers was justified. It said that he was a credible witness, and that the Board accepted his evidence that he had a genuine interest in the purchase of the property, as evidenced by the fact that he reacted immediately to the sign being put up.

[32] The Board found that Mrs Davis' character as revealed in her conduct of the sale, satisfied the *Sime* test. Accordingly, it directed itself to the second stage: was it in the public interest that s 99 be invoked having regard to the above findings of fact? The Board found that public interest required a response. Subsequently at a penalty hearing it imposed the three month suspension and small monetary penalty that is now appealed from.

Appellant's argument

[33] The appellant argues that the finding of the Board, that Mrs Davis should not have presented the two offers, is plainly wrong. Rule 14.11 of the Institute's rules obliges the agency to present the two offers immediately, a rule consistent with the general law of agency.

[34] It is also argued for Mrs Davis that the finding that the action by her in erecting the sign somehow reflected upon her character was made in breach of natural justice since there was no particularisation by the Institute of any criticism in connection with the sign, and no evidence or submissions directed to the reasons for the late placement of the sign.

[35] It is submitted for Mrs Davis that in any event, on these facts the *Sime* test could not possibly be met since the criticisms the Board identifies in respect of her conduct do not go to character. At worst, the Institute's criticism of Mrs Davis' conduct was that she was negligent. The only finding adverse to Mrs Davis that was open to the Board was that she should have given better advice. But that hardly goes to character. There was no basis upon which the Board could find that Mrs Davis preferred her interests over that of Ms Thom, and it is emphasised that proposition was not put to Mrs Davis in cross-examination. Although the Board says that the presentation of the offers and the erection of the sign showed that the interests of Mrs Davis and her employer prevailed on 14 January 2005, it does not articulate how that is so. Mrs Davis' counsel emphasises that there was nothing to suggest, and no finding, that Mrs Davis lied, cheated, had been corrupt, or otherwise deceitful.

Respondent's arguments

[36] Counsel for the respondent concedes that the Board could not properly base its decision upon a criticism that Mrs Davis should not have allowed the two offers to be placed before the vendor. The respondent agrees that there was no dispute during the course of the hearing that an agent has an obligation to present offers to the principal, and that there was no cross-examination of the appellant at the hearing which suggested the appellant ought not to have presented the offers to Ms Thom. The circumstances in which those offers were put and the information that ought to have accompanied them was the focus of the Institute's case as presented in submissions and the focus of much of the cross-examination.

[37] The respondent submits that in reading the decision as a whole, it is evident the Board was concerned about the overall circumstances leading up to the presentation of the offers. It is argued that it was the way in which the presentation

of the offers was conducted which in reality forms the basis for the Board's character finding.

Approach on appeal

[38] This is a general appeal under s 112(2) of the Act. As to the proper approach on appeal I must come to my view on the merits and need not defer to the views of the Board. But in forming my views of the merits I may take into account that the Board may have had an advantage in terms of technical expertise. The Board has at least one member who is a licensed real estate agent (see s 4 of the Act), so it does have access to technical expertise in its decision making process. I may also take into account that the Board may have had the opportunity to assess issues of credibility where witnesses have given evidence before them (*Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SCNZ)).

Analysis

[39] The precise basis of the Board's decision is difficult to discern from the written reasons. What can safely be said is that the Board has determined that Mrs Davis has been of such a character that it is in the public interest that her certificate of approval be suspended for three months. The basis of that decision seems to be that in placing the offers before Ms Thom in the particular circumstances she preferred her own and her employer's interests over Ms Thom's, and this was in breach of her fiduciary duty. The Board has found evidence of that preference in two aspects of her behaviour. The first that she presented the two offers, and the second that she erected the promotional sign after the sale had been effected.

[40] Counsel for the Institute did not attempt to support either basis articulated in the decision. He argued rather that a gloss had to be added to the words used by the Board to make sense of the reasons. This submission is made on the basis of how the case was argued before the Board, both by prosecuting and defence counsel, in the light of the evidence that was before the Board and in the light of some comments made by the Board in the course of its decision.

[41] The analysis of the Board's reasons suggested by counsel for the Institute involves more than merely adding a gloss to the Board's reasons; it involves substituting a whole new set of reasons. It would not be proper to proceed on that basis, so I proceed then from the reasons provided by the Board. To the extent that its findings were founded upon a criticism that the offers were physically presented to Ms Thom, then the Board plainly erred. Mrs Davis was required, as an agent of Ms Thom, to present to Ms Thom offers received. The Institute did not contend that Mrs Davis should have declined to present the offers at that point in time.

[42] In relation to the Board's reliance upon the late placement of the sign as being for promotional purposes for Mrs Davis only, again that finding cannot be supported on the evidence as it was before the Board. As conceded by counsel for the Institute, there was no evidence before the Board that the reason for the placement of the sign was promotion of Mrs Davis. In fact the only evidence I have been referred to on this issue is that collected by the Investigating Sub-Committee earlier in the process. Mrs Davis told the Sub-Committee that the sign was put up some three days after the property was under offer because the offer was subject to LIM and title searches. Mrs Davis said that was normal procedure.

[43] These specific criticisms can be levelled at the Board's written reasons. Nevertheless I also accept counsel for the Institute's submission that when the reasons are read as a whole, it is plain that the Board was troubled by the manner in which the offers were placed before Ms Thom and the advice she received in relation to them, in circumstances where the property had not been marketed at all, and inappropriate advice given to Ms Thom as to the options available to her. Because of the uncertainty as to the precise basis for the Board's determination as to Mrs Davis' character I have no doubt that the requirement that I form my own views as to the merits of the Board's determination is appropriate.

[44] I too am troubled by Mrs Davis' conduct in relation to the sale of the property. Mrs Davis knew that the property was being sold in a bullish market. Evidence before the Board showed that the market had lifted 25% in the 2004 year. Those market conditions persisted through 2005, as in that year the market lifted 20%. Under cross-examination Mrs Davis accepted there was a short supply of

similar properties in the South Brighton area, and that Ms Thom's mother's property was the only two bedroom unit potentially for sale in the South Brighton area in January 2005.

[45] When two offers were so quickly forthcoming from the very small group of people who knew the property was to be sold, Mrs Davis should have considered whether she had underpriced the property. She knew that there had been no testing of the market to clarify the accuracy of her assessment of an appropriate price for the property. As the Board identified, it is also relevant that Ms Thom was a vulnerable vendor. Mrs Davis knew that Ms Thom had poor health, and that she was commercially inexperienced. She accepted that she was aware of Ms Thom's need for professional guidance.

[46] Although Mrs Davis was undoubtedly obliged to present the offers, when offering her advice, she was also obliged to turn her mind to Ms Thom's interests. This required that at the very least she outline the options available to Ms Thom. There was nothing that required Ms Thom to accept either offer. She could have countersigned her preferred offer, or she could have held the offers, pending marketing the property over the weekend. But Mrs Davis made no mention of these alternatives. Instead she gave Ms Thom advice which seems unsupportable on any analysis of the facts.

[47] There is also something in the Board's criticism in connection with the failure to put up a sign. The failure to immediately erect a sign was indicative of a sloppy approach to the marketing of the property. Mrs Davis did not put a sign up on the property on Friday morning as one would expect. If the marketing was to commence on Friday, then it was open to her to put the sign up on Friday morning. The offers were, after all, not presented until sometime on Friday afternoon. The inescapable conclusion is that because the offers were in the wind, attempts to market the property were sidelined.

[48] When viewed in this context Mrs Davis' advice to Ms Thom and her failure to identify for her the options she had in relation to those offers, was startling. The manner in which Mrs Davis acted in respect of the sale of the unit on the Friday

evidences at the least an indifference to her obligation as Ms Thom's agent to secure the best possible price for the unit. I do not hesitate to categorise it as seriously negligent.

[49] Although this incident showed negligence on the part of Mrs Davis, the Board proceeded a step further, finding that in breach of fiduciary duty she preferred her own interests and that of her agency over that of Ms Thom. The Board does not further clarify what interest of her own and the agency Mrs Davis preferred over that of Ms Thom's. During the course of cross-examining Mrs Davis counsel for the Institute put to her that she allowed her loyalties to Ms Thom and Ms Henderson to become mixed. Mrs Davis denied this. The Board has made no finding to that effect, nor even mentioned that allegation in the course of its reasons.

[50] I infer then that the Board concluded that Mrs Davis acted in the manner she did on the Friday because she was simply concerned to easily achieve a sale and secure to herself and her agency the commission which flowed from such a sale, that it was in this sense that she preferred her own and her agency's interests. That is certainly the argument the Institute now presents in support of the Board's decision.

[51] That is one possible inference to be drawn from Mrs Davis' conduct. Her conduct surrounding the presentation of the offers certainly portrayed an indifference to Ms Thom's interest in obtaining the best price for her unit. But if that was the Institute's case it should have been particularised in the application and put squarely to Mrs Davis in cross-examination. Out of fairness to Mrs Davis I am not prepared to make a finding of breach of fiduciary duty on this basis on appeal, when it was not how the case was conducted before the Board.

[52] Nevertheless in assessing the seriousness of Mrs Davis' conduct it is relevant that if the conduct were now to be assessed under the Real Estate Agents Act 2008, it would most likely satisfy the test for professional misconduct. Section 70 of the Real Estate Agents Act 2008 provides:

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct -

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of -
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

In the light of this conduct could the Board have been satisfied that Mrs Davis was of such a character that it was in the public interest that her certificate be suspended?

[53] As Tompkins J said in *Sime*, the issue under s 99 is not whether there has been misconduct in the sense used in the Act. Rather the inquiry is as to the character of the person. Clearly what is envisaged by s 99 is a case by case inquiry as to the significance of the conduct proven against the salesperson, when assessing the sales person's character.

[54] In this case, Mrs Davis has been guilty of serious negligence at a level suggesting an indifference to her obligations to Ms Thom. Negligence at this level can reflect upon a person's character and I do not doubt that in this case this conduct reflects adversely on Mrs Davis' character to some extent. But the issue is whether, by reason of that negligence, Mrs Davis has been shown to have been of such a character that it is in the public interest that her certificate of approval be cancelled or suspended. I accept counsel for Mrs Davis' submission that there is no suggestion of dishonesty in her conduct, and that this is an isolated incident. No pattern of conduct has been shown. Against this background, I cannot conclude that Mrs Davis was of such a character that it was in the public interest that the certificate of approval be suspended in respect of her.

[55] Given that finding the appeal is allowed, and the penalties imposed in the decision of 13 October 2008 are quashed.

Costs

[56] The appellant seeks indemnity costs for this hearing, and before the Board. There is no basis for an award of indemnity costs in this case. Mrs Davis' conduct fell below the standard expected of real estate sales people. As the Board highlighted in its reasons, the provisions of s 99 create a high threshold. But even so, in this case the Institute cannot be criticised for bringing the s 99 application.

[57] If the parties are unable to agree costs, they should ask the registry to assign a tele-conference before me and I will hear counsel in relation to the issue.

Winkelmann J