

CITATION: *Lee v Agents Licensing Board* [2009] NTMC 039

PARTIES: THONG SUM LEE
v
AGENTS LICENSING BOARD

TITLE OF COURT: LOCAL COURT

JURISDICTION: LOCAL COURT

FILE NO(s): 20907057

DELIVERED ON: 9 September 2009

DELIVERED AT: Darwin

HEARING DATE(s): 29 May, 5 June & 13 July 2009

JUDGMENT OF: Dr J A Lowndes

CATCHWORDS:

AGENTS LICENSING BOARD APPEAL – NATURE OF APPEAL AND PARTIES TO THE APPEAL – ROLE OF RESPONDENT – FIDUCIARY DUTIES – DUTY OF LOYALTY – DENIAL OF NATURAL JUSTICE – FAILURE TO ACT IN GOOD FAITH – APPEAL DISMISSED

Agents Licensing Act (NT) ss 4, 5, 33, 44, 44B, 65, 67, 85, Schedule 4 of the Regulations

Local Court Rules Rule 37.07

Brideson [No 2] (1990) 170 CLR 267 Applied

Coal & Allied Operations Co Pty Ltd v Australian Industrial Relations Commission & Ors (2000) 203 CLR 194 Applied

Turnbull v NSW Medical Board [1976] 2 NSWLR 281 Applied

Cryer v Agents Licensing Board (2001) NTMC 57 Considered

Shew v Agents Licensing Board (2003) NTMC 011 Considered

R v Australian Broadcasting Tribunal Ex parte Hardiman (1980) 144 CLR 13 Considered

Attorney General v Lowndes and Anor [1993] 2 NTLR 206 Considered

Meinhard v Salmon (1928) 62 ALR 1 Applied

Equity 8 v Shaw Stockbroking Ltd [2007] NSWSC 413 Applied

Blyth Chemicals v Bushell (1933) 49 CLR 66 Followed

Hospital Products Ltd & United States Surgical Corporation & Ors [1984] 156 CLR 41 Applied

Attorney General v Blake [1998] ChD 439 Considered

Walker v Stones [2000] 4 ALL ER 412 Considered

SBAU v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCA 1076 Applied

Builders Licensing Board v Sperway Constructions Pty Ltd [1975] 2 NSWLR 174

M Aronson, B Dyer & M Groves “*Judicial Review of Administrative Action*” (Law Book Co 2009)

Bowstead & Reynolds on Agency (15th ed)

E Campbell “*Appearance of Courts & Tribunals as Respondents to Applications for Judicial Review*” (1982) 56 ALJ 293

C Sappideen, P O’Grady & G Warburton “*Macken’s Law of Employment*” (6th ed Law Book Co 2009)

AG Lang “*Estate Agency Law & Practice in New South Wales*” (Law Book Co 1994)

D C Pearce & R S Geddes “*Statutory Interpretation in Australia*” (6th ed)

A Stewart “*Stewart’s Guide to Employment Law*” (Federation Press 2009)

REPRESENTATION:

Counsel:

Appellant:	Ms S Porter
Respondent:	Mr M Johnson

Solicitors:

Appellant:	TS Lee & Associates
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID number:	[2009] NTMC 039
Number of paragraphs:	196

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2090705

BETWEEN:

THONG SUM LEE
Appellant

AND:

AGENTS LICENSING BOARD
Respondent

REASONS FOR JUDGMENT

(Delivered 9 September 2009)

Dr J A LOWNDES SM:

THE NOTICE OF APPEAL

1. On the 19 February 2009 the appellant lodged a notice of appeal in relation to the following decision of the Agents Licensing Board, which was given on 30 January 2009:

That the conduct of the appellant in wrongfully arranging for the 30% sales commission to be paid to himself from the proceeds of the settlement of the sale of the property and that the appellant thereby placed his interests ahead of the vendor and his principal, amounts to a reasonable ground which is sufficient to warrant disciplinary action being taken against the appellant under s 44(1)(e) of the *Agents Licensing Act*.

2. By way of an amended Notice of Appeal lodged on 26 March 2009 the appellant appealed the Board's decision on penalty, which was given on 27 February 2009. On the latter date the Board ordered pursuant to s 44B(1) (c) of the *Agents Licensing Act* that the appellant's registration as an agent's representative be suspended until such time as he declares that he will be

bound by a written undertaking to the Board to the effect that he shall refuse to act as a solicitor/conveyancer in respect of the settlement of a contract to sell a property for any vendor for whom he has been the agent's representative employed by a real estate agent engaged for the purpose of the sale of that property. In addition, the Board imposed a fine of five penalty units pursuant to s 44B(1)(b) of the Act.

3. During the course of the hearing of the appeal leave was given to the appellant to file a further amended notice of appeal. That further amended notice of appeal set out 14 grounds of appeal, eleven of those in respect of the substantive decision and three in relation to penalty.
4. The grounds of appeal in relation to the substantive decision are paraphrased as follows: ¹

Alleged errors of law:

1. The Board erred as a matter of law in finding that the appellant, as an independent contractor, would likely be subject to duties similar to that owed by an employee to an employer and those duties would include duties of loyalty and confidentiality. As a matter of law, the underlying independent contractor relationship between the appellant and Litchfield Realty was not one in which such duties would be implied or imposed.
2. The Board erred in law in finding that the duties referred to in the preceding paragraph would continue as long as there was a relationship between the appellant and Litchfield Realty. Even if such duties were implied or imposed, as a matter of law, those duties ceased when the underlying relationship that gave rise to those duties terminated on 7 November 2007.

¹ The grounds of appeal are not necessarily in the order they appear in the further amended Notice of Appeal.

3. The Board made an error of law in finding that regardless of the appellant's resignation from Litchfield Realty, the appellant's obligations to Litchfield Realty (which obligations were not specified) would continue until settlement of the contract. As a matter of law, the appellant's resignation from Litchfield Realty ended the appellant's relationship with Litchfield Realty which gave rise to any obligations owed by the appellant to Litchfield Realty and thereby determined those obligations.
4. The Board erred as a matter of law in finding that fiduciary duties arose from the contractual relationship between the appellant and Litchfield Realty. The appellant's relationship of independent contractor did not give rise to a fiduciary relationship or fiduciary duties.
5. The Board erred in law in finding that the contractual relationship of independent contractor between the appellant and Litchfield Realty continued to have effect until the settlement date, as that relationship was, as a matter of law, determined upon the appellant's resignation from Litchfield Realty on 7 November 2007.
6. The Board erred as a matter of law in finding that the appellant owed a fiduciary duty to the vendors, without identifying that duty and stating at what time it was owed. Any duty owed by the appellant to the vendors was determined upon the appellant's resignation from Litchfield Realty.
7. The Board erred in law by finding that the appellant acted dishonestly (or could not have held an honest belief) because no other similarly qualified person could have objectively held the view that he was entitled to the 30% commission. For the appellant to be found to have been dishonest the appellant had to have a dishonest state of mind and be aware that what he was doing would offend the

normal accepted standards of conduct; and there was no evidence before the Board that the appellant had a dishonest state of mind or was aware that what he was doing would offend the normal accepted standards of conduct.

Alleged denial of natural justice:

8. The Board acted contrary to the principles of natural justice in that the appellant was not notified of the allegation that he acted dishonestly (or without honest belief).

Alleged failure to act in good faith or without bias:

9. The Board did not act in good faith or was biased as evidenced by the Board:
 - not treating the letters from Litchfield Realty dated 9 January 2008 and 25 March 2008 as written notice for disciplinary action under s 44(4) of the *Agents Licensing Act* and thereby rendering s 44(7) of the Act inapplicable;
 - further to the above, proceeding with an inquiry as if it were initiated by the Board;
 - proceeding in the face of legal advice that no offence had been committed that could be construed as a breach of the *Agents Licensing Act* and against the recommendation of the Registrar;
 - purporting to deal with the appellant in his capacity as a solicitor contrary to s 4(1)(c) of the *Agents Licensing Act*;
 - upon objection to the above, proceeding in the face of known facts so as to try and find jurisdiction once the evidence was heard;

- failing in the first instance to properly particularise the conduct alleged to give rise to the reasonable ground upon which the Board could find that it would be sufficient to warrant taking disciplinary action against the appellant;
- by placing a higher standard of conduct on the appellant than an ordinary agent's representative due to the fact that he is also a solicitor;
- failing to consider the appellant's submissions as to the law in *Attorney General v Blake* [1998] ChD 439 at 453 to 454;
- illogically reasoning that the appellant owed a fiduciary duty to the vendor not to prefer his own interests above those of the vendor;
- illogically reasoning that the appellant owed a fiduciary duty to Litchfield Realty not to prefer his own interests above those of Litchfield Realty;
- making a finding of dishonesty against the appellant in the absence of any allegation of dishonesty and against the legal principles of making such a finding;
- imposing more than one penalty when the *Agents Licensing Act* provides only for one penalty to be imposed upon an adverse finding against the appellant.

Allegation that the decision was against the weight of evidence:

10. The Board reached its decision against the weight of evidence in finding that the appellant's conduct was dishonest to the extent that he did not act in good faith and that he could not have held an honest belief that he was entitled to the funds in dispute;

11. The Board reached its decision against the weight of the evidence in finding that the evidence given by the appellant at the hearing demonstrated his lack of understanding of the responsibilities of his role as a sales representative to the vendor and as an agent retained by Litchfield Realty.
5. In relation to penalty the appellant relied upon the following three grounds of appeal:
 12. The Board acted ultra vires by imposing more than one penalty on the appellant;
 13. The Board acted ultra vires by imposing a condition on the appellant with respect to his conduct as a solicitor/conveyancer;
 14. The Board improperly exercised its discretion by imposing a manifestly excessive penalty on the appellant.²
6. In the further amended notice of appeal the appellant sought orders that :
 1. The appeal be allowed.
 2. The decision of the Board made 30 January 2009 and the decision given 27 February 2009 be set aside.
 3. There are no reasonable grounds under s 44(1)(3) of the *Agents Licensing Act* in the appellant's conduct in arranging the payment of the extra 30% commission to himself that is sufficient to warrant the taking of disciplinary action against the appellant;
 4. In the event that the appeal against the decision 30 January 2009 is not allowed, then the penalty imposed on the appellant be a reprimand or a caution.

² Again these grounds of appeal are not necessarily in the order they appear in the further Notice of Appeal.

5. The respondent pay the appellant's costs of the appeal and of the hearings before the Board.

THE NATURE OF THE APPEAL

7. Prior to the hearing of the appeal, the Court received submissions from both the appellant and the respondent as to the nature of the present appeal. On 8 May 2009 I gave a ruling that the appeal was in the nature of a rehearing based on the evidence and material that was before the Board when it made its decision, with a discretion to receive further evidence – such discretion to be exercised according to considerations of fairness, reasonableness and justice. I indicated at the time I gave the ruling that I would publish my reasons for decision at the conclusion of the hearing. I now publish my reasons.
8. The starting point is s 85(1) of the *Agents Licensing Act* which creates the right of appeal against a decision of the Agents Licensing Board:

A person aggrieved by a decision of the Board may, within 21 days after the decision was given, appeal to the Local Court against the decision of the Board on one or more of the following grounds:

 - (a) the decision was wrong in law;
 - (b) the decision was against the weight of the evidence;
 - (c) the Board had improperly exercised its discretion or otherwise acted unlawfully;
 - (d) the Board had not acted in good faith; or
 - (e) the Board had acted contrary to the principles of natural justice.
9. Section 85 (2) of the Act obliges the Board to supply to the Local Court, for the purposes of the appeal, a copy of a record of any proceedings before the Board, a statement of the reasons for the decision appealed against and any information or thing in connection with the decision that is in the possession or control of the Board and that the Court requires.

10. In relation to the appeal the Local Court may –
- (a) affirm, set aside or vary a decision of the Board;
 - (b) give such judgment which to the Court seems proper; and
 - (c) make such other order as justice requires.³
11. The nature of the present appeal is to be determined by examining the relevant provisions, and hence is a matter of statutory interpretation.⁴ In that context it is necessary to take into account three matters when determining the nature and scope of a statutory appeal:
- The first is the nature of the function discharged by the board, and hence the nature of the decision from which the appeal lies; the second is the form of expression used by the legislature in its description of the appeal and of the powers of the court on the appeal; and the third is the particular field of considerations and powers open to the board in the discharge by it of its function.⁵
12. Applying the first consideration, the function of the Agents Licensing Board and its decision were not merely administrative or ministerial in character, but quasi-judicial. The Board is an entity which has powers resembling that of a court of law and which is able to impose penalties on a person. The fact that the proceedings before the Board are not of a purely administrative or ministerial character tends to militate against the present appeal being in the nature of a rehearing de novo: see *Builders Licensing Board v Sperway Constructions Pty Ltd* [1975] 2 NSWLR 174 at 179. However, as stated in that case, “the classification of the character of the proceedings does not inevitably and finally resolve the character of the appeal”.
13. Turning to the second consideration, the relevant provisions of the *Agents Licensing Act* do not employ any form of expression to describe the nature of the appeal. For example, the appeal is not classified as a rehearing or a

³ *Agents Licensing Act* s 85(5).

⁴ *Brideson [No 2] (1990) 170 CLR 267 at 273-4*. See also *Coal & Allied Operations Co Pty Ltd v Australian Industrial Relations Commission & Ors* (2000) 203 CLR 194 at 202 per Gleeson CJ, Gaudron and Hayne JJ.

⁵ *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281 at 285 per Street CJ.

rehearing de novo. However, the absence of any such description does not necessarily mean that the present appeal is an appeal stricto sensu.

14. The powers of the Court on appeal indicate that an appeal instituted under s85(1) of the Act goes beyond being an appeal stricto sensu. It is open to the Court to vary a decision of the Board. The existence of such a power indicates that the present appeal is not an appeal stricto sensu. Had the legislature intended the appeal to be an appeal in the strict sense then it would not given the Court the power to vary a decision of the Board.
15. As pointed out in the appellant's written submissions,⁶ "the critical distinction, for the present purposes, between an appeal by way of re-hearing and an appeal in the strict sense is that, unless the matter is remitted for re-hearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at the first instance, whereas, on an appeal by way of re-hearing, an appellate court can substitute its own decision based on the facts and the law as they then stand". The power given to the Local Court hearing an appeal brought under s 85(1) of the Act to vary a decision of the Board in effect empowers the Court to substitute its own decision.⁷
16. According to s 85(5) of the Act the Court may also give such judgment which to the Court seems proper and make such other orders as justice requires. The conferral of such powers indicates that the present appeal is not an appeal in the strict sense.⁸
17. It is noted that there is no power under s 85(5) to remit a matter for rehearing by the Board. The absence of such a power militates against the present appeal being an appeal in the strict sense.

⁶ See [4] of the appellant's written submissions dated 26 March 2009 citing *Allesh v Maunz* (2000) 203 CLR 173 at 180-181.

⁷ See [12] of the appellant's written submissions dated 26 March 2009.

⁸ See [12] of the appellant's written submissions dated 26 March 2009.

18. With reference to the third consideration, s 44(1) of the Act provides that the Board may take disciplinary action against an agent's representative on one or more of the grounds specified in that section. Section 44(5) makes it clear that the proceedings before the Board are in the nature of an inquiry. Section 44B provides that where, at the conclusion of an inquiry, the Board is satisfied that it is authorised to take disciplinary action against an agent's representative, the Board may take one of the disciplinary measures provided for in that section. In my opinion, the nature and scope of the proceedings before the Board and the powers open to the Board in the discharge of its function do not point to the present appeal being in the nature of a rehearing de novo: see *Turnbull v NSW Medical Board* ([1976] 2 NSWLR 281 at 286.
19. Taking into account the relevant considerations, I do not consider that the present appeal is in the nature of a rehearing de novo. It is therefore either an appeal in the strict sense or a rehearing.
20. Both the *Agents Licensing Act* and the *Local Court Act* are silent as to whether the appellate court has power to permit further evidence to be presented and considered at the hearing of the appeal. Section 85(3) of the *Agents Licensing Act* merely obliges the Board to provide the Court with the material specified therein. While it is implicit in that section that the Court must consider that material in discharging its appellate jurisdiction, there is nothing in either statute that precludes the Court from taking into account other material or evidence.
21. In *Cryer v Agents Licensing Board* (2001) NTMC 57 Mr Luppino SM stated:

The hearing before me is not a hearing de novo and was not conducted as such. In my view, the hearing is in the nature of an appeal stricto sensu. It involves a review of the material available to the Board and any fresh evidence with leave and on application. It is clear that that is how the parties have conducted the appeal before me. That is consistent also with section 85(3) of the Act which sets out the material that the Board is required to supply to the court in relation to an appeal.

22. This passage indicates that the Court does have power to receive and consider fresh evidence or material. However, with due respect the contents of the passage are somewhat contradictory. If an appellate court has a discretion to allow fresh or further evidence, then the appeal is not in the nature of an appeal *stricto sensu*, but an appeal in the nature of a rehearing. Such a rehearing is not a rehearing in the fullest sense – it does not “involve a completely fresh hearing by the appellate court of all the evidence”: *Fox v Percy* (2003) 197 ALR 201 at 207. The rehearing proceeds on the basis of the material that was before the original decision maker and any fresh or further evidence permitted to be presented at the hearing of the appeal: *Fox v Percy* (supra) at 207. What Mr Luppino purported to describe was an appeal by way of rehearing in the narrower sense (not a rehearing *de novo*) rather than an appeal *stricto sensu*. An appeal *stricto sensu* is concerned solely with whether the decision under appeal was right on the material or evidence before the decision maker: *Fox v Percy* (supra) at 206. Such an appeal does not involve the consideration of material or evidence that was not before the decision maker.

23. In *Shew v Agents Licensing Board* (2003) NTMC 011 Mr Loadman SM reached the following conclusion concerning the nature of an appeal brought pursuant to s 85(1) of the *Agents Licensing Act*:

It was the decision of this Court to reject the contention made by the respondent that the appeal was an appeal *stricto sensu*. The Court decided that the appeal was to proceed by way of re-hearing. The function it was therefore to discharge in the circumstances was to correct errors of law, facts in the court below, the court will try the case again on the evidence at first instance together with any additional evidence it thinks fit to receive.

The Court decreed that the power to receive new evidence was implied, as a consequence of the fact that in law the appeal was to be decided on the basis of such additional additions or changes as were permitted together with any changes in the law.

24. Although the two decisions referred to above appear at first glance to be in conflict, both decisions recognise that on an appeal instituted pursuant to s 85(1) of the Act the Court has power to receive and to consider fresh

evidence or material, which is characteristic of an appeal in the nature of a re-hearing.

25. In my opinion, an appeal instituted under s 85(1) of the Act is not an appeal *stricto sensu*. The appeal is in the nature of a rehearing based on the evidence and the material that was considered by the Board along with any additional evidence that the Court, in the exercise of its discretion, considers fit to receive. In my opinion the exercise of that discretion is to be governed by considerations of fairness, reasonableness and justice.

THE PROPER RESPONDENT

26. A consent order was made by the Judicial Registrar on 18 March 2009 to the effect that the Registrar of the Lands Business and Conveyancing Agents be joined as the second respondent in the present proceedings. The Court expressed some concern over the joinder of the Registrar, and invited the parties to make submissions in that regard. After hearing submissions I ruled on 8 May 2009 that the Registrar had been improperly joined, and should be removed as a party to the present appeal. I indicated that I would subsequently publish my reasons for decision. I now publish my reasons.
27. In my opinion the proper respondent to these proceedings is the Agents Licensing Board. That is by reason of s 85(3) of the *Agents Licensing Act* which provides that “the Board is the respondent to an appeal under this section”.
28. It is arguable that s 85(3) establishes the Board as the sole and exclusive respondent in proceedings instituted under s 85(1) of the Act. But even if it does not have that effect I can see no proper basis for making the Registrar of the Agents Licensing Board a co-respondent.
29. It is helpful to begin by looking at the role played by the Registrar in the present matter. A useful summation is to be found in the respondent’s written submissions dated 3 April 2009:

The Registrar holds his position by virtue of a statutory appointment.

In the course of its statutory role, staff from the office of the Registrar commenced an investigation into specific activities conducted by the appellant. This followed upon a complaint which had been filed with the Registrar. Following the completion of this investigation, the Registrar referred the matter to the Board. The Registrar recommended that no action be taken against the appellant. However, contrary to his recommendation, the Board exercised its discretion to conduct an enquiry as to whether or not disciplinary action should be taken against the appellant.

Even though it was the Board which made the decision to conduct an enquiry, it was actually the staff of the office of the Registrar who were involved in the preparation of the enquiry, including preparation of the documents for the enquiry, liaison and summoning of witnesses and liaison with the Solicitor for the NT to arrange for the engagement of counsel to appear as counsel assisting the Board in the enquiry hearing.⁹

30. Counsel for the respondent Board submitted that the Registrar had been properly joined as a co-respondent because he had conducted the investigation and “clearly had a statutory interest in the decision”.¹⁰
31. I am not convinced that by reason of his involvement in the inquiry the Registrar has a sufficient interest in the decision, which is the subject of the appeal, to warrant his joinder as a respondent.
32. It was the Board which initiated the disciplinary proceedings. Indeed the Registrar recommended that no action be taken against Mr Lee. The Registrar could not be seen as proposing the action taken by the Board.¹¹ Nor could he be seen as proposing the decision that the Board ultimately made.
33. It is usual to join as parties both the impugned decision maker and the decision’s proponents.¹² It is necessary to join the latter because “the proponent’s interests are vitally affected by the outcome of any judicial review challenge”.¹³ However, as the interests of the Registrar could not be

⁹ See [D], [E] and [F] of the written submissions.

¹⁰ See [M] of the respondent’s written submissions dated 3 April 2009.

¹¹ See E Campbell “Appearance of Courts and Tribunals as Respondents to Applications for Judicial Review” (1982) 56 ALJ 293 at 294.

¹² See M Aronson, B Dyer and M Groves *Judicial Review of Administrative Action* (LawBook Co 2009) at [12.80].

¹³ See Aronson, Dyer and Groves, n 12 at [12.80].

seen to be vitally affected by the outcome of the appeal he cannot be considered to be an “impugned decision proponent”.

34. Although the Registrar might have had a personal interest in the Board’s decision – bearing in that it was his recommendation that no action be taken against Mr Lee – he did not have “an interest in defending the decision or action” that would warrant his joinder as a co-respondent.¹⁴
35. In my opinion, the Registrar’s involvement in preparations for the inquiry does not provide a proper basis for his joinder.
36. Finally, the fact there will be no contradictor in the event of the Board being the sole respondent to the proceedings does not support the joinder of the Registrar. A proper contradictor needs to be a proper party to proceedings. In my view the Registrar cannot properly be considered to be a party to the proceedings for the reasons given above.

THE ROLE OF THE RESPONDENT IN THESE PROCEEDINGS

37. It is generally accepted that where the decision maker is a court, tribunal or board (as is the case here) it usually enters a submitting appearance as a respondent to the proceedings.¹⁵ Such bodies should not take an active role (ie become a protagonist) in such appeals by attempting to defend its decision, which is under review,¹⁶ but should generally submit to such orders as the court might consider appropriate.¹⁷
38. However, in the present case I was prepared to allow Mr Johnson, counsel instructed by the respondent, to assume a more active role in relation to the appeal than would perhaps be normally permitted in proceedings of this type. Basically, the Court was content to have Mr Johnson act as a type of

¹⁴ See Campbell, n 11 at 294.

¹⁵ See Aronson, Dyer and Groves, n 12 at [12.80].

¹⁶ See [J] of the respondent’s written submissions dated 3 April 2009. See in particular *R v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13 at 17 and 35-36. See also Aronson, Dyer and Groves, n 12 at [12.80].

¹⁷ See [J] of the respondent’s written submissions dated 3 April 2009.

amicus curiae, assisting the Court by providing information on points of law, and other aspects raised by the grounds of appeal, in an impartial and neutral manner.

39. In *R v Australian Broadcasting Tribunal; ex parte Hardiman* (supra) the High Court said that in some circumstances it may be appropriate for a decision maker to make submissions going to its powers and procedures. In my opinion, it was appropriate in the present case to allow the respondent that latitude.¹⁸
40. Furthermore, I considered that it was appropriate in the circumstances of the present case to permit Mr Johnson to make submissions on points of law and to respond, where appropriate, to the grounds of appeal relied upon and argued by the appellant.
41. In allowing Mr Johnson to perform an amicus curiae type of role I do not believe that the impartiality of the Board was in any way compromised.
42. In allowing counsel to perform such a role I was influenced by two considerations. The first was the current trend towards the relaxation of the *Hardiman* principle.¹⁹ The second was the rationale behind the *Hardiman* principle. There is a direct link between the principle and the need for the administrative decision maker to maintain its impartiality. If the decision maker plays too active a role in proceedings challenging its decision – if it attempts to defend its decision on appeal or review - it runs the risk of compromising its impartiality and risks disqualifying itself from deciding the matter if it is remitted to it for a further hearing.²⁰ However, no such risk arises in the present case because the Court has no power to remit the matter to the Board for a further hearing.

¹⁸ See *Attorney General v Lowndes & Anor* [(1993)] 3 NTLR 206 at 208 where Martin CJ held that adherence to the *Hardiman* principle may not be appropriate where there is no party to act as a contradictor.

¹⁹ See for example, *Re New Broadcasting Ltd and Australian Broadcasting Tribunal* (1987) 12 ALD 1; *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* [2008] VSCA 45

²⁰ See Aronson, Dyer and Groves, n 12 at [12.80].

THE MATERIAL THAT WAS BEFORE THE BOARD AND ADDITIONAL EVIDENCE

43. All the material that was made available to the Board was provided to the Court and comprised Exhibit 2 in these proceedings.
44. Consequent upon my finding as to the nature of the appeal, counsel for the appellant sought to call Mr Peter Shew, a licensed agent and principal of Palmerston Real Estate, to give evidence as to what constitutes a sale with respect to a sales representative or an agent selling a property. Counsel indicated that the evidence was to go to the issue of Mr Lee's belief or honest belief that he was legally entitled to arrange payment of the commission to himself, and therefore relevant to the seventh ground of appeal.
45. Although counsel for the respondent could not see how the proposed evidence would assist the court in determining the appeal, he had no objection to the additional evidence being adduced. The Court decided in all the circumstances that it was preferable to receive the additional evidence and accordingly the appellant was given leave to call Mr Shew.
46. Mr Shew's evidence is to be found at pages 7 – 13 of the transcript of the proceedings on 29 May 2009. In essence, Mr Shew gave evidence as to the arrangements between Palmerston Real Estate and its agent's representatives with respect to the payment of commission, and as to the manner in which it was split between the agency and the agent's representatives. The witness also gave evidence as to what constitutes a listing and a sale. A sales agency agreement was tendered during the course of Mr Shew's evidence and became Exhibit 1 in these proceedings.

THE FACTUAL BACKGROUND

47. The facts and circumstances giving rise to the Board's inquiry are conveniently set out in the Board's reasons for decision. The conflicting

evidence that was presented to the Board and the Board's analysis and evaluation of that body of evidence are also set out in those reasons for decision.

THE FIRST GROUND OF APPEAL

48. The appellant argued that the Board made an error of law in finding that, as an independent contractor vis a vis Litchfield Realty, Mr Lee would likely be subject to duties of loyalty and confidentiality. The appellant submitted that the underlying independent contractor relationship between the appellant and Litchfield Realty did not give rise to such duties.
49. It is helpful to set out the reasoning that led the Board to reach its conclusion.
50. At [19] of its reasons for decision the Board described the relationship between the vendors, Litchfield Realty and the appellant in the following terms:

There is no doubt that the relationship between the vendors and Litchfield Realty is one of principal and agent as that is the effect of the contract entered into between the two. From that contractual obligations flow and it is generally accepted that, in addition to any contractual obligations owed to the principal, a real estate agent usually owes²¹ a fiduciary duty to his principal and must act in the interests of the principal and not against them. As Cardozo J said in *Meinhard v Salmon*²² "the rule of undivided loyalty is relentless and supreme". Similar duties are often contained in regulatory statutes such as the relevant Act here (section 65). As far as the contractual relationship is concerned, there is an obligation to follow instructions (*Ireland v Livingstone*²³), an implied term as to competency (*Varden v Parker*²⁴; *Ballieu Sharp Musgrave Ltd v Cunningham McKerrell Developments P/L*²⁵) and an obligation to obtain the best price (*How v Carmen*²⁶).

The duties owed by Lee to the vendor and Lichfield Realty are ones that must derive from their principal/agent relationship and the employment or service arrangement between he and Litchfield Realty. It must be noted that, as far as the Act is concerned, Lee's entitlement to sell real estate derives from his

²¹ The Board relied upon *Bowstead & Reynolds on Agency* 15th ed.

²² (1928) 62 ALR 1 at 7.

²³ (1872) LR 5 HL 395 at 416.

²⁴ (1799) 2 Esp 710.

²⁵ Unrep Derrington J 14/3/84 Sc Qld (extrapolated to an obligation to act promptly).

²⁶ (1931) SASR 413.

registration as an “agent’s representative” and that defines his relationship vis a vis the principal and the agency for which he works. As far as the vendors were concerned, Lee was an employee or was otherwise in the service of Litchfield Realty...

Lee had power to bind Litchfield Realty, as the agency agreement demonstrates. The question is whether this resulted in a sub-agency or was a more simple relationship. The relationship between Lee and Litchfield is probably not an employer/employee relationship where the employee is subject to the employers control as regards what employees should do and how it should be done. It is more in the nature of an independent contractor who is retained to perform a service and may determine the method and the time for doing it. This proposition is supported by the fact that no wage is paid by Litchfield Realty to Lee and in fact the remuneration which Lee is entitled was a portion of the commission to which Litchfield Realty was entitled under the agency agreement and is more in the nature of a fee for the service performed. For instance listing a property or selling a property elicits a certain percentage of commission due to Litchfield Realty, but in either case the balance of the commission goes to the agency. There was no corresponding arrangement between the vendor and Litchfield Realty as the whole of the commission was to be paid to Litchfield Realty. Whilst Lee may be an independent contractor retained by Litchfield Realty, he also had the powers of an agent of Litchfield Realty in the sense that he was able to bind them in relation to the agency agreement between the vendors and Litchfield Realty.

It was submitted to the Board that Lee was a sub-agent to Litchfield Realty. There is no power in an agent to delegate the performance of the duties of the agency unless there is an express or implied power to do so. This is said to be founded upon the confidential nature of the contract of agency. “Whenever authority is coupled with a discretion or confidence it must, as a rule, be exercised by the agent in person”.²⁷ However, an agent may arrange for the performance of purely ministerial or ancillary acts arising from the agency but this is probably not the creation of a sub-agency.²⁸ This position is supported by the Act in s 112 where it is directed that a licensed agent shall not share with another person, other than a licensed agent, partner of a licensed agent or a registered agent’s representative employed by the licensed agent, any fee, commission or other gain in respect of a transaction in the agent’s capacity as agent. If Lee is to be considered as a sub agent outside his arrangement with Litchfield Realty then he would have to be a licensed agent and the evidence demonstrates that he does hold that qualification...

Even though Lee was an independent contractor, he would likely be subject to similar duties that an employee might owe to his employer. Those duties would include duties of “loyalty” and “confidentiality”.²⁹ Those duties would continue as long as there was a relationship between Lee and Litchfield Realty. As the evidence demonstrates, Lee resigned from his position as agent’s representative with Litchfield Realty on 29 October 2007. At that time the offer to purchase had been accepted by the vendor but the contract was subject to formal approval of a loan within seven days of the exchange of contracts. The contract

²⁷ *Bowstead & Reynolds on Agency* 15th ed at [5.002]

²⁸ *Bowstead & Reynolds* n 27 at [5.003].

²⁹ *Equity 8 v Shaw Stockbroking Ltd* [2007] NSWSC 413.

proceeded to settlement in early January 2008 indicating that finance must have been approved in accordance with the contract.

Litchfield Realty had an obligation under the terms of its contract with Lee to pay to Lee the portion of the commission payable to Litchfield Realty to which Lee was entitled. That obligation continued regardless of Lee's resignation from the contract with Litchfield Realty. Similarly, Lee's obligation to Litchfield Realty would continue until the settlement of the contract. In addition, the agency between Litchfield Realty and the vendors would also continue after the exchange of contracts.³⁰ Absent any other direction in the contract, the agency between the vendors and Litchfield Realty would continue until payment which would occur at the time of settlement.....

Consequently the agency between the vendors and Litchfield Realty would continue until the settlement date and so would that part of the contract between Litchfield Realty and Lee that related to payment of the commission to which Lee was entitled. As the contractual relationships continue to have effect so too would the fiduciary duties that arose from those contractual relationships.

As an agent's representative Lee would be aware of the obligations of Litchfield Realty to the vendors arising both from contract and equity. His relationship with Litchfield Realty included, impliedly, the assumption of the same duties to Litchfield Realty that mirrored the obligations that Litchfield might have had to its customers in the course of its agency with those customers. Particularly, Lee carried out his functions as an agent's representative for and on behalf of Litchfield Realty as he is required to do pursuant to s 33 of the Act and could not do so without assuming those same obligations that Litchfield Realty owed to the vendors. It could not be the case that the licensed agent might owe fiduciary duties to the principal and the agent's representative not also owe those duties.

51. It is well established that in the case of employer and employee there is an implied duty of fidelity and good faith, which includes confidentiality, based on contract.³¹ In *Blyth Chemicals v Bushell* (1933) 49 CLR 66 Dixon and McTiernan JJ explained the nature of the duty thus:

Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal...But the conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.

³⁰ *Josland v Mullaley Properties Pty Ltd* [1994] ANZ Conv R 276.

³¹ See C. Sappideen, P. O'Grady and G. Warburton *Macken's Law of Employment* (6th ed Law Book Co 2009) at 5.410 citing as authority *Faccenda Chicken v Fowler* [1986] 1 ALL ER 617 at 625. However, as noted by the authors, the English Court of Appeal would limit the obligation to contract.

52. However, are similar duties owed by an independent contractor to his or her principal?
53. In concluding that the independent contractor relationship between the appellant and Lichfield Realty gave rise to duties of loyalty and confidentiality the Board relied on *Equity 8 v Shaw Stockbroking Ltd* [2007] NSWSC 413 at [32]-[34].³² The appellant submitted that the facts in that case are readily distinguishable from the facts in the present case; and therefore the principles enunciated in *Equity 8 v Shaw Stockbroking Ltd* (supra) do not apply to Mr Lee.
54. As acknowledged by counsel for the appellant, *Equity 8 v Shaw Stockbroking Ltd* (supra) essentially dealt with the situation of an independent contractor.³³ In that case the Court was satisfied that “having regard to the express terms contained in the documents in evidence, the ‘Team’ individuals whose services were made available by E8 to Shaw Corporate were intended to occupy, in relation to Shaw Corporate, a position akin to that occupied by an employee in relation to his or her employer”.³⁴ The Court went on to conclude that “the required standards of conduct were such that each individual was expected to act qua Shaw Corporate in the same way as an employee owing a duty of fidelity and good faith to his or her employer would act towards that employer”.³⁵ The Court ultimately found that “just as such a duty is implied in an employment contract so as to be binding upon the employee (see *Russell v Trustee of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104), so, in the present context, E8 was subject to an implied term which required it to see that the individuals whose services it provided to Shaw Corporate acted in the same way”.³⁶

³² See [23] of the Board’s reasons for decision.

³³ See p 31 of the transcript of the present proceedings on 29 May 2009.

³⁴ [2007] NSWSC 413 at [32]

³⁵ [2007] NSWSC 413 at [34].

³⁶ [2007] NSWSC 413 at [34].

55. Although I accept that the facts in the present case are quite dissimilar to the facts in *Equity 8* (supra) the real significance of that case, for the purposes of the present appeal, is that it is authority for the proposition that there may be an implied term that an independent contractor and its employees owe a duty of fidelity to the client.³⁷ Whether such a term is implied in the case of an independent contractor relationship must, of course, depend upon the particular circumstances of the relationship.
56. As acknowledged by counsel for the appellant, Mr Lee had, as an agent's representative for and on behalf of Litchfield Realty, the capacity to bind Litchfield Realty to an agency agreement with a vendor.³⁸ During oral submissions made on 29 May 2009 counsel for the appellant stressed that notwithstanding the principal/agent relationship between the appellant and Litchfield Realty the appellant was not subject to the direction and control of his principal and was "basically a free agent in relation to the manner in which he conducted himself".³⁹ It was submitted that the appellant was truly an independent contractor and the relationship between him and Litchfield Realty was definitely not that of employer and employee.
57. In order to put the relationship between the appellant and Litchfield Realty in proper perspective account must be taken of the meaning of an "agents' representative", which is defined in s (5)(1) of the Act as "a person who, in the service of, and on behalf of, a licensed agent negotiates or holds himself or herself out as being prepared to negotiate any transaction of a description referred to in subsection 2(a) or (b)."⁴⁰

³⁷ There may also be an implied term that agency employees will be prevented from breaching duties of fidelity to the client.

³⁸ See [5.8] of the appellant's written submissions dated 29 May 2009.

³⁹ See page 32 of the transcript of the proceedings on 29 May 2009.

⁴⁰ Such transactions relate to the sale, purchase, exchange, leasing, letting or other dealings with, or the disposition of or negotiations for the sale, purchase, exchange, leasing of, letting or other dealings with or the disposition of either land or a business in return for commission, reward or remuneration.

58. “Licensed agent” is also defined in s 5 (1) to mean “an agent licensed to carry on business as an agent”. “Agent” is defined in the same subsection to mean “a real estate agent, business agent or conveyancing agent”.
59. Regard must also be had to s 33 of the Act in order to put the relationship between the appellant and Litchfield Realty in proper context, as the nature of the relationship is to be derived from the contextual circumstances. It is useful to set out the provisions of that section in full:
- (1) A person other than a licensed agent shall not act as, or carry out any of the functions of, an agent’s representative unless he or she is a registered agent’s representative and he or she acts or carries out those functions for and on behalf of a licensed agent.
 - (2) A person other than a licensed agent shall not, unless he or she is a registered agent’s representative, hold himself or herself out by any means as an agent’s representative or as being in the employment of, or as acting for and on behalf of an agent as an agent’s representative.
 - (3) A registered agent’s representative shall not hold himself or herself out by any means as being in the employment of, or as acting for and on behalf of an agent, unless that agent is his or her employer, principal or partner.
60. The definition of “agent’s representative” in s 5(1) of the Act together with the provisions of s 33 define the nature of the relationship between an agent’s representative and a licensed agent.
61. The definition of “agent’s representative” makes it clear that an agent’s representative is a person who acts in the service of and on behalf of a licensed agent. Section 33(1) reinforces the notion that an agent’s representative is a person who acts or carries out the functions of an agent’s representative for and on behalf of a licensed agent. Section 33(2) contemplates that an agent’s representative is a person who is either in the employment of a licensed agent or acts for and on behalf of an agent. The nature of the relationship between an agent’s representative and a licensed

agent is further amplified by s 33(3). The effect of that subsection is that for an agent's representative to be in the employment of or acting for and on behalf of an agent that agent must vis a vis the agent's representative be one of three things: his or her employer, principal or partner.

62. It can be gleaned from the statutory definition of "agent's representative" and the provisions of s 33 that the relationship between an agent's representative and a licensed agent is one whereby the former is in the service of and acts on behalf of the latter. The statutory scheme contemplates that that relationship may take different forms. The relationship may be one of employer and employee or principal or agent or be based on a partnership.
63. What was the precise nature of the relationship between the appellant and Litchfield Realty?
64. Based on the evidence that was before the Board, the relationship between the appellant and Litchfield Realty does not appear to have been that of master and servant or employer or employee. The Board concluded that the appellant's relationship with Litchfield Realty was more in the nature of an independent contractor and determined the matter before it on that basis. The appellant maintains that he was an independent contractor.
65. In my opinion the statutory scheme countenances such a relationship. But was the appellant in fact an independent contractor? If so were there any added dimensions to that relationship?
66. The relationship between the appellant and Litchfield displayed the usual indicia of the situation of an independent contractor. The contract between the parties was a contract for the provision of services rather than a contract of service. The appellant was not subject to the control and direction of Litchfield Realty as regards the manner in which his services were to be performed. Furthermore the appellant was not paid a salary, but was to

receive commission in return for services rendered. I therefore find that the Board reached the right decision in characterising Mr Lee as an independent contractor vis a vis Litchfield Realty.

67. However to describe the appellant merely as an independent contractor does not accurately reflect some additional and important characteristics of the relationship between Mr Lee and Litchfield Realty.
68. The Board briefly touched upon those characteristics in its reasons for decision. At [21] of its reasons for decision the Board observed that the appellant had the power to bind Litchfield Realty, as evidenced by the agency agreement. The Board also observed that the appellant had the powers of “an agent in the sense that he was able to bind them in relation to the agency agreement between the vendors and Litchfield Realty”. The Board was, in effect, saying that the relationship between the appellant - as an independent contractor – and Litchfield Realty was that of principal and agent.
69. With respect that reflects the true nature of the relationship between Mr Lee and Litchfield Realty. As an agent’s representative the appellant possessed the powers of a paradigm agent which enabled him to change the legal position of Litchfield Realty.⁴¹ There is nothing unusual about such a relationship, for many agents can be considered to be independent contractors,⁴² and vice versa. Contractors can be placed in positions of trust, such that they owe duties of loyalty and confidentiality comparable to those owed by an employee to an employer. As noted by Stewart “when faced by ‘disloyal’ conduct by contractors who have abused a trusted position, courts have been just as willing as with employees to identify conduct as breaching implied obligations”: *Broadwater Taxation and Investment Services Pty Ltd*

⁴¹ *Bowstead & Reynolds on Agency* n 27 at [1-014].

⁴² *Bowstead & Reynolds on Agency* n 27 at [1-030].

v Hendriks (1993) 51 IR 221; *Fortuity Pty Ltd v Barcza* (1995) 32 IPR 517; *Ashcoast Pty Ltd v Whillans* [2000] 2 Qd R 1.⁴³

70. In my opinion, the power conferred upon the appellant to bind Litchfield Realty created a fiduciary relationship between the two and imposed on the appellant duties of a fiduciary nature towards Litchfield Realty, as is the case in any principal and agent relationship.⁴⁴
71. With respect, the Board's finding that although the appellant was an independent contractor "he would likely be subject to similar duties that an employee might owe to his employer, including the duties of "loyalty" and "confidentiality" did not fully identify the basis for the duty owed by the appellant to Litchfield Realty. The existence of a principal and agent relationship between Mr Lee and Litchfield Realty formed the basis for imposing those duties on the appellant, which he owed to Litchfield Realty.
72. It is worth adding that if the relationship between the appellant and Litchfield Realty could be characterised as an employer/employee relationship, such a relationship would have placed Mr Lee in a position of trust by conferring upon him wide agency powers. Employees often have wide agency powers as in the case of a senior employee such as a manager, with the result that the employee owes a fiduciary duty to the employer. As an employee of Litchfield Realty, the appellant would have owed a fiduciary duty to his employer.
73. Whether Mr Lee was an independent contractor with agency powers or an employee with such powers, clearly he was obliged to act in the interests of Litchfield Realty and not to promote his personal interests when there was a real possibility of conflict between the two. The relationship between the

⁴³ A. Stewart "Good Faith and Fair Dealing at Work" in C Arup & Ors (editors) *Labour Law and Labour Market Regulation* (The Federation Press 2006), p 583.

⁴⁴ *Bowstead & Reynolds on Agency* n 27 at [1-001].

appellant and Litchfield Realty was therefore a fiduciary relationship. As stated by Creighton and Stewart “the archetypal fiduciary is a person who is under a strict duty not only to put another’s interests ahead of their own, but to avoid situations in which there is a possibility of conflict”.⁴⁵

74. In present case there was a possibility of conflict, which on the evidence before both the Board and the Court became an actuality.

75. The conclusion I have reached accords with the following commentary which appears in *Stewart’s Guide to Employment Law*:⁴⁶

It is less common to find the distinction between employees and contractors being drawn for the purpose of other common law rules or principles.

For instance, while there are many terms that are implied by law into employment contracts, the courts will frequently imply similar terms into contracts for service. Hence, contractors have been found to be subject to duties of “loyalty” and “confidentiality” that essentially mirror the obligations of employees: *Fortuity v Barcza* (1995); *Equity 8 v Shaw Stockbroking* (2007).

76. I have carefully considered the very comprehensive submissions made at [5.1] – [5.9] of the appellant’s written submissions dated 29 May 2009. There is nothing in those submissions that persuades me that the relationship between the appellant and Litchfield was not one of principal and agent, and therefore not a fiduciary relationship. A principal and agent relationship can be created without the existence of a contract if it is clear that the parties intended to act as principal and agent. The intent of the parties can be expressed by their words or implied by their conduct. In my opinion such an intent was evinced in the present case.

77. As stated by Bowstead and Reynolds:⁴⁷

Agency need not be contractual; and although there is much overlap with common law duties the notion of fiduciary obligation stems from equity and is independent of contract. It is submitted that the law’s control over the agent’s exercise of his powers of intervention is not to be derived from contract terms

⁴⁵ B Creighton & A Stewart *Labour Law* 4th ed at [13.59].

⁴⁶ A Stewart *Stewart’s Guide to Employment Law* (The Federation Press 2009) at [3.3].

⁴⁷ *Bowstead & Reynolds on Agency* n 27 at [6-034].

alone.⁴⁸ As was said in a subsequent case: “The essence of a fiduciary obligation is that it creates obligations of a different character from those deriving from the contract itself”.⁴⁹

78. Furthermore, the fact that Mr Lee’s entitlement to sell real estate was derived from his registration as an “agent’s representative” defined his relationship with Litchfield Realty and created a principal and agent relationship between the two in Mr Lee’s capacity as either an independent contractor or employee of Litchfield Realty.

79. As stressed by Mason J in *Hospital Products Limited and United States Surgical Corporation and Ors* [1984] 156 CLR 41 at 96-97

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions “for” and “on behalf of” and “in the interests of” signify that the fiduciary acts in a “representative” character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

80. It is highly relevant that s 33 of the *Agents Licensing Act*, which, in effect, establishes a statutory relationship between an “agent’s representative” and a “licensed agent” speaks of an “agent’s representative” acting or carrying out functions for and on behalf of a “licensed agent”. The section clearly indicates that an agent’s representative acts in a representative capacity. The relationship between an “agent’s representative” and a “licensed agent”, which has a statutory basis, creates fiduciary obligations of the type referred to by Mason J in *Hospital Products Limited and United States Surgical Corporation and Ors* (supra).

81. Finally, it was argued before the Board that Mr Lee was a sub agent to Litchfield Realty, and therefore presumably was not in a fiduciary

⁴⁸ See Sappideen, O’Grady and Warburton n 31 at [5.415] where the authors observe that fiduciary obligations may exist side by side with contractual obligations and be imposed over and above a duty of fidelity.

⁴⁹ *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98.

relationship with Litchfield Realty. That point was not argued or forcefully argued on appeal. In my opinion, for the reasons set out in its decision, the Board rightly concluded that the appellant was not a sub agent.

82. In my opinion the first ground of appeal must fail. Accordingly, the ground is dismissed.

THE SECOND GROUND OF APPEAL

83. The appellant submitted that even if duties of loyalty and confidentiality were with respect to the relationship between the appellant and Lichfield Realty implied or imposed as a matter of law, those duties ceased when the relationship ended on 7 November 2007.
84. Counsel for the appellant submitted that if there was a duty of loyalty owed by Mr Lee to Litchfield Realty, that duty “only lasted as long as the relationship which gave rise to them lasted”.⁵⁰ In advancing that argument counsel relied upon *Attorney-General v Blake* [1998] Ch 439 at 453 – 454.
85. Although where a fiduciary’s duty of loyalty arises out of the employment relationship it will end with the employment, the duty extends to transactions current at the time of leaving employment.⁵¹ To the extent that Mr Lee might be considered to have been an employee he would clearly continue to owe that duty vis a vis Litchfield Realty.
86. However, as the court has characterised the appellant’s relationship with Litchfield Realty as that of an independent contractor with wide agency powers, it is necessary to consider whether the fiduciary obligations owed by Mr Lee to Litchfield Realty as a consequence of the principal and agent relationship between the parties ceased on 7 November 2009.

⁵⁰ See [6.2] of the appellant’s written submissions dated 29 May 2009. See also the oral submissions made by the appellant’s counsel at pp 33 – 34 of the transcript of the present proceedings on 29 May 2009.

⁵¹ Sappideen, O’Grady and Warburton n 31 at [5.415] citing *Weldon & Co v Harbison* [2000] NSWSC 272 at [78] for that proposition. See also *Co-ordinated Industries v Elliott* (1998) 43 NSWLR 282 at 288.

87. My research has failed to discover any authority that deals directly with the situation where an “agent’s representative” resigns from the service of a “licensed agent” and whether fiduciary obligations survive the termination of such a relationship. However, *Bowstead and Reynolds* deal with a number of circumstances under which an agent may continue to owe fiduciary duties to his or her principal after the termination of a principal and agent relationship.⁵² It is made clear by the authors that whether or not an agent continues to be subject to fiduciary duties after he or she ceases to be an agent depends upon the circumstances of the case.⁵³
88. It bears noting that *Attorney-General v Blake* (supra) is only authority for the proposition that, as a general rule, fiduciary duties cease upon the termination of a fiduciary relationship. It is clear that a fiduciary relationship and its attendant duties may continue despite the termination of the relationship that gave rise to the fiduciary duties.
89. Notwithstanding Mr Lee’s resignation from the service of Litchfield Realty – thereby bringing an end to the agency relationship – in my opinion, Mr Lee continued to owe a duty of loyalty to Litchfield Realty with respect to the subsisting transaction involving the sale of 85 Dichondra Road Howard Springs, around which the present appeal revolves. The circumstances of the present case bear a degree of similarity to the cases referred to by *Bowstead & Reynolds*.
90. The following circumstances support the continuance of a fiduciary relationship between the appellant and Litchfield Realty:
- As at 7 November 2007 and thereafter the appellant considered that he still had an interest in the transaction and had an

⁵² *Bowstead & Reynolds* n 27 at [6-067]

⁵³ *Bowstead & Reynolds* n 27 at [6-067]

expectation that he would receive commission for his involvement in the transaction prior to 7 November 2007;⁵⁴

- The agency between the vendors and Litchfield Realty, which had come into existence as a result of the appellant's conduct, continued following Mr Lee's resignation and continued up until the date of settlement of the sale of the vendor's property;
- Commission was payable on completion of the sale and that was the apparent understanding of both the appellant and Litchfield Realty;
- Prior to settlement the appellant, in his capacity as solicitor and conveyancer for the vendors, directed payment to himself, as a former agent's representative of Litchfield Realty, of that part of the commission to which he considered himself to be entitled;
- The only rational inference that can be drawn from the circumstances is that the said direction was on instructions from Mr Lee, in his capacity as former agent's representative of Litchfield Realty;
- The appellant directed payment of the commission to himself in circumstances where his entitlement to 50% of the commission was not conceded by Mr Jones and remained a live issue;⁵⁵
- At the time the appellant directed payment of the commission to himself he had the power, by reason of his role as the vendor's solicitor and conveyancer, to control the disbursement of the purchase monies on settlement, and thereby enjoyed a personal ascendancy over Litchfield Realty.

⁵⁴ See [19] of the respondent's submissions dated 5 June 2009.

⁵⁵ See [11] to [15] of the Board's reasons for decision.

91. As an independent contractor, in a principal and agent relationship with Litchfield Realty, the appellant owed a duty of loyalty to the latter such as to not put his own interest before that of Litchfield Realty. That duty survived Mr Lee's resignation from Litchfield Realty due to his continuing involvement in an ongoing transaction, which was the subject of the original fiduciary relationship.
92. In my opinion to find otherwise defies both logic and common sense. If a person in Mr Lee's position and circumstances were found not to owe a continuing fiduciary obligation to his or her former principal, then that would undermine the integrity of the notion of a fiduciary duty. A person in the appellant's situation could simply circumvent his or her fiduciary duty by voluntarily resigning from the service of their principal and then, free of any fiduciary constraints, pursue their own personal interests with respect to a transaction to which a fiduciary duty hitherto attached. Under those circumstances the original fiduciary obligation would be rendered nugatory. In my opinion, equity intervenes to avoid that occurring; and it does that by continuing to impose on the agent the same fiduciary duty he or she owed to the principal prior to their resignation.
93. In my opinion the second ground of appeal cannot succeed. Accordingly, the ground is dismissed.

THE THIRD, FOURTH AND FIFTH GROUNDS OF APPEAL

94. These grounds of appeal have been addressed during the course of dealing with the first two grounds of appeal. For the reasons given earlier these further three grounds of appeal must fail and are dismissed.

THE SIXTH GROUND OF APPEAL

95. The appellant asserts that the Board erred as a matter of law in finding that the appellant owed a fiduciary duty to the vendors, without identifying that duty and stating at what time it was owed. The appellant says that in any

event any duty owed by the appellant to the vendors was determined upon his resignation from Litchfield Realty.

96. By way of the written submissions dated 29 May 2009 counsel for the appellant elaborated upon this ground of appeal.
97. Counsel for the appellant submitted that an “agent’s representative” is a creature of statute and not a creature of common law or equity.⁵⁶ It was further submitted on behalf of the appellant that the duties of an “agent’s representative” are statutory.⁵⁷
98. The following submissions were made at [10.4] – [10.7] of the appellant’s written submissions dated 29 May 2009:

There are no contractual duties owed by a registered agent’s representative to a vendor. The contract is between the licensed agent and the vendor – Section 65 of the Act and transcript Ken Jones at p 48 and *Bowstead & Reynolds on Agency* at para 5-008 as approved in *Henderson v Merrett Syndicates Ltd* [1995] AC 145 at 202.

If there was no contract between T.S. Lee and the vendor, there also could not have been any implied contractual duties owed by TS Lee to the vendor.

There may be duties in tort to act with due care and skill – see *Henderson v Merrett Syndicates* (supra) at 19406- which is in essence now a statutory duty – Section 65(1)(d) of the Act.

Whilst fiduciary duties are owed by a licensed agent to a vendor, as the relationship of principal and agent is generally considered to fall within the accepted classes of fiduciary relationships – see the *Laws of Australia* para 8.1.43 – that of itself does not create a fiduciary relationship between the independent contractor and the vendor as there is no direct relationship between the registered agent’s representative and the vendor.

99. However, the above submissions are predicated on Mr Lee having been a sub – agent as is made clear in [5-008] of *Bowstead & Reynolds on Agency*:

...there is no privity of contract between a principal and a sub-agent as such merely because the delegation was effected with the authority of the principal; and in the absence of such privity the rights and duties arising out of any

⁵⁶ See [10.1] of the appellant’s written submissions dated 29 May 2009. There the appellant referred to ss 5(1), 33-48 and 65 of the *Agents Licensing Act* and Regulation 25 and Schedule 4 of the Regulations.

⁵⁷ See [10.2] of the appellant’s written submissions dated 29 May 2009. The appellant relied upon s 65 of the Act and Schedule 4 of the Regulations.

contracts between the principal and the agent, and between the agent and the sub-agent, respectively, are only enforceable by and against the immediate parties to those contracts.⁵⁸

100. As found above Mr Lee was not a sub-agent – nor could he be under the statutory regime established by the *Agents Licensing Act*.
101. Although Mr Lee was an independent contractor he was in fact a representative for and on behalf of Litchfield Realty, which entity was an agent for the vendors. That relationship came into existence as a result of s 33 of the Act, which defines the relationship between an agent's representative and a licensed agent. As found by the Board and conceded by the appellant, the relationship between Litchfield Realty and the vendors was one of principal and agent, and therefore a fiduciary relationship. By reason of that relationship Litchfield Realty owed a fiduciary duty to the vendors. As a matter of logic and practical reality the appellant, as an agent's representative, was in a fiduciary relationship with the vendors and also owed a fiduciary duty to the vendors. The appellant and Litchfield Realty concurrently owed a duty of loyalty to the vendors.
102. I agree with the observation made by the Board that Mr Lee could not act for and on behalf of Litchfield Realty in accordance with s 33 of the Act without assuming the same obligations that Litchfield Realty owed to the vendors. By necessary implication s 33 imposes on an agent's representative the same fiduciary obligations that are carried by a licensed agent vis a vis a principal. I also agree with the Boards' finding that "it could not be the case that the licensed agent might owe fiduciary duties to the principal and the agent's representative not also owe those duties".
103. In my view, Mr Lee was in the same situation as an employee in the service of Litchfield Realty who by reason of their wide agency powers would with the employer co-jointly owe a fiduciary duty to the principal. As noted

⁵⁸ This statement was approved in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 202.

earlier, the distinction between employees and independent contractors is losing significance for the purposes of imposing a fiduciary duty.

104. Counsel for the appellant advanced a further argument as to why the appellant did not owe a fiduciary duty to the vendors. That argument was based on the notion of “incomplete agency”.
105. Counsel for the appellant submitted that “a real estate agent is an ‘incomplete agency’ as he is engaged in essence to make an introduction to the seller and does not have the power to ‘bind’ the seller, his principal – *Bowstead & Reynolds on Agency* at para 1-019”.⁵⁹ It was submitted that Mr Lee was nothing more than a “canvassing” or “introducing” agent. Such an agent is described as an “intermediary who makes no contracts and disposes of no property, but is simply hired, whether as an employee or independent contractor, to introduce parties desirous of contracting and leaves them to contract between themselves”.⁶⁰
106. The appellant’s counsel argued that although in the case of an incomplete agency the agent may still owe some fiduciary duties to the vendor, the extent of those duties will depend upon the facts and circumstances of the case.⁶¹ Counsel submitted that in the circumstances of the present case the appellant did not owe a fiduciary duty to the vendors.
107. When it comes to selling real estate, a real estate agent is not generally regarded as an agent in the fullest sense. As the High Court observed in *Petersen v Moloney* (1951) 84 CLR 91 at 94-95:

In connection with sales and purchases of property the word “agent” is apt to be used in a misleading way... an “agent” is a person who is able, by virtue of

⁵⁹ See [10.9] of the appellant’s written submissions dated 29 May 2009.

⁶⁰ *Bowstead & Reynolds* n 27 at [1-019]. In effecting such introductions the agent is remunerated by commission, which he may sometimes take from both parties.

⁶¹ See [10.10] of the appellant’s written submissions dated 29 May 2009. In making that submission counsel relied upon *Bowstead & Reynolds on Agency* at [1-019] and [6-037], Meagher Gummow and Lehane’s *Equity Doctrines & Remedies* at [5-190] – [5-210] and *Hospital Products Ltd v United States Surgical Corp* [1984] 156 CLR 41 per Mason J at 96/97 and 102/3.

authority conferred upon him, to create or affect legal rights and duties as between another person, who is called his principal, and third parties. When a person is employed to find a buyer or property, he is commonly said to be employed as an agent, and the term “estate agent” is a common description of a class of persons whose business is to find buyers for owners who wish to sell property. But the mere employment of such a person under the designation of agent does not...necessarily create any authority to do anything which will affect the legal position of his employer.

108. However, it is important to appreciate the distinction between the internal and external aspects of agency:

The external aspect is that under which the agent has powers to affect the principal’s legal position in relation to third parties. The internal aspect is the relationship between principal and agent, which imposes on the agent (subject to any contract) special duties vis- a –vis the principal, appropriate to the powers which he can exercise on the principal’s behalf. These follow from the need to control his opportunities to exploit his position. To an agent in the fullest sense, both aspects are applicable. Some persons may, however, be described as agent by virtue of the internal relationship but have no external powers.⁶²

109. In my opinion the internal aspects of agency impose on real estate agents some fiduciary duties towards their principals because they “act for their principals in a capacity which may involve the repose of trust and confidence”.⁶³
110. Lang in *Estate Agency Law and Practice in New South Wales* discusses the main duties of real estate agents under the general law, some of which coincide with duties imposed by statute or rules of conduct.⁶⁴ One of those duties is to act in good faith in the principal’s interest.⁶⁵ Lang states as follows:

An agent is in a fiduciary relationship with the principal, he or she must act in the interests of the principal and not adversely to her or to him... The rule of undivided loyalty is relentless and supreme”: *Meinhard v Salmon* (19328) 62 ALR 1 at 7 per Cardozo J.⁶⁶

⁶² *Bowstead & Reynolds* n 27 at [1-018].

⁶³ *Bowstead & Reynolds* n 27 at [1-019].

⁶⁴ A. G. Lang *Estate Agency Law and Practice in New South Wales* (The Law Book Co 1994) at [2701] – [2711].

⁶⁵ Lang n 64 at [2705].

⁶⁶ Lang n 64 at [2705].

111. As agent for the vendors Litchfield Realty was under a duty to act in good faith, and as an agent's representative Mr Lee owed the same duty to the vendors.
112. Counsel for the appellant submitted that if either Litchfield Realty or Mr Lee were subject to fiduciary obligations they were only subject to those imposed by s 65 of the *Agents Licensing Act* on the basis that the section codified the duties of agents, and was intended to be exhaustive, such that any other duties arising under the general law had no application to agents in the Northern Territory. As s 65 does not impose upon an agent either a duty of loyalty or a duty to act in good faith, it was submitted that Mr Lee owed neither of those obligations to the vendors.
113. I reject the submission made on behalf of the appellant for the following reasons:
- Section 65 and Schedule 4 of the Regulations deal with rules of conduct, and although those rules embrace some of the fiduciary duties at general law, the section does not explicitly deal with the duties of a licensed agent that arise out of the internal aspects of agency;
 - I do not believe that it was intended by the legislature that s 65 or Schedule 4 of the Regulations would replace all existing law relating to the fiduciary duties owed by an agent to his or her principal and to be a complete statement of the law on that subject matter, bearing in mind the presumption against the displacement of the common law;⁶⁷
 - Neither s 65 nor Schedule 4 of the Regulation evinces a clear intent that the rules of conduct set out in the section or the

⁶⁷ For a comprehensive discussion of that presumption see D C Pearce and R S Geddes *Statutory Interpretation in Australia* 6th ed at [5.23].

Schedule are to be the sole source of law in relation to fiduciary duties owed by an agent to his or her principal;

- That conclusion is reinforced by the provisions of s 67(1) (m) of the Act which enables the Board to take disciplinary action on “any other reasonable ground which, in the opinion of the board, is sufficient to warrant revocation of the licence of the agent”. A serious breach of a fiduciary duty, such as a failure to act in good faith or failure to be loyal to one’s principal, would fall within that subsection;
- Finally, in the event of there being civil litigation involving a tripartite dispute between an agent’s representative, a licensed agent and a vendor with respect to the payment of commission, it is difficult to see how one or more of the parties would be precluded by s 65 of the Act or Schedule 4 of the Regulations from raising a breach of the duty of loyalty.

114. Counsel for the appellant made the following submissions at [10.11] – [10.12] of the written submissions dated 29 May 2009:

Otherwise, if not expressed in the contract, or by operation of law, then it could be implied between the licensed and the registered agent’s representative that the registered agent’s representative is subject to the duties the licensed agent owes to the vendor. That is the registered agent’s representative has a duty to the licensed agent not to put the licensed agent in breach of his duties to the vendor, and thereby must comply with such duties himself.

Then – at law (contract and tort) – if there is a breach of duty by the registered agent’s representative the licensed agent is liable to the vendor and it is an issue between the licensed agent and the registered agent’s representative as to whether the registered agent’s representative was in breach of his contract with the licensed agent, and the licensed agent’s remedy is against the registered agent’s representative.

But that does not mean that the registered agent’s representative owes those or any fiduciary duties to the vendor direct, and if he does, as a matter of equity (ie in absence of a contractual relationship), depends on the facts and circumstances.

115. In my opinion an agent's representative must comply with the same fiduciary obligations that bind a licensed agent vis a vis his or her principal. However, contrary to the submission made by counsel for the appellant, the obligation imposed upon the agent's representative extends to the principal. Therefore, by acting for and on behalf of Litchfield Realty, the appellant directly owed to the vendors a duty of loyalty or a duty to act in good faith.
116. The appellant continued to be bound by that duty after his resignation from Litchfield Realty for the reasons that were given for finding that the fiduciary relationship between the appellant and Litchfield Realty and concomitant duties continued after his resignation.
117. In my opinion the sixth ground of appeal must fail. Accordingly it is dismissed.

THE SEVENTH GROUND OF APPEAL

118. It was submitted on behalf of the appellant that the Board had erred in law in finding that Mr Lee had acted dishonestly (or could not have held an honest belief) because no other similarly qualified person could have objectively held the view that he was entitled to the 30% commission.
119. The Board found that Mr Lee "could not have held an honest belief that he was legally entitled to the extra 30% commission".⁶⁸ In coming to that conclusion the Board relied upon the following passage from *Walker v Stones* [2000] 4 ALL ER 412 per Sir Christopher Slade at 443-444, 446:

With respect, however, I find myself unable to agree with the third proposition, if stated without qualification. At least in the case of a solicitor-trustee, a qualification must in my opinion be necessary to take account of the case where the trustee's so-called "honest belief", though actually held, is so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did or agreed to do was for the benefit of the beneficiaries. I limit this proposition to the case of a solicitor-trustee, first, because on the facts before us we are concerned only with solicitor-trustees and, secondly, because I accept that the test of honesty may vary from case to case, depending on, among other things, the role and calling of the trustee: compare *Twinsectra*

⁶⁸ See [27](v) of the Board's reasons for decision.

Ltd v Yardley [1999] Lloyd's Rep 438 at 464 per Potter LJ. In that case (at 465) the court regarded the standard of honesty applicable in the case of the defendant solicitor, Mr Leach, as being "that to be expected of a reasonably prudent and honest solicitor".

The word "honest" at first sight point is exclusively to a state of mind. But, as the *Twinsectra* case illustrates, its scope cannot be so limited. A person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers the theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest.

120. Adopting that approach, the Board stated:

In this case the Board should consider the conduct of Lee in a similar light: that is as a solicitor-estate agent. That is not to say that Lee's duties as a solicitor impinges upon the consideration undertaken by the Board, rather in determining whether Lee had an honest belief the Board must look at Lee with all his qualifications. As the Board has found, there is no evidence that Lee had any arrangement with Litchfield Realty that he would be entitled in all cases to the sales commission arising out of properties listed by him. That he considered that he was so entitled was so unreasonable that no other similarly qualified person could have objectively held that view. The evidence instead demonstrates that Lee simply considered that he should be entitled to sell his own properties and that in this case Lee considered that because he had done all the "donkey work" he was, at best, somehow morally entitled to a commission in respect of which he had no legal entitlement. Lee may have believed in his moral entitlement like the thief of Sir Christopher Slade, but he could not have reasonably believed in any legal entitlement to the 30% sale commission.⁶⁹

121. On that basis the Board considered that Mr Lee wrongly took the 30% sale commission.⁷⁰

122. That specific finding must be examined within the framework of the terms of reference of the Board's inquiry and the allegation made against Mr Lee. That is conveniently set out at [25] of the Board's reasons for decision:

The charge laid against Lee was that his conduct in arranging for the payment of the extra 30% share of the commission to himself constituted a reasonable ground under section 44(1)(e) of the Act upon which the Board considered was sufficient to warrant the taking of disciplinary action against Lee. The reasonable ground upon which the Board should take action was later refined to:

"T.S. Lee wrongly took the commission monies which were the property of Litchfield Realty and thereby:

⁶⁹ See [27] (v) of the Board's reasons for decision.

⁷⁰ See [27] (vi) of the Board's reasons for decision.

1. In arranging for the amount of \$4537.50 to be paid to himself, T.S. Lee put his own interest before those of the vendors. The vendors were both:

...

- (a) his clients in the conveyancing transaction (ie in his role as a solicitor/conveyancer); and
- (b) the clients of his principal, Litchfield Realty (ie in his role as a registered agent's representative).

In so doing, he knew, or should have known, that this would leave the vendors open to claims and litigation by Litchfield Realty.

2. T.S. Lee put his own interest before those of Litchfield Realty, his employer at the time of the sale agreement.”⁷¹

123. The first observation I make is that I am not persuaded that the Board found that the appellant had acted dishonestly in the sense discussed in *Twinsectra Ltd v Yardley* (supra). I consider it to be a fair reading of the Board's decision that it found Mr Lee could not have honestly believed that he was entitled to the 30% commission because such a belief was “so unreasonable that no other similarly qualified person could have objectively held that view”.⁷² It was on that basis that Mr Lee was found not to have held an honest belief that he was legally entitled to the commission.⁷³
124. It is noted that in its reasons for decision on penalty given on 27 February 2009 the Board considered that Mr Lee's conduct was “dishonest to the extent that he did not act in good faith and that he could not have held an honest belief that he was entitled to the funds in dispute”.⁷⁴ The Board went on to say that it had not found that Mr Lee had acted in “a deceitful fashion”. The Board was careful to confine the element of dishonesty to Mr Lee's belief that he was entitled to the additional 30% commission.
125. Notwithstanding Mr Lee's evidence that he honestly believed that he had an entitlement to the additional 30% commission – in effect a clam of right - I

⁷¹ See Folio 155 of the Hearing Book.

⁷² See [35] and [36] of the respondent's written submissions dated 5 June 2009.

⁷³ See [36] of the respondent's written submissions dated 5 June 2009.

⁷⁴ See [4] of the Board's reasons for decision on penalty.

believe that the Board was correct in rejecting his evidence, and reaching the conclusion it did, as the preponderance of the evidence established that Mr Lee's belief had no reasonable basis, and therefore was not an honest belief.

126. I consider that in determining whether Mr Lee had a reasonable belief as to his entitlement to the commission the Board was entitled to take into account all his professional qualifications and to assess his state of mind in light of him being a solicitor- agent's representative. The Board correctly concluded that Mr Lee's belief that he was entitled to the commission was "so unreasonable that no other similarly qualified person could have objectively held that view".
127. What, if any, bearing does Mr Shew's evidence have on the conclusion reached by the Board?
128. In my opinion, the evidence given by Mr Shew at the hearing of the appeal has little probative value, and such probative value that it has is not sufficient to disturb the finding made by the Board. Mr Shew's evidence did not relate to the arrangements between Litchfield Realty and its agent's representatives regarding the payment of commission. Nor did his evidence relate to any specific arrangements between Mr Jones and Mr Lee in that regard. Significantly, Mr Shew conceded that there were variations in commission arrangements between different agencies. The more specific evidence that was before the Board, which is now before the Court, relating to the commission arrangement between Litchfield Realty and the appellant is to be preferred to the evidence given by Mr Shew.
129. In my opinion this ground of appeal should be dismissed.
130. I think it is important to add that even if Mr Lee had a reasonable belief – and therefore an honest belief - as to his legal entitlement to the additional 30% commission, his conduct in arranging for payment of that commission

to himself was nonetheless wrongful. The evidence clearly shows that Mr Jones was not immediately amenable to Mr Lee receiving the extra 30% commission and the matter remained a live issue. Under those circumstances it was wrong, according to law, for the appellant to arrange for the payment of the additional commission to himself without due regard to the interests of Litchfield Realty in that 30% commission. In fact, it was conceded in submissions by the appellant's counsel at the Board hearing that the full amount of the commission was payable to Litchfield Realty under the terms of the agency agreement.⁷⁵

131. In the event that I have misread the Board's decision, and it did in fact find that Mr Lee had acted dishonestly, then I consider, in light of the principles set out in the *Twinsectra* case, that conclusion cannot stand. However, on all the available evidence, I would remain of the view that the appellant could not have reasonably believed that he had a legal entitlement to the 30% commission and therefore wrongly took the commission without due regard to his principal's interest in that commission.

THE EIGHTH GROUND OF APPEAL

132. The appellant's complaint that the Board acted contrary to the principles of natural justice in that Mr Lee was not notified of the allegation that he acted dishonestly (or without honest belief) is not substantiated.
133. It was never alleged that Mr Lee had acted dishonestly. Nor did the inquiry conducted by the Board proceed along those lines. For the reasons given above the Board did not make a finding that the appellant had acted dishonestly.
134. Mr Lee was put on sufficient notice as to the nature of the allegation made against him. He was made aware that it was his conduct in arranging for the payment of the extra 30% share of the commission to himself that was under

⁷⁵ See p 220 of the transcript of the proceedings before the Board on 21 October 2008.

scrutiny, and which was alleged to have been wrongful. He was also informed that the Board considered that conduct to constitute a reasonable and sufficient ground under s 44(1)(e) of the Act warranting the taking of disciplinary action against him. More specifically, he was put on notice that it was alleged that he had wrongly taken the commission monies which were the property of Litchfield Realty, and in so doing put his own interest before those of the vendor and Litchfield Realty.

135. It was patently clear that Mr Lee's legal entitlement to the 30% sales commission as well as his legal entitlement to arrange payment of that commission to himself was at the core of the Board's inquiry. In that regard Mr Lee was given the opportunity to give evidence as to his belief that he was entitled to the additional commission, and indeed availed himself of that opportunity. The Board also received countervailing evidence.
136. It should be noted that it was Mr Lee's evidence that he honestly believed that he had an entitlement to the commission that triggered the Board's consideration of whether he could have reasonably believed in any legal entitlement to the commission. Mr Lee had ample opportunity to address the reasonableness or honesty of his belief.
137. In light of all the evidence the Board rejected Mr Lee's evidence and found that he could not have reasonably believed that he was entitled to the commission and wrongly arranged for the commission to be paid to himself.
138. The appellant cannot complain of not being given an opportunity to respond to a charge of dishonesty because no such allegation was ever made against Mr Lee. Nor, in my opinion, did the Board find that the appellant had acted dishonestly.
139. In my opinion this ground of appeal must fail and should be dismissed.
140. However, if, in fact, the Board did make a finding that Mr Lee had acted dishonestly, then it was not reasonably supported by the evidence and

cannot stand. In those circumstances any failure on the part of the Board to extend Mr Lee an opportunity to answer an allegation of dishonesty is purely academic, resulting in no miscarriage of justice. Furthermore, the appellant had been given ample opportunity to address the evidence upon which any such erroneous finding of dishonesty had been based.

THE NINTH GROUND OF APPEAL

141. The appellant was given leave pursuant to Rule 37.07 of the Local Court Rules to amend his notice of appeal by adding a ground of appeal which asserted that the Board failed to act in good faith or was biased. This is the ninth ground of appeal referred to at the beginning of these reasons for decision.
142. The Court granted leave on the basis that, owing to the late production of certain documents to the Court, it was in the interests of justice for the appellant to be allowed to rely upon the proposed additional grounds. Many of those grounds overlapped with the existing grounds of appeal, and the first proposed ground of appeal raised a procedural point going to the heart of disciplinary proceedings under the Act, which the Court considered should be dealt with as a matter of public interest.
143. During the course of its deliberations the Court declined to grant leave in relation to the second proposed ground of appeal which asserted:

Further to (i) above, not complying with s 44(7) of the *Agents Licensing Act* and failing to ensure that a copy of Mr Jones' written notice was served on the appellant as soon as reasonably practicable.
144. Leave was refused on the basis that s 44(7) relates to a function of the Registrar which is performed independently of the Board, and any failure on the part of the Registrar could not be imputed to the Board such as to support an allegation that the Board had failed to act in good faith or was biased.

145. The proposed third ground of appeal – “further to (ii) above, proceeding with an inquiry as if it were initiated by the Board” – in respect of which leave was originally granted was subsequently abandoned because of its relationship to the second proposed ground of appeal.
146. In my opinion, the various grounds of appeal set out in the ninth ground of appeal have not been made out. The matters contained therein neither individually⁷⁶ nor collectively disclose that the Board failed to act in good faith or was biased.
147. The appellant alleges, as evidence of a failure to act in good faith or of bias, the Board not treating the letters from Litchfield Realty dated 9 January 2008 and 25 March 2008 as written notice for disciplinary action under s 44(4) of the *Agents Licensing Act* , thereby rendering s44(7) of the Act inapplicable.
148. The appellant submits that the letters were clearly written notice for disciplinary action under s 44(4) and complains that the Board, “despite receiving the letters from Mr Jones of Litchfield Realty dated 9 January 2008 and 25 March 2009 seeking disciplinary action proceeded with an inquiry as if it were initiated by the Board”.⁷⁷ The appellant says that the letters in question were not made available to him until the first day of the hearing conducted by the Board. The appellant complains of a procedural irregularity, which, when coupled with other aspects of the inquiry embarked upon by the Board, is said to evidence a lack of good faith or demonstrate bias.
149. It is necessary to examine the statutory regime for the institution of disciplinary proceedings under the Act in order to determine whether there

⁷⁶ Counsel for the appellant submitted that the alleged circumstances amounted in total to a failure to act in good faith: see [2] of the appellants supplementary submissions dated 13 July 2009.

⁷⁷ See [2] (iiii) of the appellant’s supplementary written submissions dated 13 July 2009.

was, in fact, a procedural irregularity in relation to the commencement of the inquiry.

150. Section 44(2) provides that the Commissioner of Police may apply, by notice in writing lodged with the Registrar, for disciplinary action to be taken against an agent's representative on one or more of the grounds referred to in s 44(1).
151. Section 44(3) provides that the Registrar may apply, by notice in writing, for disciplinary action to be taken against an agent's representative on one of more of the grounds set out in s 44(1).
152. Section 44(4) provides that any other person may apply, by notice in writing lodged with the Registrar, for disciplinary action to be taken against an agent's representative on one or more of the grounds referred to in s 44(1).
153. Section 44(5) provides as follows:

Subject to subsection (6), where

- (a) an application for disciplinary action is made under this section; or
- (b) the Board considers that there may be grounds under subsection (1) for the taking of disciplinary action against an agent's representative,

the Board must hold an inquiry.

154. Pursuant to s 44(6) the Board may, without holding an inquiry, reject an application made under s 44(4) if in its opinion the application is of a frivolous, irrelevant or malicious nature, or if the Board is satisfied that there are no grounds for holding, or insufficient evidence to hold, an inquiry.
155. Section 44 (7) provides that where an application for disciplinary action is made under s 44 the Registrar must, as soon as is reasonably practicable, serve a copy of the application on the agent's representative in question.

156. Section 44(5), when read in conjunction with s 44(6), has the following effect.
157. The Board must hold an inquiry where an application is made under s 44 by either the Commissioner of Police or the Registrar. The Board must also hold an inquiry where an application is made under s 44 by any other person and the Board is not of the opinion that the application is of a frivolous, irrelevant or malicious nature or is not satisfied that there are no grounds for holding, or insufficient evidence to hold, an inquiry.
158. The Board is also obliged to hold an inquiry where it considers that there may be grounds for the taking of disciplinary action. The provisions of s 44(5)(b) might come into play in circumstances where no-one makes an application under ss 44(2) , (3) or (4) for the taking of disciplinary action, but the Board comes into possession of evidence sufficient to hold an inquiry.
159. The provisions of s 44(5) (b) might operate in other circumstances. Section 44(6) presupposes that, at least in the case of an application made under s44(4), the Board will, prior to holding an inquiry, be provided with sufficient information to enable it to either reject the application or to proceed to an inquiry. In practice, the Registrar would upon receiving an application under s44(4) investigate the complaint and report to the Board by providing it with sufficient information to enable it to make a decision about holding an inquiry. If the Registrar were to recommend to the Board that no disciplinary action be taken either because there were, in his or her opinion, no grounds for holding, or insufficient evidence to hold, an inquiry, it would be open to the Board to disagree with the view taken by the Registrar, and proceed to conduct an inquiry as required by s 44(5)(b).
160. That was precisely what occurred in the present case. As stated in Mr Johnson's written submissions, staff from the Office of the Registrar commenced an investigation into specific activities conducted by Mr Lee,

following upon a complaint which had been filed with the Registrar.⁷⁸ Upon completion of the investigation the Registrar referred the matter to the Board and recommended that no action be taken against Mr Lee.⁷⁹ Contrary to that recommendation the Board considered that there may be grounds under s44(1) for the taking of disciplinary action against Mr Lee and decided to conduct an inquiry.⁸⁰

161. In my opinion there was no irregularity in the way in which the Board proceeded to deal with the application made under s 44(4). Given that the application was made pursuant to that subsection, and bearing in mind the discretion given to the Board by subsection (6), I can find no fault with the way in which the Board dealt with the complaint against Mr Lee. Presented with the Registrar's recommendation, once the Board formed the view that there may be grounds for taking disciplinary action against Mr Lee it had a statutory obligation to hold an inquiry. If it failed to do so, then it would be in breach of its statutory duty.
162. In the circumstances the appellant's complaint that the Board did not treat the letters from Litchfield Realty as written notice for disciplinary action under s44(1) seems to miss the point; and for that reason should be dismissed. If the appellant has any complaint against the Board then it must be directed at its failure to hold an inquiry once the application was made under s 44(4). However, any such complaint cannot be sustained for the reasons given above.
163. The complaint that the Board proceeded with an inquiry as if it were initiated by the Board is misconceived because, in effect, the Board has such a power; and that power is conferred by s 44(5)(b). In the present case the

⁷⁸ See [E] of the respondent's written submissions dated 3 April 2009.

⁷⁹ See [E] of the respondent's written submissions dated 3 April 2009. See the minutes of the Board's meeting on 14 May 2008 – subject matter "Status Report on Investigations and Inquiries".

⁸⁰ See [E] of the respondent's written submissions dated 3 April 2009. No doubt the decision to conduct an inquiry was based on information that had come to the Board's attention via the Registrar, which information would include the complaint received from Litchfield Realty. See p 4 of the transcript of the proceedings before the Board on 24 June 2008.

Board not only had the power to conduct an inquiry but was under a statutory obligation to do so.

164. In my opinion, no improper motive can be imputed to the Board for proceeding as it did. In the circumstances it had every right to do so, and the mere fact that it did not agree with the Registrar's recommendation in no way impairs the integrity of the Board. In fact it enhances the Board's independence, impartiality, neutrality and integrity. There is not a scintilla of evidence that the Board failed to act in good faith or was biased.⁸¹
165. The appellant complained that he not been served as soon as was reasonably practicable with a copy of the application under s 44(4). Indeed the appellant did not receive the two letters from Litchfield Realty until the 24 June 2008, being the first day of the Board's inquiry.
166. The first observation I make is that it is the responsibility of the Registrar to serve a copy of the application on the agent's representative. The failure of the Registrar to serve the application cannot be imputed to the Board, and therefore cannot be drawn upon as evidence that the Board failed to act in good faith or was biased.
167. Secondly, although Mr Lee should have been served with the s 44(4) application as soon as was reasonably practicable – and considerably much earlier than 24 June 2008 - that oversight was cured by the Board when it provided him with copies of the two letters and granted him an adjournment to enable him to prepare for the hearing. In my opinion, the Board acted fairly and appropriately – and in good faith - in providing the documentation and in granting the adjournment.
168. Counsel for the appellant submitted that the fact that the Board proceeded in

⁸¹ See *SBAU v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1076 referred to in the appellant's written submissions dated 13 July 2009 at [1]. See also the authorities referred to by counsel for the appellant at pp 92 – 93 of the transcript of the present proceedings on 14 July 2009, including *Calvin v Carr* (1977) 2 NSWLR 306.

the face of legal advice that no offence had been committed that could be construed as a breach of the *Agents Licensing Act* was evidence that the Board had not acted in good faith and was biased. It is important to bear in mind that the legal advice did not, on its face, canvass misconduct in terms of breaches of common law fiduciary duties. In my opinion, the Board had every right – and was duty bound - to look beyond the advice, and to consider whether there were grounds under s 44 (1), and in particular under s 44(1)(e), for the taking of disciplinary action.

169. Counsel for the appellant submitted that the Board purported to deal with the appellant in his capacity as a solicitor,⁸² and placed a higher standard of conduct on Mr Lee than an ordinary agent's representative because he was also a solicitor.⁸³ It was submitted that the Board's treatment of Mr Lee, together with other circumstances, shows that the Board did not act in good faith or was biased.
170. What the Board did was to assess the reasonableness of Mr Lee's belief that he was entitled to the 30% commission in light of his professional qualifications, including his qualification as a solicitor. The Board was entitled to take that approach.⁸⁴ The complaint raised by the appellant is without substance.
171. Counsel for the appellant submitted that "the Board upon objection to the Board purporting to deal with the appellant in his capacity as a solicitor, still proceeded with the inquiry in the face of known facts so as to try and find jurisdiction once the evidence was heard".⁸⁵ In my opinion, this assertion is completely unfounded.
172. It was submitted on behalf of the appellant that "the Board failed in the first instance to properly particularise the conduct alleged to give rise to the

⁸² See [2](v) of the appellant's written submissions dated 13 July 2009.

⁸³ See [2](viii) of the appellant's written submissions dated 13 July 2009.

⁸⁴ See above at p 41.

⁸⁵ See [2] (vi) of the appellant's written submissions dated 13 July 2009.

reasonable ground upon which the Board could find that it would be sufficient to warrant taking disciplinary action against the appellant”.⁸⁶ Any failure of the Board to initially properly particularise the alleged misconduct was subsequently remedied by the Board so as to enable Mr Lee to respond to the allegation made against him. Mr Lee was accorded procedural fairness, and any initial failure by the Board to properly particularise the charge against Mr Lee cannot be viewed as evidence of absence of good faith or bias on the part of the Board.

173. Counsel for the appellant submitted that the Board failed to consider the appellant’s submissions as to the law in *Attorney General v Blake* [1998] CH 453 to 454 and sought to rely upon this failure as further evidence that the Board failed to act in good faith or was biased.⁸⁷ I have no reason to believe that the Board did not consider the submissions made by the appellant’s counsel.⁸⁸ Notwithstanding *Attorney General v Blake* (supra) I believe that the Board reached the correct conclusion regarding the continuance of the fiduciary duty owed by Mr Lee.
174. By way of further evidence of absence of good faith or of bias on the part of the Board, counsel for the appellant relied upon “the Board making a finding of dishonesty against the appellant in the absence of any allegation of dishonesty and against the legal principles of making such a finding”.⁸⁹ This complaint was dealt with earlier and found to be unsubstantiated.⁹⁰
175. It was submitted on behalf of the appellant that the Board had engaged in illogical reasoning as to the appellant owing a fiduciary duty to the vendor not to prefer his interests above those of the vendor, and as to him also owing a fiduciary duty to Litchfield Realty not to prefer his interests above

⁸⁶ See [2] (vii) of the appellant’s written submissions dated 13 July 2009.

⁸⁷ See [2] (ix) of the appellant’s written submissions dated 13 July 2009.

⁸⁸ For those submissions see pp 225-226 of the transcript of the proceedings before the Board on 21 October 2008.

⁸⁹ See [2] (xii) of the appellant’s written submissions dated 13 July 2009.

⁹⁰ See above pp 40-41

those of Litchfield Realty.⁹¹ The appellant relied upon such illogical reasoning as a further indication of the Board having failed to act in good faith.

176. In my opinion, the Board correctly concluded that Mr Lee owed a fiduciary duty of loyalty to both the vendor and Litchfield Realty, requiring him not to prefer his own interests above those of the vendor and Litchfield Realty.
177. As further evidence of lack of good faith or of bias the appellant relied upon the Board's imposition of more than one penalty when the *Agent's Licensing Act* provides only for one penalty to be imposed upon an adverse finding against the appellant. Although the Board erred in imposing more than one penalty,⁹² I do not, in any way, consider that to be evidence of lack of good faith or of bias on the part of the Board.
178. Finally, in relation to the ninth ground of appeal, counsel for the appellant made the following closing submission:

All the circumstances considered together show that the Board did not act in good faith by:

- failing to act in accordance with its own legislative requirements and treat Mr Jones letters as a complaint and so held back information from the appellant;
- pre-determining the matter, or being determined to be able to make a finding in the matter as evidenced by: -

rejecting legal advice and the Registrar's recommendation not to proceed;

trying to deal with Mr Lee in his conduct as a solicitor;

not being able to say what conduct it was that gave rise to its jurisdiction and waiting for evidence to find it;

not being able to properly particularise the alleged conduct and mischief;

treating Mr Lee in his conduct not just as an agent's representative, but expecting a higher standard of conduct because he is a solicitor; and

⁹¹ See [2] (x) and (xi) of the appellant's written submissions dated 13 July 2009.

⁹² See the discussion in relation to the twelfth ground of appeal below at pp 54-55

not considering the law as to the termination of fiduciary duties on the termination of the underlying relationship; and

making illogical findings as to the appellant owing a fiduciary duty of loyalty to the vendor and Litchfield Realty; and

making a finding of dishonesty in the absence of any such allegation as to same and against the legal principles for making such a finding.

All the above circumstances can only lead to the conclusion that the Board was determined to make a finding against the appellant despite the facts and the law. And on this ground alone the appeal ought to be upheld and the orders made as per the appellant's Outline of Submissions dated 29 May 2009.⁹³

179. For the reasons that appear above I reject this submission.

180. The ninth ground of appeal should therefore be dismissed.

THE TENTH GROUND OF APPEAL

181. The allegation that the Board reached its decision against the weight of the evidence in finding that the appellant's conduct was dishonest to the extent that he did not act in good faith and that he could not have held an honest belief that he was entitled to the commission has already been dealt with the context of the seventh ground of appeal.

182. This ground of appeal should be dismissed

THE ELEVENTH GROUND OF APPEAL

183. In its reasons for decision on penalty given on 27 February 2009 the Board stated that the evidence Mr Lee gave demonstrated his lack of understanding of the responsibilities of his roles as sales representative to the vendor and as an agent retained by Litchfield Realty.

184. The appellant alleged that that finding was against the weight of the evidence. In my opinion that finding was clearly open to the Board on the evidence before it.

⁹³ See [3] and [4] of the appellant's written submissions dated 13 July 2009.

185. Accordingly, the eleventh ground of appeal should be dismissed.

THE TWELFTH GROUND OF APPEAL

186. This ground of appeal, which asserted that the Board acted ultra vires by imposing more than one penalty on the appellant, was conceded on behalf of the respondent.

187. Section 44B (1), which deals with the powers of the Board after an inquiry, provides as follows:

Where, at the conclusion of an inquiry under section 44(5), the Board is satisfied that it is authorised to take disciplinary action against an agent's representative, the Board may:

- (a) reprimand or caution the agent's representative;
- (b) by notice in writing, impose a fine not exceeding 5 penalty units on the agent's representative;
- (c) by notice in writing, suspend the registration of the agent's representative until the expiration of the period, or the fulfilment of a condition, specified in the notice;
- (d) by notice in writing, cancel the registration of the agent's representative and, if the Board thinks fit, specify a period that is to expire or impose a condition that is to be fulfilled before he or she may apply for registration as an agent's representative again.

188. It is clear that paragraphs (a), (b), (c) and (d) are disjunctive as demonstrated by the presence of the word "or" between paragraphs (c) and (d). It is clear that the Board has power only to impose one of the penalties referred to in s44B(1). By imposing two penalties the Board failed to comply with the provisions of the section and therefore acted ultra vires.

189. This ground of appeal is allowed.

THE THIRTEENTH AND FOURTEENTH GROUNDS OF APPEAL

190. It is not necessary to deal with these two further grounds of appeal as the preceding ground of appeal disposes of the appeal with respect to penalty.

CONCLUSION

191. The appeal against the Board's decision given on 30 January 2009 is dismissed and the Board's decision is affirmed.
192. The appellant's conduct in arranging for the 30% sales commission to be paid from the proceeds of sale to himself was wrongful because he could not have reasonably believed that he was entitled to the commission, and in any event the full commission was payable to his principal, Litchfield Realty, under the terms of the sales agency agreement. The appellant had no legal entitlement to arrange the payment of the commission to himself and take that commission.
193. The appellant owed a duty of loyalty to both the vendor and Litchfield Realty not to prefer his own interests above their interests. The appellant's conduct in arranging for the 30% sales commission to be paid to himself from the proceeds of sale placed his own interests ahead of those of the vendor and Litchfield Realty. By reason of his conduct the appellant not only put his own interests, in relation to commission on the sale, ahead of those of Litchfield Realty, but left the vendor open to claims and litigation by Litchfield Realty as regards the payment of commission.
194. Although Mr Lee, in his capacity as solicitor/conveyancer, directed the disbursement of the purchase monies on settlement, he directed payment of the commission to himself, as agent's representative. The overwhelming inference is that Mr Lee, as agent's representative, instructed himself as solicitor/conveyancer to deal with the commission. As found by the Board, as a result of Mr Lee's instructions as agent's representative to himself as solicitor/conveyancer the commission was arranged to be paid to himself as agent's representative. It is an unassailable conclusion that Mr Lee as agent's representative arranged for the 30% sales commission to be paid to himself for services performed as an agent's representative.

195. The Board correctly concluded that the appellant's conduct fell within the purview of s 44(1) (3) of the *Agents Licensing Act*, namely that the conduct amounted to a reasonable ground which is sufficient to warrant the taking of disciplinary action. As found by the Board, Mr Lee's conduct demonstrated a lack of understanding of the responsibilities of his roles as agent's representative to the vendor and as an agent retained by Litchfield Realty. By placing his own interests ahead of those of the vendor and Litchfield Realty he breached a duty of loyalty.
196. The appeal against penalty is allowed for the reasons given above. I will hear submissions as to penalty in due course.

Dated this 9th day of September 2009

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE