

CITATION: *Thong Sum Lee v Agents Licensing Board* [2009] NTMC 068

PARTIES: THONG SUM LEE  
v  
AGENTS LICENSING BOARD

TITLE OF COURT: Local Court

JURISDICTION: Local Court

FILE NO(s): 20907057

DELIVERED ON: 7 December 2009

DELIVERED AT: Darwin

HEARING DATE(s): 10 November 2009

JUDGMENT OF: Dr John Allan Lowndes

**CATCHWORDS:**

AGENTS LICENSING BOARD – OBJECT OF DISCIPLINARY PROCEEDINGS –  
IMPOSITION OF PENALTY

*Agents Licensing Act* ss 44B(1), s 85(5)(a)

*Paridis v Settlement Agents Supervisory Board* [2007] WASC followed

*Law Society of Tasmania v Turner* (2001) 11 Tas R1 followed

**REPRESENTATION:**

*Counsel:*

Appellant: Ms S Porter  
Respondent: Mr M Johnson

*Solicitors:*

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

Judgment category classification: C  
Judgment ID number: [2009] NTMC 068  
Number of paragraphs: 56

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

No. 20907057

[2009] NTMC 068

BETWEEN:

**THONG SUM LEE**  
Appellant

AND:

**AGENTS LICENSING BOARD**  
Respondent

REASONS FOR DECISION

(Delivered 7 December 2009)

Dr John Allan Lowndes SM:

1. On 9 September 2009 the Court dismissed Mr Lee's appeal against the substantive decision of the Board, while at the same time allowing his appeal against the penalty imposed by the Board under s 44B(1) of the *Agents Licensing Act*.
2. As found by the Court on 9 September 2009, the Board has power only to impose one of the penalties prescribed in s 44B(1). By imposing two penalties the Board failed to comply with the provisions of the section, and therefore acted ultra vires. Accordingly the penalties imposed by the Board are set aside.
3. The Court is empowered by the provisions of s 85(5) (a) of the Act to vary the Board's decision on penalty. It remains to consider what disciplinary action should be taken against Mr Lee.

## **Section 44(B)(1) of the Agents Licensing Act and the Object of Disciplinary Proceedings**

4. Section 44B(1) of the Act 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; or
- (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.

5. In determining the appropriate disciplinary action to be taken against Mr Lee it is necessary to bear in mind the objects of disciplinary proceedings.

6. It is well established that the object of disciplinary proceedings against a member of a profession is not to punish that person, but to protect the public and to maintain proper professional standards: *Paridis v Settlement Agents Supervisory Board* [2007] WASC at [25].<sup>1</sup> It is widely accepted that “the maintenance of proper professional standards is conducive to the protection of the public”: *Paridis v Settlement Agents Supervisory Board* (supra) at [25].

7. In *Law Society of Tasmania v Turner* (2001] 11 Tas R 1 at 24[61], in the context of disciplinary proceedings against a legal practitioner, Crawford J stated:

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<sup>1</sup> See also *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 286; *Clyne v New South Wales Bar Association* (1961) 104 CLR 186 at 201-202; *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-184; *Re A Barrister and Solicitor; Ex parte Attorney-General for the Commonwealth* (1972) 20 FLR 234 at 244; *Re A Barrister and Solicitor* (1979) 40 FLR 1 at 24-25; *Re A Practitioner; Ex parte The Legal Practitioners Disciplinary Tribunal* [2001] WASCA 204 at [6]-[7].

The powers of the Court are to be exercised for the purpose of, and in a manner seen to be likely to achieve, the maintenance of that high standard of conduct within the profession which will continue its good reputation, and so protect, not only the future of the profession, but also its clients from harm. The Court's task is to uphold the dignity and standards of the profession and to enable it to do so, it has many powers, including the power to impose a fine not exceeding \$20,000, to order payment of costs, to suspend and strike off. Such orders are, of course, of a punitive nature but their imposition should not be regarded as sentences as for crimes and offences. The order the Court makes should be one 'which, in its opinion, is necessary, and no more than is necessary, to maintain professional discipline and higher standards of conduct': *Dickens v Law Society* [42/1981] at 16.

8. It would seem to follow from the object of disciplinary proceedings that four main aspects need to be considered when determining what disciplinary action should be taken:
  - The profession within which the offending conduct occurred;
  - The nature and seriousness of the conduct which is the subject of the proceedings;
  - The standards of conduct expected of a member of the subject profession and the extent to which the offending conduct departed from those professional standards and
  - The need to impose a disciplinary order which adequately achieves the objective of protecting the public and maintaining proper standards within the subject profession.
9. The imposition of penalties in disciplinary proceedings also has a specific and general objective of deterrence: see *Building Professionals Board v Hans (No 2)* (GD) [2008] NSWADTAP 48 at [155]. The relationship between deterrence, whether specific or general, and the protection of the public and maintenance of proper professional standards is self evident. Deterrence serves to maintain or improve overall standards in a particular profession.

10. These primary considerations form the general conceptual framework within which the task of deciding the appropriate disciplinary action is to be performed. However, in considering the appropriate disciplinary order many other matters may be relevant. Without limiting the generality thereof, they include:
- Whether the person to be disciplined has a full understanding of the error or errors giving rise to the offending conduct, and whether he or she has accepted full responsibility for the conduct;
  - Whether the person is likely to make a similar error or errors in the future and whether there is a risk of such conduct recurring;
  - The seriousness of the subject offending relative to other conduct that could give rise to disciplinary action;
  - The person's explanation for the offending conduct;
  - Personal matters of a mitigatory nature including the person's conduct before and after the offending conduct;
  - Whether the person admitted responsibility for the alleged conduct or chose to have the matter determined by the disciplinary authority;
  - The person's personal circumstances, in particular that person's ability to earn a living from their chosen profession;
  - The person's character and antecedents, including any history of prior professional misconduct;
  - The person's fitness to practise in their chosen profession.
11. All of the above considerations need to be evaluated and given weight in determining the appropriate order to be made under s 44B(1) of the Act.

12. The above considerations are not exhaustive, but are merely illustrative of the matters which a disciplinary authority is obliged to take into account and weigh for the purpose of determining the disciplinary order which is appropriate in all circumstances in order to protect the public and maintain proper professional standards. This is consonant with the approach laid down in *Paridis v Settlement Agents Supervisory Board* (supra).

**The facts and circumstances in the present case**

13. In its reasons for decision delivered on 9 September 2009 the Court found that as a result of Mr Lee's instructions as an agent's representative to himself as a solicitor/conveyancer the commission was arranged to be paid to himself as an agent's representative for services performed in that capacity.
14. The Court further found that Mr Lee'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 Court concluded that Mr Lee had no legal entitlement to arrange the payment of the commission to himself and take that commission.
15. The Court found that Mr Lee'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 this conduct Mr Lee not only put his own interests ahead of those of Litchfield Realty, but left the vendor open to claims and litigation by Litchfield Realty as regards the payment of commission. The Court found that by placing his own interests ahead of those of the vendor and Litchfield Realty Mr Lee breached a duty of loyalty that he owed to both of those parties.

16. The Court concluded that Mr Lee's conduct as an agent's representative amounted to a reasonable ground which is sufficient to warrant the taking of disciplinary action.
17. At the outset, it is important to recognise that although Mr Lee's conduct as a solicitor/conveyancer facilitated the payment of the commission to himself as an agent's representative, his conduct as a solicitor/conveyancer needs to be segregated from his conduct as an agent's representative. Neither the Board nor this Court should be concerned with what Mr Lee did in his capacity as a solicitor/conveyancer. Neither the Board nor this Court has any jurisdiction over what Mr Lee did in his role as a solicitor/conveyancer. The Court has been made aware that Mr Lee is the subject of an inquiry by the Law Society of the Northern Territory concerning his conduct as a solicitor/conveyancer in relation to the subject matter of these proceedings. This Court must ensure that in dealing with Mr Lee it in no way intrudes upon the ambit of that inquiry. Accordingly, it is only Mr Lee's conduct as an agent's representative that must be considered for the purposes of deciding what action should be taken against Mr Lee pursuant to s 44B(1) of the Act.
18. Reasonable grounds sufficient to warrant the taking of disciplinary action against an agent's representative under s 44(1)(e) may vary in gravity. The task of the Court is to assess the level of seriousness of Mr Lee's misconduct and the extent to which his conduct departed from the professional standards with which agent's representatives are expected to comply.
19. Mr Lee's conduct amounted to a serious breach of loyalty which was owed to not only the vendor but also Litchfield Realty. His 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.

Consequently, his conduct represented a significant departure from the standards of conduct expected of an agent's representative.

20. However, the following features of the offending conduct warrant noting, and need to be taken into account in deciding what action the Court should take against Mr Lee:

- The conduct appears to have been opportunistic rather than premeditated, and occurred under a belief of being entitled to the commission, although one which on all the evidence was found to be unreasonably held by Mr Lee;
- The conduct engaged in by Mr Lee did not involve an element of dishonesty. Nor was the conduct covert. Mr Lee acted in an overt manner, and at no time attempted to conceal his misconduct;
- The conduct did not involve a course or pattern of conduct over a period of time and was confined to a single occasion or incident;
- Although Mr Lee breached a duty of loyalty to two persons or entities the same incident triggered each breach, and the breaches occurred more or less simultaneously;
- The incident which gave rise to the breach of duty represents an isolated departure from the professional standards expected of an agent's representative, as Mr Lee has not previously been the subject of disciplinary proceedings before the Board;
- The amount of money involved in the misconduct was relatively small, namely \$2,722.50, and has been paid to Litchfield Realty;



- Neither the vendor nor Litchfield Realty suffered any tangible loss or damage as a result of Mr Lee’s conduct. However, the gravamen of the offending conduct was its potential to cause loss or damage to either or both of those parties.

21. In light of the above circumstances I consider that Mr Lee’s conduct is not at the high end of the scale of misconduct under the *Agents Licensing Act*.<sup>2</sup>

22. Ms Porter, counsel for Mr Lee, relied upon the following personal circumstances as being relevant to the Court’s task of determining the appropriate disciplinary action:

- Mr Lee was totally candid in giving evidence during the hearing before the Board, and the Board’s rejection of his evidence was not based on a positive finding that he had lied to the Board;<sup>3</sup>
- Mr Lee was previously of good character as demonstrated by the testimonials that were tendered at the Board hearing and put before the Court for its consideration;<sup>4</sup>
- Mr Lee had not previously been the subject of disciplinary proceedings before the Board. As Ms Porter put it, “this is Mr Lee’s first offence”;<sup>5</sup>

23. In my opinion the above matters operate in Mr Lee’s favour, though the weight to be accorded to those aspects is a matter for the Court.

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<sup>2</sup> This was conceded by Mr Johnson, counsel for the respondent.

<sup>3</sup> For the relevance of that aspect see *Smith v New South Wales Bar Association* (1992) 175 CLR 256 referred to in *Grljusich v Andrews* [2003] WASC 206 at [153]. See [9] of the appellant’s written submissions dated 6 November 2009.

<sup>4</sup> It is significant that one of those testimonials came from the vendor. See [15] of the appellant’s written submissions dated 6 November 2009.

<sup>5</sup> See [16] of the appellant’s written submissions dated 6 November 2009.

24. On the negative side, Mr Lee did not admit his wrongdoing, and thereby obviate the need for the Board to conduct a hearing into the alleged wrongdoing. An admission of wrongdoing in disciplinary proceedings is generally regarded as a mitigating circumstance, and usually results in a reduction in what would otherwise be the appropriate penalty. Mr Lee is not entitled to that discount.
25. Ms Porter submitted that there was no need for specific deterrence as Mr Lee was “unlikely to re-offend because he has already paid a high price for his actions in that:
- being brought before the Board and then before this Court of itself has caused severe personal distress;
  - his personal and professional reputation has because of it suffered, as, inter alia, he is snubbed by other agents now;
  - the financial cost of defending the matter has been extensive, in both barrister fees and loss of his income from his personal time involved;
  - as a result of the charge and these proceedings, he ceased his study for the Diploma of Property to be able to be a licensed agent under the Act, despite having paid the fees;
  - he is yet to be dealt with by the Northern Territory Law Society as a solicitor concerning the same subject matter, and as a person has to go through this all over again,

and he feels he has learned his lesson.”<sup>6</sup>

26. Mr Lee gave oral evidence at the hearing of his appeal in relation to the fact that he learnt his lesson and was unlikely to re-offend. Mr Lee said that if he

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<sup>6</sup> See [17] of the appellant’s written submissions dated 6 November 2009.

were again faced with a dispute over commission between himself and his principal he would pay the entire commission to the principal, and if the dispute were not resolved he would pursue the appropriate legal remedy to recover his part of the commission. Mr Lee said that he would not attempt to unilaterally deal with the matter in the way that occurred in the present case.

27. Ms Porter submitted that the Court could be satisfied on the basis of Mr Lee's evidence that he had learnt his lesson, that he was unlikely to re-offend, and therefore there was no need for specific deterrence.
28. Under cross-examination by Mr Johnson, a number of questions were put to Mr Lee with a view to eliciting his capacity to recognise situations involving a conflict of interest and his ability to act appropriately in such situations. The hypothetical situations put to Mr Lee revolved around Mr Lee acting as both agent and solicitor in circumstances where there was a dispute between a vendor and the agency (Mr Lee's principal) regarding commission. Mr Johnson submitted that Mr Lee's responses disclosed a lack of understanding as to the course of action he should take in such situations, namely that he should withdraw from the matter as solicitor for the vendor.
29. I propose to deal with the matter of specific deterrence in the next section of these reasons for decision, as that issue is more conveniently dealt with in conjunction with other relevant considerations, particularly those that relate to the objects and purposes of taking disciplinary action under s 44B(1) of the Act.

### **Decision on Penalty**

30. It is important in proceedings such as the present for an appropriate penalty to be imposed. The penalty to be imposed must have due regard to the protection of the public and the maintenance of proper professional standards: it must serve that twin purpose. Furthermore, if a penalty less than what others in the real estate profession would reasonably expect for

the proven misconduct were to be imposed, it may undermine the objectives of the disciplinary process, including the goals of specific and general deterrence. Conversely, an excessive penalty may diminish respect for the disciplinary process and reduce its deterrent effect. In the context of the present disciplinary proceedings, the Court must strive towards imposing a penalty that strikes a balance between those various considerations.

31. In some cases the seriousness of proven misconduct is such that the protection of the public can only be achieved by imposing severe penalties, such as cancelling or suspending a person's registration within their chosen profession. Such a course of action is open to the Court under s 44B(1)(c) and (d) of the Act.
32. In my opinion, the seriousness of Mr Lee's conduct does not warrant a cancellation of his registration as an agent's representative. Indeed, the Board did not consider that Mr Lee's conduct raised such concerns about his fitness to practise as an agent's representative such as to warrant a cancellation of his registration.
33. Was Mr Lee's conduct such as to warrant a suspension of his registration as an agent's representative? The Board was of the view that it did, and accordingly ordered that Mr Lee's registration as an agent's representative be suspended until such time as Mr Lee 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. The Board was of the view that the condition attaching to the suspension was necessary for the protection of the public.<sup>7</sup>

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<sup>7</sup> See [9] of the Board's reasons for decision on penalty.

34. In determining whether Mr Lee's conduct was such as to warrant a suspension of his registration with or without conditions, the gravamen of Mr Lee's misconduct must be kept firmly in mind. The crux of the offending conduct was the giving of instructions as an agent's representative to a solicitor (who coincidentally happened to be himself) to have the commission paid to himself and his receipt of those monies. What Mr Lee, the "go between", did as a solicitor – no matter how serious that conduct might be - is not relevant to the present disciplinary proceedings, and should be disregarded.
35. Although he committed a serious breach of duty of loyalty owed to both the vendor and Litchfield Realty, his misconduct was not at the high end of the scale. His proven misconduct was not manipulative, nor fraudulent or deceptive. His conduct did not involve an element of preying upon vulnerable members of the public. The breach of duty was an isolated incident arising out of what was basically a commercial dispute over commission between Mr Lee and his principal. There was no actual harm suffered by either the vendor or Litchfield Realty. The benefits received by Mr Lee as a result of his misconduct were fairly modest, and he relinquished those monetary benefits after the Board delivered its decision.
36. However, the Board focused on another aspect of Mr Lee's conduct. But, in my opinion, in so doing fell into error.
37. As pointed out by Mr Johnson in his written submissions,<sup>8</sup> "in the course of its deliberations over penalty, it is clear that the Board was most concerned about the conflict - of - interest situation which arose in the factual situation involving the appellant".<sup>9</sup> Mr Johnson proceeded to make the following submission:

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<sup>8</sup> See [4] of the respondent's written submissions dated 9 November 2009.

<sup>9</sup> At [8] of its reasons for decision on penalty the Board stated:

In order to avoid this situation (by the appellant) recurring, the Board imposed a condition upon the appellant:

- such condition being intended to remind the appellant that such conflict of interest situations must not recur; and
- that such condition should only exist for such time as the appellant has failed to declare that he will be bound by a written undertaking ie it is within his control as to how long his registration should remain suspended.<sup>10</sup>

Such orders did (and do not) impinge upon the appellant's ability or rights to practise as a solicitor or conveyancer, but merely upon his rights as an agent's representative.<sup>11</sup>

The extent to which such orders impinge upon the appellant's rights to practise as an agent's representative is very limited. The extent of such limits only extends to whether or not the appellant is prepared to provide a written undertaking to the Board in accordance with [9] of the Board's Reasons for Decision on Penalty.<sup>12</sup>

As a consequence of the appellant's own evidence, the Board was clearly concerned that the appellant apparently did not recognise that his behaviour in paying himself the sales commission out of the proceeds of sale was both inappropriate and wrong.<sup>13</sup>

The form of penalty order (per [9]) was intended to try and ensure that there was not a repetition of the situation whereby there was a conflict of interest situation occurring between the appellant in his roles, firstly as an agent's representative and, secondly as a solicitor/conveyancer.<sup>14</sup>

38. The question that now arises is whether the Board's concern was soundly based, and whether the disciplinary action that it took against Mr Lee was appropriate in all the circumstances.

39. Mr Lee's conduct clearly gave rise to a conflict - of - interest situation.

While owing a duty of loyalty to the vendor and Litchfield Realty Mr Lee

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"Lee's appropriation of the commission to which he claimed he was entitled only came about because he was in a unique position acting as solicitor/conveyancer for the vendors and sales representative for the real estate agency acting for the vendors (emphasis added)."

The Board was of the view that Mr Lee ought not to be allowed to assume this unique position (emphasis added) again and on that basis made the suspension order: see [9] of the Board's reasons for decision on penalty.

<sup>10</sup> See [5] of the respondent's written submissions dated 9 November 2009.

<sup>11</sup> See [6] of the respondent's written submissions dated 9 November 2009.

<sup>12</sup> See [7] of the respondent's written submissions dated 9 November 2009.

<sup>13</sup> See [13] of the respondent's written submissions dated 9 November 2009.

<sup>14</sup> See [14] of the respondent's written submissions dated 9 November 2009.

preferred his own interests over the interests of those two parties by giving instructions to have the sales commission paid to himself. The Board had every right to be concerned about that conflict of interest. The Court shares that concern.

40. However, in my opinion, it is going too far to characterise the relevant conflict of interest as a conflict of interest situation occurring between the appellant in his twin roles as agent's representative and solicitor/conveyancer. To characterise the conflict of interest in that way necessarily incorporates Mr Lee's conduct as a solicitor/conveyancer in the gravamen of the wrongdoing. As stated earlier, what Mr Lee did as a solicitor/conveyancer is neither the concern of the Board nor the Court.
41. I do not agree with Mr Johnson's submission that the Board's order of suspension did not impinge upon Mr Lee's ability to practise as a solicitor/conveyancer, but merely upon his rights to practice as an agent's representative. The Law Society of the Northern Territory had given its approval to Mr Lee being registered as an agent's representative, and thereby approved of Mr Lee acting as both a solicitor/conveyancer and an agent's representative. I agree that the extent of the suspension order was totally within the control of the appellant, that is as soon as Mr Lee provided the written undertaking required in the order the suspension would cease. But therein lies the problem. If Mr Lee provided the undertaking then he would be agreeing to a restriction on his right to practise as both a solicitor/conveyancer and agent's representative in certain circumstances, albeit limited. He would necessarily be agreeing to a restriction on his right to practise as a solicitor/conveyancer. He would be giving up a right that he hitherto enjoyed.
42. On the above bases, the suspension order made by the Board was either ultra vires, or, by taking into account an extraneous circumstance, amounted to an

improper exercise of the discretion vested in the Board under s 44B(1) of the Act.

43. Furthermore, the Board's order is questionable on another ground. The suspension order potentially had a far reaching effect. If Mr Lee were not to provide the required undertaking, then his registration as an agent's representative would be indefinitely suspended. The Board's order had the potential to impinge upon Mr Lee's right to practise as an agent's representative such that he would be precluded for an indefinite period from acting in that capacity. The effect of the Board's order was that Mr Lee could only avoid an indefinite suspension by renouncing a right that he hitherto enjoyed. In my view the suspension order imposed a heavy burden on Mr Lee, which was not warranted by the proven misconduct. In other words, the penalty imposed by the Board was manifestly excessive.
44. If for any reason I have erred in concluding that the suspension order was ultra vires, or represented an improper exercise of the Board's disciplinary discretion or was manifestly excessive, then I would have thought that the order the Board made was still inappropriate in all the circumstances.
45. The Law Society of the Northern Territory, which is also conducting an inquiry into Mr Lee's conduct arising out of the same circumstances, gave Mr Lee approval to act as both a solicitor/conveyancer and agent's representative. In my opinion, the Law Society will be in a far better position than either the Board or this Court to make a proper assessment of the gravity of the conflict of interest situation that arose out of Mr Lee acting as both solicitor/conveyancer and agent's representative in relation to the sale of the subject property. Furthermore, the Law Society will be in the best position to determine what disciplinary action should be taken against Mr Lee in relation to his right to practise as a solicitor/conveyancer.
46. As mentioned earlier, specific deterrence has a role to play in determining the appropriate penalty. Based on the oral evidence he gave, I am satisfied



that Mr Lee has learnt his evidence, and if confronted in the future, in his capacity as an agent's representative, with a similar situation involving sales commission he would pursue the matter through appropriate legal channels. It is noted that Mr Lee has not previously been found guilty by the Board of past misconduct similar to the subject conduct or any other misconduct demonstrating a departure from the professional standards imposed by the *Agent's Licensing Act*. The subject conduct presents as an isolated departure from the professional standards expected of an agent's representative, and is unlikely, in my opinion, to be repeated.

47. While I accept that Mr Lee might have displayed an inadequate understanding of what he should have done in the present situation – or should do in similar situations - in his capacity as a solicitor/conveyancer (as opposed to an agent's representative), it is important to again note that Mr Lee's conduct as a solicitor/conveyancer falls outside the purview of the present proceedings, and is a matter for the Northern Territory Law Society. Contrary to the submission made by Mr Johnson, I consider that it would be wrong to factor that apparent lack of understanding into the assessment of the likelihood of Mr Lee re-offending in his capacity as an agent's representative and the need for specific deterrence.
48. I now turn to consider the appropriate penalty.
49. While previous decisions in similar or comparable circumstances are instructive,<sup>15</sup> they only provide a very rough guide as to what would be the appropriate penalty in a given case. In the final analysis, the appropriate penalty can only be arrived at on the basis of the facts of the case under consideration, and cannot necessarily be determined by comparison with the penalties imposed in other disciplinary proceedings.

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<sup>15</sup> I refer to the various examples mentioned in [6] of the appellant's written submissions dated 6 November 2009.

50. In my opinion the circumstances of the present case do not warrant a cancellation of Mr Lee's registration as agent's representation. It is not necessary to impose such a penalty in order to protect the public and to maintain proper professional standards within the real estate profession. Nor is it necessary to take such disciplinary action for the purposes of either specific or general deterrence.
51. It is not necessary in the present case to suspend Mr Lee's registration either conditionally or unconditionally in order to achieve any of the aforesaid objects. Furthermore, it would be wrong or inappropriate to make a suspension order of the type made by the Board for the reasons given in the body of these reasons for decision.
52. At the other of the spectrum, I consider that a reprimand or caution would not adequately protect the public interest and maintain proper professional standards within the Northern Territory real estate profession.
53. Having regard to the objects of the present proceedings, the objective seriousness of the offending conduct, the appellant's personal circumstances and other relevant circumstances - all of which have been dealt with during the course of these reasons for decision - I consider that a fine is the appropriate penalty. In selecting that penalty option I have had regard to the guiding principle that any order the Court makes should be one "which, in its opinion, is necessary, and no more than is necessary to, maintain professional discipline and higher standards": *Dickens v Law Society* (supra) at [16].
54. The maximum monetary penalty that can be imposed under s 44B(1) is five penalty units. The Board and the Court must have regard to that maximum penalty when determining the appropriate fine. In my opinion, the objective seriousness of the conduct engaged in by Mr Lee is towards the upper end of the scale for matters capable of being dealt with by way of a fine. Taking into account that assessment of the offending conduct together with Mr

Lee's personal circumstances and the other relevant circumstances I consider that the appropriate penalty is a fine of \$500.

55. Accordingly the appellant is fined the sum of \$500.

56. I will hear the parties as to any ancillary or consequential orders.

Dated this 7th day of December 2009.

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**Dr John Allan Lowndes**  
STIPENDIARY MAGISTRATE