

Lee v The Agents Licensing Board [2011] NTSC 7

PARTIES: LEE, THONG SUM

v

THE AGENTS LICENSING BOARD OF
THE NORTHERN TERRITORY

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: LA9 of 2009 (20907057)

DELIVERED: 19 JANUARY 2011

HEARING DATES: 23 NOVEMBER 2010

JUDGMENT OF: MILDREN J

APPEAL FROM: LOCAL COURT
(DR J LOWNDES SM)

CATCHWORDS:

AGENT – Appeal – Agents Licensing Board – whether appellant acted as agent to vendor or as solicitor – whether agents fee wrongly credited to appellant – whether Board had jurisdiction to hear matter if appellant acted as solicitor – whether there was a breach of fiduciary duties as an agent – appeal allowed

Agents Licensing Act, s 4(1)(c), s 5(1), s 5(2)(a), s 5(2)(b), s 6, s 33, s 44(1), s 44(1)(e), s 44(4), s 44(5), s 44(5)(a), s 44(5)(b), s 44(7), s 77, s 85(1)
Local Court Act, s 19(1)(a)
Local Court Rules, r 38.09

Meagher, Gummow & Lehane, *Equity, Doctrines and Remedies*, 4th ed,
Butterworths LexisNexis, Sydney, 2002

Addstead Pty Ltd (In liquidation) v Liddan Pty Ltd (1997) 70 SASR 21; *Attorney-General v Blake* [1998] Ch 439; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 AC 222; *Breen v Williams* (1996) 186 CLR 71; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371; *Co-ordinated Industries Pty Ltd v Elliot* (1998) 43 NSWLR 282; *Council of Auctioneers & Agents v G J Alexander Pty Ltd* (1972) 2 NSWLR 375; *De Bussche v Alt* (1878) 8 Ch D 286; *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89; *Friend v Brooker* (2009) 239 CLR 129; *Gonsalves v Debreczeni* [2000] ANZ ConvR 311; *Gathergood v Blundell & Brown Ltd* [1991] 1 NZLR 405; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 152; *Lau Liat Meng v Disciplinary Committee* [1968] AC 391; *Law Society of NSW v Foreman (No 2)* (1994) 34 NSWLR 408; *Pilmer v Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165; *Walker v Stones* [2000] 4 ALL ER 412; *Weldon & Co Services Pty Ltd v Harbison* [2000] NSWSC 272; referred to

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC and W Roper
Respondent:	R Webb QC and M Johnson

Solicitors:

Appellant:	T S Lee & Associates
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lee v The Agents Licensing Board [2011] NTSC 7
No LA9 of 2009 (20907057)

BETWEEN:

THONG SUM LEE
Appellant

AND:

**THE AGENTS LICENSING BOARD OF
THE NORTHERN TERRITORY**
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 January 2011)

- [1] This is an appeal brought pursuant to s 19(1)(a) of the *Local Court Act* from a decision by the Local Court dismissing an appeal from the Agents Licensing Board of the Northern Territory constituted under s 6 of the *Agents Licensing Act* (the Act). An appeal so brought is confined to a question of law.

Background facts

- [2] The appellant is a legal practitioner practising in Darwin under the business name of T S Lee & Associates. On 3 July 2006, the appellant obtained interim registration as an Agent's Representative by the Board. An 'agent's

representative' is 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)".¹ In short, these subsections refer to, amongst other things, negotiating the sale of interests in real property. Registration as an agent's representative is a requirement of the Act, which proscribes persons other than licensed agents from carrying out any of the functions of a licensed agent.² The appellant obtained the approval of the Law Society to work in that capacity at the same time as carrying out his practice as a legal practitioner.

[3] Subsequently, the appellant entered into an oral agreement with a firm of licensed real estate agents, Litchfield Realty, to act as an agent's representative on its behalf. In proceedings before the respondent Board, the Board concluded that the relationship was probably not a master and servant relationship, but that the appellant was "more in the nature of an independent contractor".

[4] In the course of his engagement with Litchfield Realty, the appellant was approached by a Mr and Mrs Welffer (the vendors) to sell their property at Howard Springs. On 1 May 2007, the vendors executed a "sole and exclusive" agency agreement with Litchfield Realty. The vendors nominated the appellant as their solicitor.

¹ *Agents Licensing Act*, s 5(1).

² Section 33.

[5] Subsequently, according to the evidence of the appellant at the hearing before the Board, he attended to obtaining the title search and arranged for open inspections of the property, during which offers were received but rejected by the vendors.³ It is not clear if the appellant photographed the property, but that was his usual practice. On 3 September 2007, the appellant obtained full registration.

[6] On 26 October 2007, a Mr Chenhall saw a photograph of the property in the window of Litchfield Realty's office and decided to make enquiries. After obtaining the address of the property from Litchfield Realty's office, he attended at the property where he saw a "for sale" sign indicating a mobile phone contact number for the appellant. He rang the number and left a message. After waiting for 10 minutes and not receiving any response to his call, he rang the Litchfield Realty office. He was put through to a Mr Jones, a licensed land agent and the owner of the business. As a result, an offer to purchase the property was completed which was accepted by the vendors. On the same day, a facsimile was sent by Mr Jones to the appellant instructing him as the vendors' solicitor to prepare the contract of sale. The facsimile included the following information concerning agent's fees:

Agents Fees	\$9,075.00 (GST inclusive) payable to Litchfield Realty by vendor from settlement proceeds. Note \$500.00 deposit held in Agent's Trust Account.
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³ Transcript of hearing before the Board, p 165.

[7] A major issue subsequently arose between the appellant and Litchfield Realty as to how much of this commission the appellant was entitled to. Litchfield Realty claimed that the arrangement was that the appellant was entitled to 20 per cent (\$1,815), 30 per cent was payable to Mr Jones as the agent who actually sold the property and Litchfield Realty was entitled to receive the remaining 50 per cent. The appellant maintained that he was the only agent entitled to sell the property and that he was entitled to 50 per cent of the commission. Mr Jones, who was a licensed land agent and business agent, was the owner of Litchfield Realty and it was Mr Jones who entered into the oral agreement to engage the appellant as an agent's representative with Litchfield Realty. The dispute resulted in correspondence between Mr Jones and the appellant. As it was not resolved, the appellant resigned from Litchfield Realty in November 2007 and undertook employment with another firm of real estate agents. Subsequently, further discussions took place between the appellant and Mr Jones in order to resolve the dispute, but the Board found that they came to nothing.

[8] On 30 November 2007, Litchfield Realty prepared an invoice to the vendors for the full amount of the commission, less the deposit, "payable to Litchfield Realty from settlement proceeds", which it sent to the appellant and to the vendors. It also prepared a tax invoice to itself on the appellant's behalf for the appellant's commission for \$1,815 which it sent to the appellant. The appellant sent an email to Litchfield Realty requesting that

the latter invoice be amended to \$4,537.50. Litchfield Realty replied by email to the effect that as Mr Jones was on his way to Canada, the person concerned had no authority to amend the invoice and undertook to forward the appellant's email to him. It is not clear what happened after that, but there is no finding by the Board that either party relented from its original position.

[9] On 18 December 2007, the appellant sent a settlement statement, attached to a letter on his solicitor's letterhead, to the purchasers' conveyancing agent and other interested parties. The settlement statement required a bank cheque for \$8,575 payable to Litchfield Realty and another to T S Lee & Associates for \$880. Clearly, the amount of \$8,575 represented the balance of the total commission payable by the vendors on the sale after allowing for the \$500 deposit held in Litchfield Realty's trust account and the amount of \$880 represented the appellant's solicitor's fees for his conveyancing work.

[10] On 21 December 2007, the appellant prepared an amended settlement statement indicating that bank cheques for commission should be prepared in favour of Litchfield Realty for \$4,037.50 and for himself in the sum of \$4,537.50 in addition to an amount of \$880 for T S Lee & Associates. This was sent to the purchasers' conveyancing agent and others by facsimile on the same date, with a letter on the appellant's letterhead to the effect that as settlement was due to take place on 4 January 2008, when his office would be closed, he had arranged for another conveyancing agent, MBA Conveyancing Services, to attend to settlement on his and the vendors'

behalf. This resulted in a facsimile on the same date from Litchfield Realty to MBA Conveyancing Services requesting that the total commission be paid to Litchfield Realty. MBA Conveyancing Services then prepared a new settlement statement showing that the whole of the agent's commission was payable by bank cheque to Litchfield Realty. Subsequently, on 2 January 2008, the appellant instructed MBA Conveyancing Services by email not to change the amended settlement statement. On the following day, MBA Conveyancing Services advised Litchfield Realty that it had no authority to change the amended settlement statement. Because the settlement was delayed, a further amended settlement statement was issued for 4 January 2008. It is not clear whether this was prepared by the appellant or by MBA Conveyancing Services – presumably the latter. It reflected that commission for the sale was paid to Litchfield Realty in the sum of \$4,037.50 and to the appellant in the sum of \$4,537.50. A letter of 4 January 2008 enclosing a bank cheque for \$4,037.50 was sent by MBA Conveyancing Services to Litchfield Realty. It was not in contest that a bank cheque for \$4,537.50 was similarly sent to the appellant.

- [11] On 9 January 2008, Litchfield Realty made complaints of professional misconduct concerning the appellant to the Board and to the Law Society. The Board sought legal advice from the Solicitor for the Northern Territory. The effect of the advice was that as the appellant's conduct at the time the final settlement statements were produced was in his capacity as a solicitor

and not as a licensed agent's representative, the Board had no jurisdiction in the matter; it was, however, a matter for the Law Society to investigate.

[12] Notwithstanding this advice, the Board decided to hold a Disciplinary Inquiry against the appellant pursuant to s 44(1)(e) of the Act on its own motion. The Licensing Manager⁴ of the Board was instructed "to proceed with the enquiry proceedings". The Licensing Manager, who was a Deputy Registrar of the Board, prepared briefing notes which asserted that the alleged conduct forming the basis of the grounds for disciplinary action was that the appellant "directed (in his capacity as a lawyer) monies legally obliged to be paid to Litchfield Realty to himself in his former capacity as an employed agent's representative" in respect of the sale. A notice in the same terms was sent to the appellant, advising him of the time and place of the hearing.

The proceedings before the Board

[13] The matter first went before the Board on 24 June 2008. The appellant appeared and raised certain objections before the Board. It is not necessary to delve into them. The Board adjourned the hearing until 9 July 2008.

[14] On 9 July 2008, the appellant was represented by a solicitor who immediately raised an objection to the Board's jurisdiction to hear the charge as formulated in the notice sent to the appellant. The basis of the objection to jurisdiction was that, under s 4(1)(c) of the act, the Act does not

⁴ This is not a statutory position.

apply “in relation to a person practising in the Territory as a legal practitioner in the exercise of rights and powers or the performance of duties and obligations in his or her professional capacity”. The Board decided that until it heard the facts of the case, it could not determine whether or not it had jurisdiction. However, the Board accepted that it “would not be looking at [the appellant’s] conduct as a solicitor in relation to the circumstances. We’re looking at it from a point of view as his position as an agent’s representative”. The appellant’s solicitor then submitted that there was nothing in the brief concerning the appellant’s conduct as an agent’s representative. The Board replied that “it was the instruction to himself to pay the sale commission to himself”.

[15] It does not appear that there was any formal amendment to the charge, as set out in the notice of hearing. This was most unfortunate, because it left it uncertain what it was that the Board’s enquiry was about. Presumably, the parties understood that what the Board was investigating was the appellant’s conduct as a licensed agent’s representative in directing that the commission be paid to himself. In any event, the Board continued to hear evidence that day and adjourned the proceedings until 21 October 2008.

[16] On 21 October 2008 counsel assisting the Board made it clear that the charge as drafted should be read as if it read that the appellant “in his capacity as an agent, directed monies legally obliged to be paid to Litchfield Realty to himself in his former capacity as an employed agent’s representative”. Counsel for the appellant indicated that particulars of the

charge had been supplied and that she was happy to proceed on that basis. Copies of the particulars were given to the Board. The conduct alleged in the particulars was as follows:

Allegations of Conduct by T S Lee Warranting Disciplinary Action

Background

In his role as a registered agent's representative employed by Litchfield Realty, T S Lee would have, or should have, been aware that the vendors had an obligation to pay commission to Litchfield Realty on a sale. This included knowledge of the amount of commission or, at the very least, the basis that such commission would be calculated.

In addition, in his role as a solicitor/conveyancer engaged by Bill & Val Welffer, T S Lee would have, or should have, been aware that the vendors had an obligation to pay commission to Litchfield Realty on the sale. This included actual knowledge of the amount of commission.

The Conduct

T S Lee, in his role as a registered agent's representative, instructed and directed himself, in his role as the solicitor/conveyancer for the vendor, to pay to himself, as a registered agent's representative, 50% of the commission payable on the sale.

Having provided such instructions/directions, T S Lee, as the registered agent's representative, accepted this payment of 50% of the commission.

The Reasonable Ground

T S Lee wrongly took the commission moneys which were the property of Litchfield Realty AND THEREBY:

1. In arranging for the amount of \$4,537.50 to be paid to himself, T S Lee put his own interests before those of the vendors. The vendors were both:
 - a. his clients in the Conveyancing transactions (i.e. in his role as a solicitor/conveyancer); and
 - b. the clients of his principal, Litchfield Realty (i.e. 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 interests before those of Litchfield Realty, his employer at the time of the sale agreement.

The Knowledge

T S Lee provided such instructions and directions and subsequently received the payment of 50% of the commission payable on the sale, when he knew, or should have known, that he was not entitled to such commission.

The reasons of the Board

[17] Subsequent to the conclusion of the hearing, the Board delivered written reasons for its decision. In the course of those reasons the Board made the following findings:

- The appellant was not an employee of Litchfield Realty. He was an independent contractor and an agent for Litchfield Realty.
- He owed duties of loyalty and confidentiality to Litchfield Realty so long as the relationship between them existed.
- The contractual relationship ended on 29 October 2007.

- Litchfield Realty had a contractual obligation to pay the appellant the commission to which he was entitled and that obligation continued after 29 October 2007.
- The appellant's obligations towards Litchfield Realty continued until settlement of the contract of sale.
- Litchfield Realty's agency agreement with the vendors continued after exchange of contracts between the vendors and the purchasers and absent any other direction in the contract would continue until payment of the commission when the sale is completed.
- The fiduciary obligations of the appellant to the vendors mirrored those of Litchfield Realty.
- The appellant believed that as an agent's representative he expected to be paid his commission.
- As an agent's representative he arranged for the settlement statement to be altered to represent that expectation.
- The alteration to the settlement statement was made in his performance as the solicitor/conveyancer for the vendors.
- Litchfield Realty received less than the full amount of the commission.
- Thirty per cent (sic) of the commission was paid to the appellant.
- There was no evidence that the appellant was entitled to the commission he claimed.
- The appellant was of the opinion that he should have been paid the commission because he considered Mr Jones should not have sold the property. There was no basis for that opinion which was a "rationalisation of Lee's position or, at worst, a mere fabrication".

- There was no justification for the appellant to believe that there was a subsequent agreement between him and Mr Jones that he was entitled to the 30% commission (sic).
- The full amount of the commission was payable to Litchfield Realty.
- Lee did not hold an honest belief that he was entitled to “the extra 30% commission”.
- The appellant wrongly took “the 30% sales commission”.
- The appellant put his own interests above that of the vendors by leaving them open to litigation.
- The vendors had instructed the appellant as their solicitor/conveyancer to account to Litchfield Realty from the proceeds of settlement. As a result of his instructions as an agent’s representative to himself as solicitor/conveyancer the settlement statement was changed and Litchfield Realty did not receive the commission to which it was entitled and which the vendors expected it to be paid.
- The actual failure to pay was occasioned by the appellant acting as the vendors’ agent as their solicitor/conveyancer.
- The vendors could not defend a claim against them by Litchfield Realty, because the failure to pay was occasioned by their agent.
- The appellant placed his own interests above that of Litchfield Realty when he knew that Litchfield Realty claimed 80% of the commission. This amounted to a breach of his contract of service with Litchfield Realty.
- It was implicit in the Board’s reasons that Litchfield Realty was obliged to pay the appellant only 20% of the commission.

- The appellant's conduct was sufficient to warrant disciplinary action.

[18] After hearing submissions on penalty the Board:

- (a) suspended the appellant's registration until such time as he declared he would be bound by a written undertaking to the Board to the effect that he will not act as 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.
- (b) Fined the appellant 5 penalty units.

The appeal to the Local Court

[19] An appeal lay from the decision of the Board to the Local Court pursuant to s 85(1) of the Act. The learned Magistrate found that the appeal was in the nature of a rehearing based on the evidence and the material considered by the Board along with any additional evidence that the Court, in the exercise of its discretion, considers fit to receive. There is no appeal from that part of his Honour's decision. The Local Court dismissed the appeal on the merits except in relation to penalty. Subsequently the Local Court substituted for the penalty imposed by the Board a fine of \$500.

The appeal to this Court

[20] The Notice of Appeal to this Court contains seven grounds. There is no appeal or cross-appeal relating to penalty. The grounds as argued were distilled into three alleged errors of law. Although no formal order was made substituting the grounds argued for the grounds set out in the Notice of Appeal, I will deal only with the grounds relied on at the hearing of the

appeal. To the extent that these grounds do not encapsulate a ground of appeal in the Notice of Appeal, I take it that any such ground has been abandoned.

Ground 1 – The Board had no jurisdiction

[21] This ground asserts that the Board purported to initiate and hold the enquiry under s 77 of the Act into and only into, the appellant’s conduct as a solicitor and, by reason of s 4(1)(c) of the Act, it had no power to do so. I accept that if the Board did purport to deal with the appellant’s conduct as a solicitor, it had no power to do so. However, if the Board considered the evidence related to the appellant’s conduct as an agent’s representative, it clearly did have the power to enquire into that conduct. In this case, the appellant was both a licensed agent’s representative as well as a solicitor and it may have been that his conduct over all was relevant to both capacities. To the extent that it was necessary for the Board to consider the appellant’s conduct as a solicitor to unravel from the facts those matters which bore on his conduct as an agent’s representative, it was, in my opinion, within its power to do so.

[22] Mr Wyvill SC relied on the original briefing notes and the notice of hearing given to the appellant. Clearly the notice showed that the basis for holding the enquiry was because the appellant “directed, (*in his capacity as a lawyer*) monies legally obliged to be paid to Litchfield Realty to himself in his *former* capacity as an employed agent’s representative”. On the face of the notice, the Board clearly had no jurisdiction to enquire into the matter as

pleaded. But, the Board was alive to this and ultimately counsel assisting the Board informally amended the notice so that it read “in his capacity as an agent’s representative” and provided particulars of the charge which made it clear that what was being asserted was that he, in his capacity as an agent’s representative instructed and directed himself, in his role as a solicitor/conveyancer for the vendors, to pay himself 50% of the commission and that in the capacity of an agent’s representative, he received and accepted the payment of the commission. No objection was taken on jurisdictional grounds by the appellant’s counsel once it was made clear that the conduct relied upon was asserted to be in the appellant’s capacity as an agent’s representative.

[23] This ground of appeal was not raised as a separate ground before the Local Court. It was raised as one of a number of particulars of a ground that the Board did not act in good faith and was biased (ground 8A(v)). The learned Magistrate did not deal with this particular except to say that “this assertion is completely unfounded”, and that any failure by the Board to properly particularise the alleged misconduct was subsequently remedied. No objection was taken to the formulation of this point as a separate ground going to jurisdiction.

[24] The way the argument was developed in this Court by Mr Wyvill SC for the appellant was that, the original notice to the appellant to hold an enquiry related to his conduct as a solicitor and only as a solicitor. Once it became apparent to the Board that the notice was defective, the Board needed to

formally resolve to hold a fresh enquiry and serve a fresh notice on the appellant. It was not open to the Board to proceed otherwise. Furthermore, it was submitted that the charge contained in the notice could not be amended during the course of the hearing to convert an invalid notice into a valid one.

[25] Mr Johnson, junior counsel for the Board, submitted that the complaint by Litchfield Realty fell within s 44(4) of the Act which enlivened the Board's jurisdiction under s 44(1)(e) and s 44(5)(a). Alternatively, the Board may have acted on its own motion under s 44(5)(b). In my opinion it does not matter which of these provisions triggered the Board's decision to hold an enquiry. The question remains whether the Board had jurisdiction. Clearly, the Board had no jurisdiction to enquire into the appellant's conduct as a solicitor, if that was the object of the enquiry. However, although the notice originally served on the appellant was defective, I accept Mr Johnson's submission that there was no need for the Board to formally resolve again to hold an enquiry. The body entrusted by the Act to hold the enquiry is the Board. The Board, where it considers there may be grounds under s 44(1) of the Act for the taking of disciplinary action "must" hold an enquiry.⁵ Nor was it necessary to serve a fresh notice on the appellant. A copy of the application was served by the registrar, as required by s 44(7). The appellant appeared and was told what the nature of the enquiry was about. He was granted an adjournment to prepare his case. When the matter

⁵ Section 44(5).

proceeded, there was initially no formal amendment to the charge. But subsequently the charge was informally amended and properly particularised. Although there is no statutory provision relating to the procedures to be followed before the Board, it is abundantly clear that the Board must comply with the rules of natural justice. There is nothing necessarily intrinsically unfair in making amendments at the hearing or providing particulars, even if this is done late in the hearing. If necessary, an adjournment of the hearing may be necessary to enable the person charged to meet the case against him or her. In this case, no complaint was made by the appellant's counsel at the commencement of the adjourned hearing on 21 October 2008, by which time the informal amendment was made to the charge and particulars provided. On the contrary, the appellant's then counsel was ready to proceed. There was, in the circumstances, no failure to accord natural justice to the appellant.⁶

[26] However, Mr Wyvill SC maintained that the Board's finding of guilt related to the appellant's conduct as a solicitor, not as an agent's representative. It is clear beyond argument that the appellant, in drawing a settlement statement, was acting solely in his capacity as a solicitor. When the appellant instructed MBA Conveyancing Services to act on the vendors' behalf at settlement, he did so in his capacity as a solicitor. When he instructed MBA Conveyancing Services to prepare an amended settlement statement, this also was solely in his capacity as a solicitor. As an agent's

⁶ *Lau Liat Meng v Disciplinary Committee* [1968] AC 391 at 404.

representative, he had no authority to direct how the settlement statement should be prepared. A real estate agent and therefore an agent's representative, is not entitled to act in relation to a conveyance of real property. There is no evidence that the appellant was ever a licensed conveyancing agent.

[27] The Board's finding was that, when the appellant "arranged for" the settlement statement to be altered, he did so as an agent's representative, even though the alteration itself was made in his performance as a solicitor/conveyancer for the vendors. Elsewhere, the Board found that "the actual failure to pay (Litchfield Realty) is occasioned by Lee acting as the vendors' agent as their solicitor/conveyancer". The basis for these findings appears to be that the Board found that the appellant, in his capacity as an agent's representative, owed a fiduciary duty to the vendors and to Litchfield Realty which extended up to the time of settlement of the contract and that, by directing the commission to be paid to himself and receiving the commission to which he was not entitled, he breached his fiduciary duties and therefore was acting in the capacity of an agent's representative.

[28] On appeal, the Local Court upheld the findings of the Board that the appellant owed a fiduciary duty of loyalty to Litchfield Realty and the vendors and that this extended beyond the time of his resignation. This leads to the second ground of appeal, namely that the Board and the Local Court made an error of law in so concluding.

Ground 2

[29] Mr Wyvill SC submitted that whatever fiduciary duties the appellant owed to either the vendors or to Litchfield Realty, they did not include aspects of the relationship where trust and confidence does not exist. A professional person does not ordinarily owe such a duty when he or she seeks to recover his or her account. Further, whatever fiduciary duties applied to the appellant as an agent's representative ceased when the appellant resigned. Senior counsel for the Board, Ms Webb QC, sought to uphold the Board's and the Local Court's findings. Neither party referred the Court to any authority which deals directly with these questions in similar circumstances. The matter being *res integra*, it is necessary to resolve this question from first principles.

[30] There is no doubt that Litchfield Realty, as a real estate agent, owed the vendors fiduciary duties within the ambit of its agency.⁷ Whether or not the appellant was an employee or agent of Litchfield Realty, as the agent's representative, he owed to the vendors the same fiduciary duties as did Litchfield Realty.⁸ The purpose of Litchfield Realty's agency was to find a purchaser. Clause 1.1 of the Sales Agency Agreement appointed Litchfield Realty as the vendors' agent to sell the property. Clause 6.1 provided that the agent was deemed to have effected the sale if the agent introduced the property to a buyer for the seller; the seller entered into a contract of sale to a buyer; and the seller completed the sale to the buyer. Once the sale was

⁷ *Gonsalves v Debreczeni* [2000] ANZ ConvR 311.

⁸ *Gathergood v Blundell & Brown Ltd* [1991] 1 NZLR 405; *De Bussche v Alt* (1878) 8 Ch D 286.

completed, Litchfield Realty had completed its mandate; its authority to act as agent for the vendors was exhausted.⁹ It is not to the point that commission was not payable under the contract until completion. Duties as to the payment of commission arise out of the contract of agency; but duties relating to the disbursement of the funds payable by the vendors arise out of the contract of sale¹⁰ and out of the contract between the vendors and the vendors' solicitor, to which Litchfield Realty is not a party.

[31] It follows that any authority the appellant had as an agent's representative did not extend past completion of the sale. Furthermore, it is plain that, once the vendors had entered into a binding contract of sale with the purchasers, the authority of Litchfield Realty and of the appellant, to sell the property, had come to an end, or was, at the very least, suspended. Neither could have introduced a new purchaser to the vendors because the vendors were bound to sell the property to the purchasers.

[32] It is to be noted that the vendors' contractual obligation to pay the commission under the Sales Agreement, was to pay it to Litchfield Realty.¹¹ They were under no obligation to pay any commission to the appellant. Whatever rights the appellant had to commission rested on the terms of the contract, express and/or implied, between Litchfield Realty and the appellant.

⁹ *Council of Auctioneers & Agents v G J Alexander Pty Ltd* (1972) 2 NSWLR 375 at 377.

¹⁰ *Council of Auctioneers & Agents v G J Alexander Pty Ltd* (1972) 2 NSWLR 375 at 377.

¹¹ Clause 5.

[33] It is also well established that an agent owes a fiduciary duty to his principal which may extend beyond the strict terms of the contract. However that may be, the High Court has held that fiduciary duties do not extend beyond proscriptive obligations.¹² Those obligations are not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. Otherwise, the law of Australia does not impose positive legal duties on the fiduciary.¹³

[34] In this case, the appellant did not use his position as an agent's representative to obtain an unauthorised benefit from the relationship with the vendors in the sense in which that expression is used in the leading authorities, such as in *Hospital Products Ltd v United States Surgical Corporation*.¹⁴ The way the case was put was that he used his position in such a way as to create a conflict of interest between himself and the vendors, by exposing the vendors to a claim for the commission by Litchfield Realty in that he received the money and refused to repay it to Litchfield Realty. But as Mason J observed in *Hospital Products Ltd v United States Surgical Corporation*¹⁵ a fiduciary's obligation "may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect".

¹² *Friend v Brooker* (2009) 239 CLR 129 at [84].

¹³ *Breen v Williams* (1996) 186 CLR 71 at 93-94; 113; 135; *Pilmer v Duke Group Ltd (In Liquidation)* (2001) 207 CLR 165 at 197-198 [74]; *Friend v Brooker* (2009) 239 CLR 129 at [84].

¹⁴ (1984) 156 CLR 41 at 103.

¹⁵ (1984) 156 CLR 41 at 103.

Notwithstanding the apparent breadth of this observation, there is no case which I have been able to discover that holds that a former agent, in collecting a debt which he believed was owed to him by his principal was: (a) acting in breach of his fiduciary duty, particularly after the relationship had ended; or (b) amounted to professional misconduct.¹⁶

[35] Generally speaking, fiduciary obligations do not survive the ending of the fiduciary relationship.¹⁷ The established exceptions are the use of confidential information gained whilst acting as a fiduciary.¹⁸ Another is the duty of an employee who contributed to the asset of an employer not to use information about it, obtained during the employment, so as to deprive the employer of the opportunity to use the asset profitably.¹⁹ In this respect, a fiduciary cannot resign in order to do that which, if he had not resigned, would have been a breach of duty. The cases which deal with this topic are all instances of company directors using information or other maturing business opportunities which came their way whilst in office and, after resigning, taking advantage of that information or opportunity,²⁰ or professional persons, such as lawyers, acting in circumstances where the person received confidential information from a former client which may have a tendency to create a conflict of interest between the new client and

¹⁶ Cf. the situation where a solicitor fails to properly advise his client as to the fees he intends to charge: *Law Society of NSW v Foreman (No 2)* (1994) 34 NSWLR 408 at 437.

¹⁷ *Attorney-General v Blake* [1998] Ch 439 at 453-455; *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 AC 222 at 235.

¹⁸ *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 AC 222 at 235.

¹⁹ *Co-ordinated Industries Pty Ltd v Elliot* (1998) 43 NSWLR 282.

²⁰ *Addstead Pty Ltd (In liquidation) v Liddan Pty Ltd* (1997) 70 SASR 21 at 23, 44, 59; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (3d) 371; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 152.

the former client²¹ and perhaps between the solicitor and the former client, depending on the circumstances.

[36] *Attorney-General v Blake*²² is particularly instructive. In that case, the defendant was a former secret service intelligence officer who, in 1944, signed an undertaking not to reveal any official information gained as a result of his employment. In 1989, he published an autobiography substantial parts of which were based on information gained in the course of his duties. The Attorney-General brought civil proceedings to restrain the defendant from receiving any payments or other benefits as a result of the publication of his book. One of the grounds for the application was based on an alleged breach of fiduciary duty as an employee. Lord Woolf MR delivering the judgment of the court, held that the core obligation of an employee to his employer is one of loyalty:

The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer. But these duties last only as long as the relationship which gives rise to them lasts. A former employee owes no duty of loyalty to his former employer. It is trite law that an employer who wishes to prevent his employee from damaging his legitimate commercial interests after he has left his employment must obtain contractual undertakings from his employee to this effect.²³

[37] On the other hand, the court said that a relationship of confidentiality, which can also arise out of employment or agency, gives rise to a fiduciary

²¹ *Bolkiah (Prince Jefri) v KPMG (a firm)* [1999] 2 AC 222.

²² [1988] Ch 439.

²³ [1998] Ch 439 at 454.

relationship which will survive the termination of a relationship. But the fiduciary relationship lasts only so long as the information remains confidential.²⁴

[38] The learned Magistrate, in his reasons considered that the duty of loyalty which the appellant owed to Litchfield Realty continued after the employment ceased in respect of “current transactions at the time of employment,” citing *Weldon & Co Services Pty Ltd v Harbison*²⁵ and *Co-ordinated Industries Pty Ltd v Elliott*.²⁶ Both of these cases are applications of the principal in *Canadian Aero Service Ltd v O’Malley*,²⁷ where the defendant was held liable for diverting a maturing business opportunity which the employer was actively pursuing. As was said by Laskin J, who delivered the judgment of the Court:²⁸

In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting after his resignation where the resignation may be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

[39] I accept that the appellant was more than a mere servant of Litchfield Realty and that he might fairly be classified in the same category as a senior

²⁴ [1998] Ch 439 at 454, Citing *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 265, 282.

²⁵ [2000] NSW SC 272.

²⁶ (1998) 43 NSWLR 282.

²⁷ (1973) 40 DLR (3d) 371 at 381-382.

²⁸ (1973) 40 DLR (3d) 371 at 382.

executive so as to meet fiduciary obligations with respect to maturing business opportunities.²⁹ However, there is no evidence that the appellant diverted a “maturing business opportunity” in the sense in which that expression is used in the authorities. He did not, for example, after he left his employ, seek to divert the sale to his new employer. The Contract of Sale was in fact completed and the appellant in his capacity as solicitor for the vendors participated in the exchange of contracts. When the sale was settled by completion, Litchfield Realty became entitled to be paid its commission by the vendors and that was and is, still the case. Nor is there a finding that the appellant left Litchfield Realty in order to acquire for himself any opportunity sought by Litchfield Realty to earn its commission. Indeed, the facts do not even support a conclusion that he deliberately resigned with the intention of diverting any part of the commission to himself. Not only is there no finding to this effect, but the first settlement statement dated 18 December 2007 showed that the whole commission was to be paid to Litchfield Realty at settlement. The act of causing the settlement statement to be altered was done in this capacity as the solicitor for the vendors. What is then put is that he breached his duty by receiving the 30% commission. But as noted before, he no longer owed any duty of loyalty to either Litchfield Realty or to the vendors in his former capacity as an agent’s representative and there is no evidence that the appellant received confidential information from the vendors in his capacity as an agent’s

²⁹ *Canadian Aero Services Ltd v O’Malley* (1973) 40 DLR (3d) 371 at 381; *Weldon & Co Services Pty Ltd v Harbison* [2000] NSWSC 272 at [13].

representative which still remained confidential at any relevant time after he had resigned.

[40] It follows therefore that both the Board and the Local Court were wrong in holding that the appellant in his capacity as an agent's representative, breached his fiduciary obligations either to the vendors or to Litchfield Realty. That is not to say that he did not breach his fiduciary obligations to the vendors in his capacity as a solicitor, which may amount to professional misconduct.³⁰ But as this aspect of the matter is currently the subject of an investigation by the Law Society I make no further comment about it, except to urge the Law Society to bring this matter to a prompt conclusion. The appeal must be allowed and the decisions of the Board and the Local Court set aside.

Third ground – finding a lack of honest belief

[41] In view of the conclusion I have reached, it is not necessary to consider the third ground of appeal, which complained about the finding made by the Board and upheld by the Local Court, that the appellant “could not have held an honest belief that he was legally entitled to the 30% commission”. The substance of the complaint made was that the appellant was never put on notice that the honesty of his belief was being called into question.

[42] The facts show that there was never any suggestion in either the way the case against the appellant was originally formulated or prosecuted before the

³⁰ See Meagher, Gummow & Lehane, *Equity Doctrines & Remedies*, 4th ed, para 5-175 and cases there cited.

Board, that it was being contended that he had no such honest belief. No such suggestion was ever made until the particulars were provided on 21 October 2008 when it was alleged that he “knew or should have known, that he was not entitled to such commission”. By this time, the appellant had yet to give evidence and his counsel not only made no application for an adjournment, but also indicated that she was ready to proceed. It would have been unjust to the appellant if the case had proceeded on that basis without it being particularised,³¹ but this was not the case.

[43] The finding which the Board made was that the appellant’s belief that he was entitled to the commission “was so unreasonable that no other similarly qualified person could have objectively held that view”. In considering his qualifications, the Board looked at all his qualifications and the test it applied that he had no such honest belief, relied upon a passage in the judgment of Sir Christopher Slade in *Walker v Stones*³² which dealt with the position of a solicitor–trustee:

... 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 Ltd v Yardley* [1999] Lloyd’s Rep Bank 438 at 464 per Potter LJ.

³¹ *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89 at [132].

³² *Walker v Stones* [2000] 4 ALL ER 412 at 443-444.

[44] The Board considered that the Board should consider the appellant's conduct in a similar light.

[45] It is difficult to see how the test applied in *Walker v Stones*, which applied to a solicitor-trustee in an action for breach of trust (and only to such a case), had any relevance to this case, unless it was suggested that the appellant, in his capacity as a solicitor, acted in breach of trust with respect to the funds and this was not suggested. There was no other finding of dishonesty, nor finding of any actual dishonesty in the sense in which that word is normally used. However, as it was not suggested that the Board applied the wrong test and the complaint was limited to the question of fairness in the conduct of the hearing before the Board, I make no formal findings about that matter.

[46] I am not satisfied that this ground of appeal was made out.

Conclusion

[47] The appeal is allowed and the decisions of the Local Court and of the Board are set aside. The Board must pay the appellant's costs of this appeal to this Court. It appears to me that the Board had no power to award costs. As Rule 38.09 of the *Local Court Rules* provides that each party is to bear their own costs in appeals in that Court, subject to any other orders the Court considers appropriate and the Act makes no provision for costs on appeal, I doubt if I can make an order for costs in relation to the appeal to the Local

Court. I will hear the parties further on whether I should make any further allowances for costs.
