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NZLR

IN THE HIGH COURT OF NEW ZEALAND  
(ADMINISTRATIVE DIVISION)  
WELLINGTON REGISTRY

M. 404/83

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IN THE MATTER of the Real Estate Agents Act, 1976

- a n d -

IN THE MATTER of an appeal against a refusal to grant an application for a Certificate of Approval

BETWEEN JOHN PATRICK ROSS  
APPELLANT

A N D THE REAL ESTATE AGENTS LICENSING BOARD  
RESPONDENT

Judgment: 12 July 1984  
Hearing: 12 July 1984  
Counsel: J. Haigh for Appellant  
D.F. Dugdale for Respondent

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ORAL JUDGMENT OF CASEY J.

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I am going to say at the outset that I intend to allow this appeal. Mr Ross is named as the Appellant, but actually this was an application made to the Real Estate Agents Licensing Board by Mr Williams for a grant of a Certificate of Approval for him as a salesman, as he had planned to employ him in his real estate business at Manukau Road and applied to the Board accordingly. No point is made of the fact that the appeal was brought by Mr Ross against its refusal on 2nd August to grant that Certificate pursuant to sections 45 and 46. Indeed, Counsel's reading of the appropriate section accords with mine and Mr Ross would have been entitled to appeal in his own right.

The appeal is brought under the provisions of s.112 of the Real Estate Agents Act to the Administrative Division in accordance with the Rules of that Division. As

Mr Haigh said in his final submissions, there is a broad discretion on the Court to receive further evidence or evidence which might not be strictly admissible in ordinary legal proceedings. The appeal is by way of a rehearing and I accept for the purposes of this case what Mr Dugdale has agreed as the proper approach - that I must be satisfied the decision by the Board was wrong, paying due regard to the opportunities it had of seeing and hearing the witnesses and assessing the evidence and also to its special experience and expertise as the body entrusted by Parliament to make the decision in the first instance.

It happened the transcript of evidence which the Board thought had been made of the hearing turned out not to exist, due to a defect in the tapes. The Chairman provided a report pursuant to Rule 37 of the Administrative Division Rules, in which there is a succinct account of the evidence and other matters before the Board. I accept that, and indeed Mr Ross had little to argue with in the account which it gives. But as a result it was accepted that I should rehear all the evidence and it seems apparent that the manner in which this took place in this Court has led to a much fuller investigation of the matters to be taken into account under s.46 of the Act. The Appellant and his witnesses were subject not only to a proper examination-in-chief but also to a very searching cross-examination from Mr Dugdale on behalf of the Board. So at least I am in as good and probably a better position to make an assessment of the witnesses than the Board was, although I do take into account their special expertise in this field.

The difficulty facing Mr Ross in this case was the existence of a number of convictions from his early years. He is now 32, and has clearly settled down to be a useful citizen, married with a family, and everybody who knows him and has given evidence or put in references to this Court, speaks well of his general attitude and his responsibilities to his family and in business. On the face of it the convictions relate to serious matters. There was one of arson at the age of 16 or 17 and in the same year there was again what looked to be a fairly serious matter of assault and wilful damage. Clearly

the Magistrate who heard the latter regarded the part Mr Ross played in it more leniently than the circumstances might otherwise suggest, because he was fined only \$80 for what seem to be pretty serious injuries sustained by the other party. It is very likely that his version of this was accepted, and it was accidental that he fell through a plate glass window. These events happened a long time ago and, of course, have little relationship to the qualities of trust and integrity which are the main considerations influencing anybody in deciding on a person's character in taking up the occupation of a real estate salesman.

The third conviction is of more immediate relevance. It is one of theft and seems to involve a relatively minor taking of a tappet cover. The circumstances have been gone into in full detail, apparently before the Board, and certainly in this Court. The Board recognised that this - the last of these incidents - took place about twelve years ago and said it took into account his youth and the lapse of time since then. It went on to say:-

"However, the Board cannot escape the conclusion that it had been given a particular version of events and taking all aspects into consideration including the fact that it had the advantage of seeing and hearing the witnesses give evidence the Board is not satisfied that having regard to the character and general knowledge of the person in respect of whom the application was made and to the interests of the public he is a fit and proper person to be employed as a salesman by a real estate agent and the application is therefore declined."

Although it has mentioned the matters set out in section 46 in detail, it is common ground in this hearing that the real issue before the Board and before me was the suitability of Mr Ross' character.

The reference in the decision to his having given a particular version of events relates in my view to the manner in which he appears to have explained his part in and his responsibility for these criminal incidents to the Board.

Earlier in its decision it referred to the fact that he claimed to have been set up, or was the victim of a trap on the theft charge and his solicitor had not adequately protected his interests. It went on to comment that he was ready to blame others for his troubles - his family, the victim of the assault, the owner of the stolen article, the police and his solicitor. It may well be that the only blame that he was attempting to put on the victim of the assault was the fact that he had seen him interfering with his car. He took off and was pursued and that is when the fight started.

Mr Ross certainly had a better opportunity of expressing himself in this Court than he may have enjoyed before the Board, with the skilled examination-in-chief and cross-examination. Nevertheless, at the end of his evidence I could well see what was worrying the Board in connection with his personality and character. All I can say is that he didn't handle himself particularly well in the witness box. He gave a very clear impression of still not wanting to accept the implications of his convictions and in each instance was looking for excuses. One could expect possibly a feeling of injustice or that he had been let down on one incident, but when it has happened with all three, an impartial observer may be forgiven for feeling that perhaps Mr Ross is protesting too much, and failing to face up in a responsible way and an honest way to the implications of his earlier conduct. I mention at the same time that this is not a failing confined solely to him. It is a fairly general human reaction where people, no doubt feeling ashamed of what they have done in earlier and indiscreet years, try later to talk their way out of it and make their hearers believe that their part wasn't as bad as it seems. But it does say something about a person's honesty and willingness to face up to facts. If that was the net result of this hearing today I would be inclined to say that the Board had reached an understandable decision with which I would be reluctant to interfere. Integrity of character and a basic sense of honesty are, I would think, essential elements of a real estate agent or salesman.

However, I have had advantages in this hearing

not all of which were enjoyed by the Board. First of all, I mention the evidence from Mr Williams and Mr Fleming, the former a land agent of very considerable experience. He was manager for many years at a branch of Barfoots. He has obviously had a lot to do with employees and with judging the type of person who should be engaged in this work. He has no hesitation whatever, from his admittedly brief acquaintance with Mr Ross and his references, in engaging him as a salesman in his present business at Manukau Road. More to the point was the evidence from Mr Fleming. He struck me as a fairly shrewd gentleman, an accountant, who was also engaged in setting up taxation consultancies and he said that Mr Ross was employed by them over a period of two or three years - presumably clearly on a commission basis, and during that time had sold, and successfully sold, about eight to twelve franchises for these businesses. He contrasted his activities with those of earlier salesmen, when they had experienced trouble with misrepresentations. One can readily see that the selling of such franchises would be very susceptible to misrepresentation or lack of honest disclosure on the part of the salesman. Although Mr Dugdale made the point in cross-examination that he had sold only perhaps eight of these businesses, the fact that Mr Fleming was able to speak as a businessman in such terms about him goes a long way, in my view, to restore the unfortunate impression Mr Ross made in the witness box in trying to explain his earlier convictions.

The further material which I have is in the form of references and an affidavit from people who have known Mr Ross personally or in business activities. As I have mentioned earlier, they speak invariably in high terms of personal regard. But not only that, the business references very clearly indicate a high degree of competence, responsibility and trust and I think that if these matters had been before the Board they may have acted as a counter-balance to those factors which I think genuinely and properly concerned it, and to which I have already referred. I also think it is not unfair to the Board to suggest that if Mr Williams and Mr Fleming had given the same sort of evidence as they gave before me, then one would have expected some reference in its decision to its weight

and the effect it had on the minds of its members in reaching their conclusion that he was not a fit and proper person. As I said earlier, these gentlemen impressed me and, coupled with the additional evidence I have heard, they lead me now to the conclusion that the Board did not reach the right decision. The appeal is accordingly allowed, and I direct that a Certificate of Approval be granted in terms of s.46. I make no order as to costs.

*Mr. Casey J.*

Solicitors:

Haigh Lyon & Co., Auckland, for Appellant  
Kensington Haynes & White, Auckland, for Respondent