

REAL ESTATE AGENTS LICENSING BOARD

No. 2007/602

IN THE MATTER

of an application under
s.29 of the Real Estate
Agents Act 1976

APPLICANT

**RE/MAX NEW ZEALAND
LIMITED**

RESPONDENT

**REAL ESTATE
INSTITUTE OF NEW
ZEALAND INC.**

HEARING: 3 July 2007

DECISION: 19 July 2007

APPEARANCES: William Akel for the applicant
T D Rea for the respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

Hon W P Jeffries (Chairperson), M Giera, D Russell

1. INTRODUCTION

- 1.1 This is an application under Section 29 of the Real Estate Agents Act 1976 ("the Act") for the renewal of the real estate agent's licence held by Re/Max New Zealand Limited, located at Level 1, Hawkins Construction House, 70 Stanley Street, Auckland. The Real Estate Institute of New Zealand Incorporated ("the Institute") filed a notice of its wish to be heard on "the issue of effective control of the principal place of business, given the domicile of the principal officer, Mr Ahearn, in Australia."
- 1.2 Whilst Mr Ahearn lived in Auckland in 2005 and 2006, there is no dispute that since December last year Mr Ahearn has lived with his family in Hawthorne, Queensland where he occupies the position of Regional Manager of Re/Max New Zealand Limited with "responsibility for Re/Max's franchising system in Australia."

- 1.3 Re/Max is the franchisor of, currently, 44 independently-owned real estate franchises around New Zealand, with 20 future proposals and 4 offices to open soon. It is no longer necessary for such a franchisor to hold a real estate agents licence, but the applicant seeks to maintain possession of the licence for reasons of identification with the franchisees, to meet the contingency in the event of a franchisee forfeiting an existing licence and therefore Re/Max being able to immediately take control of the franchisee's business, and to preserve the continuance of Mr Lyn Beere's [the Business Development Manager] salesperson's certificate.
- 1.4 While the applicant may presently operate a real estate agent's business from its Stanley Street, Auckland premises, it has not done so for the last two years. The fundamental business of the applicant is the operation and expansion of the Re/Max franchise system in New Zealand.
- 1.5 The question for decision is whether the Board should renew or not renew the real estate agent's licence of Re/Max New Zealand Limited. The answer to this question turns on whether the Board is satisfied that Mr Ahearn, the nominated principal officer of the licensee, will exercise effective control of the licence located in Auckland City, having regard to Mr Ahearn's permanent domicile and professional commitments in Queensland, Australia since December 2006.

2. EVIDENCE

- 2.1 Mr Gary Leon Ahearn evidenced a twenty-six year career in real estate in New South Wales, Queensland and New Zealand with participation in the work of the professional body and involvement in the training of real estate agents. For the last five years he has been an executive with the Re/Max group which also operates in Australia.
- 2.2 Mr Ahearn evidenced that since leaving New Zealand he has attended the Auckland office of the applicant on average "every 60 days" but intends to be in New Zealand monthly by the end of this year. Mr Ahearn described his use of the various forms of information technology to maintain regular daily communication with Mr Lyn Beere, the Business Development Manager. Mr Ahearn accesses all

the relevant documentation generated out of the New Zealand operation of the Re/Max franchise system.

- 2.3 Mr Beere, in turn, evidenced his participation in the administration of the Re/Max franchise business in New Zealand and its relationship with the Regional Manager Mr Ahearn based in Hawthorn, Queensland.

3. SUBMISSION

- 3.1 Mr T.D. Rea for the Institute opposed the application for renewal on the grounds that the statutory requirement for "effective control" of the licence is not met, that it is not in the public interest to grant renewal and that in any event it is not necessary for the applicant's business operation to hold a real estate agent's licence.
- 3.2 Mr William Akel, for the applicant, submitted that the "effective control" definition in S.2 of the Act does not require the "physical presence" of the principal officer, that the "conduct of the real estate agency business at that place" is not in reference to the principal officer being at "that place" when personally supervising, managing and controlling the conduct of the business and that the phrase "to work actively and substantially at or from that place" means that the principal officer may work from a "place" without being physically present all the time. Mr Akel laid particular emphasis on the efficiency of the new information technology systems enabling, in his submission, the necessary level of "effective control".

4. ANALYSIS

- 4.1 The purposive interpretation of the Act, as required by the Interpretation Act 1999, provides resolution of the major issue. The scheme of the Act is to safeguard the interests of the New Zealand public relying upon licensed real estate agents to facilitate the sale of their real estate and to give a measure of protection to members of the public acquiring real estate through the licence holders. To this end, the statute establishes the Real Estate Agent's Licensing Board (Part I of the Act), empowers the Board to grant licences in satisfaction of defined statutory criteria (Part II of the Act) and imposes duties on licensed real estate agents and

their approved salespersons (Part III of the Act). As well as providing a regime defining the qualifications for licensing, the statute creates a regime of accountability involving supervision by the licensee of the business, management of trust accounts and prohibitions against undisclosed conflicts of interest (Part IV of the Act). Finally, the statute achieves enforcement of accountability by the creation of the Real Estate Institute of New Zealand Incorporated, empowering the Institute to test applications brought before the Board, to institute disciplinary proceedings against members alleged to be in default of various legal obligations (Part V - VII of the Act) and to challenge renewals of approvals.

The statute requires identification of a principal place of business, or a branch in sections 18, 24, 26, 27, 37(1) (a), 53, 54: In the First Schedule of the Real Estate Agents Regulations 1977, Regulation 3 specifies identification of a place of business and any branch office. Allied to this comprehensive requirement for licensors to be at a physical place of business, the statute requires a principal officer to be in "effective control" at such an identified place of business, as defined in S.2 of the Act.

"Effective control", in relation to a place of business of a real estate agent, means to personally supervise manage and control the conduct of the real estate agency business at that place and to work actively and substantially at or from that place".

The adverbs "personally" "actively" and "substantially" unerringly reveal the true intention of the Act. In order to safeguard the interests of the vendor and to provide protection for a purchaser relying upon the services of a licensed real estate agent, the statute requires a physical place of business for the license with the personal presence of the licensee's principal officer supervising, managing, controlling the conduct of the "business," personally", "actively" and "substantially", at or from that place.

Against such comprehensive and unambiguous statutory requirement of a physical place of business with the personal commitment to personally supervise, manage and control in an active and substantial manner on the part of the principal officer, the applicant's proposal fails. A disgruntled vendor is entitled to visit the place of business of a real estate agent and to access within a

reasonable time a responsible person with whom the vendor can immediately lay out their grievance. A principal officer available by various forms of telecommunication does not meet that particular need. This is but one reason that the statute emphasises the physicality of place and personal presence in relation to the statutory licensing scheme. The real point of "effective control" is to avoid vendors being disgruntled in the first place. The applicant's proposal does not qualify to allow renewal.

The application for renewal is declined.



Hon W P Jeffries

Chairperson