

REAL ESTATE AGENTS LICENSING BOARD

No. 2007/605

IN THE MATTER

of the Real Estate Agents
Act 1976

AND

IN THE MATTER

of an application under
Section 48 of the Act by
Countrywide Real Estate
Limited t/a C21
Countrywide for the
renewal of a certificate of
approval as a real estate
salesperson for
XIN HUA (DAVID) CHEN

HEARING: 5 July 2007

DECISION: 15 August 2007

APPEARANCES: T Drinnan as Principal Officer for the applicant company
T D Rea for the Real Estate Institute of NZ Inc.

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

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

INTRODUCTION

Countrywide Real Estate Limited trading as Century 21 Countrywide, applies pursuant to S.48 of the Real Estate Agents Act 1976, for the annual renewal of the certificate of approval as a real estate salesperson of Xin Hua (David) Chen. ["Mr Chen"].

The Real Estate Institute of New Zealand Incorporated ["the Institute"] by way of a notice dated 15 May 2007, expressed its wish to be heard at the hearing of this application held on 5 July, 2007.

EVIDENCE

The Institute led evidence from Vernon Joseph Tamatea the Compliance Manager and Legal Counsel for the Institute, who placed relevant documents before the Board. These documents provide the primary evidential base of the Institute's challenge to the renewal and will be analysed in detail further in this decision. The previous licensee, Pinkney Real Estate

Limited's principal officer, Mr Michael Pinkney who was responsible for Mr Chen between 13 March 2006 and 6 April 2006, evidenced his professional relationship with Mr Chen and the termination of this relationship on 6 April 2006 and Mr Pinkney's subsequent complaint to the Institute. Mr Pinkney also evidenced inquiries made to him by the New Zealand Immigration Service regarding written representations made by Mr Chen to the Service under the letter head of Mr Pinkney's firm.

A George Rodger Sutherland, real estate salesperson provided an affidavit deposing to the fact that he had worked for Pinkney Real Estate Limited at the same time as Mr Chen in March/April 2006. Mr Sutherland, on being shown a document for the sale and purchase dated 28 March 2006 for 118 Stapleford Crescent, Auckland, observed that his name was shown as the person who effected the sale. Mr Sutherland evidences that "he had no involvement whatsoever in the sale of this property".

The final witness for the Institute was Warren George Mackay, the Mobile Manager for the Bank of New Zealand based at Browns Bay who evidenced his relationship with Mr Chen concerning Mr Chen's application for mortgage finance in the sum of \$360,000 to enable Mr Chen to purchase 118 Stapleford Crescent as the nominee of New Zealand Xin Hua Bookstore Company Limited, the purchaser under the document for sale and purchase dated 28 March 2006 in respect of the described property.

Mr Chen, in reply, evidenced his background as having gained a permanent residency permit after he had come from China in 1999 in order to study in New Zealand. Mr Chen holds a Master of Business Administration Degree and commenced working as an approved salesperson in 2002. After selling more than 100 properties in his first year in real estate, he was awarded the title "Rookie Star" by the franchise group of the licensed employer.

Before analysing in detail the two real estate transactions which precipitated this hearing, Mr Chen affirmed that he had a "clean record" with the real estate authorities and had never received complaints from "my vendors and purchasers".

NARRATIVE OF EVENTS

On 13 March 2006, the Board granted the application of Pinkney Real Estate Limited to issue a certificate of approval for Mr Chen. On 28 March 2006, Mr Chen, (not Mr Roger Sutherland as recorded on the documents) as salesperson for Pinkney Real Estate Limited arranged a document of sale and purchase of 118 Stapleford Crescent, Browns Bay, for the apparent sum of \$450,000. The vendor in the document is Qin Wang who became the registered proprietor of the property on 9 June 2005. The purchaser in the document is shown as New Zealand Xin Hua Bookstore Limited and/or nominee. This company was incorporated on 31 May 2002 as New Zealand Economic and Cultural Enterprise Pty Limited, changing its name

to New Zealand Xin Hua Bookstore Limited on 17 June 2003 (and changing its name to New Zealand Gold Mountain Investment Company on 28 April 2006).

This company has a \$1000 share capital held by Li Yuan (500) and Xin Hua Chen (Mr Chen) (500) who live at 111 Becroft Drive, Forrest Hill.

The registered office of the company is 3/156 Forrest Hill Road, Forrest Hill, Auckland.

The directors of the company are Mr Chen and Li Yuan who live at 111 Becroft Drive, Forrest Hill.

Mr Chen, as a director/shareholder of the purchasing company under the 28 March 2006 sale and purchase document was obliged to comply with S.63 of the Act by ensuring that the vendor Qin Wan evidently consented "on the prescribed form" being Form 15, First Schedule, Real Estate Regulations 1977 to the sale. Mr Chen did not obtain such written authority from the vendor as required by S.63 of the Act.

On 1 April 2006, Mr Chen applied to the Bank of New Zealand at Browns Bay through Mr Warren Mackay, Mobile Manager for a first mortgage advance in the sum of \$360,000 to enable Mr Chen, as "nominee" of the purchasing company, to acquire 118 Stapleford Crescent, Browns Bay for the sum of \$450,000, although beneath the numerals on the document the words "Four Hundred and Twenty Thousand Dollars" is written.

Mr Mackay discovered the discrepancy between the numerals and the description in the words in the document purchase price after his meeting with Mr Chen on 1 April 2006, and left a telephone message requesting clarification. Mr Chen returned with his own voice-mail message confirming that the correct price for the property was \$450,000.

Mr Mackay investigated Valuation New Zealand records on this property which revealed that the property had been purchased one year previously for \$358,000. Additionally, Mr Sutherland knew the subject property because of its proximity to his own house. Whilst regularly walking past the property Mr Sutherland had observed that the property had been marketed "for a long period of time" at around \$400,000. As the valuation of security to amount of the loan is a crucial factor in assessing mortgage applications, Mr Mackay made further enquiries.

Performing his professional duties as a diligent manager of applications made to his employing bank for mortgage finance on the security of real estate property, Mr Mackay enquired with the principal officer of the real estate agent of the vendor Mr Pinkney to obtain confirmation that Mr Pinkney was aware of the sale and purchase document completed under

the authority of Mr Pinkney's company's real estate licence, bearing in mind that the "approved salesperson" was also the purchaser. Mr Pinkney was ignorant of these facts.

Alerted by this inquiry, Mr Pinkney who did not possess a copy of the sale and purchase document, on 6 April 2006 rang Mr Chen who undertook to come into the office to discuss the matter. When Mr Chen failed to keep the appointment, Mr Pinkney rang him again inviting Mr Chen to bring the six or seven other listing agreements Mr Chen had represented to Mr Pinkney he had obtained for the licensee. Mr Chen failed to attend the office of his principal Mr Pinkney and did not answer telephone calls.

On 6 April 2006, Mr Pinkney terminated the relationship of the licensee/approved salesperson with Mr Chen on the grounds of Mr Chen's failure to inform his employer of Mr Chen's intention to purchase the property, his refusal to attend meetings and provide relevant commercial documentation generated under the name of the licensee and requested by the licensee Mr Pinkney immediately complained to the Institute about Mr Chen.

Following the Institute's receipt of Mr Pinkney's complaint regarding the conduct of Mr Chen, Mr Tamatea made further investigations into the conduct of Mr Chen as an approved salesperson.

These investigations revealed that on 22 May 2006 the property at 118 Stapleford Crescent, Browns Bay, was sold by Qin Wang the registered proprietor to New Zealand Gold Mountain Investment Company Limited, the same company previously named New Zealand Xin Hua Bookstore Limited, prior to the change of name on 28 April 2006.

The date of this subsequent sale of 118 Stapleford Crescent, Browns Bay, coincided exactly with the first day of Mr Chen's employment as an approved salesperson with Countrywide Real Estate Limited. Enquiries were then made of Countrywide Real Estate Limited regarding the sale. The Branch Manager of Countrywide Real Estate Limited a Mr Robert Isles confirmed that the licensee did not know of, and did not possess, in "prescribed form" the statutory consent documentation relating to Mr Chen's company's purchase of the subject property.

The Institute through its solicitors, Glaister Ennor, then contacted the solicitor for the vendor, Mr Sam Ngu seeking information. A power of attorney dated 12 May 2005 signed by the vendor, in favour of Mr Chen was duly provided by other Auckland solicitors, McVeagh Fleming. The Registrar General of Land's documentary records reveal a transfer of the subject property to New Zealand Gold Mountain Investment Company Limited on 8 June 2006.

The law firm McVeagh Fleming, also provided to the solicitors for the Institute, an independent valuer Morley and Associates Limited valuation dated 10 November 2006 opinion assessing the subject property as having a market valuation of \$450,000.

On 16 November 2006, Mr Ngu provided to the solicitors for the Institute a sworn affidavit before a notary public in Gaoyou City, Jiangsu Province, China. In this statement, the vendor evidences that he granted a power of attorney to Mr Chen and also authorised Mr Chen to sell his property at 118 Stapleford Crescent in early 2006.

The vendor further swears that:

"I waived the right to get a valuation for the property."

In addition, the vendor swears that on settlement of the sale transaction on 8 June 2006 the vendor authorised his solicitor to transfer the balance of the sale proceeds after the discharge of mortgage and deduction of selling expenses including the commission paid to the licensee, to Mr Chen personally, to hold in "trust for my further investment purposes"

The vendor's sworn declaration also confirms that the vendor did not "execute any prior listing authority with Countrywide Real Estate Limited"

OTHER EVIDENCE

In addition to the evidence relating to the two sale and purchase documents for 118 Stapleford Crescent, the Board received documentary evidence concerning the application and decline of a Han Qiaoyu's application for permanent residency in New Zealand which was partly based on the representations made by Mr Chen whilst he was an approved salesperson for franchisees of Ray White, Harcourts and Re/Max, the franchise group of Pinkney Real Estate Limited. The Immigration Service rejected as not being genuine the representations made by Mr Chen supporting the application for permanent residency founded upon employment with Mr Chen through his work with the licensed agents operating under the franchise arrangements. The Board makes its findings against the renewal of Mr Chen's certificate of approval on the basis of his contract in the two documented transactions rather than his ancillary conduct involving the Immigration Service.

Mr Chen's wife is also an approved salesperson and her role as an owner/director of New Zealand Gold Mountain Investments Company Limited came under examination at the hearing. Because Mr Chen's wife is not a party to these proceedings, the Board will not make any findings in relation to her conduct.

MR CHEN'S EXPLANATION

Regarding the document to sell the subject property, dated 28 March 2006, Mr Chen evidenced that there was a mistake on the price which was not initialled and neither party regarded itself bound to the agreement.

"We stopped there. No more action was taken, let alone any deposit or money transaction... it was just an offer, not any agreement achieved"

Mr Chen relies upon the recorded phone message to Mr Mackay regarding the correct price for the property

"Warren [Mr Mackay], David Chen here. We found the mistake. We need to get the vendor signature for the mistake."

Mr Chen does not explain why the vendor did not provide a consent in "the prescribed form." S.63 of the Act governs real estate agents commissioned to sell land. The real estate agent is Pinkney Real Estate Limited. Mr Chen, as an approved salesperson, is an employee of Pinkney Real Estate Limited. Mr Chen did not inform Mr Pinkney that he [Mr Chen] was an "interested" party in the purchasing company, New Zealand Xin Hua Bookstore Limited, Mr Pinkney was unable to ensure that the vendor's consent in "prescribed form" before the offer to purchase (which may be conditional) was signed: S 63. The terms of the provision are clear:

"No real estate agent shall, without the consent on the prescribed form of his or her principal, directly or indirectly and whether by himself or by any partner or sub-agent....."

(a) *Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land."*

Therefore, Mr Chen's employer was under an unavoidable statutory obligation to obtain from Qin Wang as vendor, express authority before accepting the offer of the "approved salesperson." Mr Pinkney's licence was jeopardised by the failure of Mr Chen to formally disclose his interest in the purchase to the vendor. Mr Pinkney acted correctly in terminating Mr Chen's employment in those circumstances.

ISSUE

The question is whether Mr Chen's conduct in the course of both the Pinkney Real Estate Limited's licence transaction and the Countrywide Real Estate Limited transaction evidences conduct justifying the Board's refusal to renew the annual approval of Mr Chen as "an approved salesperson."

The scheme of the Real Estate Agents Act 1976 is to protect the public interest by way of a comprehensive licensing regime administered by a statutory licensing Board and supervised by the Real Estate Institute of New Zealand Inc. To hold a real estate agent's licence is a statutory privilege gained by proving qualifications, experience and possession of sufficient financial resources: S.24 of the Act. A real estate agent position requires maintenance of physical premises, the administration of an audited trust account with fiduciary duties associated with the custody of other people's money, the provision of monthly accounts to the Institute and the continual supervision and effective control of the principal place of business of a real estate agent. "see S.53,54,55-60,76 of the Act".

Vendors commission licensed real estate agents to sell their property. The commission contract imposes a fiduciary duty on the licensee/agent of the vendor requiring diligence and utmost good faith in the performance of the task of negotiating the sale of real estate. Related to the duty of utmost good faith neither the licensed agent nor an employee of the agent may purchase the vendor's real estate without express written consent and the provision of an independent registered valuer's opinion on the market value of the property completed prior to the vendor signing the agreement to sell. Within this comprehensive set of statutory responsibilities on licensed real estate agents, the law allows the employment of "approved salespersons" (regardless of remuneration arrangements, S.54A confirms the status of employee). The statutory position of "approved salespersons" is subordinate to that of the fully licensed real estate agent. The vendors do not contract or commission "approved salespersons" to market and sell their property: only licensed real estate agents may enter into such contracts. Whilst "approved salespersons" may under supervision and control of the licensed real estate agent engage in the sale of real estate, the law expects the licensed real estate agent to ensure that all relevant legal obligations on those properly participating in the marketing and sale are met. It follows that "approved salespersons" are under a duty to disclose all material information to their employer, such as any "interest" the "approved salesperson" may possess in any transaction conducted in the name of the licence.

An "approved salesperson" must have their approval renewed each year: S.48 An "approved salesperson" is inextricably connected with an existing licensee and the ability to act for a member of the selling public of an "approved salesperson" is derived from his/her principal not from the member of the public, even when the "approved salesperson" has introduced the person to the agency. The S.48 mechanism in the statute, enables the Institute, in the interests of the public to challenge renewals of certificates of approval.

FINDINGS

Applying the statute law to the proven conduct of Mr Chen, the Board finds that:

1. Mr Chen breached S.63 and S.64 of the Act when he offered to purchase 118 Stapleford, Browns Bay on 28 March 2006 on behalf of a company he owned with his wife being New Zealand Xin Hua Bookstore Limited. Mr Chen failed to inform Mr Pinkney of the fact of his interest in the contract thereby placing Mr Pinkney's licensed firm in breach of its obligations owed to the vendor.

The evidence of Mr Pinkney that he did not know that Mr Chen was an "interested" purchaser of the 118 Stapleford property is accepted by the Board.

The evidence of Mr Sutherland that he did not manage the transaction, despite Mr Chen recording his [Mr Sutherland's] name on the sale and purchase agreement is accepted. Mr Chen failed to accurately record material information on an agreement of sales and purchase. Approved salespersons must complete documentation in a correct manner.

The fact that the sale transaction was not completed is irrelevant to a breach under S.63 of the Act. The language of the particular provision prohibits any involvement in any way concerned by the licensed real estate agent, his employee or "sub agent". The fact that the vendor states in a sworn statement that he

"waived the right to get an evaluation for the property"

[Paragraph 9 of the statutory declaration of Qin Wang of China] is immaterial. The statutory obligation to obtain formal vendor's express consent is mandatory. It is not open to the vendor to purport to vary or suspend a statutory obligation.

The fact that Mr Chen held a power of attorney from the vendor dated 12 May 2005 is also irrelevant. Mr Chen as appointed attorney on 28 March 2006 could have legally signed the sale and purchase agreement on that date as the duly appointed attorney of the vendor Qin Wang, but did not do so. The vendor accepted Mr Chen's offer on his own behalf, as is evident by the agreement.

2. Mr Chen the "approved salesperson" of the licensee was under an obligation to provide all material information at the material time to his employer, Mr Pinkney. The Board accepts the evidence of Mr Pinkney that his request addressed to Mr Chen for

information relating to a transaction conducted in the name of and with the responsibility of Pinkney Real Estate Limited in respect of the 28 March 2006 sale of 118 Stapleford Crescent was unjustifiably refused by Mr Chen. Mr Chen's explanation that he "quit immediately" because of a dispute about 2% commission rates in advance is unconvincing and not an answer as to why Mr Chen failed to respect the legitimate request of his employer to meet. The public interest requires that the responsible licensee's authority as an employer is maintained in order to discharge the licensee's obligation to perform his duties properly, such as securing the vendor's consent to a sale to a member of the real estate agency.


3. Mr Chen improperly recorded Mr Rodger Sutherland as the "manager" of the sale transaction facilitated by Pinkney Real Estate Limited. The public are entitled to rely on the accuracy of information recorded in an agreement for sale and purchase completed by an "approved salesperson". Departure from this standard could result in contrived transactions which are not in the public interest.
4. Mr Chen breached S.63 and S.64 of the Act in relation to the 22 May 2006 agreement for sale and purchase of 118 Stapleford Crescent. The Board observes that between the 25th March 2006 and 22 May 2006 transaction Mr Chen arranged for the change of name of his company to New Zealand Gold Mountain Investment Limited.

Mr Chen's explanation that he chose to implicate his new employer Countrywide Real Estate Limited in his purchase of real estate from Qin Wang, from whom Mr Chen held a power of attorney and was in a relationship of trust "as a gift to the new company" betrays a fundamental misunderstanding of Mr Chen's limited rights as an "approved salesperson". Under the statute the mere fact that an "approved salesperson" introduces a member of the public to the licensee, does not alter the fundamental fact the vendor's contract is with the licensee to sell the vendor's real estate. There is no contract between the vendor and an "approved salesperson". Whilst an "approved salesperson" may introduce a vendor to a licensee, ["listing"], the law requires the marketing and sales transaction to be supervised and controlled by that licensee even though the "approved salesperson" may be the man/woman on the ground who completes the transaction.

If "an approved salesperson" fails to disclose to his employer the fact that he/she as an approved salesperson is in fact the purchaser, the licensee is unable to ensure that the S.63 obligation is met. This is what occurred on two occasions in this matter. Mr Pinkney discharged his obligations by terminating the employment of Mr Chen, otherwise, Mr Pinkney would have been implicated in an unlawful sale transaction

jeopardising his own licence. A feature of both transactions is that the use of the company owned by Mr Chen does not immediately alert anyone to the fact that Mr Chen (and his wife) were owners and directors of this company.

The Board is not satisfied that the application for renewal of the "approved person" certificate ought to be granted. Accordingly, the application is refused.



Hon W P Jeffries
Chairperson