

REAL ESTATE AGENTS LICENSING BOARD

No. 2007/609

IN THE MATTER

of an application under
S.94 the Real Estate
Agents Act 1976

APPLICANT

**REAL ESTATE
INSTITUTE OF NEW
ZEALAND
INCORPORATED**

RESPONDENT

**HAWKES BAY
REALTIES (2000)
LIMITED**

HEARING: 5th September 2007

RECALLED DECISION: 24th September 2007

APPEARANCES: T D Rea for the Applicant
P McDonald for the Respondent

DECISION OF THE REAL ESTATE AGENTS LICENSING BOARD

Hon W P Jeffries (Chairperson), P Dudding, M Giera, J Harnett-Kindley and D Russell

RECALL OF DECISION 24 SEPTEMBER 2007

On page 2, under the sub heading "Institute Witnesses", the Board stated:

"The Real Estate Agents Licensing Board ["the Board"] is not required to make any findings in relation to the management of the Waipukurau office".

On 27 September 2007, Mr T D Rea, Counsel for the Institute, applied to the Board for a recall of the decision on the basis that that statement is wrong. On 12 October 2007, Mr McDonald, Counsel for the Respondent, informed the Board that he did not wish to be heard in respect of Mr Rea's written submission dated 27 September 2007.

As the statement is wrong, the decision is recalled. A fresh decision is now released with the deletion of the erroneous statement and with an additional finding in respect of the Waipukurau branch.

In all other respects, the recalled decision and its result, stand.

INTRODUCTION

By way of an Amended Notice of Application pursuant to S.94 of the Real Estate Agents Act 1976 ["the Act"], the Real Estate Institute of New Zealand Incorporated ["the Institute"] applies to cancel the real estate agent's licence held in the name of Hawkes Bay Realities (2000) Limited upon the grounds that firstly, the Principal Officer, Mr Tom Vorstman has failed to be in effective control of a place of business in respect of which it was his duty to be in effective control, and has failed to ensure that branch managers have been in effective control of branch offices, and it is in the interests of the public that the licence be cancelled.

The second ground of the Institute's Amended Application is that the two Directors/Officers of the licence, Mr Tom Vorstman and Mr Terry Podmore engaged in professional misconduct in the course of the company's business as a real estate agent, and by reason of that misconduct, it is in the interests of the public that the licence be cancelled.

Mr T D Rea, Counsel for the Institute, set out in the Amended Application twenty nine "particulars" supporting the Amended Application. Mr Peter McDonald, Counsel for the licensee company and its Directors/Officers prepared and filed an Amended Reply dated 4 September 2007 responding to each of the particulars and identifying the questions of fact for determination. A qualified admission by Mr Vorstman was also made:

"It is admitted that in some respects Tom Vorstman has failed in some cases to some extent to ensure that branch managers have been in effective control of branch offices; further that his control of the principal place of business when that place of business was the office at Wairoa, was not all it could have been. Same as so admitted paragraph A is denied [the first ground of the amended application]. Specifically it is denied that it is in the interests of the public that the licence be cancelled."

As for the second ground of the Amended Application, the Respondents deny the allegation made by the Institute thereby identifying the two major questions for determination.

Are Messrs Vorstman and Podmore responsible for professional misconduct in the course of the company's [licensee's] business as a real estate agent?

If so, is it in the interests of the public that the licence be cancelled?

INSTITUTE WITNESSES

The Institute led evidence from Mr John Crowther, a former approved salesperson employed by the licensee between April 2003 and May 2007 at Taradale, Hastings and Flaxmere.

An Ellen Moorcock, a former approved salesperson employed by the licensee between January 2004 and June 2005 at Waipukurau provided a signed brief of evidence admitted by consent.

Mr Ronald Edward Trezise, employed by the licensee (and its predecessor) between 1999 and 2005, firstly as an approved salesperson and from 2003 as a branch manager until promotion in late 2004, as the "Group Rural Manager Role" until leaving in 2005 testified. Mr Trezise was cross examined by Mr McDonald.

The fourth witness for the Institute was Mr Donald McDonald, an approved salesperson employed by the licensee between 23 October 2001 and 18 April 2006 at the Gisborne branch office. Also evidencing the operations of the licensee at the Gisborne office, was Wendy Anne Reeves, an approved salesperson employed by the licensee between 29 June 2001 and 18 April 2006 at Gisborne. Both these witnesses were cross examined by Mr McDonald.

RESPONDENT WITNESSES

Both Mr Podmore and Mr Vorstman gave evidence and were cross examined by Mr Rea.

DOCUMENTATION

The Board received an agreed bundle of documents consisting of some 53 sets of documents which was added to during the hearing with the three documents from the Respondent.

THE REGIONAL NET-WORK OF BRANCHES

The agreed factual background is that in 2000, Messrs Vorstman and Podmore incorporated the Respondent company and commenced a business strategy of building a regional network of branch offices over the geographic area from Masterton in the south, Ohakune in the west and to Gisborne in the north, with the principal place of business located (mostly) at Napier.

At one point, the Respondent had 13 branches and employed over 100 people. For the purposes of this hearing, the relevant branch offices were located in Gisborne, Wairoa, Havelock North, Flaxmere, Waipawa and Waipukurau.

Mr Terry Podmore took responsibility for administration, licensing, remunerations and employment and Mr Tom Vorstman managed training, recruitment, marketing and "policy manual". The principal officer of the company for the purposes of S.48 of the Real Estate Agents Act 1976, was Mr Tom Vorstman who completed statutory declarations supporting applications for renewal of the real estate agent's licence for the annual periods from 2002 to 2007. In each of these statutory declarations, sworn before Mr Podmore, a Justice of the Peace, Mr Vorstman deposed that the financial position of the licensee company was unaltered from when a statement of the assets and liabilities of the [licensee] was filed with the application for the original licence or at the time of the last renewal "and that the statutory requirements of the Real Estate Agents Act 1976 have been strictly complied with."

THE STATUTE

The business of real estate agents is governed by the Real Estate Agents Act. The statute establishes a comprehensive scheme of licensing supervised by the industry itself through the statutory body, the Real Estate Institute of New Zealand Incorporated. All licences are granted by the other statutory body, this Licensing Board which also administers licences, adjudicates applications and exercises disciplinary powers under Part VII of the Act. It is one of the statutory functions of the Institute to bring applications before this Board in order to enforce the provisions of the Act and in such cases, this Board must "hold an enquiry into [such a] complaint" with notice to the agent.

When a member of the public commissions a licensed land agent to sell a property, a fiduciary relationship is created between the principal [the intending vendor] and the agent licensee. Such a legal relationship is of the highest order of legal responsibility involving utmost good faith and trust on the part of the agent whose own interests must remain subordinate to the interests of the vendor. A licensed real estate agent is not a broker with equal legal obligations owed to the vendor and the purchaser. A licensed real estate agent owes a fiduciary duty to the vendor and merely a duty of care to the purchaser.

Consistent with the legal status of an agent possessing skill or expertise, the statute sets standards of qualifications, experience and adequate "financial position" before the privilege of a real estate agent's licence is granted to an applicant. The selling public expect licensees to abide the provisions of the governing statute. A licensee enters the homes of vendors, obtains confidential information about their financial position and intentions for the future and often holds funds on trust pending completion of the sale process, once the sale is unconditional. A licensee is entitled to deduct a proper commission on such trust funds before remitting the balance of the monies to the vendor or his/her representative.

Because licensees may operate from more than one physical premises, the Act allows licensees to establish branches, but not at the expense of the statutory requirements of "effective control" of the branch defined as:

"To personally supervise, manage and control the conduct of the real estate agency business at the place and to work actively and substantially at or from that place. S.54 and S.2 Definitions."

These duties are performed by one of the three positions set by the Act, a "Branch Manager." A "Branch Manager" is required to hold a certificate of approval as a branch manager, has passed the prerequisite exams and has completed the same experience as a licensee (3 out of 5 years) but is not expected to possess and need not possess financial resources required by a fully fledged licensee.

The only material difference between the legal qualifications of a licensee and a "branch manager" is that the "branch manager" is not examined as to their "financial position". As the Licensing Board has already been satisfied that the licensee possesses sufficient financial resources to support a licence, it is not necessary for this particular requirement to be met by a branch manager. But in all other respects, a "branch manager" stands in place of a licensee at the branch, available 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."

As well as the "licensed agent" and approved "branch manager", the Act allows "approved salespersons", employed (S.51A of the Act, regardless of methods of remuneration) by the licensed agent.

"Approved salespersons" are not tested as to their "financial position", nor require previous experience in real estate. "Approved salespersons" must qualify in an examination prescribed by the Institute. Provided someone passes the examination and is a "fit and proper person to be employed by a real estate agent" (S.46 of the Act), the Board will grant an annual certificate of approval even though the candidate has no practical experience involving the performance of marketing and selling. As well as the challenge of learning the new skills of marketing and selling on behalf of members of the public, an "approved salesperson" holds a position of trust and responsibility acting for a vendor under the supervision of his/her employer (or Branch Manager) in relation to a substantial transaction whether the sale be of residential or commercial property.

Therefore, the role of the employer/licensee/branch manager supervising the activities of an "approved salesperson" is central to the satisfactory functioning of this statute designed to safeguard the interests of the selling public. It follows, that in the event of a licensee

establishing branch offices, the licensee must appoint a "branch manager" who can exercise "effective control" over any "approved salespersons" operating from the branch.

In the absence of functioning "branch managers", approved salespersons who might have no experience would operate without the supervision set by the statute. Such a situation would subvert the original commissioning contract between the member of the public and the licensee. The commissioning vendor is entitled to assume that if the licensee himself or herself is not directly marketing and selling the property, only "an approved salesperson" employed by the licensee and under the "effective control" of the licensee or a properly qualified branch manager will be engaged in the process of directly marketing or selling the property.

Against this statutory scheme, the Institute alleges that the Respondent licensee operates a regional network of numerous branch offices, some of which support the employment of approved salespersons engaged in selling properties for the public but without the supervision of Branch Managers, as required by the statute.

The general defence of the Respondent was that it was difficult to obtain the services of qualified Branch Managers, therefore the company promoted experienced "approved salespersons" to the non-statutory position of "Sales Managers" with documented job descriptions identical to those of Branch Managers. The directors had their own view of the law governing their commercial activities.

HAWKES BAY REALTIES (2000) LIMITED

The principal officer Mr Tom Vorstman, under cross examination by Mr T D Rea for the Institute, described the "branch manager's" position as a "ticket" which could be attached to a particular office. Mr Vorstman said that the licensee "paid for their ticket" and that "branch managers" were "not paid for any responsibility."

When challenged by Mr Rea concerning Mr Vorstman's six statutory declarations of "strictly complied" supporting applications for annual renewal of the real estate agent's licence, Mr Vorstman admitted compliance "95% of the time". Mr Vorstman said "last week I read the renewal form for the first time".

Mr Vorstman conceded that from 8 November 2005 to 27 April 2007, although identifying the office at Wairoa as the principal place of business in the 2006 and 2007 annual renewal applications provided to the Licensing Board with himself as the principal in charge. Mr Vorstman still operated principally from Napier.

Mr Podmore admits that he intentionally misled the Institute when he represented in a letter to the Institute's solicitors, Glaister Ennor, on 23 April 2007, that Mr John Crowther was at that

time (23 April 2007) the Branch Manager of the Flaxmere branch despite commitments in the Havelock North branch of the group. Mr Crowther's evidence includes a letter of termination of his services dated 13 March 2007 "effective immediately", signed by Mr Podmore's fellow Director, Mr Tom Vorstman. Mr Podmore properly conceded the irreconcilability of those two statements.

WAIPUKURAU BRANCH

The Board accepts the affidavit evidence of Ellen May Moorcock. The Waipukurau Branch was not under effective control from November 2004 to 31 July 2006, according to the unchallenged submissions of Mr Rea.

GISBORNE BRANCH

The Board appreciates Mr McDonald's preparation of Exhibit 53 which is a representational chart graphically illustrating a time-line for each relevant branch delineating the precise time periods of contention as to whether the branch was under proper management.

Mr Rea for the Institute accepted one period on the basis of documentary evidence demonstrating a level of supervision by Mr Podmore at Gisborne.

The time period, February 2004 to February 2005, when the Gisborne branch was under the declared management of Mr Charles Crockett, remained in contention. An almost one year period, November 2005 to October 2006, involving Mr Marriott as Branch Manager was conceded by the respondent at the conclusion of the hearing.

Therefore, the only issue of fact for the Board in respect of Gisborne relates to this 2004/05 period involving Charles Crockett.

Two former employees, Mr McDonald and Ms Reeves gave evidence regarding this particular time period.

Ms Reeves corroborated the unchallenged evidence of Mr McDonald that Mr Crockett "spent little time in the office and he was always very difficult to contact".

One incident involving an "interested" purchase (a relative of Mr McDonald) and therefore declarable under S.63 of the Act, occurred during Mr Crockett's tenure as Branch Manager, but the vendor was not disadvantaged and used the occasion to avoid paying the commission fee.

Mr Vorstman characterised Mr Crockett as a "weak manager" and appointed Ms Reeves as "Sales Manager". There is no statutory position of "Sales Manager". The October 2004 documentation signed by Mr Vorstman appointing Ms Reeves as "Sales Manager" includes a

specified list of duties which are identical to the conventional duties attaching to the statutory role of a Branch Manager.

The Board finds that in respect of the time-period 10 February, 2004 to 2 February 2005, the branch at Gisborne was not under effective control of the nominated Branch Manager, Charles Crockett. The Board accepts the evidence of Ms Reeves and Mr McDonald. The appointment by the licensee of Ms Reeves as "Sales Manager" with specified duties demonstrates the director's knowledge of their own default. Ms Reeve's actual specified duties illustrate the continuance of Mr Crockett's appointment only to nominal duties, not real "effective control".

WAIROA

According to the annual returns of the licensee, Napier was the principal place of business from 2002 to 2006. In the 2006/2007 period, Wairoa was designated as the principal place of business. On 26 March 2007, Mr Vorstman wrote to the Board following an inquiry, inviting Mr Vorstman to explain internet website disclosure showing Mr Vorstman at Napier. The annual return discloses Mr Vorstman at the principal office in Wairoa.

By way of a letter dated 26 March 2007, addressed to the Board, Mr Vorstman reveals that, he had, on 26 October 2006, appointed Mr Leith Peddie as Branch Manager, to commence 13 January 2007. The date of Mr Vorstman's statutory declaration deposing Mr Vorstman's continuation as Principal Officer located at Wairoa (and Mr Peddie as Branch Manager) in Taradale is dated 23 January 2007.

Therefore, Mr Peddie was being paid by the licensee to act as Branch Manager, Wairoa from 13 January 2007, whilst on 23 January 2007 Mr Vorstman provided sworn evidence to the Board through the annual renewal of licence process, representing himself as the Principal Officer at Wairoa. The positions of Principal Officer and Branch Manager are mutually exclusive for the same office.

It is elementary that the statements made in annual renewal applications supported by statutory declarations correspond with the facts. Any licensee who does not observe this obvious requirement of telling the truth to the Board puts in jeopardy their licence.

The Board finds that Mr Tom Vorstman did not provide supervision as Principal Officer of the Licence at the Wairoa office of the licensee from 8 November 2005 to 27 April 2007.

HAVELOCK NORTH

The respondent concedes that from 13 March 2007 to 22 May 2007, there was no Branch Manager at this branch.

FLAXMERE

The respondent concedes that from 13 March 2007 to 22 May 2007, there was no Branch Manager at this branch.

WAIPAWA

Mr Trezise testified as to his six years of association with the licensee working from four different locations in the region.

The question for the Board is whether the Waipawa branch was actually under the effective control of Mr Don Secombe from date of opening in September 2002 to the time of appointment of a Mr Craig Fairgray on 11 February 2003.

Mr Trezise stated in paragraph 9 of his evidence:

"Mr Secombe never had anything to do with the management or supervising of the Waipawa office, which was completely my responsibility".

Mr Trezise also held the position of "Sales Manager" being an invention to combine an "approved salesperson" position with the form of management of a Branch Manager, without the legal status of a branch manager.

The respondents admit that "Mr Secombe did not work at or from the Waipawa office to an extent that was satisfactory."

The Board finds that there was no Branch Manager at the Waipawa office from opening on 29 September 2002 to 11 February 2003.

CONCLUSION

The Board is satisfied that the evidence and the admissions of the Respondents establish liability in relation to the two principal grounds contained in the Institute's Amended Notice of Application Pursuant to S.94 of the Real Estate Agent's Act 1976 dated 19 June 2007 and invites the Registrar to arrange a hearing for Counsels' submissions as to penalty. Messrs Vorstman and Podmore are responsible for professional misconduct in the course of the company's business as a real estate agent.

The outstanding issue relates to penalty.



Hon W P Jeffries
Chairperson

18 / 10 / 07