

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**AC 58/06  
ARC 80/05**

IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority

BETWEEN PETER JOHN MCLEAN  
Plaintiff

AND BUY WEST REALTY LIMITED  
Defendant

Hearing: 16 and 17 May 2006  
(Heard at Auckland)

Appearances: S R G Judd, Counsel for the Plaintiff  
I Davidson, Advocate for the Defendant

Judgment: 16 October 2006

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**JUDGMENT OF JUDGE C M SHAW**

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[1] Between April 2001 and March 2004 Peter McLean was the New Lynn branch manager of Buy West Realty Limited. When Mr McLean's engagement was terminated he brought a personal grievance alleging unjustified dismissal. However, before that could be determined, the preliminary question of whether he was an employee or an independent contractor was investigated by the Employment Relations Authority which found that he was self-employed. Mr McLean challenges that determination.

**The Employment Relations Authority determination**

[2] It was argued before the Authority that as Mr McLean is a branch manager under the Real Estate Agents Act 1976 he is deemed to be a salesperson and therefore by statute is also deemed to be employed on a contract for services. The Authority did not accept that argument and held that the role of branch manager did

not fall within the definition of a salesperson. However, it found that it was highly arguable that Mr McLean was a salesperson because he is a branch manager who also sells and disposes of land or businesses. He was therefore a salesperson and accordingly it found that his contract for services must stand.

[3] In the alternative, the Authority considered the real nature of the relationship pursuant to s6 of the Employment Relations Act 2000. Applying the criteria of intention, control, integration, and fundamental tests it concluded that he was employed on a contract for services.

### **The issues**

[4] The issues to be decided in this challenge are:

- (a) Was Mr McLean deemed to be a salesperson under the Real Estate Agents Act 1976?
- (b) Was Mr McLean working as a salesperson to the extent that he could be characterised as such?
- (c) What was the real nature of the relationship between Mr McLean and Buy West Realty?

### **The facts**

[5] Mr McLean has a long history of working in the real estate industry. Beginning in 1972 he worked as a salesperson for 7 years and since 1979, with some relatively short breaks, he has worked as a branch manager for a number of real estate firms.

[6] Buy West Realty is a Ray White Realty franchise in West Auckland where it has three branch offices. Mr and Mrs Voordouw are licensees under the Real Estate Agents Act. They own the franchise and at the material time managed the Henderson and Te Atatu branches. Mr McLean was employed as branch manager of the New Lynn branch. It was largely agreed by Mr and Mrs Voordouw and Mr McLean that Mr McLean's primary role as branch manager was to assist the real estate salespersons in their job.

[7] Before he started work at Buy West Realty, he and Mr Voordouw signed a contract entitled "*CONTRACTOR AGREEMENT*". The contract is annexed as a

schedule. It states that the contractor shall perform the services as an independent contractor and shall not incur any obligations on behalf of the company.

[8] At the time Mr McLean was given the contract, the parties did not discuss or give other consideration to his employment status. Mr McLean knew that he was signing a contract that referred to him as an independent contractor but said that he did this because he had no choice because this was the standard contract used. There was no other contract available to the branch manager that he knew of. If he wanted the job, he would have to sign it. He said if he had had a choice his preference was to be an employee so he could get sick pay and holiday pay. Mr Voordouw said that it was industry practice that branch managers are independent contractors and that any other form of contract would, in his opinion, be unusual. It is a structure that in his view works best in the real estate industry. Mr McLean accepted that he had worked before as a branch manager under an independent contract and understood at the outset the difference between being an employee and an independent contractor.

### **The contract**

[9] The recitals read as follows:

- A. *The company wishes to appoint the Contractor to carry out certain consultancy services and the Contractor has agreed to accept such appointment.*
- B. *The Company is the holder of a Real Estate licence under the Real Estate Agents Act 1976.*
- C. *The Contractor has agreed to subcontract with the Company to manage one of the offices operated by the Company.*
- D. *The parties wish to record the terms and conditions upon which the services shall be carried out.*

[10] In spite of these recitals, Mr Voordouw said that Mr McLean was not employed as a consultant but as a branch manager and the branch was not subcontracted to Mr McLean. It is apparent that recitals A. and B. are unrelated both to the substantive terms of the contract and to the way the parties' relationship was carried out in practice.

[11] Under a clause headed "APPOINTMENT AND TERM" the contract was to last for a period of 6 months. This clause also appears to have been irrelevant to the contract as there was no review or discussion about the contract at the end of the 6-month period and Mr McLean remained with Buy West Realty for almost 3 years.

[12] The work to be performed is described in clause 3 "OBLIGATIONS OF CONTRACTOR". Clause 3.1 provides that he is to manage the branch of the

company's business, supervise the performance and duties of the salespeople employed in that branch, and ensure that the salespeople carry out their duties in accordance with the practice in the industry and within the requirements of the Real Estate Agents Act 1976.

[13] The branch manager was to act with all due care, skill, and diligence; to prepare reports to the company in relation to services performed; meet weekly with each salesperson to review their progress and monitor their marketing programme; and to encourage them to each inspect a minimum of ten other salespeople's listings per week and review them at sales meetings. He was to report monthly to the licensee to review office performance for the previous month and plan for future performance improvements.

[14] Remuneration was a base fee of \$4,000 a month for performing the services of branch manager as an independent contractor plus a manager's bonus of a 20 percent share of the monthly branch profit and 70 percent of any listing or selling commission.

[15] Under the heading "*CONFIDENTIAL INFORMATION*", the contractor acknowledges the strict confidentiality and proprietary nature of all confidential information, gives undertakings as to the use of confidential information, and relies upon requests by the company to deliver up all documents and other material relating to, or connected with, the confidential information. Clause 7.4 specifically says that the ideas, know-how, or techniques developed by the contractor in the course of the agreement shall be the property of the company.

### **Work performed**

[16] Carey Smith, the principal officer of Ray White (Real Estate) Ltd and the chief executive of the Ray White Group in New Zealand, told the Court that branch managers in general have extra responsibilities above licensed salespersons but fundamentally, like salespeople, they are engaged in dealing with and selling real estate either in person or through the management of the sales team and are regarded as selling real estate.

[17] Mr Smith said that there were two parts to working in or selling real estate: listing and selling. The listing for a property involves signing a vendor, whereas selling involves finding an appropriate purchaser for a property. Mr Voordouw said

that listing was a particularly important part of the sales process because without properties listed there could be no sales.

[18] Under Mr McLean's management the New Lynn branch expanded from ten salespersons to 22 plus two property managers, two commercial salespeople, and a receptionist. He said his work was almost exclusively as a branch manager rather than selling property because running the branch was a full time job and he had no time to act as a salesperson selling property. His responsibilities included training salespeople, discussing sales targets with them, monitoring their performance, making sure the branch was open for business every day, and managing the administration of the branch including the receptionist, recruiting salespeople, and generally making sure the branch ran smoothly.

[19] Mr McLean had some limited engagement in the selling process. This comprised 12 or 13 incidents over 3 years where he received some commission over and above his base remuneration and profit share. On two occasions, he was directly involved in the sale of property. For one of them he received the full commission but the rest of the time he was only involved by occasionally listing a property for sale or by assisting salespersons to ensure that they achieved sales.

[20] All costs and expenses related to the branch were paid for by Mr and Mrs Voordouw. Mr McLean had no authority to incur expenditure for such things as refurbishment or trades people without their approval. All of the financial administration was run out of the Te Atatu branch including the trust account to which Mr McLean had no access or authority over.

[21] Mr McLean attended branch manager meetings with Mr and Mrs Voordouw once a month to report the progress of the branch. He said they would give directions about anything they wanted to change including objectives and whether to employ more staff. He was invited to give his views but in the end they had the final say and he was required to follow their instructions.

[22] The administration of the branch was handled by the receptionist. She was the only one with access to the branch computer, the stationery cupboard, and the petty cash. She received all incoming money and dealt directly with head office at Te Atatu on those matters without reference to Mr McLean.

[23] Mr McLean would help sales staff with their weekly advertising in real estate magazines. The form of the ads was determined by head office branch at Te Atatu.

[24] Salespersons who were engaged to work in the branch were selected at final interview by Mr and Mrs Voordouw. Those staff contracted with the owners not Mr McLean. He managed those staff who were employed by the owner of the business.

[25] As well as managing salespeople, from Christmas 2003 he was responsible for building the property management side of the business and from January 2004 he was instructed to run the property management division of Buy West. This included managing the staff in each of the four branches at that time.

[26] Mr McLean was paid a monthly salary which continued even when he took holidays or was sick. He made some limited tax claims for his expenses incurred in the course of his work for his car expenses, although this was mostly for travel to and from work, and his telephone.

[27] There were no specific hours of work stipulated in his contract, however he said that it was a full 5-day business which also ran into 6 days because of auctions run on Saturdays and he had no time to do any other work for any other organisation or for himself. Although Mr Voordouw said that Mr McLean could have spent all day at the golf course as long as the results of the branch were achieved, he agreed that in reality managing and motivating a sales force generally requires hands-on leadership and being a branch manager is a full time job.

[28] Mr Voordouw agreed that there was a difference between the way Mr McLean was paid and the purely commission based payments to salespeople. Mr McLean was paid a fixed amount regardless of whether properties were sold.

[29] Because of his previous experience in real estate, some people would phone Mr McLean and ask him to specially look after their property if they wanted to sell it or wanted to buy one. Although he didn't have time to actually sell properties or go out and find properties for people, he would list a property on behalf of the company and then would pass that listing on to a salesperson in the office. In those cases he would either share part of the listing fee or sometimes would get the whole listing fee depending on who sold the property.

[30] Tyler Humby was the receptionist/office administrator during the time that Mr McLean worked as branch manager. She confirmed that she was employed by

Mr and Mrs Voordouw and was trained at the head office before working at the New Lynn branch from where she continued to receive regular directions concerning the running of the branch. Mr McLean was not responsible for her employment and did not have authority to approve her holidays or sick leave.

[31] In summary, Mr McLean's position required him to generate sales by managing a sales team, training salespeople, discussing advertising and promotion with them, assisting them with sale and purchase agreements and negotiations, and accompanying salespeople to decide on whether properties should be listed. He brought his own listings to the branch and helped with the profitability of the branch. Mr Voordouw agreed that he appreciated business being brought in by the manager but did not want to see the branch manager to be competing with the salespeople in selling properties.

[32] Mr McLean's position was controlled by Mr and Mrs Voordouw inasmuch as he was part of a three office group which implemented the owners' strategy. It was the responsibility of the three managers to put in place what needed to be done out of each of the three branches.

[33] Mr McLean knew the difference between an independent contract and an employment agreement but understood that as a branch manager he was an employee of the owner whose task it was to manage the salespersons who were contracted to the owner as independent contractors.

[34] For the purposes of this case, the parties agreed that Mr McLean was principally involved as branch manager in supervising and assisting the salespersons associated with the New Lynn branch but that he did involve himself in some, albeit minimal, sales activity.

[35] Although there are some underlying industry practices which are common in the employment of most branch managers, including responsibilities to hold meetings and report to the owners, in practice their employment varies in certain circumstances. For example, Mr Smith said that in Australia their status is dependent on which state the employment takes place in. Queensland and Western Australia have an independent contractor model and New South Wales and Victoria have an award structure with a minimum salary.

[36] In New Zealand some branch managers also work as salespeople and branch managers operating under one franchise might operate in a different way from a branch manager in another franchise. There can be differences between city and rural areas. In some small offices a person may sell real estate and manage the office whereas in larger areas people are employed in more specific roles. In some branches, managers are paid entirely on the basis of a proportion of turnover whereas others like Mr McLean are paid a salary plus a proportion of the branch profit and commission on new listings and selling commissions. Other branch managers are shareholders in the franchise.

### **Statutory framework**

[37] In most cases whether a person is employed under the status of an employee or an independent contractor is determined by reference to s6 of the Employment Relations Act 2000. Section 6(4) provides an exception to this. The tests for deciding the nature of the employment set out in s6(2) and (3) do not limit or affect the Real Estate Agents Act 1976. This means that if there is anything contrary to s6(2) and (3) in the Real Estate Agents Act concerning the employment status of persons under that Act then the Real Estate Agents Act prevails.

[38] The Real Estate Agents Act 1976 provides for the licensing of real estate agents and regulates their conduct.

[39] Part I establishes a Real Estate Agents Licensing Board (the Board) and Part II deals with the licensing of the agents. Part III concerns approved salespersons and real estate agents who are deemed by s51A to be engaged under a contract for services. Section 51A is relevant to this case.

**51A Employment status of certain salespersons—**

- (1) *This section applies (or, as the case may be, shall be deemed to have applied) to a salesperson and a real estate agent at any time if—*
- (a) *Before that time and before the commencement of the Real Estate Agents Amendment Act 1992, they agreed, whether expressly or by implication, that the relationship between them at that time should be that of employer and independent contractor; or*
  - (b) *Before that time and on or after the commencement of the Real Estate Agents Amendment Act 1992, they agree expressly that the relationship between them at that time should be that of employer and independent contractor.*

...

[40] Part IV deals with duties of real estate agents including the supervision and control of their businesses by branch managers. It also establishes criteria for approval as branch managers which include the holding of a salesperson's certificate of approval.

[41] The Real Estate Agents Act defines the three statutory persons who may legitimately be involved in the sale and purchase of land. These are real estate agents, branch managers, and salespersons.

**1. Real estate agents**

[42] Section 3 deems persons (with exceptions) who hold themselves out to the public as ready to act for reward as an agent in respect of the sale or other disposal of land or businesses, to be real estate agents. This includes the leasing or letting of land. Such persons are deemed to be carrying on the business of a real estate agent.

[43] All real estate agents are to be licensed by the Board and are referred to in the statute as licensees.

[44] Licensees must be in effective control of a real estate agent's principal place of business (s54(1)) and every branch office of a real estate agent shall be under the effective control of a branch manager. In the present case Mr Voordouw was the real estate licensee.

**2. Branch managers**

[45] In 1989 the statutory position of qualified person was replaced by that of branch manager which is defined in s2 as:

*... a person approved by the Board under section 54 (2) of this Act to be in effective control of a branch office.*

[46] Branch managers must be approved by the Board against a number of criteria set out in s54C. They must hold a certificate of approval to act as a salesperson under s46 of the Act and as well have either passed an examination or have prescribed practical experience in the real estate industry.

[47] Following approval of a person as a branch manager, the Board grants a certificate of approval using a procedure similar to that adopted when granting a certificate of approval as a salesperson but with necessary modifications (s54D(8)) including different criteria.

[48] Where a licensee transfers a branch manager from one branch office to another, the registrar of the Board must be notified (s54E).

[49] It is an offence for a real estate agent to allow any person other than a branch manager to be in effective control of any branch office for more than 4 weeks (s54).

### 3. *Salespersons*

[50] These are defined in section 2:

*“Salesperson” means a person who, being employed or engaged (whether under a contract of service or a contract for services) by a real estate agent, works for the agent in selling or otherwise disposing of land or businesses (either with or without any interest in land), purchasing or otherwise acquiring land or businesses (either with or without any interest in land), or leasing or letting land; and—*

(a) *Includes an officer of a licensee company who is not eligible to apply for or obtain a licence in his or her own right; but*

(b) *Does not include a licensee, or an employee of a licensee whose work is primarily and predominantly clerical:*

[51] Salespersons must hold a certificate of approval under s46 of the Act.

[52] The word “officer” referred to in (a) of that definition is also defined and is logically related:

*“Officer”, in relation to a licensee company, means every director, manager, secretary of the company who, on behalf and in the name of the company, carries on the company’s business as a real estate agent; and includes any person, however designated, who is responsible for the management of the company and any person who is responsible for the management of any branch of the company, or (in relation to any company that carries on any other business in addition to its business as a real estate agent) the person responsible for the management of the company’s real estate agency business:*

[53] Licensees may engage certified salespersons. Pursuant to s51A, if they agree expressly that the relationship between them at the time should be that of employer and independent contractor, such salespersons are deemed for all purposes to be engaged by the agent under a contract for services.

[54] Section 51A was enacted in 1992 in response to the Court of Appeal decision in *Challenge Realty Ltd v Commissioner of Inland Revenue*<sup>1</sup> in which it was held that, principally because commission only real estate salesmen were controlled by their employers, they were employees rather than independent contractors.

### **Issue 1**

[55] Is a branch manager a salesperson under the Real Estate Agents Act?

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<sup>1</sup> [1990] 3 NZLR 42

[56] The Court is bound by s5 of the Interpretation Act 1999 to ascertain the meaning of an enactment from its text and in the light of its purpose which may be ascertained from elements in the Act itself.

[57] For the defendant, Mr Davidson submitted that, regardless of the facts in this particular case, the definition of salesperson in the Act was deliberately written broadly to include any person who works selling or otherwise disposing of land or property and branch managers, even in their managerial capacity, are covered by this.

[58] He also noted that the definition of salesperson is extended to include officers of licensee companies who are not eligible to hold or apply for a licence. Therefore, he concluded that the plaintiff is by definition a salesperson under the Real Estate Agents Act whether or not that person actually makes a specific sale.

[59] Mr Judd, for the plaintiff, submitted that the purpose of paragraphs (a) and (b) of the definition of a salesperson was to ensure that all those connected to selling or supervising the business of real estate are regulated rather than characterising their employment status. When the role of branch manager was created in 1989 to replace the role of qualified persons it was to ensure that real estate businesses are supervised by a person with more expertise and/or qualifications than a salesperson. There was no need for them to be salespersons because they were separately qualified.

### **Discussion**

[60] The appropriate starting point is the text of the Act. The first part of the statutory definition of salesperson in s2 makes it clear that a salesperson is someone who works for an agent selling, purchasing, or leasing or letting land or businesses. However, the definition is extended by paragraph (a) to include an officer of a licensee company. The definition of an officer in relation to a licensee company includes any person, however designated, who is responsible for the management of the branch of any company.

[61] I do not consider subsection (b) of the definition in s2 to cover branch managers. First, they are included in subsection (a) as officers and, second, subsection (b) is designed to exempt receptionists and administrative staff with no involvement in the selling of property from being deemed self-employed.

[62] Section 54(2) requires that every branch office of a real estate agent shall be under the effective control of a branch manager, confirming that they are officers as defined. On the plain meaning of the words the inescapable conclusion is that branch managers as officers are deemed for the purposes of the Act to be salespersons.

[63] In his submissions on interpreting s51A, Mr Judd referred to the Parliamentary debates in Hansard on the reporting back and introduction of the 1992 amendment of the Real Estate Agents Act which enacted s51A. It appears possible that the deeming of all branch managers to be self-employed is an unintended consequence of that amendment because the amendment was directed at preserving the self-employed status of commission only salespeople. This was demonstrated in the speech of the then Minister of Justice:

### **REAL ESTATE AGENTS AMENDMENT BILL**

#### **Introduction**

*Hon D.A.M. GRAHAM (Minister of Justice): I move, That the Real Estate Agents Amendment Bill be introduced. Over the past decade or so there has been a marked change in the way in which real estate salespeople have contracted with real estate firms for their services. In earlier times most salespeople were paid either a salary or a retainer, often together with a share of any commission earned, but latterly more salespeople have come to be commission-only agents. Indeed, it is understood that today it is quite rare to find salespeople who are working on any other basis. Such salespeople do not earn any income unless they make a sale. There is neither a salary nor a retainer. At the same time such salespeople are expected to pay their own expenses for the use of a motor vehicle or telephone, and so on.*

*It seems clear that for many years such salespeople considered themselves to be independent contractors, or self-employed. It seems equally clear that at no stage did any such salespeople regard themselves as employees as such, and, as far as can be ascertained, none considered that he or she was covered by the Minimum Wage Act or the Holidays Act, which apply to employees generally. In July 1990 the Court of Appeal delivered a judgment in which the court held that under the wording of the Real Estate Agents Act such salespeople were, in fact, employees.*

*The result of that judgment was twofold. First, it meant that such commission-only salespeople could no longer deduct their own expenses from their income as they had done in the past. The second result was that the firms with which they were associated were liable for minimum wages and holiday pay. The first result was quite unsatisfactory to the salespeople and the second result was quite unsatisfactory to the firms, which suddenly faced a contingent liability that in the aggregate amounted to many millions of dollars. It is clear to the Government that neither the firms involved nor the salespeople wanted the contractual position, found by the Court of Appeal to exist, to continue.*

*The Bill will resolve the matter. The Bill provides that, as from 1 April 1991, salespeople shall be deemed to be self-employed for tax purposes. As a result, from that date they will be entitled to deduct their own reasonable expenses from commissions earned.*

[64] Mr Judd urged the Court to interpret s51A in the light of Parliament's objectives and purpose as shown in the Act and in the Parliamentary record. He relied on the Court of Appeal's approach to statutory interpretation in *Frucor Beverages Ltd v Rio Beverages Ltd*<sup>2</sup> particularly to the principle that the Court should strive to arrive at a meaning that gives effect to Parliament's intentions.

[65] I have also had regard to the extensive discussion of statutory interpretation by the full Court in the employment law context in *Gibbs v Crest Commercial Cleaning Ltd*<sup>3</sup>.

[66] The difficulty in the present case is that Parliament's intention in enacting s51A was limited to remedying the situation of one specific set of employees: commission only salespersons. Parliament did not address the situation of other officers as defined in the Act or make any distinction in s51A between salespersons and those persons deemed to be salespersons in s2.

[67] I accept Mr Judd's submission that the purpose of including officers in the definition of salespersons was most likely to ensure branch managers were covered by the regulatory framework of the Act rather than to address their employment status but the enactment of s51A is part of the regulatory framework. The fact that the section refers to the employment status of certain salespersons lends weight to that argument. However, in the absence of a change in the definition of salespersons, I am unable to determine that Parliament did not intend to include branch managers in the scope of s51A. To find otherwise would result in the Court effectively legislating for that position.

[68] On the plain meaning of the words in the Real Estate Agents Act I conclude that the employment status of branch managers is covered by s51A.

[69] Section 51A was partly retrospective. It declared the employment status of a salesperson both before and after its enactment. Those salespersons who had agreed either expressly or impliedly before the commencement of s51A that the relationship should be one of independent contractor were deemed to be so.

[70] After the enactment of s51A only those who expressly agreed that they were independent contractors were deemed to be so (s51A(b)). Therefore, before a

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<sup>2</sup> [2001] 2 NZLR 604

<sup>3</sup> [2005] 1 ERNZ 399

salesperson or other officer is deemed to be an independent contractor under s51A they must have expressly agreed to that status.

[71] The effect of s51A is that the parties' intentions and statements about their employment relationships as expressed in an agreement are determinative of the status of that relationship. This is in contrast to s6(3)(b) of the Employment Relations Act 2000 which states that the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationship. However, s6(3)(b) does not limit s51A of the Real Estate Agents Act because of s6(4).

[72] It remains as a matter of fact to determine if Mr McLean and Buy West Realty expressly agreed the status of their employment relationship.

[73] I find that they did. The written contract signed by Mr McLean stated expressly that he was an independent contractor. I have considered whether the effectively meaningless recitals which formed part of the description of his employment affects the worth of the contract as a whole. There are some circumstances where a contract may be so uncertain that it is of no effect. The question is whether there was sufficient agreement on the central matters between the parties.

[74] In the present case there was such agreement. The contract established Mr McLean's remuneration and his work obligations and responsibilities including reporting mechanisms. The remuneration was expressly linked to his performance as an independent contractor.

[75] Although Mr McLean said he would have preferred to have been an employee, I find that this preference arose only after he had entered the contract and was not conveyed to Buy West Realty until after his dismissal. I conclude that Mr McLean and Buy West Realty expressly agreed that he was to be an independent contractor. As a deemed salesperson he is therefore also deemed by s51A(5) to have been employed under a contract for services and was not an employee of Buy West Realty.

[76] While that effectively disposes of the case, I have decided to give my judgment on the other two issues, notwithstanding the limitations on the Court

imposed by s6(4) of the Employment Relations Act 2000 in relation to the Real Estate Agents Act.

[77] The reason for this otherwise academic exercise is two-fold. First, I do so in deference to the evidence and argument presented to the Court and, second, it may be that this case will be considered by policy makers to determine whether there is a need for legislative change as it will be apparent from the rest of this judgment that some officers of real estate agents perform work and have responsibilities and conditions of employment that may be significantly different from people who are solely engaged in selling real estate such as commission only salespersons.

## **Issue 2**

[78] Whether Mr McLean was employed as a salesperson is a question of fact and degree and depends on the extent of salesperson's duties undertaken by Mr McLean.

[79] Mr Judd submitted that the contract did not specify that Mr McLean was a salesperson but a supervisor of salespeople and was to ensure that their duties were properly carried out.

[80] On the other hand, Mr Davidson submitted that Mr McLean had considerable involvement in selling or otherwise disposing of real estate especially in listing properties for sale which in Mr Davidson's submission was an act of selling. He also relied on Mr McLean's evidence that he advised vendors on options and facilitated sales with vendors.

[81] To determine the true nature of Mr McLean's position I have had recourse to tests that were once applied under the Industrial Relations Act 1973 in demarcation disputes.

[82] Section 119 of the Industrial Relations Act prescribed considerations for the Court to have regard to when determining which union membership rule and award covered the work done by workers.

[83] Apart from these considerations, the Court was to consider the work done by the workers and the substantial nature of the occupation of those workers. Decisions

of the Labour Court emphasised that the test for the substantial nature of the occupation related to the work that was being done by the employee<sup>4</sup>.

[84] In the present case, if Mr McLean's position were not deemed to be a salesperson, I would have no hesitation in finding that the substantial nature of his work was not as a salesperson. His role was predominantly managerial and any sales work he did was minimal and incidental to his manager's job. He was not employed as a salesperson.

### Issue 3

[85] The last issue is the real nature of the relationship between Mr McLean and Buy West Realty in his role as branch manager. Would he have been an employee or an independent contractor but for the Real Estate Agents Act? This requires the application of s6 of the Employment Relations Act 2000 and the well-settled criteria as confirmed by the Supreme Court in *Bryson v Three Foot Six*<sup>5</sup>.

[86] Section 6 of the Employment Relations Act 2000 materially states:

6 *Meaning of employee*

(1) *In this Act, unless the context otherwise requires, **employee**—*

(a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service;*

...

(2) *In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.*

(3) *For the purposes of subsection (2), the Court or the Authority—*

(a) *must consider all relevant matters, including any matters that indicate the intention of the persons; and*

(b) *is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.*

(4) *Subsections (2) and (3) do not limit or affect the Real Estate Agents Act 1976 or the Sharemilking Agreements Act 1937.*

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<sup>4</sup> *Tasman Pulp & Paper Co Ltd v New Zealand Engineering IUOW & NZ Plumbers and Gasfitters and Related Trades IUOW* [1982] ACJ 233

<sup>5</sup> [2005] 1 ERNZ 372; [2005] 3 NZLR 721; [2005] NZSC 34

[87] Absent s51A of the Real Estate Agents Act, I find that the reference in the contractor agreement to Mr McLean being a contractor is not determinative of the relationship. To find otherwise would not be in accord with s6(3)(b). In addition, Mr Voordouw's evidence rules out Mr McLean being employed as a consultant or as a subcontractor in spite of those roles being specifically defined in the agreement.

[88] Mr Voordouw's intention was to employ Mr McLean as an independent contractor because that was the industry practice at the time as reflected in the standard Real Estate Institute form contract which he used on this occasion. At best for him, Mr McLean did not object to this status at the time.

[89] Although the intention of the parties at the time of signing the contract is an important feature of the test for employment status it is not the only one. As the Supreme Court reiterated, all relevant matters also include the way in which the parties have actually behaved in implementing their contract. The Supreme Court said that "*How their relationship operates in practice is crucial to a determination of its real nature.*"<sup>6</sup>

[90] The matters which are relevant to this determination are conveniently dealt with under the usual headings although these categories are neither closed nor discrete.

### **1. Control**

[91] This important although not singularly decisive factor in determining employment status essentially comes down to the extent to which a person is supervised in his or her work performance<sup>7</sup>. In this case it turns on the extent to which Mr and Mrs Voordouw exercised control over Mr McLean's work and conversely the extent of Mr McLean's independence from the business.

[92] Mr Davidson submitted that Mr McLean was free to manage his office and develop it without direct control, that he could influence his income through management of the office performance, and could work his own hours and manage the office day to day as he saw fit with his reporting obligations being only once a month.

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<sup>6</sup> At paragraph [32]

<sup>7</sup> *Challenge Realty Ltd* at 53

[93] Mr Judd relied on the fact that Mr McLean was not running his own business and could not do so because he was not a licensee. He had no control over the financial operation of the business, could not hire or fire staff, or incur expenses without consent of the business owners.

[94] I find that Mr McLean was largely independent in terms of the daily operations of the New Lynn branch and in particular the way in which he managed and supervised the sales team. He had, after all, been employed as manager on the strength of his experience in that role. However, beyond the day to day operations, he had very little independence. First, he had no role in financial management apart from ensuring that sales targets set by his employers were met. He could not hire or fire clerical staff or engage salespeople. He was not their employer. Therefore, although he was free to manage the branch, he was subject to targets set by the owners and he had no role in planning the overall operation of the business. I conclude that this aspect is rather finely balanced and of itself could not be determinative of the employment status.

#### **Integration test**

[95] Was Mr McLean's work done as an integral part of the business or was it only an accessory to it?<sup>8</sup>

[96] The business in question is the Ray White Buy West Real Estate franchise held by Mr and Mrs Voordouw. The New Lynn branch was an integral part of that business and the management of that part was important to the success of the business as a whole. The branch manager ensured that sales were generated in order to provide income for the business as well as for the commission paid agents.

[97] In the *Challenge* case, the Court of Appeal found that real estate persons were part and parcel of the organisation and necessary for the running of the business of the real estate agency on whose behalf they were acting<sup>9</sup>. While the status of salespersons has now been determined otherwise by statute for taxation policy reasons, the principle remains the same and applies even more so to a branch manager in Mr McLean's position. Whereas salespersons were directly generating income for the business, his job as branch manager was to manage that income

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<sup>8</sup> *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 106 (CA) per Lord Denning

<sup>9</sup> Page 54

generation and, as the performance criteria in the contract states, he was directly answerable to the owners of the business for that.

[98] The major requirement of the branch manager in the contract is to ensure that the branch is profitable. I conclude that Mr McLean's role as branch manager was an integral part of the business and not an accessory to it.

### **Fundamental test**

[99] An important aspect of independence is whether a person was performing his or her services on their own account. Relevant to this test is whether and to what extent the person assumes any financial risk and whether that person has supplied his or her own equipment.

[100] Mr McLean used his own car and made tax claims for that use although he used it for little more than driving to and from work. He also paid for his own home phone. Beyond that, there is no evidence of any of his personal equipment being used in the commission of his employment. Given the administrative nature of the position compared with other positions such as courier drivers or model makers, this is hardly surprising. More relevant is the fact that Mr McLean did not hire or fire the staff on his own account. While he assisted with the selection of staff, the ultimate decision was with the owners of the business. The only financial risk he took was related to the profitability of the branch which dictated the bonus he would receive.

[101] While Mr McLean was registered for GST he had no other business interests or even time to operate these given that he usually worked a 6-day week. However much hypothetical flexibility of time he had, the reality was that he was a full time manager answerable to the owners of the business. In no sense was he operating his own business and nor could he do so as he was not a licensee.

[102] Other matters that are relevant are the payment of Mr McLean's salary regardless of holidays and sick leave which he took. This indicates a continuity of employment and is consistent with the status of employee.

[103] While a proportion of his income was related to profit, there is no difference between that and a bonus system based on total business performance that is a common enough feature of the remuneration packages of salaried executives and managers.

### **Industry practice**

[104] Mr Davidson submitted that industry practice is relevant because the contract reflected this. He expressed the defendant's concerns that the outcome of this case could have implications for a large number of people and could disturb an established way of doing business.

[105] In answer, Mr Judd argued that the only relevant industry practice that supports the defendant's argument is the written contract. He pointed out that Mr Voordouw could not explain why managers should be independent contractors as opposed to employees when looking at the practicalities of the situation.

[106] Although Mr Smith was called by the defendant to give evidence of industry practice, this was limited to describing work done by salespeople and branch managers. When it came to industry practice as it related to employment status, it was apparent that this can vary considerably depending on the nature, size, and location of any branch. Some branch managers are shareholders in the real estate business while others are salespersons with some managerial responsibility. Some share profits, some earn commission, many are on salary. In Australia some are independent contractors and others are covered by awards.

[107] It is important not to interpret industry practice as industry convenience. I accept that parts of the real estate industry have templates of contracts for branch managers which are framed as independent contracts but in this case the template proved less than adequate. It was at odds in several respects from the actuality of the work and responsibilities undertaken by Mr McLean.

[108] If his work had aligned with the contract and he had genuinely been subcontracted to act as a consultant, then it is more likely that he would have been found to have been an independent contractor. However, observing the relationship from the standpoint of an impartial observer, I conclude that Mr McLean's employment had all the hallmarks of an employment relationship. It was a long term, 6-day a week, salaried position which was similar to branch managers in other fields.

[109] For these reasons, were it not for the statutory deeming of branch managers to be employed under a contract for services by s51A and his express acceptance of

that status, I would have found that Mr McLean was an employee and entitled to bring a personal grievance. However, his claim must be dismissed.

### **Costs**

[110] This is a test case and for that reason I would normally hold that costs should lie where they fall. However, counsel asked for costs to be reserved and should the parties be unable to resolve costs, counsel for the defendant is to file a memorandum within 28 days of this judgment. The plaintiff will have 14 days to respond.

**C M Shaw**  
**JUDGE**

Judgment signed at 3.15pm on 16 October 2006

Solicitors:        Davis Law, Auckland  
                      I Davidson, Green Ecosse Limited, Pukekohe

## SCHEDULE 1

*THIS AGREEMENT is made on the eighteenth date of April 2001.*

### **BETWEEN:**

- (1) **RAY WHITE** Buy West Realty Limited; and
- (2) Peter John McLean, Real Estate Branch Manager (the "Contractor").

### **RECITALS:**

- A. *The Company wishes to appoint the contractor to carry out certain consultancy services and the Contractor has agreed to accept such appointment.*
- B. *The Company is the holder of a Real Estate licence under the Real Estate Agents Act 1976.*
- C. *The Contractor has agreed to subcontract with the Company to manage one of the offices operated by the Company*
- D. *The parties wish to record the terms and conditions upon which the services shall be carried out.*

### **IT IS AGREED:**

#### **1. INTERPRETATION**

##### **1.1 Definitions**

*In this Agreement, unless the context otherwise requires:*

**"Related Company"** means a related Company within the meaning of the Companies Act 1993 or any person or entity with which the Company may deal or be concerned.

**"Confidential Information"** means all information regarding the current or future business interest, methodology or affairs of the Company or any Related Company which:

- (a) *the Contractor may be given in relation to or during the course of the performance of the Services; or*
- (b) *may come to the Contractor's knowledge in relation to or during the course of the performance of the Services and which the Contractor is told is, or which from its nature content is or would reasonably be expected to be, confidential,*

*Whether such information:*

- (c) *is oral, written, recorded or stored by electronic, magnetic, electromagnetic or other form process or otherwise in a machine readable form; or*
- (d) *originates from or is obtained by or comes into possession, custody, control or knowledge of the Company or any Related Company either alone or jointly;*

*and without limitation, includes all:*

- (i) *business plans;*
- (ii) *details of any advertising campaigns or information about any of the Company's or any Related Company's clients;*
- (iii) *planning and marketing strategies, procedures, techniques and information;*
- (iv) *accounting procedures and financial information;*
- (v) *contracts or assignments whether verbal or written and in the process of formalisation;*
- (vi) *customer lists, supplier lists, and price lists;*
- (vii) *survey information; and*
- (viii) *training and product policy manuals.*

**"Services"** means the services to be performed by the Contractor.

- 1.2 **Headings:** Clause and other headings are for ease of reference only and shall not be deemed to form any part of the context or to affect the interpretation of this Agreement.
- 1.3 **Clauses:** References to clauses are references to clauses of this Agreement.
- 1.4 **Plural and Singular:** words importing the singular number shall include the plural and vice versa.
- 1.5 **Statutes and Regulations:** References to a statute include references to regulations, orders or notices made under or pursuant to such statute or regulations made under the statute and references to a statute or regulation include references to all amendments to that statute or regulation whether by subsequent statute or otherwise and a statute or regulation passed in substitution for the statute or regulation referred to as incorporating any of the provisions.

## 2. **APPOINTMENT AND TERM**

The Company hereby appoints the Contractor to provide the Services on the terms and conditions set out in this Agreement and the Contractor accepts such appointment. This appointment shall commence on the signing of this agreement and shall continue for a period of six months.

## 3. **OBLIGATIONS OF CONTRACTOR**

- 3.1 **Services:** The Contractor shall manage a branch of the Company's business stipulated by the Company and agreed upon by the Contractor.

The Contractor shall supervise the performance and duties of the salespeople employed in that branch and ensure that the salespeople carry out their duties in accordance with the practice in the industry and within the requirements of the Real Estate Agents Act 1976 and its amendments.

- 3.2 **Skill and Diligence:** The Contractor shall carry out the Services with all due care, skill and diligence, and provide independent and unbiased advice to the Company. Without limitation, the Contractor shall exercise due care and skill in the handling and storage of all information which comes into the possession of the Contractor, or which the Contractor creates, in the course of carrying out the Services.

- 3.3 **Reports:** The Contractor shall prepare such reports, and provide the Company with such information, in relation to the Services as it may reasonably require.

- 3.4 **Meetings:** The manager will meet on a weekly 1 to 1 basis with each salesperson for a review of their progress and to monitor the proactive marketing (contact management) programme generated by each salesperson.

The manager will conduct weekly sales meeting with all salespeople to inform of market conditions, motivate and manage sales efforts. The meeting will discuss exclusive and auction properties that the salespeople have listed. Each salesperson is expected to inspect a minimum of 10 other salespeople's listings per week and these inspections are to be reviewed at sales meetings.

Minutes of each sales meeting are to be kept on file.

The manager will hold a monthly 1 to 1 meeting with his receptionist to review their progress, motivate and encourage their efforts and to seek opinions for improvements.

- 3.5 **Time for Performance:** The Contractor shall give priority to the Company's requirements.

- 3.6 **Errors, Omissions, Etc:** The Contractor, at the Contractor's own cost, shall make good any errors or omissions in the Services of which the Company notifies the Contractor in writing during the term of this Agreement.

## 4. **REPORTING**

The manager will report to the Directors. A monthly meeting will be held between the Licensee and all Branch Managers. The meeting will review office performance for the previous month and year to date and plan for future performance improvements.

**5. REMUNERATION**

*A base fee for performing the services of Branch Manager as an independent contractor will be \$4,000 per month (\$48,000 p.a.) gross.*

*The manager's bonus is a 20% share of the monthly branch profit.*

*Any listing or selling commissions will be paid to the contractor at the rate of 70%.*

*The contractor is liable for all personal marketing expenses.*

**6. INDEPENDENT CONTRACTOR**

**Obligations:** *The Contractor shall perform the Services as an independent contractor and shall not incur any obligations on behalf of the Company.*

**7. CONFIDENTIAL INFORMATION**

**7.1 Confidential Information:** *The Contractor acknowledges the strict confidentiality and proprietary nature of all Confidential Information and that no right, entitlement, or interest in the Confidential Information is extended to or conveyed to the Contractor other than for the strict purpose of carrying out the Contractor's obligations as provided by this Agreement.*

**7.2 Indemnity:** *The Contractor shall take all reasonable steps to preserve the confidentiality of the Confidential Information and the Contractor agrees to indemnify and hold harmless the Company and any other relevant Related Company from all losses damages and expenses (including legal expenses) which it may incur or sustain as a result of any unauthorised use or disclosure of the Confidential Information by the Contractor.*

**7.3 Deliver Up:** *Forthwith upon request by the Company, and, in any event, immediately upon termination of this Agreement the Contractor shall deliver up all documents and other material relating to or connected with the Confidential Information and all copies and duplicates of those items.*

**7.4 Ownership:** *Subject to the provisions of this clause 7, the ideas, know-how or techniques developed by the Contractor in the course of this Agreement shall be the property of the Company. All right title and interest in real, personal or intellectual property produced during the currency of this Agreement, including all elements thereof, will at all times belong solely and exclusively to the Company for use in any manner or media it may make or authorise throughout the world in perpetuity.*

**8. TERMINATION**

**8.1 General:** *The Company or the Contractor may terminate this Agreement by providing to the other party not less than one week's notice in writing.*

**8.2 Termination by the Company:** *The Company may terminate this Agreement forthwith by notice if:*

(a) *the Contractor commits or allows to be committed any breach of the terms of this Agreement and fails to remedy the breach within one week of notice in writing from the Company requiring the breach to be remedied (subject to (b) and (c) below);*

(b) *the Company no longer requires the Contractor to carry out the Services;*

(c) *the Services are not carried out expeditiously and with all due care, skill and diligence; or*

(d) *the Contractor is in breach of clause 7.*

**8.3 Termination Without Prejudice:** *Termination of this Agreement shall be without prejudice to the rights and obligations of the parties prior to termination. Termination shall also be without prejudice to any of the provisions of this Agreement which are expressed to survive termination.*

**9. NO ANNOUNCEMENTS**

*The parties shall treat the contents of this Agreement and the arrangements contemplated in it as confidential and shall not disclose them to any person except with the prior written consent of the other party.*

**10. NO ASSIGNMENT**

*The Contractor shall not assign the Contractor's rights under this Agreement without the prior written consent of the Company.*

**11. REMEDIES AND WAIVERS**

*11.1 No waiver of any breach of this Agreement shall be deemed to be a waiver of any other or any subsequent breach. The failure of any party to enforce any provision of the Agreement at any time shall not be interpreted as a waiver of the provision.*

*11.2 The rights of the Company under this Agreement are cumulative and not exclusive of any rights provided by law.*

**12. NOTICES**

*12.1*

*Each notice under this Agreement is to be made in writing by facsimile, personal delivery or post to the addressee at the facsimile number or address, and marked for the attention of the person or office holder (if any), from time to time designated for the purpose of the addressee to the other.*

*12.2*

*Any communication to any person shall be deemed to be received by that person upon successful transmission (in the case of facsimile) or in any other case when left at the address required by clause 12.1 or five days after being put in the post postage prepaid.*

**13. ENTIRE AGREEMENT**

*This Agreement constitutes the entire agreement between the parties and shall supersede all previous negotiations, commitments and/or writings. No alteration of the terms of this Agreement shall be binding unless it is in writing and executed by both parties.*

**EXECUTED as an Agreement**

*SIGNED for and on behalf of* )  
**RAY WHITE BUY WEST REALTY LIMITED** )  
*by:* )

**EXECUTED under the name of** )  
**Peter John McLean** )