

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF an Appeal by Complainant [J.H] and [M.J.H] under Part 3,  
section 40 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

Hearing Panel Members: [K.S], Chair  
[J.P]  
[W.R]

Hearing Date: April 22, 2022

Appearances: Elsie Saly, Counsel for the Registrar of the  
Real Estate Council of Alberta

[J.H]  
[M.J.H]

Decision Date: May 16, 2022

DECISION OF COMPLAINANT APPEAL

Introduction

1. This is a decision of a Complainant Appeal (the Appeal) under section 40 of the *Real Estate Act*, RSA 2000, c. R-5 (the *Act*).
2. [J.H] and [M.J.H] (the Complainants) submitted a complaint (the Complaint) about the conduct of residential real estate associate licensee, Anthony Schumacher (the Licensee).
3. The conduct in the complaint relates to the Complainants' purchase of a residential property. The Complainants state that they put an offer on a house listed by the Licensee (the First Offer). The Licensee then informed the Complainants' agent that there was another offer on the property (the Competing Offer). As a result, the Complainants increased the First Offer and re-submitted it (the Second Offer). The sellers accepted the Second Offer. However, in the interim, the Competing Offer was withdrawn. The Licensee did not disclose this to the Complainants' agent.
4. The Complainants allege that the Licensee failed to act honestly and did not provide competent service in breach of section 41(a) and 41 (b) of the *Real Estate Act Rules* (the Rules). Likewise, they assert that he misled them

- and their agent when he did not disclose that the Competing Offer had been withdrawn (breach of section 42(a) of the Rules). Finally, they say that the Licensee's conduct undermines public confidence in the industry and brings it into disrepute (breach of section 42(g) of the Rules).
5. The Registrar commenced an investigation into the Complaint but ultimately discontinued the investigation under section 38.1 of the Act and section 21(b) of the Real Estate (Ministerial) Regulations. The Registrar determined that the conduct complained of was not a breach of the legislation because, under the Act and the Rules, the Licensee was under no obligation to disclose that the Competing Offer had been withdrawn.
  6. The Complainants appealed the decision of the Registrar and this Panel was constituted to determine the Appeal.
  7. This Panel does not make findings of fact and does not determine whether misconduct has occurred nor what penalty would be appropriate if misconduct were found. Rather, in accordance with section 40(2) of the Act, this Panel must simply determine whether:
    - a. The Complaint is frivolous or vexatious or there is insufficient evidence of conduct deserving of sanction; or
    - b. There is sufficient evidence of conduct deserving of sanction to warrant a hearing by a Hearing Panel.
  8. For the reasons set out below, it is the unanimous decision of this Panel that the Complaint is not frivolous or vexatious and there is sufficient evidence of conduct deserving of sanction to warrant a hearing by a Hearing Panel.

## Evidence

9. The Complainants submitted copies of emails amongst the agent for the Competing Offer, the Complainants' agent, and themselves. These were considered by the investigator appointed by the Registrar. In their Appeal, the Complainants submitted emails between the Brokerages for the Licensee and the Complainants' agent which had not been available to them at the time they filed the Complaint (the New Appeal Records).
10. An appeal under section 40 of the Act is generally an appeal on the record. That is, it is limited to a review of the Registrar's decision, based on the information collected during the investigation. However, the Counsel for the Registrar did not object to the inclusion of the New

Appeal Records in the materials to be considered by this Panel. The Counsel for the Registrar advised that the New Appeal Records would not have changed the Registrar's decision to discontinue the investigation. Accordingly, we have considered the New Appeal Records as part of the record before the Counsel of the Registrar in making our decision.

11. While it is not the role of this Panel to make findings of fact, and we acknowledge that a more fulsome evidentiary record could be established at a hearing, the information provided by the Complainants could, if accepted as evidence, support a finding that the following chain of events occurred:
  - a. April 29, 2021 – the Competing Offer is submitted to the Licensee;
  - b. May 1, 2021 – the agent for the Complainants submits the First Offer to the Licensee;
  - c. May 1 or May 2, 2021 – the Licensee verbally informs the agent for the Complainants that there are multiple offers on the property;
  - d. May 2, 2021 at 1:43pm – the Licensee advises the agent for the Competing Offer that there are multiple offers on the property;
  - e. May 2, 2021 at 2:29pm – the Complainant's agent submits the Second Offer to the Licensee;
  - f. May 2, 2021 at 3:37pm – the Competing Offer is withdrawn;
  - g. May 2, 2021 – the sellers accept the Second Offer;
  - h. June 16, 2021 – the Complainants' agent learns that the Competing Offer was withdrawn on May 2, 2021 and she informs the Complainants;
  - i. July 13, 2021 – the Complainants submit the Complaint;
  - j. August 17, 2021 – the Brokerage for the Complainants' agent writes to the Brokerage for the Licensee citing the Realtor's Association of Edmonton protocol regarding multiple offers (the RAE Protocol); and
  - k. September 1, 2021 – the Brokerage for the Licensee responds acknowledging that the Licensee should have communicated that the Competing Offer had been withdrawn prior to final acceptance of the Second Offer.

## Submissions

12. The crux of the Complaint is the allegation that the Licensee erred through silence or omission. That is, he was dishonest, failed to provide competent service, and misled the Complainants by failing to disclose that the Competing Offer had been withdrawn.
13. The Complainants rely, in part, on the RAE Protocol, which states:

### *11.05 Multiple Offer Communication Requirements*

*Where two or more written offers to purchase are received by the Seller's Representative, the Seller's Representative shall, prior to presentation to the Seller, undertake the following unless otherwise instructed in writing by the Seller:*

- a. Inform all competing Brokerages of the existence of all written offers and/or counteroffers as soon as the Seller's Representative becomes aware of any other written offers;*
  - b. Provide the names of the competing Buyer's Representatives and their Brokerages to all competing Buyer's Representatives upon request;*
  - c. Inform all competing Brokerages as soon as the Seller's Representative becomes aware of any competing offers that have been withdrawn while negotiations are still ongoing with other Buyers.*
14. The Complainants further assert that the Licensee's conduct, in failing to disclose the withdrawal of the Competing Offer, was "shady" and undermines public confidence in the industry and brings the industry into disrepute.
  15. The Counsel for the Registrar, on the other hand, argues that the RAE Protocol is separate from, and may conflict with, the standards of conduct required by the Act and the Rules. The Counsel of the Registrar relies on a number of Real Estate Council of Alberta (RECA) publications regarding multiple offers. In particular, the Counsel of the Registrar referenced:
    - a. The RECA Board's *Information Bulletin on Multiple Offers* which states that "sellers or buyers, or their real estate representatives, do not have a duty of fairness to each other during the buying and selling process;"

- b. The RECA *Consumer Page on Multiple Offers* which advises that “It’s the seller who determines the process, including whether they want to disclose the multiple offer situation to potential buyers;”
  - c. The RECA website article, *Multiple Offers: The Seller is in the Driver’s Seat*, dated August 17, 2021, which provides that, while a seller has an obligation to be honest with a buyer, this does not mean that a seller is required to be “transparent” with buyers;
  - d. The November 16, 2021 article, *Due Diligence for Real Estate Professionals*, authored by RECA Real Estate Regulatory Compliance Advisors, which reiterates that: “It’s the seller who determines the process, including whether they want to disclose the multiple offer situation to potential buyers;” and
  - e. Three practice tip videos from a RECA Real Estate Practice Advisor regarding multiple offers.
16. The evidence supports a finding that there were multiple offers on the property when the Licensee communicated this to the Complainants’ agent. Thus, Counsel for the Registrar argues, the Licensee was acting honestly at the time.
17. Moreover, neither the Act nor the Rules specifically required the Licensee to disclose that the Competing Offer was withdrawn (prior to accepting the Second Offer, or at all). Rather, the RECA publications all reinforce that, in a multiple offer situation, disclosure is controlled by the seller and the seller is under no obligation to be transparent.
18. Further, the Counsel for the Registrar argues that the Licensee is prevented from making such a disclosure because this constitutes confidential information. Citing sections 41(d), 42(c), 44(1), 57(d), 57(e), 57(h), and 57(n) of the Rules, the Counsel for the Registrar asserts that the Licensee is under a fiduciary duty not to disclose this confidential information without the seller’s permission.
19. The Counsel for the Registrar argues that, in this context, it was incumbent on the Complainants’ agent to make inquiries about the status of the Competing Offer before submitting the Second Offer. At that point, the Licensee could have sought instructions from the seller. The Licensee would then, depending on the seller’s instructions, either disclose that the Competing Offer had been withdrawn, or decline to answer the question.

20. In sum, the Counsel for the Registrar asserts that it was sufficient for the Licensee to have been truthful at the time that he made the representation to the Complainants' agent that there were multiple offers. If he had been asked subsequently, the Licensee may have had an obligation to answer truthfully (or decline to answer), but he had no obligation to be transparent with the Complainants and disclose the change in circumstances of his own accord. To do otherwise, says the Counsel for the Registrar, would be a breach of the Licensee's fiduciary obligations, undermine the public confidence in the industry and bring it into disrepute.

## Analysis

21. The Act does not define "frivolous or vexatious". However, these terms can generally be understood to refer to a claim that is so clearly "unsustainable" that to put it forward would be an "abuse of process": *Cerny v Canadian Industries Ltd.*, [1972] 6 WWR 88 at para. 17 (ABCA).
22. With this in mind, we are of the view that the Complaint is not frivolous or vexatious. We are not satisfied that the conclusion reached by the Registrar is so obviously the only correct one that the complaint is unsustainable or that proceeding to a Hearing Panel would be an abuse of process.
23. Rather, we note that none of the RECA materials relied upon by the Counsel for the Registrar specifically deals with circumstances that arise in the case, nor does the Act or the Rules. Instead, we are left with two potentially competing expectations for the Licensee.
24. On the one hand, the Licensee owed fiduciary duties of loyalty and confidentiality to his client and was obliged to use his best efforts to promote his client's interests: Rules, ss. 41(d), 42(c), 44(1), 57(d), 57(e), 57(h), and 57(n). On the other hand, the Licensee was also required to act honestly and competently: Rules, ss. 41(a) and 41(b). He was prohibited from making representations that mislead anyone or are likely to do so: Rules, s. 42(a).
25. The Registrar's assessment appears to have focused significantly on the first set of obligations; that is, the Licensee's obligations solely to his client. The Registrar does not appear to have considered how the Licensee's other obligations and prohibitions in sections 41 and 42 of the Rules reconcile with these client-focused obligations. As a result, the Registrar essentially came to the conclusion that the Licensee's fiduciary obligations to his client are paramount and override any obligation to clarify in order to avoid being dishonest or misleading.

26. We are not satisfied that the conclusion in this case is necessarily this simple for three reasons.
27. First, we observe that the Counsel for the Registrar placed heavy emphasis on the Licensee's fiduciary obligations – the obligation not to disclose confidential information without his client's consent in particular – in the absence any evidence on this point.
28. The Licensee was not a party to the Appeal and does not appear to have participated in the investigation. As a result, there is no information as to whether the Licensee did or did not discuss his obligations (if any) under the RAE Protocol with his client, nor, more generally, whether he sought and was denied permission to disclose the status of the Competing Offer.
29. The Licensee may have evidence about the specific instructions that he received and the balance that he struck between his potentially competing obligations. This evidence may support the Registrar's analysis and conclusion. In the absence of evidence on this point, however, we are not satisfied that the Complaint is obviously unsustainable.
30. Second, the Counsel for the Registrar took a narrow view of the obligation to "act honestly". The Counsel for the Registrar found that the Licensee "acted honestly" because the information that he disclosed to the Complainants' agent was accurate at the time that he disclosed it. The Registrar then held that the duty to act honestly does not include a duty to correct statements that may have been accurate at the time that they were made but are no longer so.
31. However, neither the *Act* nor the Rules clearly states that this is the case. That is, *the* Rules do not specifically state that a Licensee's obligation to "act honestly" is limited only to the exact moment in which his actions occur. Indeed, s. 42(a) of *the* Rules states that a Licensee must not "make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so."
32. While it is not our role to make a finding of misconduct, in our view, it is at least arguable that, in failing to provide updated disclosure about the status of the Competing Offer, the Licensee was "reckless" in a way that could "mislead" the Complainants and their agent. In the same vein, it is at least arguable that the obligation to avoid misleading another party (Rules, s.42(a)) colours the meaning of the obligation to "act honestly" in section 41(a) of the Rules and imposes an obligation to correct "honest" statements which have become inaccurate in at least some circumstances.

33. Finally, other factors in this case may also impact the meaning of the Licensee's obligation to "act honestly" and not "mislead" a party.
34. Although we appreciate the Counsel for the Registrar's argument that the REA Protocol is not a law, nor is it a rule or bylaw over which RECA has jurisdiction, it is nevertheless important to acknowledge that the Licensee's conduct did not occur in a vacuum. Rather, his representation to the Complainants' agent that there were multiple offers was made against the backdrop of the REA Protocol, which could have affected the parties' expectations in terms of the Licensee's conduct.
35. Notably, the Counsel for the Registrar asserted that the Complainants' agent bore the onus to request updated disclosure from the Licensee and that, in the absence of a request, the Licensee had no obligation to be transparent. However, given the RAE Protocol, the Complainants' Agent may have expected the opposite to occur – that is, the Licensee would, in accordance with the RAE Protocol, advise the Complainant's agent if the Competing Offer was withdrawn. This may have resulted in the Licensee's silence taking on a misleading character.
36. In this context, it is at least arguable that the Licensee's obligation to "act honestly" and / or avoid representations that "mislead" took on a broader meaning than simply ensuring the statements were accurate at the time that they were made. For example, the RAE Protocol requires a Seller's Representative to disclose that competing offer has been withdrawn unless, at the outset, the seller instructs them in writing not to do so. If the Licensee had been instructed in writing not to comply with the steps contemplated in the RAE Protocol, his obligation to "act honestly" and avoid representations that could "mislead" another party may have included an obligation to disclose this instruction.
37. We also note that, other than the practice tip videos, the materials relied upon by the Counsel of the Registrar are all dated after the events that led to the Complaint. This calls into question their effectiveness in setting the parties' expectations of one another in terms of the onus on each party to seek additional information and the level of disclosure required to "act honestly" and avoid representations that "mislead".
38. To be clear, in setting out the above, we are not making a finding that the client's instructions to the Licensee, the RAE Protocol, or the practice tip videos do or do not impact the Licensee's obligation to "act honestly" and not "mislead" a party, nor what impact they might have. We are simply of the view that neither the Act nor the Rules provides specific guidance on this point and that there is sufficient evidence on the record to warrant consideration of the issue by a Hearing Panel.

39. Similarly, nothing in these reasons is intended to prohibit or discourage the Registrar from investigating the Complaint further in order to advance the presentation of the case to another Hearing Panel.

### Conclusion

40. In summary, the record before this Panel, could support a finding of conduct deserving of sanction. It is not plain and obvious to us that the Licensee's fiduciary obligations to his client could or did override his other obligations to act honestly and avoid misleading other parties.
41. This matter should be considered by a Hearing Panel.

Signed this 16th day of May, 2022, at the City of Edmonton, Province of Alberta.

**"Signature"**

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[K.S]

Hearing Panel Chair