

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Sections 39(1)(b)(ii) and 83.1(1) of the *REAL ESTATE ACT*,
R.S.A. 2000, c.R-5

AND IN THE MATTER OF a Hearing regarding the conduct of
AUSTIN SPENCER FLEMING, currently registered with Mountain View Real Estate
Inc. operating as Re/Max Real Estate (Mountain View)

Hearing Panel: [K.K] (Chair, Public Member)
[G.P] (Panel Member, Licensee)
[S.D] (Panel Member, Licensee)

Hearing Date: November 24, 2021, via video conference

Appearances: Elsie Drew Saly, Counsel for the Registrar of the Real
Estate Council of Alberta
Scott Chimuk, Counsel for the Appellant
Austin Spencer Fleming

DECISION OF HEARING PANEL

BACKGROUND

1. Pursuant to section 83.1(1) of the *Real Estate Act* (the "Act"), Austin Spencer Fleming (the "Appellant") has appealed the Registrar's administrative penalty dated May 31, 2021 to a Real Estate Council of Alberta ("RECA") Hearing Panel (the "Panel").
2. The appeal to the Panel proceeded as a de novo hearing. Under section 83.1(5) of the Act, the Panel may quash, vary or confirm the administrative penalty, and make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the RECA Bylaws. Pursuant to section 83.1(6) the Panel's decision is final.

3. Before addressing the appeal, the Panel will provide a brief background of this matter.
4. On May 31, 2021 the RECA Registrar decided that the "Appellant contravened Rule 41(b) of the *Real Estate Act* Rules (the "Rules") by allowing a person to use a homeowner's bathroom during a showing. The Registrar imposed a \$1,500 administrative penalty against the Appellant and ordered that the penalty must be paid within 30 days of the administrative penalty.
5. The Appellant appealed the above administrative penalty, and on November 24, 2021 the appeal was heard in front of the Panel via video conference.

APPEAL

6. The Appellant's ground of appeal is that the Registrar has not proven the Appellant allowed a person to use the bathroom, and that by allowing a person to use the bathroom the Appellant failed to provide competent service.
7. The Panel considered all of the evidence, the Record, submissions and arguments made by the Registrar and the Appellant at the appeal hearing. Our findings and decision are set out below.

EXHIBITS

8. The following exhibits were entered in this appeal hearing with the consent of the parties and are listed as they are described in the document titled "Registrar Exhibits Revised":

Exhibit 1: Notice of Hearing
Exhibit 2: 289164 New Online Complaint
Exhibit 3: 290300 Complainant Statement
Exhibit 4: 318104 Complainant Picture
Exhibit 5: 318104 picture
Exhibit 6: Front view of the house
Exhibit 7: house and area
Exhibit 8: house and condo lot
Exhibit 9: Map 10379 Rocklyedge St to Co-op
Exhibit 10: AREA COVID-19 Updates Feb 4-21
Exhibit 11: LISTING COMMENTS LOG
Exhibit 12: LISTING MANAGEMENT LOG

Exhibit 13: LISTING SHOWINGS & FEEDBACK LOG
Exhibit 14: LISTING CONFIRMATION FOR AUSTIN FLEMING
Exhibit 15: COVID Pre-Screening Form
Exhibit 16: 298108 Cam Sterns Email with pictures
Exhibit 17: 298108 Picture 1
Exhibit 18: 298108 Picture 2
Exhibit 19: 19318103 Sterns to Moore – Apology from Fleming
Exhibit 20: Fleming Contacts Report
Exhibit 21: 292134 Opening Letter
 OL – Sub – FlemingA
 complaint
Exhibit 22: 292134 Fleming response to OL
Exhibit 23: 292134 Fleming Response Attachment
Exhibit 24: CREB® Rules

ISSUES

9. The issue we must decide is as follows:
 - a. Should the Panel quash, vary or confirm the administrative penalty?

SUMMARY OF EVIDENCE AND SUBMISSIONS

10. The following witnesses gave oral evidence during the hearing:
 - For the Registrar: SM and MM, homeowners; and CS, Sales Associate for SM and MM;
 - For the Appellant: the Appellant, **Austin Spencer Fleming**.
11. SM testified that she submitted a complaint to RECA in March, 2021 arising from the Appellant's showing of the property located at [Calgary, Alberta] (the "Property") on March 10, 2021 between 5:30 – 6:30pm. SM and her husband MM left all lights on at the Property due to COVID-19 protocols to avoid touching of surfaces. They drove around during the showing and parked on the street near the property. Around 6:26 p.m. a car pulled onto the Property's driveway and a man opened the front door and was inside the property for approximately 10 minutes. Another vehicle showed up around 6:35 p.m. and a man briefly entered the Property with the other man while a child played outside in the snow. The men finished their conversation outside while a lady and the child went into the Property unaccompanied. Everyone left the Property around 6:45 p.m.

12. SM and MM returned to the Property and SM noticed the toilet seat was up and a towel had been used in the bathroom near the front door. The Appellant's business card was placed on the kitchen counter, so he would have seen the signs inside the Property which stated, among other things, to not use the bathroom. The child could have used the public bathroom at the Co-op store that was approximately a few minutes' drive from the Property. SM's view of the Property was slightly obscured by a tree but she could see the Property entrance. She could not confirm that she had seen the listing instructions for the Property, which indicated that four people could view the Property. SM was distressed by the child using the bathroom.
13. CS testified that he placed signs in the kitchen and on an ornamental bear in the front foyer. He was not sure where the signs were located when the Appellant's clients viewed the Property because CS did not attend the Property on that date. The showing instructions that required viewers to wear masks and limited viewers to two adults and their Sales Associate and no children were sent to the Appellant when he booked the showing.
14. MM testified that the woman and child spent approximately five minutes in the Property. His testimony matched that of SM that the toilet and the bathroom towel had been used. He and SM had a clear view of the Property from where they had parked.
15. SM believes the sign that asked viewers to remove their shoes and to not use the bathroom was in the front entrance. However, the separate sign at the front entrance that only said "Please do not use the bathroom" was provided by CS after the incident in question. There was also some discrepancy regarding the actual size of the signage at the front door at the time of the showing. MM estimated it to be 4" x 6" while SM estimated it was 5" x 9".
16. The Appellant testified that he booked the Property the night before the showing pursuant to his client's instructions. The Property was the 9th of 10 properties the Appellant showed his clients on March 10. The showing instructions did not contain any bathroom use restrictions and he was not aware of any such restrictions or COVID restrictions of bathroom use. He opened the front door and waited in the lobby for his clients. He did not see any signage inside the front entrance.

17. The gentleman client spent approximately one minute inside the Property. While the Appellant was closing the front door, the client's wife approached the Appellant in much distress and asked if her six year old son could use the bathroom, because "you know kids cannot hold their pee" and he could not hold it. The Appellant did not want the child to pee on the lawn, so he made a quick decision and allowed the client's wife and son to enter the Property and use the bathroom. He stood at the front doorway where he could see the husband on the driveway and respectfully see that the wife and child were in the bathroom. He quickly looked at the bathroom then locked the Property. He had not locked the door before the wife and child entered the Property.
18. The Appellant and his clients then stood on the driveway and discussed going to the final viewing. That evening CS called the Appellant and was quite angry. The broker and the Appellant were not quite sure what the Appellant had done wrong. On March 13 the Appellant sent an apology via email to CS, as his broker said sometimes it's best to just give an apology.
19. The Appellant said it was possible the signs were in the Property and he didn't see them. He did not go into the kitchen at all, and he does not recall putting his business card in the kitchen, even though the sellers found his card there. He stood to the right side of the kitchen countertop but never entered the kitchen. He agreed under cross-examination that his recollection would have been better on March 13, 2021 than at this hearing. He had no reason to believe it was not okay to use the bathroom.
20. The Appellant is a Calgary Real Estate Board ("CREB®") member and is pretty familiar with the CREB® Rules. CREB® Rule 8.01(a) states that keys shall only be used for authorized purposes. The Appellant was not conducting an inspection of the Property; he was showing it to prospective buyers. Using the bathroom is not a part of the normal viewing process, but the Appellant could not foresee that the child would need to use the bathroom. When showing a home a Sales Associate cannot always predict if a kid will have to use a bathroom. The Appellant is responsible for his clients. He was not considering keeping his clients happy so that he would get paid. There was not another available option at that time as the child had to go pee. The Appellant had no reason to contact CS for permission to use the bathroom. The client instructed him that the child had to use the bathroom.
21. The Registrar submitted that the child using the bathroom was concerning to the sellers of the Property and should be of concern to the Panel. The Appellant did not have the sellers' permission to allow his clients to use the

bathroom. Any reasonable person would have noticed and followed the signs in the kitchen and on the decorative bear near the front door. The Appellant's business card was found in the kitchen. He was either locking or had already locked the front door when his client asked if the child could use the bathroom. Only the child's parents were responsible for the child. The sellers, as owners of the Property, had the right to prohibit viewers from using the bathroom. Public bathrooms were down the road, and the Appellant could have contacted the sellers' Sales Associate, CS to seek permission to use the bathroom. Instead, he deliberately allowed the child to use the bathroom. This was a case of convenience, not necessity. The Appellant looked around and, seeing no one, allowed the child to use the bathroom. The public needs to be assured that anything other than express permission must be prohibited. Homeowners' restrictions must be followed. The Appellant's decision to allow the use of the bathroom was a choice. He had an obligation to respect the homeowners and to say no to his client. The Appellant was holding the sellers' keys in trust.

22. The Registrar cited various legal texts to argue that a homeowner has the right to protect their land from the actionable tort of trespass. The Registrar submitted that every invasion of private property, no matter how minute, is a trespass even though there may not be any actual damage.¹ The Registrar submits that the Appellant's trespass was not harmless.
23. The Registrar further submitted that the CREB® Rules outline authorized purposes for using a key box at a property. Using a bathroom is not an authorized purpose. The Appellant used the key box for the purpose of using the bathroom. Whether or not the Property door was locked, the Appellant allowed the bathroom to be used after the clients had viewed the Property. During property viewings, homeowners surrender possession of their home and are vulnerable. They are allowed to make their own rules in connection with allowing other people to view their property. The evidence and submissions demonstrate that the Appellant violated section 41(b) of the *Real Estate Act* Rules. Although the Appellant's actions amount to one act of negligence, it was significant.
24. The Appellant submitted that the Appellant was not aware of a restriction on using bathrooms, and no evidence was provided as to whether or not this was acceptable. The Appellant was at the Property for the express purpose of showing the Property to prospective buyers, which is not conduct deserving

¹ *Anger and Honsberger Law of Real Property*, 3rd Ed. at page 7; *Canadian Encyclopedic Digest, Torts – Trespass* at I.1; *Black's Law Dictionary* at page 1347.

of sanction. He was under the honest and mistaken belief that he was authorized to allow clients to use the bathroom. There is no evidence that the Appellant was told about the bathroom restriction or that his actions amount to incompetence. A single act of negligence does not establish a pattern of behaviour.

25. Counsel for the Appellant submitted that in professional conduct proceedings, expert evidence is required when a person is accused of not providing competent service. Counsel for the Registrar submitted in rebuttal that the requirement to include expert evidence is not absolute, and that expert evidence is required only in certain procedures such as medical disciplinary proceedings. The Panel did not address the Appellant's arguments for the requirement of expert witnesses and expert evidence in this appeal because the Appellant's actions in this complaint was not deemed to amount to incompetence.
26. Counsel for the Registrar and the Appellant both agreed that one act of negligence without circumstances tending to show incompetence will not on its own amount to incompetence.

DISCUSSION

27. After considering all of the evidence, the Record, submissions and arguments made by the Registrar and the Appellant, the Panel finds that: a) the child used the bathroom at the sellers' Property; b) signs with multiple instructions were posted in the kitchen and the front entrance of the Property; c) the signs that only stated "Please do not use the bathroom" were posted after the incident in question. Also, the Appellant and his client were late for the showing, however, this was not brought forward as an issue of incompetence.

28. Section 41(b) of the *Real Estate Act* Rules states that

41 *Licensees must:*
 (b) *provide competent service.*

29. The Registrar provided a definition for "competent" as "able to do something well".² The Registrar also directed the Panel to a RECA bulletin which provides that

Industry professionals must be competent in all areas in which they provide services. Being competent means industry professionals possess the knowledge, skills and abilities to allow them to perform the necessary services

² Cambridge English Dictionary.

and give necessary advice. Industry professionals must maintain their competency on a continuing basis.

Industry professionals must give the best possible service and advice to clients. The service and advice must meet reasonable standards of competence. This means each industry professional is responsible to achieve and maintain competence in all areas in which they practice.

30. In the context of regulated professions, the Registrar cited a text by James T. Casey which provides that:

Statutory powers have been used by professions to control incompetence generally in two ways. First, some of the governing statutes contain specific provisions with respect to incompetence and incapacity of members to properly practise, with specialized procedures to deal with the problem. Secondly, some professions attempt to regulate incompetence or incapacity through their general power to discipline for professional conduct.

....

It is a question of degree as to whether a mistake made by a professional will be of such significance so as to constitute "incompetence".

....

An exercise of professional judgment which turns out to be incorrect is not necessarily outside of the range of possible courses that a reasonably competent professional might choose to make and as a result is not necessarily professional misconduct.³

31. The Registrar cited *Mason v. Registered Nurses' Assn. of British Columbia*, which provided several dictionary definitions of competency:

The following are dictionary definitions of the word 'incompetence':

1. 'INCOMPETENCY. Lack of ability, legal qualification, or fitness to discharge the required duty.'

Blacks' Law Dictionary, Revised 4th Edition.

2. 'INCOMPETENCE, INCOMPETENCY. 1. General lack of capacity or fitness, or lack of the special qualities required for a particular purpose; insufficiency; inability.'

³ *Regulation of Professions in Canada* at chapter 13.7.

INCOMPETENT. 1. Not competent; not having the ability necessary or desirable for any purpose; unable to do properly what is required.
Funk and Wagnall's New Standard Unabridged Dictionary of the English Language, 1943 Ed.

3. 'INCOMPETENCE: The state or fact of being incompetent; as (a): lack of physical, intellectual, or moral ability: INSUFFICIENCY, INADEQUACY.'
*Webster's Third New International Dictionary, Unabridged, 1976 Ed.*⁴

Mason also stated that:

It is respectfully submitted that the following principles may be discerned from the foregoing authorities:

- 1. The particular definition placed upon the word 'incompetency' should be molded by the object of the enactment in which the word appears in this case, the Registered Nurses' Act, R.S.B.C. 1970, Chapter 335, as amended. In this respect, it is submitted that the statement of statutory purpose quoted from the Kansas State Board of Healing Arts v. Foote [supra] is appropriate to the statute under consideration here.*
 - 2. All the definitions of 'incompetency' focus on the lack of ability, capacity or fitness for a particular purpose.*
 - 3. The want of capacity, ability or fitness may raise from a lack of physical or mental attributes. However, a person not lacking in physical or mental attributes may nonetheless be incompetent by reason of a deficiency of disposition to use his or her abilities and experience properly.*
 - 4. Negligence and incompetence are not interchangeable terms. A competent nurse may sometimes be negligent without being incompetent. However, habitual negligence may amount to incompetence.*
 - 5. A single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence.*⁵
- 32. We found both SM and MM to be credible witnesses. Their testimony seemed more believable because their respective versions of events, while similar, contained some discrepancies and did not seem rehearsed. We found the Appellant to be a credible witness on some issues. He could have been more forthcoming in some of his evidence and should have admitted to making a*

⁴ *Mason v. Registered Nurses' Assn. of British Columbia*, 1979 CarswellBC 190 at pages 10-11.

⁵ *Ibid* at page 14.

mistake. The Appellant appeared sincere in his written apology and his desire to make amends.

33. We accept the evidence of SM and MM that they did not want anyone to use the bathroom. We also acknowledge that SM found it distressing that someone used it. Whether or not the Appellant saw the signs in the Property, we find that the Appellant, by allowing his clients' child to use the bathroom, made a spur of the moment mistake. We find his actions to be a mistake because he did not attempt to contact the sellers' Sales Associate to seek permission for the child to use the bathroom because the Appellant believed it to be an emergency. However, we do not find that his mistake amounts to incompetence. We refer back to the Registrar's case of *Mason* which states that a single act of negligence unaccompanied by circumstances tending to show incompetency will not of itself amount to incompetence.

DECISION

34. For the reasons stated above, the Registrar's administrative penalty is quashed.

This decision is certified and dated at the City of Calgary in the Province of Alberta this 23rd day of February 2022.

"Signature"

[K.K], Hearing Panel Chair