

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF s. 39(1)(b) and s. 41 of the *Real Estate Act*, R.S.A. 2000, c. R-5

AND IN THE MATTER OF a Hearing concerning the conduct of **Brian Ames**, Broker,
currently registered with Whitecourt Advantage Real Estate Servis Ltd. c/a RE/MAX
Advantage (Whitecourt)

Hearing Panel members: Richard Parker, Chair
Marjorie King
Ken Shearer

Appearing: Ms. Leela Ramaswamy, legal counsel on behalf of the
Executive Director
Mr. Brian Ames, on his own behalf

Hearing Date: August 23, 2006

DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA

WHEREAS the Executive Director of the Real Estate Council of Alberta has, pursuant to the Act, conducted an investigation in respect to the conduct of Brian Ames and assessed an Administrative Penalty pursuant to a Notice dated February 22, 2006;

AND WHEREAS Brian Ames, by a notice in writing dated March 22, 2006, requested an appeal of the Administrative Penalty pursuant to the Act;

AND WHEREAS Brian Ames tendered the sum of \$1,000 on March 24, 2006 to the Executive Director as security for costs pursuant to the Bylaws;

AND WHEREAS the Executive Director issued a Notice of Hearing dated July 12, 2006 pursuant to the Bylaws.

I) INTRODUCTION

On February 22, 2006, pursuant to his authority in section 83 of the Real Estate Act (the "Act"), the Executive Director ("Executive Director") of the Real Estate Council of Alberta ("RECA") imposed an administrative penalty on Brian Ames. The penalty arises out of a determination by the Executive Director of a breach of section 25(1)(d) of the *Real Estate Act* (failing to disburse money received or held in trust in respect of a dealing or trade in accordance with the rules and with the terms of the trust governing the use of that money).

Pursuant to section 35 of the RECA Bylaws, Mr. Ames appealed the administrative penalty to this Panel which takes the form of a hearing de novo. On August 23, 2006, evidence was presented and arguments made in relation to this matter.

II) EVIDENCE

A total of 19 exhibits were presented, contained within one binder. The exhibits in the binder included the purchase contract, communication between Mr. Ames and M.K. and the property inspection report, among various documents. Three witnesses appeared on behalf of the Executive Director, being M.K., the complainant in this matter, Mr. David Moore, an investigator with RECA and Mr. David Pomeroy, an auditor with RECA. Mr. Ames testified on his own behalf.

M.K. stated that she had filed a complaint with RECA against Mr. Ames. She submitted that she was the agent that represented S.S. and J.D. (the "D's"), the potential buyers of 35 Chickadee Drive, Whitecourt, Alberta.

M.K. outlined the sequence of events that caused her to file her complaint. She submitted during her testimony that she had contacted Mr. Ames on behalf of her clients who were looking for a property in Whitecourt. She stated that her clients had viewed the property located at 35 Chickadee Drive, Whitecourt, and decided to make a conditional offer to purchase. She submitted that they had learned that there was a competing offer and subsequently increased their offer to full list price as well as increased their deposit. They also removed all of their conditions except for a property inspection. The D's later had the property inspection done by J.E.D. on May 15, 2004, and once they received the inspector's report, they decided they no longer wanted to proceed with the purchase of the property as they felt there were too many issues with it.

M.K. advised Mr. Ames on May 16, 2004, that her clients no longer wanted to proceed with the purchase. On May 18, 2004, she stated that she faxed Mr. Ames a deposit release form and asked that he have his clients sign it. M.K. outlined some of the issues that had been cited in the inspector's report, such as a leak with the basement toilet, uneven baseboards, and no insulation in various areas in the house. She submitted that Mr. Ames then requested a copy of the house inspector's report as well as the house inspector's qualifications. She submitted that she provided all of the requested documents to Mr. Ames on May 26, 2004. During this period she received communication from Mr. Ames stating that his clients, the B's, would rectify any concerns or issues the D's had as a result of the property inspection and that the purchase could proceed. She stated that she informed Mr. Ames that this was not necessary as her clients had decided they no longer wished to proceed in the purchase of the property.

Mr. Ames advised M.K. that he was unable to return the deposits at the instruction of his clients, the B's. As a result, M.K. stated that her broker, L.S., became involved in the situation on May 28, 2004, as she was unable to retrieve the deposit from Mr. Ames. She stated that the \$5,000 deposit was not returned to the D's until on or about July 6, 2004.

Mr. Moore, an investigator with RECA, was the next witness to be called by Ms. Ramaswamy. He was called to testify as a result of a conversation that he had had with Mr. Ames in early June 2004. He stated that he had received a phone call from Mr. Ames who had wanted to discuss the deposits in question with respect to a purchase. Mr. Moore submitted that Mr. Ames related some of the information regarding this transaction to him. He stated that he put

Mr. Ames on speakerphone since his colleague, Mr. Pomeroy, was present at the time of the call and had more knowledge about the questions Mr. Ames was asking. He stated that one of the concerns Mr. Ames had was that he was the broker for the brokerage, as well as the agent representing the sellers in this transaction, which he thought may have been a conflict. Mr. Ames also asked the advice of both Mr. Moore and Mr. Pomeroy regarding the issue of deposits and whether or not he could hold them based on the circumstances surrounding this transaction. Mr. Moore submitted that he advised Mr. Ames that he should seek his own legal advice regarding this matter. He submitted that he did offer an example to Mr. Ames with respect to a situation he had been involved in prior to his work with RECA, as an industry member. He stated that he was aware of a situation in which the buyer's agent did not remove conditions of a house inspection. He did this as a method by which to hold a property while negotiating on other properties. Mr. Moore stated, however, that this was merely an example and as he was unaware of the entire situation with Mr. Ames he could not offer advice, nor did he say that this example reflected Mr. Ames' situation.

The next witness called by Ms. Ramaswamy was Mr. Pomeroy. Mr. Pomeroy stated that he is an auditor with RECA. He submitted that he was present during the phone conversation with Mr. Ames and Mr. Moore. He stated that Mr. Ames gave some specifics of his situation with respect to a property. He said that Mr. Ames explained that the situation had to do with a conditional transaction. He relayed that the buyers had received a property inspection report and as a result of this report, had decided that they were not going to waive the property inspection condition and therefore were not going to proceed with the purchase of the property. He stated that Mr. Ames also explained that the sellers were prepared to rectify the issues the buyers had with the property in order for the purchase to complete. He also stated that his clients disagreed with various issues outlined in the inspector's report. Mr. Pomeroy stated that he advised Mr. Ames that as the trustee of the deposit, he had to follow the terms of trust as outlined in the purchase contract and make the decision as to where the monies were going to go, whether the deposit was to be returned or kept. Mr. Pomeroy stated that since there are variations of the purchase contract being used throughout the province, he was unable to specify how the monies were to be dealt with. He stated that Mr. Ames felt that the purchasers were not acting in good faith, to which Mr. Pomeroy indicated to him that good faith could be a determination in where the deposit should be dispersed. He submitted that he did not offer any advice to Mr. Ames, other than to suggest that he seek the advice of his corporate solicitor, since not all details were supplied surrounding the situation.

The final witness to appear was Mr. Ames. Mr. Ames agreed with the timeline and facts, as outlined in M.K. testimony. He submitted that he did not return the deposit when asked by M.K. on instruction from his clients, the Eurridges. He stated that he did his due diligence by contacting both Mr. Moore and Mr. Pomeroy with RECA as well as consulting with his lawyer on where the money should be dispersed until the disagreement was resolved. He submitted that he was acutely aware of the possible conflict he had being the broker, the agent, as well as a friend of the sellers. He stated that he wanted to ensure there was no bias as a result. He testified that he had consulted his lawyer on where to disperse the deposit money, however his lawyer indicated that he was unable to advise him, but recommended him to have the money put in trust, which he did. Mr. Ames submitted that he had the deposit money put into trust with the lawyer for the sellers, L.M. He stated that he advised all parties regarding the depositing of monies into trust with

L.M. . He submitted that he did this in effort to be overly cautious. Mr. Ames stated that he had not insisted on a property inspection schedule which could have protected his clients against what transpired, since he trusted M.K. and her clients to act in good faith. He stated that he felt that her clients, in the end, abused the property inspection condition and that having a property inspection schedule would not have changed that. Mr Ames submitted a Property inspection report that was subsequently done of the property for another purchaser which did not identify the problems that had been identified by J.D.

When Mr. Ames was questioned by Ms. Ramaswamy, he submitted that M.K. was clear that her clients no longer wanted to proceed with the purchase of 35 Chickadee Drive, Whitecourt as of May 16, 2004. He stated that once he learned of the reasons why they were choosing not to proceed, he asked for the inspector's report as well as his qualifications, as instructed by his clients. He acknowledged, however, that this requirement was not included in the offer to purchase contract. Mr. Ames submitted that ultimately, M.B. instructed L.M. to return the deposit money to the D.'s .

SUBMISSIONS AT HEARING

FOR THE EXECUTIVE DIRECTOR

Ms. Ramaswamy submitted that the issue for consideration at the Hearing was a determination of whether or not Mr. Ames dealt with the trust monies in accordance with trust rules. She submitted that through the evidence before the panel, it was clear that Mr. Ames did not disperse the trust monies in accordance with the Act

Ms. Ramaswamy submitted that Mr. Ames was informed on May 16, 2004 by M.K. that her clients no longer wished to proceed in the purchase of 35 Chickadee Drive, Whitecourt and as such, would not be removing the property inspection condition, as they were not satisfied with the result of the inspector's report of the property. On May 18, 2004, M.K. faxed Mr. Ames a deposit release form and had requested that it be signed by his clients. The deposit was not released from trust until June 10, 2004.

The issue, Ms. Ramaswamy submitted, was that the deposit monies were not dealt with in accordance with the legislation and the purchase contract. She submitted that clause 3.5 of the purchase contract that was used indicates how monies should be dealt with if conditions are not removed. The D.'s had decided not to remove the property inspection condition and as such, should have had their deposit returned to them. Mr. Ames had contended that the D.'s were not acting in good faith; however, Ms. Ramaswamy submitted that there was no evidence to indicate that they were acting in bad faith. In fact, she stated that they were very cooperative by supplying the property inspector's report as well as the qualifications of the property inspector, which were not required. If this was something that Mr. Ames wanted, that should have been specified by having a schedule attached to the contract. Mr. Ames was in fact advised numerous times that the D.'s did not want to proceed with the purchase. He was advised to seek legal advice with respect to the return of the deposit as well as how to proceed in the matter. Ms. Ramaswamy submitted that he did not in fact seek that advice. She submitted that paying money into a trust account does not constitute receiving legal advice.

Mr. Ames was obligated to act within the terms of the contract, which Ms. Ramaswamy submitted he did not do. The fact is that the money was not dispersed as set out in the purchase contract, which is a breach of 25(1)(d) of the *Real Estate Act*.

Ms. Ramaswamy submitted that the administrative penalty that was issued to Mr. Ames should be upheld, based on the evidence presented. Ms. Ramaswamy stated that Mr. Ames had breached the same section previously and according to legislation, if an industry member breaches the same section a second time, the Executive Director is obligated to impose a \$5000 fine. She stated that the Executive Director does not have the ability to alter the amount of the fine for a second offense of the same breach; however a Hearing Panel has the ability to alter the amount of the fine. She submitted that Mr. Ames' previous breach of 25(1)(d) of the Act was approximately ten years ago. She stated that if the Panel upholds the administrative penalty, the amount of the fine is at their discretion. The Panel needs to make the determination of how serious a violation this was in order to determine the amount of the fine.

MR AMES ARGUMENT SUMMARY

Mr. Ames began his closing submissions by stating that he did not dispute the timeline or facts as were laid out during M.K.'s testimony. He submitted that clause 3.5 of the purchase contract does not adequately address how money should be handled if there is a dispute.

With respect to the question of whether Mr. Ames sought legal advice, he submitted that he did seek legal advice and was advised by his lawyer to put the money in trust until there was a resolution to the dispute. Mr. Ames submitted that by putting the money in trust, he was being overly cautious. In a communication with M.K., he even wrote that he was sorry for the situation but he was trying to ensure everything was done properly. He submitted that ultimately the D.'s did in fact have their deposit returned to them.

Mr. Ames submitted that he felt that he followed the instructions outlined in the offer to purchase and he felt that the D.'s had abused this. Mr. Ames submitted that he went above and beyond what was required of him, being acutely aware of the possible conflict of his being both the agent and the broker in this situation. He stated that he felt that as the agent for the B.'s, his clients were entitled to the deposit; however, he wanted to follow the proper processes in order to avoid any conflict.

Mr. Ames finally submitted that he does not believe that an administrative penalty should have been issued to him for this situation. He stated that he was overly cautious and felt that he followed the instructions outlined in the purchase contract and as such, the administrative penalty should be dismissed. He submitted, however, that if the Panel upholds the penalty, the fine should not exceed \$1000. He stated that his previous breach was ten years ago and he was only trying to protect his clients from an unscrupulous buyer, in that situation. He submitted that in this situation, he did more than he felt was necessary.

III) FINDINGS

The Executive Director argued that Mr. Ames breached s.25(1)(d) of the Real Estate Act (failing to disburse money received or held in trust in respect of a dealing or trade in accordance with the rules and with the terms of the trust governing the use of that money) and imposed an administrative penalty pursuant to the RECA Bylaws.

Upon closer examination of clause 3.5 of the purchase contract, Exhibit One, it is clear that deposits should have been refunded to the buyer forthwith if the condition is not satisfied or waived. We arrive at this conclusion because Clause 3.7 states "If there is a dispute between the Seller and The Buyer as to entitlement to the Deposits then: a.) the brokerage holding the deposit shall review the circumstances, determine entitlement and pay money to the party who is entitled to the deposit." Having regard to clause 8.3 of the agreement which states that "Unless otherwise agreed in writing the Buyers conditions are for the sole benefit of the Buyer and the Sellers Conditions are for the sole benefit of the seller" Mr Ames should have been able to determine that the D.'s as Buyers should get their deposit back as there were no conditions in the agreement regarding the circumstances under which they could refuse to lift the Home Inspection condition. i.e. it was at their sole discretion pursuant to clause 8.3. Although Mr. Ames argued that clause 3.7 b offers an exception to this, regarding when no reasonable conclusion can be reached regarding entitlement to the deposit we do not feel it applied in this case. We feel that Mr. Ames had the ability to make a determination and an obligation to return the deposit based on the wording of the contract, in particular Clause 8.3. Mr. Ames should have commenced the process of returning the deposits as soon as he was advised that the buyers were not prepared to remove all conditions. As a result of this clause, we conclude that Mr. Ames breached s.25(1)(d) of the *Real Estate Act* and that the administrative penalty that was issued by the Executive Director was justified.

When examining the arguments on the amount of the fine of the Administrative Penalty, we feel that Mr. Ames was in fact trying to do the right thing but made an incorrect determination under clause 3.7 a of the agreement. The effect of Mr Ames's action was to withhold a deposit from the D.'s for approximately six weeks creating difficulties for them in trying to acquire another property. A real estate agent or broker needs to follow the trust conditions as set out in a sales agreement particularly where an action is having a deleterious effect on one of the parties. Although his actions constituted a second breach of the Act, the amount of \$5,000 for a fine seems excessive as his prior contravention of this section of the Act was ten years ago. Therefore we are prepared to reduce the penalty imposed by The Executive Director to \$3,000.

IV) ORDERS

Based on the foregoing, the appeal is hereby dismissed and, as such, the administrative penalty is upheld. As already discussed in the Findings section, the Hearing Panel is prepared to lessen the amount of the fine of the administrative penalty from \$5,000 to \$3,000, for the reasons cited above.

During the Hearing there were no submissions made on costs of the Hearing. We therefore invite the parties to supply written submissions on the issue of costs of the Hearing as follows:

- Ms. Ramaswamy will have two weeks from service of this decision to provide any written submissions she has regarding costs. Any such submission shall be delivered to both the Hearings Coordinator and to Mr. Ames within the two-week deadline.
- Mr. Ames shall provide any written submissions they may have within two weeks of receiving Ms. Ramaswamy's submission. Any such submission shall be delivered to both the Hearings Coordinator and to Ms. Ramaswamy within the two-week deadline.

The Hearing Panel will then issue a written decision on costs after considering the written submissions.

If no response is heard from Ms. Ramaswamy or Mr. Ames within the allocated timeframes, we will make and issue a decision on costs without the benefit of their submissions.

This decision was made on August 23, 2006.

"Richard Parker"
Richard Parker, Chair

Marjorie King

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DECISION OF A HEARING PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA ON COSTS

I) INTRODUCTION

The members of this Hearing Panel are Richard Parker (Chair), Marjorie King and Ken Shearer. The Hearing into this matter took place on August 23, 2006. The Hearing Panel issued a written decision on its findings in respect to the Appeal of an Administrative Penalty by Brian Ames on August 23, 2006. Following the issuance of that decision, the Hearing Panel requested submissions on costs of the Appeal from Ms. Ramaswamy, legal counsel on behalf of the Executive Director of the Real Estate Council of Alberta, and Mr. Ames, who was not represented by legal counsel.

II) SUBMISSIONS ON COSTS

Submissions on sanction were provided in writing to us by Ms. Ramaswamy and Mr. Ames.

Ms. Ramaswamy provided us with an Estimated Schedule of Costs in the amount of \$6,577.70.

Ms. Ramaswamy discounted the total amount of costs and submitted the Executive Director is only seeking \$3,922.69. She submitted that she was only seeking costs for the Case Presenter's time in the amount of 44 hours of the 51.5 total hours. As well Ms. Ramaswamy submitted that given that the Executive Director was successful in establishing that the Administrative Penalty against Mr. Ames was rightfully imposed, costs at a rate of 60% should be ordered to be paid by Mr. Ames, as the amount of the penalty was reduced from \$5,000 to \$3,000. This reduction in costs amounts to \$3,922.60.

Mr. Ames submitted that the number of hours being billed for the Case Presenter was excessive. As well, he questioned the breakdown of the travel costs being asked by the Executive Director. In response to the amount being sought for the Process Server for the service of the Notice of Hearing, he submitted that he was been cooperative throughout the process and this was an unnecessary expense. Finally, Mr. Ames stated that he was not made away of the potential costs involved in appealing the Administrative Penalty.

III) ORDERS AND REASONS

The Hearing Panel considered the submissions made by Ms. Ramaswamy and Mr. Ames.

In response to Mr. Ames' statement regarding not being aware of the potential costs of this Appeal, the Hearing Panel would like to indicate that the potential for such costs is clearly stated in the Notice of Hearing, which Mr. Ames was served with prior to this matter being heard. The panel confirmed that the use of a server, the charging of legal costs where RECA staff is involved is standard practice and that the travel costs charged were incurred by staff and one panel member.

In considering the costs of Mr. Ames' Appeal of his Administrative Penalty, the Hearing Panel has not received any compelling argument that would induce an alteration of the amount of costs being sought by Ms. Ramaswamy to be paid, amounting to \$3,922.69. The Hearing Panel feels that a reduction of the actual costs by 60% is fair and reasonable when considering all of the facts and arguments.

As a result of the Hearing Panel's finding and the upholding the Executive Director's imposing of an Administrative Penalty for a contravention of s.25(1)(d) of the *Real Estate Act*, however reducing the penalty from \$5,000 to \$3,000, we hereby order, pursuant to Section 35 (7)(b) of the *Bylaws* made pursuant to the *Real Estate Act*, that:

1. Mr. Ames pay an Administrative Penalty in the amount of \$3,000, as stated in the Hearing Panel's decision dated August 23, 2006;
2. Mr. Ames pay hearing costs of \$3,922.69.

This decision was made on October 20, 2006.

"Richard Parker"

Richard Parker, Chair

Marjorie King

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