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James v. Real Estate Council of Alberta

Michael James and Signet Real Estate Ltd. (Appellant) and The Real Estate Council of Alberta (Respondent)

Alberta Court of Appeal

C. Hunt, A. Fruman, S. Brooker JJ.A.

Heard: June 14, 2006

Judgment: July 17, 2006

Docket: Calgary Appeal 0501-0036-AC

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Proceedings: affirming *James v. Real Estate Council of Alberta* (2004), 2004 ABQB 860, 2004 CarswellAlta 1613, 370 A.R. 247 (Alta. Q.B.)

Counsel: F.R. Fenwick, Q.C. for Appellant

T.R. Davis for Respondent

Subject: Contracts; Property; Torts

Real property --- Real estate agents — Discipline

Client complained to Real Estate Council of Alberta about agent's conduct during course of real estate transaction — Council appointed investigator to examine complaint, which was dismissed due to lack of evidence — Agent's conduct during investigation led to second investigation to determine whether his conduct breached governing legislation, as agent was rude and belligerent to investigator, refused to answer questions, and refused or failed to produce his records of transaction that led to client's complaint — Hearing panel appointed under Real Estate Act found that agent had failed to cooperate fully with representative of council, contrary to s. 38(2) of Act and s. 7(d) of code of conduct for industry members — Agent was suspended for three months, fined \$5,000, and required to pay investigation and hearing costs of \$11,124.40 — Agent appealed to appeal panel and his appeal was dismissed — Agent's appeal to court was also dismissed — Appeal judge found that appeal panel was justified in reaching its conclusion on basis of both reasonableness and correctness — Agent appealed — Appeal dismissed — Standard of review was reasonableness as expertise of appeal panel was greater relative to that of court on matters relating to specialized knowledge of real estate industry, statutory purpose was concerned with protection of public, and questions involved were of mixed fact and law, bringing into question acceptable practices in real estate industry — Standard of review used by judge on appeal was appropriate — Appeal panel was justified in drawing inferences it did, and appeal judge correctly dismissed argument that disciplinary hearing was akin to criminal proceeding and required "prosecution" to establish compliance with all possible procedural requirements — Ample evidence existed to support appeal panel's conclusion

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that agent had failed to cooperate with investigator by being rude and failing to produce listing agreement, and appeal judge correctly applied reasonableness standard.

Cases considered by *C. Hunt J.A.*:

Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board) (2002), 2002 ABCA 199, 2002 CarswellAlta 1083, 31 M.P.L.R. (3d) 153, (sub nom. *Alberta (Minister of Municipal Affairs) v. Telus Communications Inc.*) 218 D.L.R. (4th) 61, [2002] 11 W.W.R. 418, 6 Alta. L.R. (4th) 199, 45 Admin. L.R. (3d) 1, 312 A.R. 40, 281 W.A.C. 40 (Alta. C.A.) — referred to

Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs) (2006), 2006 ABCA 9, 2006 CarswellAlta 13, 17 M.P.L.R. (4th) 189, 376 A.R. 44, 360 W.A.C. 44, 54 Alta. L.R. (4th) 106, 263 D.L.R. (4th) 725, 40 Admin. L.R. (4th) 134 (Alta. C.A.) — referred to

Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services) (2004), 2004 SCC 54, 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 75 O.R. (3d) 479 (note), [2004] 3 S.C.R. 152, 242 D.L.R. (4th) 193, C.E.B. & P.G.R. 8112, 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1 (S.C.C.) — referred to

Pushpanathan v. Canada (Minister of Employment & Immigration) (1998), 226 N.R. 201, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) 160 D.L.R. (4th) 193, (sub nom. *Pushpanathan v. Canada (Minister of Citizenship & Immigration)*) [1998] 1 S.C.R. 982, 1998 CarswellNat 830, 1998 CarswellNat 831, 43 Imm. L.R. (2d) 117, 11 Admin. L.R. (3d) 1, 6 B.H.R.C. 387, [1999] I.N.L.R. 36 (S.C.C.) — referred to

Q. v. College of Physicians & Surgeons (British Columbia) (2003), (sub nom. *Dr. Q. v. College of Physicians & Surgeons of British Columbia*) [2003] 1 S.C.R. 226, 2003 SCC 19, 2003 CarswellBC 713, 2003 CarswellBC 743, 11 B.C.L.R. (4th) 1, [2003] 5 W.W.R. 1, 223 D.L.R. (4th) 599, 48 Admin. L.R. (3d) 1, (sub nom. *Dr. Q., Re*) 302 N.R. 34, (sub nom. *Dr. Q., Re*) 179 B.C.A.C. 170, (sub nom. *Dr. Q., Re*) 295 W.A.C. 170 (S.C.C.) — referred to

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan*) [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — referred to

V. (K.) v. College of Physicians & Surgeons (Alberta) (1999), 1999 ABCA 125, 1999 CarswellAlta 349, 173 D.L.R. (4th) 431, 237 A.R. 49, 197 W.A.C. 49, 74 Alta. L.R. (3d) 93 (Alta. C.A.) — referred to

Voice Construction Ltd. v. Construction & General Workers' Union, Local 92 (2004), 2004 SCC 23, [2004] 1 S.C.R. 609, [2004] 7 W.W.R. 411, 14 Admin. L.R. (4th) 165, 29 Alta. L.R. (4th) 1, 2004 CarswellAlta 422, 2004 CarswellAlta 423, (sub nom. *Construction & General Workers' Union, Local 92 v. Voice Construction Ltd.*) 2004 C.L.L.C. 220-026 (S.C.C.) — referred to

Zenner v. College of Optometrists (Prince Edward Island) (2005), 2005 SCC 77, 2005 CarswellPEI 88, 2005 CarswellPEI 89, 260 D.L.R. (4th) 577, 36 Admin. L.R. (4th) 1, [2005] 3 S.C.R. 645, (sub nom. *Zenner v. College of Optometrists (P.E.I.)*) 342 N.R. 176, (sub nom. *Zenner v. College of Optometrists (P.E.I.)*) 254 Nfld. & P.E.I.R. 1, (sub nom. *Zenner v. College of Optometrists (P.E.I.)*) 764 A.P.R. 1 (S.C.C.) — referred to

Statutes considered:

Real Estate Act, R.S.A. 2000, c. R-5

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Generally — referred to

s. 1(1)(i) "Court" — considered

s. 5 — referred to

s. 36 — referred to

s. 37 — referred to

s. 38 — referred to

s. 38(1)(a) — referred to

s. 38(2)(a) — considered

s. 38(4) — considered

s. 38(5) — considered

s. 39(1) — considered

s. 52(1) — considered

APPEAL from judgment reported at *James v. Real Estate Council of Alberta* (2004), 2004 ABQB 860, 2004 CarswellAlta 1613, 370 A.R. 247 (Alta. Q.B.), dismissing agent's appeal of decision that he failed to cooperate with Real Estate Council of Alberta's investigation.

C. Hunt J.A.:

1 The Real Estate Council of Alberta ("RECA") convicted the appellant, Michael James, of failing to cooperate with an investigator and imposed sanctions that included a three-month suspension. An Appeal Panel dismissed his appeal, as did a judge of the Court of Queen's Bench.

2 We also dismiss his appeal.

Facts

3 The facts are fully canvassed in the reported version of the Court of Queen's Bench decision: *James v. Real Estate Council of Alberta* (2004), 370 A.R. 247, 2004 ABQB 860 (Alta. Q.B.). Briefly, a client complained to RECA about James' conduct in the course of a real estate transaction. RECA appointed an investigator to examine the complaint, which was later dismissed due to a lack of evidence. James' conduct during the investigation resulted in a second investigation to determine whether his conduct breached the governing legislation and RECA's Code of Conduct. James was extremely rude and belligerent to the first investigator, refused to answer her questions both on the telephone and in a subsequent in-person interview, and refused or failed to produce his records of the transaction that led to the client's complaint.

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Legislation

4 The relevant sections of the *Real Estate Act*, R.S.A. 2000, c. R-5, as amended ("Act") provide:

1(1) In this Act, ...

(i) "Court" means the Court of Queen's Bench;

...

37 (1) A person may make a complaint to the executive director about the conduct of an industry member.

(2) A complaint must be in writing.

38(1) The executive director shall,

(a) where a complaint is made under section 37, immediately on receipt of the complaint, ...

commence or appoint a person to commence an investigation into the conduct.

(2) A person conducting an investigation may

(a) request any person to answer any questions and to produce to the investigator any books, documents, records or other things in that person's possession or under that person's control that are relevant to the investigation, ...

(4) An industry member shall co-operate with a person conducting an investigation.

(5) Where a person other than the executive director conducts an investigation, that person shall, on concluding the investigation, report to the executive director.

39 (1) On completion of an investigation or on receipt of a report under section 38(5), as the case may be, the executive director shall

(a) direct that no further action be taken, if the executive director is of the opinion that

(i) the complaint is frivolous or vexatious, or

(ii) there is insufficient evidence of conduct deserving of sanction,

or

(b) if the executive director determines that there is sufficient evidence of conduct deserving of sanction,

(i) refer the matter to a Hearing Panel, or

(ii) impose an administrative penalty on the industry member in accordance with section 83 and the bylaws, where the matter involves a contravention by the industry member of a provision referred to

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in section 83(1).

...

52 (1) An industry member in respect of whom the Appeal Panel has made a decision may appeal the decision to the Court.

5 The relevant provision of the Code of Conduct states:

7. An industry member must be professional in dealings with the public and other industry members. This includes the following: ...

(d) An industry member must cooperate fully with, and provide any information requested to, any representative of the Real Estate Council of Alberta carrying out their responsibilities under the legislation.

Hearing Panel Decision

6 James represented himself before the Hearing Panel. The Hearing Panel's fact findings included that James was uncooperative during four phone calls made by the investigator and during a February 11, 2002 meeting with the investigator, and that he displayed a complete lack of remorse for his actions: A.B.II 78.

7 These findings grounded the Hearing Panel's decision that James had breached s. 38 of the Act and s. 7(d) of the Code of Conduct by failing to cooperate with the RECA investigator. Sanctions were imposed.

Appeal Panel Decision

8 James was represented before the Appeal Panel. His grounds of appeal included the finding that he had failed to cooperate. He also submitted that the Hearing Panel had lost jurisdiction because there was no evidence that a report had been made to the Executive Director as required by ss. 38(5) and 39(1) of the Act.

9 The Appeal Panel held that it should not interfere with the Hearing Panel's findings of fact unless the findings were clearly unreasonable or palpably and demonstrably wrong: A.B.II 130.

10 As to whether the Hearing Panel lost jurisdiction because there was no evidence of a report to the Executive Director (A.B.II 137-8), the Appeal Panel observed that since the Act did not require an investigator's report to the Executive Director to be in writing, an oral report would suffice. Because the Executive Director signed the Notice of Hearing, the Appeal Panel inferred that he must have received a report about the investigation. It also noted that because this argument was not raised at the hearing, no one introduced any evidence on the point and "[i]t would be completely unreasonable to expect the Executive Director's counsel to anticipate every sort of procedural or legal argument that might be made at a Hearing or afterwards, and then to introduce into evidence at the Hearing to address them all, whether or not the arguments are even being raised.": A.B.II 138.

11 Concerning James' failure to cooperate, the Appeal Panel noted his admission that he had been rude, then considered his argument that rudeness was not akin to a failure to cooperate. It carefully reviewed the evidence, concluding that there were "many possible bases on which to conclude that Mr. James failed to cooperate": A.B.II 146.

Appeal to the Court of Queen's Bench

12 James appealed the decision of the Appeal Panel to the Court of Queen's Bench pursuant to s. 52(1) of the Act.

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His several grounds of appeal included the ones raised before the Appeal Panel (the finding that he failed to cooperate and whether the Hearing Panel lost jurisdiction).

13 The Court of Queen's Bench judge concluded at para. 47 that since the Executive Director had a discretion as to how to proceed after he received a report, the report was part of the administrative procedure rather than part of the actual complaint process. As such, there was no requirement to produce evidence of the report before the Hearing Panel. He added:

48 Further, and importantly in this case, Mr. James did not raise this issue before the Hearing Panel. It would have been easy for him to adduce evidence relevant to this issue in the cross-examination of R.E.C.A. witnesses at the hearing. While he correctly asserts that it would also have been easy for R.E.C.A. to introduce such evidence at the hearing, I agree with the finding of the Appeal Panel, that there was no reason for R.E.C.A. to anticipate that such an argument would be raised by Mr. James and, therefore, no reason to introduce evidence as to the procedural steps followed before the hearing was scheduled.

49 These comments relate to the supposed statutory requirement that a written report must be prepared and the question of whether or not R.E.C.A. is obligated to produce such a report. In my view, the Hearing Panel, the Appeal Panel, and this Court are all entitled to presume regularity in the administrative process leading to the hearing. Evidence to the contrary could have been led or introduced by Mr. James, but he did not do so. The Appeal Panel properly concluded that the procedural requirements in this case were met.

14 As for James' failure to cooperate, he concluded that the Appeal Panel was justified in reaching its conclusion on the basis both of reasonableness and correctness. At para. 38 he noted James' own admission at the hearing that he was "100% not cooperating".

15 He dismissed the appeal. James appealed further to this Court, again attacking the finding that he had failed to cooperate and asserting that the Hearing Panel had no jurisdiction.

Standard of Review

16 At para. 6 of his decision, the Court of Queen's Bench judge accepted the parties' agreed standard of review, namely, correctness on questions of jurisdiction and reasonableness as to whether James failed to cooperate. This practice is not acceptable: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 (S.C.C.) at para. 6. An analysis must be conducted to determine the appropriate standard of review for each alleged error made by the Appeal Panel: *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.). Since the Court of Queen's Bench judge did not conduct the necessary analysis, we must do so in accordance with the four-step process directed by *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

Legislative Intent — Privative Clause or Statutory Right of Appeal

17 The factum filed on behalf of the appellant states that the standard of review of correctness is statutorily prescribed by the Act. Previous decisions considering similar provisions have not interpreted them in that fashion, see for example *V. (K.) v. College of Physicians & Surgeons (Alberta)*, [1999] A.J. No. 440, 1999 ABCA 125 (Alta. C.A.) at para. 11.

18 Section 52(1) of the Act grants a right of appeal to the Court of Queen's Bench, signalling that little deference is owed by courts to decisions of the Appeal Panel regardless of the type of issue on appeal.

Expertise of the RECA Appeal Panel Relative to that of the Queen's Bench Judge

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19 Section 36 of the Act specifies the appointment of an Appeal Panel consisting of at least three members of RECA's twelve-member governing council. With the exception of one non-industry member appointed by the Minister, the other members of the council are connected with the real estate industry. Nothing in the Act requires the members to have particular expertise beyond this industry affiliation. Appointments are generally for a three-year term.

20 The expertise of the Appeal Panel is greater relative to that of the court on matters relating to the specialized knowledge of the real estate industry ([Pushpanathan](#) at paras. 32 and 33) and it has acquired expertise about the "general public's perception" (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247 (S.C.C.) at para. 32). Thus the Appeal Panel has greater relative expertise than the courts on the issue of cooperation. The Appeal Panel is also owed deference in regard to issues concerning compliance with administrative procedures.

The Purpose of the Statute and the Provision in Particular

21 The real estate industry is self-regulating and the Act prescribes the rules by which it governs itself. RECA was established to set and enforce standards for the industry and to administer the Act: s. 5. The Appeal Panel explained that to carry out its mandate, RECA employs investigators who are given powers under the Act to determine whether a member breached a rule: "[i]f members are permitted to ignore the rules, or refuse to cooperate with investigators, then the entire system of self-regulation is undermined.": A.B.II 145.

22 As the Supreme Court stated in *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) at para. 31, when the statutory purpose is concerned with protection of the public, a high degree of deference is warranted. "A review of the Act and Regulations as a whole suggests that the College is to play an important role in setting standards and ensuring that the principles of the profession are upheld. This responsibility sets a higher level of deference": *Zenner v. College of Optometrists (Prince Edward Island)*, [2005] S.C.J. No. 80, 2005 SCC 77 (S.C.C.) at para. 23.

23 Therefore, the purpose of the applicable provisions and the Act as a whole suggest a high level of deference.

Nature of the Questions

24 The allegations against James were that he failed to cooperate and provide information requested in the course of an investigation, contrary to s. 38 of the Act and s. 7(d) of the Code of Conduct. Whether these provisions were breached are questions of mixed fact and law, but they bring into question acceptable practices in the real estate industry. As such, considerable deference is suggested. The question of whether the Appeal Panel is entitled to infer that the Executive Director had received the investigator's report contemplated by s. 38(5) of the Act is also a question of mixed fact and law.

Synthesis of Pushpanathan factors

25 All but the first of the four factors suggest that the decision of the Appeal Panel on the issue of cooperation is entitled to a high degree of deference. Consequently, the appropriate standard of review to apply to the issue of whether James' conduct was deserving of sanction was reasonableness, which was the standard of review applied in the Court of Queen's Bench by agreement of the parties. The same standard applies to whether an inference could be drawn about receipt of the report of the Executive Director.

26 Because the standards of review used by the Court of Queen's Bench judge were appropriate, the next step is to determine if the judge correctly applied those standards: *Alliance Pipeline Ltd. v. Alberta (Minister of Municipal Affairs)*, 2006 ABCA 9 (Alta. C.A.) at para. 32 citing *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal*

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Government Board) ([2002](#)), [312 A.R. 40](#), [2002 ABCA 199](#) (Alta. C.A.).

Grounds of Appeal

27 Some aspects of the three grounds of appeal raised by James are improperly stated in his factum. For example, the first ground complains of errors made by the Hearing Panel and the Appeal Panel and the second and third attack "findings" made by the Queen's Bench judge. It is not this Court's function to review the decisions of the Hearing or Appeal Panels, but rather to review the decision in the Court of Queen's Bench. Moreover, it is not the function of the judge in that Court to make fact findings but rather to review the decision of the Appeal Panel.

28 James' grounds have therefore been restated to reflect the appropriate function of this Court. The second and third grounds have been combined because they deal with different aspects of the same topic.

29 The respondent RECA asserts that the second and third grounds of appeal are new (that James cooperated because he answered questions and that his failure to produce the listing agreement cannot be taken as an indicator of non-cooperation because it was not relevant to the investigation). There is considerable merit in the respondent's position on this point but we have nonetheless considered James' arguments in the overall context of whether the evidence supported a finding of non-cooperation.

Analysis

1. Did the Queen's Bench judge err in accepting that the Appeal Panel had properly inferred that the procedural requirements of s. 38(5) had been met?

30 On this issue we agree with the views expressed by the Court of Queen's Bench judge. Moreover, we reject James' suggestion that RECA's disciplinary hearings are somewhat akin to criminal proceedings and require the "prosecution" to establish compliance with all possible procedural requirements. The Appeal Panel was justified in drawing the inference it did, and the Court of Queen's Bench judge correctly dismissed this argument.

2. The Queen's Bench judge erred in accepting as reasonable the Appeal Panel's conclusion that James had failed to cooperate with the investigator by being rude and by failing to produce the listing agreement.

31 There was ample evidence to support the Appeal Panel's conclusion. The Court of Queen's Bench judge correctly applied the reasonableness standard to this issue.

32 Much of James' factum involves picking and choosing among various parts of the evidence. He asserts that the Hearing Panel made faulty fact findings on the evidence. But that argument cannot be sustained, especially in light of our standard of review.

33 James asserts that the finding of a failure to cooperate should not have been based on his failure to produce the listing agreement relative to his client's complaint, because it was never proven relevant to that complaint. The Appeal Panel's decision at A.B.II 140-2, however, makes it clear that it determined that the listing agreement was relevant to the complaint. That decision was reasonable. Although it seems that the argument about the listing agreement was not raised in the Court of Queen's Bench in quite the same way as it was argued before us, the Court of Queen's Bench judge was alive to the significance of the listing agreement as a basis for the reasons of the Appeal Panel. He found those reasons to be both reasonable and correct, and made no error in this regard.

Sanction

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34 Finally, James argued that the sanction imposed was unreasonable. We do not agree.

35 Accordingly, the appeal is dismissed and the stay is lifted.

Appeal dismissed.

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