

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF sections 48, 49 and 50
of the *Real Estate Act*, R.S.A. 2000, c. R.-5 (the "Act")

AND IN THE MATTER OF a Hearing concerning the conduct of Guy (L.G.) Henderson, Broker,
then registered with White Star Realty Ltd. o/a Realty Executives White Star Realty (hereinafter
"White Star Realty") at all times material hereto

Appeal Panel members: Kevan Ladner, Chair
Lynn Patrick
Patrick Rudiger

Appearing: Mr. Terry Davis, legal counsel on behalf of the Executive Director
J.M. , on behalf of Mr. Guy Henderson
Mr. Guy Henderson

Appeal Date: May 29, 2006

DECISION OF AN APPEAL PANEL OF THE REAL ESTATE COUNCIL OF ALBERTA

I) INTRODUCTION

In this matter, Mr. Henderson has appealed a decision of a Hearing Panel of the Real Estate Council of Alberta dated October 3, 2005. The Appeal Panel was composed of Kevan Ladner (Chair), Lynn Patrick and Patrick Rudiger.

The appeal hearing took place on May 29, 2006. In attendance at the hearing were Terry Davis, legal counsel on behalf of the Executive Director of the Real Estate Council of Alberta, Jeff Moroz, legal counsel on behalf of Guy Henderson and Guy Henderson.

II) GROUND OF APPEAL

Mr Henderson appeals the Hearing Panel's findings and Orders in relation to both conduct deserving of sanction, as well as the level of sanction, including an order suspending his license as a broker until he completes the remaining orders, and the amount of costs imposed on the basis that the Hearing Panel erred in finding Mr. Henderson deserving of sanction on three counts all stemming from the same event when it should have been only one count and that the basis for the findings were not those alleged in the Notice to be the basis of the charges.

III) STANDARD OF REVIEW

Appeals of Hearing Panel decisions are heard pursuant to the provisions of sections 48 to 50 of the *Real Estate Act*. An Appeal Panel may choose to overrule findings on law that were made by the Hearing Panel, however on issues of fact, the Appeal Panel typically defers to the Hearing Panel's

findings unless the Appeal Panel concludes that, on review of the evidence that was before presented at the hearing, those factual findings are clearly unreasonable or demonstrably wrong.

IV) BACKGROUND FACTS

Mr. Henderson was served with a Notice of Hearing dated January 19, 2005, containing allegations that resulted from a Real Estate Council of Alberta investigation.

The Notice of Hearing alleged that Mr. Henderson had:

1. failed to be actively engaged in the management of the real estate brokerage;
2. failed to ensure the business of the brokerage was carried out competently;
3. failed to ensure there was an adequate level of supervision for agents within the brokerage and employees who performed duties on behalf of the brokerage;
4. failed to ensure the required trust accounts and trust account records were maintained;
5. failed to review the monthly bank reconciliation within 30 days of the date of the prior month's bank statement and acknowledge the review by signing and dating the monthly reconciliation;
6. failed to properly delegate broker responsibilities, and;
7. upon becoming aware of misconduct, failed to take reasonable steps to deal with the conduct of an agent.

During interviews with RECA investigators, Mr. Henderson admitted that he did not sign the monthly bank reconciliation within 30 days because he had these sent out to an accountant for review and that slowed down the process of signing and the dating of the reconciliations within the 30-day time frame.

V) DECISIONS OF THE HEARING PANEL

Upon consideration of the evidence and testimony before them, the Hearing Panel issued a written decision on October 3, 2005, and ordered that Mr. Henderson pay a fine in the amount of \$2,500; pay costs of \$11,594.14; complete and pass three modules of the Real Estate Broker's course: Real Estate Brokerage; Real Estate Law; and, Real Estate Office Administration; and the Hearing Panel ordered that Mr. Henderson's license as a broker remain suspended until all orders are fulfilled. However, the Hearing Panel stated, in the interim, Mr. Henderson may have his license as a real estate agent reinstated at another brokerage.

VI) SUMMARY OF APPEAL

Appellant's Summary on Conduct Deserving of Sanction

J.M. submitted that none of the factual findings of the Hearing Panel are under appeal. J.M. submitted that the three convictions all stemmed from one finding of fact, that being that Mr. Henderson failed to sign the monthly bank reconciliations within the 30 day period, as stipulated by the *Real Estate Act*. He submitted that criminal law principles apply to administrative law proceedings. In saying that, he referred the Appeal Panel to the case of *K.C. v. College of Physical Therapists of Alberta*, which states that "multiple convictions for the same conduct are prohibited." J.M. submitted again that when there is one circumstance of a breach, there can only be one finding of conduct deserving of sanction.

J.M. stated that the Hearing Panel also erred in basing their findings in part on the contents of a file submitted by Mr. Henderson to show a typical file at his brokerage. The Panel concluded that the file contained various deficiencies and non-compliances. J.M. submitted that Mr. Henderson was not charged with deficiencies and non-compliances in the submitted file, therefore, a finding of conduct deserving of sanction cannot be found on an allegation which did not stipulate this in the particulars set out in the Notice of Hearing.

Respondent's Summary on Conduct Deserving of Sanction

Mr. Davis' submissions were that the Hearing Panel ultimately found that Mr. Henderson was sufficiently incompetent that he should not be licensed as a broker until he took educational course requirements. He submitted that this is not simply a case with a finding of a breach of the 30 day rule. Mr. Davis submitted that the multiple convictions doctrine does not apply once there is a proper understanding of the law. He stated that in order for the rule to potentially arise, there must be a factual nexus, meaning the same underlying transaction or set of facts. However, if the facts differ and there are different findings, there can be multiple convictions. Mr. Davis stated that Mr. Henderson was in breach of the fifth allegation for failing to review the monthly reconciliations within 30 days and then signing and dating. With respect to the fourth allegation, Mr. Davis submitted that there are different legal elements involved. Mr. Davis submitted that the first allegation states that the broker must ensure the business of the brokerage is carried out competently. He stated that if a broker fails to sign the trust reconciliations within 30 days, that is a breach of Rule 38(3), if they fail to do it within 60-90 days that is a breach of Rule 21(1)(g), and if they fail to do it month after month, it is a breach of Rule 21(1)(e). Mr. Davis submitted that these are different charges therefore there cannot be the multiple convictions rule. He also submitted that there are separate factual findings even though they are not set out in detail in the decision.

Mr. Davis submitted that even though the Hearing Panel found conduct deserving of sanction with respect to the second allegation, the particulars of which were not outlined in the Notice of Hearing, the breaches or deficiencies they found with respect to the trust accounts were serious enough for such a finding. Mr. Davis then referred to the case of *Cwinn vs. the Law Society of Upper Canada*, which allows a person to be found guilty of an offense that they were not originally charged with provided that there is no surprise to the accused person. In this case, Mr. Henderson had all of the information through the Executive Director's disclosure package and by virtue of the fact that the additional file was provided by Mr. Henderson himself. As such, there was no surprise to Mr. Henderson.

Appellant's Summary on Sanction

J.M. submitted that since Mr. Henderson should only have been found guilty of one offence (failing to review and sign bank reconciliations within 30 days), his penalty should reflect this. He stated that in these circumstances, and when similar precedents are considered, a suspension is not warranted and the fine should have been much smaller. J.M. noted the *Zaharko* precedent in which similar, though more serious, transgressions resulted in an administrative penalty of \$1,500 for three separate breaches.

J.M. further stated that the Appeal Panel should also consider when assessing what constitutes a reasonable sanction that Mr. Henderson has been a broker for 32 years, and prior to this he had a clean record.

As such, J.M. requested that the appeal panel quash the suspension order and reduce the fine to something more reflective of the single transgression of which Mr. Henderson is guilty.

Respondent's Summary on Sanction

Mr. Davis acknowledged that if the Hearing Panel extended Mr. Henderson's existing suspension, then that was an error. However, he stated that, despite the wording of the Hearing Panel's decision, the intent was to impose a further suspension, which it has authority to do pursuant to the Act.

With respect to the fine, Mr. Davis stated that the authorities cited by J.M. totaled more than the fine imposed on Mr. Henderson for three breaches, and as such they are justified in these circumstances.

Appellant's Summary on Costs

J.M. stated that the Hearing Panel awarded the Executive Director 3/7 of his requested costs on the basis that Mr. Henderson was found guilty on 3 of 7 charges. However, this formula is inappropriate in this case. First, as previously submitted, Mr. Henderson should only have been found guilty of one breach. Second, Mr. Henderson has always admitted that he failed to sign the reconciliations within the required 30 days and therefore little or no investigation or hearing time was devoted to this issue. Moreover, with respect to the amount of costs generally, J.M. submitted that the amount charged for Ms. Burman's time as the case presenter at the original hearing should not be charged at the same rate as a lawyer's time since Ms. Burman is not a lawyer.

As a result, in these circumstances, J.M. submits that no costs should be awarded against Mr. Henderson.

Respondent's Summary on Costs

Mr. Davis started by acknowledging that the costs awarded by the Hearing Panel should be reduced to \$11,053, from the \$11,594.14 ordered. The \$11,594.14 ordered by the Hearing Panel was based on an approximate 3/7 approach to the full costs outlined by Ms. Burman at the Hearing, which totaled to \$27,594.14. Mr. Davis then stated that using the Hearing Panel's 3/7 approach, costs would be \$3,158, which is 2/7 of the \$11,053 in costs outlined at the Appeal. Mr. Davis based this figure on the finding of guilt on the original three charges; however, taking into consideration the admission of Mr. Henderson during the investigation of one charge; that being failing to sign the trust reconciliations within the 30-day period. Mr. Davis stated that since Mr. Henderson admitted to a breach of one charge during the investigation, the time required to make one finding of conduct deserving of sanction was reduced and as such, should be reflected in the costs ordered.

VII) APPEAL PANEL CONCLUSIONS

Conduct Deserving of Sanction:

We agree with J.M. that the Hearing Panel's conclusions all arose out of the single factual transgression of failing to sign bank reconciliations within 30 days. We acknowledge that the Panel made reference to the file Mr. Henderson presented at the Hearing as further support for its conclusion that the business of the brokerage was not being carried out competently. However, in our view, clearly the substantive factual foundation for the finding was the failure to sign the bank reconciliations.

In our opinion the Hearing Panel was in error in finding Mr. Henderson guilty of three separate breaches on the basis of a single factual transgression. In these circumstances, the Panel should have restricted itself to a finding of guilt on the single charge of failing to sign the bank reconciliations within the required 30 days.

Sanction:

The Hearing Panel's penalty (suspension and \$2,500 fine) arises out of the error of finding Mr. Henderson guilty of three counts instead of one. Taking into consideration our conclusion on conduct above, together with the precedents presented at the Appeal Hearing, we conclude that the appropriate fine should be \$500 and a suspension of time up to and including the date this decision is served on Mr. Henderson, after which the suspension is hereby ended. Further, in the circumstances, we do not believe that an educational requirement would be necessary, appropriate or beneficial.

Hearing Costs:

The Hearing Panel's costs award arose out of a simple mathematical formula based on the number of convictions relative to the number of charges. Although such a formula may be appropriate in some situations, in our view this is not one of them. Applying the formula to this case results in a patently unreasonable result because it requires Mr. Henderson to pay a portion of the hearing costs even though he admitted from the outset that he did not sign the reconciliations within the required 30 days. We have no doubt that if the Executive Director had restricted himself to this charge, the matter could have been dealt with expeditiously without the necessity of a hearing. As a result, much of the cost arises out of the fact that a hearing was necessary to deal with the charges on which the Executive Director was unsuccessful and Mr. Henderson ought not to be responsible for that.

This said, the investigation was necessary and Mr. Henderson ought to be required to pay the costs of that.

Based on the information supplied, we conclude that the costs award ought to have been \$2,100, which represents the cost of the investigation. The breakdown on this cost is as follows: Investigator's time at \$20/hour and there were 105 hours of investigation with respect to Mr. Henderson. This totals \$2,100.

VIII) DISPOSITION AND COSTS

Based on the foregoing, we hereby concluded and Order as follows:

1. Mr. Henderson has breached Rule 38(3) made pursuant to the *Real Estate Act*.
2. Mr. Henderson shall pay a fine in the amount of \$500.

3. The suspension penalty ordered by the Hearing Panel is hereby ended.
4. Mr. Henderson shall not be required to complete an educational course as part of the penalty in this matter.
5. Mr. Henderson shall pay costs of the Hearing and investigation in the reduced amount of \$2,100, as outlined in the Appeal Panel Conclusions.
6. Given the divided success, no costs of this Appeal are payable by either party.

This decision was made on June 9, 2006

"Kevan Ladner"

Kevan Ladner, Chair

Lynn Patrick

Patrick Rudiger

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This decision was made on June 9, 2006

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This decision was made on June 9, 2006

Kevan Ladner, Chair

Lynn Patrick

"Patrick Rudiger"

~~Patrick Rudiger~~