

THE REAL ESTATE COUNCIL OF ALBERTA

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IN THE MATTER OF Section 40 of the Real Estate Act, S.A. 1995, c.R.-4.5

AND IN THE MATTER OF an appeal by the Complainants, Kelly and Tania Innocent, of the decision of the Executive Director of the Real Estate Council of Alberta

Hearing Panel Members: Sheldon Johnston, Chairman
Bev Andre
Marj King

Appearances Kelly and Tania Innocent – on their own behalf
Jocelyne Caldwell – on behalf of the Real Estate Council of Alberta

Appeal Hearing Date: June 13, 2002
Edmonton, Alberta

A. Background Facts (not in chronological order)

1a) Mr. And Mrs. Innocent purchased property located at 3817 63 St., Camrose, Alberta from M.N. in July 1999.

b) R.N. acted as an agent on behalf of the Innocent's, the buyers, and M.N., the seller.,

2) M.N. purchased the property using R.N. as his agent.

3) At the time of the Innocent purchase, The Code of Conduct was not yet in effect.

4a) R.N. was at all times of the Innocent purchase an agent with Central Agencies.

b) R.N. had occasion to view the property with the police prior to M.N. purchasing the property.

5) Prior to M.N. purchasing the property, the property sustained damage.

a) M.N. made some improvements to the property after acquisition.

b) After taking possession of the property, the Innocent's discovered numerous deficiencies.

- 6a) R.N. did an evaluation for M.N. in April 1999.
- b) R.N. stated the property was "looking very good". The Innocents confirmed this assessment during submissions on June 3, 2002.
- c) R.N. engaged a building inspection to be done on behalf of the Innocent's.
- d) Conflicting verbal evidence exists as to whether or not a list of inspectors was given to the Innocent's.
- e) The Innocent's confirmed they asked R.N. to engage an inspector.
- 7a) D.H. of Foundation to Finish conducted the home inspection.
- b) D.H. was contacted by R.N.
- c) The inspection report was completed and received by R.N. then passed to M.N. Conflicting, verbal evidence exists on this matter. R.N. states he was authorized by the buyers and the Innocents claim he was not.
- d) The Innocent's received the inspection report for the first time at the subject property with the seller and R.N. present and subsequently removed their inspection condition.
- 8) A property disclosure statement was completed and signed by the seller. It was at R.N.'s urging the Property Disclosure Statement was obtained.
- 9) The Innocent's filed a complaint with the Real Estate council.
- 10) The Executive Director of the Real Estate Council of Alberta, as mandated by the real estate act, opened a file and commenced an investigation and subsequently expanded the investigation to include conspiracy of latent defects.
- 11) Subsequent to the investigation the executive director determined there was insufficient evidence to act on the complaint.
- 12) The Innocent's appealed and a Section 40 Appeal panel was convened.

B. Complaint by the Innocent's

Arising out of the foregoing the Innocent's filed their complaint regarding the conduct of R.N. Their complaint contends that R.N. :

- 1) Was aware of the previous damage to the subject property and did not reveal the nature of these deficiencies to them.
- 2) That R.N. directed them to an inexperienced and unqualified home inspector. It is also said that R.N. provided no options for them to choose from in their inspection.
- 3) That R.N. released confidential information in the way of the inspection report without their authorization.
- 4) That due to many past dealings with D.H., R.N. had a conflict of interest in referring D.H. to them and did not disclose this to them.

5) That R.N. did not verify statements made by the seller in writing on the Property Disclosure Statement.

6) That R.N. did not explain or have them sign a Dual Agency Disclosure Statement.

C. Executive Directors Decision and Appeal

Following an investigation, the Executive Director of the Real Estate Council of Alberta issued his decision in the matter on Feb. 01, 2001, pursuant to section 39(1)(a)(31) of the Real Estate Act. (the "Act")

The Executive Director concluded that there was insufficient evidence of conduct deserving of sanction and therefore directed that no further action be taken against R.N. in relation to the complaint.

Pursuant to Section 40 of the Real Estate Act the Innocent's appealed the Executive Directors decision. The Appeal was heard by this hearing panel on June 3, 2002. Oral submissions were given by the complainants, Mr. And Mrs. Innocent, and a representative for the Executive Director. Some new evidence was submitted and accepted by the panel convened ("this panel"). A review of the new evidence determined that it had no bearing on what occurred and could not impact the decision of this panel. The primary basis for the Innocent's appeal was their belief that there was sufficient evidence to find R.N.'s conduct deserving of sanction.

D. Scope of the Appeal

Section 40 of the Real Estate Act governs this appeal and the Panel's decision in this matter.

This appeal and the Panel's decision in this matter are governed by section 40 (2) of the Act.

That section provides as follows:

"(2) On an appeal under subsection (1) the Hearing Panel shall 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 the Hearing Panel

and shall notify the complainant and the industry member in writing of its decision."

1) We concur with the Campos Decision that our task under subsection 2 is not absolutely clear.

2) We concur with the Campos panel's decision that it is this panel's only obligation to determine whether or not there was sufficient evidence before the Executive Director to warrant forwarding this matter to be heard by a hearing panel.

3) We concur with the Campos panels decision that it is not our task to take or consider new evidence and are restricted to evidence that was before the Executive Director at the time of his decision. New evidence could and only be considered under extreme circumstances. New evidence would have to be of an onerous nature that the Executive Director should have had the information before him. Although at the time of the hearing the complainants made submissions that were entered as new evidence, this panel determined that it was not to the standard mentioned above.

Test under Section 40(2)

In line with the Campos decision regarding the proper interpretation of the panel's authority and jurisdiction; It is before this panel to determine whether or not the Executive Director had sufficient evidence before him to determine whether a reasonable hearing panel would find R.N.'s conduct deserving of sanction.

E. Merits of Appeal

1) Did R.N. fail to act in the client's best interest and an industry member disclose relevant information?

The Innocent's have stated that, had the previous damage been known to them, they would have not purchased the property and R.N. failed to disclose this information, therefore: withholding relevant information to them.

The Executive Director contends that there is insufficient evidence in this regard to uphold any charge.

In the Innocent's submissions at the hearing, they indicated there were some discussions with R.N. about the property's previous condition, but it was not conveyed from one spouse to another. Sworn testimony by R.N. corroborates this.

What was relevant information at the time of writing the offer and what becomes relevant after a person takes possession of the property is difficult for any panel to determine. We believe the Innocent's contention based on their assessment of the damage that had they known the extent of the damage, they would not have purchased the property.

However there is no evidence that R.N. held himself out to be an expert on renovations and has stated only that the property looked good when he evaluated it. This statement is backed by the Innocent's submission to this panel that the property looked good when they viewed it. In our opinion, it would not be reasonable for R.N. to assume the property had been poorly renovated unless he held himself out to an expert in renovations.

This panel also finds that it would reasonable to assume R.N. did not know the extent or severity of damage. Furthermore, R.N. obtained a Property Disclosure Statement and inserted an inspection condition for the buyer's protection, which is consistent with an agent acting in his client's best interest.

That R.N. should have investigated further into the renovations, is in our view beyond what would be considered normal and reasonable industry practice.

This panel has found there is insufficient evidence to determine R.N. failed to disclose relevant information or act in the best interest of his client and agrees with the Executive Director in this matter.

2) That R.N. directed them to an inexperienced and unqualified home inspector and provided them no options to choose from.

It is not within the jurisdiction of this panel to determine the experience level and qualifications of the inspector used by the Innocent's. There were no guidelines for agents referring home inspectors at that time. The inspection clause is generally added for the buyer's protection. By inserting this clause and adding protection for the buyer, the agent is consistent with acting in a client's best interest.

This panel cannot determine whether the inspector was holding himself out to be a member of an association. There is insufficient evidence that would suggest R.N. knew the inspector was unqualified and yet referred the Innocent's to them.

The evidence indicates that R.N. had a reasonable belief in the inspector's competency at the time of this transaction.

The fact that an inspector is a member of a particular association does not mean the inspector is more or less competent than another inspector who is not a member of said association. At present and at that time there are no associations that are recommended or mandated.

This panel could find no evidence that the agent knew the inspector was holding himself out to be a member of an association of which he apparently did not belong and agrees with the Executive Director in his decision.

Further the Innocent's charge that R.N. provided them with no options to choose from in respect to inspectors.

The Innocents confirmed they authorized R.N. to engage an inspector. Insufficient evidence exists on this charge for the Executive Director to expect that a reasonable hearing panel would find R.N.'s conduct deserving of sanction in this matter.

The panel agrees with the Executive Director in this matter.

3) That R.N. released confidential information in the way of the inspection report without their authorization.

Contradictory and insufficient evidence exists on this matter. Statements from both parties indicate time was of the essence.

Here we find two fiduciary duties conflict with each other. Those being, **confidentiality** owed to the buyer and the **full disclosure** owed to both parties. In normal industry practice full disclosure trumps confidentiality except where price and motivation are at issue.

However when a conflict arises between duties it would be reasonable for an industry member to protect a party that may be harmed. For this duty to arise we would first have to believe that R.N. was involved in a conspiracy to conceal latent defects from the purchaser. The Executive Director expanded the investigation to include this and found no evidence that such a conspiracy existed.

In addition this panel could find no evidence R.N. expressly disobeyed any lawful instructions from his clients by releasing the inspection report. An agent's ability to act on his client's behalf must have some implied authority to act on behalf of his clients. It would be contrary to the public good if an industry member would be required to obtain every instruction in writing.

In this instance the panel has looked for and cannot find sufficient evidence to substantiate this complaint. The panel agrees with the executive director in this matter.

4) That R.N. had an undisclosed conflict with the home inspector referred to them.

The panel has concluded that at the time of this transaction, there was no requirement in place regarding a disclosure of this type of relationship.

Furthermore this panel has been advised by independent counsel, the common law threshold would not require a disclosure on a relationship of this nature.

Most importantly the panel found no evidence of any payment from the Inspector to R.N. for referring the Innocent's, which would require a written disclosure.

The panel acknowledges that a reasonable Hearing Panel could not find R.N. conduct deserving of sanction in this matter and therefore agrees with the Executive Director.

5) That R.N. did not verify statements made in writing by the seller.

It is this panel's opinion that the agent did act in the Innocent's best interest by obtaining the Disclosure Statement for which the Innocent's may now use in their pursuit of remedies. Without the Property Disclosure Statement there would be no documented representations made by the seller about the property. However the Innocent's contend that R.N. did not verify the correctness of the seller's statement.

The panel finds that this would be outside normal reasonable industry practice to challenge a client's statements. An agent should be able to rely on a client being truthful in providing such statements.

The panel agrees with the Executive Director in this matter that there is insufficient evidence of conduct deserving of sanction to expect a reasonable hearing panel to find R.N.'s conduct deserving of sanction.

6) That R.N. did not explain or have them sign a Dual Agency Disclosure Statement at the time of this transaction.

Although the Executive Director has submitted that this issue is not to be addressed by this panel, it is clearly in the panel's jurisdiction to consider it.

In concurring with the Campos decision this panel finds its responsibility is to look at a public members complaint in terms of an industry members total conduct. The panel can receive submissions from the Executive Director on which issues to look at but must maintain a degree of independence as it is reviewing the Executive Directors decision to dismiss a complaint.

The job of this panel is to review the information that was before the Executive Director at the time of his decision and determine whether this complaint has sufficient evidence in order that a reasonable hearing panel could find R.N.'s conduct deserving of sanction.

In consultation with independent counsel and after review of the of the Campos decision this panel disagrees with the Executive Director's submission that this panel should not examine the dual agency issue.

The information relating to an agency disclosure was clearly before the Executive Director.

In submissions the Executive Director has based instructions to this panel on based on parts the Innocent's complaint.

This panel nor the Executive Director should not strictly rely on a member or the public's complaint, when formulating the grounds for an appeal. A member of the public may not have the specific knowledge to make a complaint that would identify the specific wrong doings of an industry member.

It is also agreed by this panel that it is within the Executive Directors mandate discretion to deal with discipline on administrative matters. The Executive Director chose to deal with this issue by way of an advisory note to the individual.

If the Executive Director had not issued the advisory note this panel would be compelled to bring this issue to a hearing panel but because the executive director has dealt with it this panel finds no basis to overturn consents to the Executive Director's decision.

F. Comments

The panel has conducted a thorough examination of the evidence that was before the Executive Director and has agreed with the Executive Directors decision in not pursuing charges against R.N.

An important note is that the Executive Director expanded the investigation to determine if there was a conspiracy by the R.N. to conceal latent defects. No evidence of this nature was could be found by this panel. With no evidence of a conspiracy added to the fact R.N. added an inspection clause and a property disclosure statement for the buyer's protection, there is insufficient evidence that R.N. did not act in the Innocent's best interests.

Notwithstanding the strong empathy the panel feels for the Innocent's situation, this panel has remained focused on its responsibility of determining whether or not there was sufficient evidence before the Executive Director to determine if R.N.'s conduct was deserving of sanction.

This panel unanimously agrees in all respects with the Executive Director's decision not to proceed with charges against R.N.

Dated this 8 day of July, 2002

"Sheldon Johnstone"
Hearing Panel Chairman

"Bev Andre"
Bev Andre
Hearing Panel Member

"Marj King"
Hearing Panel Member