

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 47 of the *Real Estate Act*, R.S.A. 2000, c.R-5

AND IN THE MATTER OF a Hearing regarding the conduct of
ROBERT CUNDAL, Real Estate Associate registered with 2 Percent
Realty Max Inc., Brokerage, at all material times

Hearing Panel Members: Mr. Ramey Demian, Chair
Mr. Matthew Wiebe
Ms. Rita Aggarwala

Appearances: Mr. Robert Cundal, for Mr. Cundal

Ms. Tricia Hickey, for the Executive Director
of the Real Estate Council of Alberta

Hearing Date: October 16, 2018 at the offices of the Real
Estate Council of Alberta in Calgary, Alberta

DECISION

UPON considering the materials submitted and submissions made at the
hearing of this matter;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

This case is about the importance of properly dealing with trust funds. Real estate professionals are entrusted with deposit amounts during the course of real estate transactions. These amounts are to be held in trust for the benefit of certain parties to the transactions, as per agreed terms of trust in purchase contracts. Trust monies are essential to the real estate industry, and the public expects real estate funds to be protected as trust funds. Depositing trust funds into non-trust accounts is a serious breach of a real estate professional's obligations, and puts these monies at unnecessary risk.

On August 15, 2018, Mr. Robert Cundal submitted a statement of Admission of Conduct Deserving Sanction ("**ACDS**") in regards to certain events which took place beginning in July of 2016.

On September 17, 2018, the Executive Director (“ED”) of the Real Estate Council of Alberta (“RECA”) issued a Notice of Hearing regarding Mr. Cundal’s conduct.

On October 10, 2018, the ED accepted Mr. Cundal’s ACDS.

A Hearing was held at the RECA offices on October 16, 2018.

B. Issues

As there is an ACDS in this matter, which is accepted by the ED, the only issues to be determined by the Hearing Panel (the “Panel”) are the determinations of sanction and costs. The Panel orders the following sanction, discussed further below:

1. Mr. Cundal must pay a total fine of \$4500 to RECA, within a reasonable timeline to be determined by the ED;
2. There will be no costs awarded in this matter.

It should be noted that the Panel’s decision in this case is very fact-specific. Had Mr. Cundal shown a careless attitude or had he not taken his breaches seriously, the sanction may well have been more severe.

C. Allegations

Section 47(2) of the Act states:

If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the industry member’s conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the industry member is conduct deserving of sanction.

The admissions in the ACDS, deemed by the Panel to be conduct deserving of sanction, are as follows:

1. Mr. Cundal failed to fulfil his fiduciary duties to his client, contrary to Rule 41(d) of the *Real Estate Act Rules* (the “Rules”). Specifically:
 - a. He personally accepted deposit monies that were intended to be held in trust, and did not pay those monies into the brokerage trust account, contrary to the purchase contract the buyer was obligated to comply with;

- b. He kept the monies in a personal account and used it for personal use;
 - c. He failed to return the monies for the benefit of the buyer to the brokerage, for 3 months.
2. Mr. Cundal made misrepresentations to his broker that were reckless or intentional and that misled or deceived the broker or were likely to do so, contrary to Rule 42(a) of the *Rules*. Specifically, the broker asked Mr. Cundal where the deposit was and Mr. Cundal gave him an answer that led him, or may have led him, to believe that the deposit had not been paid.

At the Hearing, Mr. Cundal indicated that the monies were in fact deposited into a business account, not a personal one. The ED did not dispute this. The Panel finds that this information has no bearing on its findings on sanction. What is relevant is that the monies were deposited into a non-trust account and used for non-trust purposes.

D. Facts

The facts surrounding the impugned conduct are provided in the ACDS and summarized here:

1. Mr. Cundal was an agent in a property purchase in July 2016.
2. A purchase contract was entered on July 15, 2016;
3. The purchase contract required an initial deposit of \$1000 and an additional deposit of \$4000;
4. As Mr. Cundal's client was frequently out of town, making it inconvenient to provide a physical bank draft, Mr. Cundal agreed to accept the client's deposits through an email transfer. At the Hearing, it was clarified that the client suggested using email transfer;
5. Mr. Cundal did not verify with his brokerage whether accepting deposits in this way was acceptable;
6. Mr. Cundal accepted the deposits into his own account, intending to issue a bank draft to the brokerage at a later time;
7. Three deposit amounts were received by email: \$1000 on July 15, 2016; \$3000 on July 19, 2016 and \$1000 on July 20, 2016;
8. Between July 20 and July 29, 2016, some of these funds were used by Mr. Cundal for purposes other than what they were intended for;
9. On July 30, Mr. Cundal's broker emailed him asking where the deposit funds were;
10. Mr. Cundal misrepresented to his broker that he was waiting on an amendment and date change;

11. The deposit funds were not provided to the brokerage until 3 months later, when the brokerage received a release letter from the lawyer. At that point, the funds were immediately provided to the brokerage by Mr. Cundal.

The ED explained that Mr. Cundal has been fully co-operative and forthright. He has taken responsibility for his mistakes, and has undertaken education that has helped him to more fully understand the importance of properly handling trust funds.

During the Hearing, Mr. Cundal re-iterated that he understands his actions were wrong, and that more than ever, he understands the importance of trust accounting. The Panel found Mr. Cundal to be honest and sincere.

E. Sanction

The ED refers to *Jaswal v. Newfoundland (Medical Board)* (1996), 138 Nfld. & P.E.I.R. 181, which enumerates a number of factors that hearing panels may consider in determining appropriate sanctions in professional disciplinary matters. The Panel has considered the *Jaswal* factors in arriving at its decision on sanction. The factors are as follows:

1. The nature and gravity of the proven allegations

The parties and Panel agree that the handling of trust funds is a serious matter.

2. The age and experience of the industry professional

Mr. Cundal has been an industry professional for 11 years. The ED submits that Mr. Cundal should be well aware of the importance of handling trust funds properly. Mr. Cundal did not provide any comment. The Panel agrees with the ED.

3. The presence or absence of prior disciplinary issues

Mr. Cundal has not had any previous disciplinary issues.

4. The personal circumstances of the client

This is not a relevant factor here.

5. The number of times the offence occurred

There were 3 email transfers, all pertaining to one client. The ED pointed out that the 3 email transfers, along with the broker's inquiry about the funds several days later, provided Mr. Cundal with multiple reminders to transfer the deposit funds to trust. However Mr. Cundal did not complete the transfer until approximately 3 months later. The Panel agrees that this is not acceptable, and that more care must be taken with trust funds.

6. Acknowledgment by the industry member

Mr. Cundal has taken full responsibility for his breaches, and has undergone educational upgrading.

7. Whether Mr. Cundal has already suffered other serious financial or other penalties as a result of the allegations having been made

No evidence was presented with respect to this factor.

8. The impact of the incident on Mr. Cundal's client

The ED explained during the Hearing that Mr. Cundal's client did not bring the matter forward to RECA rather, Mr. Cundal's broker did. The client was not harmed, and may not even be aware of these proceedings. There is no evidence that the broker was harmed.

9. The presence or absence of mitigating circumstances

As agreed to in the ACDS, Mr. Cundal's daughter was ill at the time of the breaches, and his brokerage was going through a system upgrade. The Panel agrees that these are mitigation circumstances.

10. The need to promote specific and general deterrence and thereby protect the public and ensure safe industry practices

The ED agreed that specific deterrence is not a significant factor here, and that Mr. Cundal never had any intention to misappropriate funds. The more important factor for consideration is general deterrence.

The panel agrees that general deterrence is an important factor in this case, as the mishandling of trust funds is a very serious breach. At the same time, the Panel must balance the various other relevant factors.

11. The need to maintain the public's confidence in the integrity of the real estate industry

The use of trust funds is very important to the real estate industry. By treating trust funds casually or improperly, the industry risks losing the public's confidence.

12. The degree to which the offensive conduct was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct

The *Act* and *Rules* refer to requirements with respect to trust monies and their handling numerous times. Real estate professionals must always be cognizant of the importance of properly handling trust funds. Both parties agree, as does the Panel, that Mr. Cundal's conduct falls outside the range of permitted conduct.

13. The range of sentences in other similar cases

The ED provided three precedents for the Panel to consider. The first is a case where a real estate broker received trust funds into a non-trust account, in the amount of approximately \$90,000, and transferred funds from trust accounts to a non-trust account, in the amount of approximately \$12,500. Combined with other unidentified transfers, a trust fund shortage of \$140,000 was amassed. The diverted trust funds were used in large part to fund the broker's lifestyle. The broker's registration was suspended for 30 months, and he was personally ordered (by agreement) to pay \$30,000 in fines, of which \$15,000 was for the breach of Section 41(d) of the *Rules*. The brokerage was ordered to pay \$45,000 in fines. The ED agrees that the foregoing facts are more extreme than those in Mr. Cundal's situation.

The second precedent is a letter of reprimand issued by the ED to a real estate associate who paid an invoice out of trust funds, contrary to the instructions of her client. The ED argues that Mr. Cundal's actions are more egregious than the actions of the associate in this precedent.

The third precedent involves a situation where misrepresentations were made by an associate. Specifically, the associate indicated he had done credit checks when he had not; made statements regarding ownership and ability to pay that were not verified; and misrepresented his role in a transaction. The parties in that case

agreed to a total fine of \$4500, of which \$3000 was for the breach of section 42(a) of the *Rules*.

Mr. Cundal did not provide any additional precedents.

F. Decision on Sanctions and Costs

The ED suggests a fine of \$6000 for the breach of Section 41(d) of the *Rules*, and a fine of \$1500 for the breach of Section 42(a) of the *Rules*. In addition, the ED suggests an order of \$500 in costs.

Mr. Cundal believes these amounts are high, and that perhaps a letter of reprimand is more appropriate in this situation.

Taking into the account the facts of this as well as the *Jaswal* factors, including

- The serious nature of the offences of mishandling trust funds and misrepresentation, and the need for general deterrence;
- The delay in depositing the deposit monies into the trust account;
- Mr. Cundal's personal situation at the time of the impugned conduct;
- That Mr. Cundal has taken responsibility for his conduct, and has since completed further industry education.

The Panel finds that a fine is warranted in these circumstances, but not in the amount suggested by the ED. The Panel according orders the following:

1. For the breach of Section 41(d) of the *Rules* (fiduciary duties), Mr. Cundal is ordered to pay a fine of \$3000.
2. For the breach of Section 42(a) of the *Rules* (misrepresentation), Mr. Cundal is ordered to pay a fine of \$1500.
3. As Mr. Cundal has succeeded in his request for a lower fine than what was suggested by the ED, and because a Hearing is required by the *Act* in the circumstances of an ACDS, no costs are ordered.

G. Conclusion

In accordance with the above reasons, the Panel orders the following sanction against Mr. Cundal:

1. Mr. Cundal must pay a total fine of \$4500 to RECA, within a reasonable timeline to be determined by the ED;

2. There will be no costs awarded in this matter.

Dated at the City of Calgary in the Province of Alberta, this 23rd day of October, 2018.

Hearing Panel of the
Real Estate Council of Alberta

Ramey Demian, Hearing Panel Chair