

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
WAYNE DOUGLAS LAND, Real Estate Broker with
Oakwood Property Management Ltd., at all material times

Hearing Panel Members: Mr. Stan Mills, Chair
Ms. Angela Kolody
Ms. Rita Aggarwala

Appearances: Mr. Douglas Jenkins for Mr. Land

Ms. Leanne Monsma, for the Executive Director of
the Real Estate Council of Alberta (the "ED")

Hearing Date: February 19, 2019 via telephone conference

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 is a case about the proper use of trust funds in the context of property management. The ability to hold funds in trust is essential for the efficient functioning of the property management industry. Trust funds must be held in strict accordance with relevant agreements and legislation. Using trust funds for purposes other than those for which they are held is a serious breach of a real estate professional's obligations.

Mr. Land has submitted a statement of Admission of Conduct Deserving Sanction ("**ACDS**") dated January 22, 2019, in regards to certain events which took place between December 2016 and February 2017. The ACDS was accepted by the ED on January 31, 2019.

The parties have submitted a Joint Submission on Sanction (“JSOS”), dated January 22, 2019. The jointly proposed sanction arising from Mr. Land’s conduct is as follows:

- a. Fines of \$5,000 each for two breaches of Section 25(1)(d) of the *Real Estate Act* (the “**Act**”), to be paid by Mr. Land within 6 months of this Panel issuing an order;
- b. A suspension of Mr. Land’s authorization to trade in real estate under the *Act*, for a period of 3 months, commencing on the issuance of this Panel’s order;
- c. The successful completion of two education courses within 6 months of the issuance of this Panel’s order, the courses being
 - i. *Real Estate Act, Rules and Regulations* course (Unit 2 of the Fundamentals of Real Estate); and
 - ii. *Ethics, Professionalism and Risk Reduction* (Unit 12 of the Fundamentals of Real Estate);
- d. Costs in the amount of \$500.

B. Issues

As there is both an ACDS and a JSOS in this matter, the only issue to be determined by the Panel is whether the sanction in the JSOS ought to be accepted, or whether the Panel ought to substitute a different sanction on the facts of this case.

For the reasons discussed below, the Panel accepts the JSOS and makes the order requested. For clarity, the costs of the education courses prescribed are to be borne by Mr. Land.

C. Facts

The facts giving rise to conduct deserving of sanction are provided in the ACDS and are summarized here. Although not specifically stated in the ACDS, the Panel understands that it was Mr. Land who directed Oakwood Property Management Ltd.’s actions throughout the period:

1. In June of 2016, Oakwood Property Management Ltd., which is a corporation owned by Mr. Land, entered into written property management agreements with
 - a. [“Company”]] for the management of 17 properties, and
 - b. GN, the owner of [“Company”]], for the management of 15 properties.

2. Both property management agreements contained clauses indicating that Oakwood would
 - a. manage and operate the properties in accordance with applicable laws, and
 - b. manage tenant security deposits in accordance with the *Residential Tenancy Act of Alberta*.
3. In July of 2016, Oakwood was provided with security deposits for 5 properties under the [{"Company"}] agreement and for 2 properties under the GN agreement. These amounts were provided by the outgoing property manager.
4. In August 2016, Oakwood used rent monies to create security deposits for 6 of the [{"Company"}] properties for which no security deposit was held, and for 2 of the GN properties for which no security deposit was held. All securities deposits were held in security deposit trust accounts.
5. In November 2016, GN terminated both property management agreements, effective December 15, 2016.
6. On December 15, 2016, Oakwood held \$12,085 in security deposit trust funds for the [{"Company"}] properties and \$4,345 in security deposit trust funds for the GN properties.
7. These security deposit trust funds were not transferred to the new property manager. Instead they were transferred out of the security deposit trust accounts and used to pay for
 - a. expenses incurred by Oakwood in respect of the [{"Company"}] and GN properties, and
 - b. management fees allegedly owed to Oakwood under the [{"Company"}] and GN property management agreements.
8. Specifically, the security deposit trust funds held for the GN properties were used to pay for expenses and fees arising from the GN agreement.
9. The security deposit trust funds held for the [{"Company"}] properties, along with trust funds from a separate account for [{"Company"}], were used to pay for expenses and fees arising from both the [{"Company"}] properties and the GN properties.
10. Following the December 2016 adjustments, no monies remained in the GN security deposit trust account. \$4,245.91 from [{"Company"}] trust funds remained, and Oakwood continued to hold that amount. It is not clear what kind of account those funds were held in, though the statements indicate all monies from security deposit trust accounts had been transferred.
11. Oakwood issued additional account statements in January 2017 and February 2017, indicating expenses incurred by Oakwood on the [{"Company"}] and GN properties. Money obtained from [{"Company"}] trust funds were used to pay for these expenses, for both the [{"Company"}] and GN properties.

12. Following the February 2017 account statements, \$51.90 remained from the [{"Company"}] trust funds, which amount was transferred to Mr. GN.
13. On January 15, 2019, Oakwood repaid \$12,085 to [{"Company"}] and \$4,345 to Mr. GN.

D. Conduct Deserving Sanction

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 ACDS contains the following breaches (presented here in summary form), agreed to by the parties and arising from the conduct summarized above. These admissions are deemed by the Panel to be conduct deserving of sanction:

Between December 2016 and February 2017, Mr. Land used money held in trust for both the [{"Company"}] and the GN properties, in a manner contrary to

- a. Rule 96 of the *Real Estate Act Rules* (the "**Rules**"), and
- b. the terms of the trust (including the term requiring security deposits to be managed in accordance with the *Residential Tenancies Act*), thereby in violation of section 25(1)(d) of the Act.

Specifically, the following is a list of the improper use of trust funds:

Transfers from [{"Company"}] trust funds, for [{"Company"}] fees and expenses:

- a. security deposit trust funds from [{"Company"}] properties were used to pay Oakwood's management fee under the [{"Company"}] agreement;
- b. security deposit trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood under the [{"Company"}] agreement in December;
- c. security deposit trust funds and other trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood on [{"Company"}] properties in January;

- d. security deposit trust funds and other trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood on [{"Company"}] properties in February;

Transfers from GN trust funds, for GN fees and expenses

- e. security deposit trust funds from GN properties were used to pay part of Oakwood's management fee under the GN agreement;

Transfers from [{"Company"}] trust funds, for GN fees and expenses:

- f. security deposit trust funds and other trust funds from [{"Company"}] were used to pay part of Oakwood's management fee under the GN agreement;
- g. security deposit trust funds and other trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood under the GN agreement in December;
- h. security deposit trust funds and other trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood on GN properties in January;
- i. security deposit trust funds and other trust funds from [{"Company"}] were used to pay expenses incurred by Oakwood on GN properties in February;

Rule 96 of the *Rules* states:

Subject to section 97 of these Rules [which does not apply here], a brokerage shall not pay any of the brokerage's personal or general office expenses, commission or other remuneration payable to the brokerage's own authorized officials, brokers or associates out of an account in which money is held in trust.

Section 25(1)(d) of the *Act* states:

An industry member who is required by the rules to keep and operate a trust account shall ... (d) disburse money received or held in trust in respect of a dealing or trade in the business of the industry member only in accordance with the rules and with the terms of the trust governing the use of that money.

Although the parties did not address any specific provisions of the *Residential Tenancies Act* or its regulations, it is apparent from a review of that act and the *Residential Tenancies Ministerial Regulation* that security deposit trust funds are to be used strictly as security deposits, or in certain cases, as final payments of rent for departing tenants.

E. Sanction

Section 43 of the Act provides the Panel with authority to order a sanction where there is finding of conduct deserving of sanction:

43(1) If a Hearing Panel finds that the conduct of an industry member was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:

- (a) an order cancelling or suspending any authorization issued to the industry member by the Council;
- (b) an order reprimanding the industry member;
- (c) an order imposing any conditions or restrictions on the industry member and on that industry member's carrying on of the business of an industry member that the Hearing Panel, in its discretion, determines appropriate;
- (d) an order requiring the industry member to pay to the Council a fine, not exceeding \$25 000, for each finding of conduct deserving of sanction;
- (e) any other order agreed to by the parties.

(2) The Hearing Panel may, in addition to or instead of dealing with the conduct of an industry member under subsection (1), order the industry member to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

The parties in this case have submitted a Joint Submission on Sanction. The JSOS address the *Jaswal* factors, from *Jaswal v. Newfoundland (Medical Board)* (1996), 138 Nfld. & P.E.I.R. 181, in arriving at the parties' joint proposal on sanction. The factors, slightly modified for the purposes of this tribunal, are as follows:

a. The nature and gravity of the proven allegations

In this case, the allegations deal with the proper use of trust funds, which is an important part of a real estate professional's obligations.

b. The age and experience of the industry member

The ACDS states that Mr. Land has been a real estate broker since the formation of RECA, and was a real estate professional before that. Mr. Land's counsel indicated that Mr. Land has been a property manager since 1982.

- c. The previous character of the offender and, in particular, the presence or absence of prior complaints or convictions

Mr. Land has not had any disciplinary history and has been member in good standing with RECA since 1997.

- d. The number of times the offence was proven to have occurred

As outlined above, there were 9 proven improper uses of trust funds, though there were less than this number of actual money transfers.

- e. The role of the industry member in acknowledging what occurred

As explained in the ACDS, Oakwood voluntarily repaid the amounts improperly transferred, to both [{"Company"}] and Mr. GN. During the hearing, Mr. Land's counsel explained that he directed Oakwood to do so within a couple of months of becoming aware of RECA's investigation. Furthermore, Mr. Land cooperated with the investigation, and worked with conduct counsel for RECA to reach a resolution by agreement, saving the time, expense, inconvenience and stress of a contested hearing.

- f. Whether the industry member has already suffered serious financial or other penalties as a result of the allegations having been made

Although there is no evidence that Mr. Land is subject to any other penalties for the impugned conduct, his counsel did point out that the limitation period for bringing an action against [{"Company"}] and Mr. GN in civil court has likely expired, so that Oakwood may not be able to recover its management fees and expenses using that venue.

- g. The impact on victims, if any

There is no evidence indicating whether any tenants experienced harms as a result of Mr. Land's conduct.

- h. Additional mitigating circumstances

None have been put forward by the parties.

- i. Additional aggravating circumstances

The parties point out the following: that Mr. Land engaged in willful and intentional conduct; and that he breached fiduciary duties to his client.

- j. The need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession

The parties submit that there is a need to promote specific and general deterrence to ensure that Mr. Land and other real estate professionals realize that such conduct will be met with consequences.

- k. The need to maintain the public's confidence in the integrity of the profession

The parties submit that Mr. Land's conduct does harm the reputation of the real estate industry.

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

There is general agreement that the improper administration of trust funds is a serious breach of professional conduct by real estate professionals.

- m. The range of sentences in similar cases

The parties have put forward a number of precedents involving the improper use of trust funds, the most factually similar being the 2017 decision of a hearing panel of RECA regarding the conduct of Judy Nelson (RECA Case 005359).

In the *Nelson* case, the industry member admitted to improperly handling trust funds. Specifically, on 9 separate occasions over a 4-month period, funds totalling \$21,000 were improperly transferred from a trust account to the general operating account of the brokerage. Following a practice review, the shortfall was promptly funded by Ms. Nelson. The listed breaches included a breach of section 25(1)(d) of the Act.

In *Nelson*, as here, the industry member signed an admission of conduct deserving sanction, and the parties prepared a joint

submission on sanction and costs. The proposed sanction included a \$5,000 fine for the breaches of section 25(1)(d) of the Act; a 3 month suspension of Ms. Nelson's authorization to trade in real estate under the Act; an education requirement; and \$500 in costs.

The parties submit that the Panel must only interfere with an agreed submission on sanction if the proposed sanction "would bring the administration of justice into disrepute or is otherwise contrary to the public interest." In other words, if the proposed joint sanction is so "markedly out of line with expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system," (citing *R. v. Anthony Cook*, 2016 SCC 43). The threshold for interference in joint submissions for sanctions is high.

The Panel finds that the JSOS does not offend the public interest in this case. Breaches dealing with the improper use of trust funds are serious breaches. In this case, in particular, Mr. Land comingled funds from multiple trust accounts and treated those trust funds as a single fund from which he could pay Oakridge amounts allegedly owing from two separate clients. There was significant disregard to both the trust nature of the property, and the distinction between separate client entities. The *Nelson* precedent provided by the parties is largely on point, with a similar sanction.

F. Conclusion and Order

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

1. Mr. Land is ordered to pay a total fine of \$10,000, being \$5,000 each for breaches of Section 25(1)(d) of the Act in regards to 2 clients, within 6 months of the date of this decision;
2. Mr. Land's authorization to trade in real estate under the Act, is suspended for a period of 3 months, commencing on the date of this decision;
3. Mr. Land is required to successfully complete the following education courses within 6 months of the date of this decision, at his own expense:
 - a. *Real Estate Act*, Rules and Regulations course (Unit 2 of the Fundamentals of Real Estate); and
 - b. Ethics, Professionalism and Risk Reduction (Unit 12 of the Fundamentals of Real Estate);
4. Mr. Land is ordered to pay costs in the amount of \$500.

Dated at the City of Lethbridge in the Province of Alberta, this 28th day of February, 2019.

Hearing Panel of the
Real Estate Council of Alberta

Stan Mills, Hearing Panel Chair