

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Sections 39, 41, 46 and 47 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "*Real Estate Act*")

AND IN THE MATTER OF a Hearing regarding the conduct of JESSE MACLEAN, Real Estate Associate, registered with Masters Realty Ltd. o/a Century 21 Masters, previously registered with Hope Street Real Estate Corp.

Hearing Panel Members: Stan Mills, Chair
Susan Rabbitte
Kathryn Oviatt

Appearances: Tracy Leonardo, legal counsel for the Executive Director of the Real Estate Council of Alberta
Jesse MacLean, on his own behalf

Hearing Date: August 14, 2019, via telephone

**DECISION ON CONDUCT DESERVING OF SANCTION
AND
DECISION ON SANCTION AND COSTS**

A. Introduction

The conduct deserving of sanction relates to the execution of a residential tenancy lease. Mr. Maclean has been licensed as a real estate associate with the Real Estate Council of Alberta ("RECA") since July 10, 2015. At all material times, Mr. Maclean was registered as a real estate associate with Hope Street Real Estate Corp.

The parties jointly submitted an Admission of Conduct Deserving of Sanction document to the Hearing Panel, dated July 24, 2019. The parties also submitted a Joint Submission on Sanction, dated July 23, 2019.

Jesse Maclean signed the Admission of Conduct, which included an acknowledgment that he was given an opportunity to seek legal advice prior to signing the Admission of Conduct, a statement that he agreed to the Admission of Conduct voluntarily, an admission of the facts and breaches set out in the Admission of Conduct, and an admission that his conduct was deserving of sanction.

The parties did not object to the composition of the Hearing Panel.

B. Conduct Deserving of Sanction

Mr. Maclean admitted that the following conduct, which occurred in November 2017, was conduct deserving of sanction:

- a) Mr. Maclean did not provide competent service, contrary to section 41(b) of the *Real Estate Act Rules*:
 - i. Mr. Maclean separated the carbon copies of a Residential Tenancy Agreement (the "Agreement") before filling in all of the applicable sections;
 - ii. Mr. Maclean did not ensure that the tenant initialled all of the pages of the Agreement;
 - iii. Mr. Maclean did not fill in the breach and termination section of the Agreement prior to separating the document, leaving the term blank on the tenant's copy;
 - iv. Mr. Maclean did not have the tenant's spouse, named as co-tenant, sign or initial the Agreement;
 - v. Mr. Maclean created two different Agreements for the lease of one property.

- b) Mr. Maclean made representations and carried on conduct that was reckless, and misled or deceived the tenant and his broker, contrary to section 42(a) of the *Real Estate Act Rules*:
 - i. Mr. Maclean added information to the Agreement after it was signed by the tenant, including the name of the tenant's spouse as co-tenant and the tenant's children as occupants;
 - ii. Mr. Maclean added the tenant's spouse as co-tenant on the Agreement even though he knew that she was not in the country and would not be present or available to sign and initial the Agreement;
 - iii. Mr. Maclean added the tenant's spouse as co-tenant knowing that because they were both named on the rental application, they would both have to be tenants of the property;
 - iv. Mr. Maclean did not advise the tenant or his broker that he added the tenant's spouse as co-tenant to the Agreement after it was signed by the tenant, nor did he provide a copy of the altered Agreement to the tenant;

- v. Mr. Maclean submitted the altered Agreement to his brokerage, knowing that it was not the same as the copy provided to the tenant, misleading his broker to believe that both rental applicants had agreed to be co-tenants and signed the Agreement.

C. Issues

Since s. 47(2) of the *Real Estate Act* deems each admission to be a finding of the Hearing Panel that the conduct is conduct deserving of sanction, the only issue arising in this hearing is as follows:

1. Should the Hearing Panel accept the Joint Submission on Sanction in the circumstances?

D. Applicable sections of the *Real Estate Act* and *REA Rules*

Mr. Maclean admitted that he breached ss. 41(b) and 42(a) of the *Real Estate Act Rules* ("*REA Rules*"). Section 41 sets out the standards of conduct for industry members for actions that they must take. Section 41(b) provides:

41 Industry members must:

...

(b) provide competent service;

Section 42 of the *REA Rules* sets out prohibited conduct. Section 42(a) provides:

Industry members must not:

(a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so;

Sections 46 and 47 of the *Real Estate Act* refer to situations where the Industry Member admits to conduct deserving of sanction.

Section 46(1) permits an industry member to submit a statement of admission of conduct deserving of sanction at any time prior to the Hearing Panel making its findings:

46(1) An industry member may, at any time after the commencement of proceedings under this Part and before a Hearing Panel makes its findings in respect of the industry member's conduct, submit to the executive director a statement of admission of conduct deserving of sanction in respect of all or any of the matters that are the subject matter of the proceedings.

...

Section 47 sets out the effect of an accepted admission entered at a hearing:

47(1) If a statement of admission of conduct is accepted, the executive director shall immediately refer the matter to a Hearing Panel, and in that case the Hearing Panel shall deal with the matter as if it had been referred to it under section 39(1)(b).

(2) 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.

Once conduct deserving of sanction has been established, section 43 of the *Real Estate Act* sets out the authority of the Hearing Panel to fashion a remedy:

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;

(d.1) an order prohibiting the industry member from applying for a new authorization for a specified period of time or until one or more conditions are fulfilled by the industry member;

(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.

E. Exhibits

The following exhibits were entered at the Hearing:

1. Notice of Hearing dated July 29, 2019;
2. Affidavit of Service dated August 6, 2019;
3. Admission of Conduct Deserving of Sanction dated July 24, 2019;
4. Joint Submission on Sanction dated July 23, 2019 and case law to support:

Tab 1 – *Jaswal v Newfoundland (Medical Board)*, 1996 CarswellNfld 32

Tab 2 – *Adams v Law Society of Alberta*, 2000 ABCA 240

Tab 3 – *Law Society of Upper Canada v Lambert*, 2014 ONLSTH 158

Tab 4 – *Ira Ross* (RECA 2016)

Tab 5 – *Keith Faria* (RECA 2015)

Tab 6 – *Scott Lambert* (RECA 2016)

Tab 7 – *Naveed Ul Haq Shah* (RECA 2014)

Tab 8 – *R v. Anthony-Cook*, 2016 SCC 43

F. Facts

The Hearing Panel accepts the Admission of Conduct, including the Agreed Facts. Portions of the Agreed Facts are set out below:

...

9. On November 26, 2017, Mr. Maclean met with [the tenant] at the Property to sign the Agreement. Mr. Maclean reviewed the Agreement with [the tenant]. [The tenant] was the only tenant listed on the agreement. The rental term on the Agreement was for a 6-month period...

10. [The tenant] signed the Agreement and initialled on pages 1 and 4 of the Agreement but not pages 2 and 3. Page 2 of the Agreement included additional terms (ie. Security Deposit, Tenant's Obligations). Page 3 includes the Rules and Regulations of the Agreement.

11. After signing the Agreement with [the tenant], Mr. Maclean separated the carbon copy pages to give one to [the tenant]. Mr. Maclean did not fill in the re-rental fee in Term #3 prior to separating the Agreement...

12. Mr. Maclean filled in the re-rental fee of \$2350.00 after the copies were separated and only on the brokerage copy of the Agreement.

13. At some point after the meeting with [the tenant] and prior to submitting the Agreement to his brokerage, Mr. Maclean altered the Agreement by adding [the tenant's] spouse as a co-tenant and his

children as occupants of the Property. [The tenant's spouse] did not review or sign the Agreement, even though Mr. Maclean had previously advised [the tenant] that she would have to do so if she was going to be listed as a co-tenant.

14. Mr. Maclean did not advise [the tenant] of any of the amendments to the Agreement or send him a copy. Mr. Maclean then submitted the altered Agreement to his brokerage.

15. On or about January 11, 2018, [the tenant] contacted Hope Street to inquire how to give notice to terminate his Agreement. ...

...

19. During the discussions between [the broker] and [the tenant], it was discovered that [the tenant's] copy of the Agreement was not the same as the copy of the Agreement provided to the brokerage.

20. While negotiating the termination of his Agreement with [the broker], the rental Property was listed for sale. The Property sold and the broker and [the tenant] agreed that he would not have to pay the re-rental fee, but he would continue to pay rent until the closing date on the sale of the Property. [The tenant] ultimately paid rent on the Property for 5 months.

G. Sanction

The parties submitted a Joint Submission on Sanction. Counsel for the Executive Director presented an oral summary of the Joint Submission on Sanction. Mr. Maclean indicated that he agreed with the Executive Director's submissions and did not make any further submissions.

The Hearing Panel accepts the direction from the Supreme Court of Canada in relation to criminal sentencing that a joint submission should only be overturned if it will bring the administration of justice into disrepute or is otherwise contrary to the public interest: *R. v. Anthony-Cooko*, 2016 SCC 43 at para. 33.

The Hearing Panel gives substantial deference to the Joint Submission on Sanction and notes that it addressed the relevant factors identified in the seminal case of *Jaswal v. Medical Board (Nfld.)*, 1996 CarswellNfld 32,1996 CANLII 11630 ("*Jaswal*").

The age and experience of the Industry Member

Mr. Maclean is 39 years old and at the relevant time he had approximately two years of experience in the industry. The Hearing Panel takes into consideration his relatively young age and experience in fashioning this award. However, it

also notes that Mr. Maclean had direct experience in tenant leasing and that he completed the Fundamentals of Real Estate Part 1 in July 2014 and the Fundamentals of Real Estate Part 2 in January 2015, both of which provide knowledge in the areas of contract law and consumer relationships. Mr. Maclean had sufficient training and experience that he should have known better.

The previous character of the Industry Member

Mr. Maclean has no disciplinary history.

The number of times the offence was proven to have occurred

There were two separate breaches of the REA Rules, pertaining to the same transaction, which occurred over November 2017. The Hearing Panel has considered that there does not appear to be a pattern or repeat offences.

The nature and gravity of the of the proven allegations

The nature of the proven allegations is serious. Mr. Maclean altered an executed contract before submitting it to his brokerage. He both added a tenant without her knowledge or consent and added a re-rental fee. He failed to advise either his brokerage or the tenant of the alterations. The Hearing Panel agrees with the Executive Director that this conduct was serious in both nature and gravity since it goes to industry competence, credibility and trust.

The impact of the incident on the Complainant

There was a negative impact on the tenant in both stress and inconvenience by having to insist on the terms of the agreement in negotiating a termination of the lease.

In addition, the Hearing Panel noted that Mr. Mclean's actions failed to protect the brokerage's interests and the brokerage was unable to enforce the re-rental fee.

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

Mr. Maclean's conduct harmed the reputation of the real estate industry. The Hearing Panel agrees that public confidence in the profession is of critical importance to RECA's mandate: *Adams v Law Society of Alberta*, 2000 ABCA 240.

The role of the industry member in acknowledging what occurred

Mr. Maclean signed an admission of conduct deserving of sanction pursuant to section 46 of the *Real Estate Act*, which saved RECA the time and expense of a contested hearing and saved witnesses the inconvenience and stress of having to attend and testify at a hearing.

General and specific deterrence

There is a need for general deterrence. Industry members need to recognize that harm to public confidence in the real estate industry comes with sanctions.

In addition, the Hearing Panel agrees with the Executive Director that there is a need for specific deterrence in this case. Although Mr. Mclean admitted his conduct at the hearing, as discussed above, he initially failed to take responsibility and tried to blame his former brokerage for his actions. He was also reckless in his responses to RECA's investigator.

Previous Sanctions in similar circumstances

The parties submitted several cases that were relevant to sanction. The Executive Director submitted, and Mr. Maclean adopted her submissions, that the facts of this case are more serious than the precedents provided, which justified a slightly higher sanction in the circumstances. The Hearing Panel agrees.

For the breach of Rule 41(b), the Executive Director presented the following cases:

Ira Ross, RECA 2016

The Industry Member received fine of \$1,500 for each breach of the *REA Rules* when he failed to ensure that the parties signed all of the necessary documents for a purchase of agricultural land.

Keith Faria, RECA 2015

The Industry member received an administrative penalty of \$1,500. He inserted a clause into a purchase contract that exposed his client to a risk of losing a landscaping deposit. He also failed to adequately explain to his client the options available in placing the deposit into trust. The client lost the deposit.

For the breach of Rule 42(a), the Executive Director presented the following cases:

Scott Lambert, RECA 2016

The Industry Member was fined \$3,000 for each breach of Rule 42(a). He made misrepresentations to the seller's representative in negotiating a rent-to own agreement. These misrepresentations included that he had performed a credit check on his client, that she owned a property that was in the midst of selling and could not qualify for financing until then, and was willing to pay substantial deposits and pay rent until she could buy the property. The Industry Member had not performed a credit check or confirmed that his client owned property.

Naveed Ul Haq Shah, RECA 2014

The Industry Member was fined \$2,000 after he failed to complete a waiver of conditions, to specify the terms of trust for a deposit on a purchase contract, and to have his and his client's signatures witnessed on the purchase contract.

The Hearing Panel agrees with the parties that the *Jaswal* factors described above are the appropriate considerations in this matter. In particular, the Hearing Panel finds that the mitigating factors in this matter are as follows:

- a. Mr. Maclean has no disciplinary history.
- b. Mr. Maclean has admitted his conduct and entered into consent agreements both on the conduct deserving of sanction. This allowed RECA to forgo the time and expense of a hearing, and saved witnesses the inconvenience and stress of appearing.

Similarly, the Hearing Panel finds that the aggravating factors in this matter are as follows:

- a. The conduct at issue was serious, going to Mr. Maclean's honesty as well as competence. The conduct harmed or potentially harmed the reputation of the industry.
- b. Mr. Maclean exposed his client and his brokerage to liability for the costs associated with cancelling the Agreement.
- c. Mr. Maclean, in acting as agent for the landlord, exposed the landlord to potential loss of income or rent.
- d. Mr. Maclean had experience completing residential tenancy agreements. He should have known how to properly fill in the material information in the Agreement and should have been aware of the

- importance of fully completing a contract and not altering a contract after it was signed by the tenant.
- e. When confronted by his broker, Mr. Maclean was unable to provide an explanation for the discrepancies in the two Agreements and attempted to cover up his conduct to escape culpability.
 - f. Mr. Maclean deflected responsibility for his conduct by:
 - i. indicating to the investigator many times that his brokerage did not provide him with adequate training,
 - ii. downplaying his experience with residential tenancy agreements, and
 - iii. pointing out that it was not a coincidence that a complaint was made about him at a time when it was well known that he was planning to leave his employment at Hope Street.
 - g. Mr. Maclean was reckless in answering questions of the investigator regarding the details of the events surrounding the transaction, including changing his response when presented with contradictory evidence and making assumptions, rather than taking the time to inform himself of all information available or to refresh his memory so he was providing an accurate or reliable answers.
 - h. Mr. Maclean provided multiple explanations to the investigator as to how and when the tenant's spouse was added to the Agreement as co-tenant. When his first explanation was contradicted by the evidence, he provided an alternate explanation, but then indicated he could not recall the event.

The proposed sanction is appropriate in the circumstances and is consistent with previous decisions in similar circumstances. It is appropriate to give higher fines than those imposed in the cases cited above because of the increased seriousness of the facts of this case.

The proposed fines for each breach of the *REA Rules* are appropriate. Similarly, the proposed coursework in Contract Law is rationally connected to the conduct and will assist Mr. Maclean in improving his expertise and knowledge going forward.

Lastly, we find that the proposal for costs is appropriate. It is appropriate for Mr. Maclean to bear some of the costs of this matter. However, given his cooperation and participation in proceeding by admission, the costs are appropriately limited to an amount less than the actual investigation and hearing costs.

The Hearing Panel is satisfied that the parties have carefully considered the relevant factors with a view to protection of the public and rehabilitation of Mr. Maclean. The Joint Submission on Sanction is in the public interest.

H. Conclusion and Order

Mr. Maclean is deemed to have engaged in conduct deserving of sanction for two breaches of the *REA Rules*, rule 41(b) and rule 42(a).

The Hearing Panel orders the following sanction:

1. Fines to be paid as follows:
 - a. for the breach of rule 41(b) of the *REA Rules* \$3,000;
 - b. for the breach of rule 42(a) of the *REA Rules* \$5,000.
2. Course work to be completed within six months of the date that this Decision is issued, as follows:
 - a. Education Upgrade Course: "Contract Law".
3. Costs in the amount of \$500.

This decision is certified and dated at the City of Lethbridge in the Province of Alberta, this 19th day of August, 2019.

Stan Mills, Hearing Chair