

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 47 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "Act")

AND IN THE MATTER OF a Hearing regarding the conduct of CORNELIS UITTENBOGERD, Real Estate Associate registered at all material times to Linview Realty Inc., Brokerage ("Linview")

Hearing Panel Members: Ms. Rita Aggarwala, Public Member, Chair
Mr. Gordon Reekie, Industry Member
Mr. Matthew Wiebe, Industry Member (the "Panel")

Appearances: Joint Written Submissions

Date of Decision: March 3, 2020

DECISION

OVERVIEW

The facts of this case are agreed to by the Executive Director ("ED") and the industry member, Mr. Uittenbogerd. Briefly, in 2011, Mr. Uittenbogerd and/or his wife decided to purchase a 26-acre property in Kneehill County, Alberta (the "Property"). The Property was listed for sale by an associate of Linview named ["M.C"]. Linview was a common law brokerage. This means that as an associate of Linview, Mr. Uittenbogerd was deemed to also be an agent for the sellers of the Property. This created a conflict of interest that Mr. Uittenbogerd did not disclose to the sellers. Mr. Uittenbogerd proceeded with the purchase as though he had no agency relationship with the sellers. The property was sold to Mr. and/or Mrs. Uittenbogerd for significantly less than the listed price, and Mr. Uittenbogerd proceeded to subdivide it into 6 lots and list each lot for sale. The subdivided properties have been listed for sale but have not yet sold.

Mr. Uittenbogerd and the ED have agreed to a number of breaches of the *Real Estate Act Rules* (the "Rules") by Mr. Uittenbogerd. These breaches are listed in Mr. Uittenbogerd's Admission of Conduct Deserving of Sanction ("ACDS"), which also enumerates the agreed upon facts in more detail. Mr. Uittenbogerd and the ED have also submitted a Joint Submission on Sanction ("JSOS"). Both the ACDS and the JSOS are dated January 24, 2020.

Because there is an agreement as to facts and the parties have come to an agreement on sanction, the only task remaining for the Panel is to determine

whether the sanction proposed in the JSOS ought to be accepted, or whether the Panel ought to substitute a different sanction based on the facts of this case. For the reasons below, the Panel accepts the proposed sanction.

A telephone hearing for this matter was originally scheduled for February 26, 2020, however the parties have requested the hearing proceed in writing only. The Panel accepts this request. It has reviewed the written materials provided by the parties, and the following is its decision in the matter.

DECISION

For the following reasons, the Panel accepts the sanction proposed in the JSOS and makes the order requested.

CONDUCT DESERVING OF SANCTION

According to Section 47(2) of the Act, the admissions in the ACDS are deemed to be findings of this Panel that the conduct of Mr. Uittenbogerd is deserving of sanction. These admissions are:

- Breaches of Rules 57(3) and 41(d) dealing with fiduciary duties of industry members, specifically:
 - Mr. Uittenbogerd did not explain to the sellers that he was in a conflict of interest;
 - Mr. Uittenbogerd did not explain to the sellers that he was their agent and had fiduciary duties towards them;
 - Mr. Uittenbogerd did not provide information he had to the sellers about the Property;
 - Mr. Uittenbogerd did not properly inform the sellers of the compensation structure of the sale.
- A breach of Rule 59 dealing with transaction brokerage agreements, specifically:
 - Mr. Uittenbogerd did not offer a transaction brokerage agreement to the sellers.
- A breach of Rule 42(a) dealing with reckless or intentional conduct which misleads or deceives, specifically:
 - As a result of Mr. Uittenbogerd not explaining to the sellers that he was their agent and instead behaving as though he had no agency relationship with them, the sellers were misled into believing they had limited rights to disclosure of information from Mr. Uittenbogerd.

- A breach of Rule 62(1)(b) dealing with personal trades in real estate, specifically:
 - Mr. Uittenbogerd did not make the required disclosures to the sellers regarding the transaction.

The Panel finds these admissions to be conduct deserving of sanction. The question of sanction therefore needs to be addressed.

THE PROPOSED SANCTION IS ACCEPTED

In their JSOS, the parties propose the following sanction:

- For the breaches of Rules 57(e) and 41(d), a fine of \$3500;
- For the breach of Rule 59, a fine of \$3500;
- For the breach of Rule 42(a), a fine of \$7500;
- For the breach of Rule 62, a fine of \$1500;
- A 1 month suspension;
- Costs in the amount of \$1500.

The parties have provided joint submissions on how they have come to this proposal, with a thorough review of the factors which RECA Panels routinely consider in sanctioning, including precedents for the Panel's consideration. Both parties are represented by counsel.

The question the Panel must consider in determining whether to accept the proposed joint sanction is: would the proposed sanction bring the administration of justice into disrepute or is it otherwise contrary to the public interest? The threshold to alter a jointly proposed sanction is high. Analogous questions to consider are:

- Would reasonable persons aware of the circumstances view the imposition of the sanction as a break down of the proper functioning of the discipline system?
- Would the proposed sanction cause an informed and reasonable public to lose confidence in the administrative tribunal system?

The Panel has reviewed all of the parties' submissions and has considered the precedents provided. Specifically:

- The parties have agreed that the following mitigating factors are relevant:
 - Mr. Uittenbogerd has no previous disciplinary history;
 - Mr. Uittenbogerd was cooperative during the investigation and has taken responsibility for his misconduct;

- Mr. Uittenbogerd has suffered lost sales and business due to the investigation;
- All of the breaches involve a single transaction in real estate.
- The parties have agreed that the following aggravating factors are relevant:
 - Mr. Uittenbogerd was relatively experienced;
 - There were multiple breaches associated with the single transaction at issue, and these breaches could have affected the price of the Property;
 - Mr. Uittenbogerd was personally enriched by his misconduct;
 - Mr. Uittenbogerd's misconduct damages the collective reputation of the Alberta's real estate industry;
 - Mr. Uittenbogerd completed a course dealing with conflicts of interest and fiduciary obligations approximately 3 years before entering this transaction.
- The parties have provided two precedents which have similar fact patterns to the current case: *Novick* and *Kalia*, which is currently under appeal. The total fines in *Novick* were \$22,500, with a costs order of \$17,151.39. The total fines in *Kalia* were \$20,000. A 3-month suspension was ordered and costs were ordered in the amount of \$13,294.

The parties propose total fines of \$16,000, a 1-month suspension and a costs order of \$1500.

Having reviewed all of the joint submissions, both with respect to facts and sanction, we find the proposed sanction is within the range of sanctions ordered in RECA decisions based on similar facts and circumstances. The proposed sanction is not such that it would bring the administration of justice into disrepute, nor would it be contrary to the public interest. There is a strong public interest in having parties come to agreements on sanction.

CONCLUSION AND ORDER

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

1. Mr. Uittenbogerd is ordered to pay a total fine of \$16,000, being \$3500 for breaches of Rule 57(3) and 41(d), \$3500 for breach of Rule 59, \$7500 for breach of Rule 42(a) and \$1500 for breach of Rule 62;
2. Mr. Uittenbogerd's authorization to trade in real estate under the Act is suspended for a period of 1 month, commencing on the date of this decision;
3. Mr. Uittenbogerd is ordered to pay costs in the amount of \$1500.

Dated at the City of Calgary in the Province of Alberta, this 3rd day of March, 2020.

Hearing Panel of the
Real Estate Council of Alberta

Rita Aggarwala, Panel Chair