

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Part 3 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 THOMAS DARROL COWLEY, Real Estate Broker registered at all material times to Impact Real Estate Group Ltd. (“**Impact**”) or Castlewealth Real Estate Corp. (“**Castlewealth**”), both operating as Residential One Real Estate (“**Residential One**”, or “**Brokerage**”)

Hearing Panel Members: [R.A], Public Member, Chair
[M.B], Licensee
[S.D], Licensee (the “**Panel**”)

Appearances: Mr. Andrew Bone, for the Registrar

Date of Hearing: March 10, 2021

Date of Decision: March 25, 2021

DECISION

OVERVIEW

This case is about broker responsibilities. Mr. Cowley was the broker of two successive real estate brokerages, both operating as Residential One Real Estate. As broker, he was responsible for establishing policies and procedures for the Brokerage, including those pertaining to privacy. He was also responsible for supervising the associates of Residential One, and for being actively engaged in the management of the Brokerage.

One of Residential One’s associates had his laptop stolen from his vehicle in 2017, resulting in the potential compromise of client information. Earlier, in 2016, the same associate acted as agent in a residential real estate transaction that resulted in mortgage fraud. In 2016/2017, the same associate acted as agent in another transaction in which he was both the listing agent and the purchaser of a property. The Registrar alleges that Mr. Cowley did not have adequate policies in place to address the stolen laptop, nor did he properly oversee the two transactions.

The Registrar also alleges that Mr. Cowley was not actively managing the Brokerage from January 2018 to May 2018, that he improperly withdrew personal funds for his use from the Brokerage’s commission account during that time, and that he lied to an investigator in regard to those withdrawals.

DECISION

For the following reasons, the Panel finds that allegations 1, 2, 3 and 5 in the Notice of Hearing have been proven by the Registrar. Specifically, the Panel finds that Mr. Cowley contravened sections 44(2)(a) of the *Real Estate Act Rules* (the "Rules") regarding establishing adequate policies and procedures around personal and confidential information; 51(1)(e) of the Rules regarding supervision of associates; 51(1)(a) of the Rules regarding active engagement in and management of the Brokerage; and 38(4) of the Act regarding co-operating in investigations. He has therefore engaged in conduct deserving of sanction.

PROCEDURAL MATTERS

Mr. Cowley did not appear for the hearing of this matter. The hearing was originally scheduled for February 4 and 5, 2021. Personal service of the Notice of Hearing was made on January 12, 2021, indicating the February 4 and 5 dates. The hearing was adjourned to February 25 and 26, 2021, at the request of the Registrar, so that adequate time could be provided for exchange of documents. On February 25, 2021, Mr. Cowley did not appear. Out of an abundance of caution, the Panel adjourned the hearing to March 10 and 11, 2021 to ensure Mr. Cowley was aware of the hearing dates. On February 25, 2021, the Panel received confirmation that Mr. Cowley had been personally served with the March hearing dates. The Panel is satisfied that Mr. Cowley was given proper notice of both the allegations and the hearing dates. The hearing proceeded on March 10, 2021 in the absence of Mr. Cowley.

During the course of the hearing, independent legal counsel to the Panel, Ms. Hunka, realized that she had been involved in the discipline hearing of one of the lawyers whose name appeared in the evidentiary documents for this matter. This was disclosed in the hearing. Counsel for the Registrar did not have any concerns with Ms. Hunka continuing as legal counsel. The Panel agrees that there is no compromise to natural justice in allowing Ms. Hunka to continue as independent legal counsel to the Panel. Ms. Hunka is not a decision maker in this matter. She advises the Panel on legal and procedural, not factual, matters. The Panel was at all times free to reject Ms. Hunka's advice. The Panel allowed the hearing to continue with Ms. Hunka as its independent legal counsel.

CONDUCT DESERVING OF SANCTION

Mr. Cowley was not present at the hearing. The Registrar put forward his case through five witnesses: [H.C], a professional conduct review officer with the Real

Estate Council of Alberta (“RECA”); [K.M], who worked as an office administrator at Residential One from November 2017 to March 2018; [J.W], a licensee who worked as an associate at Residential One in 2017 and 2018; [B.C], a management consultant who helped to create and was part owner of Castlewealth Real Estate Corp O/A Residential One Real Estate in 2018; and [J.P], a professional conduct review manager with RECA.

Mr. Cowley failed to establish adequate policies and procedures around the maintenance and protection of personal and confidential information

The Panel finds that Mr. Cowley contravened section 44(2)(a) of the Rules by not establishing adequate Brokerage policies and procedures for the maintenance and protection of personal and confidential information.

A police report dated August 14, 2017 indicates that an associate’s laptop was reported missing to the police on that date. An email from Mr. Cowley to [H.C] indicates that Mr. Cowley received the police report on August 30, 2017. [H.C] testified that through her investigation, she determined that the laptop contained real estate files, but did not know how many. The files would have contained personal information about clients, including names, addresses and identification documents. [H.C] testified that when she interviewed Mr. Cowley about the missing documents, he indicated that he had not taken any steps to protect the information contained on the stolen laptop, such as reviewing client files and contacting clients whose information may have been compromised. Although Mr. Cowley told [H.C] that the associate whose laptop had been stolen, who was also the associate that was involved in the transactions discussed below, was given a week’s termination notice, the associate was not terminated in that time period or for months thereafter. Mr. Cowley provided a copy of the Brokerage’s privacy policies to [H.C]. [H.C] testified that Mr. Cowley told her the policies were provided to all associates, and they were required to initial each page. [H.C] also testified that Mr. Cowley said he had scheduled a meeting to talk to the associate involved in the August 14, 2017 incident, but the associate did not appear at the meeting.

In the Panel’s opinion, the three-page Residential One privacy policy is inadequate. In an industry where many professionals work remotely and travel with personal and confidential information on their laptops, there is an increased risk of privacy breaches. Brokerage policies should be formulated with these working realities in mind and specify actions that must be taken to protect personal and confidential information in the event of a potential privacy breach. The Residential One policy does not take this reality into account. For example, it refers to reception areas and filing cabinets in the Brokerage office, but does not address issues of home offices or

personal vehicles. The policy specifies that privacy complaints are to be referred to the privacy compliance officer (Mr. Cowley in this case), but does not contain any direction as to what steps should be taken to protect personal or confidential information in the event of a potential privacy breach where no complaint is made. As illustrated in this case, the result was that when a potential privacy breach occurred, no steps were taken to protect personal and confidential information that may have been compromised. This is not adequate.

There is no evidence that any personal or confidential information was in fact compromised.

Mr. Cowley failed to ensure there was an adequate level of supervision for associates

The Panel finds that Mr. Cowley contravened section 51(1)(e) of the Rules by failing to ensure there was an adequate level of supervision for associates registered to the brokerage. The Panel has not considered whether there was an adequate level of supervision for employees of the Brokerage, as no particulars were put forward by the Registrar in regard to employees.

Evidence in relation to two sets of real estate transactions, both involving the associate mentioned above, was put forward by the Registrar to address this allegation. Based on the facts proven by the Registrar, the Panel finds Mr. Cowley contravened section 51(1)(e) in connection with both sets of transactions.

Trochu Property

In the first transaction, a property was purchased by a client of Residential One and resold within less than one month for more than double the purchase price. The closing date of the initial sale was the same as the purchase date of the subsequent sale, which involved a high ratio mortgage. **The associate acted for both the buyer and the seller in the subsequent sale.** [H.C] interviewed Mr. Cowley about this transaction. She testified that Mr. Cowley said he reviewed the transaction and did not see anything which would cause concern.

The Panel finds that Mr. Cowley did not properly supervise the associate with respect to this transaction. There were a number of red flags suggesting potential mortgage fraud which would require a broker to discuss the transaction with the associate. These include the timing of the transactions, including the short time period over which the transactions took place; the fact that the associate was representing both the buyer and seller in the subsequent transaction; the difference between the

purchase prices over the period of one month; and the fact that the subsequent purchase involved a high ratio mortgage. The Panel finds, on a balance of probabilities, that Mr. Cowley did not discuss any of these red flags with the associate. Mr. Cowley ought to have discussed this transaction with his associate to determine if there was a potential for mortgage fraud. His failure to do so was a failure to provide proper supervision.

[H.C] testified that she interviewed the buyer from the subsequent sale, who told her she used her identity to obtain the mortgage, and made \$20,000 in the process. The property eventually went into foreclosure.

Panamount property

In the second transaction, a property was listed by the same Residential One associate involved with the Trochu property and the potential privacy breach. He also acted for the purchaser. The purchase price was \$450,000. The purchase contract, which was signed on December 14, 2016, specified a \$10,000 deposit. The deposit was not received by the December 23, 2016 deadline. Financing conditions were to be waived under the contract by December 23, 2016, but were not waived. On January 8, 2017, an amendment was signed inserting the associate's name as the purchaser of the property, new financing conditions and a new closing date as well as an acknowledgement that the purchaser is a real estate agent and that he may renovate and immediately resell the property. The transaction closed on January 20, 2017.

Although the Brokerage policy stated that all documents pertaining to real estate transactions must be forwarded to the broker within two business days, the associate did not forward the documents pertaining to this transaction to Mr. Cowley until January 13, 2017, almost one month after it was originally signed. On receiving the documents, Mr. Cowley responded to the associate by email: "looks like a nice house." The property was listed for sale on February 20, 2017 for \$589,000. It is not clear if and when the property was sold.

[H.C] interviewed Mr. Cowley about this transaction. She testified that Mr. Cowley told her he hadn't had any discussion about the transaction with the associate, and that he was surprised that the transaction was being reviewed by RECA, or that there might be anything concerning about the transaction. Her impression was that Mr. Cowley had not reviewed the file before her interview with him.

The Panel finds that Mr. Cowley did not properly supervise the associate with respect to this transaction. Again, there were a number of red flags which would have

required the broker to discuss the transaction with the associate. These include the amendment of a contract subsequent to the date that a condition was not waived, thus rendering the contract invalid; the fact that the associate was representing both buyer and seller; the lengthy delay in providing the documents to Mr. Cowley; and the fact that the associate was intending to purchase his own listing. The Panel finds, on a balance of probabilities, that Mr. Cowley did not notice any of these red flags, even though all of the documents were presented to him in one email, and that he did not discuss any of these red flags with the associate. Mr. Cowley ought to have discussed this transaction with the associate to avoid a potential mortgage fraud and conflict of interest. Furthermore, the fact that this associate was involved in the Trochu transaction described above ought to have alerted Mr. Cowley to the need to give this associate closer supervision. His failure to meaningfully engage with and advise the associate regarding this transaction was a failure to provide proper supervision.

[H.C] interviewed the seller in this transaction. She testified that the seller was an elderly woman, and that English was not her first language. She testified that the seller told her she was not aware that the associate was buying the property, and that the same lawyer was representing both her and the associate purchasing the property. The seller felt that if she didn't sign the transfer documents and follow through with the deal, a lawsuit would be launched against her. Appraisals for the property requested by the bank and by the seller, contemporaneous to the transaction, assessed the value at \$510,000 and \$525,000, respectively.

Mr. Cowley failed to be actively engaged in the management of the Brokerage from January 2018 to May 2018

The Panel finds that Mr. Cowley contravened section 51(1)(a) of the Rules by failing to be actively engaged in the management of Residential One, for which he was the registered broker. The Registrar put forward three witnesses in connection with this allegation.

[K.M] worked at Residential One as an office manager from November 2017 to March 2018, while Mr. Cowley was still the registered broker. She testified that when she was hired, she expected her duties to including answering the phone, answering emails, and other office duties. She did not have previous experience in the real estate industry. Upon being hired, she took courses from industry groups, including a course for unlicensed assistants.

The Panel accepts [K.M]'s testimony as credible, on a balance of probabilities. [K.M] testified that Mr. Cowley attended the office occasionally, and that he avoided

speaking to associates. He often directed phone calls intended for him to his office staff, and he would physically leave the Brokerage to avoid addressing inquiries. She testified realtors told her Mr. Cowley did not return phone calls and texts, and that everything was forwarded to non-brokers to deal with. Mr. Cowley gave associates in the office [K.M.]'s personal cell phone number without her consent, and associates reached out to her every day by phone, text and email with questions. She could only help them with software issues, and any other inquiries were forwarded to Mr. Cowley's son on Mr. Cowley's instruction. His son was an associate with the Brokerage, but was not a broker's delegate. She was instructed by Mr. Cowley to "figure out" how to deal with issues outside her comfort zone. She was able to see Mr. Cowley's email activity, and testified that he did not return emails to his associates. Mr. Cowley directed [K.M.] to respond to his emails. [K.M.] testified that at some point, associates were showing up with bats, asking for their money.

[J.W.] worked as an associate with Residential One during the period in question. He testified that it was very difficult for him to get help from Mr. Cowley with questions he had as an associate. He testified that he didn't get paid at times. He testified that when he sent Mr. Cowley paperwork, electronically or in hard copy, Mr. Cowley would say he didn't get it, and that Mr. Cowley was hard to get in touch with. He recounted one situation when he had set up a meeting with Mr. Cowley following a complaint. The meeting was with the Real Estate Insurance Exchange, the industry's errors and omissions insurance provider. [J.W.] felt he needed Mr. Cowley's advice. Mr. Cowley said he would attend, but did not show up. When [J.W.] called Mr. Cowley during the meeting, he did not answer. He eventually said it was not his concern and [J.W.] sought advice from a lawyer. [J.W.] testified that Mr. Cowley was not timely in responding to inquiries, and that he needed to access Mr. Cowley through his assistant. The decline in his experience, he said, happened in the last several months he worked at Residential One. [J.W.] testified that he spoke to other associates at the Brokerage who recounted similar experiences. The Panel accepts this testimony, which largely corroborates [K.M.]'s testimony.

[B.C.] is a management consultant. At the end of 2017 and the beginning of 2018, he and Mr. Cowley restructured the Brokerage. The brokerage operating as Residential One, which had originally been owned by Mr. Cowley and his ex-wife, changed ownership and was subsequently owned by [B.C.] and Mr. Cowley. The memorandum of understanding entered into by [B.C.] and Mr. Cowley specified that Mr. Cowley was the broker of the new entity, still operating as Residential One, and [B.C.] was responsible for business development.

The Panel accepts [B.C.]'s testimony as true, on a balance of probabilities. [B.C.] testified that Mr. Cowley did not attend at the office very often (sometimes as little as

10 minutes a day) because of personal problems, and that he directed the office staff to handle a lot of the work. [B.C] testified that he himself ended up going through a lot of the files, though he was not the broker. He said that Mr. Cowley forwarded his phone to [B.C], and that he would get calls from associates who were looking for Mr. Cowley. He wrote a lengthy letter to Mr. Cowley on May 5, 2018 outlining his concerns and suggesting Mr. Cowley take some time off and allow a designate to take his place as broker. Mr. Cowley reacted by terminating the Brokerage on May 7, 2018.

In a written response to a letter from RECA, Mr. Cowley stated that he worked 5 hours per day, made himself available to associates and spoke to associates every day. He stated that [B.C] was to blame for the issues at the Brokerage.

The Panel rejects Mr. Cowley's unsworn written statement regarding his involvement with the Brokerage and the associates. Mr. Cowley's evidence is refuted by three credible witnesses. Counsel for the Registrar informed the Panel that a fourth potential witness was not able to appear at the hearing because she felt it would be detrimental to her mental health. An email from this fourth potential witness to RECA was entered as an exhibit. In the email, she too confirms the allegations that Mr. Cowley was rarely present at the office, avoided addressing Brokerage issues, and forwarded his calls to her and [B.C], and that she would at times be left to respond to associate issues.

The testimonies of [K.M], [J.W] and [B.C] are in alignment. Each witness was sincere and spontaneous in their responses to questions. Based on their credible evidence, the Panel finds that, during the period from January 2018 to May 2018, Mr. Cowley's attendance at Residential One was minimal; that he failed to return phone calls, texts and emails from associates and others at the Brokerage; that he forwarded his phone to unlicensed individuals and expected them to deal with issues that he was responsible for dealing with; and that he failed to provide guidance to associates who were seeking his guidance. The Panel finds that the testimony of these witnesses establishes that Mr. Cowley failed to be actively engaged in the management of Residential One, for which he was the registered broker, in contravention of section 51(1)(a) of the Rules.

Despite Mr. Cowley's neglect of the Brokerage, there is no evidence that any associates or other parties were not paid their commissions or charges.

Mr. Cowley failed to co-operate with an investigation

The Panel finds that Mr. Cowley breached section 38(4) of the Act by lying to a RECA investigator about withdrawals.

In the same written response to RECA discussed above, Mr. Cowley stated that he did not take money from the Brokerage's commission account for his personal use. He stated the same verbally to [J.P], a professional conduct review manager at RECA. A portion of an interview between [J.P] and Mr. Cowley was played at the hearing. In it, Mr. Cowley states that he did not take money from the commissions account for personal expenses. Moments later, when bank statements were reviewed, he admits that he withdrew money to pay for restaurant meals, to pay for his own lawyer, and because he felt he was entitled to a certain amount of deal fees. He states that the account was funded by deal fees and commissions, therefore it was proper for him to make these withdrawals. [J.P] testified that based on his investigations, the account in question was only used for associate commissions. This was confirmed by [B.C] in his testimony. The Panel accepts that the account in question was intended to only be used for associate commissions.

The Panel finds that Mr. Cowley lied to a RECA investigator about withdrawals from the commission account. As a result, he failed to co-operate with the investigator as a person who is required to answer questions, in contravention of section 38(4) of the Act.

Mr. Cowley's withdrawal of funds for personal use does not amount to incompetence under section 51(1)(d) of the Rules

The Registrar argues that Mr. Cowley's actions in withdrawing funds for personal use from an account set up to only pay commissions was in contravention of section 51(1)(d) of the Rules, which requires real estate brokers to ensure the business of the Brokerage is carried out competently and in accordance with the Act, Regulation, Rules and Bylaws. The Panel disagrees.

Although a number of Mr. Cowley's actions may contravene this section of the Rules, withdrawing funds from the commission account for personal use does not establish that Mr. Cowley failed to ensure the business of the Brokerage was carried out competently. The Registrar argues that these actions are linked to Mr. Cowley's incompetence because the withdrawals were a breach of the memorandum of understanding between him and [B.C], and because the withdrawals came from an account specifically intended for commission fees. He argues that Mr. Cowley ought only to have withdrawn funds in accordance with the memorandum of understanding, and that in not doing so, he demonstrated incompetence in carrying out the business of the Brokerage.

The Panel appreciates the Registrar's arguments. However, in the Panel's view, it is not clear that Mr. Cowley's withdrawals were a breach of the memorandum of understanding. That document does not specify banking arrangements and specific accounts to be put in place for Castlewealth. In any case, in the Panel's view, breaching a memorandum of understanding does not, in and of itself, demonstrate incompetence. In the circumstances of this case, a broker withdrawing money from a non-trust account is not a demonstration of incompetence. Non-trust moneys that flow to Residential One belong to the Brokerage. The fact that the commission account was run like a trust account does not make it a trust account. Moneys withdrawn from the commission account could be replenished from the general account. Mr. Cowley's actions do not establish incompetence in running the business of the Brokerage. Furthermore, there is no evidence that because of Mr. Cowley's withdrawals, commissions did not get paid to associates.

SUMMARY

The Panel finds that Mr. Cowley has engaged in the following conduct deserving of sanction:

- Mr. Cowley breached section 44(2)(a) of the Rules by failing to establish adequate policies and procedures around personal and confidential information;
- Mr. Cowley breached section 51(1)(e) of the Rules by failing to adequately supervise an associate in regard to two separate sets of transactions;
- Mr. Cowley breach section 51(1)(a) of the Rules by failing to actively engage in the management of the Brokerage;
- Mr. Cowley breach section 38(4) of the Act by lying to a RECA investigator about bank withdrawals.

REQUEST FOR SUBMISSION ON SANCTION AND COSTS

The Panel requests written submissions from the parties on the appropriate sanction and costs. The Registrar is asked to supply his written submissions to the Hearings Administrator within 14 days of receipt of this decision. The Hearings Administrator is directed to supply those written submissions to Mr. Cowley immediately on receipt. Mr. Cowley is asked to supply his written submissions to the Hearings Administrator within 14 days of receipt of the Registrar's written submissions. The Hearings Administrator is directed to supply those written submissions to the Registrar immediately on receipt. The Registrar is provided 7 days to supply a rebuttal. Once the timelines for provision of written submissions to Hearings Administrator has past, the written submissions received within the timeframe set

out will be supplied to the Hearing Panel for their consideration and decision on sanction and costs.

Should either party desire a formal hearing in relation to sanction, with further *viva voce* evidence, or should they desire to advance more evidence by way of affidavit, they must advise the Hearings Administrator within five days of receipt of this decision, with an explanation of why such a hearing or additional written evidence is requested. The Panel will then make a decision as to whether a formal hearing on sanction will be held and/or the procedure to be followed with respect to additional affidavit evidence and any related questioning on that evidence, and the above timeline will be adjusted accordingly.

Dated at the City of Calgary in the Province of Alberta, this 25th day of March 2021.

Hearing Panel of the
Real Estate Council of Alberta

"Signature"

[R.A], Panel Chair

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THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Part 3 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 THOMAS DARROL COWLEY, Real Estate Broker registered at all material times to Impact Real Estate Group Ltd. (“**Impact**”) or Castlewealth Real Estate Corp. (“**Castlewealth**”), both operating as Residential One Real Estate (“**Residential One**”, or “**Brokerage**”)

Hearing Panel Members: [R.A], Public Member, Chair
[M.B], Licensee
[S.D], Licensee (the “**Panel**”)

Appearances: Mr. Andrew Bone, for the Registrar

Date of Hearing: March 10, 2021

Date of Decision: May 14, 2021

DECISION ON SANCTION

OVERVIEW

This is the Panel’s decision on sanction following its March 25, 2021 decision on conduct deserving of sanction (the “**Phase 1 Decision**”). In that decision, the Panel found Mr. Thomas Darryl Cowley had engaged in the following conduct deserving of sanction:

- Mr. Cowley breached section 44(2)(a) of the *Real Estate Act Rules* (the “**Rules**”) by failing to establish adequate policies and procedures around personal and confidential information;
- Mr. Cowley breached section 51(1)(e) of the Rules by failing to adequately supervise an associate in regard to two separate sets of transactions;
- Mr. Cowley breached section 51(1)(a) of the Rules by failing to actively engage in the management of the Brokerage over a period of approximately five months;
- Mr. Cowley breached section 38(4) of the Act by lying to a Real Estate Council of Alberta (RECA) investigator about bank withdrawals.

The Registrar’s submissions on sanction were received according to the timeline set out in the Phase 1 Decision. Mr. Cowley did not respond to the Registrar’s

submissions. The Panel received all submissions, as well as proof of service on Mr. Cowley, on April 27, 2021.

DECISION

For the reasons that follow, the Panel orders the following sanctions in this matter:

- A \$5,000 fine for the breach of Rule 44(2)(a);
- A \$10,000 fine for the breaches of Rule 51(1)(e);
- A \$20,000 fine for the breaches of Rule 51(1)(a);
- A \$2,500 fine for the breach of Section 38(4) of the Act;
- License cancellation, with a possibility to re-apply after 1 year, but only at the level of associate;
- Costs in the amount of \$8,020.

General Observations

As pointed out by the Registrar, there are few decisions dealing with the breaches at issue, particularly for real estate brokers. The Panel considers real estate brokers to hold positions of responsibility that affect everyone associated with their brokerages, from associates to staff members to members of the public. Mr. Cowley failed in the most basic and fundamental of his duties as a broker. His breaches were serious and had the potential to severely compromise many individuals and members of the public. Therefore, as explained below, the sanctions ordered by the Panel exceed those recommended by the Registrar in his submissions.

As pointed out by the Registrar, the following factors are aggravating in terms of determining sanctions:

- Mr. Cowley had 20 years of experience;
- Mr. Cowley had a disciplinary history in respect of similar issues;
- There were multiple breaches;
- There were potentially far-reaching consequences;
- Mr. Cowley's conduct put the reputation of the industry at risk;
- Proper conduct may have avoided a fraud.

There was some reference to Mr. Cowley having personal difficulties during the hearing, however this was not explored by the Registrar, and Mr. Cowley did not appear at the hearing. As such, no mitigating factors have been established by Mr. Cowley.

The Act allows the Panel to issue fines not exceeding \$25,000 for each finding of conduct deserving of sanction; to order reasonable costs; and to order license

cancellation, time restrictions on re-application and restrictions on licensees, as appropriate.

Breach of Rule 44(2)(a)

The Panel orders a fine of \$5,000 for this breach, out of a maximum \$25,000 fine.

The Registrar provides a 2017 precedent in which a letter of reprimand was issued to a broker when an associate revealed confidential information about a client on Facebook. Inadequate policies were in place, however the broker took action immediately on becoming aware of the incident and created a policy to protect confidential information. The Registrar suggests a fine of \$2,000 is appropriate in this case.

The Panel agrees that this matter is more serious than that described in the precedent. Mr. Cowley's policies around information protection were inadequate, and he failed to take any action following a potentially serious confidentiality breach which included a laptop containing several client files as well as physical files that were stolen from an associate's car. The compromised information likely included financial and identity information relating to several clients, creating a serious privacy risk. Mr. Cowley did not take steps to contact clients whose information may have been compromised, nor did he revisit the inadequate policies he had in place. In the Panel's view, a \$5,000 fine is appropriate in these circumstances. In arriving at this value, the Panel has considered that the breach of section 38(4) of the Act, discussed below, is a less serious breach than the breach of Rule 44(2)(a) in this case. The Panel has accepted the Registrar's suggestion of a \$2,500 fine for that breach. Considering this is a more serious breach, a more onerous fine is appropriate.

Breach of Rule 51(1)(e)

The Panel orders a fine of \$10,000 for this breach, out of a maximum \$50,000 fine.

The Registrar provides a 2012 precedent in which a \$5,000 penalty was issued on consent where a broker had failed to properly supervise an associate's transaction and to ensure the associate fulfilled fiduciary obligations involving a mortgage. The Registrar suggests a fine of \$5,000 is appropriate in this case.

The Panel disagrees that the conduct described in the precedent used by the Registrar is equivalent to Mr. Cowley's failure to supervise an associate on two occasions, and finds that Mr. Cowley's conduct is more serious. Although in the precedent the broker was more actively involved in the breach, actually advising a

client to remove the financing condition without ensuring the mortgage lender was a legitimate source of financing, in this case, a mortgage fraud actually resulted in one transaction, and an associate purchased his own listing by amending an invalid contract, causing harm to his client, in the other transaction. Mr. Cowley did not appear to appreciate the problems inherent in either of these transactions. He did not carry out his supervision duties in either case, which duties are fundamental to his position as a broker. In the Panel's view, this situation, involving not one instance but two, is more egregious than the single incident described in the precedent. A \$10,000 fine is appropriate in these circumstances, in the Panel's view.

Breach of Rule 51(1)(a)

The Panel orders a fine of \$20,000 for this breach. There is no discernable maximum for this continuing conduct involving several instances of conduct deserving of sanction. The Registrar suggests a penalty of \$7,500.

The Panel agrees with the Registrar that this breach was very serious. In fact, Mr. Cowley failed in the very essence of his position as a broker by not engaging in the management of his brokerage. The degree of his neglect is startling: redirecting phone calls to non-brokers; not attending a pre-scheduled REIX meeting; not being available to associates; being present at his brokerage for a little as ten minutes a day; and ultimately terminating the brokerage two days after receiving a letter of concern from his business partner. This final action was simply reckless. Mr. Cowley put at risk the licenses of over 100 associates, potentially affecting all of those associates' clients and transactions. The Panel finds that, considering the higher level of responsibility and accountability conferred upon a broker and Mr. Cowley's apparent total failure to carry out those responsibilities, a fine of \$20,000 is appropriate in these circumstances.

Breach of section 38(4) of the Act

The Panel orders a fine of \$2,500 for this breach, out of a maximum \$25,000 fine.

Mr. Cowley was dishonest to a RECA investigator regarding withdrawals he made from a commissions account. He did not admit to this dishonesty until he was confronted with the account statements. The length of time during which RECA was misled by Mr. Cowley was fairly short. The Panel agrees with the Registrar that Mr. Cowley's failure to co-operate with the RECA investigation was not as serious as the situations described in the precedents provided, and accepts the Registrar's uncontested suggestion of a \$2,500 fine.

License Cancellation

The Panel agrees with the Registrar that Mr. Cowley's breaches call for a license cancellation or suspension. The Registrar suggests a one-year license cancellation with the possibility to re-apply for a license after that time. In the circumstances of this case, for the reasons that follow, it is the Panel's opinion that Mr. Cowley's license should be cancelled, and Mr. Cowley should be permanently prevented from holding a broker's license in the future. After one year he should be permitted to apply for an associate license, which will require him to take all the requisite education.

Mr. Cowley was licensed as a broker for more than 20 years. He had been issued administrative penalties previously which also addressed problems with carrying out his duties as a broker. Given both his lengthy experience as a broker and acknowledging that Mr. Cowley had already received sanctions reminding him of his duties, Mr. Cowley ought to have had significant knowledge and experience to effectively supervise the brokerage and its associates. The Panel agrees that he essentially left his brokerage without any supervision for a period of time, akin to a ship without a captain, and put everyone doing business on behalf of the brokerage or with the brokerage at risk because of his lack of engagement.

Mr. Cowley repeatedly ignored requests to acknowledge hearing dates and he also failed to appear at the hearing and to provide submissions on sanction and costs. There is no evidence that Mr. Cowley shows remorse for his behaviour or understanding of his mis-steps. It appears he is unable to see the larger scope of his inaction or reckless actions. In the Panel's view, he simply does not meet the basic requirements to practice as a real estate broker. He does not understand the very essence of his role. For example, Mr. Cowley's inability to understand which components of a real estate agreement require review to prevent harm to the public indicates that he does not possess the knowledge required to supervise associates. His shocking lack of knowledge after over 20 years in the industry suggests that he himself will always require supervision and should therefore only be allowed in the future to be licensed as an associate to prevent harm to the public and to protect the reputation of the industry.

Mr. Cowley's decision to cease the brokerage and instantly cause over 100 associates to lose their ability to trade in real estate was completely reckless, and demonstrates a temperament and judgment that does not befit the role of a broker. The broker is ultimately responsible for the well-being of the brokerage, its associates and its

clients. With associates working with numerous clients and at all hours of the day, it is highly likely that Mr. Cowley's behaviour put several associates in a position where they were unknowingly trading in real estate while unlicensed, which would be conduct deserving of sanction for the associates. Mr. Cowley's apparent disregard for his associates and their clients indicates that there is a possibility of serious harm to the public and to the reputation of the industry should he be allowed to return to a position of authority and responsibility for others.

Costs

The Panel orders costs against Mr. Cowley in the amount of \$8,020, as suggested by the Registrar.

The Registrar has provided a schedule of costs that ranges from about \$10,000 to \$22,000. The schedule does not include all expenses associated with the investigation and hearing, and is therefore a conservative estimate. The Registrar suggests a costs order of 80% of the lower end of the schedule amount, which is \$8,020. The Panel has reviewed the schedule of costs and finds that it fairly represents a portion of the costs of the investigation and hearing, and that the Registrar's suggestion is reasonable.

The Panel is cognizant that the Guide to Costs in the *Real Estate Act Bylaws* (the "**Bylaws**") lists an amount of up to \$7,500 for a fully contested hearing where, as here, the total fine or penalty is between \$30,000 and \$69,999. In the Panel's view, the Bylaws direct the Panel to consider the actual investigation and hearing costs where possible, but allows for the use of the Guide to Costs as an alternative. In this case, where a schedule of costs has been provided, the Panel considers the values in that schedule as a more accurate representation of the true costs and bases its decision on that schedule.

The Bylaws direct the panel to consider a number of factors in coming to a costs order, which the Panel has done. The Panel notes the following in coming to its cost decision:

- Although Mr. Cowley did not specifically lengthen the hearing, since he did not attend, neither did he not engage with the Registrar to come to any agreement on facts or sanctions. Therefore, the Registrar had to prove all the elements of its case and provide full submissions on sanction. This suggests a higher costs order;
- Mr. Cowley did not acknowledge electronic service by the Registrar, so the Registrar served him personally, including in one instance at the direction of the Panel, in order to ensure natural justice. This suggests a higher costs order;

- The Registrar was largely successful, though it did not establish one of its allegations. This suggests a higher costs order;
- The issues in this case are extremely important, as they involve the basic duties of real estate brokers, who run real estate brokerages and oversee all real estate associates in Alberta;
- The Registrar was required to incur the expenses it incurred to establish its case. This suggest a costs order which reflects the actual costs;
- There is no evidence regarding Mr. Cowley’s financial situation, however the Panel acknowledges that he is not currently licensed as a broker. This suggests a lower costs order.

In light of these factors, the Panel finds a costs order reflecting a large portion of the lower end of the actual costs estimate is appropriate. The Registrar’s suggestion on costs is, accordingly, accepted.

CONCLUSION AND ORDER

The Panel orders the following sanctions and costs against Mr. Thomas Darryl Cowley:

- \$5,000 for the breach of Rule 44(2)(a);
- \$10,000 for the breaches of Rule 51(1)(e);
- \$20,000 fine for the breaches of Rule 51(1)(a);
- \$2,500 fine for the breach of Section 38(4) of the Act;
- License cancellation, with a possibility to re-apply after 1 year, but only at the level of associate;
- Costs in the amount of \$8,020.

Dated at the City of Calgary in the Province of Alberta, this 14th day of May, 2021.

Hearing Panel of the
Real Estate Council of Alberta

“Signature”

[R.A], Panel Chair