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 Appeal of an Administrative Penalty against TIEBO CAI, Real Estate Associate registered at all material times to Master Realty Ltd. operating as Century 21 Masters

Hearing Panel Members:	[R.A], Public Member, Chair [S.D], Licensee [L.M], Licensee (the "**Panel**")
Appearances:	Mr. Christopher Davison, for the Registrar
Dates of Hearing:	May 26 and 27, 2021 (the "**Hearing**")
Date of Decision:	July 12, 2021

DECISION ON CONDUCT DESERVING OF SANCTION (PHASE I)

OVERVIEW

This case is about the duty of a listing associate to alert others to changes made to an online real estate database listing. Mr. Cai was the listing associate for an apartment-style condominium property. Mr. Cai's original understanding was that condominium fees included heat and water. He included this information on the online listing for the condominium property. [M.M] was representing a potential buyer. During informal negotiations, that is, at a point where there was no active offer between the parties, Mr. Cai learned that condominium fees did not include heat and water. He immediately changed the online listing to reflect this. He received an offer the following day from [M.M]'s client. Mr. Cai did not confirm with [M.M] whether he was aware of the change made to the online listing. [M.M] was not aware of the change. [M.M]'s client proceeded to complete the sale and later learned through the utility provider that the condominium fee did not include heat and water. [M.M]'s client made a complaint to RECA against Mr. Cai.

Mr. Cai was issued a $3000 administrative penalty ("**AP**") by the Registrar of the Real Estate Council of Alberta ("**RECA**") on December 11, 2020 for contravention of section 42(a) of the *Real Estate Act Rules* (the "**Rules**"). Section 42(a) of the Rules prohibits licensees (previously called industry members) from making representations or carrying on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so. Mr. Cai is appealing that AP, which he is entitled to do under section 83.1 of the Act.

DECISION

For the following reasons, the Panel finds that Mr. Cai did not contravene section 42(a) of the Rules, and that there is no conduct deserving of sanction in this case. The Panel finds that Mr. Cai's actions were neither reckless nor done with intent or knowledge that [M.M]'s client was acting on incorrect information. Although it may be that Mr. Cai ought to have recognized the risk in not discussing the update to the online listing with [M.M], and that a prudent licensee in Mr. Cai's position would have confirmed that [M.M] and his client were aware of the recent update to the online listing, Mr. Cai's conduct does not rise to the level of reckless or intentional misrepresentation. Furthermore, the Panel finds that although Mr. Cai's omission, which was neither reckless nor intentional, may have contributed to the buyer making an offer on the property, it did not lead to the buyer completing the purchase, on a balance of probabilities.

PROCEDURAL MATTERS

Mr. Mabey may give closing submissions on Mr. Cai's behalf

Mr. Cai requested that his broker, Mr. Mabey, be permitted to give closing submissions on his behalf. He explained that his broker was more familiar with the hearing process, and that he would be more comfortable having Mr. Mabey give the closing submission because Mr. Mabey's first language is English. The Registrar agreed to this limited involvement by Mr. Mabey. The Panel confirmed that Mr. Mabey was comfortable with this and that Mr. Mabey was not a witness in the proceedings. Following confirmation of these matters, the Panel allowed Mr. Cai's request.

The Panel may consider intentional conduct

The original AP states only that Mr. Cai was reckless in his conduct, whereas the Registrar also argued at the Hearing that Mr. Cai's conduct was intentional. Mr. Cai did not challenge the Registrar's decision to include intent in its Hearing arguments. The Registrar pointed out to the Panel that, in his opinion, it was procedurally fair for the Panel to consider intentional conduct even though the AP only mentions reckless conduct. Mr. Cai presented argument around intentionality.

In the Panel's view, it was not procedurally unfair to raise the issue of intent at the Hearing. Reckless conduct has been found to give rise to a finding of imputed intent. Given this potential link between reckless conduct and imputed intention, and given

that Mr. Cai made argument in relation to intention, the Panel finds that the AP provided sufficient notice that the issue of intent could be considered at the Hearing.

Submissions requested from parties regarding reckless conduct

During the course of its deliberations, the Panel requested submissions from the parties regarding the necessary elements of recklessness in the context of Rule 42(a). In particular, the parties were asked to turn their minds to the cases of *R. v. Zora*, 2020 SCC 14 and *Law Society of Upper Canada v. Marshall Stephen Kazman*, 2008 ONSLAP 7. The Panel received and reviewed submissions from both parties.

CONDUCT DESERVING OF SANCTION

The Panel found all of the witnesses to be credible in their testimony. Each witness was thoughtful, consistent and straight-forward in his testimony.

In order to understand the Panel's decision, it is useful to consider the timeline around the date of the update to the online listing (October 6, 2019) more closely. Based on the evidence, the Panel finds as follows:

- On August 15, 2019, Mr. Cai received an email from the condominium management company indicating that garbage, heat and water were included in the condominium fee. He included this information in the online listing.
- [M.M]'s client made an offer on the property on or about August 19, 2019. There was some negotiation but the parties did not come to an agreement.
- On or about September 26, 2019, Mr. Cai invited another offer from [M.M]'s client. The list price of the unit had been lowered since the first round of negotiations. A few days later, [M.M]'s client made an offer on the property. Mr. Cai's client did not accept the offer.
- There was some informal negotiation in the following days, which resulted in the final offer on October 7, 2019. The offer was attached to an email from [M.M] indicating, "As discussed on the phone… we will look forward to the signed accepted offer…." There is little evidence detailing the dates or content of any phone discussion, or who initiated contact and when. The Panel finds, on a balance of probabilities, that condominium fees were not discussed, nor was the change in the online listing.
- On October 11, 2019, Mr. Cai received another offer on the property from a different party.
- On October 16, 2019, Mr. Cai provided [M.M] with a package of condominium documents. [M.M] forwarded these documents to a condominium document review company on behalf of his client. Although he could not specifically

remember, [M.M] testified that he would also have scanned and sent the last hard copy of the online listing that he had printed (on September 30, 2019), according to his standard practice. The package that he actually sent, including any listing document, was not in evidence. Given [M.M] was a new real estate associate at that point in time, the Panel finds it is unlikely that he had established a reliable practice in regard to condominium document reviews. [M.M] also testified that listings are not generally part of the records provided to condominium review companies. The Panel is unable to determine what, if any, listing document was provided to the condominium document review company based on this evidence, and makes no finding on this point.

- On October 23, 2019, Mr. Cai received an email from the condominium management company following an inquiry made by Mr. Cai for a potential buyer about whether electricity, gas and garbage were included in the condominium fee. It is unclear which potential sale this inquiry was in connection to – the conditional sale to [M.M]'s client or the October 11, 2019 offer.
- On October 23, 2019, after receipt of the condominium document review report, [M.M]'s client waived conditions on the sale. The report stated that heat and water were included in the condominium fee. The transaction closed in the following days. A few weeks after the sale was complete, [M.M]'s client realized condominium fees did not include heat or water.

The Registrar argues that this case is analogous to cases in which misrepresentations are made on listing sheets. The Registrar argues that misrepresentations in listing sheets are not tolerated by RECA and that there is a long history of administrative penalties in such cases, even where the misrepresentation would be plainly obvious once someone viewed the property.

The Panel disagrees that this case is analogous to a misrepresentation on a listing sheet. There is no dispute in this case that the online listing accurately reflected Mr. Cai's understanding of the property at all times, and that Mr. Cai updated the online listing within minutes of finding out that the condominium fees did not include heat and water. The integrity of the online listing system, which is available to the general public, was not compromised by Mr. Cai.

The dispute in this case is around the extent of Mr. Cai's duty, if any, to inform [M.M] of the change to the online listing, and whether Mr. Cai's omission amounts to intentionally or recklessly misleading [M.M] and the buyer into believing the condominium fees included heat and water. In order to determine whether there

was a breach of Rule 42(a), the Panel must consider the difference between negligent, reckless and intentional conduct.

Negligent vs. reckless vs. intentional conduct and Rule 42(a)

Rule 42(a) states:

> Licensees must not make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so.

Rule 42(a) applies to representations and conduct by licensees in regard to any person. Other Rules consider conduct specifically in regard to a licensee's client and include conduct that is less egregious than reckless or intentional conduct. Mr. Cai is not accused of breaching any Rules in regard to his own client.

Rule 42(a) prohibits licensees from engaging in reckless or intentional conduct that misleads or deceives, or is likely to mislead or deceive, any person. In the Panels' view, the use of the word "intentional" in this Rule does not require the licensee to have an intention to deceive, but to act in an intentional way, with knowledge (or knowledge imputed through the application of the concept of wilful blindness as discussed below) that the manner in which they are acting will or is likely to mislead or deceive. The Panel disagrees with the Registrar that intentional simply means voluntarily performing or not performing certain acts. As explained by Martin J. in *Zora* at para. 112, there must be a recognition that the licensee's conduct will or is likely to mislead or deceive in order for the conduct to be intentional. The licensee does not need to have knowledge of the legal consequences of deciding to proceed with the conduct.

The requirements for reckless conduct have been recently considered by the Supreme Court of Canada in connection with criminal failure to comply offences, in *Zora*. Martin J. explains at para. 117:

> ...Recklessness requires that accused persons be aware of the risk of not complying with their condition and proceed in the face of that risk. Knowledge of risk is key to recklessness ... Recklessness is not and should not through misapplication, become the same as negligence. Recklessness has nothing to do with whether the accused ought to have seen the risk in question, but whether they subjectively saw the risk and continued to act with disregard to the risk.

At para. 113 of *Zora*, Martin J. also explains the concept of wilful blindness, which is closely related to acting with knowledge or intent in professional conduct proceedings:

> Wilful blindness is a substitute for the accused's knowledge of the facts whenever knowledge is a component of *mens rea* and where the accused is deliberately ignorant … the accused has to know there was a need for inquiry, and deliberately decline to make the inquiries necessary …

Finally, Martin J. considers two ways in which an accused can possess the mental element required to commit a failure to comply offense - one through actual or imputed knowledge and one through recklessness:

1. An accused can know, or be wilfully blind, of the circumstances that require them to behave in a certain way and act contrary to those requirements anyway;
2. An accused can be reckless, i.e. perceive a substantial and unjustifiable risk that their conduct constitutes an offence and persist in the conduct anyway.

In the Panel's view, the Supreme Court's guidance in *Zora* regarding acting with knowledge versus acting recklessly versus acting negligently in criminal failure to comply situations, provides the basis for the correct interpretation of Rule 42(a):

1. A licensee acts negligently where they ought to have seen a risk of someone being, or likely being, misled or deceived, and ought to have acted in a way that a reasonably prudent person would have acted to prevent the other person from being, or likely being, misled or deceived;
2. A licensee acts recklessly where they subjectively see a substantial and unjustifiable risk that someone will or will likely be misled or deceived by their conduct, but they proceed with the conduct anyway. Recklessness has been held to be equivalent to gross negligence in certain cases;
3. A licensee acts intentionally where they have actual knowledge, or are wilfully blind, to the fact that their conduct will or is likely to mislead or deceive someone, and they proceed with the conduct anyway.

The second and third of these scenarios constitute breaches of Rule 42(a). The first does not. In this case, a reckless breach would occur if Mr. Cai subjectively perceived, without knowing for certain, a substantial and unjustifiable risk that the buyer would enter or close the transaction based on inaccurate information about condominium fee inclusions that he had provided. An intentional breach would occur if Mr. Cai had actual knowledge that the buyer was entering or closing the transaction based on

inaccurate information provided by him and proceeded anyway, or if Mr. Cai knew there was a need to inquire into the buyer's understanding of the condo fee inclusion and deliberately declined to make the necessary inquiries, proceeding anyway.

Entering the transaction

The Registrar argues that, given the short time frame between the online listing being updated and the offer being received, and in light of the ongoing negotiations, Mr. Cai knew or ought to have known that there was a real risk that [M.M] was not aware of the online listing update and was potentially negotiating based on information in the old online listing. The Registrar argues that on October 7, when an offer was made, Mr. Cai had a duty to tell [M.M] about the update he had made the previous day, and that in not doing so, he breached Rule 42(a). The Registrar asks the Panel to find that Mr. Cai not only acted recklessly but intentionally in failing to notify [M.M] of the updated information. The Registrar suggests that Mr. Cai intended to deceive [M.M]'s client by quietly changing the online listing the night before the offer and not informing [M.M] of the same.

The Panel disagrees with Registrar's assessment of the evidence. First, there is no evidence that Mr. Cai was aware that the condo fee inclusions were an important or deciding factor in [M.M]'s client's decision to make an offer, such that there would be an awareness of the need to inquire into [M.M]'s knowledge of the updated online listing. Second, Mr. Cai did not hide his newly acquired knowledge about the condominium fee, rather he posted it on a public database five minutes after he found out that the condominium fee did not include heat and water. He testified that he thought this was the extent of his duty. Third, there is insufficient evidence to find that Mr. Cai knew [M.M] had not seen or would not view the updated online listing before advising his client to make an offer. Mr. Cai testified, and the Panel accepts, that Mr. Cai believed he had a duty to correct himself if he misled others, and that he believed he had done this by updating the online listing. The Panel disagrees that this is evidence that Mr. Cai was aware of a risk that [M.M] was relying on old information, rather it is evidence that he thought he had done what he needed to do to inform the world, including [M.M]. Fourth, there was no active offer or counter-offer on the property at the time the online listing was updated. The evidence is that some days had passed since the parties last communicated. There is insufficient evidence to find that Mr. Cai knew when he changed the online listing that an offer from [M.M]'s client would be coming the following day. Although it may be true that a prudent realtor would have mentioned the update to [M.M] in any case, that is not the standard for recklessness or intention under Rule 42(a).

The Panel finds Mr. Cai, as a new licensee, did not subjectively see a risk that [M.M] was advising his client based on old information. Whether or not he ought to have seen such a risk is not the proper inquiry. The question in regard to reckless conduct is whether he actually perceived a substantial and unjustifiable risk that [M.M] would be misled or deceived if the update to the online listing was not explicitly discussed on October 7. The Panel also finds that Mr. Cai did not know the condo fee inclusions were important to [M.M]'s client, and that he did not intentionally decline to make inquiries about whether [M.M] had seen the updated online listing, that is, he was not wilfully blind in making enquiries. Finally, the Panel finds Mr. Cai did not actually know at the time he advised his client to accept the offer, that [M.M] had not seen the updated online listing and was relying on old information. Based on these findings, Mr. Cai did not act recklessly nor intentionally at the time of the offer.

The Registrar suggests that there is further evidence of intentional conduct in the fact that Mr. Cai received an email about condominium fees from the condominium management company on October 23, 2019, the day conditions were waived, and yet still did not discuss the online listing update with [M.M]. The Panel disagrees. Mr. Cai's inquiry to the condominium management company was about electricity, gas and garbage, not heat and water. It is not clear on whose behalf the inquiry was made. The Panel finds that Mr. Cai continued to be unsure as to what was included in the condominium fee. At this point, the condominium document review company was engaged to independently determine what was included in the condominium fee. The Panel finds that in the circumstances, the email from the condominium management company did not trigger any duty under Rule 42(a) for Mr. Cai to discuss the online listing update of October 6 or condominium fee inclusions with [M.M].

Closing the transaction

The purchase contract was subject to a number of buyer's conditions, one of them being a condominium document review. A common part of residential real estate transactions is independent verification of the claims made by sellers, for example, claims made in listings and feature sheets. A standard notice at the bottom of listings, which notice was included at the bottom of the online listing for the property in question, is "information herein deemed reliable but not guaranteed." Home inspections, reviews of community documents and restrictive covenants, and condominium document reviews are routinely conducted in order for buyers to satisfy themselves that what they think they are purchasing and what is represented in listings and feature sheets are in alignment. If listings were understood or guaranteed to be 100% reliable, there would be no need to engage various independent experts. The reality is that the representations made in listings are

routinely verified through independent third parties. Similarly, in this case, a condition of the contract was that the buyer would be able to independently review the condominium documents to verify any claims made by the seller and to discover any issues he had not been made aware of. [M.M]'s client hired a professional company to conduct the independent condominium document review.

During the Hearing, the buyer testified that he hired the review company because he wanted a professional opinion of the condominium documents, including the condominium fees. The buyer also testified that he now thinks the review company used the old listing information to opine on the condominium fee inclusions. Even if this opinion of the buyer turns out to be correct, this is not a failing of Mr. Cai. The very reason for such a review is to independently assess the condominium documents. Such reviews are intended to be based on condominium documents, and not on any realtor representations or any listing information. A small portion of the reserve fund study entered as an exhibit at the Hearing stated, "The units reportedly have self-contained heating and domestic hot water heaters which are owner Responsibility." This suggests to the Panel that the document review company would have been put on notice that heat and water may not have been included in the condominium fee. The buyer testified during the Hearing that the document review company refunded his fee when they were told of their mistake regarding condominium fee inclusions.

The Panel finds that Mr. Cai did not subjectively perceive a risk that the condominium document review company would rely on the outdated online listing in completing its report, nor did he have actual or imputed knowledge through the application of the concept of wilful blindness, of any reliance by the condominium document review company on the outdated online listing such that he was required to discuss the updated online listing with the condominium document review company or anyone else. Furthermore, the Panel finds, on a balance of probabilities, that once the condominium document review was completed, [M.M]'s client relied on that document in waiving conditions and completing the transaction, not on any representation or alleged omission of Mr. Cai. This is evidenced by the October 23, 2019 email from [M.M] to Mr. Cai indicating that the buyer was able to waive conditions because he had received the condominium document review. Therefore, Mr. Cai would not have misled or deceived [M.M]'s client through any alleged representation or omission once the condominium document review was completed. Rule 42(a) is not engaged in respect of [M.M]'s client waiving conditions and closing the transaction.

SUMMARY AND COSTS

The Panel finds that Mr. Cai did not engage in conduct deserving of sanction as alleged. Specifically, Mr. Cai did not breach Rule 42(a).

If either party would like to make submissions on costs, they must inform the Panel no later then July 23, 2021. The Panel will determine the appropriate procedure to follow if and when such a request is received.

Dated at the City of Calgary in the Province of Alberta, this 12th day of July, 2021.

Hearing Panel of the
Real Estate Council of Alberta

"Signature"
[R.A], Panel Chair