

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Sections 39(1)(b)(i), 41 and 47(1) of the *REAL ESTATE ACT*,
R.S.A. 2000, c.R-5

AND IN THE MATTER OF a Hearing regarding the conduct of Licensee David George Eger, was a licensed Real Estate Broker with 4th Street Holdings Ltd., o/a Re/Max Real Estate (Central)

Hearing Panel Members: [A.B], Chair
[B.R]
[M.B]

Appearances: Elsie Saly, Case Presenter for the Registrar of the Real Estate Council of Alberta ("RECA")

Scott Chimuk, Counsel for David George Eger

(collectively, "the parties")

Hearing Date: September 24, 2021, by way of a video conference

DECISION OF THE HEARING PANEL ON CONDUCT DESERVING OF SANCTION
AND
DECISION ON SANCTION AND COSTS

A. Introduction

The Licensee, David George Eger ("Mr. Eger"), was a licensed Real Estate Broker with 4th Street Holdings Ltd., o/a Re/Max Real Estate (Central). The Hearing relates to conduct that occurred between April 23, 2019, and May 18, 2019.

B. Documents submitted to the Hearing Panel

The parties submitted to the Hearing Panel a Notice of Hearing dated August 9, 2021, and an Affidavit of Service, sworn September 14, 2021, entered as Exhibit "2".

An Agreement on Facts and Breaches document signed by Counsel for Mr. Eger on September 21, 2021, was submitted, and entered as Exhibit "4".

The parties also submitted a Joint Submission on Sanction signed by Counsel for Mr. Eger on September 21, 2021, and by Case Presenter on September 21, 2021.

Case law provided to the Hearing Panel:

- *Jaswal v. Medical Board (Nfld.)*, 1996 CanLII 11630 (NL SCTD)
- *Adams v. Law Society of Alberta*, 2000 ABCA 240 (CanLII)
- *Law Society of Upper Canada v. Lambert*, 2014 ONLSTH 158 (CanLII)
- *Harris*, RECA – Fine
- *Quinn*, RECA – Letter of Reprimand
- *R. v. Anthony-Cook*, 2016 SCC 43, 2016 CSC 43, 2016 Carswell BC 2929

C. Agreed Breaches and Agreed Facts

The conduct deserving of sanction agreed to by Mr. Eger was:

- a. Failing to ensure that all parties to a trade in real estate were immediately notified when a deposit was not received contrary to Rule 51(1)(l)(i) of the *Real Estate Act* Rules. The deposit was required by May 1 and not delivered until May 6. This deposit was by certified cheque, not a bank draft as required by the contract. No notice about the deposit went to the sellers or their representative until May 13, 2019.
 - b. Failing to ensure all parties to a trade in real estate were immediately notified when a deposit was not honoured, contrary to Rule 51(1)(l)(ii) of the *Real Estate Act* Rules when the second draft was returned as counterfeit on May 17, 2019. No notice went to the sellers or their representative until May 18, 2019.
1. David George Eger is the broker of Re/Max Real Estate (Central) (the brokerage) at the time of these events. He is no longer a broker or registered with this brokerage.
 2. Vincent David Pellettier is a real estate associate licensed with Re/Max Real Estate (Central).
 3. Mr. Pelletier represented a buyer, [P.P], on behalf of Re/Max Real Estate (Central). [P.P] signed a purchase contract to purchase [ADDRESS] (the property).
 4. The property sellers were [K.K]. Their representative was [C.S] licensed with Engel and Volkers, Calgary.
 5. Buyer and sellers signed a purchase contract on April 23, 2019. This contract required that the buyer deliver a \$50,000 deposit by bank draft to the brokerage by April 25, 2019.

6. Two subsequent amendments to the purchase contract extended the due date for the deposit to May 1, 2019.
7. On May 1, 2019, the buyer texted Mr. Pellettier's assistant with a picture of a bank draft of \$50,000. Mr. Pellettier's assistant texted this picture to sellers' representative [C.S].
8. The buyer also texted Mr. Pellettier he had delivered the draft to the brokerage that evening.
9. On May 2, 2019, Mr. Pellettier learned from staff at the brokerage no draft was delivered by [P.P].
10. Mr. Pellettier continued to pursue the deposit from the buyer. On May 6, 2019, [P.P] delivered a certified cheque to the brokerage which the brokerage deposited.
11. Neither the sellers nor their representative, [C.S], had notice from Re/Max Real Estate Central or Mr. Pellettier that the buyer did not deliver a deposit to the brokerage on May 1, 2019.
12. On May 13, 2019, the bank returned the cheque unhonoured as "un-traceable".
13. On May 13, 2019, Mr. Pellettier emailed the sellers' representative:

"I have been advised this morning that our office was notified by the bank that the \$50,000 deposit received is "non-traceable". At this time we are not in receipt of the deposit cheque for [ADDRESS]."
14. On May 14, 2019, [P.P] delivered a bank draft to the brokerage. The brokerage deposited the draft. Mr. Pellettier advised the sellers' representative.
15. On Friday May 17, 2019 at approximately 2:50 pm, the brokerage received notice from their bank that the draft was "counterfeit".
16. Mr. Eger contacted a senior manager (Registrar) for advice. Mr. Eger was told to "call the police" and he followed RECA instructions. At approximately 3:50 pm on May 17, 2019, Mr. Eger phoned the Calgary Police Service and a RECA practice advisor about the counterfeit draft.
17. At 4:30 pm on Saturday May 18, 2019, Mr. Pellettier emailed the sellers' representative: "I regret to advise that late yesterday our office was advised that the most recent \$50,000 draft, received May 14, has been identified by the bank as counterfeit ..."

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

Mr. Eger admitted to conduct deserving sanction for the following breaches of the *Real Estate Act Rules*:

- a. Failing to ensure that all parties to a trade in real estate were immediately notified when a deposit was not received, contrary to Rule 51(1)(l)(i) of the *Real Estate Act Rules*. The deposit was required by May 1 and not delivered until May 6. This deposit was by certified cheque, not a bank draft as required by the contract. No notice about the deposit went to the sellers or their representative until May 13, 2019.
- b. Failing to ensure all parties to a trade in real estate were immediately notified when a deposit was not honoured, contrary to Rule 51(1)(l)(ii) of the *Real Estate Act Rules*.

E. Conduct Deserving of Sanction

As the Agreement of Breaches was accepted by the Registrar pursuant to section 47(2) of the *Real Estate Act*, the conduct is deemed to be a finding of the Hearing Panel that the admitted conduct is conduct deserving of sanction. Accordingly, the Hearing Panel finds that Mr. Eger engaged in conduct deserving of sanction, specifically that he breached Rule 51(1)(l)(i) and (ii) of the *Real Estate Act Rules*.

F. Joint Submission on Sanction

The Hearing Panel's finding concludes Phase 1 of the Hearing. The Hearing Panel then considered the Joint Submission on Sanction which was presented in the written and agreed upon submissions of the parties:

The parties proposed the following sanction:

Breach	Fine
Rule 51(1)(l)(i) and (ii)	An order reprimanding the Licensee
Costs	\$250
TOTAL	\$250.00

Authority for Sanction

A Hearing Panel's authority to impose sanction on a licensee whose conduct has been found to be deserving of sanction is described in section 43 of the *Real Estate Act*:

43(1) If a Hearing Panel finds that the conduct of a licensee 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 licence issued to the licensee by the Industry Council;
- (b) an order reprimanding the licensee;
- (c) an order imposing any conditions or restrictions on the licensee and on that licensee's carrying on of the business of a licensee that the Hearing Panel, in its discretion, determines appropriate;
- (d) an order requiring the licensee to pay to the Council a fine, not exceeding \$25,000, for each finding of conduct deserving of sanction;
- (d.1) any order prohibiting the licensee from applying for a new license for a specified period of time or until one or more conditions are fulfilled by the licensee;
- (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 a licensee under subsection (1), order the licensee to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

Factors on Sanction

The Panel must consider the facts of the case in relation to the breach and the supporting case law when deciding on a sanction.

Jaswal lists factors relevant to a decision about sanction:

- the nature and gravity of the proven allegations
- the age and experience of the licensee
- the previous character of the offender and, in particular, the presence or absence of prior complaints or convictions
- the number of times the offence was proven to have occurred

- the role of the licensee in acknowledging what occurred
- whether the licensee had already suffered serious financial or other penalties as a result of the allegations having been made
- impact of the incident on the victim, if any
- mitigating circumstances
- aggravating circumstances
- the need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession
- the need to maintain the public's confidence in the integrity of the profession
- the degree to which the offensive conduct that was found to have occurred was clearly regarded, by consensus, as being the type of conduct that would fall outside the range of permitted conduct and
- the range of sentence in other similar cases (Precedents).

General deterrence refers to the effect a sanction will have on others in the future: will it dissuade others from similar conduct? General deterrence is also about what the public and industry would consider a reasonable response to the conduct.

Specific deterrence refers to the effect a sanction will have on the subject of the sanction: will it dissuade them from repeating the conduct? Here the Panel can weigh factors like the subject's financial circumstances, their remorse or lack of remorse, etc. and what impact a sanction will have on them personally.

Mitigating and aggravating factors refer to evidence which make the conduct less serious (mitigating) or more serious (aggravating).

While all of the above factors can be thought of as mitigating or aggravating, the last 2 items refer to factors not specifically enumerated in *Jaswal*.

Factors in the Present Matter

Below is the parties' analysis of the relevant *Jaswal* factors:

- Age and Experience of the Licensee

a. Mr. Eger has been a Licensee since 2002 and has 18 years in the industry. He has been an associate broker or associate broker since 2008.

b. Given his experience he ought to have been aware that his conduct in this matter was unacceptable. This is aggravating.

- The Previous Character of the Member

Mr. Eger has no previous disciplinary history. This is mitigating.

- The Number of Times the Offence was Proven to have Occurred

There was a breach of each of subsection of 51(1)(1)(i) & (ii). This is neither mitigating nor aggravating.

- The Nature and Gravity of the Proven Allegations

a. Prompt and accurate communication of the status of a deposit held in trust for a party who is not their client is an important function of a real estate broker. All parties must immediately be made aware when deposit monies are not received by contract deadlines, or when deposit monies are not honoured. The nature of the breach is aggravating.

b. The gravity of these breaches is mitigating. While the deposit was delivered late and then was not honoured, the sellers were eventually notified and, in both cases, decided to continue to pursue closing. This is mitigating.

- The Need to Maintain Public Confidence in the Industry

The public needs to have confidence that they can rely on the accuracy and honesty of everything real estate associates tell them. The public needs to have confidence that the brokerage was well informed about the status of deposit monies. Public confidence is engaged by these breaches. This is aggravating.

In *Adams* the Alberta Court of Appeal noted that public confidence in a profession should be of utmost importance to disciplinary bodies (at p. 2):

[6]...A professional misconduct hearing involves not only the individual and all the factors that relate to that individual, both favorably and unfavorably, but also the effect of the individual's misconduct on both the individual client and generally on the profession in question. This public dimension is of critical significance to the mandate of professional disciplinary bodies.

In *Lambert* a hearing panel for the Law Society of Upper Canada added that a profession's most valuable asset is its collective reputation, and this must be considered in determining an appropriate sanction. In *Lambert* the hearing panel writes (at para 17):

When determining the appropriate penalty for this misconduct, the panel is guided by the reasons or purposes for a penalty order in discipline matters set out in Law Society of Upper Canada v. Strug and in Bolton, supra, in which Sir Thomas Bingham M.R. stated at p. 519, "A profession's most valuable asset is its collective reputation and the confidence which that inspires".

- The Role of the Member in Acknowledging What Occurred

Mr. Eger admitted his misconduct and is taking responsibility by entering into an agreement before the Panel. This is mitigating.

- Specific Deterrence

Mr. Eger's lack of previous record, his experience as broker, his admission and the low gravity of the breaches indicate there is a low need for specific deterrence.

- General Deterrence

There is a need for general deterrence. The public and other licensees must have confidence in the accuracy of information required to be exchanged. Other licensees need to be deterred from this type of conduct in the future.

Precedents

Precedents are not binding on the Hearing Panel but can help the Panel consistently impose sanctions to comparable conduct.

The following was provided in the joint submission to guide the Panel:

No cases were found for a Rule 51(1)(l) breach but there are other provisions where information is required to be immediately communicated; Rule 40, for example.

Harris - \$1000 fine Oct 29, 2020 [Tab 4]-the Licensee failed to immediately notify the executive director (prior Rules) they were subject to criminal proceedings under Rule 40(1)(h).

Quinn - letter of reprimand Oct 29, 2020 [Tab 5]- the Licensee failed to immediately notify the executive director (prior Rules) they were subject to bankruptcy proceedings under Rule 40(1)(e).

Sanction

Based on precedent and the other *Jaswal* factors, the parties jointly submitted that a Letter of Reprimand was appropriate in this case.

It was also jointly submitted that Mr. Eger be ordered to pay Costs of \$250. This corresponds with column 1, row 5 in the *Real Estate Act* Bylaws found at s. 28(3).

The parties agreed Mr. Eger should pay Costs of \$250 in this matter.

The Agreement between the parties

A further factor is that the parties have reached an agreement on conduct and on sanction taking into account the relevant factors.

The Supreme Court of Canada addressed the test that should be used when considering whether to depart from an agreed outcome in the case *R v. Anthony-Cook* (2016), the “public interest” test:

[32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

[33] In Druken, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in R. v. O. (B.J.), 2010 NLCA 19 (N.L. C.A.) (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

At paragraphs 49-60, the Court in *Anthony-Cook* also outlines the procedure decision makers must follow if they want to depart from a joint submission.

The parties submit that the proposed sanction is within an appropriate range that the Panel can accept.

G. The Hearing Panel's Decision

The Hearing Panel considered the sanction that was jointly proposed by the parties and found it appropriate given all the factors to be considered as set out in *Jaswal, supra*.

The authorities provided to the Hearing Panel supported an Order for a Letter of Reprimand for the breach of Rule 51(1)(1)(i) and (ii) of the *Real Estate Act* Rules.

The Hearing Panel also considered *R v. Anthony-Cook, supra* and the public interest test set out in that case. The public interest test states a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

The Hearing Panel finds that it should not depart from the joint submission on sanction as the proposed sanction would not bring the administration of justice into disrepute and it is not contrary to public interest.

H. Conclusion

Pursuant to section 47(2) of the *Real Estate Act*, the Hearing Panel has determined that Mr. Eger engaged in conduct deserving of sanction. For the reasons set out in this decision, the Hearing Panel agrees with the sanction jointly proposed by the parties and pursuant to section 43 of the *Real Estate Act*, the Hearing Panel orders the following sanction:

- I. \$250.00 for Costs associated with the Investigation and Hearing; and
- II. Order for a Letter of Reprimand for breach of Rule 51(1)(1)(i) and (ii).

This Decision is dated in the City of Calgary, in the Province of Alberta this 9th day of November 2021.

"Signature"

[A.B], Hearing Panel Chair