Case: 009277.002

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 39(1)(b)(i), s.41 and s.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, Vincent David Pellettier, is a licensed Real Estate Associate with the 4th St. 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")

Steve Chimuk, counsel for Vincent David Pellettier

Hearing Date: September 25, 2021, by way of a video conference

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

A. Introduction

The Licensee, Vincent David Pellettier ("Mr. Pellettier"), is a licensed Real Estate Associate with the 4th St. 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 the Notice of Hearing dated August 9, 2021, and the Affidavit of Service sworn September 14, 2021, which were Exhibits "1" and "3" respectively.

An Admission of Conduct Deserving of Sanction document signed by Mr. Pellettier on August 24, 2021, that included Agreed Breaches and Agreed Facts was also submitted and entered as an Exhibit "2".

The parties also submitted a Joint Submission on Sanction signed by Mr. Pellettier on August 24, 2021, and by the Case Presenter on September 9, 2020 that was entered as Exhibit "4".

The caselaw provided to the Hearing Panel was:

- *Jaswal v. Medical Board (Nfld.*), 1996 CanLll 11630 (NL SCTD);
- *Adams v. Law Society of Alberta*, 2000 ABCA 240 (CanLII);
- *Law Society of Upper Canada v Lambert*, 2014 ONLSTH 158 (CanLII);
- *McLeod,* RECA – letter of reprimand
- *Prosser,* RECA – letter of reprimand
- *Richter,* RECA – fine
- *Wood,* RECA – fine, and;
- *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 admitted to by Mr. Pellettier was:

a. Mr Pellettier failed to advise [C.S] and the sellers contrary to Rule 42{a) of the Real Estate Act Rules by leaving [C.S] with the information that a deposit was delivered on May 1 after learning that was not accurate. From May 1 to May 6 no deposit was delivered. [C.S] was never made aware of the failure to provide the deposit on May 1 or that a different deposit was delivered on May 6, 2019.

b. Failing to notify his broker when a deposit referred to in s. 51(1)(1) had not been received, contrary to Rule 53(f) of the Real Estate Act Rules when he found out [P.P] had not delivered a deposit on May 1,2019.

2. Vincent David Pelletier is a real estate associated licensed with Re/Max Real Estate (Central) (the brokerage).

3. David George Eger is the broker of Re/Max Real Estate (Central) (the brokerage).

4. Mr. Pellettier represented a buyer, [P.P], on behalf of Re/Max Real Estate (Central). [P.P] signed a purchase contract to purchase [ADDRESS] (the property).

5. The property sellers were [K.K]. Their representative was [C.S] licensed with Engel and Volkers Calgary.

6. 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.

7. Two subsequent amendments to the purchase contract extended the due date for the deposit to May 1, 2019.

8. 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]

9. The buyer also texted Mr. Pellettier he had delivered the draft to the brokerage that evening.

9. At 6:38 am on May 2, 2019, Mr. Pellettier texted [C.S]

> "The deposit was delivered to our office late yesterday ... I will have a copy for you a little later this morning."

10. By 9:44 am on May 2, 2019 Mr. Pellettier learned from the brokerage [P.P] did not deliver a draft to the brokerage.

11. 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.

12. 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.

13. On May 13, 2019, the bank returned the cheque unhonoured as "un-traceable".

14. 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]"

15. On May 14, 2019 [P.P] delivered a further bank draft to the brokerage which was again deposited. Mr. Pellettier advised the sellers' representative:

> "Our office has just confirmed receipt of the new $50,000 bank draft as the initial deposit on this sale. I will forward a copy as soon as I receive it."

16. On Friday May 17, 2019 at approximately 2:50 pm the brokerage received notice from their bank that the draft was "counterfeit".

17. 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.

18. 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*

Rule 42(a) of the *Real Estate Act Rules,* which Mr. Pellettier admitted to breaching, states:

> 42 Licensees must not:
> (a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so;

And Rule 53(f) which states:

> 53 A real estate associate broker and associate must:...
> (f) notify the broker if a deposit referred to in Rule 51(1)(l) has not been received;

E. Conduct Deserving of Sanction

As Mr. Pellettier's statement of admission of conduct was accepted by the Executive Director, 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. Pellettier engaged in conduct deserving of sanction, specifically that he breached Rule 42(a) and 53(f) of the *Real Estate Act Rules*.

F. Joint Submission on Sanction

The Hearing Panel's finding concluded Phase 1 of the Hearing. The Hearing Panel went on to consider the Joint Submission on Sanction which was presented in the written and agreed upon submissions of the parties:

The Executive Director and Industry Member proposed the following sanction:

Breach	Fine
42(a)	$1,500
Rule 53(f)	An order reprimanding the licensee
Costs	$250
TOTAL	**$1,750**

Authority for Sanction

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

> 43(1) If a Hearing Panel finds that the conduct of an industry member was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:
>
> a. an order cancelling or suspending any authorization issued to the industry member by the Council;
>
> b. an order reprimanding the industry member;
>
> c. an order imposing any conditions or restrictions on the industry member and on that industry member's carrying on of the business of an industry member that the Hearing Panel, in its discretion, determines appropriate;
>
> d. an order requiring the industry member to pay to the Council a fine, not exceeding $25,000, for each finding of conduct deserving of sanction;
>
> e. any other order agreed to by the parties.
>
> (2) The Hearing Panel may, in addition to or instead of dealing with the conduct of an industry member under subsection (1), order the industry member to pay all or part of the costs associated with the investigation and hearing determined in accordance with the bylaws.

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 industry member
- 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 industry member in acknowledging what occurred
- whether the industry member 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 Executive Director's and the Industry Member's analysis of the relevant *Jaswal* factors.

- Age and Experience of the Industry Member

  Mr. Pellettier has been a licensed associate since 2011, with 9 years' experience in the industry. With that level of experience he should have been aware that his conduct contravened important standards. This is considered aggravating.

- The Previous Character of the Member

  Mr. Pellettier has no previous disciplinary history.

- The Number of Times the Offence was Proven to have Occurred
  There was a single incident of breach of 42(a) and 53(f). This is neither mitigating or aggravating.

- The Nature and Gravity of the Proven Allegations

  Accurate and timely communication about material facts concerning a transaction is extremely important. All parties must be able to rely on the communications especially when it concerns deposits held in trust and contract rights. Material statements found to be inaccurate need to be corrected immediately. The nature of the breach is aggravating.

  The gravity of these breaches is mitigating. While the deposit was delivered late and then returned, the sellers were 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 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. Pellettier admitted his misconduct and is taking responsibility by entering into an agreement and admission before the Panel. This is mitigating.

- Specific Deterrence

  Mr. Pellettier's lack of previous record, 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 impose sanctions consistently to comparable conduct.

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

Rule 53(f)

McLeod Letter of Reprimand Oct 22, 2012 - six transactions where the licensee failed to provide information to parties and the broker, including information on deposits not received. While multiple transactions it relies on similar aggravating and mitigating factors.

Rule 42(a)

Prosser $3000 fine Feb 12, 2019 - overstating the size of a property on MLS. The Licensee discovered the error but did not update MLS or advise a buyer for over a week. The failure was found to be intentional and of consequence to the buyer.

Richter Letter of Reprimand Nov 16, 2018 -Licensee texted buyers' rep there was a 40% discount on appliances available through the builder but it was only 20%. Licensee failed to check the discount before sending this information and didn't correct it.

Wood $1500 fine July 31, 2000 b - overstated square footage because they failed to confirm the size. The error was significant but this was unintentional resulting from inattention.

> $1500 is also the minimum fine set out in Schedule 2 of the Bylaws for a breach of s.42(a).
>
> In this case a reprimand for the failure to notify his broker and $1500 for failing to confirm or correct the representation to the sellers' representative appear consistent with these precedents.
>
> There is no suggestion of a motive for intentionally failing to tell the sellers' rep, rather it was an oversite, though one that resulted in a Rule breach. The other factors and that the sellers continued with the transaction also weigh against a higher fine.

Sanction

Based on precedent and the other *Jaswal* factors the parties agreed that an appropriate fine for the breaches of Rule 42(a) is $1,500, and an order reprimanding the Industry Member for the breach of Rule 53(f).

The parties agreed Mr. Pellettier should pay costs of $250 in this matter.

The Agreement between the Registrar and Licensee

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 Executive Director and Industry Member submit 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 emphasis on education rather than punitive measures is congruous with the facts in this matter.

The authorities provided to the Hearing Panel supported the fine agreed to by the parties for the breach of *Rule 42(a)* and an order of reprimand for the breach of Rule 53(f) 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. Pellettier 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. A fine of $1,500.00 for the breach of *Rule* 42(a);
II. $250.00 for costs associated with the investigation and Hearing, and;
III. Order of reprimand for breach of Rule 53(f)

This Decision is dated this 9th day of November 2021

"Signature"
[A.B], Hearing Panel Chair