

THE REAL ESTATE COUNCIL OF ALBERTA

**IN THE MATTER OF** an Appeal Hearing pursuant to Part 3 and sections 39 and 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "**Real Estate Act**")

**AND IN THE MATTER OF** an Administrative Penalty Appeal issued with respect to the conduct of **JASON MICHAEL DUNCAN**, managing broker of RentPerks Alberta LP

Hearing Panel Members: [W.K], Chair  
[J.L], Panel Member  
[A.S], Panel Member

Appearances: Jason Michael Duncan on his own behalf  
  
I. Nazir on behalf of the Registrar of the Real Estate Council of Alberta

Hearing Dates: May 29 and 30, 2024

**DECISION OF THE HEARING PANEL**

**SUMMARY OF THE APPEAL**

1. This Hearing Panel was appointed to hear the appeal of Jason Michael Duncan (the "**Licensee**" or **J. Duncan**") managing broker of RentPerks Alberta LP ("**RentPerks**"). J. Duncan was the subject of a \$1000 administrative penalty issued in accordance with section 39 and section 83 of the *Real Estate Act*, R.S.A. 2000, c. R-5 (the "**Act**") for contravention of section 43(1) of the Real Estate Act Rules (the "**Rules**").
2. On or around May 5, 2024, the Registrar of the Real Estate Council of Alberta determined there was sufficient evidence that the Licensee had contravened section 43(1) of the Rules and that this conduct was deserving of sanction.
3. In reference to section 43(1), a licensee who establishes a client relationship when trading in residential real estate, engaging in property management, or when dealing in mortgages must enter into a written service agreement with that prospective client (a "**Written Service Agreement**").
4. Upon the review of a complaint issued by [S.U] (the "**Complainant**" or "**[S.U]**") with respect to the Licensee, the Registrar concluded that in or around

December of 2019 the Licensee had failed to enter into a Written Service Agreement with a client contrary to section 43(1) of the Rules which created confusion with respect to the obligations to the client and the authority of the brokerage.

5. Consequently, a \$1,000 administrative penalty was issued to J. Duncan and J. Duncan now appeals that decision to this Hearing Panel.
6. For the reasons outlined below, the Hearing Panel dismisses the appeal and confirms the finding that the Licensee breached section 43 of the Rules for failing to have a Written Service Agreement in place after establishing a client relationship in December of 2019.

## BACKGROUND/FACTS

7. In or around December of 2019, RentPerks entered into a contract for the sale of management rights with an individual referred to the Hearing Panel as [B.H] (“**B.H**”) for the management rights of several properties located in or around Calgary, Alberta, Canada (the “**Management Rights**”). J. Duncan submitted that RentPerks was to pay \$25,000 to [B.H] for the Management Rights (the “**Management Rights Contract**”).
8. [S.U] was identified by both parties as the landlord and owner of a number of the properties that were the subject of the Management Rights sold by [B.H] to RentPerks.
9. J. Duncan confirmed that he believed a client relationship had formed with [S.U] in December of 2019 but that the verbiage of the Management Rights Contract specified that [B.H] must have the authority to “sign off” on [S.U]’s behalf and that [B.H] would “take the obligation of any other expectations directly.”
10. J. Duncan confirmed that he did not speak directly to or connect with [S.U] in December of 2019 but relied on the assurances provided to him by [B.H]. J. Duncan confirmed that at no point in time did he or a member of RentPerks present or discuss a Written Service Agreement with [S.U].
11. J. Duncan further acknowledged that in or around May of 2020, RentPerks became aware that a Written Service Agreement had not been secured with [S.U] for the properties at issue and that in or around that time he prepared and sent a “Service Level Agreement” (“**SLA**”) through [B.H] to [S.U] for his signature.
12. Both [S.U] and J. Duncan confirmed that, on or around May 20, 2020, an executed copy of the first and last page of an SLA were provided by [B.H] to RentPerks (Exhibit #18).

13. [S.U] acknowledged that the signature on Exhibit #18 appeared to be his though he did not recall signing the SLA or reviewing its contents with either [B.H] or Duncan.

## ISSUE(S)

14. The issues before the Hearing Panel are as follows:
  - a. Did J. Duncan establish a client relationship when engaging in property management on behalf of [S.U]?
  - b. Did J. Duncan enter into a Written Service Agreement with [S.U] at that time?

## STANDARD OF REVIEW

15. In accordance with section 83.1(1) of the Act, a person to whom a notice to pay an administrative penalty is given under section 83(1) may, within 30 days after receipt of the notice, appeal the decision to a Hearing Panel.
16. The Hearing Panel on an appeal may:
  - a. quash, vary, or confirm the administrative penalty, and
  - b. make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the bylaws.
17. The Hearing Panel's review of the Registrar's decision is *de novo* and must be made independently and without deference to the underlying decision of the Registrar.
18. In accordance with section 83.1(6) of the Act, the Hearing Panel's decision under this section is final.

## SUBMISSIONS OF THE PARTIES

19. The parties provided considerable and lengthy submissions over the course of the two-day hearing held on May 29 and May 30, 2024. Many of these submissions were ultimately irrelevant to the issue before the Hearing Panel which was to determine whether, as of December of 2019: a client relationship existed as between J. Duncan and a particular client ([S.U]); and, if so, whether a Written Service Agreement with that client was in place. The Hearing Panel did not wish to pre-judge or pre-determine the potential narrative of argument of either party and therefore allowed for lengthier submissions that ultimately proved irrelevant to a determination on the matters at issue.

20. The Registrar attempted to adduce evidence of additional misconduct engaged in by J. Duncan (which was not relevant or material) as well as to argue that the SLA executed in May of 2020 would still not have met the requirements of a Written Service Agreement in accordance with 43(2) of the Rules.
21. J. Duncan attempted to adduce evidence as to the credibility of [B.H] and the contents of the Management Rights Contract which J. Duncan asserted placed liability arising from administrative matters, such as those at issue, on [B.H].
22. The material facts at issue, as articulated above, were not substantively contested or disputed.

## ANALYSIS

23. Section 43 of the Rules addresses Written Service Agreements as follows:

### Written service agreements

43(1) Subject to these rules, a licensee who establishes a client relationship when trading in residential real estate, engaging in property management, when dealing in mortgages, or providing condominium management services, must enter into a written service agreement with that prospective client.

24. A Written Service Agreement outlines the roles and responsibilities of the parties, clarifies the expectations of each party, and helps to ensure the client understands their relationship with the brokerage.
25. Clarity of roles, responsibilities, and expectations are essential to consumer trust and confidence and Written Service Agreements should be reviewed with prospective clients to ensure a mutual understanding of those roles.
26. In light of this Rule, the Licensee's role is to demonstrate that a Written Service Agreement was in place at the time the client relationship was established. In this regard, he has not succeeded.
27. Neither the Registrar nor [S.U] were parties to the Management Rights Contract and its existence does not obfuscate RentPerks' or J. Duncan's obligations with respect to section 43 of the Rules. While [B.H] may very well have been in breach of the Management Rights Contract, that matter is not before this tribunal and it cannot be considered by this Hearing Panel with respect to the administrative penalty assigned to J. Duncan.
28. Contraventions of the provisions listed in column 1 of Schedule 5 to the Rules (which includes section 43) may be addressed by the Registrar in accordance with the procedure set out in section 83 of the Act by the issuance of an administrative penalty as occurred in this instance.

29. To conclude, this Hearing Panel has determined there is sufficient evidence that J. Duncan contravened section 43(1) of the Rules and is therefore deserving of sanction in accordance with section 83 of the Act.

## CONCLUSION AND ORDER

30. After considering the evidence and the respective submissions of the parties, the Hearing Panel has concluded that in or around December of 2019 the Licensee failed to enter into a Written Service Agreement with a client contrary to section 43(1) of the Rules which ultimately created confusion with respect to its obligations to the client and the authority of the brokerage.
31. As the parties were earlier advised, the Hearing Panel reserved its decision on sanction and costs pending the outcome of the Hearing. The parties are now directed to provide their submissions on sanctions and costs in writing, not to exceed five pages, according to the following schedule:
- a. The Registrar is to provide its submission on sanction and costs on or before August 15, 2024;
  - b. The Licensee is to respond to Registrar's submission on or before August 30, 2024; and
  - c. The Registrar is to provide its reply, if any, on or before September 6, 2024.

Dated the 31<sup>st</sup> day of July, 2024, in the City of Calgary in the Province of Alberta.

**"Signature"**

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[W.K], Hearing Panel Chair

THE REAL ESTATE COUNCIL OF ALBERTA

**IN THE MATTER OF** an Appeal Hearing pursuant to Part 3 and sections 39 and 83.1 of the *REAL ESTATE ACT*, R.S.A. 2000, c.R-5 (the "**Act**")

**AND IN THE MATTER OF** an Administrative Penalty Appeal issued with respect to the conduct of **JASON MICHAEL DUNCAN**, managing broker of RentPerks Alberta LP

Hearing Panel Members: [W,K], Chair  
[J.L], Panel Member  
[A.S], Panel Member

Appearances: Jason Michael Duncan on his own behalf

Iqra Nazir on behalf of the Registrar of the Real Estate Council of Alberta

Hearing Dates: May 29 & 30, 2024

Written submission on Costs Written Submissions Registrar – August 15, 2024

Received: Written Submissions by Licensee – August 30, 2024

Reply by the Registrar – September 6, 2024

**DECISION ON COSTS AND SANCTION**

**SUMMARY OF THE APPEAL**

32. This Hearing Panel was appointed to hear the appeal of Jason Michael Duncan (the "**Licensee**" or **J. Duncan**") managing broker of RentPerks Alberta LP ("**RentPerks**"). The Licensee was the subject of a \$1000 administrative penalty issued in accordance with section 39 and section 83 of the *Real Estate Act*, R.S.A. 2000, c. R-5 (the "**Act**") for contravention of section 43(1) of the Real Estate Act Rules (the "**Rules**").
33. On July 31, 2024, following a contested administrative penalty appeal, the Hearing Panel issued its decision confirming a finding that the Licensee had breached section 43 of the Rules for failing to have a Written Service Agreement in place after establishing a client relationship in December of 2019.

34. The Hearing Panel then directed the parties to provide their written submissions on sanction and costs. The Registrar was directed to provide its submission on or before August 15, 2024 and the Licensee was to respond on or before August 30, 2024. The Registrar was to provide its reply submission, if any, on or before September 6, 2024.
35. The Hearing Panel has now received submissions from both the Registrar and the Licensee.
36. In accordance with section 83.1(5) of the Act, the Hearing Panel on an appeal of an administrative penalty may:
  - a. quash, vary, or confirm the administrative penalty, and
  - b. make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the Bylaws.
37. In accordance with section 83.1(6) of the Act, the Hearing Panel's decision under this section is final.
38. For the reasons articulated below, the Hearing Panel confirms the administrative penalty previously assigned to and paid by the Licensee with no additional costs payable under section 83.1(5)(b).

#### ISSUE(S)

39. Having concluded that under section 43(1) of the Act that the Licensee had engaged in conduct deserving of sanction, the issues before the Hearing Panel are as follows:
  - a. Should the Hearing Panel quash, vary, or confirm the administrative penalty, and
  - b. Should the Hearing Panel make an award as to costs of the investigation that resulted in the administrative penalty and of the appeal in an amount determined in accordance with the Bylaws.

#### THE REGISTRAR'S SUBMISSION ON Sanction and COSTS

40. The Registrar directed the Hearing Panel to the off-cited factors articulated in *Jaswal v Medical Board (Nfld)*, 1996 CanLII 11630 which are relevant to a decision on the appropriate sanction to be applied in administrative proceedings (the "*Jaswal Factors*").
41. The Registrar, in light of the *Jaswal Factors*, provided a number of comparable cases for past breaches of Rule 43(1) including, without limitation: *Kisilowski (Re)*, 2020 ABRECA 117, *Jochem (Re)*, 2022 ABRECA 076, and *Khan (Re)*, 2022 ABRECA 051.

42. It was the Registrar's submission that in each of the precedents reviewed and provided, the appropriate sanction for breaches of Rule 43(1), in analogous circumstances, typically involved a fine of \$1,000.
43. With respect to its submissions on costs, the Registrar referenced the "Jinnah Presumption" arising from the seminal case of *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 ("*Jinnah*"). The Court in *Jinnah* found that in the case of self-regulated professions, "the profession as a whole should bear the costs in most cases of unprofessional conduct," and costs should only be imposed where there are compelling reasons including the:
  - a. Breach was especially serious;
  - b. Subject was a "serial offender" – this can mean there was only one prior discipline;
  - c. Subject failed to cooperate with the investigation and extended the use of resources of the regulator; or
  - d. Subject participated in hearing misconduct which made the hearing more expensive.
44. Notwithstanding referencing the Jinnah Presumption, the Registrar submitted that: "the Alberta Court of Appeal is going to reconsider *Jinnah* and whether the presumption that regulatory bodies bear the full cost of disciplinary proceedings in most cases should stand" and that, in any event, there are reasons to deviate from the *Jinnah* Presumption and order costs in these circumstances.
45. The justification provided by the Registrar to deviate from the Jinnah Presumption ostensibly was that the Licensee was given an opportunity prior to advancing the appeal hearing to pay the administrative penalty issued to him and could have avoided incurring potential costs in the event he was unsuccessful.
46. Accordingly, the Registrar sought costs to be awarded in the amount of \$5,240.00 which it viewed as being on the "low end" of those available under the Bylaws.

#### **THE LICENSEE'S SUBMISSION ON Sanction and COSTS**

47. The Licensee was self-represented at both the Hearing and in their written submissions.
48. In their submissions, on both sanction and costs, the Licensee did not substantively address the submissions of the Registrar but seemingly attempted to relitigate the matter and make arguments against the findings of the Hearing Panel with respect to conduct deserving of sanction under section 43(1) of the Rules.



49. With respect to costs, the Licensee did submit that much of the time spent during the Hearing was to address matters found not to be relevant to the administrative appeal and acknowledged that, while costs were potentially warranted, they should be reduced from those sought by the Registrar.

## ANALYSIS

50. Section 43 of the Rules addresses "Written Service Agreements" and is administrative in nature. Such agreements outline the roles and responsibilities of each party, clarify the expectations of each party, and help to ensure that a given client understands their relationship with a given brokerage.
51. Clarity of roles, responsibilities, and expectations are essential to consumer trust and confidence and Written Service Agreements should be reviewed with prospective clients to ensure a mutual understanding of those roles.
52. There was no evidence presented to the Hearing Panel that the Licensee's breach of Rule 43 was malicious, deliberate, or repeated. Accordingly, the appropriate sanction, in the absence of additional misconduct, is, as articulated in the cases provided by the Registrar, a \$1,000.00 administrative penalty.
53. Neither party argued for a deviation from this sanction and the Hearing Panel confirms its application in accordance with section 83.1(5) of the Act.
54. With respect to costs, the role of the Hearing Panel is to evaluate whether exceptions to the general rule, that costs are borne by the self-regulating body, were met.
55. In these circumstances, no such exception applies. The breach at issue:
  - a. Was not especially serious;
  - b. The Licensee was not a "serial offender;"
  - c. The Licensee cooperated fulsomely with the investigation; and
  - d. The Licensee was not found to have engaged in any misconduct.
56. While the Jinnah Presumption is rebuttable, the facts of this matter do not give rise to such an exception. To conclude otherwise would be to confirm that an administrative penalty appeal under Section 83 of the Act, in-and-of-itself, gives rise to litigation misconduct, which is simply not a tenable conclusion in these circumstances.
57. Any such finding would be punitive in nature and could result in a chilling affect that may prevent licensees, with legitimate concerns arising from an administrative penalty, from raising them.

58. It is for this reason, among others, that the Jinnah Presumption was established and notwithstanding the Registrar's argument that: "the Alberta Court of Appeal is going to reconsider *Jinnah*," as of the writing of this decision, they have not yet done so and there are no reasons to deviate from the *Jinnah* Presumption in this case.
59. In this matter, the costs sought by the Registrar were a multiple of over 5X the amount administered or even sought as a penalty in the underlying decision.
60. As articulated in the Phase 1 decision on conduct, during the underlying hearing, both parties provided considerable and lengthy submissions over the course of two days that were ultimately irrelevant to the issue before the Hearing Panel. The Registrar attempted to adduce evidence of additional misconduct engaged in by the Licensee outside of the matters at issue (which was not relevant or material) and the Licensee attempted to adduce evidence as to the credibility and culpability of an individual not a party to or present at these proceedings.
61. All parties to administrative appeals under Section 83 of the Act must be cognizant of the facts and evidence that may be relevant and material to an adjudication of the matters at issue. As asserted by both parties, deviations or tangents from those issues can be inefficient and costly. In this matter, any such deviation (and the costs associated with those deviations) are borne equally by the parties.

## CONCLUSION AND ORDER

62. In accordance with section 83.1(5)(a) the Act, the Hearing Panel confirms the administrative penalty paid by the Licensee in the amount of \$1,000.00.
63. In accordance with section 83.1(5)(b) the Act, no further costs are payable.

Dated the 4<sup>th</sup> day of November, 2024, in the City of Calgary in the Province of Alberta.

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"Signature"

[W.K], Hearing Panel Chair