

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, Caren Sylvia Kelley, registered with Twin Oakes Real Estate 1993 Inc., operating as REMAX House of Real Estate

Hearing Panel Members: [A.B], Chair
[A.S]
[G.P]

Appearances: Sania Chaudhry, Counsel for the Registrar of the Real Estate Council of Alberta ("RECA")

Hardeep Sangha, Counsel representing Licensee, Caren Sylvia Kelley. Initial appearance by Johnathon Denis as Counsel.

Hearing Date: June 20 & 21, 2022 by way of a virtual hearing

DECISION OF A HEARING PANEL ON CONDUCT DESERVING OF SANCTION

A. Introduction

The Licensee, Caren Sylvia Kelley ("Kelley"), was licensed as a Real Estate Associate with Twin Oakes Real Estate 1993 Inc. operating as REMAX House of Real Estate. The alleged breaches are said to have taken place in January and February 2017.

B. Documents submitted to the Hearing Panel

The Registrar provided to the Hearing Panel the Notice of Hearing dated March 3, 2022, as Tab 1 of their Exhibits. Exhibits provided by the Registrar number 1 through 39(b), each entered individually during the course of the hearing. The Exhibits relate to the Registrar's original submission with Tabs 1 – 43. The Schedule of Exhibits is attached hereto as Schedule "A".

The parties also submitted written Closing Submissions on July 4, 2022, and the Registrar's Reply Submissions on July 11, 2022

C. Alleged Breaches

The conduct deserving of sanction as alleged by the Registrar is as follows:

a. Kelley, the licensee, engaged in conduct deserving of sanction by breaching section 42(b) of the *Real Estate Act* Rules on a balance of probabilities by participating in fraud in connection with the provision of her services from January 2017 to February 2017 by:

- i.** Knowingly providing an unlicensed third party with a blank listing agreement (also known as an Exclusive Seller Representation Agreement), Consumer Relationship Guide, and verification of identity forms and allowing the unlicensed person to explain and sign these forms with the clients, [F.H] and [A.D];
- ii.** Signing as witness on the listing agreement and filling in details into this blank agreement after receiving partially signed copies of it from the unlicensed party and not having actually witnessed the signatures herself;
- iii.** Not meeting with, verifying the identities of, nor speaking directly to the clients;
- iv.** Allowing the unlicensed party to use her to list the property on MLS and listing the property without measuring it nor having direct conversations with the client about the property;
- v.** Not engaging in due diligence with disregard for her professional responsibilities in this matter; and
- vi.** These actions allowed for the unlicensed third party to commit fraud by lying to [F.H] inducing her to believe the house sold for \$455,000 when it actually sold for \$529,000 and he kept the difference;

b. Kelley engaged in conduct deserving of sanction by breaching section 41(d) of the Rules on a balance of probabilities by failing to fulfil her fiduciary obligations to her clients, [F.H] and [A.D], and her brokerage by:

- i.** Failing to protect her clients;

- ii. Failing to meet with her clients, nor to speak with them directly, to obtain information from them about their needs and circumstances so that she could advise them and protect them;
 - iii. Failing to directly explain her role and the services she would provide to the clients directly;
 - iv. Failing to perform the services she agreed to perform on behalf of her brokerage in the listing agreement, by declining to set up viewings because the tenants required one-day notice and allowing the unlicensed third party to do showings;
 - v. Entering old unverified information on the MLS listing on behalf of her clients;
 - vi. Letting her clients be advised and directed in the sale of their property by an unlicensed third party who was not their agent and did not owe them any fiduciary duties leaving them vulnerable to fraud and liability;
 - vii. Letting an unlicensed third party negotiate with her clients without being present or representing them in this negotiation, allowing this unlicensed third party to lie to her clients and induce them to enter into a sale contrary to their best interests; and
 - viii. Letting her brokerage become vulnerable to liability as a result of letting an unlicensed third party carry out her responsibilities;
- c. Kelley engaged in conduct deserving of sanction by breaching section 41(c) of the Rules on a balance of probabilities by not disclosing to her clients, [F.H] and [A.D], how she would be paid for her services by filling in the commission portion of the listing agreement after they had signed it in blank form and not explaining to them directly how she would be paid;
- d. Kelley engaged in conduct deserving of sanction by breaching section 43(3) of the Rules on a balance of probabilities by not delivering to [F.H] a true copy of the listing agreement immediately upon its full signature;
- e. Kelley engaged in conduct deserving of sanction by breaching section 57(a) of the Rules on a balance of probabilities by not using her best efforts to market her client's property nor promoting the interest of her seller clients by failing to provide a comparative market analysis or comparable listings to her clients to ensure that the listing price was reasonable or in their best interests and by using the listing price from the previous MLS listing without taking steps to ensure that the price was reasonable;

f. Kelley engaged in conduct deserving of sanction on a balance of probabilities by breaching section 41(g) of the Rules on a balance of probabilities by contravening CREB Rule 2.04(e) by using information and photos from an old listing for the property without the consent of the previous listing brokerage; and

g. Kelley engaged in conduct deserving of sanction on a balance of probabilities by breaching section 46(2) of the Rules on a balance of probabilities by allowing an unlicensed third party to perform tasks that must only be performed by a licensee specifically by allowing [I.S], an unlicensed third party, to receive confidential information, advise her clients in the sale of the property, market the property, negotiate the sale of the property, and execute forms and contracts associated with her agency and the sale of the property.

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

The *Real Estate Act* Rules state:

41 Licensees must:

- (c) disclose to their clients, at the earliest practical opportunity, how they will be paid for their services;
- (d) fulfill their fiduciary obligations to their clients;
- (g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate, mortgage transactions or property management in Alberta;

42 Licensees must not:

- (b) participate in fraudulent or unlawful activities in connection with the provision of services or in any dealings;

43 (3) A licensee must deliver to the client a true copy of a service agreement and of any amendment or addition, immediately upon its signature.

46 (2) A licensee must not delegate, assign, request, direct or in any way allow an unlicensed or unregistered assistant to perform tasks that must only be performed by a licensee.

57 The basic obligations of an licensee who is in a sole agency relationship with a seller are:

- (a) to use best efforts to market the property and to promote the interests of the seller;

E. Procedural Matters

The Panel notes that the hearing originally scheduled for April 28 & 29, 2022 was adjourned with consent of the Registrar. The adjournment decision was issued on April 26, 2022.

During the course of the hearing, the licensee objected to the acknowledgement of the witness [J.P] declaring the authenticity of certain documents or statements.

Counsel for Kelley objected to the presentation of the phone call recording without an accompanying transcript. Counsel also raised an objection to the presentation of video and transcript interviews of the Licensee with RECA investigators absent the investigators being made available for questioning.

We note that in the final written submission of the Licensee, provided by her counsel on July 4, 2022, she admits to the conduct alleged under s. 41(d), 41(g) and 43(3).

F. Background & Evidence

The Licensee in this case, Kelley, is alleged to have breached various *Real Estate Act* Rules ("the Rules") during the course of her dealing with the Complainant, [F.H] and during January and February 2017. In particular, she is alleged to have provided a blank listing and representation agreement to an unlicensed third party ([I.S]) and allowing that party to explain the forms to the client and to have the forms signed. Kelley failed to explain her role and services to the clients.

Subsequently, it is alleged that Kelley never met with the clients, did not witness their signatures on the agreement, did not verify their identities or speak directly with them. The property that was to be sold was listed on MLS without measurements or pictures being taken, nor through discussions with the clients. It is alleged that Kelley used photos and measurements from a previous listing of the property in contravention of Calgary Real Estate Board (CREB) Rules (Exhibit 5).

The sale of the client's property was managed by the unlicensed third party leading to the commission of fraud; the unlicensed party advises the client that the property sold for \$455,000 when in fact it sold for \$529,000. The unlicensed party kept the difference, some \$56,000, made payable to his spouse's company. Counsel that facilitated the sale was disciplined by the Law Society of Alberta (Exhibit 36) for failing to conscientiously and diligently represent the best interests of the client.

Several months later, June 2017, Kelley contacted [F.H] by phone and there was a discussion between them about the transaction (Exhibit 28). Kelley questioned whether the property had been sold and the status of her commission. [F.H]

questioned Kelley's provision of services, there was discussion of [F.H]'s complaint to the Real Estate Council of Alberta.

There is no dispute that [A.D] and [F.H] were the owners of the property located at [ADDRESS] and that this is the subject property from which this matter arises. The panel also heard no dispute over the facts in relation to the facilitation of the transaction by the Amanoh Law Firm and the outcome of disciplinary matters before the Law Society as a result of the transaction.

Exhibit 13, May 10, 2018, response from [F.H]:

- This all started on January 27 2017. Kelly Caren from RE/MAX was referred to me by one of the third party private lenders named [I.S]. [I.S] was referred to me by a friend. [I.S] brought a client offer to me and told me that he is not a realtor so he couldn't list the house in order to get a mortgage from the bank. The bank would need to see a listing in order to sell and approve a mortgage so he said he would ask his realtor that she works with (Ms. Caren). He referred me to her verbally and I never met her personally. I agreed to list my house with whoever he knew at this point. I had to sell my property as soon as possible and the next day (January 28.2017) my house was listed. I signed a blank purchase contract as [I.S] said that the realtor would fill up the rest. They listed my house for \$559,000. I did ask [I.S] later about offers and he told me no one was willing to pay me my asking price. He also said i([F.H]) didn't know anything about selling the property but the bank needed to see a higher price to bargain it. [I.S] came to me with an offer of \$455,000 which he said would be the highest offer. So I trusted him and followed his words. At the end of the closing I asked my lawyer about the property document and she gave me, when I saw my document I asked her this is not the right document because my house was sold for 455,000 not 529,900 she told me this is the right document When I asked her about it she smiled and told me that I should know whats going on. When I called [I.S] he said he had nothing to do with it and that all her did was send me a client and refer me to a lawyer and realtor so that if I had any questions I should ask them instead. I never met the realtor and I found out about her when I looked through my purchase papers and found her name to which I found her number. When I called she said she did not know me so I Introduced myself and asked her about the property and she told me that she listed the property but did not sell it. I also asked her about my listing contract and asked her who signed it. She said that my husband and I signed it, which is completely wrong because my husband and I were separated. I asked her for a copy of the purchase contract but then she hung up on me. The next day she called me and told me that my house had been sold but she did not receive any commission and requires it immediately. I asked her why she signed the purchase contracting including representing a third party on the contract If she claimed she did not sell the house? She then asked me for a copy of the document with her signature. I told her I'd send her a copy as soon as she provided me listed contract documentation I asked for, in return she denied and said she would sue me for her commission because she list the house and I sold privately That was the last time she picked up my call. I called RE/MAX and spoke with [D.N]

who is one of the broker managers and Caren Kelly work under his company I requested for my listing contract to him and he was also denied by My financial situation is not stable therefore can not afford a lawyer.

I also filed a request with the Law which is currently under consideration. I am asking for the money that I lost from your company and affiliates, whether it is direct or under a company/ realtor Insurance. I have witnesses and proof for all the explained events explained. Thank you for your time and I hope to hear from you soon.

Regards, [F.H]

Further interviews with the Licensee were held in the process of information gathering. Interviews were recorded. Interviews were held on August 9 & 15, 2018 between RECA investigators and Kelley. Recordings of the interviews were played on several occasions during the course of the hearing. Audio is entered as Exhibits 38(b) and 39(b), while the transcripts of the interview are Exhibits 38(a) & 39(a).

[J.P] Evidence

[J.P], Investigations Manager, Real Estate Council of Alberta, provided evidence concerning the investigation of the matter. [J.P] provided the licensing history of the Licensee, indicating she was first licensed October 9, 2002, Exhibit 2.

[J.P] proceeded to provide information concerning the investigation, beginning with the complaint from [F.H], initially provided on March 21, 2018 Exhibit 4. The complaint was signed by [F.H] on February 13, 2018 and date stamped as being received by RECA on March 21, 2018.

[J.P] then identified the CREB rules, effective January 2016, Exhibit 5. RECA counsel pointed out rule s2.04 subsection E ... *Members shall not use any of the images from active MLS listings or previous listings, regardless of the format, without the written consent of the former listing, brokerage and notification to the board upon request.*

Counsel introduced the document outlining the administrative penalty issued on October 24, 2018, by RECA to [I.S], the unlicensed individual who facilitated the sale transaction on behalf of [F.H]. A fine of \$15,000 was issued for a breach of s.17 of the *Real Estate Act*, - unauthorized trading in real estate. Exhibit 6. [J.P] also provided information that the spouse of [I.S] and sole director of a numbered company received a portion of the excess funds from the sale.

Evidence of the investigation and correspondence, dated April 13, 2018, to Kelley, was entered into evidence, Exhibit 7. The author of the correspondence was [V.E], Professional Conduct Review Administrator. The specific questions posed were:

1. *Please provide your detailed, written description of how [F.H] became a client of yours, why did she want to sell her house, how much did she want to see it for?*
2. *Please provide any documents that formed part of this transaction that were not handed into the brokerage.*
3. *How did you first encounter the client?*
4. *Do you know who referred the client to you?*
5. *Provide the name and contact information of the referral source, as well as a detailed description how you know them and how often you have worked with them.*
6. *Was a service agreement presented to the client and signed; if so please provide a copy.*
7. *Did you go through the listing agreement with the seller?*
8. *Who were you representing in this transaction?*
9. *What happened during this transaction?*
10. *Was your commission amount explained to the seller? If so, how did you explain it?*
11. *Did you receive any money or commissions for this transaction?*
12. *Did you receive a key to the house?*
13. *Provide any other documents or information relevant to this matter.*

Kelley's response, Exhibit 8, dated April 25, 2018, provides:

About the middle of January, 2017 I was contacted by a previous client, I. [I.S], requesting I list [ADDRESS]. I was told the seller was under financial duress and was approaching foreclosure on both her principal residence and her rental property. This was her rental property that was tenant occupied. I was told the property was tenant occupied with minimal access for showings.

I originally declined as I was terribly busy at the time and didn't have time available to deal with this.

I eventually agreed and prepared documents required for the listing. When I attempted to make arrangements to meet with the seller, [F.H] & [A.D] I was told she was working two jobs and didn't have time. [I.S] had the contract and other documents signed and obtained copies of identification. I spoke with him on the phone at the time but I wasn't present. [F.H] wanted the property listed in her name only. As I understood this to be a marriage break up and the home was to be transferred into the wife's name, [F.H], a copy of a Separation Agreement was supplied. The title did not reflect the transfer of property too [F.H]. As she was not able to continue on with the property financially the property was listed in both names, [F.H] & [A.D] on January 25, 2017 for \$559,000.

This was a very busy time for me in my business and there was very little interest in the property. One showing and four others declined due to 24 hours' notice not being due to the tenants. The listing expired on March 25, 2017 and I did not pursue it further.

At the beginning of June, about the 6th (I'm not sure of exact date) I was contacted by [F.H]. She told me she had sold her house and wanted a copy of the sales contract. I explained to her that I had no idea the house had been sold and therefore didn't have that information. I then asked her who the Lawyer was that represented her and she refused to tell me. I tried to explain to her that she was under contract with my brokerage and should not have proceeded with a sale without me being notified and she was liable for commissions. She then claimed she didn't know what she was doing and was trying to figure it out. I told her to go and talk to that Lawyer as she should have received full disclosure of the sale.

The following day she asked me to call her again. She left me a message requesting I call her back as she was preparing to supply information to RECA. When I returned her call she had no idea who I was and why I was calling, even though she had left me a message. This was a strange conversation – I had to refresh her memory as to who I was. She had me hold for a while and then came back on the line recalling the conversation from the previous day. We had a lot of interference on the call and along with her accent the call didn't make a lot of sense. I asked her to call me back.

We spoke again the following day. At that point she asked me to email the listing contract to her as she couldn't find her copy. I agreed and told her to

send me her email address and the Lawyers name that closed the sale. She then sent me a text with her email address but didn't include the Lawyers name. I responded requesting the Lawyer information again.

I received another message from her saying - not to worry, she had all the information she needed.

I have not had contact with her since.

I was not aware of the sale of this property until I was contacted by [F.H] in June 2017 but I understand it took place prior to the listing expiring.

I was not involved at all in this sale and have no further information in regards to the details.

"Caren Kelley"

And in response to the remaining questions Kelley provided:

Question 2.

All documents for the listing have been supplied.

Question 3.

As explained in question 1. – [I.S]

Question 4.

I have known [I.S] and family since approximately 2010

Question 5.

*[I.S] ***_***_*****

In July 2011 I represented both [I.S] and his wife, [R.I] as a Buyer's Agent for the purchase of [ADDRESS 2]

Question 6.

Copy of Listing contract supplied.

Question 7.

As explained in question 1.

Question 8.

A listing contract in the names of [F.H] & [A.D]. There was no other Transaction.

Question 9

No other transaction occurred other than explained in question 1.

Question 10

As stated on the listing contract, over the phone with [I.S]

Question 11

No

Question 12

I did not receive a key to the house. Showings were to be allowed with 24 hrs notice and tenants would provide access.

Question 13.

No additional documents or information.

Counsel introduced correspondence from RECA to the Broker of Kelley, [D.N] dated April 13, 2018, posing similar questions that had been asked of Kelley concerning the notification of professional conduct review. Exhibit 9.

Also included in the Exhibit are copies of the exclusive seller representation agreement signed by [A.D] and [F.H] and Kelley as witness. Further documents include the MLS listing sheet indicating Kelley is the listing realtor. [D.N] responded – Exhibit 11:

Dear [V.E]:

The following information is being provided as per your April 13, 2018 request.

1. Please see the attached documents from our Brokerage File regarding [ADDRESS]
2. Upon review of the file the only document not turned in is a copy of the title. Upon initial review of the documents there does not appear to be any errors or mistakes.
3. During my discussion with Kelley it was determined that she had not met or spoken with [F.H] and had the provided the documents to a third party to have them signed. Upon learning this information I reviewed the documents again and found that Kelley had in fact signed as witness for both signatures which was not correct. Neither of these actions are condoned in any way by the Brokerage. I was also able to determine that this is a one of situation and Kelley does not practise real estate in this manner.

4. There are no other documents as Kelley was not involved in anyway with the actual sale of this property. Her only involvement was the listing of the property.

Further correspondence was sent to [F.H] in the course of the investigation, to which she responds at Exhibit 13: and which is provided in [F.H]'s later oral testimony. Within that Exhibit is a copy of the Real Estate Purchase Contract which [F.H] indicates at #10 (p.81, registrar's Exhibit binder) of her response that she never received any documents from [I.S] and only signed one blank document she received from him. She acknowledges agreeing to a sale of \$455,000 on an offer presented by [I.S] as she was "running out of time".

At p.82, the Real Estate Purchase contract indicates a selling price of \$529,900, with the purported signatures of the sellers at p. 6 of 6 (p. 87) along with Kelley's signature as witness to the buyer's and sellers' signatures. Counsel questions [J.P] on the signatures at p.40 (exclusive seller representation agreement) versus those found on p.87 on the Purchase contract. [J.P] indicates that [F.H] and [A.D]'s signatures are different between the two documents.

Counsel then introduced records related to the payment of a portion of the proceeds of sale to the numbered company 175**** Alberta limited. In Exhibit 13 is also a copy of the direction to pay created by Amanoh Law Firm, p.92, at paragraph 3 "To 175**** Alberta limited any amount in excess of 455,000." Exhibit 14 provides the corporate registry search document indicating that the sole director of the company is [R.I]. Exhibit 15 provides a dispute note filed at the Provincial Court of Alberta in a civil matter between [F.H], Plaintiff and [I.S] and 175**** Alberta limited. In that document at #10 it is alleged that a contract was made between the parties and that if a buyer was found any amount beyond the base amount would go to 175**** Alberta limited. At #14 this is restated referencing the irrevocable order and direction to pay. "The defendants claim no cause of action. "

[J.P] provided information and documentation relating to the lawyer, Mercy Amanoh, that assisted [F.H] with the sale of her home. Those documents appear at Exhibit 35 and 36. M. Amanoh was disciplined by the Law Society of Alberta for failing to conscientiously and diligently represent the best interests of [F.H], and that M. Amanoh acted in a conflict of interest in relation to [F.H], "Ms. Amanoh did not act in a thorough, conscientious, and diligent manner in providing legal services to her clients." (Exhibit 36 Para 19). "Ms. Amanoh has admitted this conduct and has not acted as a prudent and careful solicitor." (Para 21)

Documents were introduced confirming ownership and title to the property, Exhibit 27. It is within this Exhibit that the registrar presents the signed direction of [F.H] for

the deduction of \$17,501 from the sale proceeds (p. 337) payable to 175**** Alberta Ltd.

At this juncture, Counsel introduced a recording of a phone call between [F.H] and Kelley. Kelley's counsel requested the transcript for the recording, Registrar's Counsel indicated that a transcript was not available and that the recording of 8 minutes would be played in its entirety, and that under the Real Estate Act Rules – 42, the strict rules of evidence do not apply to the hearing. The panel retired briefly to discuss and returned to allow the playing of the recording in its entirety with opportunity for Kelley's counsel to cross examine [J.P] on the recording. Kelley's counsel maintained that objection, and we will address it in our reasons below.

The recording is a discussion between Kelley and [F.H]. [F.H] during her testimony, admits to recording the discussion between the parties. The discussion between [F.H] and Kelley centered on the disclosure of documents related to the transaction of sale; [F.H] wanted copies of the contract from Kelley; Kelley wanted information about the sale.

As provided above, letters were exchanged between [V.E] and Kelley, following which Kelley was interviewed by a RECA investigator, August 9, 2018 (Exhibits 38(a) - transcript and 38(b) - audio, and on August 15, 2018 (Exhibits 39(a) – audio, 39(b) transcript. In the course of the interview (for which no transcript was provided?) Kelley responded to a series of questions concerning her involvement with the sale of the [A.D]/[F.H] property. Much of what is discussed during the interviews is confirmed by other evidence and witnesses in the proceedings; [D.N], and [F.H and Kelley herself.

[D.N] Evidence

[D.N] provided evidence under oath and in particular confirmed the information that he had supplied in writing to RECA via email on April 25, 2018, which had been entered earlier as Exhibit 11. [D.N] is the broker at RE/MAX House of Real Estate. Further, [D.N] spoke to Exhibit 33, which was his response to questions from [T.H], a RECA investigator, dated August 10, 2018. This response included documents that were part of this transaction including the exclusive seller representation agreement, submitted February 1, 2017. On cross examination Counsel for Kelley noted that several versions of the document had been uploaded and requested an explanation of differences between the documents. [D.N] responded that the system does not delete previous uploaded versions so there may be no difference between them, but that he was unable to confirm if there were differences without studying them closely.

Counsel also questioned [D.N] on his response of April 25, 2018, that the documents concerning the [A.D]/[F.H] transaction contained no errors or mistakes as they were

filled out and filed in the system. [D.N] also confirmed his response statement that the incident was a "one off" for Kelley given his discussion and his knowledge of how she does business.

[F.H] Evidence

The following day, June 21, 2022, upon completion of the evidence of [D.N], the complainant [F.H] was affirmed. On questioning by RECA Counsel, [F.H] identified Exhibit 4 as the Real Estate Council of Alberta complaint form that [F.H] had supplied to RECA. The document is dated February 13, 2018.

[F.H] went on to describe how she had met [I.S], initially in 2016 through a friend. She indicated that they met at a Tim Horton's, and she had explained her situation to [I.S], that she needed to sell her property, in turn [I.S] indicated that he would need to find a buyer. After the initial discussion [F.H] states that [I.S] was out of the country for a time and then when she was able to contact him, he indicated that he was working on her sale. It was sometime later that [I.S] informed [F.H] that the transaction required a realtor, when she questioned him, he stated that he was a lender, not a realtor. [I.S] then informed [F.H] that he had a realtor friend that could assist. [F.H] tells of [I.S] having her sign the listing agreement, it was a few days after that [I.S] emailed [F.H] requesting, she check her email, and it was then that her house was listed, she indicates the house was listed in "February somewhere". It was then that she became aware the C. Kelley was the realtor. She indicated that she never met C. Kelley or spoke on the phone in relation to the listing. When the house was sold, [F.H] obtained the documents on the file from Amanoh Law Firm and realized that the house had been sold for \$529,999 rather than the \$455,000. There was a phone discussion between herself and [I.S], which ended with [F.H] asking for documentation on the sale. [I.S] suggested that the realtor should have all the information but did not supply contact information. [F.H] obtained contact information for Kelley with the assistance of her daughter and the internet.

[F.H] then called Kelley. During the call she indicated that she was calling about [ADDRESS], [F.H] notified Kelley of the sale, to which Kelley acknowledged listing the property but not the sale. Kelley suggested that [F.H] sold her property privately. There is a discussion between them about who sold the property, what the price was and who introduced Kelley to the property, which [F.H] stated Kelley indicated was [A.D] her ex-spouse.

At this point [F.H] states that she went to the buyer's home where she questioned him on the purchase price and suggested they had been taken for fools.

[F.H] discussed a further conversation with Kelley, where [F.H] seeks the assistance of Kelley to understand what happened in the transaction, she states that Kelley

threatened to sue her for the commission on the sale. [F.H] suggests that she can pay the commission if she gets money with the help of Kelley.

[F.H] acknowledges that she did nothing for one year after that, she states that this was a very stressful time for her, with her divorce, medications, work issues and children to care for. RECA Counsel then takes [F.H] through her responses to the RECA investigators questions, Exhibit 13.

During the course of explaining her responses to the RECA request, [F.H] stated that she met [I.S] through a friend and met him at a Tim Horton's to discuss her situation. She indicated that he was agreeable to assisting her in selling the house and that no commission would be payable. They discussed the possible assistance of Kelley as the selling agent, but that [F.H]'s spouse would not agree, if it meant waiving his interest in the property. When Counsel asked why [F.H] did not contact Kelley, [F.H] indicated that she blindly trusted [I.S] and she did not know Kelley. [F.H] also indicated that the only document she executed was the purchase offer. Her information on this was somewhat unclear, initially she stated she signed a document and then that she couldn't sign the document without her "ex".

Counsel then took [F.H] to Exhibit 20, which is the listing contract, which [F.H] confirms holds her signature, [F.H] also indicates that while she signed it, it was blank. [F.H], through the presentation of various text messages indicates that the property was listed on January 22, 2017, which [F.H] confirmed by receipt of the listing agreement. At Exhibit 30, is the MLS listing sheet, which [I.S] forwarded to [F.H] on January 28, 2017, which [F.H] states [I.S] received from Kelley. [F.H] states that she never discussed the listing with Kelley. She did not discuss the listing with Kelley until after the property was sold.

In cross examination Counsel for Kelley asked [F.H] whether [I.S] was aware of the price she needed from the sale of her property, her response indicated that during her initial meeting with [I.S] she had identified the price she needed, which she stated was \$510,000.00. When asked further whether the price was actually \$455,000, [F.H] stated that was the offer that [I.S] said he had for the property.

Counsel also inquired as to whether [F.H] had prepared her answers to the questions of RECA herself or whether she had assistance, she indicated that her daughter had helped her type out the responses.

[F.H] also admitted to recording two conversations with Kelley, one that was destroyed and never submitted to RECA and the one that is Exhibit 28 in these proceedings. The audio Exhibit was played again at the request of Counsel for Kelley. Kelley's counsel inquired as to whether [F.H] provided her email to Kelley, [F.H] answered that she did not, that she was waiting for Kelley to send her the listing agreement. (from the various responses, it appears that Kelley did not have an email

for [F.H] at that time.) There were some questions on cross examination concerning the signatures on the purchase contract; [F.H] responded that it was not her signature on the document, and that she could not answer that the witness signature belonged to Kelley.

There were further questions to [F.H] on when she knew there was a buyer for the property, to which she responded that she knew there was a buyer before she was introduced to a realtor. Counsel for Kelley questions [F.H] on her signature on the exclusive listing agreement, which she acknowledges signing a blank document.

Caren Kelley Evidence

Kelley confirmed she has been a realtor since 2002, working with RE/MAX for "about 10 years" and that it is her primary occupation.

Questions turn to Kelley's knowledge of [I.S], Kelley indicates she met him at an open house several years prior to the 2017 transaction. Kelley also assisted [I.S] in purchasing a property in [ADDRESS 2] in the City of Calgary prior to 2017. She states they had no other dealings until this transaction.

Counsel for Kelley then takes her through her written response to RECA's original inquiry, Exhibit 5, establishing how the transaction progressed. Kelley indicated that she was contact by [I.S] who advised that [F.H] was in a foreclosure position. Kelley initially declined the request to assist as she was assisting another realtor in his absence as well as contending with a sick grandchild.

When asked a second time to assist in preparing the document for the listing, she agreed because she felt sorry for [F.H] and assisted someone else in a similar situation. Kelley recalls that they spoke on the phone, but she did not meet with [F.H]. She states that [I.S] was with [F.H] during the phone call, and they were speaking in their native language.

Turning to the exclusive seller representation agreement at Exhibit 8. Kelley acknowledges her writing within the document, naming the parties to the sale. She states the document was complete on the date she listed the property and that it was sent to be signed. It was returned with signatures and initials on it but was otherwise blank. Kelley advises that she did query why the document was blank, but that she then filled it in, in part. This is supported by the interview by RECA, p. 660 Exhibit 39(b), August 9th interview.

Kelley then provides information on the list price, discussing that in the initial conversation with [F.H] she had suggested that the price of \$559,000 was what the property had been listed for previously and did not sell and the market had not changed.

Taken to Exhibit 20, the Residential Purchase contract, Kelley states that the contract number in the top right corner is not familiar to her. Kelley also states that she was unaware of the removal of [A.D] from the title to the property until the investigation of the transaction. Taken to the foot of the document and shown the various signatures, when asked, Kelley indicates that although her name appears on the document and there is an apparent signature beside her name, it is not her signature, in fact it is not her handwriting on the page, and she does not recognize the handwriting. Kelley also states that she did not meet [F.H] on January 29, 2017. There were some questions concerning the deposit on the transaction and Kelley indicated that the identified deposits were not paid to Re/Max. Kelley indicated that she was not aware of who the lawyer facilitating the sale was.

Kelley denies having met or knowing [A.D].

After the sale, Kelley did have a conversation with [F.H] but could not recall the exact date. There was also a point where [F.H] served Kelley with papers to an action, again no exact date was provided. Kelley, on questioning, also agreed that she had contact [I.S] looking for answers as to what had transpired in the transaction.

Kelley was asked of her knowledge of the company 175**** Alberta Limited or their profit from the transaction, to which she said she had no knowledge until the RECA investigation.

When questioned, Kelley stated that even if she had met with [F.H], there may not have been anything that would have stopped the fraud from occurring.

G. The Hearing Panel's Decision

Our first consideration will be those allegations that Kelley's Counsel "admits" to and suggests sanctions for. It is challenging to have gone through the process of a hearing that requires the parties to support allegations or defend against them only to have the Licensee admit to several of the allegations in submissions. The process could have been abbreviated considerably had the admission been tendered prior to the hearing. The evidence was available to all parties well in advance, although the Panel acknowledges that Kelley retained counsel in April, the reason for the adjournment at that time.

Kelley's submission advises as follows, p12/13:

38. Kelley through her admitting directly can be found to have failed to fulfil the Licensee's fiduciary obligation to the Licensee's client, contrary to s. 41(d) of the Real Estate Act Rules.

39. Kelley through her admitting directly can be found to not delivered client a true copy of a service agreement and any amendment or addition immediately upon its signature, contrary to s. 43(3) of the Real Estate Act Rules.

40. Kelley through her directly admitting failed to practice in strict accordance to laws governing trading in real estate in Alberta, contrary to s. 41(g) of the Real Estate Act Rules.

As a panel we are at liberty to accept the admission and look to s.46 of the Act:

Admission of conduct

46(1) A licensee may, at any time after the commencement of proceedings under this Part and before a Hearing Panel makes its findings in respect of the licensee's conduct, submit to the Board a statement of admission of conduct deserving of sanction in respect of all or any of the matters that are the subject-matter of the proceedings.

(2) A statement of admission of conduct may not be acted on unless it is in a form acceptable to the Board and meets any additional requirements set out in the bylaws.

This Panel finds nothing in the bylaws related to accepting the admission. Under the hearing rules and procedures at Part 4, C, the scenario anticipated is that both the Registrar and the Licensee jointly provide the admission of conduct. In this case and with the Licensee admitting to the conduct prior to the Panel making a finding, we accept the admission and s.47(2) provides: *If a statement of admission of conduct is accepted, each admission of conduct in the statement in respect of any act or matter regarding the licensee's conduct is deemed for all purposes to be a finding of the Hearing Panel that the conduct of the licensee is conduct deserving of sanction.*

In this case, while the Board has not accepted the admissions, the Panel accepts that the admissions, even at this juncture, serve to create efficiencies going forward.

The Panel will not analyze matters related to 41(d), (g) or 43(3).

Objections

Counsel for Kelley objected to having [J.P] swear to the authenticity of documents that were not created by him personally and that came through others in the organization to him and the Registrar's Exhibit binder. While the Panel is not bound by the strict rules of evidence, the rules of reliability and relevance are at the heart of evidentiary principles and play a role in every matter where evidence is tendered. It is reasonable that in the course of an investigation, several people from the organization may be involved with only one party presenting the evidence gathered on the whole. In our view it is not necessary for the witness to swear to the originality of the tendered document for it to be entered as an Exhibit, nor is it proper when that document is a copy of an original. For documents to be entered the party wishing to enter the document as an Exhibit should establish the chain of custody of such evidence; what are the events of collection and storage that lead the document to be before the Panel, once established if opposing counsel has concerns, they can raise them, if no objection is raised, the document can be entered as an Exhibit. The objection of counsel in this case was directed at the claim of documents to be "true copies", counsel did not express any objection to the substance of the document and was able to cross exam the witness, in this case, [J.P]. We allow the objection, in part, and suggest that Registrar's counsel use chain of custody process and questions for the entry of Exhibits in future matters.

The second objection from Kelley's counsel was to the playing of the phone conversation between Kelley and [F.H], that was recorded by [F.H], no written transcript of the conversation was available. At the time of the objection the Panel indicated that the matter of the recording will be addressed in the weighting of the evidence. The Panel notes that the recording was played on several occasions during the course of the hearing; during [J.P]'s testimony, and during [F.H]'s testimony. Counsel for both parties had the opportunity to question the statements made by both [F.H] and Kelley. Kelley acknowledged the conversation took place. While the conversation provides evidence of the relationship between the parties it provides little value to the Panel in relation to the allegations and we have given it little weight in consideration of our findings.

The third objection was to the entry of the transcripts of the interviews on August 9 and 15, 2018 with RECA investigators and the Licensee. The recordings and transcripts were available; however, the interviewers were not made available for cross-examination. The overarching consideration with absence of the interviewers to be cross examined is whether that absence prejudices the Licensee. The video recording of the interview was played in its entirety; no suggestion was made that any portion of the

interview was absent. The Licensee acknowledged that she participated in the interviews. The objection raised no particular issue with the information or format of the interview, nor was the objection raised at the outset of the hearing, when Licensee's counsel was aware of who the witnesses for the Registrar would be. The Panel does not believe that the Licensee was prejudiced by the absence of the Interviewers.

s. 46(2)

Turning to the allegation under 46(2) - A licensee must not delegate, assign, request, direct or in any way allow an unlicensed or unregistered assistant to perform tasks that must only be performed by a licensee.

It is alleged that Kelley delegated her authority to [I.S] in relation to the transaction in this case. When the Panel considers the language of the Registrar in relation to the allegation, the Registrar identifies the breach as "allowing an unlicensed third party to perform tasks that may only be performed by a licensee" ...

We note in the administrative penalty decision of [I.S] on page 1 (I) (Tab X) that the Registrar provides: *I) In or around January 2018 you arranged a buyer for a property located in Calgary, Alberta, for a seller you were assisting. Your activities required authorization to trade in real estate in Alberta, as a real estate associate. This is a breach of Section 17 (a) of the 'Real Estate Act'.*

The correct date of the transaction is January 2017 according to the evidence before us. This statement of [I.S] "assisting" the seller does not in and of itself bring [I.S] into the sphere of an assistant to Kelley.

The Hearing Panel considered the use of the term "assistant" to mean helper, it can also mean subordinate. We note that the term is not defined in any of the related legislation.

In the Registrar's closing submission, at page 15, the Registrar submits:

The totality of the evidence presented at the hearing demonstrates that it is more likely than not that from January 2017 to February 2017, C. Kelley allowed an unlicensed individual to perform tasks that must only be performed by a licensee, contrary to s. 46(2) of the *Rules*, as follows:

a. Kelley's testimony at the hearing, Kelley's initial written response

to RECA, Kelley's two investigative interviews with RECA, [F.H]'s testimony, and [F.H]'s written responses to RECA, as well as the documents presented at the hearing including the email in which Kelley sent the blank listing forms to [I.S] and the different versions of the forms in Kelley's possession versus those in the real estate lawyer's and [F.H]'s possession, showed that C. Kelley allowed, [I.S], to perform all of her required tasks associated with the representation of her clients [F.H] and [A.D] including:

- i. Receiving confidential information;
- ii. Advising her clients in the sale of the Property;
- iii. Marketing the Property;
- iv. Negotiating the sale of the Property; and
- v. Executing forms and contracts associated with her agency and the sale of the Property.

It is our view that this section of the rules is meant to govern parties in a formal relationship as between an Agent or Broker and their own assistant. Subsection (1) of section 46 states:

- 46 (1) A licensee must only assign to support personnel or assistants tasks they are competent to perform and must ensure they are properly trained and supervised.

The Panel infers from this statement along with subsections (3) and (4) that assistants and support personnel are persons who have a formal relationship with a licensee.

While we acknowledge that it was improper for Kelley to permit [I.S]'s involvement in the transaction for which she was responsible, we do not find that the wording provided in 46(2) is specific to these circumstances and do not find a breach.

Documentation supplied by the Registrar specifies that [I.S] was found in breach of s. 17 of the Rules, trading in real estate while unlicensed. Trading in Real estate without a license as a breach is more grievous than acting without direction from a licensee. It is possible, of course, that an assistant or other personnel could breach s.46(1) while formally associated with a licensee. To find the relationship between these parties falls within s.46(2) would be overbroad, and any relationship that is businesslike in nature could be construed as an "assistant" acting under the legislation. While it has been established that there was a connection between Kelley and [I.S], [I.S] acted independent of Kelley and for his own ends.

41(c)

The question flowing from this section is whether Kelley had disclosed to [F.H] how she would be paid for her services. There was some evidence that Kelley was expecting a commission to be paid, as indicated in the recorded phone call between Kelley and [F.H]. There was also the Exclusive Relationship Agreement that at 10.1, states payment is due when the sale of the property is complete. At 10.2 there is a percentage fee of 1.5% of the 1st \$100,000 and 1% Balance of the sale price. No evidence was provided to indicate that this information was complete when the Seller's initialed and signed the document. Kelley indicated that she partially completed the document upon receipt of the signed and initialed agreement. At no time does it appear that the completed document was returned to [F.H] prior to the sale of the property. As for there being a practical opportunity as the section provides, Kelley was under an obligation once the document was completed, or partially completed to provide the document to the client, she did not. This is a breach of 41(c).

42(b)

42(b) licensee must not participate in fraudulent or unlawful activities in connection with the provision of services or in any dealings.

The Registrar submits that participating is said to have its plain and ordinary dictionary meaning to "take part" (10th edition Oxford English Dictionary) and that it is a low threshold to show that a party has participated. There is no doubt that Kelley's inaction and lack of involvement with her client created an opportunity for the commission of an unlawful act. Had she been actively involved she would have had knowledge of the list price and the selling price, and presumably there would have been no side agreement between [F.H] and [I.S]. That in and of itself would have been enough to ensure that the transaction would have been conducted according to the rules, not only of the Real Estate Counsel, but by other professionals involved. Allowing a party to take control of the transaction bearing her name set in motion a series of events resulting in a loss to the client.

Based on the evidence, there was no overt attempt to defraud [F.H] by Kelley, but that is not how the Registrar submits the Panel should interpret 42(b). The Registrar provides in their written submission, starting at page 8:

16. The classic definition of "fraud" is found in *Re London & Globe Fin. Corp. Ltd.*, [1903] 1 Ch. 728 at pages 732-33:

To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely, it may be put that to deceive is by falsehood

to induce a state of mind; to defraud is by deceit to induce a course of action.

17. In *R. v. Olan*, [1978] 2 S.C.R. 1175 (S.C.C.) [TAB 2], the Supreme Court of Canada stated at page 1182:

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of 'defraud' but one may safely say, upon the authorities, that two elements are essential, 'dishonesty' and 'deprivation.' To succeed, the Crown must establish dishonest deprivation.

18. As such, for "fraud" the two elements are dishonesty and deprivation.

19. *R. v. Zlatic*, [1993] 2 S.C.R. 29 (S.C.C.) [TAB 3], the Supreme Court of Canada stated at page 45: "Dishonesty" can include non-disclosure in circumstances where a reasonable person would consider it dishonest.

20. Wilful blindness is a special category to prove dishonesty/deceit. Wilful blindness substitutes for deceitful (or any) intent.

21. The definition of willful blindness is found in *R v Briscoe*, 2010 SCC 13 at paragraph 21 [TAB 4]:

Wilful blindness ... can substitute for actual knowledge whenever knowledge is... [an essential element]. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries."

The conclusion drawn from the above is that the Panel should find that Kelley was willfully blind leading to her participation in the fraud.

Kelley's counsel (p.11 #32(m)) submits that *"the improper acts and fraud and misappropriation and funds had occurred at [I.S]'s direction at the lawyer's office and outside of any the (sic) knowledge and control of Kelley;"*

(n) Kelley had not participated in the fraud, misapplication and the sale of the Property in any manner.

At #33. These points which have been taken from the evidence before the Panel, indicate and show that the fraud and misappropriation would have taken place even if Kelley had communicated with the clients and met with them initially to execute the Exclusive Seller Representative Agreement.

While Kelley's counsel's submission restates their position in relation to the allegations of Kelley's participation, they do not address how participation is defined, or the elements of fraud, dishonesty, recklessness or willful blindness.

Registrar's counsel provided the case of *Goll*, a case where the licensee was found to have participated in the fraud of mortgage fraud in spite of not having been directly involved in the fraud. The Panel finds this case instructive.

This Panel is unable to reconcile how the Licensee, in admitting to failing to fulfill her fiduciary duty to her clients; failing to practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate...; and by failing to deliver to the client a true copy of a service agreement and of any amendment or addition, immediately upon its signature, that she was not also willfully blind; she was certainly reckless. There were factors of the transaction that Kelley had a professional and legislated duty to attend to, in not doing so, by failing to make the proper inquiries and then upon hearing nothing of the transaction, would have aroused the suspicion of a licensee. Further, evidence was provided that this incident was a "one off", not a pattern of behaviour for Kelley; in that case it would be expected that she would be heightened to possible deception, this being the only incident where she has abdicated control of a transaction to an unlicensed party, and she shut her eyes to that possibility. We do find that the licensee did "participate" in fraudulent or unlawful activities, in breach of s.42(b).

57(a)

It is alleged that Kelley failed "to use best efforts to market the property and to promote the interests of the seller". In analyzing the circumstances of this case, Kelley acknowledged using a previous listing for this property to set up the listing in January 2017, which breaches rule 2 of Calgary Real Estate Board rules. Kelley admits that she breached her fiduciary duty to her client. Kelley admits she did not become aware of the sale of the property until the spring of 2017, months after the sale. That is sufficient for this Panel to find that Kelley has not used her best efforts to market the property or to promote the interest of the seller.

Throughout the course of the hearing there were several discussions on who signed or completed what document and when. With Kelley's admissions much of that discussion becomes moot. While still disconcerting, nothing in the process of the Law Society Hearing or the RECA investigations has uncovered the truth of whose signatures are on the documents.

H. Conclusion

For reasons outlined above, the licensee is found to have breached the following Real Estate Act Rules:

1. 41(c), (d), and (g)
2. 42(b)
3. 43(3)
4. 57(a)
5. The licensee has not breached Rule 46(2).

REQUEST FOR SUBMISSION ON SANCTION AND COSTS

As a result of our findings, Phase two of this matter will be addressed by written submissions of the parties. The Panel requests written submissions from the parties on the appropriate sanction and costs.

The Registrar is asked to supply 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 Kelley immediately on receipt, which we anticipate will be provided by registered mail. Kelley is asked to supply her written submissions to the Hearings Administrator within 14 days of receipt of the Registrar's written submissions, taking into account receipt by registered mail. 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, which is provided to Kelley without further reply. Once the timelines for provision of written submissions to Hearings Administrator has passed, 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 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.

This Decision is dated this 23rd of December, 2022

"Signature"

[A.B], Hearing Panel Chair

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF section 39(1)(b) and section 41 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 Licensee, Caren Sylvia Kelley, registered with Twin Oakes Real Estate 1993 Inc., operating as RE/MAX House of Real Estate.

Hearing Panel Members: [A.B], Chair
[G.P]
[A.S]

Appearances: Sania Chaudhry, Counsel for the Registrar of the Real Estate Council of Alberta ("RECA")

Hardeep Sangha, Counsel for Caren Kelley

Hearing Date(s): June 20 & 21, 2022 via virtual hearing

AMENDED AMENDED DECISION ON SANCTION AND COSTS

FOLLOWING the decision of the Hearing Panel with respect to conduct deserving of sanction (the "Phase I Decision") and **UPON Considering** the written submissions of the parties with regards to the appropriate sanction in this matter;

THE HEARING PANEL HEREBY FINDS AS FOLLOWS:

A. Introduction

In the Phase I Decision, the Licensee was found to have breached the following section of the Real Estate Act Rules;

6. 41(c), (d), and (g)
7. 42(b)
8. 43(3)
9. 57(a)

Admission of breach was made, and accepted, in relation to s. 41(d), 41(g) and 43(3)

Those sections are as follows:

41 Licensees must:

- (c) disclose to their clients, at the earliest practical opportunity, how they will be paid for their services;
- (d) fulfill their fiduciary obligations to their clients;
- (g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate, mortgage transactions or property management in Alberta;

42 Licensees must not:

- (b) participate in fraudulent or unlawful activities in connection with the provision of services or in any dealings;

43 (3) A licensee must deliver to the client a true copy of a service agreement and of any amendment or addition, immediately upon its signature.

57 The basic obligations of a licensee who is in a sole agency relationship with a seller are:

- (a) to use best efforts to market the property and to promote the interests of the seller;

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 at 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 authorization issued to the licensee by the 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) an 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.

B. Parties' Submissions on Sanctions and Costs

The parties were invited to make submissions with respect to the appropriate sanction and costs, and both parties did so. We received the final submission of the Licensee on January 18, 2023, and no reply submission was provided by the Registrar, who had filed their submissions on December 23, 2022.

The Registrar, in their submission, requests the cancellation of the Licensee's license, an ineligibility to reapply for a period of 3 months, fines totaling \$19,500 and costs in the amount of \$14,617.

In support of their request the Registrar provides various authorities. In the seminal case of *Jaswal v Newfoundland (Medical Board)* 1996 NLSC 11630 the following factors are considered in relation to professional discipline (paragraph 36):

- a) the nature and gravity of the proven allegations
- b) the age and experience of the licensee
- c) the previous character of the offender and, in particular, the presence or absence of prior complaints or convictions
- d) the number of times the offence was proven to have occurred;
- e) the role of the licensee in acknowledging what occurred
- f) whether the licensee had already suffered serious financial or other penalties as a result of the allegations having been made
- g) impact of the incident on the victim, if any
- h) mitigating circumstances
- i) aggravating circumstances
- j) the need to promote specific and general deterrence and thereby protect the public and ensure the safe and proper conduct of the profession
- k) the need to maintain the public's confidence in the integrity of the profession
- l) 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
- m) the range of sentence in other similar cases.

C. Decision on Sanction and Costs

The admitted breaches

To begin, in the Phase 1 Decision the Panel accepted the Licensee's admission to having breached the rules under s. 41(d), 41(g) and 43(3). In their submissions on sanction, the Licensee's counsel agrees with the proposed sanction put forward by the Registrar for rules.43(3) at \$1,000 and 41(g) at \$1,000.

In circumstances where the parties are in agreement with the sanction to be imposed, the Panel looks to *R v. Anthony-Cook (2016) SCC 43*. The Supreme Court of Canada addressed the test that should be used when considering whether to depart from an agreed outcome, 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 *R. v. Druken*, [2006 NLCA 67](#), 261 Nfld. & P.E.I.R. 271 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"

The Panel 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 Panel finds that it should not depart from the agreed to sanction as the proposed sanction in no way brings the administration of justice into disrepute and it is not contrary to public interest.

The parties do differ on the amount of a fine for the breach of Rule 41(d). The Registrar seeks a fine of \$5,000 whereas the Licensee proposes a fine of \$1,500.

41(1)(d) requires that a Licensee must; fulfill their fiduciary obligations to their clients. The Licensee has admitted to not fulfilling this obligation.

In applying the Jaswal factors to this admission, the admission is mitigating. The Panel considers the age and experience of the Licensee to be aggravating. With 10 years' experience in industry prior to the breach it would be extraordinary that someone with that tenure would not understand what their fiduciary obligations were. There are no previous disciplinary actions or complaints against the Licensee and this is mitigating, as is the number of times the incident is said to have occurred, nothing was brought to our attention to suggest that this is a repeated breach, however, there are several breaches resulting from this one occurrence, which is aggravating.

The decision of *Randhawa* (Registrar Tab 25) is similar on its facts to the one before the Panel, where the licensee failed to meet with the client, communicating only through a third party. In Ms. Kelley's case she also did not provide a copy of the contract to the client, nor ensure that her role in the transaction was made clear to the client. This conduct is particularly troubling in that it reduces public confidence in the profession, moreover the impact on the victim in this case was significant. The Licensee's request of a fine of \$1500 for this breach is on the lower end and the Panel finds that the conduct is deserving of more to ensure licensees are appropriately deterred from behaving in a similar fashion. \$5000 is correct in this case and in our view, not excessive given the circumstances.

Agreed to Sanctions

In the Licensee's submission and further to the admission of several of the alleged breaches, the Licensee also agrees to the proposed fines submitted by the Registrar in respect of the finding of the breach of rule 41(c) and 57(a). The Registrar proposed a fine of \$1,500 each for breach of rule 41(c) and 57(a). As provided for above, relating to the agreed upon breaches, unless it is contrary to public policy or would bring the industry into disrepute; the Panel finds neither of those factors to be relevant in the case of the agreement on these sanctions. The Panel accepts the agreed to fines.

Rule 42(b)

In relation to the Panel's finding on the breach of rule 42(b), the Registrar seeks a fine in the amount of \$10,000 and license cancellation. The Licensee seeks to have the fine for the breach set at \$3,000 and education.

In their submission, the Registrar provides that while there is no specific test for license cancellation (para 18) certain principles can be drawn from other disciplinary cases:

- a. Licence cancellation is appropriate for misconduct that is of a serious or severe character (*Behroyan (Re)*, 2018 CanLII 50247 (BCREC) (*Behroyan*) [TAB 4] at para. 27; *Inglis (Re)*, 2019 CanLII 53386 (BC REC) (*Inglis*) [TAB 5] at para. 42; (*Aulakh (Re)*, 2019 ABRECA 121 (*Aulakh*) [TAB 6] at para. 6.5);
- b. However, cancellation is not reserved for only “the most serious of misconduct.” That is because cancellation is a spectrum, where the degree of seriousness of misconduct can be reflected in the length of cancellation. Individuals can re-apply for a licence after the cancellation period is over (*Behroyan* at para. 27; *Inglis* at para. 42);
- c. The most severe penalty of lifetime cancellation is reserved for the “most serious of misconduct” akin to disbarment for a lawyer or removal of a physician from the register (*Behroyan* at para. 27; *Inglis* at para. 42);
- ...
- f. Licence cancellation is appropriate for certain classes of misconduct:
 - i. Mortgage fraud (*Aulakh* at para. 5.5(5)), i.e. breach of trust and acts of dishonesty (*Aulakh* at para. 6.5);
 - ii. Intentional fraud, even where the amount of actual loss was low (*Merchant* at p. 55 and p. 59);
 - iii. Acts of dishonesty and serious lack of judgement, compounded by making false statements (*Inglis* at para. 43); and
 - iv. Misappropriation of monies (*Behroyan* at para. 27).

The Licensee submits that previous Panels have only considered recklessness and willful blindness in relation to rule 42(a). The Licensee directs the Panel to *Cai (re) 2021 ABRECA 119* for an analysis of 42(a) and submits that the analysis in the Panel conduct decision on 42(b) should not be used.

It is our view that *Re Cai* reasonably outlines the knowledge necessary for negligence, recklessness and wilful blindness, notably sourced from the Supreme Court decision in *R v. Zora* 2020 SCC 14 (CanLII), at page 6 of *Re Cai*:

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.

This Panel has found the Licensee was wilfully blind, that is that she did have knowledge that her conduct would likely lead to a deception. The Licensee knew that [I.S] was not a licensed agent, did not clarify her role, did not provide documents to the client, or meet with them, in that sense abdicating her fiduciary obligations allowing an unlicensed party to take over the transaction which deceived M.H. and which the Licensee knew would be misleading to the client. In *Re Cai* the issue was about a licensee that was issued a \$3000 administrative penalty and appealed. The breach centred on details in an online listing and what was or was not included in condominium fees and how the matter was rectified. There was negligible impact to the client. We note that *Cai* was successful on appeal. We distinguish the matter before this Panel as here there are multiple breaches, some of which are admitted and the impact to the client was significant. While the Licensee submits that there is nothing she could have done to prevent the fraud, we find the submission of the Registrar in that regard to be more compelling, at p.13, para 45 of the Registrar's submission:

...The evidence presented at the hearing indicated that the things she could have done were:

- a. Not having given him a blank listing agreement, consumer relationship guide, and verification of identity forms to sign with the client;*
- b. Not allowing him to have reign over directly explaining these to the client;*
- c. Speaking with and meeting with her client directly to verify her identity, explain her role to her clients, and build trust with her clients in order to protect them;*
- d. Marketing the property herself rather than letting Shahzad taking the reins on this;*
- e. Showing the property herself instead of letting Shahzad take the reins on that also; and*
- f. Reaching out to the client to ensure the client knew what was going on, to ensure what her needs were, and to make sure her*

best interests were being met.

In totality, this breach is serious enough to warrant some cancellation of licence and a fine that also speaks to that seriousness. As an option available to this Panel, we find that a cancellation of three months is appropriate. We also find that \$10,000 is warranted given the severity of the circumstances. We are not persuaded that directing further education for the Licensee is necessary. Each licensee should, of their own accord, take educational opportunities where there is a knowledge gap, or where they believe education will better serve their clients and the industry.

The matter of costs

The Registrar is seeking costs of \$14,617 from the Licensee. The Licensee argues no cost should be awarded. Both parties look to the recent case of *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336 in support of their positions.

In the Real Estate Act at s. 43(2) it provides:

(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.

The Registrar claims that Jinnah provides the test to determine when costs may be awarded against a member of a regulated profession. At paragraph 130 and quoting from the decision in *Alzadi v. Alberta College of Pharmacy* 2021 ABCA 313

... 3. Professions Should Bear Most, if Not All Costs Associated with the Privilege and Responsibility of Self-Regulation Unless a Member Has Committed Serious Unprofessional Conduct, Is a Serial Offender, Has Failed to Cooperate with Investigators or Has Engaged in Hearing Misconduct, in Which Case, the Disciplined Member Must Assume Some of the Costs

It is through the lens of the four scenarios above that a compelling reason may exist to award costs.

In part, the Licensee relies on the distinction between the *Health Professions Act* and the circumstances in this case to show her behaviour does not fall within any of the four factors. At page 18:

54. She is dealing with multiple breaches arising form (sic) one occasion and none of the parameter of unprofessional conduct as outlined in the HPA.

This argument supports the distinguishing of *Jinnah* and the imposition of costs.

This Panel can quickly dispense with the factors of a serial offender, failure to cooperate or engaging in hearing misconduct. As can be seen from this decision, the Licensee has not engaged in any of those behaviours.

The matter of the commission of serious unprofessional conduct is another matter. The value of self-regulation is greatly diminished where a licensee can engage with a client, wholly abandon their obligations, expect payment for services and not be held accountable. Public confidence in industry integrity must be maintained. This is a case where the Licensee has engaged in serious unprofessional conduct, unlike *Jinnah*, there was a substantial loss to the client, who has worked persistently through the legal system and this complaint system to achieve a measure of justice. The Licensee's actions are a "marked departure from the ordinary standard of care" (*Jinnah*, para 141)

Looking within *Jinnah*, the case relies in part on the decision in *Alsaadi v. Alberta College of Pharmacy 2021 ABCA 313* and a further analysis is undertaken once it is determined that costs are appropriate, in particular at para 130:

a) *A hearing tribunal should first consider whether a costs award is warranted.*

b) *If so, then the next step is to consider how to calculate the amount. In this regard what expenses should be included, should it be a partial or full amount of the expenses and is the final amount reasonable?*

Given that the Panel has determined that the conduct of the Licensee is serious unprofessional conduct, a marked departure from ordinary practice, and that costs are warranted, we must then determine what the calculation of those costs should be.

The Registrar provided a range of value for the costs associated with this matter. The Panel finds that the "low end" valuations are reasonable. 46.5 hours at \$100 per hour, for a value of \$4650.00, related to legal counsel, \$192 for Hearing Secretary costs and Panel costs of \$2,800. In view of the seriousness of the Licensee's misconduct the Panel finds that the Licensee shall be responsible for costs in the amount of \$7,642.00. We find support for this in *Jinnah* at para 142 to 144:

1) A serial offender who commits not serious breaches of two or less, costs would be something less than twenty-five percent.

- 2) A serial offender whose breaches vary in seriousness should pay costs proportional to the to the breaches.
- 3) Where a licensee requires a regulatory body to defensibly expend more resources than necessary to obtain facts or evidence, then the licensee should be ordered to pay costs at an amount equal to the necessary expenses.
- 4) If a licensee engages in behavior that unnecessarily prolongs the hearing or otherwise results in increased costs of prosecution that are not justifiable – they should expect to pay costs that completely or largely indemnifies the Regulator.

While the Licensee is not a serial offender, there are multiple breaches and we have applied proportional costs to those breaches at a rate of 50% requested by the Registrar.

In totality the sanctions imposed are:

Breach	Fine
Rule 42(b) of the Real Estate Act Rules	\$10,000
Rule 41(d) of the Real Estate Act Rules	\$5,000
Rule 41(c) of the Real Estate Act Rules	\$1,500
Rule 43(3) of the Real Estate Act Rules	\$1,000
Rule 57(a) of the Real Estate Act Rules	\$1,500
Rule 41(g) of the Real Estate Act Rules	\$1,000
TOTAL	\$20,000

And costs in the amount of \$7,642.

Final sanction is the cancellation of the Licensee’s license for a period of three months per s. 43(1)(a) of the Act.

This decision is dated at the City of Calgary, in the Province of Alberta, 28th day of March 2023.

“Signature”

[A.B], Hearing Panel Chair