Case: 014210

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 41(1)(b).1 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 **MICHAEL EDWARD GREKUL,** currently registered

Hearing Panel Members: [J.G], Chair (Public Member)
[S.D], Panel Member (Licensee Member)
[J.M], Panel Member (Licensee Member)

Appearances: A. Bone, for the Registrar of the Real Estate Council of Alberta
K. Tzenov, Student at Law for the Registrar of the Real Estate Council of Alberta

Scott Chimuk, counsel for the Licensee
Michael Edward Grekul, Licensee

Hearing Date(s): June 26, 2024 by video conference

BACKGROUND AND ROLE OF THE HEARING PANEL

On June 26, 2024, the Hearing Panel convened for the hearing in relation to Michael Edward Grekul ("the Licensee") and the Notice of Hearing dated April 30, 2024 containing allegations of misconduct against the Licensee.

The original complaint in this matter was refused by the Registrar on March 30, 2023, pursuant to s. 38.1 of the Act. The complainant (D.L.) filed an appeal of the refusal by the Registrar, which was reviewed on February 21, 2023.

On March 20, 2024, the Hearing Panel for the complainant appeal determined that, pursuant to s. 40(2) of the Act, there was sufficient evidence of conduct deserving of sanction to warrant a hearing on this matter. Based on this determination, the Notice of Hearing was issued.

Counsel for the Registrar advised that, given the initial determination of the Registrar on March 30, 2023, they would present the evidence from their investigation but would be taking a neutral position in relation to the misconduct allegations.

The Hearing Panel recognized that due to the position being taken by the Registrar, the Hearing Panel may have more questions relating to the issues and the relevant legal criteria positions in this case than would normally be expected in an adversarial hearing where the Registrar was seeking a finding of misconduct. This more active role by the Hearing Panel in gathering information related to the legal criteria for the various allegations was necessary to ensure procedural fairness, the integrity of the hearing process as well as the proper administration of justice. The Hearing Panel explained the process they intended to follow and neither party objected.

By the Registrar not taking an adversarial position, it placed the Hearing Panel in an unusual position of having to engage in a somewhat investigatory role while also being the decision maker. The Hearing Panel has determined that this was necessary to ensure that the mandate of RECA, to protect consumers and to provide services that enhance and improve the real estate industry and the business of licensees, while ensuring procedural fairness, was fulfilled.

While the Hearing Panel did ask questions of the Licensee during the proceedings and respond to objections to its questions, the Hearing Panel did not make any findings of facts, decide any of the merits of the case, or take a position on the facts or issues until all of the evidence and argument was presented.

ALLEGATIONS

Pursuant to the Notice of Hearing, it is alleged that the Licensee failed to adhere to the following standards of the Real Estate Act Rules ("the Rules"):

Industry Standards of Practice, Division 1, Rule 41 states:

41 Licensees must:

(a) act honestly;

(b) provide competent service; ...

(d) fulfill their fiduciary obligations to their clients; and....

(g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services ..... in Alberta.

and

42 Licensees must not:

(a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so; .....

(g) engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

PRELIMINARY APPLICATIONS

Panel Constitution

There was no objection to the constitution of the Hearing Panel by either party.

Kienapple Principle

Counsel for the Licensee made an application based on their position that the six allegations on the Notice of Hearing arise from the same set of facts. They argued that this was contrary to the "Kienapple Principle" as defined in the Supreme Court of Canada decision in *Kienapple v. Regina*[1]. The Kienapple Principle expresses the same idea as *res judicata*, the doctrine that precludes multiple convictions for the same act. The Kienapple principle prevents an individual from being convicted of more than one offence in circumstances where the offences are comprised of the same or substantially the same facts or elements, and where the legal elements of the different offences are also shared.

Counsel for the Licensee argued that all of the allegations arose from the same set of facts or did not apply at all to the facts as they understood them and the Kienapple

[1] [1975]1 SCR 729

principle prevented proceeding to a hearing on all of the allegations on the Notice of Hearing. They reasoned that the Licensee was entitled to know which allegations they had to address, and a determination ought to be made at the outset of the hearing what allegations would be proceeding.

Counsel for the Registrar indicated that they were also going to raise the Kienapple Principle and provided the case for the Hearing Panel's review. They indicated that the Registrar's position was that the Hearing would have to proceed based on the allegations as outlined on the Notice of Hearing and that this issue would be better addressed in closing arguments following the evidence.

As the Hearing Panel ruled in the oral decision during the hearing, while the Hearing Panel agrees that the Kienapple Principle applies to administrative proceedings[2], it pertains to convictions, not allegations. The application made by counsel for the Licensee to have certain allegations withdrawn based on the Kienapple principle was premature as there had not yet been an assessment of whether the elements of the alleged breaches had been made out, leading to possible findings of misconduct (which are akin to convictions) by the Hearing Panel. Counsel for the Licensee was invited to make their application following the decision of the Hearing Panel, should they determine it appropriate.

Language Assistance for the Complainant

Counsel for the Registrar advised the Hearing Panel that the Complainant, D.L., had indicated to them that they would like to have their child, who was an adult, present during their evidence to assist by providing some interpretation. It was not suggested that they would need full interpretation services but on occasion their child would assist them when necessary. D.L.'s child was not formally trained as an interpreter.

Counsel for the Licensee objected to the child providing interpretation assistance to D.L. They emphasized that there was a risk for collusion and tampering of evidence with the proposed language assistance. There was also a concern that there was no

[2] Virk v. Law Society of Alberta, 2022 ABCA 2

way of ensuring the accuracy of the interpretation. Counsel for the Licensee emphasized the importance of these proceedings for the Licensee and the jeopardy that they faced. They further indicated that they would not consent to an adjournment to obtain an interpreter for D.L. and would make an application for a stay of proceedings on the basis of unreasonable delay.

The Hearing Panel denied the request by D.L to have their child provide interpretation assistance. The Hearing Panel determined that the integrity of these proceeding required that any interpretation would need to be provided by an independent interpreter who was trained to provide interpretation in hearings. This was necessary to ensure the integrity of the evidence that is being provided and procedural fairness for the Licensee.

As a result of the Hearing Panel's decision, Counsel for the Registrar was asked to confirm with D.L. as to whether they wanted to proceed without an interpreter or if they would like to request an interpreter be provided. D.L. chose to proceed without the assistance of an interpreter.

The Hearing Panel questioned D.L. to confirm that D.L understood the consequences of the decision to not allow their child to interpret, but also ensure that they were able to testify without an interpreter present. It was confirmed that D.L. wanted to proceed.

Following the discussion between the Hearing Panel and D.L., the Hearing Panel was satisfied that D.L. was able to testify without the need for an interpreter and encouraged D.L. to indicate if they did not understand any of the questions, in which case the parties would endeavour to rephrase the question. The Hearing Panel was able to understand D.L. throughout the questioning and there did not appear to be any difficulties with D.L.'s understanding of the questions or in their ability to answer them.

Articling Student

Counsel for the Registrar advised that the examination-in-chief of D.L. would be completed by Kristian Tzenov, who is an articling student with RECA. They indicated that for the purpose of objections or issues that may arise, Counsel for the Registrar

would seek permission to also provide submissions, notwithstanding the articling student is questioning the witness. Counsel for the Licensee had no objection to this request. The Hearing Panel had no objection to this request and granted the request made by Counsel for the Registrar.

EVIDENCE

Evidence of the Complainant, D.L.

D.L. testified that in January 2021, they commenced their search for a home to purchase in Edmonton, AB. They were looking online and obtained a Licenced Real Estate Associate, I.C., using the Chinese Newspaper. D.L. described that a double attached garage was an important feature in the house that they purchased as they had two vehicles and winters in Edmonton are cold. This was told to I.C.

Ultimately, D.L. purchased a residential property (hereinafter referred to as "the property"). They identified the Online Listing Database listing sheet (hereinafter referred to as "the listing sheet"), as the listing sheet they viewed in relation to the property. The listing sheet described that the property had a double attached garage. D.L. indicated that they trusted that the information on the listing sheet was correct.

D.L. testified that they had attended personally at the property with I.C. D.L. observed the garage and thought that it looked like a double attached garage. The garage was empty at the time D.L. viewed the garage.

With the assistance of I.C., an offer to purchase the property was made by D.L. on February 26, 2021. This was a standard offer to purchase and included a "due diligence clause" which was acknowledged by D.L. There were financing and property inspection conditions in the offer to purchase made by D.L. for the property. The property inspection was completed and D.L. confirmed during testimony that there was nothing in the inspection report relating to the size of the garage. Both conditions were waived and D.L took possession of the property on March 26, 2021.

Once D.L. moved into their property, D.L found that they were unable to park their two vehicles in the garage. D.L. measured the garage, and the interior width of the garage was 14 feet wide.

D.L. confirmed in cross-examination that at no time during the process of purchasing the property did they communicate in any way personally with the Licensee. All communication with the Licensee was through I.C.

During their testimony, D.L. identified a document that they indicated I.C. provided to them that were "drawings" of the property. The drawings had a business card attached that suggested they were created by the Home Builder. On these drawings, it shows the garage and depicts a single car situated in the garage. D.L. testified that these were provided to them a couple of weeks prior to the filing of their complaint with RECA in 2023. This was approximately 2 years after they purchased the property.

D.L. also identified a Real Property Report and another "drawing" of the property. D.L. testified that both of these documents were provided to them by their lawyer following the purchase of the property. D.L.'s evidence was that they did not see these documents prior to purchasing the property but I.C. may have had the Real Property Report prior to the closing.

D.L. acknowledged that on March 14, 2023, they sent the Licensee an email indicating their issue with the size of the garage and demanding $10,000.00 as damages, failing which they would report the Licensee to RECA.

In its expanded role in these proceedings, the Hearing Panel found it necessary to ask questions of D.L. In response to the Hearing Panel's questions, D.L. confirmed that they measured the garage and it was 14 feet wide. D.L. also testified about the timing of receiving various documents. Counsel were given the opportunity to ask any follow-up questions arising from the Panel's questions.

Evidence of the Licensee

The Licensee testified on their own behalf. They confirmed that they acted for the seller in relation to the sale of the property to D.L. The Licensee inputted the

information for the listing sheet that D.L viewed and created the listing for the property. The Licensee acknowledged that they described the property garage as a "double attached garage" on the listing sheet.

The Licensee described that they determined that the property had a double attached garage by "observing the property" when it was vacant and it "appeared to him to be a double attached garage". They further looked at the garage door to make this determination. The Licensee observed their vehicle parked on the garage driveway and it appeared to them the garage would permit 2 vehicles. The Licensee did not measure the garage and confirmed that they did not believe the Residential Measurement Standard required them to do so.

The Licensee confirmed that they emailed the Real Property Report ("RPR") for the property to I.C. on February 26, 2021.

The Licensee indicated that they did not have any discussions, emails or any correspondence or communication whatsoever with D.L. The Licensee and I.C. did not have discussions about the garage nor did I.C. have any questions.

The Licensee identified the email from D.L. indicating D.L.'s issue with the garage and demanding $10,000.00 as damages, failing which they would report them to RECA. The Licensee did not pay the $10,000.00.

The Licensee denies that they were dishonest and was clear that that they did not provide any services to D.L. and D.L. was never their client. The Licensee stated they did not intend to mislead D.L. They believed it was a double attached garage.

On cross-examination, the License indicated that they had been licensed since June 2005. They confirmed their licensing history and education history through RECA. They completed the Residential Measurement Standards Course. The Licensee did not recall any requirements relating to the measurement of garages nor did they recall any guidance relating to the classification of garages in any industry standards.

The Licensee indicated that it is not their practice to measure garages and they did not measure the garage attached to this property to determine if it was a single or double garage. They now believe that the garage was 15 feet wide.

In it's expanded role in these proceedings, the Hearing Panel found it necessary to ask questions of the Licensee, which was possible given their decision to testify. In response to the Hearing Panel's questions, the Licensee confirmed that they were still of the opinion that the garage was a double attached garage, even with knowledge of the actual measurement of the garage. The Licensee further indicated that they did not believe that the value of a property would be affected by the size of the garage, specifically a double garage or an oversized single garage. Counsel were given the opportunity to ask any follow-up questions arising from the Panel's questions.

HEARING PANEL DECISION

The Hearing Panel heard and has considered all of the evidence. The Hearing Panel found both witnesses to be credible and accepts their evidence.

For the reasons outlined below, the Hearing Panel finds, on a balance of probabilities, the following:

Allegation #1- Rule s.41 (a) act honestly- **breach not established**

Allegation #2- Rule s.41 (b) provide competent service- **breach established**

Allegation #3- Rule s.41 (d) fulfill their fiduciary obligations to their clients- **breach not established**

Allegation #4 - Rule s.41 (g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services in Alberta- **breach established**

Allegation #5 - Rule s.42 (a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so - breach **not established**

Allegation #6 - Rule s.42 (g) engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute- **breach established**

Allegation #1- Rule s.41 (a) act honestly

The Hearing Panel has determined that there is no evidence to support a finding that the Licensee did not act honestly, contrary to Rule s. 41(a). Based on the Licensee 's evidence, they believed that the garage was a double garage. The Licensee denied being dishonest and indicated that it was not their intention to mislead. The Hearing Panel accepts the Licensee's uncontradicted evidence of their belief and intention. Based on this finding, the Hearing Panel finds that Allegation #1 has not been established on a balance of probabilities.

Allegation #2- Rule s.41 (b) provide competent service

Section 41(b) of the Rules provides that Licensees must provide competent service. Counsel for the Licensee argued that the requirement of competent service must relate to the Licensee's client. The Hearing Panel notes that this Rule does not specifically refer to "their clients" as other Licensee responsibilities in the Rules do. The Hearing Panel disagrees with this position and finds that the competent service that is required to be provided by the Licensee must be considered in a broader context and not solely the service provided to the Licensee's client. This is consistent with Schedule 3 of the Rules which states, "Competent Practice is foundational to maintaining the trust, respect and confidence of other professionals and the public".

The Rules do not provide a definition of "competent service". The Hearing Panel was only provided with one case to provide guidance relating to "competent service", specifically, *Bowers (Re)*[3].

It is accepted by the Hearing Panel that there is no requirement to measure a garage pursuant to the Residential Measurement Standard. It is also accepted that there is not a specific measurement that would identify if a garage is an oversized single garage or a double garage. Although the Hearing Panel finds it concerning that there are not written standards for Licensees relating to the size and identification of garages,

[3] *Bowers (Re)*, 2022 ABRECA 037

standards for a profession may be unwritten. The Hearing Panel finds that it is within the common understanding of the profession that the applicable standard of practice would require that reasonable steps be taken to confirm the size of the garage on a residential property that a Licensee is listing for sale and that they accurately identify the size of a garage on the listing sheet.

The Hearing Panel has two members who are licenced members of the Profession, upon whose expertise the Hearing Panel is entitled to rely upon. In doing so, the Hearing Panel is not relying on personal opinions but uses their industry experience to assist it to identify the standard of practice where the standard is so commonly understood within the profession as to be something the Panel can take judicial notice of[4]. Some standards are so obvious that expert evidence is unnecessary. The Hearing Panel finds that this is applicable in relation to the standards in question relating to garages.

The Hearing Panel notes that the property is located in Edmonton, Alberta and finds, by judicial notice, that the area experiences several months of cold, snowy weather resulting in garages being an important feature of homes. Buyers who are purchasing a home will determine the size and type of the garage that is necessary to meet their vehicle needs. The Hearing Panel finds that this is obvious, and expert evidence beyond that on the Hearing Panel is not needed[5].

Contrary to the Licensee's evidence, the Hearing Panel finds that the size of a garage is an important factor in determining the market value of a property. The Hearing Panel again finds that this is obvious, and an expert is not necessary to make this finding.

Members of the profession and the public rely on listing sheets to provide them with the details of properties for various purposes. This includes, but is not limited to, using them for searching for homes with particular features, preparing comparative market valuations, or completing appraisals of homes. The Hearing Panel finds that part of

[4] Bowers (Re), Ibid, para 18, quoting Walsh v. Council for Licensed Practical Nurses, 2020 NLCA 11 at footnote 1
[5] Bowers (Re), Ibid, para 14, quoting R. Durcan & R. McKechney, Prosecuting and Defending Professional Regulation Cases (Toronto: Emond Montgomery Publications Limited, 2020) pg. 116

"competent service" is ensuring that the information that is provided on a listing is accurate, even where there is no specific written standard. This is consistent with the position of Counsel for the Registrar described in *Cai(Re)*[6], referred to by both the Licensee and the Registrar, that misrepresentations in listing sheets are not tolerated by RECA and there is a long history of administrative penalties in such cases, even where the misrepresentation would be plainly obvious once someone viewed the property. The Hearing Panel agrees with the importance of accurate listing sheets, particularly when addressing important features, such as the size of a garage.

The Licensee, prior to completing the listing sheet in relation to the property:

a) Did not measure the garage.
b) Did not determine the garage measurements by any other means.
c) Made a determination that the garage was a double attached garage only by their own observation.

The Hearing Panel finds that describing the garage on the listing as a "double attached garage" without doing more than observing the garage is obviously contrary to the standard of practice for the industry and is so egregious that expert evidence beyond the expertise of the Panel is not required. The Licensee's process that they used to determine the size of the garage, that is mere observation, did not constitute competent service. It should not come as a surprise to the Licensee that determining the size of a garage through proper measurement is a commonly understood professional standard.

The Hearing Panel has further determined that the Licensee's position at the time of the listing of the property, that the garage was a double garage, did not constitute competent service. The evidence of D.L. was that the interior width of the garage (wall to wall) was 14 feet wide. The Licensee testified that they believed that it was 15 feet wide.

[6] 2021 ABRECA 119, page 4

The Hearing Panel finds that it was incompetent to determine that the garage, whether it is 15 feet wide or 14 feet wide on the interior, would be a double garage. As discussed previously, the Hearing Panel can rely on standards that are so obvious that it is not necessary for there to be a specific rule in relation to the concept or expert evidence. Given the width of the interior walls of the garage, the Hearing Panel finds that the garage is not a double garage, but an oversized single garage. The common understanding of the profession, which cannot come as a surprise to someone in the profession, is that an interior garage measurement of 14 or 15 feet cannot be described as a double garage. The drawing of the property created by the property builder is further evidence that supports the determination that this was not a double garage. While the untested evidence of the drawing alone would not be sufficient to make that finding, when considering the measurement of the garage (whether it is 14 or 15 feet wide), the Hearing Panel accepts that the drawing supports the finding that the garage is not a double garage, as does D.L.'s testimony that they could not fit their two vehicles in the garage.

Counsel for the Licensee also argued that the description of the garage on the property listing as a double garage was not misconduct because;

a) Paragraph 3.1(g) of the Real Estate Purchase contract states, 'the seller and the buyer are each responsible for completing their own due diligence and will assume all risks if they do not",
b) The listing sheet states "Information herein deemed reliable but not guaranteed",
c) D.L. could and did have a property inspection done;
d) D.L. had a licenced real estate associate to address issues such as garage size, and
e) D.L. personally attended at the property and observed the garage.

Inherent in these arguments is that D.L. had the obligation and opportunity to determine if the garage attached to the property was in fact a double garage and that their obligation relieved the Licensee of responsibility for any information on the listing

sheet that may not be correct. The Hearing Panel finds that although these may be additional duties of D.L., they do not absolve the Licensee of their professional duty to prepare accurate listing sheets. Further, it would lead to an illogical consequence of Licensees having no professional obligation to ensure the accuracy of information on the listing sheet.

Further, the contractual obligation of the parties to a Real Estate Purchase Contract and a Licensees' regulatory obligations are not the same. Even if in a civil law context D.L. had an obligation to exercise due diligence in relation to the size of the garage pursuant to the contract and even if the Licensee was afforded protection from errors on the listing sheet, an error which the Licensee does not acknowledge, the Hearing Panel finds that they do not afford defences to breaches of the Rules.

For the reasons outlined above, the Hearing Panel finds on a balance of probabilities that the Licensee breached Rule s. 41(b) to provide competent service.

Allegation #3- Rule s.41 (d) fulfill their fiduciary obligations to their clients

Counsel for the Licensee argued that this allegation was not established as D.L. was not the Licensee's client. In the Hearing Panel's view, this alone is not enough to find that there has not been a breach of this Rule. However, while it may be possible to establish a breach of Rule 41(d) without the evidence of the client, the Hearing Panel has considered all of the evidence in this matter and determined that there was not sufficient evidence of the relationship between the Licensee and their client to establish that the Licensee had not fulfilled their fiduciary obligation to their client. The Hearing Panel finds that the Allegation #3 has not been established on a balance of probabilities.

Allegation #4 Rule s.41 (g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services in Alberta.

By virtue of the Hearing Panel's finding that Allegation #2 has been established and the determination by the Hearing Panel that the Licensee breached Rule s. 41(b), it

follows that the Licensee has also failed to practice in accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate… services in Alberta.

The Hearing Panel finds on a balance of probabilities that the breach of Rule s. 41(g) has been established.

Allegation #5 - Rule s.42(a) make representations or carry on conduct that is reckless or intentional and that misleads or deceives any person or is likely to do so.

Rule 42(a) requires that a breach must involve any representations or conduct that are reckless or intentional **and** that misleads or deceives any person or is likely to do so.

The Hearing Panel finds that the Licensee's representation on the listing agreement that the property had a double attached garage was misleading, deceived D.L and was likely to deceive others. The Hearing Panel is, however, unable to find the Licensee's representation was reckless or intentional. The wording of the Rule includes "and", which requires both elements of the Rule be established to find a breach.

As indicated above, the Hearing Panel found that the Licensee did not act dishonestly. The Hearing Panel found that the Licensee honestly believed that it was a double attached garage. The Hearing Panel in *Cai (Re)*[7] provided an analysis of Rule 42(a) relying on ***R. v Zora***[8], specifically,

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;

[7] Cai (Re),Ibid pg. 5
[8] R. v. Zora,2020 SCC 14

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.

Based on the evidence that the Hearing Panel accepts, the Hearing Panel finds that the Licensee did not intend to mislead or deceive nor were they wilfully blind as to the potential consequences of their conduct. Their uncontested evidence was that they did not see any issue with their process for determining the size of the garage or their representation on the listing sheet that it was a double attached garage. The Licensee believed that it was a double garage. As such, the Hearing Panel finds they was not acting intentionally, nor were they willfully blind. Being incompetent is different than being wilfully blind. The Hearing Panel accepts that the Licensee did not know that they were engaging in conduct that did or could mislead or deceive.

Similarly, the Licensee was not wilfully blind such that the Hearing Panel can impute actual knowledge about the garage size to them. The Licensee did not turn a blind eye to the issue, rather they believed their method of determining the garage size was appropriate.

To find that the Licensee was reckless would require a finding that they subjectively knew there was a substantial and unjustifiable risk that they were engaging in conduct that did or could mislead or deceive. The Hearing Panel finds that the Licensee did not act recklessly, given the Hearing Panel's acceptance of the Licensee's evidence that they did not think that they did anything wrong with their process or that they were wrong with their determination of the size of the garage. The Licensee did not subjectively see the substantial and unjustifiable risk as they did not recognize that their conduct was a breach of the standard of practice for the profession.

Ultimately, the Hearing Panel does not need to determine if the Licensee was negligent. As was determined in *Cai (Re)*, only the second and third scenarios described above would constitute a breach of Rule s. 42(a).[9]

[9] Cai (Re), Supra, pg. 6

For the reasons outlined above, the Hearing Panel is unable to determine that the Licensee's conduct was intentional or reckless and, consequently, the Hearing Panel finds that a breach of Allegation #5 has not been established on a balance of probabilities.

Allegation #6 Rule s.42 (g) engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute

The Hearing Panel recognizes the privilege that it is to be a part of a regulated profession. As a licensee of a regulated profession, as real estate associates are, the conduct of its members are a reflection on the industry as a whole. The Hearing Panel accepts that "A profession's most valuable asset is its collective reputation and the confidence which that inspires".[10] Rule s. 42(g) encapsulate this principle.

Rule s. 42(g) provides that if the Licensee's conduct undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute, the Licensee will have breached the Rule. The Hearing Panel can infer from the evidence it accepts that the elements of Rule 42(g) have been established. This was confirmed in the case of *Chin (Re)*, wherein the Appeal Panel found that actual evidence of the elements are not necessary and that the Hearing Panel's decision may be based on its own inferences.[11]

The Hearing Panel has found that the evidence has established the Licensee's methodology to determine the size of the garage, which did not involve measuring, as well as their determination that the garage was a double garage, which the Hearing Panel found was an oversized single garage, would result in all three components of Rule s. 42(g) being met. The public and other real estate associates rely on listing agreements for numerous purposes, as discussed above. By determining the size of a garage by observation alone and including information on the listing sheet that was not accurate, even if the correct information could be determined by due diligence or even just by observation, the Hearing Panel can and does infer that public confidence

[10] Clark (Re), 2018 ABRECA 98, pg. 4 quoting Law Society of Upper Canada v. Strug
[11] Chin (Re), 2015 ABRECA 173

would be undermined, it would harm the integrity of the industry and would bring the real estate industry into disrepute.

The Licensee further testified that they maintained at the time, and still maintains, that not only is the garage a double garage, which the Hearing Panel has determined is not accurate, but further indicated that they were of the belief, both then and now, that the value of a property is not affected by the size of the garage (specifically a double garage or an oversized single garage). This belief was reflected in their conduct, specifically the manner in which the Licensee determined the size of the garage and lack of concern as to the size. The Hearing Panel infers that the Licensee's conduct regarding the size of the garage and the value of the property in relation to the garage size would also undermine public confidence, harm the integrity of the industry and would bring the real estate industry into disrepute. Common knowledge, along the with industry expertise on the Panel, confirm that the garage in question was not a double garage and that a property with a double garage will generally have a higher value than the same property with an oversized single garage.

The Hearing Panel has contemplated how the Licensee's conduct would be considered by the general public in relation to the real estate industry as a whole. The Hearing Panel finds on a balance of probabilities that the breach of Rule s. 42(g) has been established.

Conclusion

For the reasons set out above, the Hearing Panel finds, on a balance of probabilities, that the following allegations have been established as against the Licensee:

Allegation #2- Breach of Rule s.41 (b) provide competent service

Allegation #4 – Breach of Rule s.41 (g) practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services in Alberta

Allegation #6 – Breach of Rule s.42 (g) engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute

While the Hearing Panel has made the finding of breaches as outlined above, a determination needs to be made as to whether all of the breaches should constitute conduct deserving of sanction or if the Kienapple Principle applies. The Hearing Panel requests that the parties provide written submissions in relation to how the Kienapple Principle should apply, if at all. The Hearing Panel has reviewed *Virk v. Law Society of Alberta*[12] and *McLeod v. Law Society of British Columbia*[13] and would invite the parties to consider these decisions in addition to any cases they deem appropriate. Should either party prefer to have an oral hearing in relation to this issue, they must advise the Hearings Administrator within 5 business days of the service of this decision. If neither party indicate a preference for an oral hearing, the Hearing Panel requests the parties to provide written submissions, as follows:

a) Counsel for the Licensee will provide their written submissions two weeks following receipt of the Hearing Panel's decision.

b) Counsel for the Registrar will provide their written submission one week after receipt of the written submissions of Counsel for the Licensee, and

c) If Counsel for the Licensee choses to file a Reply to the written submissions of Counsel for the Registrar, they will do so 1 week after receipt of same.

Dated at the City of Calgary in the Province of Alberta, this 16th of September 2024, Hearing Panel of the Real Estate Council of Alberta

"Signature"

[J.G], Panel Chair

[12] Virk, Supra
[13] 2022 BCCA 280

Case No. 014210

THE REAL ESTATE COUNCIL OF ALBERTA

IN THE MATTER OF Section 43 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 **MICHAEL EDWARD GREKUL,** currently licensed with **1426300 Alberta Ltd. operating as Maxwell Progressive**

Hearing Panel Members: [J.G], Chair
[S.D], Panel Member
[J.M], Panel Member

Appearances: A. Bone, Counsel for the Registrar of the Real Estate Council of Alberta

K. Tzenov, Student at Law for the Registrar of the Real Estate Council of Alberta

Michael Edward Grekul, Licensee
Scott Chimuk, Counsel for the Licensee

Hearing Date(s): June 26, 2024 by video conference

BACKGROUND

On September 16, 2024, the Hearing Panel issued a decision in relation to findings of breaches following the hearing on June 26, 2024. The Hearing Panel found that, on a balance of probabilities, that the following misconduct had been established as against the Licensee:

1. Breach of Rule s.41 (b) To provide competent service;
2. Breach of Rule s.41 (g) To practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services in Alberta; and

3. Breach of Rule s.42 (g) To not Engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

Having found the breaches had been established as against the Licensee, the Hearing Panel invited the parties to provide written submission as to the application of the Kienapple Principle to these breaches. This issue had been raised by both parties and the Hearing Panel agreed that the Kienapple Principle does apply to administrative proceedings. The Hearing Panel received sanction submissions from Counsel for the Registrar, which included a section on the application of the Kienapple Principle. There were no submissions by Counsel for the Respondent but there was an email provided indicating that they were in agreement with the submissions of Counsel for the Registrar.

Position of the Parties on Kienapple Principle

The Registrar's position is that as a result of the Hearing Panel finding of a breach of Rule 41(b), it necessarily follows that there is a breach of Rule 41(g). Their position is that there is a clear factual and legal nexus between the breach of Rule 41(b) and Rule 41(g) and to find that find both sections were conduct deserving of sanction would contravene the Kienapple Principle. They rely on *R v. O.B.*[14]

Relying on *McLeod v. Law Society of British Columbia*[15], the Registrar submits the finding of the breaches of Rule 42(g) and Rule 41(b) have a factual nexus and but do not have a legal nexus and as such a finding that breaches of both were conduct deserving of sanction would not be a violation of the Kienapple Principle.

[14] 2016 ONSC 6861
[15] 2022 BCCA 280

Hearing Panel's Decision

The Kienapple Principle applies to established breaches in RECA disciplinary proceedings when two criteria are met. There must be a relationship of sufficient proximity[16];

a) First, as between the facts that form the basis of the breaches (factual nexus), and
b) Second, as between the Rules which form the basis of two or more breaches (legal nexus).

The factual nexus is satisfied if the same acts form the basis of each of the Rule breaches. The legal nexus is satisfied if there are no additional or distinguishing elements that go to establishing a finding that the breach has been established for each of the Rules[17].

In determining there had been a breach of Rule 41(b), the Hearing Panel made the following finding of facts:

> "The Licensee, prior to completing the listing sheet in relation to the property:
>
> a) Did not measure the garage.
>
> b) Did not determine the garage measurements by any other means.
>
> c) Made a determination that the garage was a double attached garage only by their own observation.
>
> [...]
>
> The Hearing Panel has further determined that the Licensee's position at the time of the listing of the property, that the garage was a double garage, did not constitute competent service."[18]

[16] *McLeod,* Ibid
[17] *R. v. Prince*, [1986] 2 SCR 480
[18] Hearing Panel decision dated September 16, 2024

These findings formed the factual basis for determining the Licensee breached Rule 41(b). Based on these facts, the Hearing Panel found that the legal requirements to establish a breach of the rule that requires that that Licensees engage in competent service had been established, specifically that the conduct of the Licensee, breached the standards of the profession in a manner that resulted in the Licensee being incompetent.

The breach of Rule 41(b) necessarily led to the breach of Rule 41(g) which requires licensees to act in strict accordance with the Real Estate Act. The legal requirement to establish the breach of Rule 41(g) requires the finding of the breach of Rule 41(b). Consequently, the same facts apply to the breach of both rules, thus meeting the factual nexus and there is a legal nexus as a result of the legal requirement for both rules having the same element, specifically the breach of Rule 41(b). There is not a distinct element necessary to make the finding of the breach of Rule 41(g).

The Hearing Panel has determined that the Kienapple Principle does apply as between the breach of Rule 41(b) and Rule 41(g) as there is not a distinct factual and legal nexus as between the breaches of these rules. Consequently, the Hearing Panel finds that the breach of Rule 41(b) is conduct deserving of sanction but will not proceed to sanction the breach of Rule 41(g).

The breach of Rule 42(g) also satisfies the first criteria as it relates to Rule 41(b), specifically the facts that support the breach of Rule 41(b) are the same facts that support the breach of Rule 42(g). The Hearing Panel finds that while there is a factual nexus, there is not a legal nexus, which is required to apply the Kienapple Principle. While there is a factual nexus, Rule 42(g) requires an assessment of the Licensee's conduct (which does not necessarily have to be a breach of a Rule), to determine if the conduct would undermine public confidence in the industry, harm the integrity of the industry, or bring the industry into disrepute. This is a distinct element that is required to establish a breach of 42(g) which is not required for Rule 41(b). This distinct element that is required to establish a breach of Rule 42(g) results in there not being a legal nexus between the breach of the Rules. Consequently, the

Kienapple Principle does not apply and the Hearing Panel finds that the breach of Rule 42(g) is conduct deserving of sanction.

Conclusion

The Hearing Panel finds that the Licensee engaged in the following conduct deserving of sanction.

1. Breach of Rule s.41 (b) To provide competent service, and
2. Breach of Rule s.42 (g) Engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

Phase 2 - Sanction and Costs

As indicated in the Hearing Panel's decision of September 16, 2024, Counsel for the Registrar advised that given the initial determination of the Registrar on March 30, 2023, to refuse the complaint, they would present the evidence from their investigation but would be taking a neutral position in relation to the misconduct allegations.

The Hearing Panel engaged in a more active role in Phase 1 proceedings as they were not adversarial. This included the Hearing Panel asking more questions relating to the issues and the relevant legal criteria in this case than would normally be expected in an adversarial hearing where the Registrar was seeking a finding of misconduct. In the Hearing Panel's view, this more active role was required in the interests of justice and procedural fairness.

Although not requested by the Hearing Panel, the Registrar already made Phase 2 submissions on sanction and costs along with its submissions on the Kienapple Principle. To ensure the Hearing Panel has the information it needs to make a proper decision on sanction and costs, the Hearing Panel is of the position that they must continue to take a more active role through Phase 2 of the Hearing. This includes gathering information related to the appropriate sanction and costs to be imposed by the Hearing Panel. While the Hearing panel will consider the submissions of Counsel

for the Registrar and the email from Counsel for the Licensee indicating their agreement with the submissions of Counsel for the Registrar, the Hearing Panel maintains that their role must ensure procedural fairness, the integrity of the hearing process as well as the proper administration of justice which, in this case, is achieved by taking a more active role in ensuring it has the information it needs to make an appropriate decision.

As such, the Hearing Panel will be utilizing Independent Legal Counsel to provide case law research for its review in relation to sanction and costs and will consider same along with the submissions of the Licensee and Counsel for the Registrar in relation to the various *Jaswal* factors that must be considered in determining the appropriate sanction and costs in this matter. The Hearing Panel will provide both parties with the cases they are relying on prior to their decision, if any. The parties will be invited to address the cases and provide any further submission on sanction and costs, should they choose to do so. Further, if the Hearing Panel has questions about the various *Jaswal* factors or is considering alternative sanctions, it will inform the parties.

Dated at the City of Calgary in the Province of Alberta, this 8th of November 2024

Hearing Panel of the Real Estate Council of Alberta

"Signature"

[J.G], Panel Chair

Case: 014210

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Appearances: A. Bone, Counsel for the Registrar of the Real Estate Council of Alberta
K. Tzenov, Student at Law for the Registrar of the Real Estate Council of Alberta

Michael Edward Grekul, Licensee
Scott Chimuk, Counsel for the Licensee

Hearing Date(s): June 26, 2024 by video conference

Background

In the Hearing Panel's written decision dated November 8, 2024 ("Phase 1 Final Decision"), the Hearing Panel found, on a balance of probabilities, that the Licensee had engaged in the following misconduct:

4. Breach of Rule s.41 (b): To provide competent service;
5. Breach of Rule s.41(g): To practice in strict accordance with the Act, Regulations, Rules, Bylaws and any other laws that govern trading in real estate services in Alberta; and
6. Breach of Rule s.42 (g): To not engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

Following the application of the Kienapple Principle, the Hearing Panel found that the Licensee would be sanctioned in relation to the following:

> 1. Breach of Rule s.41 (b) To provide competent service, and
>
> 2. Breach of Rule s.42 (g) To not engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute.

This case comes to this Hearing Panel as the result of a complainant's appeal of the Registrar's decision to refuse a complaint. An earlier Hearing Panel heard the appeal, disagreed with the Registrar's refusal, and directed the matter proceed to a Hearing.

The Registrar informed the Hearing Panel at the outset of the Hearing that because they were maintaining the position that the Licensee had not committed any conduct deserving of sanction, they would not be taking a position on the Licensee's conduct and would simply present evidence gathered during the investigation. This is in accordance with RECA's Hearing and Appeal Practice and Procedure Guidelines ("HAPPG").

Considering the procedural context of this case, particularly the absence of an adversarial process, the Hearing Panel explained at the outset of the Hearing that it would be taking a more active role in the proceedings. The Hearing Panel outlined in the Phase 1 Final Decision that the Hearing Panel would continue to take a more active role in Phase 2 of the Hearing. The Hearing Panel's view is this more active role was required in the interests of justice and procedural fairness.

Although not requested by the Hearing Panel, the Registrar made Phase 2 submissions when responding to the Hearing Panel's request for submissions on the Kienapple principle, prior to the Phase 1 Final Decision. There was no indication in these submissions that the Registrar was changing their role as identified and engaged in at the beginning of Phase 1. The Licensee provided their agreement to the Registrar's written submissions on sanction by way of an email.

As a part of Phase 2 of the hearing, the Hearing Panel invited the parties to provide written submissions relating to the imposition of an education condition to the Licensee's sanction. Both the Registrar and the Licensee provided written submissions in response to this request, addressing not only the imposition of an education condition but also outlining their objection to the more active role of the Hearing Panel continuing in Phase 2 of the hearing.

The Role of the Registrar and the Hearing Panel

In their written submissions, the Registrar indicated that:

> "In phase one, the Registrar presented the investigative evidence impartially without taking a position on the allegations pursuant to Part 12(I) of the Hearing and Appeal Practice and Procedures Guidelines. However, after the Panel determined the licensee's conduct was deserving of sanction, the Registrar adopted its normal adversarial role in phase two and argued for sanctions based on the Panel's findings. Therefore, we submit that the Panel should maintain a neutral role in phase two, differing from the more active role required in phase one."

The Licensee's position in their written submissions, was stated as:

> "As a final note before continuing, for the record, we object to the submission by the Panel that this is not an adversarial process and that the Panel is entitled to "play a more active role" in these proceedings. With respect, the panel's ability to "play an active role" outside of the normal scope as an independent and neutral party has no legal foundation. The Panel is not authorized to act for the Complainant in the Real Estate Act, RECA's Bylaws, or RECA's Hearing Guidelines or to take any role beyond that of an independent and neutral third-party decision maker. Any departure from this well-established standard it(sic) is a breach of the principles of natural justice and procedural fairness. The Panel is not and cannot be an advocate nor can it take on the role of the Registrar even in cases where the Registrar takes no position.
>
> Mr. Grekul now finds himself in the unenviable position of having to rebut submissions on penalty made by the Panel itself to the same Panel that will be deciding the issue. This is precisely why there needs to be clear delineation between the Panel being a neutral decision maker as opposed to "playing an active role" in this process."

The parties agreed at the commencement of the hearing that the Hearing Panel would engage in a more active role in the proceedings as they were not adversarial. This included the Hearing Panel asking more questions relating to the issues and the relevant legal criteria than would normally be expected in an adversarial hearing where the Registrar was seeking a finding of misconduct. In the Hearing Panel's view, this more active role was required in the interest of justice and procedural fairness. Importantly, this role did not require the Hearing Panel to relinquish its role as a neutral decision maker, rather it allowed for the Hearing Panel to impartially gather evidence to fulfill its statutory mandate.

A conduct hearing in relation to a licensee is not two separate hearings but is bifurcated. It is a single hearing that is divided into phases, Phase 1 for misconduct and Phase 2 for sanction (if necessary). The Hearing Panel outlined the role they intended to take at the beginning of the hearing as a result of the Registrar's decision to not participate in the hearing in an adversarial role. The parties agreed to this process.

The HAPPG describes the role of the Registrar in a hearing following a successful complainant appeal:

> "If the registrar maintains the position that there is no conduct deserving of sanction, they will still appear at the hearing and provide the investigation evidence to the panel but will take no position before the panel on whether conduct deserving of sanction has been proven or not."

The HAPPG allows for the Registrar, where they are of the position that there is no misconduct, to assume a neutral role during the hearing. There is no distinction between the two phases of the hearing in the HAPPG.

While the Hearing Panel acknowledges that the HAPPG is not a law or a rule that is mandatory, there ought to be a reason to depart from the HAPPG procedure, particularly when the Registrar has identified at the beginning of the hearing, based on their position, that they are following the HAPPG. There was no reason provided by the Registrar to vary from the HAPPG.

The role of the Hearing Panel includes ensuring procedural fairness, the integrity of the hearing and the proper administration of justice, which necessitates the hearing process remaining consistent, barring exceptional circumstances. The Respondent in a conduct hearing, including a hearing stemming from a complainant appeal, should be made aware of the role the Registrar is taking at the commencement of the hearing; be given the opportunity, along with the Registrar, to address the role the Hearing Panel is taking in light of the circumstances; and this process ought to be maintained throughout both phases of the hearing. It would be hard for an impartial observer to reconcile the Registrar's change from a neutral position in Phase 1 to a position of advocating for a sanction in Phase 2. Where the Registrar was not persuaded by the Hearing Panel's decision following the complainant appeal that there was sufficient evidence to hold a conduct hearing, it is unclear how the Registrar would be persuaded, following the Phase 1 decision by another Hearing Panel, that there was conduct deserving of sanction. The public relies on the Hearing Panel implementing a hearing process that has integrity. Allowing for a change of roles mid-hearing risks an appearance of disingenuity. The Hearing Panel finds that a change of roles mid-hearing, both by the Registrar, and consequently by the Hearing Panel, would not be a process that provides that integrity.

The Hearing Panel never engaged in an adversarial role but was more active as a result of the Registrar's position and subsequent role. There was never a suggestion that the Hearing Panel would be acting for the complainant, nor did that occur. Similarly, although the Hearing Panel asked the complainant a number of questions, it was not acting for the Licensee. The Hearing Panel is able, in circumstances such as these where the Registrar has assumed a neutral position, to be more active. It is not unheard of or contrary to the principles of natural justice and procedural fairness for administrative decision-makers to engage in evidence gathering and remain impartial. Other administrative tribunals, such as the Refugee Protection Division and several Worker's Compensation Boards and Appeal Commissions in Canada are even

inquisitorial but still are bound by the principles of natural justice. They ensure a fair process and remain impartial throughout their decision making.

Notwithstanding the parties' objections, the Registrar's original position and the role of the Hearing Panel must be maintained throughout the entirety of the hearing, including Phase 2, to ensure the interests of procedural fairness, the integrity of the hearing and the proper administration of justice are met.

Sanctions and Costs

Purported Joint Submission of the Parties

Although not requested by the Hearing Panel, the Registrar provided Phase 2 written submissions on sanction and costs along with their submissions on the Kienapple Principle. The Licensee indicated in an email that they agreed with the Registrar's position.

The Registrar and the Licensee made further submissions following the Phase 1 Final Decision that indicated they were putting forward a "joint submission" on Sanction and Costs ("joint submission") and jointly proposed a fine of $1500 be imposed as the sanction for the breach of s. 41(b) and s. 42(g) globally and no costs be payable by the Licensee for the investigation and proceedings. There was no formal signed joint submission presented to the Hearing Panel. The Registrar concedes that there is not a formal "joint submission" on sanction in this matter but is of the position that the Licensee fully agreed with the Registrar's arguments, which essentially serves as a joint submission.

While the Hearing Panel will consider the written submissions of the Registrar and the email indicating the Licensee's agreement with the submissions of the Registrar, the Hearing Panel finds that this is not a "joint submission" as contemplated by the court in *R v. Anthony-Cook*[19]. The Registrar did not assume an adversarial role in this matter, rather stated at the outset that they do not believe the Licensee engaged in any

[19] 2016 SCC 43 (CanLII)

conduct deserving of sanction. Any agreement between the Registrar and Licensee in this matter does not carry the weight of a compromise made between parties with opposing interests as to the outcome of these proceedings. Such a compromise is what underscores a joint submission.

For all the reasons described above, the Hearing Panel is of the position that the deference that is required by the Court in the *Anthony-Cook* decision when considering a joint submission does not apply in this matter and the Hearing Panel may accept or reject, in whole or in part the parties' submissions on sanctions and costs.

Sanction

The Hearing Panel's authority to impose a sanction on a licensee whose conduct has been found to be deserving of sanction is provided at section 43 of the *Act*:

> 43(1) If a Hearing Panel finds that the conduct of a licensee was conduct deserving of sanction, the Hearing Panel may make any one or more of the following orders:
>
> (a) an order cancelling or suspending any licence issued to the licensee by an Industry Council;
>
> (b) an order reprimanding the licensee;
>
> (c) an order imposing any conditions or restrictions on the licensee and on that licensee's carrying on of the business of a licensee that the Hearing Panel, in its discretion, determines appropriate;
>
> (d) an order requiring the licensee to pay to the Council a fine, not exceeding $25 000, for each finding of conduct deserving of sanction;
>
> (d.1) an order prohibiting the licensee from applying for a new licence 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.

Education Condition

The Hearing Panel considered imposing an education condition as a part of the sanction to be imposed on the Licensee and invited the parties to provide written submissions relating to the imposition of an education condition as a part of the Licensee's sanction, including specific information about education, including courses, that addressed reducing risk and recognizing/avoiding conduct that increases potential liability. Specific deterrence is an important factor in sanctioning, and the Hearing Panel was concerned that this factor may not be adequately addressed by a fine alone. The Hearing Panel wanted to provide the parties notice of the Hearing Panel's consideration of a possible education sanction and ensure the Hearing Panel had the information it needs to make a proper decision on sanction and costs, which includes gathering information related to the appropriate sanctions to be imposed by the Hearing Panel.

Education in regulated professions ensures the public interest is being met by licensees maintaining their specific skills and remaining current with issues and practices in the industry. It also provides a tool for the Regulator and the Hearing Panel to impose as conditions on licensees who are found to fall below the acceptable standards, whether written or unwritten.

The Licensee's position is that further education will have no impact because the Licensee was sanctioned for failure to provide competent service by not adhering to certain standards regarding the size of a garage – even though there are no accepted(sic) standards. The Licensee did not make submissions regarding education around recognizing risks.

The Registrar's position is that although the Registrar historically had included an education component in most sanction submissions before a Hearing Panel, the responsibility for education was divested from RECA, and education components are no longer included. The Registrar indicated that this has resulted in difficulty identifying the specific nature of courses and their availability. In consultation with an exam and curriculum specialist at RECA, they identified the Practice of Residential Real

Estate Pre-Licensing Course offered by all the major service providers would be the most likely to address the conduct at issue and proposed significant flexibility if this course was imposed by the Hearing Panel.

The Hearing Panel understands that the Practice of Residential Real Estate Pre-Licensing Course is a lengthy and costly course that is required of all individuals prior to licensing, or in some cases following suspension. It covers all areas of competency required prior to being licensed to trade as an associate in Residential Real Estate. This is not what the Hearing Panel contemplated nor was a course of this magnitude necessary.

The Hearing Panel in *(Re) Saher*[20] also considered an education condition, notwithstanding they were considering a joint submission that did not contain one. They identified that the Registrar indicated that "a training requirement had been considered but was rejected due to a lack of information regarding the nature of available training programs following the divestiture of education and training from RECA's responsibility."[21]

The Hearing Panel stated:

> "The Hearing Panel was not persuaded by this explanation. Notwithstanding RECA's divestiture of education and training, counsel for the Registrar indicated that other parties do provide education and training relevant to licensees. It is unclear why information about the programs offered by these third parties could not be obtained."[22]

That Hearing Panel observed, and this Hearing Panel agrees, that the need to promote specific deterrence is a significant Jaswal factor. The purpose of sanctions is to deter licensees from engaging in similar misconduct in the future, protect the public, and ensure safe and proper conduct of the profession. If sanctions focus on monetary

[20] 2022 ABRECA 97 (CanLII)
[21] Ibid, para. 40
[22] Ibid, para. 41

penalties only, there is a risk that sanctions become a mere license fee for misconduct.[23]

The Hearing Panel is similarly in a situation wherein information about courses that would be appropriate to impose as a sanction have not been provided, if they exist. While the Hearing Panel has an obligation to ensure the sanction addresses deterrence, protection of the public and ensure the safe and proper conduct of the profession, an education condition can not be imposed due to the lack of information provided.

Decision

The Hearing Panel considered the facts of this case in relation to the breach and the relevant factors as outlined in *Jaswal v. Newfoundland (Medical Board)*[24]. These factors include:

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;

[23] Ibid, para. 42
[24] 1996 CanLII 11630 (NL SC)

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.

In applying these factors to this matter, the Hearing Panel considered:

Mitigating Factors

The previous character of the Licensee

The Licensee has no previous history of misconduct, which is mitigating.

The number of times the offence was proven to have occurred

The misconduct occurred in relation to one transaction, which is a mitigating factor.

Aggravating Factors

The nature and gravity of the proven allegations

The Licensee's misconduct falls outside the bounds of acceptable behavior, which is aggravating.

The age and experience of the Licensee

The Licensee is currently 61 years old and was first licensed with RECA in 2005. They had been licensed as an associate for approximately 19 years. They were a very experienced real estate associate and should have known better, which is aggravating.

Impact of the incident on the victim

The complainant stated that only being able to park one car in the garage was very inconvenient to them, especially in the wintertime, when the snow covers their vehicle. They also described that if they want to move the car in the garage, they need to move the other car on the driveway. This is aggravating.

Specific and General Deterrence

The Licensee maintains that that their past conduct is not a breach of the *Act*, they would not change their process, and they still believe the garage at issue is a double garage and that size of a garage does not affect a property's value. The Hearing Panel finds that these beliefs could negatively impact how they measure and classify garages in their future listings. The Licensee further indicated in their written submissions that education would not be of assistance. This is an aggravating factor and supports the need for specific deterrence.

Members of the profession benefit when the public has confidence that licensees will maintain their expertise, provide competent service, practice in strict accordance with the *Act*, and not engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute. The need for general and specific deterrence relating to these breaches is important and is an aggravating factor.

The need to maintain the public's confidence in the integrity of the Profession

In *Law Society of Upper Canada v Lambert*, the Law Society Hearing Panel stated that, "a profession's most valuable asset is its collective reputation and the confidence which that inspires."[25] When a licensee breaches the rules it compromises the public's confidence in the industry. The nature of breaches in this case are particularly aggravating and reflect negatively on the industry as a whole. This must be considered in determining an appropriate sanction.

[25] 2014 ONLSTH 158 (CanLII)

Neutral Factors

The role of the Licensee in acknowledging what occurred

While the Licensee is entitled to a hearing and to have the evidence tested before the Hearing Panel, by doing so they are unable to benefit from the mitigation that comes with an acknowledgment, resulting in this factor being neither aggravating nor mitigating.

Whether the Licensee had already suffered serious financial or other penalties as a result of the allegations having been made.

There is no evidence of any serious financial or other penalties suffered by the Licensee as a result of the allegations.

Previous Sanctions in Similar Circumstances

The Hearing Panel considered the cases provided by the Registrar in relation to the appropriate range of sanctions, specifically:

a) Cases involving Rule 41(b)

   i) *(Re)Moen*[26], a Letter of Reprimand was issued in October 2022 for a breach of Rule 41(b) involving a licensee that relied on the exterior measurement when advertising a half-duplex property. The Residential Measurement Standards (RMS) required the licensee to use the measurement of the interior perimeter. This error led to the property being represented as a larger size then it was.

   ii) *(Re)Sidhu*[27], an Administrative Penalty of $1500 was issued in August 2022 for a breach of Rule 41(b) involving a licensee that failed to measure the second level of the property. They relied on measurements taken of the main level to estimate the second level.

[26] 2022 013417 ABRECA (LofR)
[27] 2022 ABRECA 69 (CanLII)

This led to the licensee overstating the above grade size in the property advertising.

iii) *(Re)Harding*[28], an Administrative Penalty of $3000 was issued in February 2015 for a breach of Rule 41(b) involving a licensee that did not ensure that paperwork was properly filled out in 33 instances over 12 different transactions between April 2011 and September 2012. The Hearing Panel finds that this decision is not influential given the significant factual differences.

b) Cases involving Rule 42(g)

i) *(Re)Doyle*[29], a Letter of Reprimand was issued in July 2018 for a breach of Rule 42(g) involving a licensee who posted to social media disparaging remarks about the state of items found in various homes.

ii) *(Re)Bergeron*[30], a Letter of Reprimand was issued in March 2019 for a breach of Rule 42(g) involving a licensee that published a real estate newsletter with before and after staging photos of their client's bedroom in a manner that insulted the clients.

iii) *(Re)Rhandhawa*[31], an Administrative Penalty of $2500 was issued in April 2019 for a breach of Rule 42(g) involving a licensee who contacted a person who filed a complaint with RECA about their conduct. They offered the person money in exchange for withdrawing complaint. They had a disciplinary history.

iv) *(Re)Helm*[32], a Consent Agreement, including a $15,000 fine for the breach of Rule 42(g), ratified by a Hearing Panel in May 2012

[28] 2015 003443 ABRECA (AP)
[29] 2020 ABRECA 500013 (CanLII)
[30] 2019 008572 ABRECA(LofR)
[31] 2019 000261 ABRECA (AP)
[32] 2012 001600 and 000768 ABRECA (CA)

involving a real estate broker who used clients' trust monies to fund shortages in the brokerage accounts. He did this on multiple occasions over an extended period of time.

The Hearing Panel finds the cases involving breaches of Rule 42(g) to be distinguishable on the facts. Of the cases considered, only *(Re)Moen* and *(Re)Sidhu* resemble the current facts.

The Hearing Panel is of the position that a fine for both breaches is not an appropriate sanction. Having considered all the Jaswal factors, similar cases and the written submissions of the parties, the Hearing Panel imposes the following sanctions upon the Licensee:

1. Breach of Rule s.41 (b) To provide competent service

   A fine of $1500

2. Breach of Rule s.42 (g) Engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute

   A Letter of Reprimand

The Letter of Reprimand, which is deemed satisfied by this decision, will serve to clarify the expectation of the Licensee (and other licensees) to ensure their conduct is competent in similar circumstances, notwithstanding a lack of written guidance.

It is a reasonable expectation of consumers that the information on a listing is correct, including if a garage can fit two vehicles and could be considered to be a "double" garage. Relying on the expertise of the licensed members of the Hearing Panel, the following are steps which a licensee ought to implement to confidently determine whether a garage qualifies as a double garage, avoiding potential misrepresentation to potential buyers, other professionals and members of the public and ensure competency in situations involving garages.

Step 1: Measure the Interior Dimensions

a) Measure the width from wall to wall and the depth from the back wall to the garage door.

b) Measure ceiling height.

Step 2: Measure the Garage Door Opening Width and Height

Step 3: Evaluate Usable Space

a) Consider at least 2 feet (0.6 meters) of space on either side of the parked cars for easy access and maneuverability.

b) Obstructions: Check for any poles, shelving, water heaters, or permanent fixtures that could limit usable space.

Step 4: Verify by Parking Two Vehicles

a) Park two standard-sized vehicles side by side in the garage.

b) Confirm there is enough space to open doors and move comfortably around the vehicles.

Step 5: If New Construction Consult the Builder

Step 6: Speak to Your Office Manager or Broker

a) Before finalizing, consult your office manager or broker to ensure all steps have been completed and your assessment is thorough.

While this is not an exhaustive list of steps that may be necessary in every situation, it provides guidance and an extra layer of review that will help ensure that licensees meet the competency expectations of the profession.

Costs

Section 43(2) of the *Act* provides:

> 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.

Both the Licensee and the Registrar submit that costs are not appropriate in this case. The Hearing Panel agrees.

The Alberta Court of Appeal in *Jinnah v Alberta Dental Association and College*[33] held that costs are an "inevitable" part of self-regulation for a regulatory body and set out four compelling reasons where costs ordered against the professional may be appropriate.

The Hearing Panel agrees that the four compelling reasons to order costs: serious unprofessional conduct, serial offenders, a failure to cooperate or engaging in hearing misconduct[34] are not applicable in this matter.

In light of these circumstances, the *Jinnah* decision, and the written submissions of the parties, the Hearing Panel orders that no costs are payable by the Licensee.

Conclusion

Having found that the Licensee engaged in two counts of conduct deserving of sanction, specifically:

1. Breach of Rule s.41 (b) To provide competent service, and

2. Breach of Rule s.42(g) To not engage in conduct that undermines public confidence in the industry, harms the integrity of the industry, or brings the industry into disrepute,

[33] 2022 ABCA 336 at paras.131-154
[34] Ibid, paras. 141-144

and for the reasons set out in this decision, the Hearing Panel, pursuant to section 43 of the *Act,* imposes the following sanctions and costs:

a) For the breach of Rule 42(b) - A fine of $1500,

b) For the breach of Rule 42(g) – A Letter of Reprimand, which is satisfied by this decision, and

c) There shall be no costs payable by Michael Edward Grekul

Dated at the City of Calgary in the Province of Alberta, this 15th of January, 2025

Hearing Panel of the Real Estate Council of Alberta

"Signature"

[J.G], Panel Chair