



Real Estate Council of Ontario

DISCIPLINE DECISION

**IN THE MATTER OF A PENALTY HEARING HELD PURSUANT TO THE
*REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C***

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

MICHAEL BOLGER (also known as MIKE BOLGER)

DATE OF DECISION: May 15, 2019

ORDER: Fine of \$7,500.00 payable to RECO on or before December 31, 2019.

Successful completion by the Registrant of the Real Estate Institute of Canada "REIC 2280: Legal Issues in Real Estate" course and provide RECO with confirmation of successful completion on or before May 15, 2020.

COSTS AND EXPENSES: No costs awarded

WRITTEN REASONS:

REASONS FOR DECISION **PENALTY & COST**

INTRODUCTION

A hearing to deal with submissions on penalty and costs from the parties was held on May 15, 2019 in the presence of the Respondent Michael Bolger (the "Respondent" and/or "Bolger"), Maya Sabharwal, counsel for the Real Estate Council of Ontario. The Panel was comprised of Devon Saunders, Silvio Azzinnari and Laura Graham. Maria Bursey was present as independent legal counsel to the Discipline Panel.

The matter proceeded on the basis of an Agreed Statement of Facts, pursuant to Rule 4.02 of the Rules of Practice (*REBBA* 2002).

The Agreed Statement of Facts read:

AGREED STATEMENT OF FACTS

It is agreed as follows:

1. Mike Bolger is employed as a Salesperson with Brokerage A.
2. On or about June 14, 2017, Brokerage A, with Bolger as its representative, listed a property located at 1-A Street in City A ("Property") for sale on the Multiple listing Service ("MLS") The MLS advertisement indicated that the property had been built in 2001.
3. Representative A is a Salesperson with Brokerage B, he was assisting Buyer A and Buyer B (the "Complainants") in preparing an offer on the Property.
4. Prior to submitting their offer on the Property, the Complainants attended an open house at the Property where they were told by Bolger that the house was renovated in 2008.
5. On June 16, 2017 and in advance of preparing an offer on the Property, Representative A emailed Bolger to make several inquiries about the Property, including the age of the furnace and the roof. Bolger replied only that they were "original", with no further details.
6. On or about June 22, 2017, the Complainants submitted an offer to purchase the Property. The Complainants' offer was unconditional with a purchase price of \$806,000. The offer was accepted on June 23, 2017 by Seller A and Seller B ("Sellers").
7. The choice to submit an unconditional offer was made by the Complainants.
8. Shortly before closing, the Complainants discovered through their insurance company that the Property was actually built in 1986, this fact was confirmed with a Geo Warehouse search. The Complainants also discovered that the renovations had in fact been done in 2001 and not in 2008.
9. Bolger input the construction date of 2001 based on the Sellers' verbal information. This information was then inputted into the MLS data form which his clients signed.

10. Bolgers' information was based on the Sellers' representation to him that a large portion of the original home was demolished and re-built in 2001. In support of this, the Sellers provided Bolger with building plans which were dated 2001.
11. When the Complainants raised their concerns regarding the Insurance Company and Geowarehouse both indicating that the Property's construction date was actually 1986, a meeting with the original builder and the builder who did the 2001 renovations was held. The purpose was to satisfy the Complainants that their new home was built at or above the current building codes, and that the Property was sound and well-built.
12. The Sellers further offered several pieces of furniture as a gift to the Complainants, including all beds, two full sets of furniture along with many additional ottomans for the home which they at the time accepted as reunification towards the misprinted concerns.

SUMMARY OF AGREEMENTS

It is agreed that:

13. Bolger failed in his duty to demonstrate competence, knowledge and judgement when he failed to properly verify the construction information his clients had told him. Further, he failed to take reasonable steps to prevent an error or misrepresentation by not verifying material information before he posted it to the MLS. This conduct is in violation of sections 5 and 38 of the Code of Ethics.

Conscientious and Competent Service, etc.

Section 5 of the Code of Ethics - A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgement and competence in providing those services.

Error, misrepresentation, fraud, etc.

Section 38 of the Code of Ethics - A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

By signature below the Parties agree, acknowledge, understand and consent to the submission of these facts to the Discipline Panel, so that it may decide the penalty in this matter.

[The Agreed Statement of Facts was duly signed by the Parties]

SUBMISSIONS ON PENALTY FROM RECO

Counsel for RECO read the Agreed Statement of Facts into the record highlighting the “Summary of Agreements” (Paragraph 13), with emphasis on Mr. Bolger's conduct, the violations of the Code of Ethics, namely, Section 5 – A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgement and competence in providing those services; and Section 38 – A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

Counsel for RECO then delineated the principles established by the Suzette Thompson Case that discipline tribunals must address in assessing any penalty to be ordered against a registrant who has been found to have breached the Code of Ethics.

In Registrar v. Suzette Thompson (Appeals Committee of RECO, May 31, 2012), the Appeals Committee set out the following governing principles:

- a) The nature and gravity of the breaches of the Code of Ethics;
- b) The role of the offending member in the breaches;
- c) Whether the offending member suffered or gained, as a result of the breaches;
- d) The impact of the breaches on the complainant or others;
- e) The need for there to be specific deterrence to protect the public;
- f) The need for there to be general deterrence to protect the public;
- g) The need to maintain the public's confidence in the integrity of the profession;
- h) The degree to which the breaches are regarded as being outside the range of acceptable conduct; and
- i) The range of sanctions in similar cases.

With the foregoing, Counsel for RECO put forth the following submission:

- a) The nature and gravity of the breaches of the Code of Ethics

The Respondent failed to do his due diligence. If the Respondent did his due diligence he would have identified that the Property was not a new construction but was built in 1986 and building or adding to part of an old structure is not considered as new construction and as a result, the Respondent would have identified that there would be a significant increase in the property insurance rate.

b) The role of the offending member in the breaches

At all material time the Respondent had access to all information. The Geowarehouse database was always available and would have provided the necessary information. The Respondent did not seek to search the Geowarehouse database and therefore did not provide himself with the pertinent information to inform the Complainants.

It was noted that the Respondent did not double-end the deal.

c) Whether the offending member suffered or gained, as a result of the breaches

The Respondent neither suffered nor gained as a result of the breaches. It was again highlighted that the Respondent did not double-end the deal.

d) The impact of the breaches on the complainant or others

Had the Complainants known that the Property was not a new construction, they would not have paid so much for the Property.

e) The need for there to be specific deterrence to protect the public

Counsel for RECO submitted that specific deterrence to protect the public speaks to the notion of Penalty and that Penalty must be meaningful for it to be a deterrence. Counsel for RECO drew the Panel's attention to Tab 1, Page 35, Paragraph 97 of RECO's Book of Authorities, under the heading "*Deterrence, Denunciation and Rehabilitation*" and excerpt from *R. v. Robert McGill* – Reasons for Sentence:

"[97] *Deterrence*, then, is understood as having two facets, specific and general. The first, *specific deterrence*, captures the idea that sentences need to be sufficiently meaningful to inhibit offenders from recommitting the offences or offences that brought them into conflict with the criminal law..."

Further, Counsel for RECO submitted that the Penalty must be more than the cost of doing business for it to be a specific deterrence.

f) The need for there to be general deterrence to protect the public

Counsel for RECO submitted that the primary concern regarding general deterrence is the collective reputation of the real estate profession in Ontario.

Counsel for RECO drew the attention of the Panel to Tab 2, Page 51, Paragraph 119 of RECO's Book of Authorities to highlight the primary concern of collective reputation and general deterrence to protect the public – Excerpt from *Merchant v. Law Society of Saskatchewan* (2014), a Court of Appeal decision:

“[74] A criminal court judge ... is rarely concerned with the collective reputation of an accused's peer group but is free to focus instead on the individual accused to the exclusion of most other considerations. On the other hand, law society discipline panelists must always take into account the collective reputation of the accused licensee's peer group - the legal profession. According to *Bolton*, it is the most fundamental purpose of a panel's order. This is a major difference between the criminal court process and a law society's discipline process. It is largely this difference that causes many principles of criminal law, such as mitigation, to have less effect on the deliberations of law society discipline panels. It is a difference easy to lose sight of, but one that should be ever in mind.”

Further, Counsel for RECO submitted that the Penalty should be of such that it will deter the Respondent and others from re-offending.

Counsel for RECO then drew the attention of the Panel to Tab 3, Page 3, Paragraph 11 of RECO's Book of Authorities – Excerpt from Reasons for the Sentence in *Her Majesty the Queen v. Leading Seaman J. B. Thies, Offender*:

“[11] The court is of the opinion that sentencing in this case should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from re-offending but also deter others in similar situations from engaging in the same prohibited conduct.”

Further, Counsel for RECO submitted that the imposition of the Maximum Penalty of \$50,000.00 can be considered as an effective penalty for General Deterrence and such drew the Panel's attention to the Appeal Decision in Executive Director of the British Columbia Securities Commission – *Appellant v. Robert Arthur Hartvickson and Blayne Barry Johnson* and Ontario Securities Commission - *Intervenor* at Tab 4, Page 677 of RECO's Book of Authorities where Justice Lebel opined that, "...general deterrence is an appropriate factor in formulating a penalty in the public interest. General deterrence is both prospective and preventative in orientation." The court found that it was in the public interest to impose the maximum financial penalty.

g) The need to maintain the public's confidence in the integrity of the profession
Counsel for RECO submitted that RECO's work as the regulator is to ensure that the public maintain confidence in the integrity of the profession.

h) The degree to which the breaches are regarded as being outside the range of acceptable conduct

Counsel for RECO submitted that consumers need to have confidence in the Multiple Listing Service (MLS) as information is easily verifiable before it is posted on MLS.

i) The range of sanctions in similar cases

Counsel for RECO submitted that for reasonableness, the range of sanctions in similar cases must be looked at when considering penalty. The Panel's attention was directed to Tab 5, Page 4, Paragraph 11 of RECO's Book of Authorities – Excerpt from Shane Anthony Duval and College of Nurses of Ontario:

"[11] We are of the view that the Panel was correct in reminding itself that before imposing penalty, it was necessary to insure and consider certain principles of 'sentencing', including the protection of the public, general and specific deterrence, and the need to promote a sense of responsibility in the Appellant for his misconduct. However, we are of the opinion that the Panel in arriving at a decision was obliged to insure that the penalty imposed was reasonable having regard to the circumstances of the offender, including his age, past and present conduct, experience and other similar such circumstances. In addition, we are also of the view that in so far as it was practicable, the Panel should have had regard to past decisions of the Discipline

Committee in similar circumstances in an effort to place the instant case within a range of previously imposed penalties for comparable misconduct.”

Counsel for RECO, in her submission, provided a copy of the Geowarehouse for the subject Property to demonstrate that the information was available and accessible to the Respondent to verify the information.

With the foregoing, Counsel for RECO provided the following comparable cases to demonstrate the range of previously imposed penalties for comparable misconduct:

1. Real Estate Council of Ontario and Allister J. Sinclair (also known as Al Sinclair);
2. Registrar Under the Real Estate and Business Brokers Act, 2002 and Diane L. Gundert (also known as Dyan Gundert) and Jack Davidson; and
3. Real Estate Council of Ontario and Timothy Kevin McKinney.

SANCTION SOUGHT

Counsel for RECO submitted that any sanction against the Respondent should include educational courses.

Counsel for RECO submitted that regarding the totality of the evidence and Agreed Statement of Facts an appropriate penalty is \$12,000.00.

SUBMISSIONS ON PENALTY FROM THE RESPONDENT

The Respondent being unrepresented made the following submissions:

1. He did not have any cases for the Panel, to support his submission;
2. He is party to the Agreed Statement of Facts where he has admitted to the breaches of Sections 5 and 38 of the Code of Ethics;
3. He was of the belief that the Property was built in 2001 based on the Sellers' representation and also from the architectural drawings of the builder who did the renovations. That he relied on the date represented on the stamped builder's architectural drawings;
4. He represented only the seller and made representation the facts the seller provided;
5. He was of the belief that it was a brand new house;

6. During the time of the transaction, it was a very busy period where he was working long hours and things were overlooked and he could have done more to verify the information;
7. His background is Mennonite and he had no ill intentions. He did not mean ill will, did his best and do not believe that he should be subjected to the penalty requested by RECO;
8. He believes that both himself and RECO works on the same team yet RECO wants to 'cripple' him. The penalty started at \$18,000.00 but he was thinking \$15,000.00;
9. This was his first offence and that the breach occurred during his second year as a realtor;
10. He does not think that an increase in insurance premium of \$5.00 to \$10.00 is worth the \$12,000.00 Penalty which RECO is seeking;
11. At the time the error was identified, he admitted he was wrong and went above and beyond and arranged a meeting with the builder and the Buyers;
12. The Buyers had the right and option to do an inspection of the subject Property but the Buyers opted not to get an inspection done;
13. He blames the Broker of Record who he reported to at the time of the subject transaction for not providing proper guidance;
14. He did not do anything on his own merit to deserve the kind of penalty being requested by RECO;
15. He is still questioning why this matter has come back to haunt him; and
16. He does not think that the Penalty should be a 'slap on the wrist' but it should be of such that he will learn from it.

Counsel for RECO did not reply to the Respondent's submission.

PANEL'S DECISION ON PENALTY

The Respondent admitted to violating Sections 5 and 38 of the Code of Ethics by entering into Agreed Statement of Facts.

Section 5 requires registrants to provide conscientious service and demonstrate reasonable knowledge, skill, judgement and competence in providing those services.

Section 38 requires registrants to use their best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade.

The Respondent, in his submissions, reiterated that he was wrong, as he could have verified information about the subject property through Geowarehouse. Nevertheless, the Respondent cast some of the blame for his action on the Sellers, for providing incorrect information verbally and also by providing the architectural drawings with the date which he relied on, on the Buyers for not exercising their option of doing an inspection, on his former broker of record for not providing enough guidance and also on his inexperience, having been in the business for only two years.

The Panel found that the Respondent while accepting responsibility was deflecting his failure to other individuals. The Panel found this to be troubling because deflecting responsibility is a sign of not accepting responsibility for one's action or inaction.

The Panel found that the Respondent failed to do his due diligence, especially with the accessibility of Geowarehouse.

It is the finding of this Panel that this is a case of innocent misrepresentation. There was no deliberate misconduct on the part of the Respondent. The violations could have been the result of his inexperience.

The Panel found that the Respondent did not double-end on the deal and therefore did not gain from the misconduct.

Nevertheless, the Panel found that the Respondent's inactions or actions in the transaction cannot be characterized as anything but lacking knowledge and skill and a demonstration of incompetence and further, the Respondent did not use his best efforts to prevent error and misrepresentation. In any event, it was the Respondent's duty to prevent error and misrepresentation. Hence, the breaches are regarded as being outside the range of acceptable conduct for a real estate professional.

The Panel took into consideration the spectrum of the issues and the range of sanctions in similar cases.

The cases provided to the Panel by Counsel for RECO for consideration were examined and the Panel determined that the Gaudet Case contained elements similar to the matter at hand. The McKinney Case was used as the bench mark for Penalty consideration for this matter,

since the nature and gravity of the misconduct bears similarity to the matter at hand. Like Mr. McKinney, the Respondent had evidence on which he relied.

The Panel in determining a reasonable sanction looked at Community Service as an option but none of the sanctions in similar cases supported this option.

Having reviewed the Agreed Statement of Facts, heard and reviewed the submissions from both Parties, giving due consideration to the principles established by the Suzette Thompson Case and comparable cases, the Panel concluded that the Penalty for the Respondent should be of such that it serves both a specific and a general deterrence, so as to protect the public and consumers engaged in real estate transactions and to maintain the public's confidence in the industry and the professionalism of registrants. The Panel therefore orders the Penalty as stated below.

PENALTY

A fine of \$7,500.00 payable to RECO on or before December 31, 2019 plus successful completion of REIC the on-line course, Legal Issues in Real Estate, on or before May 15, 2020.

No Cost was awarded by the Panel.

[Released: October 31, 2019]