

**IN THE MATTER OF**  
**THE REAL ESTATE ACT, C. R-1.3**  
**AND**  
**IN THE MATTER OF KATHERINE BERNER**

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**DECISION OF THE**  
**SASKATCHEWAN REAL ESTATE COMMISSION**

**Commission File: #2008-38**

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Before: A Saskatchewan Real Estate Commission Hearing Committee  
comprised of the following:  
Randal C. Touet - Chairperson  
Richard Jeanneau  
Scott Musgrave  
John Puderak

Appearances: Ed Miller, on behalf of the Investigation Committee  
Katherine Berner, Non-Registrant  
Leonard Eva, Broker.  
Randy Sandbeck, Solicitor for Katherine Berner

Hearing Date: January 15, 2009

Written Decision: February 5, 2009

The Mitigation Hearing was held January 15, 2009 at the Saskatoon Club, 2<sup>nd</sup> Floor, 417 - 21<sup>st</sup> Street East, Saskatoon, Saskatchewan before a Hearing Committee (“the Committee”) of the Commission. The Statement of Facts and Admissions dated December 01, 2008 provided particulars of Katherine Berner’s violation and admissions.

### **CHARGE and ADMISSION OF MISCONDUCT**

The registrant was charged with and has admitted, in the Statement of Facts and Admissions, to professional misconduct contrary to Section 39(1)(a) of *The Real Estate Act* as follows:

- she breached this section between January 1, 2008 and May 26, 2008 (inclusive) by doing one or more of the following acts:
  - a) depositing into the brokerage’s property management trust account, personal money not connected to Regency Property Management’s client base;
  - b) using the property management trust account as a source of funds to pay suppliers, owners and tenants of clients rather than paying the expenses from the respective pooled operating account or the security deposit account; and
  - c) not maintaining a specific security deposit account whose bank balance continually equalled security deposits collected on behalf of owners and tenants.

### **LEGISLATION**

Section 39(1)(a) of *The Real Estate Act* states: “Professional misconduct is a question of fact, but any matter, conduct or thing whether or not disgraceful or dishonourable is professional misconduct within the meaning of this *Act*, if it is harmful to the best interests of the public, the registrants or the Commission.”

### **FACTS**

In accordance with subsection 9(4) of *The Real Estate Regulations* (“the Regulations”), the Committee accepted Katherine Berner’s Statement of Facts and Admissions, which include the following relevant points:

1. Katherine Berner was continuously registered under the provisions of *The Real Estate Act* in the Province of Saskatchewan with the Saskatchewan Real Estate Commission from October 24, 2005 to May 29, 2008.
2. She was registered as broker during the time period February 19, 2008 to May 29, 2008.
3. Katherine Berner has taken the following real estate courses.
  - Real Estate as a Professional Career
  - Property Management as a Professional Career
  - Working Within *The Real Estate Act*
  - Real Estate Office Management
  - Principles of Real Estate Appraisal
  - Principles of Real Property Law

- Residential Real Estate as a Professional Career
  - Commercial Real Estate as a Professional Career; and
  - completed the mandatory continuing professional development seminars each registration year since July 1, 2005.
4. Regency Homes Corporation commenced operation in October of 2003 for the purpose of managing their own holdings and offering property management services to the public. In October 2003 Regency Homes Corporation became registered with the Saskatchewan Real Estate Commission operating as Regency Property Management (hereinafter referred to as **RPM**).
  5. Upon RPM's registration with the Saskatchewan Real Estate Commission, Katherine Berner's involvement included the day-to-day activities of the brokerage in the absence of her step-father and broker, Leonard Eva.
  6. RPM's business focused on quality service to clients and to her knowledge during the time of RPM's registration with the Saskatchewan Real Estate Commission, no clients complained about their service or processing of client information.
  7. On October 22, 2004, Ed Miller (a Review Officer with the Saskatchewan Real Estate Commission) conducted an audit of the books and records of RPM and thereafter provided a letter of direction to the brokerage which directed the brokerage to not pay suppliers from the property management trust account but rather, use the designated pooled operating account once the terms of trust were met.
  8. Notwithstanding the contents of Ed Miller's October 22, 2004 audit letter, the broker, Leonard Eva and Katherine Berner failed to ensure that RPM followed the Saskatchewan Real Estate Commission's written direction.
  9. At all times material to the violations, Katherine Berner and her husband, owned and operated RPM. Katherine Berner handled all RPM trades in property management and her husband managed the day to day maintenance and repair of the properties they managed.
  10. RPM managed approximately 240 homes for clients; 10 houses for their relatives and affiliated companies; 13 apartment buildings of which 6 are for their relatives and affiliated companies; and RPM reported to about 100 clients.
  11. RPM submitted its 2007 Annual Financial Report to the Saskatchewan Real Estate Commission on or before March 15, 2008. The report showed that as of December 28, 2007 RPM's reconciled balance for the property management trust account stood in a positive position at \$17,267.03; while the actual bank statement showed a positive balance of \$65,452.80.
  12. The difference between the reconciled bank balance and the actual bank balance resulted from outstanding cheques issued from the property management trust account rather than the pooled operating account or security deposit account and the fact that funds had been deposited into an incorrect account.

13. Katherine Berner, rather than Leonard Eva, took an active part in monthly reconciliations of RPM's property management trust account, pooled operating account and security deposit account.
14. Commencing late May 2008 through August 2008, Saskatchewan Real Estate Commission investigators audited the brokerage and Katherine Berner voluntarily resigned as the Broker May 30, 2008, while under investigation. Throughout the entire period, RPM management and staff fully co-operated with the Saskatchewan Real Estate Commission to ensure that proper checks and balances exist at the brokerage to ensure that only property management trust funds are deposited into the property management trust account in accordance with Saskatchewan real estate legislation.

### **REPRESENTATIONS**

The Investigation Committee representative, Ed Miller, confirmed that Ms. Berner is a first time offender under the *Act*. She voluntarily terminated her registration. When he wrote the original letter of October 2004, the comments were mostly positive, but with recommendations for the proper use of their accounts. As the Commission does regular reviews of the financial reporting of property management brokerages, Regency Property Management was audited in May 2008 and for the period in question, it was noted that personal monies were placed in their trust account. Suppliers were being paid out of that account rather than out of the pooled account.

Mr. Miller acknowledged that he was not aware of any public complaints to the Commission about the operations of this brokerage. The Investigation Committee recommended a letter of reprimand and the maximum fine of \$5,000.00. He said a substantial fine sends a message to the real estate industry and to the public of the importance of maintaining proper trust accounts. Although this is a first time offence for Ms. Berner, the offence did involve other people's money; it was a trust account and must be used properly. Mr. Miller stressed that property management firms are the biggest risk to the Assurance Fund; however, he acknowledged that there was no evidence of defalcation in this matter. Mr. Miller also confirmed that all accounting of the brokerage was in proper form with no problems now.

The Hearing Committee was referred to the D & D Property Management file (2002-05) where the registration was cancelled. This involved monies being collected and not placed in trust, a situation far more serious than this matter. As well, Mr. Miller referenced the Prairie Living Property Management file (2002-15) where cancellation also took place along with fines totalling \$5,000.00, and the Porter and Katchan decisions (2005-65 and 2006-67 respectively). Mr. Miller felt this matter, where the trust account was used as an operating account and monies were commingled, was closest to the Porter decision where Mr. Porter received a fine of \$2,500.00 each for breaches of Bylaw 607 and 608.

Mr. Sandbeck made a written representation to the Hearing Committee as well as an oral presentation. He stressed that this was a situation of omission rather than commission. This company has become very successful, very quickly. This created challenges for the business due to the rapid expansion. Mr. Sandbeck made it clear that no funds were unaccounted for and no losses are alleged to have occurred. He said this charge and the situation were upsetting and embarrassing to Ms. Berner. She imposed a significant penalty on herself by voluntarily resigning.

He said that this was a situation which was virtually self-reported and immediate steps were taken to bring the accounts in compliance with the requirements of the Commission. This was different from the Porter decision where there was significant delay in accounting for missing funds. The cases referred to by Mr. Miller show deliberate actions of the registrants, not an omission such as this case. In Ms. Berner's case, Mr. Sandbeck said she took active participation in resolving the situation.

Mr. Sandbeck stated that these proceedings by themselves act as a deterrence for Ms. Berner. She has suffered angst and has had much self-reflection, but has put accounts in proper order now. He said she is an industrious, conscientious person who will be an asset to the real estate industry. Mr. Sandbeck also provided the Commission with a number of testimonial letters from clients of Regency Property Management which show that they find the company dependable and provide excellent client service. He suggested an appropriate fine would be \$2,500.00 or lower.

## **DECISION**

In accordance with clause 9(4)(a) of the Regulations and clauses 38(1)(f), 38(2)(b) and subclause 38(2)(a)(i) of the *Act*, the Committee made the following orders:

- a) Pursuant to clause 38(1)(f) of the *Act*, that Katherine Berner receive an order of reprimand for the violation of Section 39(1)(a) of the *Act* ;
- b) Pursuant to subclause 38(2)(a)(i) of the *Act*, that Katherine Berner, prior to March 31, 2009, pay to the Saskatchewan Real Estate Commission, a \$2,000.00 fine for the said violation of the *Act*;
- c) Pursuant to clause 38(2)(b) of the *Act*, that Katherine Berner's registration shall be suspended if she fails to pay any portion of the fine within the said period of time;

## **RATIONALE**

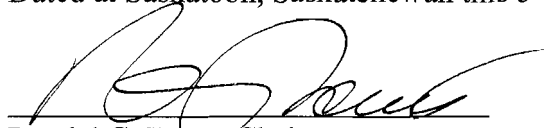
The Committee, in considering the disciplinary action, considered Katherine Berner's lack of previous sanction history and the short length of time she has been in the real estate industry.

The Hearing Committee accepted the submissions of the parties that Ms. Berner has taken this charge very seriously and has taken active steps to help resolve the issues. We are concerned that the matter was allowed to continue from 2004 until the audit in 2008, but it appears that the accounts were simply never changed until subsequent to the audit. At that time, Ms. Berner took swift action to resolve matters, including resigning as a registrant. Defalcation was neither found nor alleged in this matter. It is clear that the trust account was not properly being used. This is a serious situation and one which the Hearing Committee wants to ensure does not occur again.

All property managers should know the rules and regulations regarding the operation of their trust accounts. This is dealing with the property of other people; it is their money and it must be handled appropriately. In this matter, there was no allegation of fraud or misuse of the funds.

While it is more than a simple accounting issue, the Committee accepts that there was not an intention to harm their clients or take any personal advantage. The testimonials give comfort to this finding. The voluntary resignation shows the serious response given by Ms. Berner and is a further reason for the fine not being higher.

Dated at Saskatoon, Saskatchewan this 5<sup>th</sup> day of February, 2009.



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Randal C. Touet, Chairperson