

IN THE MATTER OF
THE REAL ESTATE ACT, C. R-1.3
AND
IN THE MATTER OF LEAH BRISDON

DECISION OF THE
SASKATCHEWAN REAL ESTATE COMMISSION

Commission File: #2007-50

Before: A Saskatchewan Real Estate Commission Hearing Committee
comprised of the following:
Randal C. Touet - Chairperson
Donnett Elder
Larry Gingerich
John Puderak

Appearances: Ed Miller, Investigation Committee Representative
Leah Brisdon, Registrant
Laurie Burrows, Registrant's solicitor

Hearing Date: May 2, 2008
Saskatoon, Saskatchewan

Written Decision: May 27, 2008

The Formal Hearing was held May 2, 2008 at the offices of the Saskatchewan Real Estate Commission, 237 Robin Crescent, Saskatoon, Saskatchewan, before a Hearing Committee (“the Committee”) of the Commission.

CHARGES

The Registrant was charged with professional misconduct contrary to the following Sections of *The Real Estate Act*:

- a) Section 39(1)(c) of the *Act* in the following instance:
 - i) It is alleged that Mr. Brisdon breached Bylaw 708 of the *Act* on or about March 22, 2007 by taking an in-house exclusive non-co-operating Seller’s Brokerage Contract and not delivering to the Sellers, written notification of the limitations of this type of listing as found in Saskatchewan Real Estate Commission policy;

- b) Section 39(1)(a) of the *Act* in the following instance:
 - i) It is alleged that Mr. Brisdon breached this section on or about March 22, 2007 by deterring a potential buyer of property in Saskatoon, Saskatchewan from writing and/or purchasing a property while he negotiated a purchase price exclusively for himself.

LEGISLATION

Section 39(1)(a) of the *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.”

Section 39(1)(c) of the *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 a breach of this *Act*, the regulations or the bylaws or any terms or restrictions to which the registration is subject.”

Commission Bylaw 708 states:

“A Registrant, at the time of signing an in-house exclusive written agreement, must have written notification from the Seller that the Seller requests the registrant’s brokerage to co-operate or to not co-operate with other brokerages in the marketing of the Seller’s property. If the Seller directs the brokerage not to co-operate with other

brokerages, the brokerage shall state the implications of this agreement to the Seller in writing.”

FACTS

Leah Brisdon has been a registrant as a salesperson since October 3, 1996 and is currently and was at the time of the alleged incidents a salesperson registered with Century 21 Conexus Realty Ltd. in Saskatoon.

The Hearing Panel heard from four witnesses during the course of the Hearing: the Seller in the transaction; the former girlfriend of the Seller; the person who had contacted the Registrant; and the Broker for the Registrant. The Registrant did not give evidence himself and did not present any other witnesses. In addition, there was an exhibit book that was adopted as full exhibits, with the exception of Exhibits D3, H2, and J from the book of documents. All other documents in the binder were accepted as full exhibits.

The Seller and his ex-wife had moved to Canada a few years ago and had purchased a residential property in Saskatoon. Approximately in the spring of 2006, the Seller vacated the sale property, leaving his wife and children behind. The evidence indicates that he had made payments to her; however, the mortgage payments were not made from these sums and the mortgage ultimately went into foreclosure. By the spring of 2007, the bank had taken possession of the property after it had previously been abandoned by the Seller's ex-wife and the Seller indicated that he had not received notification of the foreclosure proceedings until a few days before March 22, 2007, at which time he had seen a notice in the paper indicating a Decree Nisi for foreclosure had been granted. On the 21st day of March, 2007, the Registrant contacted the Seller at his home, having received knowledge of the situation from a friend of the Seller's ex-wife.

The evidence of the Seller and his then-girlfriend were that Mr. Brisdon attended at their home the night after he had first contact the Seller by telephone. Mr. Brisdon indicated at this meeting that he could assist the Seller with maintaining his credit rating and various documentation was signed, including:

- a) Statement of Disclosure, indicating Mr. Brisdon and Associates as buyer and Mr. Seller as Seller, wherein Mr. Brisdon was to purchase the property for \$115,000.00, less a commission of nil;
- b) Limited Dual Agency Acknowledgement form directed to Century 21 Conexus Realty Ltd., from Leah Brisdon and Associates or nominee and the Mr. and Mrs. Seller as Seller;
- c) An in-house exclusive Seller's Brokerage Contract, indicating the Mr. and Mrs. Seller as Seller and Century 21 Conexus Realty Ltd. as the Seller's Brokerage, indicating in paragraph 4(a) that the Seller's Brokerage is not to co-operate with other Brokerages

in the marketing of the property. This document was signed by the Mr. Seller and by Leah Brisdon on behalf of the Seller's Brokerage;

- d) Saskatchewan Data Input form, showing Mr. and Mrs. Seller to be the Seller;
- e) Information about the Property Condition Disclosure Statement, whereby the Seller declined to complete the Property Condition Disclosure Statement form; and
- f) Residential Contract of Purchase and Sale form, indicating Century 21 Conexus Realty Ltd. as the Buyer's Brokerage and Leah Brisdon as Salesperson, Leah Brisdon and Associates or Nominee as Buyer, and the Mr. and Mrs. Seller as the Seller on the document. This document shows Mr. and Mrs. Seller signed acceptance at 6:00 p.m. on March 22, 2007. It was the clear evidence of Mr. Seller and his ex-girlfriend that Mr. Brisdon presented himself at the home at approximately 6:15 p.m. and the documentation was completed and Mr. Brisdon was gone within approximately 15 minutes.

For all of the above documents signed by the Mr. Seller's ex-wife, it appears she signed them prior to Mr. Brisdon presenting the documents to Mr. Seller.

It should be noted that the in-house exclusive Seller's Brokerage Contract above-described was for the period from the 22nd day of March, 2007, until 11:59 p.m. on the 22nd day of March, 2007.

In the next day or so after completion of these documents, the documents having been left at the home of Mr. Seller; Mr. Seller and his ex-girlfriend contacted a relative of her daughter, a person who was interested in purchasing the property. It is the evidence of that person that he contacted Mr. Brisdon by telephone indicating he was interested in the property. He was advised by Mr. Brisdon that the property was not listed at that time. This person left his telephone number and was not further contacted by Mr. Brisdon.

It was the evidence of Mr. Seller and his ex-girlfriend that when Mr. Brisdon reviewed the documents he did not explain them clearly to Mr. Seller but merely said words to the effect that, "if you sign here, here, and here, the sale will take place quickly and your property can be sold to ensure the mortgage has been paid."

Mr. Seller's evidence was that he was happy with Mr. Brisdon's purchase price of \$115,000.00 and was pleased that he ultimately was able to receive half of the net sale proceeds after the mortgage was paid off. Mr. Seller said on numerous occasions that he was not aware of the nature of the documents other than they were to allow Mr. Brisdon to sell the property. He indicated that he was not aware the property was actually sold to Mr. Brisdon until such time as he attended at the offices of the lawyer who handled the sale on his behalf, at which time he discovered that the sale was to Mr. Brisdon and not to Century 21 Conexus Realty Ltd. This was quite disconcerting to him, as he felt he had been misled. Mr. Seller, however, indicated in all other respects he was happy with the actions of Mr. Brisdon,

including Mr. Brisdon allowing him to enter the premises after the transaction had been signed in order for Mr. Seller to remove certain personal items such as his television.

It was the evidence of Mr. Seller that the documentation was indicated by Mr. Brisdon to be a mere formality in order to speed things up. His ex-wife had already signed the documents and he wasn't sure what exactly they meant, but was told the documents would speed up the process when a Buyer was found. He was concerned that there would be no commission payable and if the documents were signed now it would save time for him later.

When asked about clause 4(a) in the in-house exclusive Seller's Brokerage Contract, Mr. Seller indicated he did not know at the time what this meant. He indicated that he did not read the documents. He says he was gullible and naïve. Mr. Seller also made it clear that the most important thing to him was to sell the house and to get out of it what he could. He was okay with the figure of \$115,000.00 as a sale price because it would cover the mortgage, at least.

It was the evidence of the manager of Century 21 Conexus Realty Ltd, Saskatoon that the documentation on the file was complete. There was no documentation with respect to the in-house exclusive Seller's Brokerage Contract and he said this is a very rare form to be used. He could find no statement of limitations in the file after he had reviewed it, and he was not aware that the company or the salesperson was to provide a statement showing the limitations as set forth in Bylaw 708.

The sale of the property did conclude on April 15, 2007, with the title being transferred to Mr. Brisdon.

DECISIONS

Section 39(1)(c) of *The Real Estate Act*, Breach of Commission Bylaw 708

The Hearing Committee finds the Registrant, Leah Brisdon, guilty of professional misconduct for a breach of Bylaw 708 in that he did not provide the Seller with a written statement of the implications of an in-house exclusive non-co-operating agreement. The evidence was clear that an in-house exclusive written agreement with a non-co-operating clause had been entered into. It was equally clear from the evidence that no written documents stating the implications of this arrangement were provided to the Seller at that time or at any other time.

Section 39(1)(a) of *The Real Estate Act*

The Hearing Committee finds the Registrant, Leah Brisdon, not guilty of this charge. There was no listing in existence at the time that he spoke to this latter person and there were no negotiations by Mr. Brisdon to complete the transaction as the documentation and an unconditional offer had been made some time before that.

SANCTIONS

In accordance with clauses 38(1)(f) and 38(2)(b) and subclauses 38(2)(a)(i) and 38(2)(a)(ii) of the *Act*, the Committee made the following orders:

1. For the violation of Section 39(1)(c) of *Act*, Breach of Bylaw 708:
 - a) Pursuant to clause 38(1)(f) of the *Act*, that Leah Brisdon receive an order of reprimand;
 - b) Pursuant to subclause 38(2)(a)(i) of the *Act*, that Leah Brisdon, prior to August 1, 2008, pay to the Saskatchewan Real Estate Commission a \$1,000.00 fine for the said violation of the *Act*;
 - c) Pursuant to subclause 38(2)(a)(ii) of the *Act*, Leah Brisdon shall pay costs of the Hearing in the amount of \$1,335.00 (being 50% of the total Hearing costs) to the Saskatchewan Real Estate Commission prior to August 1, 2008.

RATIONALE

The Hearing Committee heard a great deal of evidence from the witnesses for the Investigation Committee relating to the lack of understanding of the documentation by Mr. Seller. It certainly seems this was an unsophisticated Seller and the amount of time spent by Mr. Brisdon explaining this series of documents to this person the first time they had ever met, appears to have been very minimal at best. However, the Hearing Committee can only make a ruling on the basis of the charge in front of it, that being not providing a written statement of the implications of a non-co-operating agreement. This did not appear to have been discussed in any fashion with Mr. Seller at any time. It is a document which may have made it impossible for Mr. Seller to later argue that he did not understand that he was entering into a listing agreement and perhaps he would not have entered into the listing agreement.

The Hearing Committee wants to be clear that, notwithstanding the uncontested evidence of Mr. Seller, the documentation signed by Mr. Seller in the brief meeting with Mr. Brisdon also made it very clear in the small number of places where writing was filled in, that the property was to be sold to Mr. Brisdon and/or his nominee and that sale price was \$115,000.00. The various other terms of the document were not a concern to Mr. Seller in these circumstances, and it is the Hearing Committee's position that Mr. Seller either knew or certainly ought to have known that he had sold the property and that the sale was to Mr. Brisdon. Again, this is not the charge which has been levied against Mr. Brisdon. The only matter in which he was found in violation was that of failing to provide a written disclosure of the implications of a non-co-operating In-House Exclusive Seller's Brokerage Contract.

With regard to the second charge that Mr. Brisdon was alleged to have committed, it was the feeling of the Hearing Committee that the one telephone call received by Mr. Brisdon after the transaction had been completed did not deter a potential buyer for the property, as the property was not for sale at that time.

Mr. Miller, on behalf of the Investigation Committee, indicated that this was a similar situation to the Judy Forster file 2005-41. In this case, Ms. Forster was charged with breaching Bylaw 708 on two occasions, both cases in which she had arranged in-house non-co-operating exclusive Seller's Brokerage Contracts. In each of those cases, she failed to provide a written statement of the implications of them entering into this type of brokerage contract. She was fined \$1,000.00 for each offense, for a total of \$2,000.00. In these circumstances, she was the broker only and had no personal gain in the transaction and was not a party to the transaction. Mr. Miller also referred the Hearing Committee to the Jeff Howsam and Kerry Fox cases, both of which involved a breach of Bylaw 709. It is the position of the Hearing Committee that Bylaw 709 is covering a substantially different area than Bylaw 708. Bylaw 709 involves negotiating directly with the party who is exclusively represented by someone else. The Forster and Fox cases were therefore not considered in the decision.

Mr Miller indicated that the costs of the hearing were approximately \$2,670.00 and these costs should have been borne by the Registrant. It was the feeling of the Hearing Committee that only a portion of these costs were applicable, as Mr. Brisdon had some success.

It should be noted that Mr. Burrows, on behalf of Mr. Brisdon, commented that the Broker for Mr. Brisdon knew nothing about Bylaw 708 and felt that there was no education in place. He indicated that there should be some ownership in the Brokerage to educate their agents and not all of this problem should be placed on Mr. Brisdon's shoulders. He had indicated a fine in the range of \$500 to \$1,000 would be reasonable.

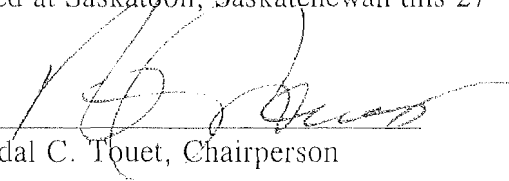
The Hearing Committee, in reviewing all these matters, did take note that the breach of Section 708 in these circumstances did not have as serious a consequence as it may have. The sale to Mr. Brisdon was virtually in place at that time and unless such a statement of implications would have warned the Seller off of the transaction, it did not have a significant impact on the trade. There was no evidence put before us that the Seller would not have gone ahead with the transaction had he been aware of this clause or its meaning.

The Hearing Committee would like to reiterate its position that the Saskatchewan Real Estate Commission has taken on numerous occasions where a Registrant is involved in their own transaction; there is an obligation to take extreme care in presenting the documentation to the public. This was clearly not done in this case and it allowed the allegations of misunderstanding to be presented. For Mr. Brisdon to have taken as short as 15 minutes to explain these five or six detailed documents to the Seller is clearly not satisfactory. While that was not the charge before us, it may have led to the allegations and the charges coming forth. Even though the owners apparently consented to these matters, it does not take away the obligation of the Registrant to properly advise the public and the people they are dealing with, in this case the Seller, to ensure they make a fully-informed decision before documentation is signed.

It should also be noted that this is the second time Mr. Brisdon has had an appearance before the Saskatchewan Real Estate Commission, the last time being a Hearing held January 18, 2001, in which he was charged under Section 39(1)(c) of the *Act*, with improper advertising of

a property. While this is a different section and it took place some time before, the issue of ensuring protection of the client is similar. The Committee therefore felt a fine of \$1,000.00 was warranted.

Dated at Saskatoon, Saskatchewan this 27th day of May, 2008.



Randal C. Touet, Chairperson