

IN THE MATTER OF
THE REAL ESTATE ACT c.R-2.1
AND
IN THE MATTER OF LOU DODERAI

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

Before: C.E. Thompson, Deputy Superintendent of Real Estate

Appearances: Lou Doderai
Tom Ketterer on behalf of the Saskatchewan Real Estate Commission

Hearing Date: August 23, 2011

Decision Date: October 12, 2011

DECISION OF THE DEPUTY SUPERINTENDENT OF REAL ESTATE

This decision addresses the appeal by Lou Doderai, as allowed pursuant to section 43 of *The Real Estate Act* (the Act), of the decision of the Saskatchewan Real Estate Commission (the “Commission”) in the Matter of Lou Doderai, dated March 28, 2011.

Lou Doderai was registered, at all relevant times, as a salesperson under the provisions of the Act, in the Province of Saskatchewan, with the Saskatchewan Real Estate Commission.

I. Facts

The following facts were admitted to by Mr. Doderai in his Statement of Facts and Admissions, provided in the record, and accepted at appeal:

1. Mr. Doderai was charged with and pled guilty to professional misconduct, as defined in clause 39(1)(c) of the Act. The professional misconduct occurred when Mr. Doderai breached bylaw 726(b), by allowing a Multiple Listing Service (MLS) advertisement to identify a property’s basement walls as concrete even though he knew the basement walls were constructed of preserved wood.
2. On or about March 16, 2008, Mr. Doderai attended the property at the centre of this appeal, met with the sellers and inspected the property to collect the data required to complete the data input form and the sellers’ brokerage contract.
3. Mr. Doderai learned from his inspection of the property that the basement walls were constructed of preserved wood sitting on a concrete footing.
4. Mr. Doderai provided the information from the onsite review to his business partner and the sellers authorized Mr. Doderai and his partner to advertise the property for sale.
5. On or about April 13, 2008, the buyers and sellers agreed to a conditional contract of purchase and sale which included a term requiring the sellers to provide the buyers with a surveyor’s certificate. Before the sale closed, the sellers supplied the surveyor’s certificate to the buyers’ lawyer’s office. On April 23, 2008, the buyers removed conditions on the sale and the transaction closed according to the terms of the agreement between the buyers and sellers.
6. During the summer of 2008, the buyers discovered that the basement walls were constructed of preserved wood and not concrete.
7. In April of 2010, Mr. Doderai received a copy of the buyers’ complaint form and supporting documentation filed with the Commission.
8. Mr. Doderai acknowledged the error and conveyed his regret that the MLS advertising indicated that the property had a concrete foundation as opposed to a preserved wood foundation.
9. Mr. Doderai maintains that the buyers’ agent ought to have discovered the basement construction material on his own.
10. Before this charge, the Commission fined Mr. Doderai \$2,000, in 2009, for failing “to take reasonable steps to discover facts pertaining to every property for which

the registrant accepts as an agency agreement that a prudent registrant would take in order to fulfill the obligation to avoid error, misrepresentation or concealment of pertinent facts.” In that case, the Commission found that Mr. Doderai had failed to take reasonable steps to discover facts pertaining to a property and, in so doing, caused a misrepresentation as to a property’s square footage when he completed and signed an Exclusive Seller’s Brokerage Contract that included inaccurate property measurements, without verifying the accuracy of the measurements by conducting the physical measurement himself.

II. The Commission’s Decision

A Mitigation Hearing took place on March 17, 2011. The Commission’s hearing committee accepted the Statement of Facts and Admissions wherein Mr. Doderai acknowledged the violation and the Commission heard representations on sanction.

On March 28, 2011, the Commission rendered its Decision (the “Decision”) wherein it stated:

In accordance with *The Real Estate Act*, Regulations and Bylaws, the committee made the following orders:

- a) Lou Doderai receive an order of reprimand for the violation of Bylaw 726;
- b) Lou Doderai, prior to May 31, 2011, pay to the Saskatchewan Real Estate Commission, a \$2,000 fine for the said violation of the *Act*; and
- c) Lou Doderai’s registration shall be suspended if he fails to pay any portion of the fine within the said period of time.

In coming to this decision the Commission considered Mr. Doderai’s previous sanction history and the length of time he had been in the real estate industry and it concluded that the error on the MLS Input Form could have been avoided if Mr. Doderai had reviewed the form with the seller. The Commission insisted that registrants must understand that it is imperative that advertising is correct because the public relies on registrants to handle transactions properly. It also noted that the disciplinary processes for registrants must reflect a standard of professionalism that the public can trust.

Correcting the error on the form after the fact of having distributed the incorrect information was insufficient to meet the registrant’s responsibility, in the Commission’s view. The Decision explained that Mr. Doderai ought to have attempted to correct the error with the individuals who had received that incorrect information and, more particularly, he ought to have notified the buyers of the error on the open house fact sheet.

The Decision also noted Mr. Doderai’s demeanor and remorse for the wrong he had committed and suggested that Mr. Doderai had placed undue weight on the hardship that the disciplinary process created for him, while at the same time expressing surprisingly little concern for the potential for harm inaccurate advertising could cause consumers and the industry.

The Decision concluded that proper review of all documentation is essential to ensure errors do not occur. Facts must be verified before they are issued into the public domain, according to the Decision, and in cases where a mistake occurs, serious effort must be made to ensure that persons that could be affected by inaccuracies are informed before they suffer a loss.

III. Appeal

Mr. Doderai's appeal hearing took place on August 23, 2011, at the office of the Superintendent of Real Estate. Mr. Doderai represented himself. Tom Ketterer represented the Commission.

At the appeal hearing Mr. Doderai explained that he considered the \$2,000 fine unfair, that the only case applicable to the facts of the decision resulted in a \$500 fine and that he considered the Commission's decision to fine him \$2,000 to be unduly harsh and arbitrary in light of the Investigation Committee's original recommendation of a \$1,000 fine.

Mr. Doderai could not understand how doubling the fine would help him do his job better.

According to Mr. Doderai, Ed Miller had advised Mr. Doderai that Mr. Miller and the other investigation committee panel member had concluded that the recommended fine would be \$1,000. When asked whether Mr. Miller had clarified that the fine amount was only a recommendation and not the actual fine, Mr. Doderai answered: "yes, oh, absolutely".

Mr. Doderai explained that he was an upstanding member of the real estate community, the past president of the Board of Directors of the Association of Saskatchewan Realtors and the current president elect. He also noted that he had contributed many hours of volunteer time on the Board of the Saskatchewan Association of Realtors, for the betterment of that organization.

With respect to the charge, he admitted that he did not mind paying for his mistake. He noted, however that he felt the fine was disproportionate when weighed against the clerical error of checking a wrong box. He was also upset at having to waste another day of his time coming to appeal over a mis-checked box.

In response to Mr. Doderai's submission on the amount of the fine, Mr. Ketterer responded that the misrepresentation in the case involving the \$500 fine differed from Mr. Doderai's circumstances in that it involved a registrant preparing information that while initially accurate, became inaccurate. In that case the registrant provided information to the public that indicated a condo property included underground parking. After the registrant released the information to the public, the condo board passed a bylaw that changed the policy on parking spots such that the condo's parking spot was not available at the time of the condo sale.

Mr. Ketterer also addressed the challenge that the Commission continues to face as the value of real estate has risen in Saskatchewan over the past four or five years. As the value of real estate rises, it is appropriate to raise the cost of deterrence to ensure that the fine is significant enough that registrants are not tempted to factor fines into the cost of doing business. In Mr. Ketterer's view, a \$500 fine five years ago simply would not have the deterrent effect in today's more lucrative market.

IV. Issues

- a. What is the applicable standard of review?
- b. Was the Commission's decision on quantum reasonable?

V. Analysis

a. What is the applicable standard of review?

The Supreme Court of Canada has set out the judicial review process in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (hereinafter *Dunsmuir*), as follows:

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review. (para 62)

In previous decisions the Deputy Superintendent of Real Estate determined that the appropriate degree of deference to be accorded to the Commission when reviewing the reasoning and quantum associated with a penalty is met by the reasonableness standard (see: *In the Matter of Kevin Wouters* (08-54A); *In the Matter of Realty Executives* (08-56A; *In the Matter of Christian Didur* (08-56))

b. Was the Commission's decision on quantum reasonable?

The Supreme Court explained the qualities to be considered in assessing the reasonableness of a decision as follows:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. (*Dunsmuir* at para 47)

- i. Was the Decision reasonable in the sense that the decision making process conveyed sufficient justification, transparency and intelligibility?

The Decision set out the elements of the charge and the considerations that went into assessing the fine with sufficient justification, transparency and intelligibility.

The Decision acknowledged that Mr. Doderai made an effort to address the inaccuracy by correcting the information, but it noted that Mr. Doderai ought to have taken the step of notifying the buyer as well.

There are a number of considerations that go into determining the amount of a fine for a regulatory infraction. Those considerations include sanction history, the severity of the breach and the effort required to remedy it, the magnitude of the potential consequences, the need for specific deterrence and general deterrence and the remorse of the registrant. The Decision addressed each of these considerations.

The Decision referred to Mr. Doderai's recent sanction history as a factor; it addressed the relatively small effort it would have taken for Mr. Doderai to avoid the misrepresentation; it noted the potential consumer consequences to a consumer relying on such a representation; and it noted the potential for loss of reputation for the industry as a result of these types of misrepresentations. The Decision also highlighted the need for specific deterrence in Mr. Doderai's case as well as the need for general industry deterrence; and, it conveyed that Mr. Doderai appeared to be more concerned with the amount of the fine, and the inconvenience of a hearing, than he was with the serious harm that such an error can cost an unsuspecting consumer.

- ii. Was the Decision reasonable in the sense that it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law?

The Decision falls within a range of possible acceptable outcomes which are defensible, in respect of the facts and the law.

I do not know what Mr. Doderai's commission on the sale of this house was. Nor do I have information as to the length of time a wood basement lasts versus a concrete basement, or information on the relative value of each basement type. I do know that consumers ought to be able to rely on representations of salespersons, without having to exercise additional due diligence to determine whether these representations are misleading.

At law, a person who suffers a loss, due to his or her reliance on a misrepresentation of another person, has a right to sue to recover for his or her loss as against the person that made the misrepresentation.

Preparing documents that are to be distributed for the purpose of inducing a sale is drafting a contractual offer. These documents are used to induce consumers to purchase a property. Consumers expect to be able to rely on key information provided in the offer. Leading a consumer to believe that a property's foundation is concrete when it is wood cannot be brushed aside as a mere clerical error, in fact, it is entirely foreseeable that a consumer would suffer a loss if he or she relied on this type of misrepresentation.

Mr. Doderai's pronounced concern for his own time and money, coupled with his utter disregard for the harm this type of misrepresentation can cause to consumers and the industry's reputation is troubling. In my view, the magnitude of potential harm and the attitude of the registrant left the Commission with only one responsible course, which was to send a deterrent message, both to Mr. Doderai and to the industry.

Registrants are not simply filling in forms for their clients, they are creating legally binding contractual documents. For this reason the representations made on these documents must be made with an appropriate level of due diligence and precision. Registrants are accountable to consumers and to other registrants for information that they place in the public domain. When a registrant knows that information is wrong, then he or she has a responsibility to ensure that any potential for harm from the wrong information is mitigated by identifying the error to individuals who may be affected by it. Mr. Doderai knew that the information on the information sheet was wrong and he eventually corrected the information. Unfortunately, he did not contact the one person who stood to lose the most from the error—the buyer.

I have reviewed *In the Matter of Slade Desroches*, 2008-12, in which Mr. Desroches received a fine of \$500 for breaching bylaw 726(c). I do not consider this case to be relevant in the determination of Mr. Doderai's fine. The Desroches case involved an accurate representation that a condominium price included access to underground parking. The representation became inaccurate only after the condo property manager changed the policy on guaranteed parking, prior to the sale closing. In the present case, Mr. Doderai did not review the information provided by the seller. Mr. Doderai admits that he knew the basement was wood at the time the seller completed the information sheet. If Mr. Doderai had taken the time to review the listing information with the seller this error could have been avoided, along with any consequences that have arisen from it.

Under the Act, the Commission has the authority to order a fine of up to \$5,000 for professional misconduct. I would expect that charges associated with intentional misrepresentation and criminal activity could trigger the maximum fine, whereas charges associated with non-compliance of an administrative nature would trigger lesser fines, bearing in mind the context of either scenario. In this case the potentially harmful consequences of the infraction, the minimal effort it would have taken for Mr. Doderai to have avoided the infraction, Mr. Doderai's compliance history, the need for general industry deterrence and the need to deter Mr. Doderai, specifically, all work together to bring the fine of \$2,000 within the range of possible acceptable outcomes which are defensible in respect of the facts and the law.

In my view the Commission's Order that Mr. Doderai receive an order of reprimand and a fine of \$2,000 is reasonable on the facts.


VI. Decision

Having reviewed the records, the Commission's Decision and Mr. Doderai's representations at appeal, I find that the Commission's decision making process was reasonable in that it reflected sufficient justification, transparency and intelligibility. I also find that the Commission's decision on quantum falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

For the foregoing reasons, I hereby dismiss Mr. Doderai's appeal and confirm the Commission's Decision. As the Order was stayed pending the outcome of the appeal, Mr. Doderai shall pay the fine of \$2,000 to the Commission by October 31, 2011.

In the event that Mr. Doderai should fail to comply with payment of the fine, I hereby order that Mr. Doderai's registration be suspended until such time as Mr. Doderai pays the full amount of the fines to the Commission.

Dated at Regina, Saskatchewan this 12 day of October, 2011.



C. E. Thompson
Deputy Superintendent of Real Estate